IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 604 of 2023

PRESENT:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Khadim Hussain Tunio

Noor Muhammad
Faiz Muhammad ...*Appellants*

versus

The State ...*Respondent*

For the Appellants: Mr. Nisar Ahmed Narejo. Advocate.
Mr. Muhammad Ramzan, Advocate.

For the Respondents: Mr. Khadim Hussain Khuharo, APG Sindh

Date of Hearing: 01.04.2024

JUDGMENT

KHADIM HUSSAIN TUNIO, J- This appeal arises from a case originating from a trial of Special Case 68/2023 in the Special Court (CNS), Thatta ("**Trial Court**"). The charge in the case of Noor Muhammad and Faiz Muhammad ("**the appellants**") accused the two men of possessing narcotic drugs, an act in contravention of section 6 of the Control of Narcotic Substances Act, 1997 ("**CNSA 1997**").[1] They were convicted by the judgment passed on 14.11.2023 ("**impugned judgment**") whereby they were sentenced to ten years of rigorous imprisonment and fined Rs.100,000/- (one hundred thousand) each under section 9-1, sub-section (3)-(c) of the CNSA 1997.

2. The facts can be shortly stated. At about 12.30am on 3rd April, 2023, Noor Muhammad (driver) and Faiz Muhammad (passenger) were traveling in a Silver Toyota Corolla GLI when they were signalled to stop at a police checkpoint led by SIP Mushtaque Hussain from the Makli Police Station. Allegedly, they fled on foot but were apprehended. A physical search yielded one thousand rupees and five hundred rupees from them respectively. The car was also searched, revealing three pieces of chars left on open display within a black shopper between the driver and passenger seats. After being weighed on a digital scale, the discovery yielded a total amount of 1460 grams. They were detained at the police station, and FIR No. 68/2023 was lodged.

3. Four prosecution witnesses gave evidence, two of the events being, (1) SIP Mushtaque Hussain ("**the complainant**") and (2) HC Abdul Ghafoor ("**the mashir**") whereas the other two of the investigation post-FIR being, (3) SIP Ali Khan Rahojo ("**the investigating officer**") and (4) PC Jalaluddin ("**the transporter**"). Then,

[1] As amended in 2022; Act No. XX of 2022

statements of the appellants were recorded under section 342 of the Code of Criminal Procedure ("**CrPC**") wherein they disputed the prosecution case stating that they only claimed possession of the car and not of the money recovered and that no contraband of any description was recovered. On conclusion of the arguments, Trial Court passed the judgment impugned herein.

4. Counsel for the appellants argued that in this case independent witnesses could have been procured as it was a thoroughfare with many other cars and such an omission suggests malice; that in fact nothing had been recovered from the exclusive possession of the appellants at the time the arrest was made; that there were several major contradictions in the deposition of the witnesses which make the prosecution case highly doubtful, the benefit of which must go to the appellants. To support such assertions, they cited a division-bench judgment dated 07.03.2024 passed in "Maqsood Ahmed v. The State" (Cr.A 563/2022).

5. *APG* Sindh half-heartedly supported the prosecution case while stating that no enmity had been proven against the prosecution witnesses for them to fabricate the recovery of narcotics and that the appellants had claimed possession of the vehicle.

6. We have heard submissions from both counsels on the merits of the appeal. In his ruling convicting the appellants for the possession of narcotics, the learned judge summarised the evidence that had been given by the prosecution witnesses and framed a single point for determination being: whether on the given date, in the given car at the place of incident, the appellants were arrested and had 1460 grams of chars recovered "from their" possession. In our view, various questions arise from the above which are ultimately also the grounds of appeal from our understanding:-

a) What is "from their" possession? Was the possession exclusive or joint?

b) If the possession was exclusive, who was to be saddled with its responsibility? If the possession was joint, could it be said that both the appellants had the knowledge of the contents thereof?

c) Was chain of custody established to ascertain whether the recovered contraband was in fact what it was shown to be recovered?

6.1. These are, just to name a few, material questions that the learned judge ought to have looked into for deciding whether a case for possession of narcotics had been established, if at all, and against who?

7. Besides appraising the evidence of the witnesses, which the Trial Court made basis for convicting the appellants, the learned judge also drew several inferences from the fact that the appellants had claimed possession of the vehicle. This we shall address first.

7.1. The ownership of a vehicle has, in the present case, no nexus with establishing the recovery until and unless the underlying aspects of the recovery and the incident itself are proven. Noor Muhammad's ownership is not in dispute; had it been so, they would not have claimed such a possession in their statements under section 342 CrPC nor would Noor Muhammad have filed an application for restoration of possession before the Court which was allowed vide order dated 20.04.2023. Their admissions were in the interest of full disclosure and would, one may argue, support their stance and attach more worth to their word against the prosecution because they knew the consequences of such an admission.

What was the nature of the possession; exclusive or joint?

8. We reappraised the prosecution evidence, more specifically the depositions of the complainant and the mashir along with the contents of the FIR. We note that the events as unfolded are that at the time of their apprehension, neither the driver nor the passenger were in the car itself. Allegedly, they ditched their vehicle and chose to run on foot. Although surprising on its own, we noted that the only recoveries from physical searches conducted were of money which the appellants do not claim. The chars so recovered is said to have been placed in a black shopper in the middle of the driver and passenger seat. Both the appellants were said to be seated on the front seats, as such it cannot be said with authority that the chars belonged to one or the other. This makes the possession of narcotics joint in the literal sense; we deliberate more over this below.

