

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.787 of 2019

Present:

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellant : Akhtar Meen son of Khayal Jan.(Nemo).
Respondent : The State through Mr. Zafar Ahmed Khan,
Additional Prosecutor General.
Date of hearing : **18.12.2020**

J U D G M E N T

NAZAR AKBAR, J.--- Appellant Akhtar Meen son of Khayal Jan was tried by learned Ist Additional Sessions Judge/Model Criminal Trial Court (MCTC)/ Special Court (CNS) Karachi Central in Special Case No.467 of 2019, arising out of FIR No.12 of 2019 of P.S. Excise-Central, Karachi, for offence under Section 6/9(c) of the Control of Narcotic Substances Act, 1997. After full dressed trial, by judgment dated **26.10.2019**, the appellant was convicted for an offence under 6/9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs.100,000/-, in default whereof to suffer S.I. for one year more. Benefit of Section 382-B Cr.PC was extended to appellant. Appellant has challenged his conviction and sentence through instant appeal.

2. Briefly stating the facts of the case are that on **04.09.2019** complainant AETO Sheraz Gul Thebo has received spy information about accused Akhtar Meen. On such information he alongwith Constables (1) Arshad Rahim, (2) Syed Irshad Ali, (3) Nawaz Khan, (4) Bharat Kumar, (5) Mohammad Tariq, (6) Muhammad Furqan and lady constable (7) Cristina Nasir on official Mobile No.GS-540-B left Excise P.S, Clifton and reached at main road Nazimabad No.2 near

Subhan Bakery and found a rickshaw having no registration number was coming from front, spy gestured toward him and Excise Police tactfully intercepted it. There was no passenger in rickshaw except driver. AETO Sheraz Gul introduced himself to driver and asked his name, who disclosed his name as Akhtar Meen son of Khayal (the present appellant). On personal search, the complainant recovered cash of Rs.1200/- and original CNIC from the side pocket of the accused and then the I.O asked him to pick up the back seat of rickshaw wherefrom the complainant recovered 13 packets wrapped in yellow plastic tape, which were opened and found chars therein. Therefore, the accused/ appellant was arrested and vehicle was seized and recovered property was also sealed. The complainant himself prepared mashimama of arrest and recovery, inventory of seized narcotics and memo of recovery of personal search. Then he brought the accused and case property at Excise Police Station District Central, Karachi and registered FIR No.12/2019.

3. Next morning (**05.09.2019**) AETO/ Narcotics Officer presented the appellant for remand before the Magistrate and orally requested the accused may be remanded to judicial custody (Ex:3/H). On **18.09.2019** AETO Sheraz Gul himself submitted challan acting as Investigation Officer showing himself and only two of his subordinates EC Syed Irshad Ali and EC Muhammad Tariq as witnesses. The learned trial Court convicted the appellant on the sole testimony of AETO Sheraz Gul and one of the two witnesses of memo of arrest and recovery namely PW-02, EC Irshad Ali and sentenced him as stated above vide judgment dated **26.10.2019**. Therefore, the appellant has preferred this appeal.

4. In view of the fact that everything has been done single handedly by AETO Sheraz Gul from **(i)** receiving purported spy information, **(ii)** forming a raiding party, **(iii)** conducting search and arrest of accused, **(iv)** lodging of FIR as complainant and **(v)** assuming the role of investigating officer to **(vi)** submit challan by showing out of seven members of raiding party only two as witnesses, therefore, we allowed the instant appeal by a short order and directed him to produce his spy in Chamber next day before we begin to write reasons for the short order. The short order dated **18.12.2020** is reproduced below:-

After hearing the case at length and reviewing the material on record we reach to the irresistible conclusion that the case at hand is also a routine false case registered by Inspector Sheraz Gul against the appellant in the name of "spy information". The same accused has already been acquitted in FIR No. 212/2019, registered at P.S. Steel Town, Karachi, under section 6/9-B, CNS Act, 1997 on **17.08.2019**. Copy of Judgment has been provided by the I.O. himself since he has shown this case as pending in the present proceedings.

The brief facts of the case as stated by I.O. are that through an unidentified spy information he came to know that at 2:45 p.m. an un-numbered Rickshaw will start its journey from Shireen Jinnah Colony destined for Kutti Pahari, when the said Rickshaw reached Nazimabad No. 2 it was spotted and stopped. The fact is that their police station is located in Clifton which is a stone throw away from Shireen Jinnah Colony, the police party kept on chasing the said Rickshaw for about two hours till it reached Nazimabad. He recovered 13 K.Gs. of Charas from the said Rickshaw. In the charge sheet, I.O. seems to have been deliberately failed to mention the Rickshaw as case property. We have called the I.O., who stated before the Court that he knows that plying of an un-numbered Rickshaw on the road was in violation of some traffic rules and as well as he admits that in the day time the traffic police was available and he would have sought help from traffic police to have the Rickshaw stopped and rather joined them as recovery mashirs, however, he kept on chasing the Rickshaw for hours. Be that as it may, he did not even inquire from the accused as to who was owner of the Charas and to whom he is going to deliver it. The willful failure of the I.O to find out to whom the accused was going to deliver the Charas highlights his inability to stop crimes. Till date he has not been able to find out the actual owner of the Rickshaw though he

admits that Rickshaw was not owned by the accused to whom he has arrested. He even did not mention color, make or engine number of the Rickshaw. This story gives such a colossal blow to the case of prosecution that his version about recovery of Charas (in the absence of any private mashirs) becomes highly unbelievable.

