

# IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

*Cr. Appeal No.D-66 of 2016*

**PRESENT:**

*Mr. Justice Naimatullah Phulpoto*

*Mr. Justice Shamsuddin Abbasi*

*Date of Hearing: 25.04.2018*

*Date of Judgment: 24.05.2018*

*Appellant/accused: Abbas Ali S/o Ahmed Ali Mangarhar,  
through Mr. Aslam Baig Leghari,  
Advocate.*

*The State: Through Mr. Shahzado Saleem  
Nahiyoon, Deputy Prosecutor General  
Sindh.*

## **J U D G M E N T**

**SHAMSUDDIN ABBASI, J:-**

This criminal appeal has been

preferred by appellant Abbas Ali S/o Ahmed Ali Mangarhar, wherein he has assailed the judgment dated 06.06.2016 passed by learned Sessions / Special Judge, CNSA, Mirpurkhas in Special Narcotics Case No.06 of 2016 arising out of Crime No.01 of 2016 of P.S DIO Excise, Mirpurkhas for offence under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellant was convicted under Section 9(c) of CNS Act, 1997, and sentenced to imprisonment for life and to pay fine of Rs.200,000/-, in case of failure to pay the fine, to further undergo S.I for 06 months. Appellant was extended benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution case as disclosed in the FIR are that on 19.01.2016 at 03:00 p.m. Excise Inspector Nand Lal of P.S DIO Excise, Mirpurkhas vide roznamcha entry No.93 left police station alongwith his subordinate staff ECs Sikandar Ali, Muhammad Ameen, Rafique Shah and Muhammad Iqbal in official mobile for patrolling in the area. During patrolling, when they reached adjacent to Mirwah Road at Sim Nalo Bypass, Excise officials received spy information that a person was coming from Digri in Corolla Car bearing Registration No.AQS-928 he was transporting chars. On such spy information, the excise police started checking the vehicles and while checking the said car appeared before them, it was signaled to stop but the driver attempted to dove away fastly but they stopped the car by placing the mobile in-front of the car. On inquiry, the driver disclosed his name as Abbas Ali S/o Ahmed Manganhar, resident of Ward No.6, Bhitai Mohalla, Badin. Due to non-availability of the private persons at the spot, Excise Inspector Nand Lal made ECs Sikandar Ali and Muhammad Ameen as mashirs. Thereafter, the personal search of the accused was conducted and from his right pocket of shirt, two currency notes, one of Rs.500/- and other of Rs.100/- and from left side pocket a cell phone of china made were recovered. While searching the car, 40 packets of plastic in different colours were also secured from back seat of the car. The packets were opened; each packet contained two slabs / patties of chars wrapped in transparent plastic papers. On weighing, each packet was found of 01 kilogram (total 40 kilograms). The whole recovered chars was kept in a white plastic bag / katta for sending the same to the chemical examiner for its analysis. Mashirnama of arrest and recovery was made in presence of mashirs. Thereafter, the accused and case property were

brought to the police station, where the present FIR was registered against the accused under Section 9(c) of CNS Act, 1997.

3. Excise Inspector Nandala conducted the investigation of the case and recorded statements of P.Ws / Mashirs under Section 161 Cr.P.C, The I.O also sent the case property to the chemical examiner for analysis and wrote letter to Motor Registration Authority, Excise & Taxation and Narcotic Control M.R.A Karachi in order to verify the ownership of the car. After receiving such reports and completing other formalities, he submitted challan before the competent Court of law.

4. The learned trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-4. The accused did not plead guilty and claimed to be tried.

5. In order to prove the charge against the accused, the prosecution examined P.W-1 Excise Inspector Nand Lal, who is I.O of the case at Ex-6. He has produced roznamcha entry at Ex-6/A, mashirnama of arrest and recovery at Ex-6/B, another roznamcha entry at Ex-6/C, FIR at Ex-6/D, report of chemical examiner at Ex-6/H. P.W-2 Excise Constable Sikandar Ali was examined at Ex-7. Thereafter, prosecution closed its side.

