

ORDER SHEET

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Rev. Appl. No. D- 02 of 2017

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan

Applicant : Inam Ali through
Mr. Bashir Ahmed Almani, Advocate

Respondents : The State
through Syed Meeral Shah Bukhari, D.P.G.

Date of Hearing : 06.04.2017

Date of Judgment : 18.04.2017

ORDER

ZULFIQAR AHMAD KHAN, J:- Being aggrieved and dissatisfied with the impugned order dated 23.12.2016 passed by the learned Sessions Judge/Special Judge (N) Jamshoro at Kotri on his application moved under Section 516-A Cr.P.C. in Special Case No. 53 of 2016 where through the impugned order the learned Special Judge declined to release the vehicle claiming to be owned by the applicant on his *superdari* during the pendency of trial, the instant criminal revision application has been preferred.

2. Brief facts of the case are that on 2-12-2016 at about 1830 hours when SIP Toufique Ahmed Bughio, posted at police station Jamshoro, was on usual patrol along with his subordinate staff in the official vehicle No. SPD-908, as soon as they reached at T-Maur Superhighway Road on the way leading to Karachi they started checking of cars and coaches heading towards Karachi. A car bearing No.AZE-601 coming from Hyderabad was stopped with the help of staff persons during this snap checking and it was found that there was no one in the car except its driver namely Ayaz Mallah. When the car was searched in the presence of HC Rahim Bux and PC Darvesh Ali, two big pieces of charas in plastic shopper were found lying below the driving seat, and from the personal search of the accused, one black colour Q-Mobile, CNIC and Rs.320/- were also recovered. The charas was weighed as 1,000

grams. When the accused was inquired about the documents of the car, he disclosed that those are not available with him. The charas was sealed for chemical examination, Mashirnama of arrest and recovery was prepared in the presence of above named mashirs. The accused was accordingly arrested and brought at police station along with the recovered property as well as the vehicle, where FIR in Crime No. 285 of 2016 under Section 9(c) Control of Narcotic Substance Act, 1997 was lodged against the accused.

3. During pendency of the trial, the applicant Imam Ali s/o Fazal Muhammad claiming to be owner of said Toyota Corolla Car moved an application under Section 516-A Cr.P.C. before the trial court for the release of the said vehicle on *superdari* on the background that the car having been confiscated was used as Taxi and been driven by Ayaz Mallah driver and upon his coming to know of the confiscation of the car and the registration of FIR he approached the concerned SHO along with original documents, however, since the SHO refused to have the car released to the applicant, he moved the said 516-A Cr.P.C. application before the trial court for release of the car on *superdari* inter alia contending that the car is parked at police station Jamshoro under open sky with no proper care and as he feared that the value of the car will be depreciated by such exposure and thereafter its parts may be sold away.

4. Whilst hearing the above referred application, learned Trial Judge called report from SHO PS Jamshoro, who confirmed that the car in question was parked at police station Jamshoro on account of its involvement in Crime No. 285 of 2016. Report was also called from the Excise and Taxation Department, Motor Registration Wing Karachi which showed that applicant Imam Ali was the real owner of the car in question. The learned Trial Judge however dismissed the said application with observation that the car in question was found to have been used for transporting narcotic substance and under the provisions of Section 74 of Control of Narcotic Substance Act, 1997 there is a bar on the release of any vehicle which has been used in the transport of narcotics. Hence the present Cr. Revision Application was preferred against the said order.

5. Learned counsel for the applicant submitted that the applicant is undoubtedly owner of the car in question and he had engaged the accused Ayaz Mallah as driver to ply the car as Taxi and that he was not aware that the car

was used for transporting narcotics. Reiterating the line of arguments raised before the learned Trial Judge that there is serious danger to the car having been spoiled or it being broken down into parts and sold away, thus mandating its possession to be restored to the applicant. In support of his contention he placed reliance on the case of Shakeel Arshad v. The State (2008 MLD 1603) wherein the Peshawar High Court held that in cases where the petitioner was not the accused person and where there was nothing on record to show that the petitioner had any knowledge that the accused/driver using his vehicle for committing any offence relating to narcotics, courts would come to the rescue of the owners coupled with the fact that the vehicle being parked in the open sky was always exposed to the vagaries of weather and its retention in police custody for an indefinite period not to achieve any useful purpose custody of the vehicle be handed over to the owner on furnishing bail bond along with two sureties. The case of Zewar Khan v. Additional Advocate General, Darul Qaza (2013 YLR 2228 was also referred to where court having come to the conclusion that there was nothing on file which could suggest that the vehicle in question has been used for committing any offence relating to narcotics with the knowledge of the petitioner, ordered handing over the possession of the vehicle to its owner.

6. Heard the counsels and perused the material available on record as well as the case law cited by the learned counsel for the applicant.

7. Before proceeding any further, it will be appropriate to refer to the two relevant provisions of the Control of Narcotic Substances Act, 1997 namely, the proviso of section 74 of the Act, dealing with the temporary custody and section 32 that provides for confiscation or otherwise of such a vehicle at the conclusion of the trial.

