IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL NO. 30 OF 2023
(Against the judgment dated 03.05.2023 passed by the High Court, in Criminal Appeal No. 79 of 2022)

Saeed Pardesi s/o Shazullah r/o Kharigam, Tehsil Sharda District Neelum Azad Jammu and Kashmir, presently in judicial lockup Central Jail Rarra, District Muzaffarabad.

…Convict-Appellant

VERSUS

The State through Advocate-General having his office at Supreme Court Building Muzaffarabad.

…Respondent

Appearances:

For the convict/appellant:	Sh. Attique-ur-Rehman, Advocate.
For the State:	Kh. M. Maqbool War, Advocate-General.

Date of hearing: 30.10.2023

JUDGMENT:

***Raza Ali Khan, J*:-** The captioned appeal is the outcome of the judgment of the High Court dated 03.05.2023, whereby, the appeal filed by the convict-appellant, herein, has been dismissed and the other appeal filed by the co-convict, Muhammad Waseem, has been accepted.

2. The brief facts forming the background of the captioned appeal are that the convict-appellant faced charges under sections 9(C) and 15 of the Control of Narcotics Substances Act, 2001 (referred to as CNSA). The trial took place before the Sessions Judge Neelum, who was empowered as a Special Judge for CNSA cases. According to the First Information Report (FIR), on June 30, 2020, while the complainant, Muhammad Iqbal, and other police officials were on patrol duty at Sharda Bazar, they received an intelligence report that two accused-convicts were allegedly involved in selling contraband/chars near Gillian Guest House in Sharda District Neelum. Upon receiving this information, they reached the place of occurrence at 12:45 a.m. and found two individuals there. Upon seeing the police, these individuals attempted to flee. One of them, the convict- appellant Saeed Pardasi, was arrested on the spot, while the co-accused-convict, Muhammad Waseem, managed to escape. During a search, 1200 grams of chars/grada was discovered in the possession of Saeed Pardesi, which was wrapped in a shopper in the presence of

prosecution witnesses, namely Muhammad Ashraf and Aman-ullah. Subsequently, during the investigation, Saeed Pardesi revealed that Muhammad Waseem was also part of the drug trafficking, and he was later arrested as well. Following necessary proceedings, a charge sheet under section 173 of the Criminal Procedure Code (Cr.P.C), was presented to the Competent Court. During the trial, the convict-appellants were examined under section 265-D of Cr.P.C, where they pleaded not guilty and opted for a trial. The trial court directed the prosecution to present evidence in support of its case. The prosecution presented eight prosecution witnesses (P.Ws). Upon completing the prosecution's evidence, the convict-appellants were provided an opportunity under section 342 of Cr.P.C to respond to the allegations and evidence presented by the prosecution. They maintained their not guilty plea and claimed that false evidence had been presented against them. The convict-appellants also called witnesses in their defense.Upon the conclusion of the trial and after hearing the arguments from both parties, the trial court vide judgment dated 16.08.2022, reached the following conclusion: -

> ''لہذا ملزمان مندرجہ چالان محمد سعید پردیسی ولد شاہزاللہ قوم ملک ساکن کھریگام ۲۔ محمد وسیم ولد صدرالدین شیخ قوم شیخ ساکن طارق آباد مظفر آباد کو جرائم 9C/15CNSA میں مجرم قرار دیا جاتا ہے۔ مجرمان قبل از میں سزا یافتہ نہ ہے بدیں وجہ مجرمان کے ساتھ رعایت کرتے ہوئے مجرم محمد سعید پردیسی ولد شاہراللہ قوم کے ساکن کھریگام کو جرم9C, CNSA میں سات (7)سال کی سزائے قید محض اور دولاکھ روپے جرمانہ کی سزادی جاتی ہے۔عدم ادائیگی جرمانہ کی صورت میں مجرم مزید تین ماہ قید محض برداشت کرے گا۔دیگر مجرم محمد وسیم نوا۔ صدرالدین قوم شیخ ساکن طارق آباد مظفر آباد کو جرم 9C/15CNSAمیں مجرم قرار دیتے ہوئے سات(7)سال سزاقید محض اور سزائے جرمانہ دولاکھ روپے دی جاتی ہے۔عدم ادائیگی جرمانہ کی صورت میں مجرم مزید تین ماہ قید محض برداشت کرے گا۔ مجرمان یہ سزاسنٹرل جیل مظفر آباد (راڑہ)میں مکمل کریں گے۔ مجرمان کو B-382 ض ف کا بھی استفادہ دیاجاتاہے۔ براہ راست

