JUDGMENT SHEET

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

Crl. Appeal No.312-J of 2019

Abid Ali **versus** **The State**

JUDGMENT

Date of hearing:	**07.04.2021**
Appellant by:	Mr. Shafique Ahmad Chaudhry, Advocate.
State by:	Mr. Riaz Ahmad Saghla, Additional Prosecutor General.

Farooq Haider, J.:- This appeal has been filed by Abid Ali (appellant) against the judgment dated: 04.04.2019 passed by learned Additional Sessions Judge (MCTC), Khanewal, whereby in case arising out of F.I.R No.391/2016 dated: 14.07.2016 (Ex.PA/1) registered under Section: 9 (c) of the Control of Narcotic Substances Act, 1997 at Police Station: City Khanewal, District: Khanewal, the learned trial Court has convicted and sentenced the appellant as under:-

> ***under Section 9(c) of Control of Narcotic Substances Act, 1997*** *to 04-years and 06-months R.I alongwith fine of Rs.20,000/- and in default thereof, to further undergo S.I for 05-months. Benefit of Section 382-B Cr.P.C. was also extended to the appellant.*

2. Briefly, the accusation levelled in the complaint (Ex.PA) against Abid Ali (appellant), on the basis of which, above mentioned F.I.R. (Ex.PA/1) was chalked out, is that on 14.07.2016, Israr Ahmad A.S.I./ complainant (PW-4) alongwith his companions/police officials was present at *Niazi Chowk, Khanewal* for patrolling/checking crimes on an official vehicle, where he received spy information that ill-famed drug peddler namely Abid (appellant) is openly selling narcotics outside his house located at *Hamayat Abad* (حمائیت آباد) and if a raid is conducted, he could be apprehended; on receiving this information, raiding team reached at the pointed place and upon pointing out by the informer, apprehended the appellant, who disclosed his name as Abid Ali (appellant); on his personal search, *charas* wrapped in a white coloured shopper was recovered from middle pocket of commando coloured school bag, which was carried by the appellant in his right hand; on further search, sale proceeds amounting

to Rs.1930/- was also recovered from front pocket of aforestated school bag; on weighing, recovered *Charas* was found 1250-grams; out of recovered *Charas,* 10-grams *Charas* was separated and secured into sealed parcel as sample for chemical analysis while the remaining *Charas* (case property) was also sealed into separate parcel with stamp ZH and both sealed parcels alongwith sale proceeds were taken into possession *vide* recovery memo (Ex.PB).

After investigation, challan report was sent to Court against the appellant; charge was framed against him, to which he pleaded not guilty; prosecution produced its evidence. Learned trial Court recorded statement of the appellant under Section 342 Cr.P.C., wherein he refuted allegations leveled against him; he did not record his statement under Section 340(2) Cr.P.C. and also did not produce any evidence in his defence. Learned trial Court after hearing learned counsel for the parties, passed the impugned judgment, whereby Abid Ali (appellant) was convicted and sentenced as mentioned above.

3. Learned counsel for appellant has contended that safe custody of case property has not been proved; therefore, conviction recorded and sentence awarded to the appellant through the impugned judgment, are liable to be set- aside; finally requested for acceptance of instant appeal.

4. Conversely, learned Additional Prosecutor General has supported the impugned judgment and requested for dismissal of instant appeal.

5. After hearing learned counsel for the appellant, learned Additional Prosecutor General and going through the record, it has been noticed that according to the case of prosecution, 1250-grams of *Charas* was allegedly recovered from the possession of accused/appellant by Israr Ahmad A.S.I./complainant (PW-4), who separated 10-grams of *charas* as sample, secured the same into sealed parcel for chemical analysis as well as secured remaining *charas* (case property) into separate parcel and took into possession both "**sealed parcels**" *vide* recovery memo (Ex.PB), thereafter he handed over custody of accused, sealed parcels of sample as well as of case property and *wattak* money to Investigating Officer (PW-3) on the same day; Israr Ahmed A.S.I./complainant (PW-4) then received both aforementioned sealed parcels on 13.09.2016 from Waseem Ahmed T/A.S.I. (*Moharir*) and deposited the same to the office of Punjab

Forensic Science Agency, Lahore on 20.09.2016; Ghulam Rasool S.I./ Investigating Officer while appearing as PW-3 before learned trial court deposed about handing over of sealed parcels of case property and of sample to the *Moharir* of police station (concerned) for keeping into safe custody; Waseem Ahmed T/A.S.I./ *Moharir* while appearing as PW-5 before learned trial court deposed about handing over of two "**sealed parcels**" to Israr Ahmed A.S.I./ complainant for onward transmission to the office of Punjab Forensic Science Agency, Lahore.

