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**Judgment Sheet**  
**IN THE LAHORE HIGH COURT, LAHORE.**  
**JUDICIAL DEPARTMENT**

**Cr. Appeal No. 1628 of 2011**

**Muhammad Tariq.**

**The State.**

**JUDGMENT**

**Date of hearing** 17.02.2016.

**Appellant by:** Mr. Azhar Ilyas Bajwa, Advocate.  
Mr. Maqbool Ahmed Qureshi, Advocate/Defence counsel on  
behalf of the appellant.

**State by:** Mr. Munir Ahmad Sial, Deputy Prosecutor General.

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**Aalia Neelum, J.-** Muhammad Tariq son of Muhammad Bashir, Caste Sheikh, resident of Bazar 30-Foota, Shehbaz Colony, Khiali Shahpur, District Gujranwala, appellant was involved in case F.I.R. No. 241 of 2007, dated 30.5.2007, offence under Section 9 (c), 15 of the Control of Narcotic Substances Act, 1997, registered at Police Station Peoples Colony, District Gujranwala and was tried by the learned Additional Sessions Judge, Camp at Central Jail, Gujranwala. The learned trial court seized with the matter in terms of judgment dated 12.10.2011 convicted the appellant under Section 9 (c) of the Control of Narcotic Substances Act, 1997 and sentenced him to undergo imprisonment for life with the direction to pay Rs.2,00,000/-as fine and in case of default thereof, further undergo Simple Imprisonment for six months. Benefit of section 382-B of Cr.P.C. was also extended to him. The appellant has assailed his conviction through filing the instant appeal.

2. The prosecution story as alleged in the F.I.R (Ex.PA) lodged on the complaint (Ex.PC) of Muhammad Iqbal Ojla, Inspector/SHO (PW-3) is that on 30.5.2007 he along with other police officials was present in the area of Super Market, Gujranwala. The complainant received spy information that the appellant along with his co-accused, namely, Muhammad Shabbir Ahmad Butt, Muhammad

Boota and Jamshaid Ali Khan (since acquitted) are indulged in selling narcotics as well as illegal weapons in huge quantity and if raid is conducted, a bulk quantity of Charas as well as weapons can be recovered. On this information, raid was conducted at the house of Boota co-accused of the appellant. However, co-accused Boota and Shabbir fled away while the appellant was apprehended at the spot. On search of the house, five (5) nylon Toras 157 packets of Charas Garda packed in printed plastic papers of various colours, weighing 160 Kilograms along with one packet of two Kilograms opium, wrapped in plastic papers were got recovered. On further search, 200 bullets of Kalashnikovs and 100 bullets of 244 Bore rifle were also recovered. Out of the recovered “Charas” the complainant separated 10/10 grams from each packet for chemical analysis whereas out of the recovered “Opium” 10-grams were also separated by the complainant for chemical analysis. The samples of Charas, opium and other recovered Charas and Opium along with bullets were taken into possession by the complainant through recovery memo (Ex.PB) which was attested by the PWs. The complainant drafted complaint (Ex.PC) and sent the same through Jehangir 1540/C to the Police Station for registration of the formal FIR (Exh.PA). Zulfiqar Ali, SI reached at the place of recovery and the complainant handed over the accused and the case property and sample to him.

3. Initially, preliminary investigation was conducted by Zulfiqar Ali, S.I. (PW-5) who found the appellant guilty along with other three co-accused persons and challan was sent to the court against the appellant and Jamshaid Ali whereas arrest of co-accused Boota and Shabbir Butt was yet to be effected. Later on, Zafar Ali Shah, Inspector (PW-6) arrested co-accused Boota and Shabbir and their challan was sent. It is pertinent to mention here that during investigation, on the petitions of the accused party, various investigations were conducted and consequently, co-accused Muhammad Boota and Muhammad Tariq, according to the investigation conducted by Muhammad Riaz, SI RIB (PW-1) were not found present at the place of recovery. Thereafter the Investigating Officer recorded statements of Muhammad Ashraf, Moharrar regarding sending of parcel and that of Muhammad Naeem, constable under sections 161 Cr.P.C. regarding depositing of sample

parcel in the office of Chemical Examiner, Lahore. Having found the accused guilty, the Investigating Officer prepared report under Section 173 Cr.P.C. and sent the same to the court of competent jurisdiction.