For these reasons and many other reasons, to be recorded later on, instant Criminal Appeal is allowed, judgment dated 26.10.2019, passed in Special Case No. 467 of 2019, arising out of FIR No. 12/2019, registered at P.S. Excise Clifton, Karachi, for offence under sections 6, 9(c) of CNS Act, 1997 is set aside. Appellant Akhtar Meen son of Khayal Jan shall be released forthwith, if not required in any other custody case.

Next day and even on three subsequent dates the I.O failed to produce the informer/spy on whose information he has prepared the whole case, therefore, we passed the following orders:-

19.12.2020

Mr. Zafar Ahmed Khan, Additional Prosecutor General.
I.O. Inspector Sheraz Gul, AETO is present in person.

Mr. Zafar Ahmed Khan, Additional Prosecutor General is present along with Inspector Sheraz Gul, Assistant Excise and Taxation Officer (AETO)/I.O of the case.

Yesterday while acquitting the appellant/ accused by short order, we have orally directed I.O, Inspector Sheraz Gul to produce the informer/spy on whose information he has prepared the whole case. Yesterday he committed to produce him today, however, today he is giving an excuse that he has called the informer but he is in Sawabi. He states that he has made a phone call from his cell No.0307-0399704 to informer, namely Irfan, on his cell phone No.0345-3100522. In presence of learned Additional P.G we enquired from him that on which date he lastly met with the said informer, he states that he has met with him only on the date when the FIR was registered against the appellant and prior to that he has met with him once or twice and he has no address of the said informer of Karachi. He also states that he does not know the name of owner of rickshaw said to have been involved in the crime. He states that in all the cases, he works on spy information from different spies, however, except Irfan, informer of present case, he has no particulars of any other spy/ informer.

The I.O is directed to produce the informer Irfan within two days. To come up on **22.12.2020**, when he shall also bring the CDR of the said informer.

22.12.2020

Mr. Hussain Bux Baloch, Additional Prosecutor General.

I.O. Inspector Sheraz Gul Thebo, AETO is present.

Call Data Record placed on record. The I.O seeks one weeks' time to produce Irfan on whose sole information the incomplete enquiry and investigation has been done in a case in which 13 Kgs. of chars as recovered from a rickshaw owned by one Manzoor Khan son of Feroz Khan and the I.O did not bother to even record 161 Cr.P.C statement of said owner of rickshaw. May be it was also the direction of the said individual that I.O should not touch the owner of rickshaw. To come up on **29.12.2020** at **11:30 am**; to be taken up in Chamber, on which date the I.O undertakes to bring along Irfan.

29.12.2020

I.O. Inspector Sheraz Gul Thebo, AETO is present.

I.O. Inspector Sheraz Gul Thebo, AETO is present and informed the Court that he has tried to contract the informer on **28.12.2020** around **11:30 am** but the informer told him that his mother is not feeling well, therefore, he cannot attend the Court. We have directed the I.O to find out that the mother of informer is really sick or not and under which doctor she is getting treatment and obtain such information from the informer. Adjourned to **04.01.2021**.

04.01.2021

I.O. Inspector Sheraz Gul Thebo, AETO is present.

Today again I.O., Inspector Sheraz Gul Thebo, AETO is present and informed the Court that the informer is not attending his telephone calls. He is given one week's time to make sure that the informer is being produced before the Court and in case of his failure, the Court will be constrained to presume that no information was received from the spy/informer on the date of incident reported in the FIR and we will complete the detailed judgment by mentioning all this happening from the date of short order. Copies of CDR presented today are also taken on record. Adjourned to **11.01.2021** at **01:30 am**.

5. Our detailed reasoning is as follows:-
6. The only evidence in this case is evidence of PW-1, AETO/Narcotic Officer, Sheraz Gul Thebo, who on the fateful day (**04.09.2019**) was available at Excise Police Station, situated at Bungalow No.28/CF/4/D-27 near DO-TALWAR, Clifton, Karachi. He allegedly received spy information around 11:00 or 11:30 a.m. made

no entry thereof, and according to him he formed a raiding party comprising (7) seven constables (named in paragraph-2) and left P.S at 01:00 p.m. for the pointed place in Nazimabad No.2 along with spy whose name is not mentioned in the list of witnesses but his presence in the police mobile on the way and at the place of arrest and recovery of charas is mentioned in the FIR and the challan. Complainant's entire cross-examination is reproduced below:-