It is pertinent to mention here that examination-in-chief of Israr Ahmad A.S.I./complainant was recorded in the case by the learned trial court on 24.05.2018 and his cross-examination was reserved but subsequently he did not make himself available for cross-examination though efforts were made to procure his attendance, hence, his statement without cross-examination cannot be termed as **"legal statement"** and has lost its evidentiary value, therefore, cannot be relied upon being "**unreliable piece of evidence**"; in this regard, case of "**Muhammad Uzair versus The State**" (**2005 YLR 1533**) can be advantageously referred; relevant portions from its Paragraph No.25, 26 and 27 are hereby reproduced: -

> *"Although P.W.5, Sabir Khan (Taxi Driver) deposed that the appellant being one out of four persons, hired taxi for travelling from Lalookhait to Rimpa Plaza where in Room No.5 at 4th floor, according to him, a meeting took place but his examination-in-chief cannot be relied upon for the simple reason that the said witness disappeared thereafter and did not make himself available for cross-examination though efforts were made to procure the attendance of this witness."*
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> *"26. Interpretation of Article 133 of Qanun-e-Shahadat, 1984 leads us to hold that the evidence of a witness cannot be relied upon unless he is cross-examined which is not the case here."*
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> *"27. In view of the above discussion that since F.I.R. has lost its sanctity in view of inadmissibility of the evidence of main witness P.W.5 who did not appear for his cross-examination,……"*

Case of "**Madad Ali and another versus The State**" (**2005 MLD 246**) can also be safely referred on the subject; relevant portion whereof available at Page No.251-252 is hereby reproduced:

> *The ocular testimony consists of complainant and three eye-witnesses namely Abdul Raheem, Altaf Hussain and Bahar Ali. The examination-in-chief of the above named three eye-witnesses were recorded, thereafter their cross-examination was reserved but subsequently they did not appear before the Court for cross-examination because they absconded after allegedly committing the murdors of Cr. No.26 of 2003 of Police Station, Site, Sukkur under Article 133 of Qanun-e-Shahadat Order; it was the right of the accused to conduct the cross-examination to the witnesses produced by the prosecution but the prosecution failed to produce these witnesses before the Court as such a valuable and vested right given to the accused persons under the law was denied to them. The statements of witnesses would include examination-in-chief, the cross-examination, if the accused intends to do so or re-examination if the prosecution wants to avail that opportunity. In the present case, the appellants wanted to cross-examine the witnesses but they did not appear before the Court therefore, in such circumstances without cross-examination, the statements of these three eye-witnesses cannot be termed as complete statements within the meaning of Article 133 of Qanun-e-Shahadat Order, therefore, the said statements, without cross-examination, cannot be termed as legal statements. Thus, the same lost their evidentiary value, therefore, they cannot be considered for any purpose. The above view is supported by the case of Yahya Bakhtiar vs. The State (PLD 1983 SC 291)."*

Further guidance on the point can also be sought from the case of "**Pir Mazharul Haq and others versus The State through Chief Ehtesab Commissioner, Islamabad**" (**PLD 2005 Supreme Court 63**); relevant portion whereof available at Page No.76 is hereby reproduced: -

> *"Monir in his commentary on section 183 of the Evidence Act remarks 'where no opportunity to cross-examine the deponent has been given his testimony would be inadmissible. [p.1766] K". (Muhammad Afzal v. Muhammad Altaf Hussain 1986 SCMR 1736).*

