JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Appeal No. 345/2023

Awais Khan

Versus

The State

Jail Appeal No. 353/2023

Awais Khan

Versus

The State

Appellant by:	Mr. Akhtar Mehmood, Advocate.
State by:	Makhdoom Syed Fakhar Imam Ali Shah, State Counsel. Shahid Asghar, S.I. PS Tarnol, Islamabad.
Date of Hearing:	25.03.2024.

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, we intend to decide the captioned criminal appeal and jail appeal as the same have arisen out of one and same judgment dated 27.09.2023, passed by learned Judge Special Court (CNS), Islamabad, whereby appellant Awais Khan was convicted in case FIR No.1256, dated 20.12.2022, offence u/s 9(1)3(c) CNSA 1997, P.S Tarnol, Islamabad and sentenced to R.I. for Nine years, with fine of Rs.80,000/-, in default of payment of fine he has to further undergo 05 months S.I. Benefit of Section 382-B Cr.P.C. was also extended.

2. Brief facts referred in the complaint Ex.PC lodged on the complaint of Shahid Asghar, S.I./PW-1 are that on 20.12.2022, he along with other officials was on special task against drug peddlers in private vehicle at about 09:10 p.m. reached in street of village Sunday Mar a young boy having blue colour

shopping bag in his right hand coming towards main street by foot tried to return back after seeing police party, was apprehended being suspect. He disclosed his name as Awais Khan S/o Muhammad Shabbir and during his search packet wrapped in solution tape inside the shopping bag was recovered, which contain charas in shape of gardah namdar/wet weighing 1095 grams. From recovered charas 10 grams separated for chemical analysis and two separate parcels were prepared and sealed with seal SA and remaining charas was identified as Ex.P-1, recovery memo Ex.PA was prepared. On further personal search of accused Rs.150/- Ex.P-2 was taken into possession through recovery memo Ex.PB. Complaint was converted into FIR and after registration of FIR all the incriminating articles and recoveries were deposited with Moharar Malkhana whereas PW-3 took the sample to NIH, who submitted report Ex.PF, which is positive. Challan was submitted in the Court U/S 173 Cr.P.C. and trial court framed the Charge on 04.04.2023, to which appellant pleaded not guilty and claimed trial. Trial court after recording of statements of 5 PWs, recorded statement of accused U/S 342 Cr.P.C. awarded the sentence of 09 years R.I. with fine to the appellant. Hence, these appeals.

3. Learned counsel for the appellant contends that trial court has not appreciated the legal position of evidence and material contradictions are floating on record; that road certificate, Register No.2 & 19 were not produced in the evidence; that there was apparent time difference in the testimony of PWs and no question was put to the appellant/accused in the statement U/S 342 Cr.P.C. in respect of witness who had transmitted the parcel to NFSA.

4. Conversely, learned State Counsel has opposed the instant appeal on the ground that safe custody and transmission of narcotics has been proved and conviction has rightly been awarded to the appellant by the trial court.

5. Arguments heard, record perused.

6. Perusal of record reveals that appellant was caught red handed while in possession of 1095 grams charas by PW-1 Shahid Asghar, S.I. in Sunday Mar street at about 09:10 p.m. within the territorial jurisdiction of PS Tarnol. Contraband Ex.P-1 was recovered from inside blue colour shopping bag wrapped in yellow solution tape. The star witnesses in this case on the basis of Ex.PA are Shahid Asghar, S.I/PW-1 and Imran Ahmed, constable/PW-3, who acknowledges that his presence on site plan was not shown, place of recovery was in the main street with residential houses but I.O did not try to associate private witness from public/nearby residential houses. He also admitted that he has not produced any evidence of arrival and departure from police station, even he has acknowledged that he did not hand over the parcel to Moharar Malkhana and he had not recorded the statement U/S 161 Cr.P.C. of Moharar Malkhana.

7. Learned counsel for the appellant has pointed out the admission made by PW-3 that *"it is correct that neither any parcel was handed over to me nor I further submitted the same in NFSA, Islamabad"*, such aspect seems to be a typographical mistake where word "not" is missing, therefore, no adverse effect had to be taken against the prosecution case. There is difference between total time spent at place of occurrence in the testimony of PW-1 and PW-3 but nothing fruitful has been achieved in the cross-examination of PW-1. On the other hand PW-2 Haq Nawaz, HC reiterated the stance and further stated that on 21.12.2022 on the direction of I.O he handed over one parcel to Imran Constable along with road certificate for onward transmission to NFSA. However, during the course of cross-examination he was unable to demonstrate entry in Register No.19 in court file and police file and his statement was also admittedly not recorded on the same day when contraband was deposited with him by the I.O. The witness who brought complaint to PS was identified as Zahid Ali Constable/PW-5 also confirms that nobody from public become witness as I.O has not put any serious

effort to that effect. All these aspects if seen in the context of stance taken by the appellant in his statement U/S 342 Cr.P.C. nothing justiciable has been brought on record.

8. We have attended the NFSA report issued by chemical analyst Ex.PF which reflects substance of 10.10 gram was of dark brown resinous material identified as charas. Learned counsel for the appellant takes exception to that findings and claims that shape and colour of recovered contraband is different which as per the statement of PW-3 is gardah namdar/wet, which claims to be in different context. The word resinous used by the chemical analyst also convey the similar meaning.

