Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

Criminal Appeal No. 57 of 2021

Muhammad Wali Khan

Vs

The State

APPELLANT BY:	Mr. Laiq Khan Swati, Advocate.
RESPONDENT BY:	Mr. Ishtiaq Ahmed, State Counsel.
DATE OF DECISION:	12.07.2021.

BABAR SATTAR, J.- Through this appeal the appellant has impugned the judgment of the learned Additional Sessions Judge/Judge Special Court (CNSA), Islamabad West dated 04.03.2021, whereby the appellant was convicted under section 9(c) of the Control of Narcotic Substances Act, 1997 **("CNSA")** and sentenced to six years rigorous imprisonment with fine of Rs.30,000/- in case FIR No. 387 dated 26.06.2020 registered at Police Station Tarnol, Islamabad.

2. According to the complaint (Exh.PA), which was converted into an FIR (Exh.PA/1), the complainant Tipu Sultan (PW-6), along with other police officials was present at Sarai Kharbooza stop on 26.06.2020 when he received information from an informer that a drug peddler, Wali, was on his way on motorcycle to Rawalpindi to supply drugs. The complainant had set up a check post at Dhoke Abbasi near Basharat Market and about 04.05 p.m a person riding on motorcycle from Dhoke Abbasi Bazar side carrying a bag on his back tried to evade the check post. When apprehended, he was identified as Muhammad Wali Khan. On search of bag which was laying on his back, four packets of brown colour and two packets of white colour were recovered. From brown packets charas in the amount of 960 grams (P1), 987 grams (P2), 977 grams (P3) and 996 grams (P4) in total weighing 3920 grams were recovered and while checking two white packets heroin weighing 850 grams from each packet in total 1650 grams were recovered. The complainant separated 10 grams of charas from each four packets and 01 gram of heroin from each packet for chemical analysis. The recovered charas and heroin, including samples separated for chemical analysis, in total seven sealed packets were taken into possession through recovery memo Exh.PB.

3. The learned counsel for the appellant has made three basic arguments to contend that the impugned judgment suffered from infirmity. He stated that Ahmed Ullah (PW-5) during his cross-examination stated that after the

incident in which the appellant was charged with an offence under section 9(c), the said witness returned to the Police Station around 6/6.10 p.m. The learned counsel for the appellant stated that Ahmed Ullah (PW-5) during his cross-examination recorded in case FIR No. 389/2020 admitted that he returned to the Police Station at 4.00 p.m and remained in the Police Station till 7.00 p.m. The learned counsel suggested that this Court should take judicial notice of the statement of Ahmed Ullah (PW-5) recorded in case FIR No. 389/2020. He stated that Mubarik Ali (PW-4) in his testimony stated that two parcels one containing charas and the other containing heroin were handed over to Arshad Mehmood (PW-2) for onward transmission to National Institute of Health for chemical examination on the direction of Tipu Sultan (PW-6). He stated that this exposed a contradiction in the prosecution's case which was that there were six samples that were handed over to Arshad Mehmood (PW-2) for their onward transmission to National Institute of Health, and chemical analysis reports (Exh.PE to Exh.PK) of such samples dated 29.07.2020 have been adduced in evidence, and it was on the basis of such evidence that the appellant had been convicted. Contention of the learned counsel for the appellant was that the prosecution has failed to prove safe custody and transmission of the contraband material as Mubarik Ali (PW-4) had admitted handing over of only two parcels for chemical examination while Arshad Mehmood (PW-2) claimed to have submitted six samples to the National Institute of Health and such discrepancy demolished the case of the prosecution. He

submitted that while Ghazanfar Iqbal (PW-3) and Ahmed Ullah (PW-5) had stated that information regarding the accused/appellant had been provided by an informer on cell phone, while Tipu Sultan (PW-6) contended that such information was provided by an informer who was present at the site of occurrence where the police party was present. The learned counsel for the appellant contended that given the contradiction the manner in which the information regarding alleged offence was communicated by the informer to the prosecution witnesses establishes that the story has been made up by the police. He finally contended that the prosecution had built a fake case against the appellant as stated by him in his statement recorded under section 342 of Cr.P.C and the *mala fide* motive for building the case against the petitioner was that as he was pursuing the case of his younger brother involved in a case FIR No. 04/2020 (P.S CTD, under Section 302 PPC read with Section 7 of the Anti-terrorism Act, 1997), and that he was arrested from Police Station CIA, Islamabad and not from the place of occurrence as alleged by the prosecution.

