IN THE HIGH COURT OF SINDH, SUKKUR BENCH, SUKKUR

Spl. Cr. Appeal No. D-31 of 2020

Appellant:	Bacha Khan S/o Abdul Jalil through Mr Mustafa Safvi Advocate
State:	Through Mr Mohsin Ali, SPP ANF
Date of hearing:	22.06.2023
Date of decision:	27.06.2023

J U D G M E N T

Jawad A. Sarwana, J.: On 12.01.2020 at 1500 hours, a raiding party from PS ANF Sukkur, based on spy information, that one smuggler, Bacha Khan ("the appellant"), operating a black colour Toyota Hi-Lux bearing registration no. LZR-4954 was likely carrying a considerable quantity of narcotics from Sukkur/Jacobabad to Karachi, sighted and stopped the very said vehicle on the Sukkur/Jacobabad Highway with Bacha Khan operating the same. On inquiry, the appellant informed the raiding party that the narcotics were hidden in the floor and walls of the "Dala" of the Toyota Hi-lux. The raiding party found 100 packets of alleged narcotics totalling 120kg, hidden in the vehicle. Following the prescribed procedure and protocols, the appellant was arrested on the spot and taken into custody. Meanwhile, the crime property, duly signed and sealed on the site, was deposited with the Malkhana/Warehouse at the station. An FIR No.01/2020 dated 12.01.2020 was lodged at ANF Sukkur police station against the appellant under sections 6 and 9(c) of the Control of Narcotics Substance Act ("CNSA"), 1997.

2. On 13.01.2020, the narcotics samples were sent to the Chemical Examiner at Rohri for chemical examination. They were returned by them on the following day, i.e., 14.01.2020, due to the non-availability of the Chemical Examiner at Rohri. After that, the narcotic samples were sent

from PS ANF Sukkur to the Director Laboratories and Chemical Examination, Government of Sindh at Karachi, on 15.01.2020. On 27.01.2020, they identified the narcotic samples positively as being "Charas". After an uneventful investigation, a charge was framed against the appellant. He denied all allegations levelled against him and claimed trial.

3. During the trial, the prosecution examined and relied on four prosecution witnesses. **PW-1 S.I. Imran Ali** was the complainant, on behalf of the State, who lodged the FIR, prepared the mashirnama of arrest and recovery in the presence of the two mashirs and read it to them, and deposited the crime property and the narcotic samples in the Malkhana/Warehouse too. Imran Ali was also the Malkhana/Warehouse In-Charge and investigated the crime. **PW-2 PC Khalid Ahmed** was one of the two mashirs present at the scene of the crime. **PW-3 PC Mansheer Ahmed** transported the samples of the narcotics first from the Malkhana at PS ANF Sukkur to the Chemical Examiner at Rohri. Secondly, he returned the property from the Chemical Examiner at Rohri to the Malkhana/Warehouse at PS ANF Sukkur. **PW-4 PC Zeeshan Zaidi** took the crime property from the Malkhana at PS ANF Sukkur to the Chemical Examiner at Karachi. The prosecution exhibited various documents supporting the case to show that the chain of safe custody and safe transmission was intact throughout the investigation and trial.

4. The appellant denied all allegations while recording his statement under section 342 Cr. P.C. He contended that the Toyota Hi-lux was not his and that it belonged to another person. The vehicle had been lying in police custody until the owner got it released from Court on 11.01.2020. He claimed he operated the vehicle on 12.01.2020 when the PS ANF Sukkur stopped him. He claimed he was innocent and had been falsely implicated by the ANF Police. He did not give evidence on oath or call any DW to support his defence.

5. Learned Judge of Special Court No.II, Sukkur, in Special Case No.07/2020, after hearing the learned counsel for the appellant and assessment of the evidence available on record, vide Judgment dated 06.08.2020, convicted the appellant under sections 9(c) of CNSA, 1997 and sentenced him to life imprisonment with fine of PKRs.100,000 or in default of fine to suffer simple imprisonment for one year. The appellant has challenged the said judgment through this Criminal Appeal.

