Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

Judicial Department

J.Cr. A No. 591-P/2017
Multan Jan Vs the State

Date of hearing: 18.09.2019.

Appellant by: Ms. Nosheen Ahmad, Advocate.

State by: Mr. Muhammad Riaz Khan, AAG.

JUDGMENT

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AHMAD ALI, J. Questioned herein is the judgment of learned Sessions Judge/Judge, Special Court, Hangu, dated 16.05.2017, whereby appellant Multan Jan was convicted and sentenced to life imprisonment with fine of Rs.200,000/ in case FIR No.315 dated 08.04.2015 registered against him u/s 9© CNSA, 1997 at Police Station, City (District Hangu).

2. Brief facts of the case are that complainant/Fazal Muhammad ASI/PW2 alongwith other police officials, during gusht received information that charas would be smuggled from Hangu to Kohat. On this information, he made Nakabandi at Raeesan Bazaar on main Kohat-Hangu Road and at about 20:30 pm, a white colour motor car (Probox) bearing registration No. WK-997/Islamabad arrived from Hangu side which was stopped. The driver

alongwith one person was found suspected. The driver disclosed his name as Muhammad Hakeem while the other person disclosed his name as Multan Jan (present appellant). Search of the vehicle resulted into recovery of 12 kgs charas from secret cavities of the car contained in 10 packets of 1200/1200 grams each. Out of the recovered contraband 10/10 grams were separated for chemical analysis of FSL, remaining stuff was sealed in another parcel. The Contraband and vehicle along with its registration book 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 five 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 apprehended while setting in a car driven by acquitted co-

accused Muhammad Hakeem, having 12 kgs charas recovered from its secret cavities.

5. For just decision of the instant case, a thorough look at the testimony of evidence produced by the prosecution is necessary. Particular portions of the statement of PW-2 who is the Seizing Officer/complainant in the instant case, are reproduced below for ready reference:-

PW-2…..

> "***The motorcar was searched by me During search, from the rear portion and the cavities which were made on the sides of motor car, 10 packets of charas were recovered. Presently, I do not recollect the number of packets which were recovered from each side of the motor car but probable they were 5+5 from each sides……….I handed over the accused and charas in the PS along with motor car and then I left for the spot again…….I have separated 10/10 grams of charas from each 10 packets while the remaining quantity was packed/sealed by me in a separate parcel, amounting to quantity 11900 grams in a separate parcel while the 10 separate parcels in connection with FSL were also packed/sealed in a separate parcel.*** "

From the above statement, it is not clear that to whom the seizing officer has handed over the recovered contraband and samples in the police station being allegedly sealed in separate parcels. Which were also, indeed, un-numbered. PW-1 is Hussain Badshah No.20/FC who took the samples

to FSL for chemical analysis. This witness while appearing as PW-1, deposed as under:

PW-1…..

> ***"Moharrir of the PS handed over to me 10 parcels of sample containing 10/10 grams each, meant for FSL analysis on receipt, which is ExPW1/1. I took the parcels of sample and handed over the same to FSL authorities".***
>
> ***XX….I had gone to FSL laboratory from the PS and had handed over the parcels of sample. Apart from the case property of the present case, the case property of some other cases were also handed over to the FSL Peshawar on 08.04.2015 for ascertaining the opinion. I was entrusted with a copy of FIR, recovery memo, site plan and samples of the recovered charas by the Moharrir of the PS when I was taking the case property to FSL. I had handed over the parcels of sample to FSL Peshawar on 08.04.2015. No receipt was handed over to me by the FSL Peshawar in connection of receiving of samples."***

Contrary to the above stated facts of PW-1, the FSL report shows the date of receipt of samples, contained in parcels No.1 to 10, as 16.04.2015. Such stance creates a serious doubt in the prosecution case and also negates the stance of PW-2/Seizing Officer/complainant as hinted above. Ilyas Khan IHC, who is also witness to the recovery memo, appeared as PW3 and deposed in his cross-examination as under (relevant portion):-

PW-3…….

