

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.989-P/2019

Rehmat Gul son of Hayat Gul,
r/o Mamozai Orakzai.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-

Ms. Farhana Naz Marwat, Advocate.

For State :-

Mr. Mujahid Ali Khan, AAG.

Date of hearing:

28.01.2021

Date of announcement:

JUDGMENT

ROOH-UL-AMIN KHAN, J:-This Criminal Appeal under section 48 of the Control of Narcotic Substances Act, 1997 (“**the Act of 1997**”), filed by Rehmat Gul, the appellant, is directed against the judgment dated 18.07.2019, passed by learned Additional Sessions Judge-III/Judge Special Court, Kohat, whereby the appellant has been convicted under section 9 (c) of the Act of 1997 and sentenced to undergo life imprisonment and to pay a fine of Rs.2,00,000/- and in default of payment thereof to further undergo six months simple imprisonment, in case FIR No.216 dated 11.05.2018, registered under section 9 (c) of the Act of 1997, at Police Station Usterzai District Kohat. Benefit of section 382-B Cr.P.C., has been extended to the appellant.

2. The prosecution case as unfolded in the First Information Report (**FIR**) Exh.PA is that on receipt of spy information qua trafficking of huge quantity of narcotics from Orakzai Agency, Qaismat Khan SHO (PW.1) along with Constables Muhammad Yasir No.468, Aman Ullah No.1342 (PW.2), Owais No.454, Wajat Hussain No.1321, Muhammad Usman No.361, Attiq ur Rehman No.825 and other police officials, on 11.05.2018 conducted a *Nakabandi* at *Old Marai Check Post Marai Road* and at 0830 hours intercepted a flying Coach bearing Registration No.C.2068-Kohat coming from Orakzai side. On query, its driver disclosed his name as Rehmat Gul son of Khayal Gul r/o Mamu Zai Meshti Bazaar Orakzai (the appellant). He was deboarded from the flying Coach. On search of the flying coach, 15 packets *chars Gardha*, each weighing 1200 grams, total 18000 grams, was recovered from its secret cavities. The Seizing Officer (PW.1), separated 10 grams from each packet as sample for chemical analysis by the FSL and sealed the same in parcels No.1 to 15 whereas the remaining quantity i.e. 17850 grams were sealed in separate parcel No.16, and thereafter took the same into possession through recovery memo Exh.PW.1/1 in presence of Constables Muhammad Yasir No.468 and Amanullah No.1342 (PW.2), marginal witnesses to the recovery memo Exh.PW.1/1. The complainant-SHO, prepared arrest card of the appellant Exh.PW.1/2, drafted

Murasila and sent the same to Police Station through Constable Wajahat No.321, on the basis of which FIR Exh.PA was registered against the appellant by Mukhtiar Ahmad HC (PW.5).

3. Arshad Mehmood SI (PW.3) was entrusted with the task of investigation, who on receipt of FIR, proceeded to the spot and prepared site plan Exh.PB on the pointation of Qismat Khan SHO (PW.1). On his return to Police Station, the case property was handed over to him by Mukhtiar Ahmad HC (PW.5), who after examining the same returned to the said Moharrir, interrogated the accused, recorded his and statements of the PWs under section 161 Cr.P.C., produced the appellant along with case property before Judicial Magistrate along with case property vide application Exh.PW.3/2 for recording confessional statement but he refused. The case property in parcel No.16 weighing 17850 grams was destroyed by the learned Judicial Magistrate on the same day vide court order Exh.PW.3/3, the memo of proceedings is Exh.PW.3/4 and Certificate is Exh.PW.3/5. The I.O. sent parcels No.1 to 15 containing samples to the FSL for chemical analysis vide application Exh.PW.3/6 through Aftab Ahmad LHC No.30 (PW.4), road certificate in this regard is Exh.PW.3/7 and received the FSL report Exh.PZ which is in positive. He also placed on file daily diaries regarding departure of the Seizing Officer and Mad report

with regard to brining of the appellant along with case property and samples to Police Station as well as extract of Registrar No.19 Exh.PW.3/8 and on completion of investigation handed over case file to SHO, who submitted challan against the appellant.