4. The learned trial court formally charge sheeted the appellant on 25.8.2009, to which the appellant along with other co-accused (since acquitted) pleaded not guilty and claimed trial. The prosecution in order to advance its case, produced as many as seven witnesses. Muhammad Iqbal Ojla, Inspector/SHO (PW-3) is the complainant of the case, whereas, Zulfiqar Ali, S.I (PW-5) is the first Investigating Officer of the case, Zafar Ali Shah, Inspector (PW-6) is the second Investigation Officer. Shabbir Ahmad, SI (PW-1) deposed that on 30.5.2007 he performed his duty as Duty Officer and received complaint (Ex.PC) sent by the complainant through Muhammad Jahangir 1504/C and on the basis of which he drafted formal F.I.R. (Ex.PA), Muhammad Ashraf, Moharrar 1733/HC (PW-2) deposed that on 30.5.2007 Zulfiqar Ali, SI/Investigating Officer handed over to him 157 and two opium sealed samples for keeping the same in Malkhana for safe custody and bullets of Kalashnikov and another one sealed parcel containing live bullets of 244 for its onward transmission in the office of Chemical Examiner and he (PW-2) handed over 157 sealed parcels said to contain Charas along with two sealed parcels said to contain opium to Muhammad Naeem, 743/C (PW-7) on 13.6.2007 for onward transmission in the office of Chemical Examiner and he (PW-7) deposited the same on the same day intact. Liaqat Ali, SI (PW-4) along with another Liaqat Ali, SI are the witnesses of the recovery memo Ex.PB. Muhammad Naeem 743/C (PW-7) deposed that on 13.6.2007 Muhammad Ashraf 1733/HC Moharrar handed over to him sample parcels of Charas and opium which he (PW-7) deposited in the office of Chemical Examiner, Lahore on the same day intact.

5. It is pointed out here that on the application moved by the accused persons, the learned trial court summoned Muhammad Riaz, SI as (CW-1) and statement of Muhammad Riaz, SI, Regional Investigation Branch, Gujranwala was recorded who deposed that according to his investigation, presence of the appellant and co-

accused Boota was proved at the place of occurrence and they are innocent whereas remaining co-accused are guilty in this case. Thereafter, evidence of Muhammad Iqbal Ojla, Inspector (PW-3) and Liaqat Ali, SI (PW-4) was again recorded after accepting application under section 540 Cr.P.C. filed by the prosecution and consequently, once again statements of the accused persons were got recorded under section 342 Cr.P.C. Liaqat Ali (PW-4) was recalled by the learned trial court on 12.9.2011 who deposed in his deposition that he relied on his previous statement. He, however, further deposed that case property i.e. recovered Charas along with opium, bullets of Kalashnikov and bullets of 244 bore rifle were got recovered by the complainant and the same were taken into possession by the complainant vide recovery memo Ex.PB which was attested by him and one Liaqat Ali, SI. Muhammad Iqbal Ojla, Inspector was also recalled by the learned trial court on 12.9.2011 who deposed in his deposition that he relied on his previous statement too. He further deposed that case property i.e. recovered Charas along with opium, bullets of Kalashnikov and bullets of 244 bore rifle were got recovered by him and the same were taken into possession by him vide recovery memo Ex.PB which was attested by Liaqat Ali, SI (PW-4) and another Liaqat Ali, SI.

6. On 09.3.2011, the learned Deputy District Public Prosecutor closed the prosecution evidence after tendering the report of Chemical Examiner (Ex.PE).

7. Firstly, statement of the appellant was examined under Section 342 Cr.P.C, on 09.3.2011 wherein he opted not to lead defence evidence and not to appear as his own witness in terms of Section 340 (2) Cr.P.C in disproof of allegations levelled against him and while replying to a question that why this case against him and why the PWs have deposed against him, the appellant made the following deposition:-

*“No alleged case property has been produced in the court and said proceedings are fake and have been fakely shown to show the police efficiency by the police at the behest of influential persons of the locality who are inimical to me. PWs have falsely deposed against me being subordinate of the complainant.”*

8. After accepting application under section 540 Cr.P.C. filed by the prosecution, second statement of the appellant was examined under Section 342 Cr.P.C, on 06.10.2011 wherein he also opted not to lead defence evidence and not to appear as his own witness in terms of Section 340 (2) Cr.P.C in disproof of allegations levelled against him and while replying to a question that why this case against him and why the PWs have deposed against him, the appellant made the following deposition:-

*“I have been falsely involved in this case by the police in order to show the fake police efficiency by the police at the behest of influential persons of the locality who are inimical to me. PWs have falsely deposed against me being subordinate of the complainant. Further that finding of the first Investigating Agency who was the complainant/I.O., this case was disproved in second investigation which was conducted by the R.I.B. and departmental action against the complainant and PWs was recommended. In second investigation it was opined that I had no concern with this occurrence. ”*

9. After hearing the arguments advanced by the learned counsel appearing on both sides, the learned trial court, while evaluating the evidence available on record, found the version of the prosecution as correct beyond any shadow of doubt, which resulted into conviction of the appellant in the above stated terms.