6. Learned Counsel for the appellant has contended that the appellant is entirely innocent; that the alleged recovered vehicle, Toyota Hi-lux, was in police custody from 23.12.2019 to 10.01.2020 when the Judicial Magistrate/Consumer Protection Court, Jacobabad passed Orders to release the said vehicle to its owner, one Muhammad Sarwar; during this period the appellant was staying at the New Royal Guest House at Jacobabad; the car was handed to the owner on 11.01.2020 at Jacobabad; the appellant did not have the vehicle during this period; the vehicle could not be laden with charas by the appellant given the short-time between the release of the vehicle on 11.01.2020 and 12.01.2020 when it was stopped by the raiding party; the appellant did not own the vehicle, he was simply operating it; he had neither knowledge nor was in conscious possession of the narcotics hidden inside the vehicle; the complainant of the FIR was also the IO and he has falsely implicated the appellant; the chain of safe custody and safe transmission is broken; there are gaps and inconsistencies in the timings mentioned in the memo produced by the PWs which do not add up/match; and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt.

7. Conversely, Special Prosecutor, ANF for the State, has fully supported the impugned judgment. He has contended that the appellant was caught red-handed on the spot with narcotics in the Toyota Hi-lux; the appellant

pointed out the place of hiding of the charas in the floors and walls of "Dala" of the vehicle; safe custody and safe transmission have been proved; the prosecution witnesses were reliable and trustworthy and supported the prosecution case, and there were no material contradictions in the prosecution evidence; the appellant's alibi regarding his location and whereabouts before 12.01.2020 in the facts and circumstances of the case do not add up in support of his defence of conscious possession; and as such the appeal should be dismissed.

8. We have heard the arguments of the learned counsel for the parties, reviewed the entire evidence read out by the learned counsel for the appellant, considered the impugned judgment, and examined the relevant law, including the reported decisions cited at the bar. Our findings subject-wise are stated herein below.

The Complainant and Investigation Officer are the same person.

9. S.I. Imran Ali is the complainant of FIR No.1/2020 and the crime's Investigation Officer ("IO"). The appellant's Counsel has argued that this is grounds for setting aside the impugned Order. It is correct that the Complainant and IO are the same person; however, no evidence has been placed on record by the appellant that suggests that the IO (i) has prejudiced the investigation; (ii) acted in a biased manner against the accused; and (iii) has any enmity with the accused. Indeed, if the appellant was unhappy or had severe objections against the Complainant acting as the IO, he could have moved an appropriate application for the transfer of the investigation to a different IO, which he did not. He chose to do nothing. He accepted and acquiesced to the investigation. In fact, the same question was before the Supreme Court in the case of *Zafar vs The State,* 2008 SCMR 1254), and the Court observed that:

> "So far as the objection of the learned counsel for the appellant that the Investigating Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408, wherein it is observed that a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigating Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution D witnesses."

Considering the circumstances of the present case and being guided by the wisdom of the Supreme Court, we cannot accept the appellant's submission as a ground to set aside the impugned Judgment.

Conscious possession

10. The Counsel for the appellant asserted that the appellant neither had knowledge nor was conscious of possessing the charas found in the Toyota Hi-lux on 12.01.2020. The vehicle was not registered in his (the accused) name. The owner of the vehicle was Mohammad Sarwar. It was lying in Police Custody from 23.12.2019 to 10.01.2020 as the police had taken custody of the same under section 550 Cr.P.C. During this period, the appellant was in Jacobabad, staying at a guest house. To get the vehicle released from the police, Mohammad Sarwar filed a formal application with the Judicial Magistrate at Jacobabad, supported by a verification report issued by the Motor Registration Authority-V, Lahore. The vehicle was released to the owner on 11.01.2020. The following day, i.e., 12.01.2020, the appellant operated the vehicle when the raiding party stopped it. The appellant claims that he was allegedly getting the vehicle serviced when he was apprehended. And that the charas was found on board the vehicle

unknown to the accused/appellant; hence he is/was innocent. The appellant filed with his Statement u/s 342 Cr.P.C., a copy of the Judicial Magistrate's Order dated 10.01.2023, photocopy of the extract of the register of the guest house, photocopy of CDR of one cell phone no.03452545702, etc.

