IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Cr. Jail Appeal No. D – 92 of **2021**
(*Najeebullah Brohi versus The State*)

Spl. Cr. Appeal No. D – 96 of **2021**
(*Abbas Ali Baloch versus The State*)

Present:
Mr. Muhammad Iqbal Kalhoro, J.
Mr. Arbab Ali Hakro, J.

Dates of hearing : **28.11.2023** & **06.12.2023**

Date of announcement : **21.12.2023**

Mr. Abdul Baqi Jan Kakar, Advocate for appellant in Spl. Cr. Appeal No. D-96 of 2021.
Mr. Gul Mir Jatoi, Advocate for appellant in Spl. Cr. Jail Appeal No. D-92 of 2021.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Appellants, having been convicted through impugned judgment dated 04.12.2021, passed by learned Additional Sessions Judge-III / MCTC-II / Special Judge (CNS), Sukkur in Special Case No.41 of 2021 (*Re: The State v. Abbas Ali Baloch & another*), arising out of Crime No.01 of 2021, registered at Police Station Excise, Rohri Circle U/S 9(c) of Control of Narcotic Substances Act, 1997, and sentenced to suffer imprisonment for life with payment of fine of Rs.1,00,000/- (Rupees one lac) each, or in default, to undergo SI for 01 year with benefit of Section 382-B CrPC, have filed this Appeal challenging the same.

2. As per brief facts, a team of Excise Police, Sukkur headed by ETI Meenhal Khan spotted a suspicious Mazda Hino Truck No. LXP-2676 near Excise Check Post, beside Arore University, National Highway on 24.02.2021 at about 05:00 p.m. They stopped it and found appellants travelling in it. Rs.5,000/- (Rupees five thousand) and Rs.1,000/- (Rupees one thousand) were recovered from personal search of appellants Abbas Ali and Najeebullah respectively. Search of the truck led to a secret cavity near fuel tank, from which 200 plastic shoppers containing *charas* were recovered. Each shopper was found to have two slabs i.e. 500 grams each, total 1 kilogram, and thus in all 200 kilograms of *charas* was recovered. From each shopper, 100 grams of *charas* were segregated for sample to be

examined by the chemical lab, hence 200 samples were prepared and sealed in one parcel, whereas remaining *charas* was sealed in 10 different plastic sacks by putting 20 shoppers in each plastic sack. Such recovery induced arrest of appellants and preparation of relevant memo. The property and accused thereafter were brought at DIU-I Sukkur, where FIR was registered and necessary entries in daily diary were kept.

3. After usual investigation, the case was challaned showing both the appellants arrested. In the trial, a formal charge was framed against them for committing offence U/S 9(c) of CNS Act, 1997: keeping in possession 200 kilograms of *charas*. They pled not guilty and claimed trial. Hence, prosecution examined complainant as PW-1 (Ex.07). He has produced relevant daily diaries, memo of arrest and recovery duly attested by the witnesses / *mashirs*, FIR and report of chemical lab. At Ex.08, prosecution has examined PW-2 Excise Constable Shakeel Ahmed, who was part of the Excise Police team and had also acted as *mashir*. In his evidence, he has confirmed the story of FIR and has verified preparation of memo of arrest and recovery in his presence. After their evidence, statements of appellants U/S 342 CrPC were recorded. They have denied prosecution's case and have submitted that they are labourers working at Quetta. On 23.02.2021, while travelling in a bus from Quetta to Karachi and Hyderabad respectively, to meet their relatives etc., they were alighted by the Excise Police at Excise Chek Post near Central Jail, and involved in this case falsely. They have further said that recovery of *charas* has been foisted upon them. By impugned judgment, the trial Court has however decided the case in the terms as stated in Para No.1.

4. We have heard learned Counsel for the appellants. They have stated that appellants are innocent, have been falsely implicated in this case. Learned trial Court has mis-appreciated the evidence and has wrongly concluded appellants to be guilty of the offence. The place of incident was a thickly populated area, but not a single person was associated as a witness or *mashir* in the case. Alleged recovery was neither effected on pointation of the appellants, nor the secret cavity of alleged truck was searched at the instance of the appellants, hence the case against the appellants is doubtful. Appellant Abbas Ali was juvenile at the time of alleged offence, but his plea was neither considered, nor decided in accordance with law by the trial Court. The presence of secret cavity in the truck was not established by the prosecution in the trial, nor the fact that it was adjacent to the fuel tank of the truck, hence the case against the appellants is of a doubt; that no document was produced by the

prosecution in the trial to show that in fact the *charas* was found inside the alleged secret cavity of the truck; that samples were dispatched to the chemical examiner after much delay, which has not been properly explained by the prosecution; that Form-I, through which the samples were sent to chemical lab, has not been produced in the trial, hence safe transmission of the samples to the lab is not without a question; that the appellants cannot be saddled with recovery of entire 200 kilograms, and at the most, if the prosecution case is found to inspire confidence, they would be held responsible for quantity of *charas* in the samples only.