9. We have attended the proposition, in this backdrop the question of weight which in total was referred as 1095 grams by PW-1 but trial court as well as defense counsel have not put any serious effort to get the contraband parcel Ex.P-1 to be opened in the court for its inspection with respect to its packing, colour, shape, which is the only aspect created an exception in favour of appellant, therefore, it is the duty of trial court in every case to open the contraband parcel and record its status in the interest of justice, therefore, we are not in position to confirm as to whether the contraband was weighed along with packing material or otherwise though I.O/PW-1 confirms that he removed the yellow solution tape and charas gardah namdar/wet was recovered from inside the packet. Similar stance was taken by PW-3 in his affirmative evidence.

10. PW.5 / Zahid Ali in his affirmative evidence stated on oath that:

> *"On personal search of accused a packet wrapped in yellow solution tape was found from inside shopping bag being held by accused. On removing yellow solution tape charas garda wet/namdar was recovered from inside the packet. Shahid Asghar SI weighed recovered charas on a digital scale and same was found to be 1095 grams."*

Though this aspect is similar to the statement of Shahid Asghar S.I / PW.1, who stated that :

> *"On removing yellow solution tape charas garda wet/namdar was recovered from inside the packet. I weighed recovered charas on a digital scale and same was found to be 1095 grams."*

But it is not clear as to whether the weight has been measured excluding the yellow solution tape or otherwise, even it is not the case of the prosecution that they torn apart entire yellow insulation tape and the charas was put on digital scale without any packing material. Such aspect persuaded this Court to believe that if trial court opened the recovered charas / Exh.P.1 in the court or defense side had put any serious question on the weight of the recovered narcotics, the position might be changed, even the "*blue color shopping bag as referred by star witnesses has not been exhibited in this case*", which is an essential part to be looked into, even Moharrar mall khana / Haq Nawaz / PW.2 while receiving recovered contraband has not mentioned the blue shopping bag, as well as looking this situation from another angle, whereby, the aspect of blue shopping bag is also missing in complaint / Exh.PC, where Shahid Asghar S.I /PW.1 has only referred that:

"مذکورہ کے ہاتھ میں اٹھائے ہوئے نائلون پنگ بیگ کے اندر سے پیلی سلوشن ٹیپ میں لپٹا ہوا چرس پیکٹ برآمد ہوا۔"

This aspect has also been compared with فرد مقبوضگی / Exh.PA, whereby, it has been referred as:

"نائلون نوجوان لڑکا جس کے دائیں ہاتھ میں نائلون پنگ بیگ نیلے سفید موجود تھا"

Though on minute scanning of the word "سفید", the same could have been read as "نیلا", in Exh.PA, but without any confirmation. Such aspect is to be considered in light of broader principles, where case property was not produced

before the trial court as held in **2012 SCMR 577 (*Amjad Ali Vs. State*), 2017 P.Cr.L.J [Lahore] 14 (*Abrar Hussain Vs. State*), 2009 P.Cr.L.J [Lahore] 1334 (*Agha Qais Vs. State*), 2015 YLR [Peshawar] 2189 (*Fiaz Shah Vs. State*)** and **2015 P.Cr.L.J. [Karachi] 235 (*Abdul Qadir Vs. State*),** however, in all these cases the vehicles were not produced, but the said principle is equally applicable in the cases where shoulder bag or shopping bag in which narcotics was carried out by the accused persons were not produced, therefore, the principle which attracts in the present scenario is to be considered in terms of Article-129 (g) of Qanun-e-Shahadat Order, 1984, where it can easily be presumed that no such material / narcotics is in existence, as adverse inference or assumption against the prosecution could be drawn as held **in 2023 SCMR 781 (*Ahmed Ali Vs. State*)**.

11. In nutshell we considered this case in category of section 9 (1) (3) (b) instead of section 9 (1) (3) (c) of CNSA, 1997, by excluding the packing material solution tape, whereby all the recovered charas might be less than 999 grams, where minimum sentence used by the legislature in schedule is 05 years alongwith fine and it may extend to 09 years as by adding only 01 gram after 999 grams, the cliff effect comes on surface, where minimum sentence is to be seen as 09 years in terms of section 9 (1) (3) (c).

12. In view of above mentioned documents and discussion relating to the change of category of offence in terms of section 9 (1) (3) (b) as well as non-production of the shopping bag by the prosecution, including confusion of "*blue shopping bag or white shopping bag or of no color shopping bag*" will create a doubt. The accused is of a young age and a first offender, where no other record or history has been produced, therefore, it is better to acquit the accused, though in such type of cases the sentence should have been undergone but recent amendment in the CNS Act, put a clog upon awarding the minimum sentence,

therefore, mitigation could not be considered as a valid factor rather the same has been considered as a factor of acquittal.

13. For what has been discussed above, both the captioned appeals are **ALLOWED** and the impugned judgment dated 27.09.2023 is hereby **SET-ASIDE**, the appellant is acquitted and he be released forthwith if not required in any other case.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE **JUDGE**

Approved for Reporting

Zahid