SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Kh. Muhammad Naseem, J.

Raza Ali Khan, J.

Criminal Appeal No. 10 of 2020

(PLA filed on 06.02.2020)

Khursheed Hussain Shah s/o Syed Ali Asghar Shah, caste Syed r/o Namli Syedan, Tehsil and District Muzaffarabad, Azad Jammu & Kashmir, presently in Judicial Lockup Rara, Muzaffarabad.

......APPELLANT

VERSUS

1. State through Advocate-General of Azaad Jammu & Kashmir having his office at Supreme Court Building, Muzaffarabad.
2. Station House Officer (SHO) Police Station Civil Secretariat Muzaffarabad, Azad Jammu & Kashmir.

.... RESPONDENTS

[On appeal from the judgment of the High Court dated 06.01.2020 in criminal appeal No. 27 of 2018]

Appearances:

FOR THE APPELLANT: Ch. Shoukat Aziz, Advocate.

FOR THE RESPONDENT: Kh. Maqbool War, Advocate-General.

Date of hearing: 18.01.2022.

ORDER:

Raza Ali Khan, J.– This appeal, by leave of the Court, has been directed against the judgment of High Court of Azad Jammu & Kashmir, dated 06.01.2020, in Criminal Appeal No. 27 of 2018.

2. The facts forming the background of the captioned appeal are that FIR No. 48/2018, was registered in the offences under sections 3 & 4 "The Prohibition (Enforcement of Hadd) Act, 1985, and 15,

32 & 9(C) of Control of the Narcotics Sbstances Act, 2001, (*hereinafter to be referred as CNSA*) against the appellant, herein, and other accused Waseem Iqbal, at the police Station Civil Secretariat, Muzaffarabad, on 03.03.2018. On registration of the FIR, the accused was arrested and after completion of the investigation, the Challan of the case was submitted before the concerned Court. The Charge was framed against the accused alongwith another under section 265-D Cr.PC, whereby, they pleaded not guilty. During proceedings, the other accused Waseem Mughal was acquitted of the charge under section 265-K, Cr.PC, vide order dated 12.09.2018. The prosecution produced eleven witnesses out of 12, listed in the Challan and also produced the documentary evidence. After completion of the prosecution evidence, statement of the convict-

appellant under section 342-Cr.PC, was recorded; he again pleaded not guilty and opted not to produce defense evidence. The learned trial Court after hearing the learned counsel for the appellant as well as Assistant Public Prosecutor, acquitted the appellant in the offences under section 15, 32, CNSA and Section 3 of the prohibition (Enforcement of Hadd), Act, 1985, however, he was sentenced to 14 years' rigorous imprisonment in the offence under section 9(C) of CNSA with fine of Rs. 5,00,000/-, in case of default, he had to undergo further imprisonment for six months and further sentenced with one year's simple imprisonment under section 4 of "The Prohibition (Enforcement of Hudd)" Act, 1985, with fine of Rs. 5000/- in case of default he had to further undergo simple imprisonment for six months, vide judgment dated 19.09.2018. The

appellant, herein, feeling aggrieved, filed an appeal before the learned High Court on 18.10.2018. The learned High Court after necessary proceedings, has dismissed the appeal through the impugned judgment dated 06.01.2020.

3. Ch. Shoukat Aziz, the learned Advocate appearing for the appellant argued with vehemence that the offences under Section 3 & 4 of the Prohibition (Enforcement of Hudd) Act, 1985, are triable by the Tehsil Criminal Court, under the provisions of Islamic Penal Laws. He argued that the section 23(5) of the Islamic Penal Laws excludes the jurisdiction of any other Court for the purpose of trial of the offence committed under that Act. He argued that the offence under section 9(C) of CNSA, was also liable to be tried by the Tehsil Criminal Court, hence,

the submission of the challan before the special Court constituted for the trial of the offences under CNSA was not justified. He further argued there are material contradictions in the statement of prosecution witness but the learned trial Court did not consider this vital aspect of the matter, whereas, it is the settled principle of law that benefit of doubt always goes to the accused and even a slight doubt must favour the accused but in the instant case, the convict-appellant has been deprived of this benefit. He submitted that the whole investigation was completed in violation of law and rules on the subject, as the alleged recovered items were not sent for chemical examination well in time. He added that the trial Court on one hand admitted in its judgment that there is difference in weight and delay in sending samples create doubt in the present case and

accused is entitled to get benefit of doubts and dents but at the same time, awarded much excessive punishment in a false and fabricated case. He further submitted that the story alleged by the prosecution was not proved as all the witnesses narrated different stories about the arrest of the accused. He emphasized that the convict-appellant was not present at the place of occurrence and the Police registered a fake and forged case against the accused and illegally attributed the narcotics towards the convict, therefore, the impugned judgments of the both the Courts below are liable to be set-aside. The learned Advocate in support of his submission placed reliance on the following cases: -

