

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Revision. Application. No. D- 34 of 2017

PRESENT:

Mr. Justice Abdul Maalik Gaddi

Mr. Justice Arshad Hussain Khan

Imam Ali Vs. The State

Mr. Bashir Ahmed Almani, Advocate for the Applicant.

Syed Meeral Shah, A.P.G. for the State.

Date of hearing: 23.01.2018.

Date of order: 31.01.2018.

ORDER

ARSHAD HUSSAIN KHAN, J: Through instant Criminal Revision Application, applicant has challenged the portion of the judgment dated 19.10.2017 passed by learned Special Judge (N)/ Sessions Judge, Jamshoro, in Special Case No.84/2016 (re-The State v. Ayaz Hussain), whereby learned trial Judge after full dressed trial while convicting the accused u/s 9 (b) of CNS Act, 1997, in crime No.285/2016 registered at Police Station Jamshoro and sentenced him to suffer RI for 01 year and to pay the fine of Rs.10,000/-, in default thereof to suffer SI for 03 months more. However, by the same judgment, learned trial court passed the order u/s 517 Cr.P.C. by confiscating the vehicle involved in the aforesaid crime. For the sake of convenience the relevant portion of the impugned judgment is reproduced as under:-

“The case property viz. 1-KG chars be destroyed, cash Rs.320/- recovered from accused Ayaz Hussain has not be claimed by the accused, the same be deposited with Government Treasury, copy of CNIC of accused be returned to him, a Q-mobile Phone, so also white coloured Corolla Car No.AZE-601 lying with Imam Ali on Superdari granted to him by the Honourable High Court of Sindh, Circuit Court, Hyderabad on furnishing of surety Rs.200,000/-, as per evidence the same car has been used for transportin g and carrying narcotic substance i.e chars, therefore, the same be confiscated to Government and shall be auctioned

or disposed of as per law. All the above acts be done after expiry of appeal period.”

2. Brief facts giving rise to this criminal revision application are that on 02.12.2016 accused/convict Ayaz Hussain Mallah was arrested by SIP Toufique Ahmed Bughio while he was allegedly transporting the charas in Toyota Corolla Car No.AZE-601 which was subsequently weighed and comes to 1000 grams and also one Q-Mobile of black colour with Telenor and U-phone Sim cards, his CNIC and cash of Rs.320/-. On inquiry accused failed to produce the registration documents of the car.

3. Learned counsel for the applicant, inter alia, contends that the order regarding the confiscation of Toyota Corolla Car of the applicant bearing Registration No.AZE-601 is against the settled principles of criminal administration of justice; that the learned trial Judge has not considered that the said Car has already been released to the applicant on Superdari by this Court, on the plea that the same was being run by the accused Ayaz Hussain as taxi and the applicant has no concern with the alleged offence; that the order for confiscation of the car of the applicant in favour of the State has resulted a grave miscarriage of justice; that the applicant is real owner of the said car and possesses the title documents in his favour; that the above said car is the only source of income of the applicant and his family. He lastly contended that the order with regard to the confiscation of Car of the applicant has been passed without any reason or justification hence liable to be set aside.

4. Conversely, learned A.P.G. appearing for the State has opposed this criminal revision application on the ground that the Car in question was found to have been used for transporting narcotic substance and under the provisions of Section 74 of CNS Act, 1997 there is bar on release of any vehicle which has been used in the commission of offence.

5. Heard learned counsel for the parties and perused the record.

6. From the perusal of record, it appears that admittedly the car in question was used in the commission of offence but there is nothing on the record which could show that the present applicant was having any

knowledge about the transporting of narcotic substance in the said car nor such point has been agitated before the learned trial court during the trial. However, during the pendency of the trial, upon application of the present applicant this court through its order dated 18.04.2017 passed in Cr. Revision Application No.D-02 of 2017 had handed over the interim custody of subject vehicle to the applicant. Relevant portion of the said order for the sake of ready reference is reproduced as under:

“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. Prime 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.”

7. From the perusal of the evidence available on record, it has been proved that the applicant is real owner of the vehicle in question and he has nothing to do with the alleged offence as he had handed over the Car to accused for plying on the road to earn for their livelihood and it has been brought on the record that it was run by the accused Ayaz Hussin as Taxi and the original documents are still in favour of the applicant which fact has been confirmed by the concerned SHO as well as Excise and Taxation Department. Furthermore, the present applicant is not the accused in this case nor he was found available in the said car at the time of incident nor he had any knowledge that the accused Ayaz Hussain was using his Car in transporting the narcotic substance therefore, under these circumstances, courts would come to the conclusion to rescue the real owners of the vehicle and release of the same to the real owner would be just and proper.

8. We have also gone through Section 32 of CNS Act, 1997 which provides 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. It is settled law 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 favour 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. In this regard we are also fortified with the case law reported as *BANARAS KHAN v. The STATE and 2 others (2007 YLR 1908)*, wherein it has been held as under:

“Nothing was on record to show that vehicle in question had been used in the commission of crime with the knowledge of the petitioner. Section 74 of the Control of Narcotic Substances Act, 1997, no doubt, prohibited the grant of custody of a vehicle used in the import, export or transportation of narcotic substance to accused or any of his associates or relatives or any private individual till the conclusion of the case, but application of said provision by no canon of interpretation could be extended to cover an owner who had no hand or involvement in the crime, as it could not be construed independently of the provisions contained in S.32 of said Act; which protected the right of the owner, who had no conscious hand in the commission of crime” It has been further held that *“Nothing was available on the record of the investigation of the case showing that petitioner had any knowledge that accused would use his car for committing any offence relating to narcotics and law did not allow putting onus petitioner to prove his lack of knowledge in that regard. Rights of the owners who had no knowledge of commission of offence or had no conscious hand in the crime, were fully protected.”*

In another case reported as, *The STATE through Dy. Director (Legal) ANF v. FARUUKH NADEEM through Branch Manager (2007 MLD 1372)*, it has been observed as under

“Admittedly the vehicle was owned by the Leasing Company and there was no rival claimant. Section 74 of the Control of Narcotic Substances Act, 1997 read with S. 32 did not create any absolute bar for the release of a vehicle. Owner of the vehicle was only required to prima facie establish that he had no knowledge that the vehicle was being used for transporting narcotics.”

9. From perusal of the judgment impugned in the present proceedings it appears, the learned trial court while confiscating the vehicle of the applicant has not assigned any cogent reason that as to why the Car in question may not be handed over to the applicant who is the bonafide owner of the same and since there is no evidence available on record to connect the present applicant with the commission of offence or even with the accused who was only the driver of the applicant and was plying his Car as taxi and the applicant was not aware of the fact that his vehicle was being used for committing any offence relating to the narcotics, hence the custody of the vehicle to the applicant being its genuine and real owner would be proper and in accordance with law.

10. The upshot of the above discussion is that the instant Criminal Revision Application is allowed. The impugned judgment dated 19.10.2017 to the extent of confiscation of Toyota Corolla Car No.AZE-601 of the applicant is hereby set aside and the possession of vehicle, is restored to the applicant. Consequently, surety and P.R. bond furnished by the applicant are discharged.

JUDGE

JUDGE

Tufail