I am complainant so also investigating officer of this case. **I have left PS at about 1300 hours. I left PS from Shahray-e-Faisal to Karsaz and then towards to stadium road to reach pointed place. Spy informed me about the information at about 1130/1200 hours at PS. I have not associated any private person despite of having spy information. It is fact that it is not mentioned in memo that I had weighing scale with me.** It is fact that the type of weighing scale is not mentioned. Vol. says I weighed it on digital scale. **It is fact that I have not produced any document that I am authorized to investigate this case.** Vol. says I am defacto authorized **u/s 21 CNS Act, 1997** to conduct investigation. There is no other officer or official competent to investigate the cases under CNS Act at PS-Excise, Karachi Central. **I have not mentioned chassis number or engine number of rickshaw so also make, model, color or description. It is fact that I have not conducted any investigation about the registration, ownership or other information of seized rickshaw.** I have come to know during interrogation of accused that **one Manzoor Khan son of Feroz Khan provided the said rickshaw to accused.** It is fact that it is not mentioned in memos that the accused was coming from certain direction. Vol. says he was coming from Eidh Gah and was going to Habib Bank Chowrangi. It is incorrect to suggest that **I have not investigated about source of supply of the recovered chars.** Vol. says I have mentioned that accused has brought the said chars from Peshawar. **It is fact that the word Peshawar is not mentioned in my report u/s 173 Cr.P.C. I have not disclosed the details of SOS so also the recipient.** Vol. says accused did not disclose such facts during investigation. Such fact is not mentioned by me. **It is fact that the net weight of chars in chemical report is 12.740 K.Gs. It is fact that I have not weighed the camel color nylon bag at the time of weighing slabs at the spot.** It is incorrect to suggest that I have arrested accused four days prior to this incident. It is incorrect to suggest that as accused had no CNIC and I threaten him to charge him under Foreign Act. It is incorrect suggest that relatives of accused have provided original CNIC to me. It is incorrect to suggest that there occurred harsh

talks b/w me accused, therefore, I charged him in this case falsely. **I have not prepared any sketch of the place of arrest and recovery. It is fact that I have not submitted the recovered chars to chemical examiner office on the same date. Vol. says I have submitted it on 05.09.2019 by myself.** It is incorrect to suggest that nothing was recovered from accused at the time of arrest.

7. The perusal of cross-examination shows that all the actions taken by AETO Sheraz Gul Thebo were contrary to law. Purportedly he has acted in exercise of the power conferred on Provincial Excise Police under **Section 21** of the CNS Act, 1997 by virtue of notification bearing **SRO 787(1)/2004** dated September 17, 2004. In cross examination he has stated that *“I am defecto authorized under Section 21 of CNS Act, 1997 to conduct investigation”*. The notification is reproduced below:-

MINISTRY OF NARCOTIC CONTROL

NOTIFICATION

Islamabad, the 16th September, 2004

S.R.O. 787(I)/2004.--- In exercise of the powers conferred by **sub-section (1) of section 21** of Control of Narcotic Substances Act 1997 (XXV of 1997), and in suppression of its Notification No. S.R.O.656(I)/2004 dated 2nd August, 2004, the Federal Government is pleased to authorize the members not below the rank of Sub-Inspector or equivalent of the Anti Narcotics Force, **Provincial Excise and Police Departments**, Inspector or equivalent of the Customs Department and Subedar in the Frontier Corps in the Provinces of Balochistan and the North-West Frontier, Sub-Inspector or equivalent of Pakistan Rangers (Sind), Sub-Inspector or equivalent of Pakistan Rangers (Punjab), Naib Subedar or equivalent of Pakistan Coast Guards and to the Officers of Maritime Security Agency not below the rank of Chief Petty Officer to **exercise the powers and perform the functions under the aforesaid section and sections 22, 23, 37 (2) and 38 of the said Act within the areas of their respective jurisdiction.**

This notification does not authorize Excise Police to conduct investigation of offences under CNS Act, 1997. The effect of this notification will be discussed in later part of this judgment. Even under the general provision of Criminal Procedure Code, 1898 the

investigation of crime No.12/2019 registered at Excise Police Station, District Central, Karachi has not been assigned to AETO Sheraz Gul Thebo by any competent authority. The perusal of FIR No.12/2019 shows that the FIR has not been registered by the SHO/ Head Moharar of Excise Police Station, District Central Karachi. Both at the start/ beginning and at the end of FIR the AETO has put his own signatures and affixed seal of his office showing his designation as Assistant Excise Officer and Narcotics Officer, Karachi. Then in the later part of FIR nothing is mentioned about the proceedings required to be conducted by the SHO under **Section 157 Cr.P.C.** Even the FIR does not disclose name of its author nor its copies were sent to the concerned officers mentioned in **Section 157** of the Cr.P.C read with **Rule 24.5** of the Police Rules, 1934. **Rule 24.5** of the Police Rules, 1934 is reproduced below:-

24.5. First Information Report Register. (1) The First Information Report Register shall be **printed book in Form 24.5.(1) consisting of 200 pages and shall be completely filled before a new one is commenced cases shall bear an annual serial number in each police station for each calendar year.** Every four pages of the register shall be numbered with the same number and shall be written at the same time by **means of the carbon copying process.**

The original copy shall be **preserved in the Police Station for a period of sixty years.** The other three copies shall be submitted as follows:-

- (a) One to the Superintendent of Police or other gazette officer nominated by him.
- (b) One to the Magistrate empowered to take cognizable of the offence as is required by **Section 157**, Criminal Procedure Code.
- (c) One to the complainant unless a written report in Form 24.2(1) has been received in which case the check receipt prescribed will be sent.