In a case reported as *Hussain Bux alias Kabacho Channa vs. The State* [2017 P Cr.LJ 501], accused was allegedly found holding one plastic

shopper in his hand, containing charas weighing 1050, grams at the time of raid, despite the incident having occurred in a busy road where many private persons were available, Investigating Officer did not try to arrange any witness of the locality, who might have seen the accused in any manner linked with the said packet of narcotics. It was held by the Court that evidence of police officials was as good as others, but in cases, where public persons were available at the site, and prosecution failed to join them as witnesses' evidence of police officials lost its sanctity and evidentiary value. It was further held that delay of about seven days in sending the samples of narcotics to Chemical Examiner for analysis was not explained by the prosecution, exercise of sending sample for testing was required to be completed within seventy-two hours of the recovery and inordinate delay in sending samples was fatal to the case of prosecution. The accused was acquitted in circumstances.

In other case titled *Farrah Ayyub vs. The State, Criminal Appeal No. 15 of 2020, decided on*

11.11.2021, it was alleged that the alleged contraband was sent to Forensic Science Laboratory after the delay of eight days and this Court held that the parcel should be deposited within seventy-two hours after seizure of the contraband substance, therefore, delay in sending parcel creates dent in the prosecution story. It was further held that the discrepancy in weight and color of sample casts serious doubt on the credibility of the prosecution case. The accused was acquitted in the circumstances.

In the other case reported as *"Tariq Pervaiz vs. The State", [1995 SCMR 1345],* an accused was apprehended while selling one gram of heroin to a fake customer, the raiding party further recovered 1099 grams of heroin from the accused, two separate parcels containing one gram heroin which was sold by accused to fake customer and one gram heroin from bulk heroin recovered from him had been prepared by the police but only one parcel was sent to Chemical Examiner for examination and report. It was held that it could not be said with judicial certainty that the parcel

containing sample heroin had been sent to Chemical Examiner. The accused was acquitted on benefit of doubt in circumstances.

4. Conversely, Kh. Maqbool War, the learned Advocate-General appearing for the State forcefully, defended the impugned judgments and submitted that the judgments of both the Courts below are well-reasoned, comprehensive and passed in accordance with law and the facts of the case. He submitted that the convict-appellant has failed to point out any legal ground for interference by this Court in the impugned judgments, hence, this appeal is a futile exercise only to prolong the litigation. He further argued that the appellant is fully connected with the offences and the prosecution has successfully proved its case beyond any shadow of doubt against the convict-appellant by producing

ocular, circumstantial and corroborative evidence. He contended that the convict-appellant is a habitual offender and as per record he has previously been convicted in several cases of intoxicants. He further contended that huge quantity of narcotics/charaas was recovered from his possession and same was sent for chemical examination, the report of Forensic Science Laboratory is positive which also corroborates the prosecution version. He further argued that the Courts below have concurrently recorded findings on all the vital aspects of the case and the convict-appellant has failed to point out any illegality in the impugned judgment, therefore, the appeal is not maintainable.

5. We have heard the learned Advocates for the parties and have gone through the record of the

case made available. The perusal of the record reflects that the SI/SHO Police Station, Civil Secretariat, Muzaffarabad, sent a written report to the Police Station, stating therein, that on 03.03.2018, he along-with other officials was patrolling when he was informed by the police informer that notorious drug seller Khurshid Shah, s/o Ali Asghar, r/o Namli Syedan, Kappa-Butt was selling charas on motorcycle bearing number MD-JJ-350, he along-with other officials reached at Tarni, at 04:30, pm, and found a person there wearing helmet on the motorcycle having number MD-JJ-350, AJK. It was further stated that the person was talking with someone on mobile phone, on inquiry, that person told his name as Khurshid Hussain Shah. Finding him suspicious, the said person was searched and charas weighing 4 kg and one bottle of alcohol colouring red

was recovered from the said person in presence of the witnesses. On this report, FIR NO. 48/2018, was registered in the offences under sections 9(C), 15 & 32 of the “Control of Narcotic Substance Act” and sections 3 and 4 of The Prohibition (Enforcement of Hadd), Act, 1985. After making investigation, the challan was submitted in the competent Court against the convict-appellant and one, Waseem Mughal.

