IN THE HIGH COURT OF SINDH AT KARACHI

Present: Ahmed Ali M. Shaikh, CJ
Omar Sial, J

Criminal Appeal No. 265 of 2014

Appellant	**:**	**Abdul Sattar** **through Mr. Inamullah Khan, Advocate**
		Versus
Respondent	**:**	**The State** **through Ms. Firdous Faridi, Special Prosecutor,** **Pakistan Coast Guard**

JUDGMENT

Omar Sial, J.: A party of the Pakistan Coast Guards on 16-9-2012, on spy information received, was checking vehicles near the Gharo Regulator when it noticed a suspicious Mehran car without number plates at about 12:30 p.m. which it signaled to stop. There were two persons in the car. Abdul Sattar, the appellant, was driving the vehicle whereas the name of the passenger was Mohammad Yaseen. Upon searching the car, 95 packets of charas were found from concealed compartments in the car. 92 packets weighed one kilogram each whereas the three remaining packets weighed a total of two kilograms. In all, 94 kilograms were recovered. The arresting officer took samples of 10 grams from each packet of charas. The narcotics was sealed, the driver and the passenger of the car arrested.

2. The accused pleaded not guilty and claimed trial. The prosecution examined four witnesses. Subedar Arshad Mehmood who was the complainant and the officer who made the arrest and recovery was examined as the first prosecution witness. LNK Arshad Nadeem Khalid who was a witness to the memo of arrest and recovery was the second prosecution witness. The investigating officer of the case Subedar Tasawar Hussain was the third prosecution witness. The accused in their section 342 Cr.P.C. statements pleaded innocence and further stated that they were picked up from their houses on 15-9-2012, taken to the Coast Guards Headquarters and the false case registered against them.

3. The learned Court of Special Judge, Control of Narcotic Substances in Thatta announced its judgment on 13-8-2014 in terms of which Mohammad Yaseen was acquitted of the charge against him but Abdul Sattar was convicted and sentenced to

rigorous imprisonment of 12 years and a fine of Rs. 60,000 or undergo a further period of 8 months and 15 days S.I. in default of payment. The benefit of section 382-B Cr.P.C. was given to him. Abdul Sattar, through these proceedings has impugned the judgment of the learned trial court.

4. We have heard the learned counsel for the appellant as well as the learned Special Prosecutor of the Pakistan Coast Guards. We have minutely gone through the record of the case and our observations are as follows.

5. According to Subedar Arshad Mehmood the incident occurred on 16-9-2012. He, together with a Pakistan Coast Guard party consisting of LNK Arshad Nadeem Khalid, Sepoy Majid Ali, Sepoy Imran and Driver Rashid were on duty checking vehicles on the Gharo – Mirpursakro Road when his superior informed him over the phone that the Coast Guard party should go to the Gharo Regulator as information regarding smuggling had been received. The Coast Guard party stopped the appellants at 12:30 p.m. According to the Subedar "*we took about an hour at the spot proceeding of arrest, recovery and preparation of memo.*" This would mean that the Coast Guard party was at the Gharo Regulator till approximately 1:30 p.m. The Subedar testified that "*at about 1:40 p.m. noon I had completed the spot proceedings.*" Indeed, the memo of recovery also shows that it was prepared at 1:40 p.m. What baffles us is that even though the Subedar himself testified that the distance between the Gharo Regulator and the Battalion Headquarters in Korangi, Karachi is 100 kilometers, the Coast Guard party was able to cover the 100 kilometers distance in 20 minutes, as the Subedar testified that "*we reached at Battalion Headquarters Korangi at about 2:00 p.m.*" The F.I.R. in the case which was admittedly lodged in Karachi shows the time of 2:10 p.m. as the time of registering the report. Subedar Tasawar Hussain who was the investigating officer of the case, testified that "*in the car the distance will be covered within two hours.*" Further, the notice under section 22 of the CNS Act that was admittedly given to the accused on the spot shows the time as 1400 hours. It was simply impossible that the Coast Guard party could travel to Korangi, Karachi from the spot of incident in 20 minutes. If the notice under section 22 CNS Act, 1997 is to be believed, then the Coast Guard party was still in Gharo when it says that it was in Karachi. While the Subedar Arshad Mehmood testified that the three open packets that were recovered from the car had an aggregate weight of 2 kilograms, the witness to the memo of recovery LNK Arshad Nadeem Khalid testified that each packet weighed 2 kilograms. This aspect of the case puts in doubt the entire prosecution case and the credibility of the witnesses examined at trial.

