

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

Criminal Appeal No.06-P of 2019

The State through Advocate-General,
Khyber Pakhtunkhwa, Peshawar.

.....Appellant

Versus

Tahir Usman S/o Mir Jan Shah,
R/o Village Mita Khel, District Karak

.....Respondent

Counsel for the State/Appellant.	---	Mr. Walayat Khan, Assistant Advocate General, Khyber Pakhtunkhwa.
Case FIR No, date & Police Station.	---	No.61 dated 05.02.2015, P.S. Pezu, District Lakki Marwat
Date of impugned Judgment.	---	15.12.2018.
Date of institution	---	29.04.2019.
Date of hearing	---	26.11.2019.
Date of decision	---	26.11.2019.

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JUDGMENT

SYED MUHAMMAD FAROOQ SHAH, J:- By invoking the appellate jurisdiction of this Court under section 417 Cr.P.C., the State through Advocate General, Khyber Pakhtunkhwa, Peshawar has called in question the impugned judgment dated 15.12.2018, rendered by the learned Sessions Judge/Judge Special Court, Lakki Marwat, whereby the accused/respondent was acquitted in case F.I.R No. 61, dated 05.02.2015, for an offence punishable under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979. A prayer to convict and sentence the accused/respondent after setting-aside the impugned judgment has been made on the grounds averred in the memo of appeal.

2. The learned State Counsel while arguing Criminal Miscellaneous Application No.11-P of 2019 for condonation of delay submitted that time for filing of appeal by the State as provided in statute is six months. The application is accordingly disposed of being infructuous.

3. Story of the prosecution case in nutshell is that on 05.02.2015 Yaqoob Khan ASI, Incharge police check post Wanda Banochi, District Lakki Marwat, received spy information that Flying Coach bearing registration number Peshawar-E/6903 was transporting huge quantity of *Dodah* i.e. scrap of empty poppy capsule from Peshawar to D.I.Khan. On such information, he alongwith police party stopped the Flying Coach bearing registration number Peshawar-E/6903 and on the roof of Flying Coach three sacks of white color containing the said narcotics, weighing 105 K.G. was recovered. It is alleged in the F.I.R (Exh.PA) that the driver of the said Flying Coach claimed the ownership of said narcotics. The accused was arrested and the Flying Coach as well as the narcotics were taken into possession. On completion of usual investigation final report, under section 173 Cr.P.C. was submitted in the Court. Charge against the accused was framed on 12.09.2017 under Articles 3-4 of the Prohibition (Enforcement of Hadd) Order, 1979, to which the accused pleaded not guilty and claimed trial by professing his innocence. Prosecution, examined as many as five witnesses and thereafter statement of accused under section 342 Cr.P.C was recorded by the trial court.

4. Submissions made by Mr. Walayat Khan, Assistant Advocate-General, representing the State have thoroughly been considered and record has also carefully been scanned. Learned State counsel, without controverting the reasons of acquittal recorded by the learned trial Court, submitted that impugned judgment is based on conjectures and surmises, hence liable to be set-aside. Next argued that mandate of section 103 Cr.P.C. is necessarily meant for search of premises, however, recovery in present case is made from the possession of the accused. The inordinate delay in sending contraband samples to F.S.L. after 72 hours is directory, not mandatory to dismantle the credibility of F.S.L. report.

5. Prosecution case hinges on testimonies of police officials. Undeniably, despite having advance information about the trafficking of narcotics, the complainant Muhammad Yaqoob ASI did not associate any private persons to witness the alleged search and recovery proceedings; though, admittedly at the time of alleged recovery, private persons were present in the Flying Coach in-question but none of them was cited as marginal witness of the recovery memo.

6. A perusal of record transpires that the contraband narcotics were allegedly recovered on 05.02.2015 while the samples were received in the laboratory after 14 months without any sufficient reasons or plausible cause of delay. Moreso; the contraband sent to F.S.L. through Muhammad Hussain FC-36 was neither included in the calendar of prosecution witnesses nor he was examined during the trial.

