

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Jail Appeal No. D-98 of 2019

Before :

Mr. Justice Muhammad Saleem Jessar,

Mr. Justice Khadim Hussain Tunio-

Appellants : Munir Ahmed Dogar through Ms. Rizwana Jabeen Siddiqui, Advocate.
Zulfiqar Ali Machhi through Mr. Ubedullah Malano, Advocate

Respondent : The State through Syed Sardar Ali Shah Rizvi, Deputy Prosecutor General

Date of hearing : 23-11-2021
Date of announcement : 02-12-2021

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J U D G M E N T

KHADIM HUSSAIN TUNIO, J. Through captioned criminal jail appeal, the appellants have impugned the judgment dated 14.06.2019 passed by the learned 1st Additional Sessions Judge/Special Judge CNS (MCTC) Ghotki in Special Case No. 29/2017 (*Re: State versus Munir Ahmed & others*), u/s 9(c) CNS Act, 1997, culminated from FIR No. 01 of 2017 registered at P.S Excise DIO Camp Ubauro, whereby learned trial Court convicted the appellants u/s 9(c) CNS Act, 1997 and sentenced them to suffer rigorous imprisonment for life with fine of Rs.500,000/- (five lac) each and in case of failure in payment of fine, appellants were ordered to suffer S.I for two years more. However, benefit of section 382-B Cr.PC was extended to them.

2. Briefly, facts of the prosecution case are that on 24.07.2017 complainant Excise Inspector Talat Aziz registered an FIR at P.S Excise Ubauro wherein he stated that on the day prior, he along with his subordinate staff left P.S vide roznamcha entry No. 03 at 01.30 pm and

started checking of vehicles at Sindh-Punjab border, where at about 9.00 pm a dumper-truck bearing registration No. EA-4317 came from Punjab side, speeding through in which two persons were sitting. The complainant signaled them to stop and then got them down from the truck. On inquiry, driver disclosed his name as Munir Ahmed while the other person claimed to be the cleaner and disclosed his name as Zulfiqar Ali and they further disclosed that the truck is empty. On personal search of driver, the complainant secured Rs.5000/- in the form of five notes of Rs. 1000/- and on personal search of cleaner he recovered cash of Rs.1,500/- in the form of three notes of Rs. 500/- and on his further body search, an original copy of CNIC was also recovered from the cleaner. The complainant also secured driving license of Munir Ahmed from him and a registration book in the name of Afghan Construction and Logistics Unit was also recovered from the dash board of the truck. The truck was initially found empty but on further search of the truck, complainant found a secret cavity near the front Tuk, same was opened and was found containing two hundred (200) plastic packets of charas. Charas was weighed at the spot and it became 200 K.Gs. Out of each packet, the complainant separated 100 grams and sealed them in white paper for chemical examination, and the rest of the contraband was sealed separately. The complainant then prepared memo of arrest and recovery in the presence of mashirs at the spot. Thereafter accused along with property were brought at P.S, for which the case was registered.

3. After registration of the FIR, the complainant being the Investigating Officer conducted investigation, recorded 161 Cr.P.C statements of PWs, inspected place of incident and submitted challan after concluding the investigation.

4. At the trial, prosecution examined complainant/I.O namely Inspector Talat Aziz and PW EC Farhan Ali, who produced numerous documents through their evidence. Thereafter prosecution side was closed.

5. Statements of accused u/s 342 Cr.P.C were recorded in which they denied the allegations made against them by the prosecution and they pleaded their innocence. However, they did not examine themselves on oath in terms of section 340(2) Cr.P.C to disprove the charge nor examined any witness in their defence.

6. After hearing the learned counsel for respective parties, learned trial court convicted and sentenced the appellants as stated supra, hence this appeal.

