

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

Judicial Department

**Cr. A No. 825-P/2017
Khurshid Vs the State**

Date of hearing: 17.09.2019.
Appellant by: Mr. Noor Alam Khan, Advocate.
State by: Mr. Muhammad Riaz Khan, AAG.

JUDGMENT

AHMAD ALI, J. Questioned herein is the judgment of learned Sessions Judge/Judge, Special Court, Swabi, dated 23.11.2017, whereby appellant Khurshid s/o Muhammad Qasam, was convicted and sentenced to life imprisonment with fine of Rs.200,000/ in case FIR No.787 dated 28.11.2016 registered against him u/s 9© CNSA, 1997 at Police Station, Kalu Khan (District Swabi).

2. Brief facts of the case are that complainant/Tariq Nisar Khan, ASI/PW1 alongwith other police officials, during mobile gusht received information that proclaimed offender (Khurshid, hereinafter the appellant) in case FIR No.370 dated 20.06.2016 u/s 302/34 PPC PS Jabbar Mardan was present in a rented house, he rushed the spot with the other police officials where the accused was present in the courtyard of said house duly armed with a

pistol 9-MM bore No. To 62010H 1809, alongwith holster containing two spare chargers and 29 cartridges. The Accused-appellant was arrested. There was a motorbike Honda black color, 125-cc bearing registration No. RIQ-4644, having two black color bags tied thereon. On search, the bags were found to have contained 24 packets charas, each packet was 1000 grams and total 24 kgs charas were recovered. Out of the recovered contraband 5/5 grams were separated for chemical analysis by FSL, sealed in parcels No.1 to 24, remaining stuff i.e.23880 grams (23.880 kgs) were packet and sealed in parcel No.25. The Contraband and vehicle etc were taken into possession vide recovery memo Ex.PW1/1. On the basis of murasila Ex.PA/1, FIR (Ex.PA) was registered against the accused-appellant.

2. On completion of investigation, challan was submitted in Court where the appellant was charge sheeted to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as three (03) witnesses whereafter statement of the accused was recorded, wherein, he professed his innocence. The learned Trial Court, after conclusion of trial, found the appellant guilty of the charge and, while recording his conviction, sentenced him as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court.

3. Arguments heard and record gone through.
4. Allegation against the appellant is that he was proclaimed offender in case FIR No.370 dated 20.06.2016 u/s 302/34 PPC PS Jabbar Mardan, but at the time of his arrest in the above mentioned case from his rented house, 24 kgs charas were recovered from two bags tied on a motorbike which was being parked in the said house.
5. Perusal of record reveals that there is no such FIR available on file or exhibited by the prosecution so as to affirm the fact that actually the accused was a proclaimed offender. There is nothing on record with regard to ownership of the alleged rented house or any lease agreement to suggest and substantiate the stance of complainant/PW1 as to whether the said house was rented to accused-appellant. Similar is the position of motorbike in this regard. To clear the happening, relevant portions of the statements of PW1 and PW2, recorded in cross examination, are reproduced below for ready reference:-

PW1.....

“I was neither in possession of copy of FIR 370 which is referred to by me in the murasila nor the same was received by me from Police Station Jabbar District Mardan or from Police Station Kalu KhanThe motorbike was available inside the spot house. It is correct that no documents regarding the ownership of motorbike was recovered from the accused. It would be in the knowledge of the I.O however in my presence the statements of people of the locality were not recorded at that time. It is correct that regarding the inmates of the house including the women folk or children there is nothing mentioned in the murasila as to whether they were available or not. The witness volunteered that there was

only one female available in the said house whose name I do not know. It is correct that even I do not know relationship of that lady with the accused.....it is correct that driving license was not recovered from the possession of the accused'

PW2.....

"In my presence the I.O has not recorded the statement of any person regarding the ownership of the aid house. It is correct that no document regarding the ownership of the motorcycle was recovered from accused o show the connection of the accused with the above noted motorbike".

