

THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Special Criminal Appeal No.D-219 of 2019

Present:

Justice Mrs. Rashida Asad.

Mr. Justice Khadim Hussain Soomro.

Appellant: Shoukat Hussain son of Muhammad Aziz,
bycaste Abbasi.

Through Mr. Amanullah G.Malik, Advocate.

The State: Through Mr. Aftab Ahmed Shar, Additional P.G.

Date of Hearing: 17-08-2023

Date of Judgment: -10-2023.

JUDGMENT

KHADIM HUSSAIN SOOMRO, J. Through this judgment, we intend to dispose of the instant Special Criminal Jail Appeal filed by appellant Shoukat Hussain Abbasi, whereby he has impugned judgment dated 19-09-2019 passed by learned Ist Additional Sessions Judge/Special Judge (CNS) (MCTC) Ghotki in Special Case No. 07 of 2018 Re. Shoukat Hussain and another Vs. The State, emanating from Crime No.01/2018 for an offence punishable under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Excise Ghotki, whereby the appellant has been convicted and sentenced to undergo R.I for "Life" and to pay a fine of Rs. 300,000/-, and in default in payment

of fine to undergo S.I for two years more. However, the appellant was extended the benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 29-03-2018, complainant Excise Inspector Hassan Ali Dashti lodged the FIR alleging that on the said day, he, along with his subordinate staff during checking at Excise Check-Post Sindh Punjab border Kamoon Shaheed, noticed a Truck bearing registration No.LXT-4797 was coming from Punjab Side, which was found to be suspicious. They stopped it and found two persons, including the driver, sitting inside of it. Both the persons alighted from the Truck; the driver disclosed his name as Shoukat Hussain Abbasi, and during his personal search, a cash amount of Rs. 3000/-, original CNIC and driving license were secured from his pocket, while the cleaner disclosed his name, Muhammad Askhab Abbasi, during his personal search cash Rs. 1000/- from his pocket. During the search of the Truck, a secret cavity was found in its cabin; it was opened, and 20 packets containing charas were lying in it. The recovered charas were weighed, and each packet became one kilogram, a total of 20 kilograms; out of them, 100 grams from each packet were separated for chemical analysis, which was sealed separately, whereas the remaining packets of the chars were placed in one separate plastic sack/Bachka and the same separately. On further search of the Truck, one Bilty No. 733 showed 1000 bags of Benola seed from its dashboard. The Benola seeds were also found loading the Truck. Such mashirnama of arrest and recovery was prepared in the presence of mashirs EC Imtiaz Ahmed and EC Pritamdas, and they were brought to the police station, where the complainant lodged the FIR against the accused on behalf of the State.

3. The formal charge was framed against the accused, to which they pleaded not guilty and claimed to be tried vide their pleas recorded at Exh. 7 & 8.

4. The prosecution in order to substantiate its case, examined PW/1 Excise Inspector Hassan Ali Dashti at Ex. 10, who produced mashirnama of arrest and recovery at Ex. 10/A, PS copies of departure and arrival entries at Ex. 10/B, FIR at Ex. 10/C, letter No. 07/2018 at Ex. 10/D, receipt at Ex. 10/E, chemical report at Ex. 10/F, verification letter at Ex. 10/G, verification report at Ex. 10/H, builty at Ex. 10/I, EC Imtiaz Ahmed at Ex. 11, who verified the mashirnama at Ex. 10/A. Thereafter, the prosecution had closed its side vide Ex. 12.

5. The accused, in their statements recorded under section 342 Cr.PC denied the allegations levelled against them by pleading their innocence. However, they did not examine themselves on oath nor lead any witnesses in their defence; however, they took a plea that they had been alighted from the truck by excise Police and foisted the charas against them.

6. The learned trial Court, on evaluation of the material brought on record and hearing counsel for the parties convicted and sentenced the present appellant/accused, while co-accused Muhammad Askhab was extended benefit of doubt and he was acquitted of the charge vide impugned judgment, as discussed above.

7. Per learned defence counsel, the appellant is innocent and has falsely been implicated in the present case; the appellant and co-accused were got down from the Truck by the Excise police and foisted charas against them; the appellant is neither owner of the

Truck, nor he possessed the driving license; therefore he cannot be held responsible for such a huge quantity of charas, and all the documents have been managed by the Excise police; that PW EC Allah Dino and in charge of the Malkhana were not examined by the prosecution, besides the prosecution had not produced PS copies of such entries during the trial; that entire recovered charas was not sent to the chemical laboratory for chemical analysis. Last but not least, he argued that the prosecution had not proven its case against the appellant; hence, he is entitled to acquittal.