7. Under the existing rules, officer incharge of the police station shall take charge of and keep in safe custody, pending the orders of Magistrate or a prohibition officer of articles seized under the law, which may deliver to him, and shall allow the prohibition officer to affix his seal to such articles and to take samples thereof. Unexplained 14 months delay in sending the narcotics to the laboratory and unsafe custody of narcotics besides transmission of samples to the office of chemical examiner through unexamined witness are fatal to the prosecution case; reliance is being placed on the dictum laid down by the Hon'ble Supreme Court in the judgments reported as **2012 SCMR titled AMJAD ALI vs THE STATE; 2015 SCMR 1002 titled IKRAMULLAH & OTHERS vs THE STATE; 2018 SCMR 2039 titled THE STATE vs IMAM BAKHSH & OTHERS.**

8. The cumulative assessment of prosecution evidence transpires that PW-1 acted as an eye witness as well as marginal witness of recovery memo (Exh.PW 1/1 & 1/2), admitted in cross-

examination that when the accused was got down from the Flying Coach, it was left to go and further stated that *"I cannot say as to whether statement of the driver was recorded or not. It is correct that in my statement recorded u/s 161 Cr.P.C., I have disclosed the name of the present accused". "It is correct that no date and time of occurrence are mentioned in my 161 Cr.P.C. statement". "Though the private persons/passengers were present in the Flying Coach, but no passenger was examined by the I.O."* PW-2 Muhammad Yaqoob ASI, being star witness of the prosecution stated that the driver of the Flying Coach in-question claimed the ownership of said Opium (*Dodah*) but in cross-examination, he had admitted that *"The passengers were present in the Flying Coach, at the time of occurrence. Accused was driving the vehicle at the time of occurrence. It is correct that I did not record the statement of any passenger. I had weighed the Opium Dodah on the spot, however, I had not sealed the same"* PW-4 Saadullah Khan, ASI had conducted the investigation, stated that he separated 10 K.G. from the entire quantity of the Opium "*Dodah*" and sealed the same into parcel No.1 for the purpose of chemical examination, while the remaining 95 K.G. was kept separately. In cross-examination the investigation officer admitted that *"It is correct that I did not mention in my statement today before the court that the contraband of all the three sacks were amalgamated and then weighed". "The complainant himself had taken into possession the contraband through separate recovery memo, while I also took into possession the contraband through separate recovery memo. It is correct that I did not seal the sacks into separate parcels, nor any seal lock was affixed on the parcels, in which the sacks were sealed. It is correct that accused is not shown in the Flying Coach, as per site-plan". "No private person was examined by me in support of prosecution case. I handed over the contraband to the Moharror of the P.S."* *"It is correct that I did not investigate the fact as to from whom the accused had purchased the Opium "Dodah) and to whom he was taking the same. It is correct that none of the PW had disclosed the date and time of occurrence in their statements u/s 161 Cr.P.C."*

9. As per prosecution version, the accused/respondent was arrested from a thickly populated area; it was a case of prior information but police did not associate any independent witness of the locality or any passenger of the Flying Coach to witness recovery proceedings and both the marginal witnesses of memo of recovery and arrest were police officials, subordinates of the complainant. The prosecution witnesses have contradicted each other on material points, considered by the learned trial Court. The scheme of law, settled by our judicial system is that the prosecution is duty bound to prove its case beyond shadow of reasonable doubt by producing convincing and confidence inspiring evidence in court; concept of benefit of doubt to an accused person is deep-rooted in our country and if any single or slightest doubt is created, benefit of the same must go to the accused not as a concession but as a matter of right and it would be sufficient to disbelieve the prosecution story, regardless of the fact whether the accused had taken any defence plea or not.

10. It is not out of context to mention that scope of appeal against acquittal of accused is considerably limited. Order impugned through the appeal is based on correct appreciation of facts and law, does not call for interference by this Court. Suffice it to say that there is hardly any infirmity, illegality or perversity in the impugned order of acquittal, which being based on sound and cogent reasons is accordingly maintained. In the result, the captioned appeal having no merits for consideration is dismissed in *limine*.

JUSTICE SHAUKAT ALI RAKHSHANI
JUDGE

JUSTICE SYED MUHAMMAD FAROOQ SHAH
JUDGE

Peshawar the
26th November of 2019
M.Ajmal/**.

Approved for reporting

JUSTICE SYED MUHAMMAD FAROOQ SHAH