

IN THE COURT OF ADIL ZEB KHAN
ADDITIONAL SESSIONS JUDGE/JUDGE SPECIAL COURT
MARDAN AT KATLANG

Case No. 223/SPL of 2023

The State Versus Zahid Iqbal

FIR No. 468 dated 08.09.2023 u/s 11BKPCNSA of PS Baizai

Order—10

18.07.2024

1. Altaf Ahmad APP for the State present. Accused Zahid Iqbal on bail present.
2. Through this order, I intend to dispose off an application filed by the accused facing trial under section 265-K Cr.P.C. seeking his acquittal on the ground that there is no chance of his conviction in view of contradictions in the statement of Seizing Officer who appeared before the court as PW-2. Notice on said application already given to prosecution. Arguments already heard. Record perused.
3. Facts forming the matrix of the instant case, as per the Murasila Exh.PA/1, are that on the day of occurrence, the Seizing Officer and other police officials were patrolling in the area when received information from an informer that prominent drug dealer Zahid Iqbal alias Lala (accused facing trial) is smuggling ICE from Shamoza, Ghundo to Mian Khan Road through Mashwano river; pursuant to the said information, the police party proceeded towards Mian road

when met the accused facing trial on the place of occurrence who was overpowered; on his body search, one white plastic sachet containing ICE weighing 393 grams wrapped in yellow cotton tape was recovered from his left thigh being affixed with the same; 1 grams of ICE was separated from the recovered contraband for chemical analysis and sealed into parcel No. 1 while remaining ICE weighing 392 grams was sealed into parcel No. 2; videography of the occurrence was stored in a memory card which was sealed into parcel No. 3; the accused facing trial was arrested on the spot.

4. On completion of spot proceedings, the Seizing Officer transmitted the Murasila to the police station through Constable Irfan No. 1524, and the instant FIR was registered against the accused facing trial by Jawad Khan ASI. Subsequently, the investigation was entrusted to Saif Ullah Khan SI/OII who conducted the same. On completion of investigation, complete challan was submitted against the accused facing trial before this court on 06.12.2023. Being summoned, the accused appeared and copies of relevant document u/s 265-C Cr.PC were handed over to him on 10.01.2024. He was also charge-sheeted under section 11BKPCNSA on 16.02.2024 to which he did not plead guilty and claimed trial whereupon prosecution witnesses were

summoned. During the course of trial, the accused submitted the above-referred application seeking his acquittal.

5. After perusal of the case record and analyzing the points argued by the learned prosecutor and learned counsel for the accused, this court is of the considered opinion that the accused is facing the charge of keeping in possession ICE weighing 393 grams which was recovered by the Seizing Officer in the above-stated mode and manner.
6. During the course of trial, the accused submitted an application under section 265-K Cr.P.C. on the ground of improbability of his conviction in view of evidence recorded by the Seizing Officer as PW-2. Hence the statement of said PW will be analyzed firstly. The Seizing Officer when appeared as PW-2 stated that the entire occurrence was filmed and saved it a memory card which was sealed into a parcel by producing the same as Exh.P2. During the course of cross-examination, the learned counsel for accused requested for de-sealing the said parcel which was allowed and the observations of the court are reproduced in verbatim as follows:

“The memory card was played in open court, in which 25-folders were found and there were about 627 audio recording outside the folders. In the said 25-folders four folders related to backup of mobile phone while

the remaining folders also consisted upon audio files except two folders by the name of “videos and pictures”. In the videos folder, two sub folders were found, wherein one folder was empty while the second folder by the name of “recorded video” consisted upon three videos which were played in open court but none related to the occurrence. While the other folder by the name of “picture” consisted upon two sub folders wherein one folder was empty while the other sub folder by the name of “captured photo” consisted upon 09-pictures (not related to occurrence). While the remaining folders also consisted upon audio files. No video was found pertaining to occurrence of the instant case. The brief summery sheets consisting upon four pages are Ex.CW1/1.”

This fact of the instant case alone is sufficient for the acquittal of the accused facing trial as the Seizing Officer has violated the sacred directions engulfed in the judgment of august Peshawar High Court, Peshawar as reported in **Cr.MBA No. 2729-P/2022 dated 25.11.2022 titled as “Imdad Ullah vs The State”** pertaining to making videography of the occurrence and due to the said legal omission, the mode and manner of the whole prosecution case becomes doubtful and dubious.

7. The Seizing Officer while appearing before the court as PW-2 stated that on the day of occurrence, he and other police officials were present in the area being on patrol through official vehicle while in cross examination, he categorically admitted that DD pertaining to his departure from the police station is not available with the case file. The prosecution in support of its case has not produced copy of Roznamcha/DD which could show that the Seizing Officer along with police officials were present in the vicinity on the relevant day and their entry of leaving the police station for patrolling. This omission is fatal to prosecution case as the base of prosecution story for proceedings for patrolling is not supported by documentary evidence. Hence from this angle the prosecution case crumbles like house of cards. Wisdom in this regard is drawn from **2021 YLR 662 [Peshawar (Abbottabad Bench)]**.
8. The Seizing Officer when took the witness box also admitted in his cross-examination that the modus operandi for separation of representative sample from the recovered ICE has not been mentioned by him in the Murasila. The Seizing Officer should have mentioned the source of separation of representative sample as he was duty bound to mention all the relevant facts of the case in the Murasila. In order to fill this lacunae, he stated that the representative sample was

separated with help of a paper but this fact also does not support the prosecution case for the reason that the said paper is also not taken into possession vide recovery memo, as recovery memo dated 08.09.2023 is completely silent regarding this aspect of the case. This facts also torpedoes the prosecution case beyond repair.