6. The learned trial/special Court after completion of the trial and hearing the parties passed the judgment against the appellants in the following manner:-

> *“The nub of above discussion is that accused Khurshid Hussain Shah, s/o Ali Asghar Shah is acquitted from the offences under section 15,32 of “Control of Narcotic Substance Act”, and*

section 3 of "The Prohibition (Enforcement of Hadd), Act, 1985". Accused Khurshid Hussain Shah, s/o Ali Asghar Shah, caste Syed, r/o Namli Syedan, Tehsil & District Muzaffarabad is declared guilty of offences under section 9C of "Control of Narcotic Substance Act" and under section 4 of the "The Prohibition of (Enforcement of Hadd) Act, 1985". Due to mitigating circumstances, described in judgment and previous non-conviction, guilty Khurshid Hussain Shah, s/o Ali Asghar Shah is sentenced to rigorous imprisonment for fourteen years under section 9C of "Control of Narcotic Substance Act" and to fine of Rs. Five lacs. In case of default of payment of fine guilty has to undergo further simple imprisonment for six months. Guilty Khurshid Hussain Shah, s/o Ali Asghar Shah is also sentenced to one year simple imprisonment under section 4 of "The Prohibition (Enforcement of Hadd) Act, 1985" and to fine of RS. 5000/- in case of default of payment of fine, guilty has to undergo further simple

> *imprisonment for six months. All sentence shall run concurrently. Benefit of section 382-B, Cr.PC is also extended to convict Khurshid Shah. Recovered charas and bottle of alcohol be destroyed accordingly after lapse of period of limitation for filing of appeal."*

7. Against the aforesaid conviction order, the convict-appellant, herein, filed an appeal before the High Court of Azad Jammu & Kashmir. The learned High Court after necessary proceedings, through the impugned judgment, dated 06.01.2020, upheld the judgment of the trial Court by observing that the learned trial Court has rightly appreciated the prosecution evidence in its true perspective and reached to the just conclusion.

8. The learned Advocate for the convict-appellant forcefully argued that the alleged contraband was sent to the Forensic Science

Laboratory after the delay of eleven days, whereas, as per rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001, the samples are required to be dispatched for analysis not later than seventy-two hours. For better appreciation, the relevant rule is reproduced as under: -

> *"4. **Despatch of sample for test or analysts**. ---(1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances or the controlled substances seized, shall be drawn on the spot of recovery and dispatched to the officer in charge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.*
>
> *(2) Samples may be dispatched for analysis under the cover of a Test Memorandum specified in Form-I at the earliest, but not later than seventy-one hours of*

> *the seizure. The envelope should be sealed and market 'Secret Drug Sample/ Test Memorandum".*

(Underlining is ours)

9. A cursory perusal of the abovesaid rule transpires that the sealed parcel should be deposited within seventy-two hours after seizure of the contraband substance with the Chemical Examiner, however, the record is quite barren to justify this delay on the part of the prosecution. Although, it is in judicial notice of this Court that no Forensic Laboratory is established in Azad Jammu & Kashmir, but delay in dispatching the parcel within prescribed time is not justified, however, the said delay on the part of the prosecution can be taken as a mitigating circumstance. In this regard we are guided by the

judgment titled Shabbir Hussain vs. The State, [2021 SCMR 198], wherein, it has been held that: -

> *"Similarly, forensic report is sufficiently detailed to conclusively establish narcotic character of the contraband. The argument is otherwise not available to the petitioner as he never disputed the nature of substance being attributed him nor attempted to summon the chemical analyst to vindicate this position.*

10. This view further finds support from an unreported judgment of this Court in the case titled *Farah Ayyub vs. The State*, Criminal Appeal No. 15 of 2020, decided on 11.11.2020, wherein, the alleged contraband was sent to Forensic Science Laboratory after the delay of eight days and the accused was extended the benefit of the same aspect as a mitigating circumstance. Thus, we find force in the contention raised by the learned counsel for the

appellant, that the accused-appellant was to be given the benefit of it as a mitigating circumstance.