5. It was further argued that a parcel containing combined samples was dispatched to the lab without any identification mark on each sample to relate it to the relevant slab / shopper, therefore, recovery of 200 kilograms of *charas* against appellants for want of representative sample cannot be considered; that the prosecution has failed to prove representative sample of each packet / shopper. Since a combined parcel of 200 samples, 100 grams each, was sent to the chemical lab for analysis, at the most, only that quantity would be considered against the appellants; that neither any serial number nor any alphabetic words were written on each packet of sample and corresponding serial number and alphabetic words on relevant shopper / packet to identify them together; that empty wrappers / packing of the samples referred to the chemical lab were not produced by the prosecution in the trial Court; that remaining case property was not de-sealed at the time of trial and the witnesses did not identify it to be the same, which creates a doubt; that the remaining case property was not established as there was no particular identification mark to establish that it was the same property that was recovered from the appellants; that packing of remaining case property was neither disclosed in the memo of recovery nor in any other document, hence safe transmission of case property from place of incident to the police station is doubtful. The truck was not referred to any motor mechanic for examination and certificate about its mobility and function; that appellants' past record is spotless and this case is but a result of highhandedness on the part of Excise Police; that there is no evidence that appellants are owners of the truck from which alleged recovery was effected. Learned Counsel have relied upon the cases reported as *Ameer Zeb v. The State* (**PLD 2012 Supreme Court 380**), *Fareed Ullah v. The State* (**2013 SCMR 302**), *Para Din and others v. The State* (**2016 SCMR 806**), *Qaisar and another v.The State* (**2022 SCMR 1641**) and *Javed Iqbal v. The State* (**2023 SCMR 139**).

6. On the other hand, learned Additional Prosecutor General has supported the impugned judgment, and in order to rebut the contentions of learned defense Counsel, has relied upon the cases reported as *Shah Muhammad v. The State* (**2012 SCMR 1276**), *Abdul Wahab and another v. The State* (**2019 SCMR 2061**), *Shafa Ullah Khan v. The State and another* (**2021 SCMR 2005**), *Faisal Shahzad v. The State* (**2022 SCMR 905**), *Liaquat Ali and another v. The State* (**2022 SCMR 1097**) and *Zain Ali v. The State* (**2023 SCMR 1669**) as well as an unreported judgment of this Court dated 21.09.2023 passed in **Spl. Crl. Jail Appeal No. D-85 of 2018** (*Re: Zanwar Hussain Pathan v. The State*).

7. We have heard learned Counsel for parties and perused material available on record. In order to prove the charge, the prosecution, as stated above, has examined two witnesses. One is the complainant as well as IO of the case. The other is a witness as well as *mashir* of the case. The complainant and *mashir* both have performed dual role, the complainant is not only the eyewitness but also the Investigating Officer of the case. On the flip side, one of the witnesses has acted as *mashir* of the case. But the law does not bar the complainant to be Investigating Officer of the case or the witness to act as a *mashir* either. For reliance, the cases of *State through Advocate-General, Sindh v. Bashir and others* (**PLD 1997 Supreme Court 408**) and *Zafar v. The State* (**2008 SCMR 1254**) can be cited.

8. Both the witnesses, in their depositions, have revealed that on the day of incident the Excise team comprising complainant ETI Meenhal Khan, EC Shakeel Ahmed, EC Rashid Ali, EC Akhtar Ali, EC Zubair Ali and EC Hazoor Bux was busy in snap checking of vehicles near Excise Check Post adjacent to Arore University, National Highway. At about 05:00 p.m., they spotted a Mazda Hino Truck coming with both the appellants in it. They flagged it down and took personal search of the appellants, but nothing except usual items such as cash etc. were recovered. Search of Mazda truck however led to detection of a secret cavity inside the fuel tank, which was opened, and from which 200 shoppers, containing 02 slabs of *charas* each weighing 500 grams, total 01 kilogram, were recovered. The total weight of the *charas* was 200 kilograms. From each shopper, 100 grams of *charas* as sample was separated for examination by the chemical lab. Then necessary documents were prepared and the property and accused along with the truck were brought at police station where FIR was registered. All the relevant documents to support such story have been produced right from relevant diaries noting movement of Excise team, its return to Police Station with

the accused and property etc. to memo of place of recovery and arrest, FIR and chemical lab report.

9. The incident took place at about 05:00 p.m. on 24.02.2021. The lab report reveals that the samples were received by it on next day viz. on 25.02.2021. The net weight of each sample was found 100 grams, which is in sync with the relevant documents and evidence of the witnesses, who both have confirmed that a sample of 100 grams from each packet was separated. The total weight of 200 samples itself is 20 kilograms and brings the case within ambit of Section 9(c) of CNS Act, 1997. The tests performed to verify the nature of stuff received is specifically referred to in the lab report. The seals found stamped on each packet were also found satisfactory by the lab. The samples were taken to the lab on the very next day of the occurrence by the *mashir* himself, which he has verified in his evidence, and which, keeping in view the very limited time within which the samples were moved to the lab, overrules any chance of tampering in it. His mention as the carrier of the samples in the lab report reinforces his evidence and the prosecution case on that point.