10. At the very outset, learned counsel for the appellant has contended that the appellant has been involved in the false case by the police just to show their efficiency; that all the prosecution witnesses are police officials so there is a clear violation of section 103 Cr.P.C; that the occurrence as narrated in the FIR had not taken place at all and that during the course of investigation nothing has been recovered from the possession of the appellant and prosecution has failed to prove the safe custody of the narcotics substance and lastly prayed that he be acquitted from the charge being falsely implicated in this case.

11. On the other hand, learned Deputy Prosecutor General has opposed the contention raised on behalf of the appellant and stated that in view of the quantity of recovered narcotic substance, the learned trial court has rightly convicted the

appellant and that the prosecution has proved its case by producing seven witnesses beyond any shadow of doubt.

12. We have heard the arguments advanced by the learned counsel for the appellant as well as the learned Deputy Prosecutor General and have minutely perused the record available on the file.

13. The prosecution evidence indicates that alleged recovery of five sacks having 157 packets Charas total weighing 160 Kilograms and one packet Opium weighing two Kilograms was not made from the direct physical and conscious possession of the appellant, rather it was recovered during search made by Muhammad Iqbal Ojla, Inspector (PW-3)/the complainant from the room of the house of Muhammad Boota. The recovery memo (Exh.PB) reflects that recovery was made from joint possession of the appellant along with co-accused Shabbir (since acquitted) and Boota (since acquitted) from the house of Boota. However, Muhammad Iqbal Ojla, Inspector (PW-3) deposed during his court statement that:-

*“---when at 3.30 p.m. informer informed me that in Larif Society in the house of Boota Sheikh constable Shabbir, Boota and Tariq Sheikh are present along with huge quantity of narcotics and weapons, in case raid is conducted, it could be recovered.”*

Whereas during cross-examination Muhammad Iqbal Ojla, Inspector (PW-3) deposed that:-

*“Boota accused was owner in possession of the house and accused Tariq and Shabbir were living with him. Again said it was residence of Boota, however, he was doing work along with them. I had no knowledge from whom Boota had taken the house on rent.”*

Muhammad Iqbal Ojla, Inspector (PW-3)/the complainant admitted in his statement that the investigation was transferred from him to Inspector RIB. He (PW-3) also admitted that they (subsequent Investigation Officer) opined that when raid was conducted in the house, none of the accused was present there and

they opined for initiation of proceedings against him. Muhammad Riaz, S.I (CW-1) deposed during cross-examination that:-

*”During the investigation it came on surface that house of alleged recovery was owned by the sister of Boota accused who had given the same on rent and during the occurrence neither Boota nor his sister was in possession of the house. --- It is correct that during my investigation presence of accused Boota and Tariq was not found at the place of occurrence.”*

14. It is also the prosecution case that nothing had been recovered from the appellant’s physical and conscious possession. In the site plan (Ex.PD), it has been shown that recovery was effected from corridor. In the site plan (Ex.PD) it has not been shown that from where co-accused Shabbir and Boota fled away and from where the appellant was arrested. However, Zulfiqar Ali, S.I (PW-5) deposed during cross-examination that:-

*“It is correct that I have not shown the place where Boota and Shabbir accused were standing and from which place they had fled away nor it was told to me.”*

Whereas Muhammad Iqbal Ojla, Inspector, (PW-3) deposed that he informed the Investigating Officer that from where Shabbir and Boota fled away.

15. The prosecution has also not established through cogent and tangible evidence that the house in question was in the exclusive possession of the appellant and the prosecution has also failed to establish conscious possession of the appellant. Mere presence of the appellant would not be sufficient to connect the appellant with the alleged narcotic substance. The possession has not been defined in the Act of 1979 but is has been judicially construed to be conscious and intelligent possession. The prosecution has failed to establish that the appellant was found in conscious and intelligent possession of the contraband beyond reasonable doubt. In fact, the prosecution has to prove two elements of possession i.e (i) corpus, the element of physical control and (ii) animus or intent with which

such control is exercised and not merely the physical presence of the accused in the house, the possession cannot be inferred.