From the above observations and statements of two important PWs, it reveals that prosecution has not established any connectivity of the accused with the alleged recovery of contraband effected from motorbike parked in the so called rented house. Another obtrusive issue of the case is that no warrant of arrest of the competent Court in the former FIR, if any, has not been brought on record by prosecution.

6. In present case against the appellant, the record suggests that safe custody of the recovered substance as well as safe transmission of samples of the recovered substance to the FSL had not been established by the prosecution. The Complainant/Seizing Officer/PW1 has though deposed in his Court's statement that he took into position the contraband, but it is not clear from his statement that to whom he handed over the remaining contraband except the stance that *"I myself have taken the accused and other articles to the police station"*. Conversely,

PW2 deposed in terms that *“the case property and the accused were handed over to me by the I.O and I myself took the accused and the case property to the police station”*. The complainant/PW1 further deposed that he prepared the samples for FSL, but from his statement it is not clear that to whom he handed over the samples for taking to FSL. PW3 narrated that the samples were sent to FSL by the Moharrir on 30.11.2016, but without disclosing the name of official who took the same to FSL. Now come to the FSL report Ex.PK which indeed shows that FC1075 took the samples to FSL on 02.12.2016. Surprisingly, both these important witnesses i.e. Moharrir and FC1075, being associated with the recovered contraband at the relevant time, were not produced before the Trial Court by the prosecution. So, adverse inference under Article 129(g) of Qanun-e-Shahadat Order 1984 could be drawn. There is no record or assertion that the samples and case property were ever kept in Malkhana. Had it been, the Register No.19 would have been examined. In this situation, the safe custody of the samples and case property is not proved. Guidance could be sought from case law reported in **2019 SCMR 608** wherein it was held by the apex Court that;

“In a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that

the prosecution had succeeded in establishing its case against the accused beyond reasonable doubt”.

Similar views have also been taken by the apex court in 2018 SCMR 2039, & 2019 SCMR 903.

Furthermore, record is silent as to where remained the samples and case property from 28.11.2016 to 02.12.2016 when it was received in FSL with a considerable and unexplained delay of 4/5 days. In case titled “Ikramullah and others Vs the State reported in 2015 SCMR 1002” it

has also been held by the apex Court that;

“No such police official was produced before Trial Court to depose about safe custody of samples entrusted to him for being deposited in office of Chemical Examiner---Prosecution was not able to establish that after alleged recovery of substance so recovered was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to office of Chemical Examiner without the same being tampered with or replaced while in transit---Prosecution failed to prove its case against accused persons beyond reasonable doubt”

Likewise, in case reported in 2012 SCMR 577 it has also been held by the august Supreme Court of Pakistan that;

“Although prosecution sought to corroborate testimony of recovery witnesses with report of Forensic Science Laboratory to the effect that contraband item recovered from secret cavities were charas, yet sanctity of report of Laboratory was eroded by evidence of official who could not be correctly reply as to where samples remained between the dates when those were allegedly taken into possession

from car and the date those were received by Forensic Science Laboratory ”.

7. In present case, where the recovery is doubtful and safe custody of the recovered substance as well as safe transmission of the samples thereof is not established by the prosecution through cogent evidence, there it cannot be said that the prosecution had proved its case against the accused-appellant beyond reasonable doubt.

8. Keeping in view the contradictions on material points occurred in the statements of PWs and handling of the contraband as hinted above created doubts in the prosecution case qua its recovery and safe custody, which suggests that occurrence has not taken place in the mode and manner as alleged by the prosecution.

9. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to grant acquittal to an accused. The conclusions drawn by the learned trial Court are not borne out of the case evidence therefore, the impugned judgment is not sustainable.

10. For what has been discussed above, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge leveled against him.

He be set at liberty forthwith, if not required in any other case.

11. Above are the reasons of short order of even date.

Announced.
17.09.2019

CHIEF JUSTICE

JUDGE

Amjad Ali, PS

DB Hon'ble Mr. Justice Waqar Ahmad Seth, CJ & Hon'ble Mr. Justice Ahmad Ali