11. There is also another important factor which is to be taken into consideration in this case is the discrepancy in weight of sample. The learned Advocate for the convict-appellant submitted that the parcel prepared for forensic examination and the quantity measured by the Lab are of different weight as the parcel containing 40 grams of the charas was prepared for Lab examination which has been recorded as 44.44 grams by the Lab officials, however, during the cross-examination of a witness, when the said contraband was measured in the open Court, it was recorded as 3.430 Kilogram which should have been 3.60, Kilogram. This discrepancy in weight of sample casts a dent on the credibility of the

prosecution case but the same is not enough to disbelieve the entire case of the prosecution. In this regard, we rely on judgment of the Supreme Court of India in the case titled *Noor Aga vs. State of Punjab* 2008 16 SCC 417, wherein, the Court held the case of the prosecution to be not trustworthy when the discrepancy in the weight of the samples is found at the time it was taken and, in the laboratory, when it was examined. It has been observed by the Court as under: -

> *"The fate of these samples is not disputed. Although two of them were kept in the malkhana along-with the bulk, but were not produced. No explanation has been offered in this regard. So far as the third sample, which allegedly was sent to the Central Forensic Science Laboratory, New Dehli is concerned, it stands admitted that the discrepancies in the documentary evidence*

> *available have appeared before the Court, namely:*
>
> *(i)While original weight of the sample was 5 gm, as evidence by Exts. PB, PC and the letter accompanying Ext. PH, the weight of the sample in the laboratory was recorded as 8.7 gm.*

12. The learned trial Court has not seriously taken into consideration this point which could have been taken as a mitigating circumstance to favour the convict-appellant, therefore, the learned trial Court was not justified in awarding rigorous imprisonment for fourteen years under section 9C of CNSA, especially, when the above-mentioned dents in the prosecution story were available.

It is worth mentioned that the learned counsel for the convict-appellant submitted that accused has been falsely implicated in the case. It

may be stated that absence of any apparent reason to falsely implicate the accused for possession of four kilogram of narcotic, negates the hypothesis of fake imposition. Furthermore, there is nothing on record that the witnesses have any animosity, or ill-will towards the petitioner, hence, it cannot be safely considered that the petitioner has been falsely implicated. This view is fortified from the judgment of the Supreme Court of Pakistan in the case titled *Shabbir Hussain vs. The State* [2021 SCMR 198], wherein, it has been held that: -

> *"Recovered contraband is quite a cache, in the absence of any apparent reason to falsely implicate the petitioner, by itself negates, hypothesis of fake imposition, then to, on a person travelling alongside his family, arrested at a place for away from his abode. Presence of a lady constable who frisked and*

> *arrested the co-accused goes a long way to support the prosecution case, suggestive of a methodology not unusual in drug trafficking; purported semblance of a family travelling tother in routine appears to have been foiled by receipt of timely information, a scenario seemingly probable in circumstances."*

13. So far as the other contention of the learned counsel for the convict-appellant that there is material contradiction in the statement of prosecution witnesses regarding the arrest of the accused and color of the contraband, which has neither been considered by the trial Court nor by the High Court, is concerned. This argument of the learned Advocate appears to have no force. As there is overwhelming evidence on record to show that the incident had taken place and when once the genesis of the occurrence is proved, it is now well

settled that contradictions which are minor in nature would not be sufficient to dispel the entire prosecution case. It is true that there are minor contradictions in the statement of the witnesses but it cannot be held fatal for the prosecution; moreover, parrot like statements are also disfavored by the Courts. It is worth adding that the incident is reported to have occurred on 03.03.2018, and the witnesses' recorded statements in the Court after 7/8 months, therefore, minor contradictions are pretty much natural to be crept in the statements. The discrepancies in the evidence of the witnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. The learned counsel for the convict-appellant has endeavored hard to highlight certain discrepancies

among testimony of the witnesses, but in our considered opinion, same are absolutely, minor in nature and do not discredit the cumulative evidence. The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution; giving undue importance to them would amount to adopting a hyper-technical approach. The Court while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies do not shake the basic version of the prosecution case and same are to be ignored. We are fortified in our view from the case reported as *Yasmin Ashraf & 7 others vs. Abdul Rasheed Garesta & 5 others* [2018 SCR 661], wherein, it has been held that: -

> *"In the instant case, all the witnesses remained consistent on the material points, however, some minor discrepancies are found in their statements which can lightly be ignored and it is settled principle of law that the minor discrepancies do not affect the case of the prosecution as a whole, however, these may make some mitigation to some extent which may be taken into the consideration towards the quantum of the sentence."*

In a case reported as *Muhammad Naseem vs. State & another* [2018 SCR 417], this Court has taken a view that: -

> *"so far as the contention of the learned counsel for the convict-appellant that there are discrepancies in the statements of prosecution witnesses, thus, the conviction cannot be recorded on such evidence is concerned, it may be observed that the minor discrepancies in the prosecution evidence does*

> *not thresh out the whole case of the prosecution as the minor discrepancies can be ignored lightly. However, as stated hereinabove that all the prosecution witnesses remained consistent on the material part of the prosecution version, thus, the convict-appellant failed to point out any major contradiction in the prosecution evidence."*