4. The learned State counsel stated that discrepancies pointed out by the learned counsel for the appellant were minor in nature and had already been recorded and dealt within paragraph 12 of the impugned judgment, wherein it was held that minor discrepancies regarding exact time and manner of receipt of spy information could be understood as a natural phenomenon as human being cannot be expected to

remember facts with mathematical accuracy. He submitted that prosecution's witnesses, with regard to presence of accused at the place of occurrence, presence of prosecution witnesses at the place of occurrence, recovery of charas and heroin from the accused at the time of his arrest, sampling of contraband drugs recovered from the accused and their examination by the National Institute of Health leading to the determination that they comprised charas and heroin, remained unshaken during the trial and it was on the basis of these facts that the learned Special Court rightly convicted the accused/appellant and that in view of the findings of the learned Special Court that suffers from no infirmity, the appeal is merit to be dismissed.

5. The FIR in the instant matter was recorded at 5.35 p.m and states that the time of incident was around 4.05. p.m. Ahmed Ullah (PW-5) stated in his statement that the accused was apprehended at some time between 4.00 p.m to 5.00 p.m which is in conformity with the content of the FIR. He further stated in his testimony that he returned to the police station on the date of the incident around at 6.00 p.m. The learned counsel for the appellant has placed great emphasis on the fact that while recording his evidence in relation to case FIR No. 389/2020, Ahmed Ullah (PW-5) had stated that he returned to police station at 4.00 p.m and stayed in the police station till 7.30 p.m and that this Court should notice take notice of evidence recorded in the case registered pursuant to FIR No. 389/2020. This Court cannot

juxtapose the evidence adduced in the instant case with the evidence adduced in another trial. We are required to consider the evidence recorded on the basis of which the judgment appealed before us was rendered. There appears to be nothing wrong with the reasoning of the learned Special Court that the presence of Ahmed Ullah (PW-5) at the place of incident on the said date is not disputed. It is only his recollection of the exact time on which he returned to the police station which is being highlighted by the learned counsel for the appellant. Ahmed Ullah's inability to remember exactly whether the incident transpired on 4.00 p.m or 5.00 p.m and whether he returned to police station at 4.00 p.m or at 6.00 p.m does not poke any holes in the prosecution's case. There is nothing on record to suggest that Ahmed Ullah (PW-5) was not present at the place of incident. His presence is admitted by Ghazanfar Iqbal (PW-3) and Tipu Sultan (PW-6) in their unshaken testimony.

6. Second contention of the learned counsel for the appellant relates to the fact that Arshad Mehmood (PW-2) claimed to have received four parcels containing charas and two parcels containing heroin from Mubarik Ali (PW-4) for onward transmission to NIH for chemical examination while Mubarik Ali (PW-4) contended that he handed over two parcels of charas and heroin to Arshad Mehmood (PW-2). And that this discrepancy establishes that there was no other transmission of recovered contraband drug and the appellant could therefore not be convicted in the instant case. Tipu

Sultan (PW-6) has testified that four packets comprising charas in the amounts of 960, 987, 977 and 996 grams weighing 3920 grams in total, and two packets of heroin weighing 825 grams each and comprising a total of 1650 grams, were recovered from the accused and samples in the amount of 10-grams each from four packets and 01-gram from two packets of heroin were sent for chemical analysis. Ahmed Ullah (PW-5) has also testified regarding such recovery which has been exhibited as Ex-PB. The remaining contraband along with a bag was also sealed and such seal was broken before the learned Special Court and was found to be in order as described by the prosecution witnesses. The learned Special Court has recorded in its judgment that four packets of charas and two packets of heroin were de-sealed in court in the presence of the learned defence counsel and were sealed again after the content had been viewed. The only discrepancy in the account being presented by the prosecution is the testimony of Mubarik Ali (PW-4), who stated that he handed over two samples containing charas and heroin to Arshad Mehmood (PW-2) for onward transmission to National Institute of Health.