سنائی جانے والی قید کی سزائیں (Concurrently) بہ یک وقت شروع ہونگی جبکہ عدم ادائیگی جرمانہ معاوضہ کی صورت میں سنائے جانے والی سزائیں جرائم کی سزائے قید کے پورا ہونے کے بعد (Consecutively) شروع ہونگی۔ مال منضبطہ منشی شے تحت ضابطہ بعد گزرنے معیار اپیل تلف ہو۔ مسل ہذا بعد تکمیل ضابطہ داخل دفتر ہو۔ حکم سنایا گیا۔"

3. Sheikh Attiq-ur-Rehman, the learned Advocate representing the convict-appellant, argued that the impugned judgment of the High Court goes against law, the facts, and the case record. He further contended that the High Court failed to apply proper judicial scrutiny when delivering the judgment, making it necessary to set it aside. He added that both the trial Court and the first appellate Court failed to consider a crucial aspect of the case, which is the prosecution's inability to produce independent witnesses and provide a reasonable explanation for not associating the local residents. He argued that the police officials deliberately violated the provisions of section 103 of the Criminal Procedure Code. During the evidence, no eyewitness or private witness was present at the place of occurrence, and the witnesses presented before the trial court were all police officials, including the complainant in the First Information Report (FIR), who also held the position of Head Constable. This, he claimed, is a clear violation of section 21 of the Control of Narcotics Substance Act. He further pointed out that the complainant, Muhammad Iqbal, IHC, sent the case report, and Dawood Khan (MHC), lodged the FIR against the appellants on 01.07.2020. Also, Article P-1 of Charas/toxicant material was prepared on 01.07.2020. The prosecution sent parcel No.1 to the Forensic Science Laboratory on 20.07.2020, which was received on 24.07.2020, causing a 24-days delay, which is a clear violation of the Control of Narcotics Substance (Government Analysts) Rules 2001. He argued that substantial contradictions existed

in the evidence provided by the witnesses against the appellants, and when contradictions arose during the evidence in the trial Court, the benefit of the doubt should have gone to the convict-appellant. However, the trial court failed to consider this, leading to the conclusion that the impugned judgment of the High Court is legally unsustainable and should be set aside.

4. On the other hand, Khawaja Muhammad Maqbool War, the learned Advocate-General appearing for the State, argued that the impugned judgment of the High Court is entirely consistent with the law, the facts, and the case record. He further contended that the lower court correctly sentenced the convict-appellant to seven years of simple imprisonment and imposed a fine of Rs.200,000. He argued that the convict-appellant is clearly connected to the offences under section 9(C) & 15 of CNSA. The prosecution has successfully proven its case beyond any reasonable doubt through the presentation of ocular, circumstantial, and corroborative evidence. In contrast, the defense failed to cast doubt on the prosecution's narrative. therefore, the learned High Court rightfully convicted the accused according to the principles of justice. He asserted that the convict-appellant's involvement in the alleged offense is evident, and as such, the appeal should be dismissed.

5. We have heard the learned counsel for the convict-appellant as well as learned Advocate General at some length and with their assistance, we have attended to the factual and legal issues involved in this appeal along-with case laws available on the subject. We find the following points emerging from the arguments of the learned counsel for the appellant, that need to be answered, which are as follows: -

I. Whether the violation of section 21 of the CNSA render the entire trial vitiated?
II. Whether the provisions of Section 103 of the Cr.PC been violated in this case, and if so, what are the consequences?
III. Whether the delayed submission of the parcel to the Chemical Examiner, spanning 23 days, detrimental to the prosecution's case?