> ***"xxx……Exactly I cannot tell the time of our Nakabandi and arrival of motor car……..first Fazal Muhammad ASI had signalled the vehicle…….I cannot tell that how much packets were taken out from one side and how much from another"***

It has never been mentioned in the record or in any of the statements of PWs that where the case property and samples were kept when it was produced before the court or the samples sent to FSL. Moharrir of the police station in the present case would have been a handful witness to the prosecution if examined, who would certainly depose about the custody of narcotics and samples thereof.

6. In the 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/PW2 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. The complainant further deposed that he prepared the samples for FSL, but from his statement, it is not clear that to whom he handed over the case property and samples in the police station. 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. 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. Guidance could be sought from case law reported in **2019 SCMR 608**. Similar views have also been taken by the apex court in ***2018 SCMR 2039, & 2019 SCMR 903***.

7. Furthermore, the record is silent as to where remained the samples and case property from 08.04.2015 to 16.04.2015 when it was received in FSL with a considerable and unexplained delay of 8 days. In the 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"***

8. 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 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. Prosecution had failed to tender any plausible explanation for delay in sending the samples for analysis. Case law refers to **2012 SCMR 577 & 2015 PCr.LJ 62.**

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 with confidence that the prosecution had proved its case against the accused-appellant beyond reasonable doubt.

8. Perusal of record further reveals that the accused-appellant was convicted by the learned trial court on the basis of an affidavit sworn by the accused during trial on one hand and affirmative answer to the question at the time of recording his statement u/s 342-Cr.P.C. on the

other hand. Bare perusal of the affidavit shows that accused-appellant was in judicial custody on 02.05.2016 when the affidavit was scribed and also in judicial custody when on 25.05.2016 the said affidavit was produced in the Court. Affidavit has also not contained any stamp of jail authorities, moreover, the Oath Commissioner, Muhammad Amin, Advocate, was also not produced by the prosecution who could explain that how he attested the affidavit of accused-appellant when he was in judicial lock-up. While relying on the statement of accused-appellant recorded under section 342 Cr.P.C, same is also against the law because at the time of production of accused before the Trial Court or Magistrate, he refused his guilt and while framing of charge the accused-appellant also did not plead guilty. Statement of the accused-appellant was also recorded u/s 342 Cr.P.C. Once on 25.05.2016 the accused-appellant has refused to be examined on oath or to produce defence evidence, but even then statement of DW-I Naveed Aslam was recorded on 17.02.2017 and present accused-appellant Multan Jan's statement was recorded on 18.02.2017, but the accused-appellant was again examined u/s 342 Cr.P.C on 11.04.2017 for reason best known to the learned Trial Court same vitiated whole trial of the accused-appellant. Even otherwise, section 242, 243 & 244 of the Cr.P.C clearly depicts that once a formal charge is framed and put

to accused which is denied by him u/s 242 Cr.P.C, provision of section 243 Cr.P.C shall "***epso-facto***" become inoperative and court has to proceed u/s 242 Cr.P.C by recording the prosecution evidence as well as of the accused, if led in defence. Confessional statement made by the accused-appellant after 2/3 dates of hearing after explicit denial of the charge at the time of framing the same is of no legal effect in view of section 244, 265-D, 265-E and 265-F Cr.P.C. So, when the accused pleads guilty during course of trail, independent evidence should be taken and conceded by the Court and no one should be condemned and sentenced on a capital charge merely if he pleaded guilty to the charge but some evidence must be recorded which shall be taken in support of guilt of the accused. Admission of the guilt could not be made sole basis for sentencing accused. Reliance is placed on **2017 SCMR 713**.