11. The documents filed by the appellant and the surrounding facts and circumstances of the case do not aid the appellant in support of his contention that he was not in conscious possession of the charas. First, the appellant does not explain what he was doing in Jacobabad, where the Toyota Hi-lux was seized by the police and lying in the custody of the police. The impounding of the vehicle and his alleged stay in the guest house, as shown by the extract of the register of the guest house, conveniently coincide. If the photocopy of the extract of the register of the guest house is to be believed, then it is the same day as the date of check-in by the appellant in the guest house. This coincidence begs the question of why the appellant was in Jacobabad in the first place at the same time when the vehicle had been left unattended and found abandoned by the police on 23.12.2019, i.e. when it was seized. This is notwithstanding that the photocopy of the extract of the register of the guest house is a single sheet showing the date of check-in only. No sheet showed when the appellant checked out from the guest house. The appellant provided none. Thus, the Counsel for the appellant's contention that the appellant was in Jacobabad cannot be corroborated. The Counsel for the appellant argued that the appellant always remained in Jacobabad from 23.12.2019 up to 12.01.2020. The appellant also attached the CDR report of one of the phones to evidence that he remained put at Jacobabad. This isn't easy to believe. The CDR filed by the appellant does not meet the settled parameters to accept forensic evidence through modern devices, as observed by the Supreme

Court of Pakistan.[1] Therefore, in the first instance, it is inadmissible. Notwithstanding the preceding, the CDR record filed by the appellant for Cell No.0345-2545702 does not disclose: (i) the whereabouts of the appellant before his location in Jacobabad on 21.12.2019; (ii) what was the mobile unit doing in Karachi on 09.01.2020 and 10.01.2020 when the appellant was according to his Counsel still in Jacobabad at the guest house; and (iii) why did the mobile phone return from Karachi to Jacobabad on 11.01.2020 the same day when the vehicle was released from custody. Further, according to the appellant's Statement u/s 342 Cr.P.C., he had two mobiles and two SIMS, but he filed CDR for only one mobile phone. The CDR of one cell phone alone does not provide a complete picture supporting the defence. The stance taken by the Counsel for the appellant that because the vehicle not being in his possession, he did not have conscious possession remains unsupported by the evidence brought on record.

12. Another aspect that pierces yet another hole in the appellant's argument that he did not have conscious possession of the charas is that he operated the vehicle when the raiding party stopped the appellant. He was the only person found inside the Toyota Hi-lux. There was no one else. There is no explanation of why he was operating the said vehicle, which was not his when it was in his knowledge, presumably that it had been in police custody a day earlier. According to the evidence corroborated by the prosecution witnesses, the appellant was aware of the narcotics in his possession. He disclosed to the raiding party its availability in the floor and walls of the "Dala" of the vehicle. He knew the precise location of the charas. He knew about the cavities in the vehicle where the narcotics were hidden. The charas was secured from his possession. Once the appellant

---

[1] *Ishtiaq Ahmed Mirza and 2 others vs. Federation of Pakistan and others*, PLD SC 675; and, *Ali Raza alias Peter and others vs. The State and others*, 2019 SCMR 1982

acknowledged to the raiding party that he had detention, control, and physical custody of the charas, the burden of proving that the appellant did not knowingly possess the narcotics was on him. He did not deny that the charas was not found on him. He took the position that he did not have conscious possession.

13. In the present facts and circumstances of the case, the prosecution had only to show by evidence that the appellant had physical custody of the charas found in the vehicle and was directly connected with it. The prosecution appears to have satisfied this threshold based on evidence produced during the trial. The appellant had to prove by a preponderance of probability that he did not knowingly or consciously possess the charas. In our reappraisal of the evidence, for the reasons discussed above, the appellant has been unable to prove he was not in conscious possession; hence such defence raised by the Counsel for the appellant fails. It would not be out of place to refer to the case of *Kashif Amir vs The State,* PLD 2020 SC 1052, in which it was observed that:

> "On the search of motorcar, out of its secret cavities, 193 packets of Chards and 5 packets of Opium were recovered. So the plea of the learned counsel that he had no knowledge about the transportation of the narcotics in the vehicle being driven by him has no substance. 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 CNSA that the possession should be an exclusive one and can 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 articles lying in it would be under his control and possession. Reference in this behalf may be made to the case of Muhammad Noor v. The State (2010 SCMR 927). Similarly, in the case of Nadir Khan v. State (1988 SCMR 1899) this court has observed that

> knowledge and awareness would be attributed to the Incharge of the vehicle."