6. Statement of accused under Section 342 Cr.P.C was also recorded by the trial Court at Ex-8, in which the accused denied the allegations made by the prosecution. Accused did not examine himself on oath but examined two defense witnesses namely Abdul Kareem, Driver at Ex-10 and Ghulam Mustafa Sheedi, Driver at Ex-11.

7. The learned trial Court after hearing learned Counsel for parties and examining the evidence, vide judgment dated 06.06.2016,

convicted the accused under Section 9(c) of CNS Act, 1997, and sentenced him as stated above, hence, the present appeal.

8. The learned Counsel for the appellant contended that the appellant / accused has been falsely involved in the present case and news cuttings have been produced alongwith statement to show that real culprit was let off by the excise officials. Learned defence Counsel further contended that it was case of spy information but no private witness of recovery was associated, both the mashirs of recovery of chars and arrest of accused are subordinate of the complainant. He further contended that chars was recovered from the vehicle of appellant on 19.01.2016 but it was sent to the chemical examiner on 20.01.2016, which was received by chemical examiner on 21.01.2016. It is further contended that as per mashirnama, one seal was affixed on the case property but the chemical examiner found three seals. It is also contended that report of the chemical examiner was deficient as it was not on the proforma prescribed by the Federal Government. Learned Counsel for the appellant has relied upon the cases of *MAULA JAN V/S. THE STATE (2014 SCMR 862)*, *IKRAMULLAH V/S. THE STATE (2015 SCMR 1002)* and *AMJAD ALI V/S. THE STATE (2012 SCMR 577)* and prayed for acquittal of the appellant.

9. On the other hand, the learned D.P.G has supported the judgment passed by the learned trial Court. It is argued that prosecution evidence was reliable and trustworthy and learned trial Court has rightly convicted the appellant / accused for the recovery of 40 kilograms of chars. He further submitted that huge quantity of chars could not be foisted upon the appellant. Learned D.P.G prayed for dismissal of appeal.

10. Heard the learned Counsel for the appellant as well as learned D.P.G for the state and examined the material available on the record.

11. P.W-1 Inspector Nand Lal (Ex-06) has deposed that on 19.01.2016 he was posed at P.S DIO Excise, Mirpurkhas. On the same day at about 03:00 p.m., he left police station alongwith his subordinate staff ECs Sikandar Ali, Muhammad Amin, Rafique Shah and Muhamamd Iqbal in official mobile bearing registration No.GS-8225 vide roznamcha entry No.93 for patrolling and detecting excise crime. He further stated that after patrolling at difference places, when they reached adjacent to Mirwah Road at Sim Nala Bye-Pass, where he received spy information that a person in his corolla car bearing registration No.AQS-928 was transporting chars from Digri. On receiving such spy information, excise officials started checking of the vehicles. During checking, the pointed car appeared; they signaled to stop but driver of car attempted to drive away fast but they placed their mobile infront of the said car and succeeded to stop it. They inquired name of driver, who disclosed his name Abbas Ali (the present appellant / accused). Due to non-availability of private persons, Inspector Nand Lal made ECs Sikandar Ali and Muhammad Amin as mashirs of the case. Inspector conducted personal search of the accused and secured two currency notes of Rs.500/- and one currency note of Rs.100/-, total amount became Rs.600/-, from right side pocket of his shirt. Excise Police also recovered a cell phone of china made from left side of shirt of accused Abbas Ali. On search of the car, they found 40 packets of plastic of different colours from the rear seat of the car and opened each packet and found containing two slabs / patties of chars, which were wrapped in transparent plastic papers. They weighted each packet of the chars and found to be one K.G in each packet. The total weight of recovered became 40