7. National Institute of Health issued six reports dated 29.07.2020. Each report says that sample was received on 29.06.2020 through Constable Arshad Mehmood (PW-2). Four of the reports state that the sample contained charas and two of the reports state that the sample contained heroin. Even in the event that benefit of doubt is given to the appellant and

three packets of charas and one packet of heroin is to be excluded and only one packet of charas and one packet of heroin is attributable to the appellant in view of the statement of Mubarik Ali (PW-4), the smallest packet of charas weighed 960 grams (ExP.1) and each packet of heroin comprised 825 grams and consequently in this scenario too the total amount of contraband attributable to the appellant would come to 1785 grams of charas and heroin. That would still fall within the scope of section 9(c) of CNSA.

8. We have not found any contradiction within the testimony produced by the prosecution witnesses which matches with the account recorded in FIR. The prosecution witnesses remained consistent during cross-examination. The story presented by the defence that the appellant has been arrayed due to *mala fide* on part of police authorities who were trying to settle a score merely because he was pursuing the case of his brother cannot be believed as it is not backed by any material on record. The appellant has not produced any witness to establish that he was not at the place of occurrence, as claimed in the FIR and affirmed by the prosecution witnesses, and was instead arrested at the CIA Police Station. In view of the fact that the FIR was recorded in real time provides an account of an offence that the appellant was charged with, the prosecution witnesses who arrested the accused and effected the recovery of contraband recorded their statements before the court and provided an account which is consistent with what is stated in the FIR. The

presence of either the appellant or the prosecution witnesses at the place of occurrence has not been subjected to any reasonable doubt and there is no doubt regarding transmission of at least 1785 grams of contraband. The appellant has thus failed to establish the existence of any serious doubt on the basis of which his conviction is liable to be set aside.

9. In relation to sentencing it was held by the august Supreme Court in ***Khuda Bakhsh Vs. The State (2015 SCMR 735)*** that:

> *"9. In determining the quantum of sentence it would also be appropriate to consider the nature of the narcotic substance, since some narcotics are more dangerous and harmful than others. We are cognizant that the Act does not explicitly state that the type of narcotic substance determines the quantum of sentence, however, the fact that the Act provides for a range of sentences implies as much."*

It has also been held in relation to an offence under section 9(c) in ***Khuda Bakhsh*** that:

> *"[I]f we consider section 9(b) and 9(c) together, then it is clear that for a quantity exceeding one kilogram an imprisonment for a period exceeding seven years is mandated, and if it exceeds ten kilograms it cannot be less than imprisonment for life. Section 9(c) also provides for imprisonment "which may extend to fourteen years", which would mean that the period of imprisonment in respect of narcotics weighing more than one kilogram, but less than ten kilograms, should be for a period greater than seven years to anything less than fourteen years."*

10. The discretion vested in the learned Special Court for purposes of sentencing in a case falling under section 9(c) of CNSA ranged from seven years to fourteen years even if it were to treat the testimony of Mubarik Ali (PW-4) (stating that only one sample of charas and one sample of heroin was sent for examination to National Institute of Health) as a mitigating factor thereby excluding the remaining contraband while determining the sentence to be awarded to the appellant. The learned Special Court has already awarded the appellant a sentence of six years after convicting him under section 9(c), which fell below the minimum punishment due for offence under section 9(c) in view of the law laid down by the august Supreme Court in ***Khuda Bakhsh*****.** In view of the fact that sentence awarded falls below the minimum threshold prescribed by the august Supreme Court, the appellant's sentence is not liable to be reduced any further.

11. In view of the above, we uphold the conviction of the appellant and the sentence awarded to him. Consequently, this appeal is **dismissed**.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Saeed.