6. Subedar Arshad Mehmood was examined as the first prosecution witness. In his examination-in-chief he testified that he had recovered 95 packets from the Mehran car. 92 packets were sealed and weighed one kilogram each whereas 3 packets were opened and the aggregate weight of these packets was 2 kilograms. In his cross examination, Arshad testified that "*we took samples from 20 packets of the recovered packets of charas to send to the chemical examiner*." In his testimony, he remained unsure whether he had taken samples from 20 or 22 packets but did firmly state that "*Out of 95 kilograms, I collected samples from 20 or 22 packets.*" This case occurred in September 2016. By that time the landmark judgment of the Lahore High Court in Ghulam Murtaza vs The State (PLD 2009 Lahore 362) was not only in the field but had been affirmed by the Honorable Supreme Court in Ameer Zeb vs The State (PLD 2012 SC 380). Surely, the Pakistan Coast Guards knew that in order to make a bid for a successful prosecution, samples from each of the packet should have been taken. This was not done. The learned trial court took this into account and awarded a lesser sentence to the appellant. Our purpose to highlight this aspect here is to show, in the circumstances of the present case, that the credibility of the prosecution witness was not impeachable in the matter.

7. The prosecution case was that the appellant and Mohammad Yaseen were both in the car at the time of its seizure. In fact, Subedar Tasawar Hussain testified that Yaseen told him that he and Abdul Sattar had been involved in the narcotics business. All the prosecution witnesses testified to the effect that Yaseen was equally involved in the crime; however, based on the same set of facts and evidence, Yaseen was acquitted and the State did not challenge his acquittal. The primary reasons for the learned trial court to acquit Yaseen were that the memo of recovery does not record that Yaseen's name was in the memo, the notices for search of the vehicle ostensibly given by the Coast Guards to the accused also do not show Yaseen's name, the statements of the witnesses recorded under section 161 Cr.P.C. also did not reveal the name of Yaseen and the F.I.R. too did not contain the name of Yaseen in its body. Subedar Tasawar Hussain, in his cross admitting that "*I have gone through all the documents carefully received in investigation. I see Exh. 9/C and it does not figure out in its content the name of accused Mohammad Yasin. I see Exh. 9/A & 9/D (notices served to the accused persons) it also does not figure out the name of accused Mohammad Yasin. The name of Mohammad Yasin is also not narrated in the statements of the witnesses……..I see FIR (Exh 9/E) and the name of Mohammad Yasin is not figured out in the main contents of the FIR but only in the title.*" The learned trial court, in our opinion, rightly acquitted

Mohammad Yasin, however, the credibility of the prosecution witnesses once again was adversely impacted by this aspect.

8. The report of the Chemical Examiner, is dubious to say the least. The original text in several places has been whitened and different inscriptions made. Even though the inscriptions are initialed, it cannot be determined with certainty whether the amendments were made by the Chemical Examiner or whether the same were made subsequently. In such a situation it would have been proper for the Chemical Examiner to be called as witness to verify whether it is he who made the amendments. The evidentiary value of the chemical examiner's report, is corroded.