(2)

(3) In the case of the railway police.....

(4) All information required by the form shall be filled in, and thereafter the serial number of each case diary submitted shall be noted on the reverse of the original copy which is to remain at the police station.

(5)
.....

8. Similarly, the perusal of challan which, too, has been submitted by AETO Sheraz Gul Thebo himself does not show that the self-appointed Investigation Officer has presented report under **Section 173** of the Cr.P.C. to any of his superior for its approval or District Public Prosecutor to scrutinize the report as required under **Sindh Criminal Prosecution Service** (Constitution, Functions and Powers) **Act, 2009**. The mandatory provisions of **Section 9** of the said Act are reproduced below:-

9. Conduct of prosecution.- (1) The Prosecutors shall be responsible for the conduct of prosecution on behalf of Government.

(2)
.....

(3) A police report under **section 173** of the Code, including a report of cancellation of the First Information Report or a request for discharge of a suspect or an accused shall be submitted to a **Court through the Prosecutor appointed under this Act.**

(4) The Prosecutor shall scrutinize the report or the request and may-

(a) return the same within three days to the Officer Incharge of Police Station or Investigation Officer, as the case may be, if he finds the same to be defective, for removal of such defects, as may be identified by him; or

(b) if it is fit for submission, file it before the Court of competent jurisdiction.

(5)
.....

(6) Prosecutor may submit to the Court results of his scrutiny in writing as to the available evidence and applicability of offences against all or

any of the accused as per facts and circumstances of the case.

It is always mentioned in charge sheets that the challan has been scrutinized and approved for presentation before the Court, but in the case in hand there is no such note or report of any Public Prosecutor that the charge sheet was examined/scrutinized before it was presented by the I.O in the Court of District and Sessions Judge, Central Karachi. These faults in the prosecution are not only fatal to the case of prosecution but also indicative of the brutal misuse of the powers by AETO/ Narcotics Officer Mr. Sheraz Gul Thebo to arrest a person and send him to judicial custody forthwith without interrogation.

9. We have noted that investigating officer Sheraz Gul Thebo within 24 hours of arrest of the appellant, when produced by him before the VIIth Judicial Magistrate for police remand, the I.O himself orally requested the learned Magistrate to take the appellant into judicial custody and such fact has specifically been mentioned in remand order **(Ex:3/H)**. The allegedly recovered charas was never handed over by the I.O to the Incharge Malkhana. Even recovery of charas from rickshaw allegedly driven by the appellant has not been proved since he himself admitted:-

.....**I have not mentioned chassis number or engine number of rickshaw so also make, model, color or description. It is fact that I have not conducted any investigation about the registration, ownership or other information of seized rickshaw.....**
 **I have not prepared any sketch of the place of arrest and recovery. It is fact that I have not submitted the recovered chars to chemical examiner office on the same date. Vol. says I have submitted it on 05.09.2019 by myself.....**

There is no order of disposal of rickshaw in terms of **Disposal of Vehicles and other Articles** (involved in the Narcotic cases) **Rules 2001** in the impugned order because I.O Sheraz Gul Thebo has not seized Rickshaw under memo of seizer nor he has even mentioned rickshaw as a case property in the charge sheet though he himself has prepared the charge sheet and submitted in Court without approval of prosecution. He has not produced entry of **Register No.XXIX** (Malkhana register) required to be maintained at all the police stations under **Police Rule 22.70**. The requirement of Malkhana Register is that even removal of any article, too, has to be noted in the relevant column of Register No.XIX under **Rule 22.70** of the Police Rules, 1934. It is reproduced below:-

“22.70. Register No.XIX.—This register shall be maintained in Form 22.70.

With the exception of articles already included in register No.XVI every article placed in the store-room shall be entered in this register and **the removal of any such article shall be noted in the appropriate column.**

10. A photocopy of dubious report from a book No.2, **daily diary** of a purported police station has been produced as Ex:3/D which does not disclose particulars of the police station and the I.O himself has attested the said daily diary under his own signatures and seal. It is not attested by anyone from the relevant police station. Nor the name of police station is mentioned on the said daily diary. The attestation is supposed to be made by Incharge of the Police Station or Incharge daily diary register. Even in this dubious daily diary (Ex:3/D) entry No.7 and entry No.10 showing *“Departed from P.S for discharge the official duties”* are factually incorrect. How is it possible that departure of the AETO from Clifton P.S is entered in daily diary of Excise P.S District Central showing his departure at 1:00 p.m when he admits in his cross-examination that *“for reaching at Subhan*