7. Learned counsel for the appellants has argued that there are material contradictions in the evidence of complainant and PW; that it is not established during evidence of complainant and PW that the recovery was made at the pointation of accused persons; that EC Muhammad Yassin through whom the charas was sent to the chemical examiner has not been examined; that no entry regarding depositing the case property in the malkhana has been produced; that the alleged contraband material has not been recovered from exclusive possession of the appellants; that all the PWs have not been examined by the prosecution and only complainant and PW Farhan Ali were examined by the trial court; that the prosecution has failed to establish the safe custody of contraband material; that there are major as well as material contradictions in the evidence of PWs; that the case of prosecution is full of material contradictions, discrepancies, infirmities, therefore, she prayed that the impugned judgment may be set aside and appellants/accused may be acquitted. In support of her contentions, she has referred the case law reported as **PLD 1995 SC 516, PLD 2004**

Karachi 681, 2004 P.Cr.L.J 843, PLD 2005 Karachi 128, 2005 MLD 501, 2010 P.Cr.L.J 1560, 2013 P.Cr.L.J 1160, 2015 SCMR 1002, 2020 SCMR 132 and 2020 SCMR 196.

8. On the other hand, learned DPG for the state has fully supported the impugned judgment while arguing that the appellants were arrested on the spot with dumper/truck; that huge quantity of charas has been secured from the secret cavity of the truck; that all the formalities were observed by the complainant at the spot; that no enmity or malafide has been alleged or proved by the appellants with the complainant party; that no specific plea has been taken by the appellants in their statements u/s 342 Cr.PC; that there are no major contradictions in the evidence of prosecution witnesses; that the appellants have not examined any DW in support of their plea of false implication; that PW Farhan Ali has fully supported the prosecution case; that 161 Cr.P.C statement of EC Muhammad Yassin who transported the contraband to the chemical examiner was recorded by the I.O; that all the rules of CNS Act were complied with by the Investigating Officer.

9. We have heard learned counsel for appellants and learned DPG for state and perused the record carefully with their able assistance.

10. Before entering into the merits of the case, it is observed that the nature of the case of both the appellants is different from one another and resultantly they will be discussed separately. When it comes to the case of the appellant Munir Ahmed, the driver, after a careful scanning of the evidence of the witnesses, we have found that they have constituted an uninterrupted chain of facts ranging from seizure and forensic analysis of the contraband. They are in comfortable unison on all the salient features regarding interception of the huge quantity of charas as well as all the steps taken subsequently. A total of

100 grams were separated from each of the 200 packets recovered from the secret cavity of the dumper/truck as representative sample and subsequently sent to the chemical examiner, which is found by us being exercise more than sufficient to constitute forensic proof. At the time of the arrest, appellant Munir Ahmed was the driver of the truck and from a secret cavity available at the front Tuk of the truck 200 kilograms of charas was secured and hence, making the appellant Munir Ahmed responsible for the same being the driver of the truck, responsible for its contents. We have also scanned the report of the chemical examiner available on the record and have also found that it totally corroborates the evidence of the prosecution witnesses, whose stance is in nexus with the chemical examiner's report. It is a matter of record that from the hidden cavity, a huge quantity has been secured, which was being transported while concealing in the secret cavity of the truck and from therein 100 grams were separated from each of the packet for the chemical examiner, who did not find any tampering with the sealed parcels of the contraband, so secured from the dumper/truck, hence, the report of the chemical examiner was received in positive. More so, both the witnesses have testified that the case property available in court is the same and they were not cross-examined on the said aspect of the case by the defence counsel. According to the departure and arrival entries produced by the complainant at Ex.8-C, they had arrived at the police station along with recovered case property and the accused and the case property was sent on the next day; i.e. 25.07.2017, thus no delay can be attributed to the same. The case property was sent through E.C Muhammad Yassin vide letter *No. Excise 08* dated 25.07.2017, available at Ex. 8-D. Such fact has also been fully corroborated by the chemical examiner's report wherein it was mentioned that *"Two Hundred sealed white paper packets each bearing 02 seals. Seals perfect and as per copy sent."* Therefore, the contention with regard to safe custody of the property