9. The maker of the memo of arrest and recovery was admittedly Sepoy Imran. On the one hand Subedar Arshad Mehmood testified that "I prepared the memo of recovery" while in the same breath he said "*it bears the handwriting of sepoy Imran.*" Perhaps the sepoy wrote it for the Subedar. However, the Subedar did not clarify as to why he himself could not write the memo. Doubt whether the Subedar had anything to do with the memo of recovery were strengthened LNK Arshad Nadeem Khalid (who was a witness to the memo) testified that "*The sepoy Imran prepared the inventory and memo of it and read over to us and I put my signature along with sepoy Majid Ali mashir of it.*" Yet again, the credibility of the prosecution witness took a hit. The memo of recovery does not specifically record as to from how many packets the samples of 10 grams each were taken. Instead, it records that "*having taken little quantity of hashish from the different packets and made 20 parcels*". Further, the investigating officer of the case, Subedar Tasawar Hussain, while referring to the memo of recovery, testified that "as per the memo, the color, engine number and the chassis number of the seized car is not mentioned so also it does not disclose the secret cavities wherefrom the charas was recovered and its quantum." In the said memo it is not mentioned from which packets the samples were separated out. As per the mashirnama, no mark or number was given to the packets wherefrom the samples were collected.

10. The seizure was said to have been made from the seats of a Mehran car. The learned trial judge took photographs of the seats, which photographs were exhibited at trial. Based on the photos, we find it unusual that 94 kilograms of charas could be stored and then subsequently recovered by making small cuts on the seats. In fact, the foam filling of the seats appears to be visible in the said seats. Doubt is further raised when the investigating officer testified that "it is not possible that the entire case property weighing about 94 kilograms should be concealed in the secret cavities." However, in

the next breath he said "*but the entire property can be placed inside the seats of the car.*"

11. Subedar Tasawar Hussain did not bother to carry out a comprehensive or a complete investigation. He admitted in his testimony that he only recorded the statements of the complainant, one witness to the memo and one Majid Ali. Majid Ali was not examined as a witness. Very little or no effort was made by him to find out who the owner of the car was. Though he did say that he was told that the owner is one Abdul Waleed but he did not produce any evidence at trial to this effect. He testified that he had not even bothered to inquire about the NIC or the driving license of the appellant – "I had not inquired from the accused about his driving license and his CNIC." No effort was made by the investigating officer to have the so called confessions made by the accused to be recorded judicially. We also do not understand how the investigating officer could say with such certainty that the narcotics produced at trial were the same as the ones given to him as it was his own claim that he had received the sacks in a sealed condition. Either he desealed the bags to look inside or he could possibly not know that the material inside the sack was the narcotics which were seized by the complainant.

12. He made negligible effort to trace out the supplier of the narcotics and the person to whom they were to be delivered even though according to him, he knew who they were. We have noticed in many such cases, that the investigating agencies only bother to arrest the carrier or an intermediary. No effort is made to trace and apprehend the drug barons who are the actual culprits of our society. The carriers play a small role in the menace of drugs but it is the big barons who use these poor and deprived members of the society to further their nefarious ends. The menace of drugs will not stop on only the arrest of carriers but will be addressed if the actual suppliers are taken to task. Even if Abdul Sattar was carrying the charas, his background shows that he possibly could not even buy one kilogram of any narcotic with his finances let alone trade in nearly 100 kilograms of the same. Our observations here by no stretch mean that the carriers should not be booked but they are made to reflect our disappointment at the big fish never being traced in such offences. We are cognizant that allegedly a huge quantity was recovered in the case, but we cannot close our eyes to the many lacunas in the prosecution case. The Control of Narcotic Substances Act, 1997 carries stringent punishments and hence it entails a greater responsibility upon the investigation agencies to ensure that all formalities are carried out in a proper manner,

that all aspects of the case are investigated, that efforts are made to capture the big fish and above all that an accused constitutional right of a fair trial is also adhered to.

13. In view of the above, we are of the opinion that weak and a lopsided investigation and prosecution created doubt in the prosecution case, the benefit of which should have gone to the accused. For a safer administration of justice we allow this appeal and acquit the appellant of the charge. He may be released forthwith if not required in any other case.

JUDGE

CHIEF JUSTICE