It has been further noticed that report of Punjab Forensic Science Agency, Lahore (Ex.PD) reveals that two "**sealed parcels**" were got deposited in the office of P.F.S.A., Lahore on 20.09.2016 by Israr Ahmed A.S.I./complainant (PW-4) and after sampling for analysis, the remaining portion of evidence (case property) from the applicable items was sealed and handed over by P.F.S.A., Lahore to the evidence submitting person but prosecution did not produce any witness to prove that after sampling for analysis, remaining portion of case property/sample was received from the office of P.F.S.A, Lahore and again delivered to Waseem Ahmad T/A.S.I./*Moharir* of police station (concerned) or anybody else. Israr Ahmad A.S.I./complainant while appearing as PW-4 before learned trial

court although deposed that on 19.09.2016, Waseem Ahmed T/A.S.I./*Moharir* of police station (concerned) handed over to him two sealed parcels said to contain *Charas* for onward transmission to the office of Punjab Forensic Science Agency, Lahore, which were deposited by him on 20.09.2016 yet he did not utter even a single word in his entire statement that from which parcel of allegedly recovered substance (i.e. parcel of sample or parcel of case property) sample for analysis was retained by the Punjab Forensic Science Agency, Lahore and after sampling for analysis, how much quantity was returned to him; even it is not mentioned in the report of Punjab Forensic Science Agency, Lahore (Ex.PD) that how much quantity of recovered substance was retained for sampling and when remaining recovered substance (case property) was returned back; furthermore, Israr Ahmad A.S.I./complainant although deposed that he handed over road certificate with regard to depositing of both sealed parcels in the office of Punjab Forensic Science Agency, Lahore for completion of record yet he did not depose that after sampling for analysis remaining case property was received by him from Punjab Forensic Science Agency, Lahore; *Moharir* of the police station (concerned) did not depose that after sampling for analysis by Punjab Forensic Science Agency, Lahore, Israr Ahmad A.S.I./complainant deposited the remaining case property to him. **Hence, "safe custody" of case property/sample, after sampling by Punjab Forensic Science Agency, Lahore till production in the Court, could not be proved**. By now it is well settled that if safe custody of allegedly recovered substance/ case property has not been proved in narcotic cases, then, there is no need to discuss other merits of the case and it straightaway leads to the acquittal of the accused; in this regard, guidance has been sought from the dictum laid down by the august Supreme Court of Pakistan in the case of "**Abdul Ghani and others versus The State and others" (2019 SCMR 608**), "**The State through Regional Director ANF versus Imam Bakhsh**" (**2018 SCMR 2039**), "**Kamran Shah and others versus The State and others**" (**2019 SCMR 1217**), "**Faizan Ali versus The State**" (**2019 SCMR 1649**) and "**Zahir Shah *alias* Shat versus The State through Advocate-General, Khyber Pakhtunkhwa**" (**2019 SCMR 2004**). Furthermore, august Supreme Court of

Pakistan in "**Criminal Review Petition No. 69 of 2018 in Jail Petition No. 301 of 2014**" has also observed as under: -

> *"It has already been held by this Court in the cases of Amjad Ali v. The State (2012 SCMR 577) and Ikramullah and others v. The State (2015 SCMR 1002) that in a case where safe custody of the recovered substance or safe transmission of the samples of the recovered substance is not proved by the prosecution there an accused person cannot be convicted in such a case. This aspect of the case had escaped attention of this Court at the time of passing the order under review. Apart from that we have further noticed that the original report of the Chemical Examiner had not been produced during the trial of this case. For all these reasons this review petition is allowed, the order dated 22.02.2016 passed by this Court in Jail petition No. 31 of 2014 is recalled, the said Jail Petition is converted into an appeal and the same is allowed with the result that the conviction and sentence of Abdul Razzaque petitioner/appellant recorded and upheld by the courts below are set aside and he is acquitted of the charge. He shall be released from the jail forthwith if not required to be detained in connection with any other case."*

Since safe custody of case property has not been proved, hence, prosecution has been failed to prove its case.

6. In the light of what has been discussed above, since prosecution has been failed to prove its case against the appellant beyond shadow of doubt, therefore, there is no need to discuss the defence version.

7. Resultantly, instant criminal appeal is **allowed/accepted**, conviction recorded and sentence awarded to the appellant through the impugned judgment dated: 04.04.2019, are hereby set-aside. Abid Ali (appellant) is acquitted of the charge, he shall be released from jail forthwith if not required in any other case.

(Muhammad Waheed Khan)
Judge

(Farooq Haider)
Judge

"APPROVED FOR REPORTING"

(Muhammad Waheed Khan)
Judge

(Farooq Haider)
Judge

Kashif