8. On the other hand, learned Additional P.G for the State, while supporting the impugned judgment, has submitted that the prosecution has proved its case against the appellant, who was found transporting a huge quantity of Charas through a Truck which was recovered from the secret cavity of the Truck driven by the appellant; that the police authorities had no reason to foist such a huge quantity of narcotics on the appellant, he prayed for the dismissal of the current criminal appeal.

9. We have given anxious consideration to the arguments of both sides and perused the entire material available before the Court with their able assistance and the case law cited at bar.

10. The Complainant/I.O., Excise Inspector Hassan Ali Dashti, during his evidence, has deposed that on 28.03.2018, he, along with E.T.I Abdul Sami Pitafi, Excise Inspector and other subordinate staff, each namely EC Imtiaz Ali, PC Pritamdas, EC Sajid Aslam, EC Shahnawaz, EC Allah Dino Loali, EC Azizullah and EC Zahid Hussain Pathan left Police station vide Roznamcha entry No. 2 at about 8:30 pm, duly armed with arms and ammunitions and having investigation kit, in a police mobile G.S. 543-B with the

purpose of detecting and preventing narcotic offences. After leaving the P.S., at about 10.00 pm, they reached the check-post Kamoon Shaheed, which was situated at the Sindh Punjab border and started a search of the vehicles. On 29-03-2018 at about 5.00 am, they saw that one Truck was coming from the Punjab side at high speed, to which they gave a signal to stop through the torchlight, and the driver stopped the Truck. The registration number of the Truck was LXT-4797 and found two persons were sitting inside of the Truck, out of them one was a driver. Both the persons were alighted from the Truck and enquired about their identity, to which one person, who was driving the Truck, disclosed his name as Shoukat Hussain, son of Mumtaz Aziz Abbasi, r/o Hill Siring Taluka Deerkot, District Bagh and another person disclosed his name as cleaner and identified himself as Muhammad Ashab, son of Muhammad Iqrar Abbasi, r/o Taluka Deerkot, District Bagh. Finding no person from the public there, he appointed EC Imtiaz Ahmed and EC Pritamdas as mashirs and conducted a bodily search of the accused. During the bodily search of the driver, they recovered three currency notes of Rs. 1000/- a total of Rs. 3000/-, original CNIC and driving licenses from the front pocket of the shirt, whereas Rs. 1000/- was recovered from front pocket of the shirt of cleaner. During the search of the Truck, they found it loaded with Benola Seeds (cotton seeds). Thereafter, they conducted a search of the cabin of the Truck and found one secret cavity. On its opening, they found some plastic packets of golden and black colour, which were taken out; on opening, they found two slabs of charas in each packet. They then formally arrested the accused under the mashirnama, which was attested by both the mashirs. Thereafter, he counted all the packets, which

became 20 in number. On weighing, each packet became one K.G. (01 K.G.), making the total 20 packets as 20 K.G.s of charas. Out of them from each packet, they separated 100 grams for chemical analyses, placed them in white paper and sealed them separately, whereas he had given numbers to the remaining packet from 1 to 20 and placed them in one Bachka and sealed it separately as a case property. They conducted a further search of the Truck, and from its Dashboard, they found one builty No. 733 Givay Manthar Goods Transport company KMC road Sadiqabad, which was showing the record of 1000 bags of Benola seeds, which were also taken into their custody and prepared such mashirnama in front of the same mashirs and obtained their signatures thereon. He produced such mashrinama at Ex. 10/A. Thereafter, they returned back at the Excise P.S. along with the arrested accused, recovery and Truck at about 11:00 am vide Roznamcha entry No.1. He produced attested P.S. copies of departure and arrival entries (original seen and returned at Ex. 10/B. Then he registered FIR against the accused u/s 9 (C) CNS Act, 1997, which he produced at Ex. 10/C. He kept the case property in a Malkhana in self-custody. On the same day, he dispatched the samples of chars to the Chemicals Laboratory Rohri through EC Shahnwaz vide one letter, which he produced at Ex. 10/D, who, after delivering the same, had submitted one receipt from the laboratory, which he produced at Ex. 10/E. He also produced chemical reports at Ex. 10/F. Thereafter, on 30-03-2018, incharge of Excise P.S. had, sent one letter to the MRA Lahore for verification of the Truck, which he produced at Ex. 10/G. He also produced such verification reports at Ex. 10/H. He had also produced builty No. 733 at Ex. 10/I. As per the verification report, the owner of the Truck was Muhammad

Farooq, son of Muhammad Khan, Rawalpindi. On 29-03-2018, he had recorded 161 Cr. P.C. statements of the eyewitnesses. After completing the investigation, he then submitted the challan of this case before the Court of competent jurisdiction. He recognized the accused present in the Court and case property viz. Rs. 4000/-, original CNIC, driving license, charas and Truck parked outside of the Court to be same.