14. The contention of the learned Advocate that no impartial or private witnesses were associated which is basic requirement of section 103 Cr.PC, has no force, firstly, for the reason that the provisions of section 103, has been excluded under the provision of section 25 of CNSA and secondly, non-compliance cannot be considered as a strong ground for holding the case of the prosecution fatal, it is consistent view of the Courts that police officials are competent witnesses and their statement cannot

be discarded merely, for the reason that they belong to the police force. In this regard, reliance can be placed to the case titled Salah-ud-Din vs. The State [2010 SCMR 1962], wherein it has been held that: -

> *"It is well settled by now that police officials are good witnesses and can be relied upon if their testimony remained unshattered during cross examination."*

Even otherwise, mostly people show hesitance and reluctancy due to exasperating legal procedure and lack of security and protection to witnesses. This point also came under the consideration before the Supreme Court of Pakistan in the case reported as *Shabbir Hussain vs. The State* [2021 SCMR 198], wherein, it has been held that: -

> *"On the contrary, it sounds straightforward and confidence inspiring without a slightest tremor. Absence of a witness*

> *from the public, despite possible availability is not a new story; it is reminiscent of a long-drawn apathy depicting public reluctance to come forward in assistance of law, exasperating legal procedures and lack of witness protection being the prime-reasons. Against the above backdrop, evidence of official witnesses is the only available option to combat the menace of drug trafficking with assistance of functionaries of the state tasked with the responsibility; their evidence, if found confidence inspiring, may implicitly be relied upon without a demur unhesitatingly; without a blemish, they are second to none in status."*

15. As for as the plea of the learned Advocate for the convict-appellant that offences under Section 3 and 4 of the Prohibition (Enforcement of Hudd) Act, 1985, is triable by the Tehsil Criminal Court under the provisions of Islamic Penal Laws and the offence under section 9(C) of CNSA was also liable to be tried

by the Tehsil Criminal Court, hence, the submission of the challan before the special Court constituted for the trial of the offences under CNSA Act, 2001 was not justified. We are not agreed with this contention of the learned Advocate for the convict-appellant as the Prohibition (Enforcement of Hudd) Act, 1985, is a general law and the CNSA, is a special law which was made for speedy trials and prevention of narcotics and the same has preference over the general law. It is also settled principle of law that if two laws are applicable on the same subject, the law which has been promulgated later in time will be applicable. In this regard no detailed deliberation and discussion is required as an authoritative judgment of this Court in the judgment *titled Malick Hussain Shah vs. Superintendent of Police Rangers [2014 SCR 1120],* is available, wherein, the vires of the Removal from

Service Special Powers Act, 2001 were challenged. In the said judgment, it has been unequivocally held that Act, 2001, validly legislated, later in order and being special law has overriding effect as compared to the general law, i.e. Act, 1976 and rules made thereunder. The enunciated principles of law in the judgment read as under: -

> *"27. Act, 2001 has been introduced by the legislature for specific purposes of providing law for dismissal, removal, compulsory retirement from service and reduction to lower post or pay scale of certain persons from Government Service and corporation service and speedy disposal of such case. the law has been enacted for particular purposes. Sections 10,11,12,12-A, 14 and 15 of the AJ&K Civil Servants act, 1976, already provide for termination, reversion, retirement or removal from service of civil servants and laws relating to corporation*

> *service also provide for termination, reversion, retirement and removal from service. The provision has been introduced in the Act, 2001 for speedy disposal of such like cases and such provision in a statute exclude the operation of special provisions in the general law."*

The same point came under the consideration before this Court in the case reported as *Muhammad Yousaf Haroon vs. Competent Authority & others* [2014 SCR 1180], wherein, it has been held that:-

> *"8. It is no more a disputed legal question that when there are two laws applicable to the subject, one is general and the other is special, the special law will have to prevail. Same, like if there are two laws applicable to the same subject, the law which has been promulgated later in order will be applicable.*

In the light of above detailed discussion, while keeping in view the age factor and previously non-conviction as stated by the SHO/SI in his statement, the impugned judgment of the High Court is modified in the manner that the sentence of rigorous imprisonment for fourteen years under section 9C of “Control of Narcotic Substance Act” awarded to the accused-appellant by the trial Court is hereby reduced to rigorous imprisonment for eight years. However, rest of the judgment of the High Court is hereby maintained.

JUDGE JUDGE

Muzaffarabad,
01.02.2022

Khursheed Hussain Shah vs. The State & others

ORDER:

The judgment has been signed. It shall be announced by the Registrar after notifying the learned counsel for the parties.

JUDGE JUDGE

Muzaffarabad:
01.02.2022