9. It has also been noted that Trial court recorded statement of appellant on oath u/s 340(2) Cr.P.C. and he re-affirmed his admission made in his statement under section 342, Cr.P.C. about his guilt, although he never opted for to record such statement. The learned Trial Court also could not perceive the correct legal position that, confession of accused as it has held it to be, if is recorded on oath, becomes absolutely inadmissible in evidence and for this reason alone, the same can be

discarded. For recording of confession, whether by a Magistrate or the Trial Court, the procedure laid down under the High Court Rules and Orders and the safeguards provided under section 364, Cr.P.C. have to be essentially followed. True, that under section 265-E, Cr.P.C. the Trial Court in a session case, has discretion to record the plea of the accused and if he pleads guilty to the charge, it may convict him in its discretion. Nevertheless, it is also provided in section 265-F, Cr.P.C. that if the Trial Court does not convict him on his plea of guilt, it shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. This discretion is to be exercised with extra care and caution, and ordinarily on such admission, awarding capital sentence shall be avoided and to prove the guilt of an accused, evidence of the complainant or the prosecution has to be recorded, in the interest of safe administration of justice.

The most important factors and required standards of confession may be cited below:-

> "It should be ensured,
>
> (i) that the accused is in full senses and understands the consequences of making a confession;
>
> (ii) that, the confession was not a result of any duress, coercion or any promise by the prosecution, to be made an approver;
>
> (iii) that, during transit of the accused by the police from and to the Trial Court from the prison, on each "Paishi" no threat or pressure was applied by the escorting police guard or incharge thereof;
>
> (iv) what were the actual facts, which induced the accused

to confess after facing trial, during which he pleaded innocence all the way;

(v) the court recording the confession has to ensure that the mental capacity of the accused is not diminished due to any illness and if some indication of abnormality is suspected by the Court, it is better to refer the accused to the Standing Medical Board to ascertain the true cause thereof;

(vi) While recording the confession, the same safeguards and precautions be adopted, by directing the Public Prosecutor, the complainant's counsel, the Naib Court and all other officials to leave the Court. If need be, the counsel who represents him, may be given an opportunity to be present inside the Court during the whole process, if the accused person, on asking by the Trial Judge, so demands;

(vii) the handcuffs of the accused be removed and he be provided a chair on the dais. He may be given some time to think over the making of the confession and in that regard particular questions be put to him, as to why he was making the confession when he has already pleaded innocence and claimed trial at the time, the formal charge was framed;

(viii) the Trial Judge shall explain to the accused that, in case of making confession, he has to face a capital sentence in a murder case or any offence punishable with death;

(ix) the entire record of all the questions and answers recorded, be properly maintained and thereafter, a proper certificate be appended thereto, showing the satisfaction of the Trial Judge that the accused person was not mentally sick and he was making the confession voluntarily, based on true facts and that, there was no other compelling reason behind that.

Reliance could be placed on **2017 SCMR 713.**

10. As the above procedure was not adopted, therefore, it was incorrectly construed by the Court below as confession of the accused. Under the law, it may be treated as an admission of the appellant, however, on the basis of admission alone, accused person cannot be awarded a capital punishment because admission, as has been defined by Article 30 of the Qanun-e-Shahadat Order, 1984, is only a relevant fact and not a proof by itself, as has been envisaged in Article 43 of the Order, 1984, where a proved, voluntary and true confession alone

is held to be a proof against the maker therefore, both the Courts below have fallen in error by treating this halfway admission to be a confession of guilt on the part of the appellant. It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited. Therefore, it is held that the admission of the appellant cannot be a substitute for a true and voluntary confession, recorded after adopting a due process of law and it cannot be made the sole basis of conviction on a capital charge.

11. Apart from the above, co-accused who was driver of the vehicle involved in the instant case has already been acquitted by the learned Trial Court.

12. 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, safe custody and safe transmission to the FSL, which suggest that occurrence has not taken place in the mode and manner as alleged by the prosecution.

13. 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.

14. For what has been discussed above, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required to be detained in any other case.

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

Announced.
18.09.2019

CHIEF JUSTICE

J U D G E

*Amjad Ali, PS"

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