11. The complainant submitted all important documentation connected to the matter; as a result, the appellant was found accountable for transporting a huge quantity of Charas in a Truck. The prosecution also examined mashir EC Imtiaz Ahmed, who, during his evidence, corroborated the version of the complainant. According to Apex Court, it is a well-established legal concept that a person in the driving seat is accountable for the carriage of such a huge quantity of narcotics material. The reliance in this context is placed upon the case of Kashif Ameer Vs. The State (PLD 2010 SC1052), wherein the Supreme Court of Pakistan has held that;

“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 Vs. The State(2010 SCMR-927).Similarly, in the case of Nadir Khan Vs. The State (1988 SCMR-1899). This Court has observed that knowledge and awareness would be attributed to the incharge of the vehicle. Another aspect of the case is that once the prosecution has prima facie established its case then under section 29 of the CNSA burden shifted upon the accused to

prove contrary to the plea of the prosecution. Reliance in this behalf may be made to the case of Ismaeel Vs. The State(2010 SCMR-27).Wherein, this Court while relying upon the cases of Muhammad Arshad Vs. The State(2007 SCMR-1378) and Mst.Taj Bibi Vs. The State(2007 SCMR-1591) has held that chemical examiner's report regarding Charas and Opium were sufficient to prove that the substance recovered from the accused was Charas which can be used to cause intoxication; the prosecution had discharged its initial onus while proving that substance was recovered from him whereas the petitioner had failed to discharge its burden in terms, of Section 29 (d) of CNSA".

12. Additionally, the Supreme Court of Pakistan, in its judgment while rejecting the appeal of appellant Hussain Shah, dated 20-09-2019 passed in Criminal Appeal No.7-P of 2017, has held that;-

"Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that recovered substance was charas. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witness had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which possibility could be used to doubt the veracity of the said witnesses".

13. As far as the contention of learned Counsel for the appellant regarding safe custody and safe transport of Charas from the recovery to the office of the Chemical Examiner is concerned, it is worth mentioning that the defence did not raise the possibility of tampering with the case property at the police station office or during its transmission to the Chemical Laboratory during the cross-examination of witnesses. Charas was recovered from the appellant on 29-03-2018 and was delivered to the Chemical

Laboratory through EC Shahnawaz on the same date. The Chemical Examiner's report is produced by complainant at (Exh.10/F). So the safe chain of custody of the recovered narcotics can be safely stated. Reliance is placed on the case of Faisal Shahzad Vs. The State [2022 SCMR 905] and Ajab Khan Vs. The State [2022 SCMR 317].

14. The requirement of Rule 4 of Control of Narcotic Substance (Government Analysis) Rules, 2001 is that the reasonable quantity of sample from the entire narcotic drug, psychotropic substance or the controlled substances seized, shall be drawn on the site of recovery and sent by insured post or special messenger to the office in charge of the closest Narcotic Testing Laboratory for testing. No question was put by the defence counsel that there was tempering with the case property and it is also confirmed by the Chemical Examiner that the submitted sample is identified to contain charas. Furthermore, Rule 5 of the Control of Narcotic Substances (Government Analysis) Rules, 2001 states that it must be received in the Laboratory in a sealed condition. The incharge officer must follow full protocol by properly opening and labeling the laboratory. A separate register must be kept for this purpose. All samples must be given to the analyzer on the same day and maintained in safe custody while being examined and recorded in the test memorandum. He will match the markings on the test Memorandums to the marks on the package envelopes and make certain that the relevant sample is tested. Rule 6 of C.N.S (Government Analysts) Rules, 2001 further provides that on analysis the result thereof together with full protocols the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-11. Now the question is here

whether the report received from the office of the Chemical Examiner is according to Rule 4,5 & 6 of C.N.S (Government Analysts) Rules, 2001 or not. The requirement of R.4 is only that the parcel should be received in the office of Chemical Examiner in a sealed condition. We reviewed the Chemical Examiner's report, which is accessible as Exh.10/F, and in our humble opinion, it is in accordance with its Rule and the whole process was followed by the Chemical Examiner's office.