9. Now coming to the material available with the case file. It is noteworthy to mention here that in narcotic cases the safe custody of the case property/representative sample be proved by the prosecution without any doubt and the safe custody starts from the very beginning i.e. safe transmission of the recovered narcotic substances from the place of occurrence to the police station. In the instant case, the link of safe custody is broken from the very initial stage. Perusal of record divulges that after recovery of ICE from the possession of accused facing trial and completion of spot proceedings, only the Murasila was sent to police station through Constable Irfan No. 1524 whereupon the case was registered against the accused facing trial while the Seizing Officer and other police officials returned to the police station at 10:30 hours which is very much evident from DD No. 17 dated 08.09.2023, Exh.PW1/4. The case file is completely silent regarding the fact that how the recovered contraband was shifted from the place of occurrence to the

police station and likewise the above referred DD, Exh.PW1/4, is also silent regarding the handing over of the case property/representative sample to the Muharrir of the PS for keeping the same in safe custody. The Seizing Officer while appearing as PW-2 remained completely mum regarding this fact that how did he shifted the case property to the police station. All these facts clearly shows that the safe custody of the recovered contraband has not been established in accordance with the law and in like scenario, the prosecution case shatters like the house of cards.

10. More importantly it is also pertinent to mention here that as the instant case was registered under KPCNSA, 2019 and the whole proceedings were conducted under the said Act while the bird eye view of FSL report, shows that same has been given and prepared u/s 34, 35 and 47 of Control of Narcotics Substance Act, 1997 and not under section 47 and other related provisions of KPCNSA, 2019. It is a settled principal of law that:

“A Cummuni Observation Non Est Recedendum”

Meaning thereby that when law requires a thing to be done in a particular manner, then it would be a nullity in the eyes of law, if not performed in that very prescribed manner. This universal and established principal of law has also be affirmed by the apex Court in its landmark judgment titled as

“The Collector of Sales Tax, Gujranwala vs Super Asia Muhammad Din and sons as reported in 2017 SCMR 1427 and also in PLD 2013 Supreme Court 255”.

By applying the said principle of law, the instant case is further shattered and this omission has also completely shattered the FSL report and from this angle too prosecution case falls like house of cards.

11. This court is mindful of the fact that the association of private independent persons is not a legal must in narcotics cases but this fact does not mean that if such persons are available, they should not even be asked to become witness to recovery proceedings. In the instant case, the Seizing Officer had ample opportunity to associate private independent person with the recovery proceedings as he had prior information regarding the smuggling of ICE by the accused facing trial allegedly being famous drug dealer while a flour-mill has also been shown adjacent to the place of occurrence which is very much evident from the site plan. This fact clearly means that the Seizing Officer had enough opportunity to associate private independent persons with the recovery proceedings but he has failed to show any reason as to why no private persons have been associated with the instant case. In this eventuality, the non-association of private independent persons creates serious doubt in the prosecution case.

Wisdom in this regard is drawn from **2023 YLR 321 [Sindh (Hyderabad Bench)], 2023 YLR 153 [Sindh (Hyderabad Bench)], and 2023 YLR Note 22 [Sindh (Hyderabad Bench)]**.

12. Moreover, as per FIR and statement of PW-2 (complainant), it is an admitted fact that local police acted on spy information and that too against an acclaimed drug dealer but despite that no deceptive seller was employed nor any sale purchase test conducted then in that scenario, the whole prosecution case will be torpedoed beyond repair. Wisdom in this regard is drawn from **2018 MLD 1025**.
13. Perusal of record divulges that after recovery of ICE, the Seizing Officer prepared parcel No. 1 to 3 containing representative sample, case property and memory card containing footage of the occurrence. However he failed to mention the insignia/monograms affixed on the said parcels in the Murasila, Exh.PA/1, rather he just reported in Exh.PA/1, that all the parcels were sealed while in recovery memo Exh.PW2/2, he reported that all the parcels were sealed by affixing monogram of S.T. Non-mentioning of affixation of the monogram in the Murasila on the parcels and mentioning so in the recovery memo casts serious doubt on the veracity of the prosecution story which creates dent in prosecution case. In this regard, reliance is placed on

unreported judgment of august Peshawar High Court,
Peshawar passed in **Cr.M.BA No. 523-P/2021 titled as
Muhammad Shehzad vs The State.**

14. In this scenario, there is no probability of conviction of accused if the case proceeds against him in due course of time. Therefore, on acceptance of application u/s 265-K Cr.P.C. the accused Zahid Iqbal son of Sahebzada is hereby acquitted of the charge leveled against him. Accused is on bail. His bail bonds stand cancelled and his sureties are exonerated.
15. Case property i.e. ICE be dealt with in accordance with law after the expiry of period provided for appeal.
16. File of this court be consigned to record room after necessary completion and compilation.
17. My this order under section 265-K Cr.P.C. consists of ten (10) pages and each page has been duly signed.

Announced
18.07.2024

Adil Zeb Khan
Addl: Sessions Judge,
Mardan at Katlang