Bakery in Nazimabad No.2, he has traveled from Shahra-e-Faisal to Karsaz and then towards the stadium road". It means entry No.7 is a fake entry in daily diary of Excise P.S. District Central, Karachi because at 1:00 p.m the I.O and others have left Excise Police Station at Clifton and that is why police station is not mentioned before entry No.7. But for this reason neither the FIR nor the daily diary has been attested by any official of Excise P.S, District Central Karachi or Excise Police Station, Clifton. Merely by mentioning in Register No.2, **daily diary** that the case property deposited in the Malkhana of P.S Excise, District Central, Karachi and produced in evidence is not proof of deposit of case property unless Incharge Malkhana or at least copy of Malkhna Register maintained under **Rule 22.70** of the Police Rules, 1934 quoted above is produced. In view of defective record of place of recovery of charas and Vehicles allegedly used in transportation of charas and its subsequent handling, there is hardly any proof of safe custody of charas. In this context one may refer to the case of Haji Nawaz vs. the State (**2020 SCMR 687**). Relevant observations of Hon'ble Supreme Court from page 689, side note "B" are reproduced below:-

.....we have further observed that no evidence worth its name had been produced by the prosecution before the trial court establishing safe custody of the recovered substance at the local Police Station or safe transmission of the samples of the recovered substance from the Police Station to the office of the Chemical Examiner. This Court has already held in the cases of Amjad Ali v. The State (2012 SCMR 577) and Ikramullah and others v. The State (2015 SCMR 1002) that in the absence of any proof regarding safe custody or safe transmission of the recovered substance or the samples thereof a conviction cannot be recorded in a case of this nature.

11. The quality of evidence of the Investigation Officer which has not been corroborated by anyone leads us to believe that even there

was no spy information with AETO. Every document from (i) FIR to (ii) Memo of Arrest and seizure to (iii) challan and (iv) failure to investigate known owner of vehicle used in transporting charas to Katti Pahari creates series of doubts in the prosecution story. Every document has been prepared and then produced by the self-appointed Investigation Officer himself and copies of the same have been attested under his own attestation as true copies of official record without calling custodian of record to confirm that these are copies from official documents. He has repeatedly failed to produce spy on whose information he has allegedly arrested the appellant in a manner narrated in the FIR and evidence (*Refer to order sheets reproduced in para-4 above*). In fact there was no spy information. Mere statement of complainant that he has received spy information which has not been incorporated in any daily diary of police station nor particulars of informer are disclosed anywhere cannot have any evidentiary value unless the spy is called to support the version given by the complainant. In the case in hand the so-called spy has even accompanied with the raiding party but his name was not even mentioned in the list of witnesses, therefore, the entire story build by the complainant collapses in Court. In this context the Hon'ble Supreme Court in the case of Islamic Republic of Pakistan through Secretary Ministry of Interior and Kashmir Affairs, Islamabad vs. Abdul Wali Khan M.N.A former President of Defunct Awami National Party (**1976 PLD SC 57**) has held as under:-

Now the evidence which has been adduced in this case consists partly of oral testimony adduced through the mouths of some 31 witnesses and a vast number of documents, some tape-records of speeches delivered from time to time by the leaders of the dissolved party and monitored reports of some foreign official broadcasting stations. **The oral evidence, which is based purely on hearsay, cannot, of course, be admissible unless the informant or the source, from whom the evidence was**

obtained, is himself produced to give evidence. In most cases, those sources are either spies or informers and, therefore, the authenticity of the source of such information cannot be placed on any higher level than the evidence of the spy or the informer. The usual tendency of Courts is to look upon such evidence with some "degree of disfavour", but where the spy or the informer himself is not being called to support the version given by him, the reliability of the report, even if it comes through the agency of a very highly placed responsible officer, cannot be enhanced.

12. Another aspect of the case is that AETO/Narcotic Officer has allegedly recovered Charas from an unnumbered rickshaw which according to him was driven by the appellant. In the challan/charge sheet he himself has disclosed name of the owner of said rickshaw and how and also that from where the accused has brought the charas and where was he going in the following passage in charge sheet:-

“....., the accused disclosed that he resides at Khyber Agency and he brought 13 packets of Charas from Khyber Agency to Shireen Jinnah Colony Karachi by Bus on 04.09.2019 in morning and took a Richshaw for 02 hours from one of his village acquaintance person namely **Manzoor Khan S/o Feroz Khan resides at Shireen Colony** and after concealing the Charas under back seat of Rickshaw and was going to Kati Paari.....”