6. The learned counsel for the convict-appellant primarily argued that the complainant of the FIR is the Head Constable, whereas, according to section 21 of CNSA, the Officer below the rank of Sub-Inspector was not authorized to arrest the convict-appellant, hence, the impugend judgment of the High Court is liable to be set-aside. So far as this argument is concerned, we would like to firstly, reproduce section 21 of CNSA as under: -

> "21. Power of entry, search, seizure and arrest without warrant. (1) Where an officer, not below the rank of Sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance and a warrant for arrest or search cannot be obtained against such person without affording him an opportunity for the concealment of evidence of facility for his escape, such officer may: ---"

7. In accordance with section 21, Ordinarily, only an officer with the rank of Sub-Inspector or above is authorized to conduct arrests and seize narcotics. However, this is not an absolute rule. There may be exceptional circumstances where prompt action is necessary, and a lower-ranking police officer finds an

individual in possession of narcotics. In such urgent situations, it would be unreasonable to suggest that the police officer should let the person go along with the narcotics. Importantly, it's vital to emphasize that the guilt or innocence of an accused individual is not contingent upon the competence or rank of the arresting officer. Therefore, the mere involvement of an officer without the specified authorization in the investigation doesn't automatically render the trial invalid. Unless the law explicitly states otherwise, the competent court will proceed to determine the accused's guilt or innocence based on the evidence presented before it. Furthermore, it's worth noting that the provisions of section 21 are generally seen as advisory or directive in nature. Non-compliance with these provisions is usually considered an irregularity that does not fundamentally undermine the overall validity of a trial or conviction. This irregularity is typically curable, rather than fatal to the case. In a similar case, *The State vs. Abdali Shah*[1], the matter was brought before the Supreme Court of Pakistan. The court's observation emphasized that, in practice, it is unrealistic to expect a police party to search for a Sub-Inspector when apprehending a suspect. Therefore, the court concluded that, at most, this situation constituted an irregularity that could be rectified under section 537 of the Criminal Procedure Code. This view reaffirms the principle that, while procedural standards are essential, they are not an absolute bar to the pursuit of justice. The relevant portion of the judgment supra, is reproduced hereunder for better appreciation: -

> "7. It would be seen that a huge quantity of 52 Kgs. Of Charas was I allegedly recovered from the taxi beside which the respondent

[1] [2009 SCMR 291]

> was standing while closing its dickey. It is not possible that the police would foist such a huge quantity of Charas upon him. It appears that the learned High Court has relied heavily upon the technical aspect of the seizure and arrest which in our opinion are misconceived as in the first place no raid was carried out by the police personnel but the respondent apprehended during normal patrol duty. As such the provisions of section 21 are not applicable. Even otherwise it cannot be expected that upon apprehension of the accused the police party would go in search of the officer, who is entitled to arrest the accused being an A.S.-I. At the most, this was an irregularity which was curable under section 537, Cr.P.C. As held by this Court in the case of Muhammad Hanif (supra).
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> 8. Similarly, the second ground which weighed with the learned High Court that the investigation was not carried out by an official authorized to do so, also is devoid of substance, since no prejudice has been caused to the respondent by such investigation. The case of Muhammad Farooq Khan v. The State 2007 PCr.LJ 1103 relied upon in the impugned order is distinguishable from the facts of the present case as therein mala fides were alleged against the investigative agency in which event a learned Division Bench of the Sindh High Court came to the conclusion that the investigation should have been entrusted to another agency. In this regard, the reference can be made to the case of State through Advocate-General v. Bashir (supra), wherein it was held that investigation by an officer not authorized to do so was merely an irregularity which is curable under section 537, Cr.P.C."

In the other case titled *M. Hanif vs. The State*[2], the Supreme Court of Pakistan observed as under: -

> "3. We have carefully examined the respective contentions as agitated on behalf of petitioner in the light of relevant

[2] [2003 SCMR 1237]

> provisions of law and record of the case. We have perused carefully the judgment, dated 13-8-1997 passed by learned Sessions Judge, Mianwali, and the judgment impugned. We have thrashed out the entire evidence with the assistance of learned Advocate Supreme Court on behalf of petitioner. After having careful scrutiny of the entire record we are of the view that prosecution has established the factum of recovery beyond shadow of doubt and thus proved the accusation to the hilt. We are not persuaded to agree with learned Advocate Supreme Court on behalf of petitioner, that since the raid was conducted and investigation made by an unauthorized police officer in violation of the mandatory provisions as contained in sections 21 and 22 of the Control of Narcotic Substances Act, 1997 the whole trial has vitiated for the simple reason that arrest, seizer and investigation by an incompetent police officer would not vitiate the trial and at the best such an irregularity can be cured under section 537, Cr.P.C. As it has caused no prejudice to the petitioner."