kilograms. He further stated that all these packets were placed in plastic bag, lying on the rear seat of the car. Inspector Nand Lal sealed the whole property and arrested the accused and prepared mashirnama of arrest and recovery in presence of mashirs, Thereafter, the accused and case property were brought at P.S where he lodged the FIR. Inspector Nand Lal conducted investigation and recorded the statements of P.Ws under Section 161 Cr.P.C as well as sent the recovered chars to the chemical examiner for examination and report and after receiving report he submitted challan of the case. During cross-examination he has stated that chars was sent to the chemical examiner on 21.01.2016. He further replied that for the intervening period the chars was kept at Malkhana. However, he has admitted that he has not produced any entry of roznamcha book. He has denied the suggestion that the present accused was a taxi driver and the car of appellant was hired by Abdul Razzaque Khokhar and Aziz Sheedi from Badin taxi stand. He has further denied the suggestion that they left Aziz Sheedi and Abdul Razzaque Khokhar as both were the persons of Abdul Jabbar Gharano, AETO Excise and implicated the present appellant as the appellant was handed over to Inspector Nand Lal by Abdul Jabbar Gharano by AETO and recovered chars did not belong to the appellant.

12. We have also examined the evidence of Excise Constable Sikandar Ali (Ex-07), who has also stated on the same line as stated by Inspector Nand Lal but stated that he acted as mashir of arrest and recovery. EC Sikanrdar denied in cross-examination that chars has been foisted upon the accused.

13. Both the above P.Ws were cross-examined at length but defence Counsel failed to shutter their evidence. Having scanned the evidence of both the prosecution witnesses, we found that both the

prosecution witnesses have fully supported the prosecution case and they were unanimous on all material aspects of the case. Appellant was driving the car, he was also alone in vehicle, he can be absolved from the responsibility. We could not find out any discrepancy and material contradictions in the evidence of the prosecution witnesses as they have explained each and every point in the case properly. I.O had sent the entire chars to the chemical examiner for analysis without loss of time and the report of the chemical examiner was positive, therefore, we do not find out any justification in the plea taken by the accused that huge quantity of 40 K.Gs of chars has been foisted upon him. The evidence of the prosecution witnesses is quite reliable, trustworthy and confidence inspiring.

14. We have also examined the statement of accused recorded under Section 342 Cr.P.C, who examined himself on oath as well as led the evidence through D.Ws Abdul Kareem Qambrani and Ghulam Mustafa Shaikh. Appellant raised plea that chars was not recovered from his car and the alleged recovery was foisted upon him. He was taxi driver at Badin and Abdul Razzaque Khokhar and Aziz Sheedi hired his taxi to attend a marriage ceremony at Mithi from Badin. He further deposed that at Judho Abdul Razzaque Khokhar and Aziz Sheedi asked him to take break at otaq of Khosas. When they reached outside otaq, Excise Police came there in a car and arrested the appellant and brought him alongwith car at P.S Mirpurkhas. He further deposed that he did not know as to whether who took him at P.S Excise. He further deposed that he has been implicated in this case at the instance of excise officials Abdul Jabbar Gharano, who was an Excise Inspector at P.S Badin. He was also cross-examined by SPP for the state, in which he denied all the allegations and suggestions. We have examined the deposition of D.W Abdul Kareem (Ex-11), who has stated that

he was taxi driver at Badin since last 8 / 10 years and he knew appellant Abbas Ali was available at taxi stand Badin. At that time one Abdul Razzaque Khokhar came and asked the accused that he had to attend marriage ceremony at Jhudo and then appellant went alongwith Abdul Razzaque Khokhar. However, he replied to a question that he had no knowledge that excise police had secured 40 K.Gs of chars from the car of accused Abbas Ali. Lastly, we have examined the evidence of D.W Ghulam Mustafa Shaikh (Ex-12). He has stated that he was also driver at Badin and accused Abbas Ali was also taxi driver and he was known to him since 5 / 6 years. He further stated that on 18.01.2016 Abdul Razzaque Khokhar hired taxi from the accused and in his presence taxi was hired to attend marriage ceremony. However, he has not specifically denied and deposed that he has no knowledge as to whether the present accused was dealing with sell of narcotic substance. He was also cross-examined by learned SPP for the state, in which he has disclosed that accused Abbas Ali was his neighbourer.