10. From evidence of the witnesses and the documents produced by them including the memo signed by the two witnesses, the story of the prosecution has been confirmed that appellants on the day of incident were stopped by the Excise team headed by complainant on the basis of a suspicion. That search of the truck had led to detection of a secret cavity near / inside fuel tank, from which 200 shoppers containing 01 kilogram *charas* in the shape of 02 slabs (500 grams each) were recovered. The samples of 100 grams were segregated from each packet etc. and were sealed separately for dispatching to the chemical lab. The remaining property was sealed independently and brought at the police station; which was produced in the Court at the time of trial and desealed at the instance of defense but it did not object to either its identity or quantity despite subjecting the witnesses to a lengthy cross-examination. The next day within less than 24 hours viz. 25.02.2021 at about 09:00 a.m., EC Shakeel Ahmed was marked for depositing the samples at Chemical Laboratory, Sukkur, which he did on the very day as noted in the lab report. Not only recovery of huge quantity of *charas* is proved but safe transmission of the samples from police station to chemical lab within less than 24 hours of recovery has also been established from his evidence and the lab report.

11. There is nothing on record to suggest that Excise team had any ill will or a motive to falsely implicate the appellants in the case of huge recovery of narcotics. The subject quantity of *charas* viz. 200 kilograms cannot be arranged for the purpose of foisting upon some person(s) without there being any strong reason to do so. In this case, neither any strong justification for falsely implicating the appellants has been suggested by the defense in cross-examination of the witnesses, nor any such claim has been expressed by the appellants in their statements U/S 342 CrPC. Both the witnesses have been cross examined at length, but no contradiction worth mentioning has come on record to infer prosecution's case as false one. In fact, in arguments, learned defense Counsel were not able to point out to any material contradiction or discrepancy, in the evidence of witnesses, over salient features of the case i.e. snap checking of vehicles, arrest of the appellants, detection of secret cavity and recovery of huge quantity of *charas* from it, which may cloud the prosecution's case except that each sample was not separately given a serial number or identification mark to relate to the relevant packet, from which it was segregated, and which, as per defense, is sufficient to undermine prosecution's story.

12. The Supreme Court in various cases (supra) relied upon by both the sides has concluded that there shall be a representative sample of each packet in order to establish identity of remaining stuff to be *charas* in such packet. If the samples are randomly taken and sealed and having been lumped in one or more pieces not quantifying / matching with the number of packets of *charas* so recovered, the same would not be considered as a representative sample, and no opinion about remaining stuff in the packets to be the narcotics etc. would be formed. In this case, however, it is not the position. It has been categorically mentioned that there were 200 shoppers / packets of *charas* and from each packet 100 grams of *charas*, as a sample, was segregated and sealed separately. Total 200 samples each weighing 100 grams, against 200 packets of *charas* were made. It would mean that each sample at least represents a packet and 200 samples stand for 200 packets, and thus no packet is left from which the sample was not taken, and which may create a doubt about the remaining stuff therein to be the *charas*. No doubt, over each sample, a particular identification mark to relate it to a particular packet / shopper has not been made. But, this in our view is not material in peculiar facts of the case when there are 200 samples against 200 packets. Each sample therefore somehow is a part of at least one packet out of 200 packets, and

200 samples collectively represent 200 packets in any case, and no packet is left out of counting. Moreover, each sample was separately sealed and not mixed with any other sample. It is not the case that all samples were lumped into one or more pieces obfuscating relation of the sample with some packet as is the case in the case of Ameer Zeb (**PLD 2012 Supreme Court 380**) cited supra. Further, in the Court, remaining property in 200 packets / shoppers was produced and desealed at the instance of defense. But the defense did not confront the witnesses with each packet / shopper with a claim that it was not weighing 900 grams, which should be the weight after deducting 100 grams of sample from it, or tried to get it weighed in the Court to verify this fact.

13. In our view, the question of representative sample would arise, if the samples are fewer (or less) than the actual parcels / packets of the *charas* leaving the remaining packets unaccounted for in terms of examination by the chemical lab; or all the samples have been lumped together into one or more pieces but less than the actual number of packets secured. In such a scenario only, the question, whether a sample is identifying with a relevant or any packet at all would be relevant, and a doubt would be created over the nature of stuff of remaining packets to be narcotics etc. or not. But when it is not the position, and there is equal number of samples against even number of packets, like the one in hand, and it is verifiable that from each packet, 100 grams as a sample have been segregated, then it would easily be summed up that each sample is identifiably a part of a packet at least and represents it. And all the packets would be thus considered to have a representative sample verifying the stuff therein to be narcotics etc.

14. Foregoing discussion means that prosecution has proved its case against the appellants beyond a reasonable doubt, and there are no circumstances available in the case doubting the prosecution story. Hence, these appeals are **dismissed**.

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Abdul Basit