"S.74. Application of other laws.--- If an offence punishable under this Act, is also an offence in any other for the time being in force, nothing in that shall prevent the offender from being punished under this Act:

Provided that nothing contained in section 523 of the Code of Criminal Procedure 1898 (Act of 1898), or any other provisions of the said Code or any other law for time being in force, the custody of narcotic production or manufacture of such drugs or substances or any conveyance for commission of an offence under this Act, shall not be given on custody to the accused or any of his associate or relative or any private individual till the conclusion of the case except as provided in the second proviso to subsection (2) of section 32."

"S.32. Articles connected with narcotics.---(1) Whenever an offence has been committed which is punishable under this Act, the narcotic drug, psychotropic substance or controlled substance, materials, apparatus and utensils in respect of which, or by means of which, such offence has been committed shall be liable to confiscation;

(2) Any narcotic drug, psychotropic substance or controlled substance lawfully imported, transported, manufactured, possessed, or sold alongwith, or in addition to, any narcotic drug, psychotropic substance or controlled substance which is liable to confiscation under subsection (1) and the receptacles or packages, and, the vehicles, vessels and other conveyance used in carrying such drugs and substances shall likewise be liable to confiscation:

Provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner thereof knew that the offence was being, or was to be, committed.

8. A bare reading of the above reproduced two provisions of the Act shows that Section 32 provides for the final disposal of the conveyance at the conclusion of the trial, while proviso of section 74 of the Act has created window for the grant of temporary custody of the vehicle pending the trial. It could be seen that the proviso to section 74 has no nexus with the main provision of the section which provides for the punishment of the offender for an offence under the Act in addition to punishment under other statutes. Be that as it may, the said proviso is clearly couched in negative terms, prohibiting *custody to the accused or any of his associate or relative or any other private individual.....* This proviso was dealt with at length by the Apex Court in the case of Allah Ditta v. The State (2010 SCMR 1181) where it was held that "*the said prohibition is neither absolute nor all embracing*". The Apex court interpreted that the custody of such a conveyance can be granted to those who do not fall within the said prohibitory language. Identifying "*accused, or his associate or relative*" would not ordinarily pose much difficulty. The question that required determination was whether the owner of the conveyance, who, otherwise, does not fall in the said class of persons, would come within mischief of the phrase "*any private individual*". Court held that the legislature could not have intended that the said phrase should have such an unrestricted wide scope so as to include every individual, as such a construction would have rendered meaningless reference to specific persons preceding the phrase making that part of the proviso as redundant. Since redundancy cannot be attributed to the legislature, the only rational meaning to give to the phrase

“any private individual” by the Court was to read it *ejusdem generis* with the preceding specific words, “accused, or his associate or relative”. By application of this rule the “private individual” mentioned in the proviso was held to refer to such an individual, who has some nexus with the offender or the offence thus making the innocent owner of the vehicle, used in the commission of the crime, having no nexus, whatsoever, either with the accused or the crime was declared not to fall within the scope of the phrase “private individual”.

9. The dictum held in the case of Abdul Salam v. The State (2003 SCMR 246) could also be relied upon where it was held that the proviso of section 32 of the Act, which deals with disposal of the conveyance used in commission of the crime at the conclusion of the trial, also provides a useful tip in interpreting the proviso of section 74 of the Act. Court held that while Section 32 empowers the trial Court to order confiscation of the vehicle used in trafficking of narcotics, but the proviso that the vehicle shall not be confiscated unless it is proved that the owner was aware of the fact that his vehicle was being used in the crime, comes in favor of the innocent owners of the vehicle by shifting the burden on the prosecution to establish that the owner had the knowledge of his vehicle being used in the crime.

10. Of relevance is the test provided in the case of Gul Subhan v. The State (PLD 2005 SC 160) which compels one to consider as to what steps did the owner take once he got the information that his vehicle has been confiscated on account of conveyance of narcotics. Court refused to hand over custody of the vehicle to its owners for the reasons that the vehicle was seized on 4-7-1997 and it was confiscated on 27-3-1999 since no request for taking over possession of the vehicle was made in this long intervening period. However, the facts of the case at hand are entirely different. Here the incident took place on 2-12-2016 and the vehicle was seized on the same day. Thereafter it was only within a few days that the applicant made application u/s 516-A CrPC for the release of the vehicle, which application was refused by the impugned order dated 23-12-2016 against which the instant revision application was made on 21-01-2017. Thus the applicant did not waste any time to seek possession of the vehicle.

11. We, for the aforementioned reasons have no hesitation in concluding that while proviso of section 74 does not prohibit the release of the vehicle involved in the trafficking of narcotics to its bona fide owner, against whom there is no evidence that he is connected with the commission of the crime or with the accused, and who unless proved to the contrary, was unaware that his vehicle was being used for committing any offence relating to narcotics, the custody of the vehicle be restored to its owner, and the present applicant/owner Imam Ali having also passed the Gul Subhan v. The State (*supra*) test.

12. Prima facie, applicant/owner Imam Ali is entitled to interim custody of the vehicle during trial, subject to furnishing surety in the sum of Rs.200,000 and P.R. bond in the like amount to the satisfaction of the trial court. Applicant/owner shall not sell the vehicle in question during the trial and he will produce it before the trial court on each and every date of hearing.

13. Needless to say that the findings given hereinabove are tentative in nature which are not binding upon the trial court which is duty bound to decide the case on the basis of evidence adduced by the parties before it without being influenced by any observations made in the foregoing. The trial court is however directed to decide the case within three months with intimation to this court.

JUDGE

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