But no explanation has been offered by the Investigation Officer (PW-1) that under what circumstances and why he did not enquire and find out from **Manzoor Khan** that how and why his rickshaw was found involved in an offence under **Section 6** of the CNS Act for transporting 13 Kg. Charas from Sheerin Jinnah Colony in District South to Katti Pahari in District Central, Karachi. The owner of “**conveyance**” used by the alleged accused to transport 13 Kg Charas should have been included as co-accused for an offence under **Section 7 and 8** of the CNS Act, 1997 since the Charas was allegedly recovered from a rickshaw which was owned by Manzoor Khan son of

Feroz Khan. **Section 7 and 8** of the CNS Act, 1997 are reproduced below:-

7. Prohibition of import or export of narcotic drugs, etc.-

(1) No one shall----

- (a) import into Pakistan.
- (b) export from Pakistan
- (c) **transport within Pakistan;** or
- (d) transship;

any narcotic drug, psychotropic substance or controlled substance, save in accordance with rules made under sub-section (2) and in accordance with the conditions of any license, permit or authorization for that purpose which may be required to be obtained under those rules.

(2)

8. Prohibition on trafficking or financing the trafficking of narcotic drugs etc. No one shall-

- (a) organize, manage, traffic in, or finance the import, **transport**, manufacturing or trafficking of, narcotic drugs, psychotropic substances or controlled substances, or
- (b) use violence or arms for committing or attempt to commit an offence punishable under this Act.

Why the I.O has not even tried to find out anything about the rickshaw is serious issue. He admitted in his cross-examination:-

I have not mentioned chassis number or engine number of rickshaw so also make, model, color or description. It is fact that I have not conducted any investigation about the registration, ownership or other information of seized rickshaw. I have come to know during interrogation of accused that one Manzoor Khan son of Feroz Khan provided the said rickshaw to accused.

In view of the above facts and faulty inquiry particularly by not interrogating the owner of transport (despite knowledge of his

particulars) used in trafficking of narcotics the AETO/Narcotic Officer Sheraz Gul Thebo is prima-facie guilty of impliedly conniving with the accused guilty of offence under **Section 7** and **8** of the CNS Act, 1997. Beside the other several legal flaws noted in the above discussion, in absence of inquiry and investigation necessary to control the nuisance of drug trafficking, there was no corroborative evidence to connect the appellant with the Charas allegedly recovered from the rickshaw.

13. Furthermore, the complainant/seizing officer after having taken action in accordance with **sub-section (1)** of **section 21** of the CNS Act has also utterly failed to follow the mandatory command of law for the seizing officer contained in **Sub-section (2)** of **Section 21** of the CNS Act. **Section 21** of the CNS Act as per the following:-

21 “Power of entry, search seizure and arrest without warrant. – (1) Where an officer, not below the rank of sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who **from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug psychotropic substance or controlled substance** in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and a warrant for arrest or search cannot be obtained against such person without affording him an opportunity for the concealment of evidence or facility for his escape such officer may –

- a)
- b)
- c)
- d)

(2) **Before or immediately after** taking any action under sub-section (1), **the officer** referred to in that sub-section **shall record the ground and basis of his information and proposed action and forthwith send a copy thereof to his immediate superior officer.**

The Seizing Officer Mr. Sheraz Gul Thebo neither **before** nor **immediately after** taking action “*recorded the ground and basis of his information and proposed action*” Nor he sent a copy thereof to his

immediate superior officer **forthwith**. The use of words/phrase “before or immediately” and “forthwith” by the law makers in this **sub-section** have made the provision of **Sub-section (2)** of **Section 21** of the CNS Act as compulsory and mandatory instructions to be followed by the seizing officer. The conduct of Complainant who is also the seizing officer was patently derogatory to both **Sub-sections** of **Section 21** of the CNS Act as well as **Section 23** of the CNS Act, because he has stopped the rickshaw on the pointation of so-called spy but has not reported action taken by him on spy information to his immediate superior in writing forthwith. In fact the requirement to comply with the mandatory provisions of **Section 21(2)** of the CNS Act becomes all the more necessary for the seizing officer who inspite of the availability of independent mushirs avoided to include them as witness of search and arrest on the pretext of **Section 25** of the CNS Act. The legal requirement of “**forthwith**” sending a copy of recorded ground and basis of information and action taken by the said officer to his immediate superior officer is a mandatory check placed by the legislature on possible manipulation by the seizing officer in the information received, if any, by him and seizure of narcotic drugs to favour or prejudice the case of an accused.

14. Now we examine the preposition that whether the AETO/ Narcotics Officer at all had the power under **Section 21** of the CNS Act, 1997 to investigate the offence and prosecute the appellant after lodging the FIR. We have already held in the case of Abdul Rehman son of Deen Muhammad Zahri Baloch vs. The State through Pakistan Coast Guards (Criminal Jail Appeal No.144 of 2019) that the power conferred on the various Government Agencies by virtue of the Notification reproduced in para-7 above do not include power to investigate the offence and detain an accused in a police station

under the control of any of the said agencies. All the agencies mentioned in the notification under **Section 21** of CNS Act, 1997 are creation of special law and in each case the policing powers given to the personnel of the said agencies are limited to the offences defined in the respective Special Laws. The police stations established under the special laws are not meant to detain offender/ criminal of any other law except the law under which such police stations are established. Nor the said Agencies are supposed to register a case in their police station for an offence outside the scope of the said special laws since such P.S are established only for the prosecution of specified offences under special laws. In the case in hand, the AETO was working under the **Sindh Abkari Act, 1878** and the police station notified by the Sindh Government were exclusively declared **Excise police station** meant to exercise jurisdiction for enforcement of Abkari Laws. It would be more clear if we look at the language of the notification issued by the Additional Chief Secretary, Home Department on 24.5.2013 establishing an **Excise Police Station**. It is reproduced below:-