15. Having examined the evidence of the appellant as well as his defence witnesses, it is observed that the case of the appellant is put on juxtaposition. According to the case of the prosecution, appellant was transporting a huge quantity of 40 K.Gs of chars in his vehicle and he was alone driving the car and police recovered the chars from his car. The report of chemical examiner regarding recovered chars was positive. The presence of appellant Abbas Ali being a driver of the car is not denied and it has been established by cogent evidence. The driver of a vehicle has denied the recovery of narcotics substance from his car but depending upon the facts and circumstances of the case, the contention of defence Counsel is found without merit. A driver cannot be absolved from the



responsibility and the plea taken by the appellant, that car was hired by Abdul Razzaque Khokhar and Aziz Sheedi, has not been substantiated. Therefore, we are of the considered view that prosecution had proved its case against the appellant. The judgment passed by the learned trial Court did not suffer from any infirmity. The prosecution evidence was quite reliable and trustworthy. The learned trial Court has rightly convicted the appellant for the alleged offence, therefore, the sentence awarded to the appellant by the trial Court cannot be reversed especially in the manner taken by the appellant through the evidence.

16. As regards to contention of defence Counsel that P.Ws were Excise officials, it is well settled law that the police witnesses are as good as other public witnesses and their statements could not be discarded merely for the reason they were the police employees. The police employees are the competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees as laid down in the cases of Muhammad Azam v. The State PLD (1996 SC 67), Muhammad Hanif v. The State (2003 SCMR 1237), Riaz Ahmed v. The State (2004 SCMR 988) and Naseer Ahmed v. The State (2004 SCMR 1361). The relevant portion of case law reported in 2004 SCMR 1361 (Naseer Ahmed v. State) is reproduced as under:-

*“It has been held by this Court, time and again that the police officials are as good witnesses as others, and their evidence on this score alone should not be discarded. Now-a-days, drug trafficking has created dangerous problems for the society and the country at large. This menace should be curbed so that people in society would get relief.”*

17. So far as the contention raised regarding conducting of investigation by the complainant himself, it is well settled that complaint being a Police Officer was competent to investigate the case if he was witness of offence, and such recovery could not be defeated merely on the

ground that the complainant and the Investigation Officer was a same police officer, if no mala fide was established against the said complainant. Reliance is placed on a case of Nazar Muhammad v. The State reported in 2017 P. Cr.L.J 1399.

18. The contention of the learned Counsel that there are material contradictions in the evidence of the prosecution witnesses, no material contradiction has been pointed out. Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities. Reliance is placed on the case of Ghulam Qadir v. The State reported in PLD 2006 Supreme Court 61. Relevant portion is reproduced as under:-

*“8. We are not agreeable with the contention of the learned Counsel because fact remains that “Poppy Flower” were found lying on the roof of the vehicle therefore, the technicality, which is being pointed out by the learned Counsel, would not be sufficient to acquit him. In addition to it in such-like cases Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities, as it has been held in (1993 SCMR 785) and (PLD 1996 SC 305).”*

19. Although there was a minor delay in sending the sample parcels to the Forensic Science Agency but the rules to that effect are directory and not mandatory in nature. There is nothing on record to establish that the said parcels were ever tampered with rather the evidence led by the prosecution established that the parcels received by the said agency, remained intact. Reliance is placed on the case of Muhammad Sarfraz v. The State and others reported in 2017 SCMR 1874. The relevant portion is reproduced hereunder:-

*“Although there was a minor delay in sending the sample parcels to the Punjab Forensic Science Agency but the rules to that effect are directory and not mandatory. There is nothing on record to establish that the said parcels were ever tampered with rather the evidence led by the prosecution established that the parcels received by the said agency, remained intact.”*

20. According to the case of prosecution, appellant / accused was transporting charas in the car on 19.01.2016 and he was arrested by Excise Officials. The person who was driving the car disclosed his name as Abbas Ali. Excise Officials during search of the vehicle recovered 40 K.Gs charas from the car and positive report was received. Prosecution produced witnesses before the trial Court and they have implicated the accused in the commission of the offence and evidence of Excise Officials has been corroborated by the positive report of the Chemical Examiner. Under Article 29(d) of the Control of Narcotics Substances Act, 1997 unless otherwise proved, presumption would be that a person has committed an offence under this Act in respect of any material which have undergone any process towards the production or manufacture of the narcotics, drug psychotropic substance controlled substance or any residue left of the materials from which a narcotic drug, psychotropic substance or controlled substance has been produced or manufactured for the possession of which he fails to account satisfactorily. Presence of appellant Abbas Ali being a driver in the car is not denied and it has been established by cogent evidence. The driver of a vehicle invariably raises the plea of having no knowledge when narcotics or other contraband items are recovered from the vehicle. But depending upon the facts and circumstances of the case contention of the defence Counsel is found without merit. Driver cannot be absolved from the responsibility as the vehicle was not a passenger bus and the appellant was alone in the car. In this behalf reference may be made to the cases reported as:-