4. On receipt of challan by the learned trial Court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as six witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed innocence. He, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant as mentioned above, hence, this appeal.

5. We have heard the arguments of learned counsel for the parties and perused the record with their able assistance.

6. In support of his version, Qismat Khan SHO, the complainant-Seizing Officer while appearing as PW.1, in his examination-in-chief, reiterated the same story with regard to arrest of the appellant and recovery from secret cavities of the Flying Coach being driving by the appellant

and the proceedings conducted by him at the spot, as set forth in the FIR, which has already been mentioned in the earlier part of the judgment, therefore, in order to avoid repetition, his examination in chief is not reproduced. In cross-examination it was brought from his mouth by the defence itself that appellant along with recovered contraband, flying coach and samples were sent to the Police Station through Constables Attique and Usman.

7. Amanullah FC No.1342, marginal witness to recovery memo Exh.PW.1/1 while appearing as PW.2 deposed that during the days of occurrence he was posted at Marai Check-post Usterzai. On 11.05.2018 he along with other police officials was present at Nakabandi with Qismat Khan SHO (PW.1). At 08.30 hours they intercepted a Flying Coach bearing Registration No.2068-Kohat. On query, its driver disclosed his name as Rehmat Gul (appellant). On search of the flying coach, the SHO (PW.1) recovered 15 packets of chars Gardha, each weighing 1200 grams, making the total of 18000 grams. The SHO separated 10 grams from each packet and sealed the same in parcels No.1 to 15 and the remaining quantity in parcel No.16 and thereafter took the same into possession in his presence vide recovery memo Exh.PW.1/1. He deposed that recovery memo Exh.PW.1/1 is correct and correctly bears his signature. In cross-examination, it was also brought from the mouth of PW.2 that the contraband

narcotics, samples, flying coach and the appellant were shifted to Police Station by Constables Usman and Attiq from the spot to Police Station.

8. Both the above named PWs have furnished straight forward and truthful account of the occurrence. Both have been subjected to lengthy and taxing cross-examination but nothing favour to defence could be brought from their mouths. They remained stuck to their stance and corroborated each other on all material particulars of the occurrence such as the day, date, time and place of occurrence, the mode and manner of arrest of the appellant and recovery of contraband chars from secret cavities of the flying Coach which was in the exclusive possession and control of the appellant at the relevant time being driven by him. No doubt, the PWs are police officials but nothing in black & white is available on file to show their ill will or enmity with the appellant to falsely implicate him in case. Daily diary No.8 dated 11.05.2018 substantiate the version of the Seizing Officer and marginal witness to the recovery memo wherein it has been mentioned that appellant along with case property, samples i.e. parcel No.1 to 16 and flying coach were brought by constable Usman and Attiq ur Rehman to police Station from the spot and handed over to Moharrir of the Police Station who deposited the case property and samples in Malkhana. Similarly, daily diary No.44 dated 11.05.2018

placed on file shows departure of Qismat Khan SHO along with constables Usman, Attiq ur Rehman, Wajahat and Rafiq.

9. Arshad Mehmood SI who has conducted investigation in the case while appearing as PW.3 has also corroborated the version of the Seizing Officer. He deposed that after registration of the case he proceeded to the spot and prepared site plan Exh.PB on the pointation of Seizing Officer (PW.1), recorded statements of the PWs under section 161 Cr.P.C. on the spot. On return to the Police Station, case property was handed over to him by the Mukhtiar Ahmad HC (PW.5), which after examination was returned to the said Moharrir. On expiry of custody he produced the appellant along with case property before the learned Judicial Magistrate vide application Exh.PW.3/2, where case property weighing 1785 grams sealed in parcel No.16 was destroyed by the court on the same day vide order Exh.PW.3/3, the memo of proceedings Exh.PW.3/4 and certificate Exh.PW.3/5. He deposed that before destruction of the case property, 10 grams chars from each packet were separated and sealed in parcel No.A to parcel No.O Exh.PW.3 to 17 and then in one parcel. Further stated that he sent samples containing in parcels No.1 to 15 to the FSL vide application Exh.PW.3/6, road certificate Exh.PW.3/7, and FSL report Exh.PZ as well as placed on file daily diary regarding departure and return of the

Seizing Officer on the fateful day. He also placed file ETO report regarding registration of the vehicle in question. The Investigating Officer was also subjected to lengthy and taxing cross examination by the defence but nothing favourable could be extracted from his mouth. In cross-examination it was brought by the defence itself from him that Constables Attique and Usman had brought the samples and case property to Police Station and in this regard daily diaries regarding their departure from Police station and return are available on file.