GOVERNMENT OF SINDH
HOME DEPARTMENT

NOTIFICATION

No.POL-HD/7-43/89:- In continuation of this Department's Notification of even number dated **28.03.2009**, the Government of Sindh is pleased to accord permission to declare the new Premises Excise and Taxation Department viz **Bungalow NO.28/CF/IX/D-27 Clifton, Karachi as "Excise Police Station" having the jurisdiction of Karachi Region for enforcement of Excise Laws by the Excise and Taxation Department, Government of Sindh, Karachi.**

ADDITIONAL CHIEF SECRETARY
HOME DEPARTMENT

No.POL-HD/7-43/89: Karachi dated the 24th May, 2013

Certainly when the AETO arrested the appellant under CNS Act, 1997, he was not exercising power under **Section 41** and **41-A** of the Sindh Abkari Act, 1878. The provisions of Sindh Abkari Act, 1878 are reproduced below:-

41. Certain Abkari Officers to have powers of investigation.-(1) Every Abkari-officer not below such rank as the Provincial Government may prescribe shall within the area of which he is appointed **have power to investigate the officers punishable under this Act.**

2.

41-A. Procedure on arrest.- Every person arrested and thing seized under **section 36, 37 or 40** shall, unless the arrest or seizure has been made by an Abkari-officer exercising powers under section 41, be **forwarded without delay to the nearest Abkari-officer exercising such powers**, or, if there be no such officer within a reasonable distance, to the officer in charge of the nearest Police-station.

15. The appellant was not arrested under **Section 36, 37 or 40** of the Abkari Act, 1878. The appellant was arrested under **Section 21** of CNS Act, 1997 for an offence under **Section 6/9(c)** of the CNS Act, 1997, therefore, when the complainant and self-appointed Investigation Officer in his cross-examination has claimed that he has acted under **Section 21** of the CNS Act, 1997, then instead to forwarding the appellant on arrest to the Abkari Officer, he ought to have dealt with the appellant under **Section 27** of the CNS Act, 1997 which is reproduced below:-

27. Disposal of persons arrested and articles seized:

(1) Every person arrested and article seized under a warrant issued under Section 20 shall be forwarded without delay to the authority by whom the warrant was issued; **and every person arrested and article seized under section 20 or section 21 shall be forwarded without delay to--**

(a) The officer-in-charge of the **nearest police** station;

- (b) The Special Court having jurisdiction.
- (2) **The authority or officer** to whom any person or article is forwarded **under this section shall**, with all convenient dispatch, **take such measures as may be necessary under the law for the disposal of such person or article.**

The use of words “**nearest** police station” in clause (a) means a police station under the local police and not the Excise Police Station having jurisdiction to detain persons arrested and things seized under Section 30, 37 or 40 of Sindh Abkari Act, 1878 for enforcement of Excise Law, therefore, the appellant was unlawfully detained in Excise Police Station in derogation of **Article 4** of the Constitution of Pakistan since he was allegedly arrested for an offence under **Section 6/9(c)** of the CNS Act, 1997 he was required to be treated in accordance with CNS Act alone and not under the Sindh Abkari Act, 1878. It was clear violation of the right of the appellant to be dealt with in accordance with **Section 27** of the CNS Act, 1997. The provisions of **Section 27** of the CNS Act need to be read with Police **Rule 24.19(4)** of the Police Rules, 1934 which is reproduced as follows:-

24.19. The duties of the Police as Excise Officers.--

- (1) Co-operation between the excise and police forces is necessary for the detection and investigation of excise offences. The Inspector-General of Police and the [Board of Revenue] lay stress upon this cooperation as one of the principal secrets of successful working. **Any case of jealous or obstructive working will be severally dealt with.**
- (2)
- (3)
- (4) An excise inspector or sub-inspector shall not ordinarily attempt a search or make an arrest by

himself. **He shall always obtain the assistance of the police sub-inspector. If, however, delay is likely to defeat the ends of justice, the excise inspector or sub-inspector shall make the arrest or search himself, and at the same time send to the police sub-inspector for assistance.**