15. The procedural detail is mentioned in the Chemical Examiner's report Ex.10/F about the tests applied do not fall short of "protocol". In an unreported case of Mushtaq Ahmed Vs. The State & others (Criminal Petition No.370 of 2019) the Hon'ble Supreme Court of Pakistan has held that;

3... Argument that Forensic report sans protocols as mandatorily required in the case of State Vs. Imam Bakhsh(2018 SCMR 2039), is beside the point and so is a reference to Rule 6 of the Control of Narcotic Substance (Govt. Analysis) Rules, 2001, for the convenience of reference reproduced below:-

"Report of the result of test analysis:--After test or analysis the result thereof together with full protocols of the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-II".

The above requires reference to the test applied for analysis, specifically mentioned in Form-II thereof. We have perused the forensic report, relied upon the prosecution, which substantially meets the legal requirements in the following terms:-

"Test Performed on Received Item(s) of Evidence

1. Analytical Balance was used for weighing.

2. Chemical spot Tests were used for Presumptive Testing.
3. Case Chromatography-Mass Spectrometry was used for confirmation.

Results and conclusions

“Item # 01 72.87 gram(s) of blackish brown resinous material in sealed parcel contains Charas”

Details mentioned in the Forensic report procedure/test applied do not short of ‘protocol’ as insisted by this court in the supra case. According to the Oxford English Dictionary, 6th Edition, the expression “protocol’ in relation to a forensic test means.

“ A formal or official statement of a transaction or proceedings; spec, a record of (esp. scientific) experimental observations”.

16. The reliance is also placed on an un-reported case of Hon’ble Supreme Court of Pakistan; vide judgment dated 09-01-2020 passed in Criminal Petition No.370 of 2019 Re.Mushtaq Ahmad Vs The State & another;

4. “It has been argued before us that the report submitted by the Chemical Examiner did not mention the necessary protocols followed or tests applied but we have seen the said report available on the record of the trial court and have found that the said report not only referred to the protocols adopted but also to the tests applied and, thus, we have not been able to find any deficiency in the said report”.

17. As regards the arguments of learned counsel for the appellant about violation of Section 103 Cr.PC is concerned, it would be appropriate to refer Section 25 of the Control of Narcotics Substance Act 1997, which reads as under;-

“25. Mode of making searches and arrest.--- The provisions of the Code of Criminal Procedure, 1898, except those of section 103 Cr.P.C shall mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of section 20, 21, 22 and 23 to all warrants issued and arrest searches made under these sections”.

18. It indicates that the applicability of Section 103 Cr.P.C. in drug cases has been ruled out, and the absence of any private witness is not a severe flaw that may invalidate the conviction. Normally, people avoid giving testimony against drug dealers because of fear of being threatened.

19. In terms of police officers' evidence, they are competent, and their testimony cannot be discarded just because they are police officers. They have provided straightforward and reassuring evidence, and there is nothing on the record to suggest that they deposed against the appellant maliciously or with malice, and it cannot be believed that police officials would plant or foist such a large quantity of narcotics substance (20 K.G) against the appellant using their own resources. It is a well-established legal concept that the testimony of official witnesses cannot be rejected just because they are police officials. The reference in this context is made to the case of Zaffar Vs. The State (2008 SCMR 1254), the Hon'ble Supreme Court of Pakistan has held that;-

“Police employees are the competent witnesses like any other witnesses and their testimonies cannot be discarded merely on the ground that they are police officials”

20. In the instant case, no proof of hostility with the complainant or the other witnesses was introduced into evidence; hence, in the

lack of such evidence, the competency of the prosecution witnesses, who were police officers, was properly believed. Furthermore, a procedural formality cannot be insisted upon at the expense of the accomplishment of a crime, and if an accused is otherwise discovered related, a simple procedural omission or even an accusation of inappropriate investigative conduct will not aid the accused. The reference in this context is made to the case of the State/ANF Vs. Muhammad Arshad (2017 SCMR283), wherein the Hon'ble Supreme Court of Pakistan has held that:-

“We may mention here that even where no proper investigation is conducted, but where the material that comes before the Court is sufficient to connect the accused with the commission of crime, the accused can still be convicted, notwithstanding minor omissions that have no bearing on the outcome of the case”.

21. Even then, a person's official standing would not automatically impair their credibility as a witness unless it can be established that they are biased towards the accused or have a history of animosity towards the individual in question. The reliance in this context is made to the case of Farooq Vs. The State (2008 SCMR 970).

22. It is now established law that in cases involving the transportation or possession of illegal drugs, procedural intricacies or other issues should be overlooked if doing so serves the greater good of the nation. If this is the case, the court should adopt a flexible approach that considers the true facts of the case and draws justifiable inferences and conclusions when making such decisions. The Hon'ble Supreme Court of Pakistan in the case of

Ghulam Qadir Vs. The State reported in (PLD 2006 SC-61) has held that;-

“S.9(c)---Appreciation of evidence.---No acquittal on technicalities---Court in such like cases are supposed dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities.”