10. Aftab Ahmad LHC No.30, who took the samples to the FSL from Police Station appeared in the witness box as PW.4 and deposed that on 14.05.2018, the I.O. handed over him samples in parcels No.1 to 15 along with FSL application and road certificate Exh.PW.3/7. He took the samples to the FSL and handed over the same to FSL authority and received endorsement on road certificate which he handed over to the I.O. and the I.O. recorded his statement under section 161 Cr.P.C.

11. Mukhtiar Ahmad HC who during the days of occurrence was posted as Moharrir in Police Station Usterzai while appearing as PW.5 deposed that on receipt of Murasila brought by Constable Wajahat FC he registered FIR Exh.PA. Further stated that Constables Attiq ur Rehman and Muhammad Usman brought the appellant along with contraband narcotics, samples, flying coach and

its registration and handed over to him, which he kept in malkhana of the Police Station and put the appellant in the lockup. On arrival of the I.O. to Police Station he showed parcels No.1 to 15 i.e. samples and parcel No.16, who after examining the same returned the same to him which he kept in safe custody of Malkhana. On 14.05.2018, on the request of the I.O. he handed over parcel No.16 to him who produced the same before the learned Judicial Magistrate for the purpose of destruction.

12. The testimony of all PWs referred above including the Seizing Officer and the Investigating Officer are consistent with each other on the fact that samples in parcels No.1 to 15 and contraband narcotics in parcel No.16 were brought by Constable Muhammad Usman No.361 and Attiq ur Rehman No.825 to Police Station from the spot and handed over to Moharrir of the Police Station. Similarly, daily diaries referred to above, also substantiate the testimony of Seizing Officer, I.O. and Moharrir of the Police Station. In the Murasila Exh.PA/1 which is the first written document at the spot show presence of Constable Attiq ur Rehman and Muhammad Usman with the Seizing Officer at the time of occurrence. The prosecution has proved the chain of circumstances under which the samples along with case property was shifted from the spot to the Police Station, produced before the I.O., then kept in safe custody and onward transmission

to the FSL for chemical analysis. All the PWs have been subjected to lengthy and taxing cross-examination by the defence but nothing beneficial to accused was extracted from them nor any doubt was created in prosecution's case, regarding tampering with the samples or that the samples were not in safe custody. The positive FSL report Exh.PZ qua samples further strengthens the prosecution case.

13. As regards argument of learned counsel for the appellant to the effect that the samples remained unsafe during its transit from Malkhana to the FSL, we would refer to the statement of Aftab Ahmad LHC No.30 (PW.4), according to which samples in parcels No.1 to 15, were handed over to him by the I.O. on 14.05.2018 along with application and road certificate Exh.PW.3/6 and Exh.PW.3/7, respectively, for its onwards transmission to the FSL. He handed over the samples to the FSL authority and obtained endorsement in this regard over road Certificate Exh.PW.3/7. The application Exh.PW.3/6, road certificate Exh.PW.3/7, endorsement thereon and FSL report Exh.PZ, wherein the samples have been shown received on the same date i.e. 14.05.2018, coupled with the testimony of the I.O. corroborate the version of Aftab Ahmad LHC (carrier of the samples). In this view of the matter, we are firm in our view to hold that the samples were safely transmitted to the FSL from Malakhana to the FSL.

