

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Criminal Jail Appeal No. D – 57 of 2021
(Atta Muhammad Kalhoro versus The State)

Present:

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

Date of hearing : **10.10.2023**

Date of decision : **10.10.2023**

Mr. Deewan Dhanraj Advocate for appellant.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J.- Appellant was arrested on 05.09.2022 at 2200 hours by ASI Basheer Ahmed Gopang on patrol duty along with his team of Police Station Kandiaro from link road near Degree College Kandiaro and from his possession 2000 grams of charas in a white shopper bag was secured when he was found sitting on the driving seat of a Rickshaw along with a passenger namely Nadeem, who was sitting on the back seat of Rickshaw and was in possession of 36 kilograms of charas. However, the said person namely Nadeem succeeded in making his escape good from the spot. One kilogram and 10 kilograms from 2 kilograms and 36 kilograms were separated respectively as samples for a laboratory report. Necessary papers were prepared at the spot and appellant was brought at Police Station Kandiaro where instant FIR bearing crime No. 152 of 2020 was registered against him.

2. After due formalities Challan was submitted and appellant was tried by the Court of 1st Additional Sessions Judge/Special Judge for CNS, Naushehro Feroze. In the trial, prosecution examined four (04) witnesses including complainant and mashir who have produced all the necessary documents including chemical report at Exh. 11-D in respect of samples of one kilogram and 10 kilograms separated at the time of recovery respectively for the purpose of a report.

3. After prosecution evidence, 342 CrPC statement of appellant was recorded in which he has denied the prosecution case. It may be mentioned that during trial absconder accused Nadeem was also arrested and joined the trial. Vide impugned Judgment, co-accused Nadeem was acquitted whereas present appellant was convicted to suffer imprisonment for life with fine of Rs. 200,000/- (two lacs), in case of default to suffer S.I for two (02) years more. Hence this appeal.

4. Learned counsel for the appellant at the very outset has submitted that from the physical possession of appellant only two kilograms of charas was recovered out of which one kilogram was sent for chemical analysis and with regard to remaining one kilogram, alleged to be charas, no expert opinion in the shape of lab report is on record. The remaining charas of 36 kilograms is stated to be in possession of acquitted accused Nadeem as per narration made in the FIR as well as in the memo of place of incident prepared at the spot. Even in the charge framed by the trial Court, appellant has not been saddled with the recovery of 36 kilograms which is said to have been recovered from the acquitted accused Nadeem, whereas appellant from whom only two kilograms is said to have been recovered has been awarded the punishment of imprisonment of life, which, keeping in view the quantity of recovery effected from him, is out of proportion. Appellant cannot be burdened with the recovery of 36 kilograms which was not found in his physical possession. The prosecution failed to establish any link of the appellant with 36 kilograms of charas or the acquitted co-accused, therefore, he has contended that he will not press the appeal on merit if the sentence of the appellant is converted into the period already undergone by him. He has relied upon the case of Naseem Khan vs. The State (2021 SCMR 1771).

5. Learned Additional Prosecutor General has conceded to such legal position and has recorded no objection to above proposal.

6. We have heard the parties and taken guidance from the case law cited at bar. The prosecution story revolves around two recoveries of charas from two different persons. Two kilograms of charas was recovered from the appellant, whereas 36 kilograms was found in possession of acquitted accused Nadeem, who however leaving the same behind succeeded in escaping from the spot. Only the appellant was

arrested and as per prosecution story he was on the driving seat of the Rickshaw and the shopper bag in which two K.G charas was available was lying on his front. The acquitted co-accused, sitting on the back seat of the Rickshaw who had allegedly escaped after leaving 36 K.G of charas behind has not been apparently shown having any connection with the appellant, nor the same has even been alleged by the prosecution case.

7. The prosecution witnesses in their evidence have categorically attributed the recovery of two kilograms to the appellant and have separately assigned recovery of 36 K.G of charas to the acquitted co-accused Nadeem. Even in the charge framed by the trial Court, recovery of 36 K.G is attributed to the acquitted accused Nadeem, and not to the present appellant. Hence holding him responsible for the entire recovery of 38 K.G including 36 K.G found in possession of acquitted co-accused is not sustainable in law. From him only two K.G of charas was recovered, which has been reiterated by the witnesses and therefore he would be held responsible for that only. If we consider that much recovery from the appellant and the fact that out of two kilograms only one K.G of charas was sent to laboratory for a report and regarding remaining one K.G there is no laboratory report to confirm it to be charas or not. In law, he would be held responsible for being in possession of one K.G of charas only.

8. Jail Roll of appellant received today shows that he has remained in jail for 03 years, 01 month and 05 days and has earned remission of 09 years, 03 months and 22 days, the total sentence he has suffered is thus 12 years 04 months and 27 days, which in our view is a sufficient punishment suffered by the appellant. Such term of sentence that appellant has already suffered appears to be proportionate to the quantity of charas recovered from him. As per proviso of section 9-C Control of Narcotic Substances Act, 1997 if the recovery of narcotics is more than 10 kilograms, then only, the punishment would be more than 14 years. However, if the quantity is less than 10 K.Gs of narcotics the punishment up to 14 years can be awarded.

9. We, therefore, dismiss this appeal, notwithstanding convert the life imprisonment of the appellant to the period already undergone by him in the jail. At the same time, we also reduce the fine from

Rs. 200,000/- to Rs. 50,000/- which appellant shall have to pay, in case of default, to suffer two (02) months more. The appellant shall be released on payment of fine or after the period in lieu of which he is required to undergo.

10. The appeal is disposed of in the terms as stated above.

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