23. Despite the fact that the investigation officer and other prosecution witnesses are police officials, they have no animus or rancour against the appellant to place such a large quantity of narcotics substance against him. The defence has not shown any proof of hatred towards the prosecution witnesses. In cases involving large amounts of drugs, the absence of hostility or other justifiable basis for fake involvement would also be factors weighing against the accused. The reliance is made in case of Salah-ud-Din vs. The State, reported in (2010 SCMR1962), wherein the Hon'ble Supreme Court of Pakistan has held that;-

“....No enmity whatsoever has been alleged against the prosecution witnesses and there is hardly any possibility for false implication without having any ulterior motives which was never alleged. In view of overwhelming prosecution evidence the defense version has rightly been discarded which otherwise is denial simpliciter and does not appeal to logic and reasons...”

24. On re-appraisal of the evidence of the prosecution witnesses, we find it confidence-inspiring and trustworthy; appellant Shoukat Hussain Abbasi was transporting (20 kilograms) the huge quantity of Charas and he was arrested on 29-03-2018. The version of the complainant/Excise Inspector Hassan Ali Dashti has been fully corroborated by mashir of arrest and recovery, which is substantiated with the memo of arrest and recovery (Exh.10/A),.

The investigating officer handed over Case property to the Head of Incharge Malkhana. He himself recorded the statements of witnesses u/s 161 Cr.PC. On the same day, the complainant sent the case property to Chemical examiner through EC Shahnawaz. He obtained the report from Chemical Analyzer and submitted the final report under Section 173 Cr.P.C. He produced a chemical examiner report as Exh-10/F, received positive.

25. It is a basic legal principle that objects found from a vehicle in the driver's custody are believed to be within his control and knowledge. If the narcotics are taken from an accused's possession, it is usually assumed that he has a direct link with the drugs, and the burden of proving that he did not know the same falls largely on him. In this respect, we would like to refer to a decision issued by the Supreme Court in the matter of. Muhammad Noor Vs. The State reported in 2010 SCMR 927, wherein the Hon'ble Court observed as under:

8. As regards Driver of the vehicle, it is important to note that when he is driving the vehicle, he is Incharge of the same, therefore, it would be under his control and possession. Hence, whatever articles lying in it would be under his control and possession. The liability of the driver, in view of provisions of section 27 of P.P.C., has been considered by this Court in the case of Sherzada v. State 1993 SCMR 149, wherein it was observed as under:--

The next point raised by the learned Counsel was that it is provided in section 27, P.P.C. that when property is in the possession of wife, clerk or servant on account of that person, it is in that person's possession within the meaning of this Code. The learned Counsel argued that the appellant was a driver, hence an employee of the

owner of the car and even if he is admitted to be in possession of the contraband article on behalf of the owner, he cannot be said to be liable for that possession. But this argument of the learned Counsel is without force on the fact of it because section 27, P.P.C. is confined to the Pakistan Penal Code only, as the words “within the mean of this Code” appearing in that section clearly indicate. This section has not been made applicable to the Prohibition (Enforcement of Hadd) Order, 1979 as is evident from Article 26 of that Order where certain other provisions of the P.P.C. have been made applicable.

This Court in the case of Adil Ahmed v. Deputy Collector, C & CE 1991 SCMR 1951 has observed that in view of provisions of Customs Act, the drivers and owners were both responsible.

In the case of Rab Nawaz v. The State PLD 1984 SC 858, the liability of drivers was again considered and lenient view was taken, as they expressed their ignorance about the contents and claimed to be simple carriers. In the present case the appellant did not claim to be carrier.

This Court in the case of Nadir Khan v. State 1988 SCMR 1899 has observed that knowledge and awareness would be attributed to the Incharge of the Vehicle. The relevant portion reads as under:-

“We have gone through the evidence on record and find that the petitioners had the charge of vehicle for a long journey starting from Peshawar and terminating at Karachi. They had the driving license also. As being person Incharge of the vehicle for such a long journey, they must be saddled with the necessary knowledge with regard to the vehicle and its contents”.

26. Based upon the above discussion and while relying upon the case laws of the Apex Court, we are of the unanimous view that

the prosecution has successfully established its case against appellant Shoukat Hussain Abbasi beyond the shadow of any reasonable doubt. Consequently, the instant criminal appeal merits no consideration which is dismissed and the impugned judgment passed by learned trial Court is hereby maintained.

JUDGE

JUDGE

Nasim/P.A