14. Argument of learned counsel for the appellant that at the time of destruction of the case property, no notice was given to the appellant, hence, the appellant has been prejudiced in his defence, is not tenable because on one hand, this objection has neither been raised by the defence at the time of cross-examination of Raja Muhammad Shoaib Judicial Magistrate (PW.6) who destroyed the case property or in the cross-examination of Arshad Mehmood SI (PW.3), who produced the case property before PW.6 for destruction, while on the other hand, notice to accused at the time of destruction of the case property, particularly, narcotics is not the requirement of section 33(4) of the Control of Narcotic Substances Act, 1997 read with section 516-A Cr.P.C, which for the sake of convenience and ready reference are reproduced below:-

“**S.33(4)** A narcotic drug, psychotropic substance or controlled substance seized under this Act shall be disposed of under section 516A of the Code of Criminal Procedure, 1898 (Act V of 1898).,

The 2nd and 3rd provisos attached to section 516A Cr.P.C. provide a proper mechanism for destruction of dangerous drug, intoxicant, intoxicating liquor or any other narcotic. For the sake of convenience and ready reference, the aforesaid provisos are reproduced below:-

“Provided further that if the property is dangerous drug, intoxicant, intoxicating liquor or any other narcotic substances seized or taken into custody

*under Dangerous Drugs Act, 1930 (II of 1930), the Customs Act, 1969 (IV of 1969), the Prohibition (Enforcement of Hadd) Order, 1979 (P.O. 4 of 1979), or any other law for the time being in force, **the Court may, either on an application or of its own motion and under its supervision and control, obtain and prepare such number of samples of the property as it may deem fit for safe custody and production before it or any other Court and cause destruction of the remaining portion of the property under a certificate issued by it in that behalf;** (Emphasis supplied).*

*Provided also that such samples **shall be deemed to be whole of the property in any inquiry or proceedings in relation to such offence before any authority or Court.**” (emphasis supplied).*

15. The Statutes governing destruction of seized narcotics do not provide any specific time for such destruction. The phrase ***“such samples shall be deemed to be whole of the property in any inquiry or proceedings in relation to such offence before any authority or Court”*** employed in 3rd proviso to section 561A Cr.P.C. empowered the Court to pass an order of destruction of narcotics at any stage which may even be at the time of production of accused for physical custody before the Magistrate or any time before the trial. The law on the subject referred above does not make any notice mandatory to be given to an accused before or at the time of destruction of narcotics.

16. For the sake of discussion if we deem that issuance of notice to the accused was essential, which otherwise is not the requirement of the law, then the dictionary meaning

of word "Notice" is to be taken into account which means "to see or become conscious of something or someone". Here we would refer to the testimony of Raj Muhammad Shoaib Judicial Magistrate (PW.6), under whose supervisions the case property was destroyed. He deposed that on 14.05.2018, the I.O. produced *accused Rehmat Gul before me for recording his confessional statement along with case property*. The accused refused to confess his guilt. He weighed the case property contraband which came to 1785 grams. After separating 10 grams from each packet and resealing them for the purpose of exhibition before the trial court, *I destroyed the remaining 17700 grams chars, in presence of APP, accused and I.O. of the case*. He handed over samples to Criminal Moharrir of this court. In this respect order is Exh.PW.3/3, memo of proceedings Exh.PW.3/4 and certificate Exh.PW.3/5. Similar is the statement of Arshad Mehmood SI, the Investigating Officer, according to which at the time of destruction of the case property the accused appellant was present in the entire proceedings. Order dated 14.05.2018 (Exh.PW.3/3) of the learned Judicial Magistrate, memo of proceedings Exh.PW.3/4 and certificate Exh.PW.3/5, substantiate the version of the Magistrate and the I.O. that at the time of destruction of the case property the appellant was very much present. In this view of the matter, presence of the appellant at the time of destruction of the case property was

sufficient notice to him. The appellant has not raised any objection at the time of destruction of the case property. Similarly, as stated earlier he has also not put any suggestion to the PWs to call in question the proceedings regarding destruction of the case property. In case titled “Naseer Ahmaed vs the State” (2004 SCMR 1361), the Honourable Supreme Court has held that:-

“So far as the non-production of the narcotics before the trial Court is concerned, the Investigating Officer during the trial submitted an application under section 516 Cr.P.C. for destruction of narcotics substance, which was allowed by the Magistrate on 04.12.1995 and the Destruction Certificate was issued by the Magistrate on 05.12.1995. We are mindful of the fact that during the trial, the petitioner did not raise objection for the destruction of the narcotics under the valid orders of the court”.