16. After a careful scrutiny of the materials on record, we also came to the conclusion that the prosecution has not established connection with the parcels of sample deposited with the office of the Chemical Examiner Punjab, Lahore. The seizure of the alleged narcotic substance Charas weighing 160 Kilograms and two Kilograms Opium was recovered from 157 packets and one packet respectively on 30.05.2007. From each packet of Charas, 10/10 grams was separated and 10 grams Opium was separated from bulk of Opium. Zulfiqar Ali, S.I (PW-5) handed over 157 parcels and two samples of parcels of Opium to Muhammad Ashraf, Head Constable (PW-2) for keeping it in safe custody as well as for onward transmission to the office of the Chemical Examiner. Muhammad Ashraf, Head Constable (PW-2) deposed that he handed over 157 sealed parcels said to contain Charas along with two sealed parcels said to contain Opium to Muhammad Naeem, Constable (PW-7). The statement of Muhammad Ashraf, Head Constable (PW-2) was got confronted during cross-examination. However, he (PW-2) deposed that:-

*“I could not recall whether I recorded in my statement that 157 sample parcels of Charas and one sample parcel of Opium was handed over by me to the constable for its transmission. Confronted with Ex.DB where it is not so recorded.”*

17. Contrary to the deposition of Muhammad Ashraf, Head Constable (PW-2), Muhammad Naeem, constable (PW-7) deposed that on 13.6.2007 Muhammad Ashraf, Head Constable/Moharrar (PW-2) handed over to him sample parcels of Charas and Opium which he deposited in the office of the Chemical Examiner, Lahore. Muhammad Naeem, Constable (PW-7) admitted during cross-examination that:-

*“It is correct that according to Ex.DC the sample parcels were deposited by me.”*

Whereas Zulfiqar Ali, SI (PW-5) deposed during cross-examination that:-



*“Sample parcels were sent to the Laboratory on 19.06.2007 and the statement of the constable who deposited the samples was recorded on 30.05.2009.”*

18. On perusal of report (Ex.PE) it reveals that Muhammad Naeem, Constable (PW-7) deposited 161 sealed parcels of samples with the Chemical Examiner Punjab, Lahore. The samples of parcels deposited in the office of Chemical Examiner were 161 whereas case of prosecution was that 157 sealed samples parcels were of Charas and one of Opium which after calculation become (158). However Muhammad Naeem, Constable (PW-7) had not stated that how many sample parcels were received by him from Muhammad Ashraf and how many parcels of samples were deposited by him with the office of the Chemical Examiner. There is, thus, no evidence to connect the Chemical Examiner report (Exh.PE) with the substance that was seized from the room of the house of Muhammad Boota.

19. There is another aspect of the case. Zulfiqar, S.I (PW-5) was the first Investigating Officer who deposed during his court statement that Muhammad Iqbal Ojla, SHO (PW-5) handed over to him case property five “tora-jaat” Charas original (P-1/1-5), parcels 157, parcels of Charas and one parcel of Opium and 200 bullets (P-3/1-200) and 100 bullets of 244 bore (P-4/1-100). Said Zulfiqar, S.I (PW-5) also deposed during his court statement that:-

*“.....case property was handed over to the Moharrar.”*

Whereas Muhammad Ashraf, Head Constable (PW-2) while appearing in the witness box deposed that he received only 157 parcels of samples of Charas and two parcels of samples of Opium. Said (PW-2) had not deposed that five sacks of Charas were also handed over to him (PW-2) by Zulfiqar, S.I (PW-7). In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged Charas weighing 160 Kilograms and Opium two Kilograms was seized from the house of Boota (since acquitted) was kept in safe custody. There is no explanation for this failure to establish safe custody of recovered substance from the house of Boota (since acquitted). In the considered opinion of this Court, the

aforesaid inconsistencies and contradictions considered cumulatively do lead to an irresistible inference that the prosecution has not been able to prove safe custody of the recovered substance through material and cogent evidence.

20. Under these circumstances, it is unsafe to base the conviction of the accused on the basis of above testimony of the prosecution witnesses which cannot be said to be trustworthy on the facts and circumstances of the case. It becomes manifestly clear that the prosecution has miserably failed to prove the guilt of the accused/appellant beyond reasonable doubt. On careful examination of entire evidence we are of the view that learned Addl. Session Judge has committed grave illegality in convicting the appellant for committing the offence without any legal evidence worthy of credit available on record. Since there was inherent illegality in the matter, therefor, the conviction cannot be upheld and findings in this regard are liable to be set aside and same are *set aside*.

21. Consequence whereof, the appeal is *accepted* and Muhammad Tariq, the appellant is ordered to be *acquitted* of the charge. The conviction and sentence passed by the learned trial court vide the impugned judgment dated 12.10.2011 in case F.I.R. No. 241 of 2007, dated 30.5.2007, offence under Section 9 (c), 15 of the Control of Narcotic Substances Act, 1997, registered at Police Station Peoples Colony, District Gujranwala is hereby *set aside* and the appellant is directed to be released from the jail forthwith if not required in any other criminal case.

**(SARDAR MUHAMMAD SARFRAZ DOGAR)**  
**JUDGE**

**(AALIA NEELUM)**  
**JUDGE**

*Approved for reporting.*

**JUDGE**

**JUDGE**