Safe custody and safe transmission

14. The appellant has argued that there is a break in the safe custody and transmission chain. When we asked him to identify such a break clearly and precisely, he could not pinpoint any material gap in the chain of safe custody and safe transmission. There are minor contradictions relating to timings mentioned in the memo prepared by the PWs, and we will address this in the next topic. We have carefully perused the evidence of the witnesses and found an uninterrupted chain of facts ranging from seizure to forensic analysis of the contraband. The narcotics were sealed on the spot at the time of the seizure. The same was deposited in the Maalkhana and remained in the Malkhana/Warehouse at the PS ANF Sukkur. The investigating officer of the case was the Maalkhana In Charge. At all times, they were taken back and forth by "PW-3" between the Malkhana/Warehouse at the station and the Chemical Examiner at Rohri and by "PW-4", who eventually took the sealed sample from the Malkhana/Warehouse at the station to the Chemical Examiner at Karachi. The samples remaining in a sealed condition are confirmed by the chemical report produced by "PW-1" and corroborated by "PW-3" and "PW-4". The samples duly examined by the Chemical Examiner following the required protocols are also evidenced by the Report of the Chemical Examiner dated 27.01.2020 ("Ex.5-J"). All the prosecution witness testimonies are in sync with the evidence brought on record.

Contradictions in witness statements and the memos prepared.

15. The Counsel for the appellant has submitted that the timings mentioned in the memo do not match. The Roznamcha for 12.01.2020 ("Ex.5/A") shows that the raiding party departed for the raid from PS ANF

Sukkur on the spy information at 1400 hours, whereas "PW-1" and "PW-2" had testified that the spy information came at PS at about 1345 hours. Another instance pointed out by the Counsel is about the time spent. According to the Roznamcha mentioned above, the raiding party returned to the station at 1900 hours. In his testimony, "PW-1" states it took them 15 minutes from the station to reach the Dreha Stop on the Sukkur/Jacobabad Highway and the appellant was stopped at 1500 hours. "PW-2", in his testimony, states that the raiding party consumed 45 minutes to stop and get the appellant to admit that he was carrying narcotics in his vehicle. In contrast, the time to open the cavity, secure, pack and seal the incriminating evidence was 3 hours 45 mins. This Counsel argues it is too tight a timeline. Yet another illustration of timings not matching in the memo with the testimony of the prosecution witness cited by the Counsel for the appellant is the Roznamcha for 13.01.2020 ("Ex.5E") which shows that "PW-3" left the station with the sealed sample at 0955 hours to Rohri. In his testimony, "PW-3" testified that he consumed about 40 minutes to approach the Laboratory in Rohri; but took 45 minutes to return. Counsel alleges that the timings do not match. It is a trite proposition that the court should adopt a dynamic approach when dealing with narcotics cases.[2] Further minor discrepancies in the evidence of the raiding party do not shake their trustworthiness.[3] The grounds raised by the Counsel for the appellant are flimsy and do not shake the chain of safe custody. The minor contradictions the learned Counsel pointed out are insufficient to acquit the appellant. We do not find that the Counsel's arguments carry weight nor find it a sound basis for setting aside the impugned judgment.

17. The record reflects that the appellant was in exclusive possession of the vehicle in which the narcotics were hidden in secret cavities. The

---

[2] *Ghulam Qadir vs. The State*, PLD 2006, SC 61
[3] *The State/ANF vs. Muhammad Arshad*, 2017 SCMR 283

appellant could not prove that he was unaware of the narcotics hidden inside the vehicle. He was apprehended red-handed with 120 kilograms of charas in his vehicle. Samples were taken in accordance with the law and sealed on the spot. The chemical analyst's report opined that the seized material was charas, a narcotic the possession of which is prohibited under the CNS Act, 1997. The quantity which was recovered carries a capital punishment. No evidence was produced to suggest that the ANF had malafide or ill-intent to foist such a huge quantity of charas on an innocent person.

18. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant. The impugned judgment requires no interference by this Court, and the conviction and sentencing are upheld. Consequently, the appeal is without merit and is dismissed.

JUDGE

JUDGE