- (i) Muhammad Shah v. State (PLD 1984 SC 278)  
In this case driver was found guilty for the commission of keeping in his possession prohibited items under the provision of Prohibition (Enforcement) of Hadd) Order, 1979.

- (ii) Said Shah v. State (PLD 1987 SC 288)  
In this case as well driver was convicted and sentenced holding that prohibited items were being transported in the vehicle, which was in the control and possession of the convict. In this very judgment it was also held that fixing responsibility upon a driver for transporting narcotics/drugs depends upon each case.
- (iii) Similarly in case of Nadir Khan v. State (1988 SCMR 1899) it was held that licensed drivers, having charge of vehicle for long journey supposed to have knowledge with regard to the contents and articles being transported in it.
- (iv) In another judgment in the case of Shehrzada v. State (1993 SCMR 149, the liability of driver for transportation of the contraband items was viewed under the provision of section 27, P.P.C.
- (v) In the case of Shah Wali & another v. The State (PLD 1993 SC 32) charas was recovered lying in front of the passenger seat of a car occupied by two persons, therefore, it was held that Heroin was in possession of the accused person including driver therefore, latter was found guilty and convicted.

21. In the case of *ELLA-UD-DIN and another v. The STATE (2017 P.Cr.L.J 85)* it has been held as follows:

*“The co-accused/convict Jalal-ud-Din was also rightly held responsible for committing the offence charged against him. The “knowledge and the conscious possession” of both the appellants cannot be ruled out in presence of the un-impeachable prosecution evidence. The ocular testimony, the recovery of substance, the 2D Corolla Car and the positive FSL report, the appellants/convicts in rebuttal either made evasive denial or produced one DW, the statement of DW was rightly disbelieved on basis of logical hypotheses. The appellants/convicts did not categorically deny the factum of recovery, particularly, when they had not entered on oath in their defense. Though, the statement on oath is optional in nature and can only be recoded, when the accused himself wishes so and he cannot be compelled to do so. When the initial burden of proof is discharged by the prosecution, then in case of special plea, the onus of proof shifts upon the defence and failure to discharge the same leads to adverse inference against the defence. Both the appellants were sailing the same boat as they both relied and pleaded the same defence plea. They claimed that the original culprits were substituted with them. On one hand the appellants / convicts admitted the police blockade at the (Quetta-Sibi) National Highway Raod, the recovery of the prohibited substance at the stated time, date and place, as well as, their presence on the spot but on the other they failed to bring any evidence pertaining to the truck,*

*which they claimed to have been left at the hotel where they were taking meal/lunch. Since the owner of the truck was not produced, therefore, this plea was rightly discarded by the learned trial court. Had the appellants been falsely implicated for transportation of contraband items then the recovery would have been shown from their left over truck instead of 2.O-D Toyota Corrola Car.*

*In view of the above discussion, we are of considered opinion that the prosecution successfully proved its case beyond shadow of any doubt, no interference is required by this court. Therefore, the judgment dated 20th February, 2014 passed by learned Sessions Judge/Special Judge for Narcotics, Sib is upheld and consequently, the appeal is dismissed accordingly.”*

22. In view of what has been discussed above, we are of the considered opinion that prosecution established its case and the trial Court has rightly convicted the appellant for the offence of transporting the chars, which is detrimental against the society and no one could be allowed to be set free in committing such type of offences. Consequently, we maintain the judgment dated 06.06.2016 passed by the learned trial Court and the appeal in hand is lacking merits, the same is dismissed.

**JUDGE**

**JUDGE**