does not have any sanctity as the property viz. charas so recovered from the appellant Munir Ahmed had been proved adequately by examining the PWs, even otherwise, they were not cross-examined on this part. Furthermore, as per the chemical examiner's report, the seals were received in intact condition which rules out any question of tampering and it was in fact the examiner who had broken the seals to open the sealed contents. Reliance in this respect is placed on the judgment passed by Hon'ble Apex Court, dated 03.03.2020 in *Jail Petition No. 712 of 2018 (Re: Zahid and Riaz Ali Vs. The State)*. Resultantly, the charas so recovered from the secret cavity of the truck which was driven by the appellant Munir Ahmed and such secret cavity was found in the front Tuk where from huge quantity of 200 K.Gs of charas has been secured and same has been established to the extent of realization. As far as the contention of the learned counsel for the appellants that the evidence of PWs is not reliable as the same suffers from material contradictions and inconsistencies, has no force at all until and unless some cogent and reliable evidence is brought on record which may suggest that the appellants are innocent and that their case is false. It is well established proposition of law due to flux of time, in the case of transportation or possession of Narcotics, technicalities of procedural nature or otherwise should be overlooked in the larger interest of the country, if the case stands proved the approach of the Court should be dynamic and pragmatic, in approaching true facts of the case and drawing correct and rational inferences and conclusions while deciding such type of cases. The Court should consider the entire material as a whole and if it is convinced that the case is proved then conviction should be recorded notwithstanding any procedural defect. Further, minor discrepancies in the evidence of raiding party do not shake their trustworthiness as expressed by the Hon'ble Supreme Court in the case of *State/ANF v. MUHAMMAD ARSHAD (2017 SCMR 283)*.

11. Apart from the above, the defence plea that has been agitated by the appellant Munir Ahmed is that he had been falsely involved by the complainant. He miserably failed to establish his defence plea by producing documentary or oral evidence regarding said defence plea. It is an admitted position that the appellants were arrested by the Excise police officials and from the secret cavity of truck which was in the driver appellant Munir Ahmed's exclusive possession and control, a huge quantity of 200 K.Gs charas was recovered and it would be sufficient for an ordinary person of prudent mind to realize that such huge quantity of contraband could not be foisted upon the appellant Munir Ahmed. In this respect, we are fortified by the dictum laid down in the judgment dated 08.01.2020 passed by the Hon'ble Supreme Court in the case of *Shazia Bibi v. The State (Jail Petition No. 847 of 2018)*. With regard, the contention of learned Counsel that the evidence of Excise officials is not trustworthy and that no independent or private person has been cited as witness, therefore, per the counsel the case of the prosecution is doubtful, is concerned, same has no force as such contention raised by learned Counsel could have been considered when the evidence of Excise officials was based upon untruthfulness casting uncertainty, enmity and ambiguity. As far as their testimonies are concerned, there is no universal rule that evidence of an interested witness *per se* must be invariably corroborated by independent evidence. If that were the cases, then why would the courts at all take into account the testimony of interested witness? If no other independent witness is available in the case, it would result in a grave miscarriage of justice to insist upon independent corroboration. Excise officials are good witnesses, as any other private witness and their evidence is subject to the same standard of proof and the principles of the scrutiny as applicable to any other category of witnesses; in absence of any animus, infirmity or flaw in their evidence, their testimony can be relied upon

without demur. In this respect, reliance is placed on the case of *Matiullah v. The State (Crl. Petition No. 18 of 2019)*.

12. As far as the establishment of role and the question of exclusive possession are concerned, it is well established principle of law that the driver of the vehicle in which the contraband is being transported is solely responsible for the same. In this regard, the Hon'ble Apex Court in the case of *Hussain Shah and others v. The State (PLD 2020 Supreme Court 132)* has held as under:-

“3. Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that the recovered substance was Charas. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses.”