Similarly in another case titled State vs. Bashir[3], it has been held that: -

> "A conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in his trial. That is determined mainly by the evidence that is given at the trial and considered; and the question whether that evidence has, in the first place, been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the police officer investigating, the more careful and unimpeachable his enquiry is likely to be. Therefore, an irregularity occasioned by a Sub-Inspector investigating into an offence, while investigation should have been made by an Inspector, is curable by section 537."

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[3] [PLD 1997 SC 408]

8. The next point as raised by the learned counsel for the convict-appellant was that the police did not associate the independent witnesses at the time of arrest of the convict-appellant hence, violated the provisions of section 103, Cr.PC, as far as this argument is concerned, it has no substance for the reason that the provision of section 103 Cr.PC had been excluded under the purview of section 25, CNSA. For better appreciation section 25 of CNSA is reproduced hereunder: -

> "25. Mode of making searches and arrests. The provision of the Code of Criminal Procedure, 1898, except those of section 103, shall, mutatis mutandis, apply to all searches and arrests insofar as they are not inconsistent with the provisions of sections 21,21,22 and 23 to all warrants issued and arrests and searches made under these sections."

It is clear from section 25 of CNSA, supra, that it excluded operation of section 103, Cr.PC in narcotics cases wherein the recovery was made on highway, from a moving vehicle or roadside, *(as in the instant case)*, hence, the argument that the police violated the provisions of Section 103, Cr.PC, is not available to the convict-appellant. In this regard, this Court in its latest case titled Khursheed Hussain Shah vs. State and another[4], observed as under: -

> "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

[4] [2022 SCR 334]

> witnesses and their statement cannot be discarded merely, for the reason that they belong to the police force."

Same case came before the consideration of the Supreme Court of Pakistan in the case titled *Gul Zaman and another vs. The State*[5], wherein, it has been observed as under: -

> "10. The other objection of learned counsel for the appellants that no private person was associated as Mashir in this case is also misconceived as much as by virtue of section 25 of the Act non-citing of public witness is not fatal to the prosecution case as section 103, Cr.PC has been excluded from its application in cases of narcotics.

The same proposition has been dealt with by this Court in the case titled *Nasrullah vs. The State*[6], wherein, it has been observed hereunder: -

> "The learned counsel for the accused/appellant pointed out the violation of section 103, Cr.PC and contended that it was fatal to the case of the prosecution, but perusal of section 25 of Act ibid excluded the application of section 103 Cr.PC, where, recovery was made on the highway, roadside or from a running vehicle.

9. The next point which the learned counsel for the convict-appellant deems to be fatal for the prosecution case, is delay in sending parcel for chemical examination. The record divulges that the alleged contraband was sent to the Forensic Science Laboratory after the delay of 23 days, whereas, as per rule 4(2) of the Control of Narcotic Substances (Government Analyst) Rules, 2001, the samples are required to be dispatched for analysis not later than seventy-two hours. The record is also barren to justify this delay, therefore, the same can be taken as a mitigating

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[5] [2014 P.Cr.LJ 662]
[6] [2011 PCr.LJ 277]

circumstance but on the basis of same, the trial cannot be vitiated. The same position came before this Court in the case reported as *Khursheed Hussain Shah vs. State*[7], wherein, it has been observed as under:

> "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: -
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> *"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".*
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> 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."

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[7] [2022 SCR 334]

10. In the light of above case laws, we are of the opinion that the conviction imposed by the learned trial Court, upheld by the High Court, is hereby, maintained, however, as observed above, there are certain mitigating factors which have not been considered by both the Courts below, therefore, while modifying the judgment of the High Court, the sentence awarded by the trial Court as 7 years is reduced to 5 years, as this Court reduced in Khurshid Hussain Shah's case supra, however, the fine of Rs. 200,000/- shall remain intact.

This appeal stands partly accepted in the manner indicated above.

JUDGE **JUDGE**

Muzaffarabad.
03.11.2023.
Approved for reporting.