In the case in hand the self-appointed investigation officer, AETO himself admitted in cross-examination that *“spy informed me about the information at about 1130/1200 hours at P.S”* and the appellant/accused was arrested at 2:45 p.m near Subhan Bakery Nazimabad No.2. It means there was no hurry and there was enough time to obtain the assistance of Nazimabad police before the arrest and search of the appellant. It means the I.O has also violated mandatory Police Rules by not obtaining assistance of police sub-inspector required as cooperation between the excise and police force. Therefore, on completion of an action taken on the purported spy information by the AETO/ Narcotics Officer under **Section 21** of the CNS Act, the concerned officer of Excise police was required to **“dispose of the person (the appellant) arrested and articles seized”** in terms of **Section 27** of the CNS Act. The legal position is that once personnel of Excise police while performing functions under **Sub-section 1** of **Section 21** of the CNS Act have arrested the appellant for committing an offence under **Section 6, 7 and 8** of the CNS Act 1997, they should have immediately forwarded the appellant to the officer-in-charge of the **nearest** police station alongwith seized Charas in obedience of the provisions of **Section 27** of the CNS Act, 1997. Not only the provisions of **Section 27** of the CNS Act, 1997 were violated by AETO Mr. Sheraz Gul Thebo but he has clearly failed to follow the relevant **Rule 24.19** of the Police Rules which demands that any one guilty of violating police Rules has to be severely dealt with.

16. In view of the above discussion in addition to the several dents in the prosecution story against the appellant, the action taken by the AETO/ Narcotic officer against the appellant after his arrest and alleged seizure of Charas while performing function under **Section 21(1)** of the CNS Act was illegal, void ab-initio, without any lawful authority and, therefore, the entire trial has been vitiated. All the legal flaws pointed in prosecution case under the CNS Act, 1997 on account of illegal action taken by the AETO/Narcotic Officer seems to have not been noticed by the Special Court in the impugned judgment. However, while holding that all the actions taken by the Excise police in respect of the appellant were outside the purview of **Section 21** of the CNS Act, 1997 were an illegal practice, it cannot be allowed to perpetuate. We, therefore, hold that:-

- i) The Excise police have no powers to prosecute and/or deal with a person arrested under **Section 21** of the CNS Act, 1997 for offence under the CNS Act, 1997 except to handover such arrested person and seized article to the nearest police station with immediate information to his superior as mandatory requirement of **Sub-section (2)** of the said section as non-observation of mandatory law would not only creates serious doubts in the case of prosecution but it would also be illegal and its benefit must go to the accused.
- ii) Whoever arrests any person and seizes narcotic in exercise of powers conferred under the notification reproduced in para-7 above shall immediately handover both the accused and case property including the vehicle, if any, is involved in the crime to the nearest local police station forthwith.
- iii) Whoever will detain any person arrested and article seized under **Section 20** or **21** of the CNS Act, 1997 in any place including Excise Police Station or any other

Police Station under special law except in the local police station nearest to the crime scene and police station established under **Section 9** of Control of Narcotic Substances Act, 1997, shall be guilty of illegal detention of such person and the arresting authority and the Station House Officers of such police station shall be proceeded against for keeping the person concerned in illegal custody.

17. Before parting with this judgment, we are under an obligation to report the highhandedness of the AETO/Narcotic Officer to the Director General of Excise & Taxation to take strict disciplinary action against the AETO/Narcotic Officer, Sheraz Gul Thebo for his failure to follow the basic criminal law from **(i)** registration of FIR to **(ii)** the arrest and recovery of narcotic; **(iii)** illegally forwarding the appellant for detention in the Excise Police Station, District Central, Karachi; **(iv)** failing to show rickshaw as case property and obtaining orders of its confiscation **(v)** failing to investigate offence under **Section 7 and 8** of the CNS Act, 1997 despite evidence against the owner of rickshaw as well as **(vi)** Preparing the documents produced by him in Court under his own attestation without producing authors of these documents etc and many other illegalities one can easily find out from reading of this judgment. He must also be questioned that how can he be attesting authority of police diary maintained at police station under the statutory Police Rules where he himself cannot be author of said documents nor custodian of all registers maintained in Police Station. The action proposed to be taken against the AETO should be initiated on receiving this judgment by the competent authority and progress be intimated to this Court through MIT-II for perusal in Chamber.

18. Copy of this Judgment may also be sent to (i) D.G Excise and Taxation, Sindh and all SHOs of Excise police Stations in Sindh to ensure that the illegality committed by the Excise police in prosecution of the cases under the CNS Act should be stopped forthwith and investigation and prosecution of all the pending cases registered by the Excise police in exercise of powers and functions under **Section 21(1)** of the CNS Act may be assumed/ transferred to the local police according to the place of crime to deal with the menace of narcotics and its trafficking etc. strictly in accordance with the CNS Act, 1997. Details of pending cases registered under Section 6, 7, 8 and 9 of the CNS Act, 1997 in Excise Police Station should immediately be sent to this Court through MIT-II and pending investigation should be transferred to the local police strictly according to **Section 27** of the CNS Act, 1997 under intimation to this Court in writing through the office of MIT-II for perusal in Chamber within thirty (30) days of receipt of this Judgment.

19. The office is directed to send copy of this Judgment to all the Special Courts established in Sindh under **Section 45** of the CNS Act for trial of cases under CNS Act with direction to strictly follow the provisions of the CNS Act, 1997 in the light of our findings from para-6 onwards.

JUDGE

JUDGE

Karachi,
dated:19.06.2021

Ayaz Gul