13. In case of *Kashif Amir v. The State (PLD 2010 SC 1052)* the Hon'able apex Court observed that:-

“It is well settled principle that a person who is on driving seat of the vehicle, shall be held responsible for transportation of the narcotics, having knowledge of the same as no condition or qualification has been made in Section 9(b) of CNS Act that the possession should be an exclusive one and cannot be joint one with two or more persons. Further, when a person is driving the vehicle, he is Incharge of the same and it would be under his control and possession, hence, whatever are details lying in it would be under his control and possession. Reference in this behalf may be made to the case reported as *Muhammad Noor v. The State (2010 SCMR 927)*. Similarly, in the case of *Nadir Khan v. The State (1988 SCMR 1899)* this Court has observed that knowledge and awareness would be attributed to the In charge of the vehicle.”

14. Keeping in view the above position, discussion and circumstances, we are of the opinion that the prosecution has undoubtedly proven the guilt of the appellant Munir Ahmed beyond shadow of any doubt. The learned counsel for the appellants has failed to point out any material or procedural illegality in the impugned judgment or any infirmity committed by the trial Court while passing

the impugned judgment against him. Thus, the captioned criminal jail appeal is dismissed to his extent.

15. Now coming to the case of the cleaner of the truck Zulfiqar Ali, it is crucial that his case be discussed separately as his role compared to that of appellant Munir Ahmed is very different. Appellant Zulfiqar Ali was the cleaner of the truck from wherein the contraband was recovered. However, a minute perusal of the referred dictum established in the case of **Kashif Amir (supra)**, it is clear that the possession cannot be joint and that the driver of the said vehicle shall be held responsible for the transportation of the same. The recovery of the said narcotics was not on the pointation of the appellant Zulfiqar Ali and the prosecution has failed to establish that he was in knowledge of the presence of the same. Viewing it under that context, the recovery of narcotics could hardly be connected to him as he was sitting beside the driver as an alleged cleaner; hence his responsibility was not at par with that of the appellant Munir Ahmed. The prosecution has not led any evidence to show that the appellant Zulfiqar Ali was conscious of presence of narcotics in the truck while the prosecution was duty bound to do so by providing confidence inspiring evidence against him. In the case of **HUSSAIN SHAH and others (supra)**, the Hon'ble Apex Court with respect to the role of a cleaner has observed that:-

“6. As far as Abdul Sattar appellant is concerned it was alleged by the prosecution that he was a cleaner and a helper of his co-convict namely Hussain Shah and he was travelling in the same vehicle when the said vehicle was intercepted by the raiding party. It has been pointed out before us that according to the evidence brought on the record Abdul Sattar appellant also knew about existence of a cavity in the body of the relevant vehicle but nothing had been said by any prosecution witness about the said appellant having the requisite knowledge about availability of narcotic substance in such cavity of the vehicle. As a matter of fact no evidence worth its name had been brought on the record to establish that the said appellant was conscious about availability of narcotic substance in a secret cavity of the relevant vehicle in which he was traveling along with its driver. The law is settled by now that if the prosecution fails to establish conscious possession or knowledge in that regard then a passenger cannot be convicted solely on the basis of his availability

inside a vehicle at the relevant time. This appeal is, therefore, allowed to the extent of Abdul Sattar appellant, his conviction and sentence recorded and upheld by the courts below are set aside and he is acquitted of the charge by extending the benefit of doubt to him. Abdul Sattar appellant shall be released from the jail forthwith if not required to be detained in connection with any other case.”

16. Under these circumstances, we are of the view that prosecution has failed to establish the guilt of the appellant Zulfiqar Ali beyond reasonable shadow of doubt, therefore, we by extending him benefit of the doubt acquit him of the charge. He be released forthwith if not required in any other custody case.

Instant Cr. Jail Appeal stands disposed of in the above terms.

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