In case titled, “Fida Muhammad vs the State “ (2006 P Cr L J (Peshawar) 316) this court with regard to destruction of case property has observed as under:-

“This court in Wajid Ali Shah Vs State 2002 MLD 1982 , where even the destruction certificate of chars and opium was not produced in Court, had held that non-production of destruction certificate at the trial had not prejudiced the case of the accused in any manner which at the most could be considered

as an irregularity curable under section 537 Cr.P.C. and would not affect the factum of recovery from the possession of the appellant and its prove at the trial. The Judicial Magistrate was nominated by the Special Judge to take the sample and supervise the destruction of seized chars vide Exh.PL and he in compliance of the order had acted accordingly. In *Naseer Ahmad vs the State* 2004 SCMR 1361, where the Investigating Officer during the trial had submitted application under section 516 Cr.P.C. for destruction of a narcotics substance which was allowed by the Magistrate, the destruction certificate was also issued by the Magistrate and the Hon'ble supreme court had observed that the petitioner did not raise objection for the destruction of narcotics under the valid order of the court."

In case in hand, the learned Judicial Magistrate, Kohat on the direction of the learned Sessions Judge, after adopting the mechanism provided under 2nd and 3rd provisos to section 516A Cr.P.C. has ordered the destruction of narcotics and in this regard has also issued a proper certificate under his signature and seal of the Court. The entire proceedings of the destruction of narcotics were carried out/conducted in presence of the appellant, and the same has been vividly proved by the prosecution through

cogent and confidence inspiring oral as well as documentary evidence.

17. Besides section 33(4) CNS Act 1997 read with proviso 2nd and 3rd to 516-A Cr.P.C, we would also refer to section 27 of the Control of Narcotic Substances Act, 1997, so as to know the aim and object behind the scheme of quick production of the recovered narcotics before the Special Court at the time of production of an accused for physical remand and expeditious disposal of the case property, which for the sake of convenience and ready reference is reproduced below:-

“S.27. Disposal of persons arrested and articles

seized:--(1) Every person arrested and articles seized under a warrant issued under section 20 shall be forwarded without delay to the authority by whom the warrant was issued; and every person arrested and article seized under section 20 or section 21 shall be forwarded without delay to:-

(a) The officer-in-charge of the nearest police station; and

(b) The Special Court having jurisdiction.

(2) The authority or officer to whom any person or article is forwarded under this section shall, with all convenient dispatch, take such measures as may be necessary under the law for the disposal of such person or article.”

18. From combined study of sections 27 & 33(4) of the CNS Act, 1997 read with section 516-A Cr.P.C., one

may infer the object and wisdom of the legislature that proceedings in cases of narcotics should expedite, fair and transparent that no innocent person be entangled in a false case and that the narcotics recovered in one case may not be planted against another innocent person. In this view of the matter, we are firm in our view to hold that the expeditious disposal/destruction of the recovered narcotics in presence of the appellant by the court of competent jurisdiction, has not prejudiced the appellant in his defence.

19. On reappraisal of the evidence, we have reached to an irresistible conclusion that prosecution has proved the guilt of the appellant through cogent and confidence inspiring ocular as well as documentary evidence, corroborated by circumstantial evidence. The appellant failed discharge his burden by proving to the contrary in terms of section 29 of Control of Narcotic Substances Act, 1997. In cases registered under Control of Narcotic Substances Act 1997, once the prosecution, *prima facie* establishes its case against an accused, then under section 29 of Control of Narcotic Substances Act, 1997, burden shifts upon the accused to prove contrary to the plea of the prosecution. The impugned judgment of the learned trial Court is well reasoned, based on proper appreciation of evidence and application of the law on the subject, hence not open to any interference by this Court.

20. Resultantly, this appeal being meritless is hereby dismissed. Conviction and sentence of the appellant recorded by the learned trial Court are maintained.

Announced:

M.Siraj Afridi PS

SENIOR PUISNE JUDGE

JUDGE

**DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge
And Hon'ble Mr. Justice Ijaz Anwar.**