Does the law recognise joint possession? With whom lies the responsibility of the recovery?

9. To answer this, we find it beneficial to refer to the statutory framework itself first. Section 6 of the Control of Narcotic Substances Act provides that a person shall be guilty of an offence if he were to

> "produce, manufacture, extract, prepare, possession, offer for sale, sell, purchase, distribute, deliver on any terms whatsoever, transport, despatch, any narcotic drug…"

9.1. A bare reading of the above shows that the law makes no distinction between 'exclusive' and 'joint' possession. If an authority is needed, see *Kashif Amir v. The State, (PLD 2010 SC 1052).* To answer the second part of the question, we note that the general principle as recognised and in practise by the Courts is that there is always an adverse presumption against the driver in cases where the recovery is made from within a car and in such cases establishment of knowledge and presence of narcotics needs to be established to prove possession against any other occupant. The case of *Shahzada versus The State*[2] *("Shahzada's case")* is one such example

[2] 2020 SCMR 841

where the driver of the vehicle had fled, leaving 180 kilograms of narcotics in the trunk of his car and two passengers namely Shahzada and Karim Khan was saddled with the recovery. Supreme Court set aside their convictions with the following observations at paragraph 6:

> "As regards the appellants, who were simply sitting in the car, their case is distinguishable from the case of the Driver and *for involvement of such persons the prosecution is required to lead some evidence to show that they had knowledge of the property lying in the car or they had abetted or conspired with the Driver in the commission of the crime.* No such evidence has been led by the prosecution to prove the above aspects of the case so as to make the appellants responsible for the commission of the crime along with the Driver. *If the property would have been lying open within the view of the appellants or they knew the placement of the property then the situation would have been different.* In such a situation, the appellants were required to explain their position, as required under Article 122 of Qanun-e-Shahadat Order, 1984 and without such explanation their involvement in the case would have been proved. As the property was not within their view and they had no knowledge of the placement of the property, therefore, they cannot be held responsible and in joint possession of the property with the Driver. As such the case of the prosecution against the appellants is highly doubtful."

9.2. Shahzada's case makes knowledge a condition precedent to establish a case against any other occupant besides the driver. The case of *Hussain Shah versus The State*[3] *("Hussain Shah's case")* also discusses liability of an occupant other than the driver in cases of recovery of narcotics. At paragraph 6, while dealing with the case of the cleaner of the truck namely Abdul Sattar, Supreme Court opined that:

> "As far as Abdul Sattar appellant is concerned it was alleged by the prosecution that he was a cleaner and a helper of his co-convict namely Hussain Shah and he was travelling in the same vehicle when the said vehicle was intercepted by the raiding party. It has been pointed out before us that according to the evidence brought on the record *Abdul Sattar appellant also knew about existence of a cavity in the body of the relevant vehicle but nothing had been said by any prosecution witness about the said appellant having the requisite knowledge about availability of narcotic substance in such cavity of the vehicle.* As a matter of fact no evidence worth its name had been brought on the record to establish that the said appellant was conscious about availability of narcotic substance in a secret cavity of the relevant vehicle in which he was traveling along with its driver. The law is settled by now that if the prosecution fails to establish conscious possession or knowledge in that regard then a passenger cannot be convicted solely on the basis of his availability inside a vehicle at the relevant time."
>
> (underlining is ours)

9.3. Hussain Shah's case expounded on the concept of knowledge and clarified that it needed to be the knowledge of the narcotic substance which would mark it as conscious possession. In sum, to the extent of appellant Faiz Muhammad, even if

[3] PLD 2020 SC 132

prosecution's case is taken true on its face value, we note that there were no circumstances under which Trial Court could have been convinced that he was conscious of the presence of the narcotics as no evidence to that extent is available. One can assume that if he was present in the car, he would have seen the black shopper however, being opaque, the contents thereof would be unknown to him unless otherwise proved. Even if "knowledge" as established by Shahzada's case is what must be sought, the property in the present case was not lying in the open, rather in a closer shopper which could not be looked through. On this score alone, there is no merit in his conviction which must be struck down.

9.4. Therefore, the answer to this question is that the responsibility of the recovered narcotics would lie with the driver being Noor Muhammad since a driver is normally expected to know what lies in the vehicle under his control. Had the prosecution's case been that the car's owner was different, even Noor Muhammad's responsibility as the driver would be diminished as an exception; *see Riaz Mian versus The State (2014 SCMR 1165)*.

Chain of custody

10. Having established the above, we now turn to observe whether the driver Noor Muhammad's conviction was in accordance with the principles of justice so enunciated time and again by the superior courts. Chain of custody begins with seizure of the narcotics, storage of the same with the law enforcement agency and finally its dispatch to the office of the chemical examiner.[4] In the present case, the recovery was made on 03.04.2023 and the same was brought to the police station by the complainant. From the complainant, the narcotics went to the malkhana according to the deposition of the complainant, however through whom finds no answer. The description of the three pieces of chars is also absent in the FIR and in the memo of recovery, a crucial detail which would have otherwise solidified the recovery and its transit to the chemical examiner who too notes the description in his report. From there, the case property went to the investigation officer; however he makes no mention of where he obtained the same from or whether it was ever in the malkhana. The investigating officer handed off the property to the transporter who then took it to the chemical examiner, albeit he too remains shy on details as he only makes a mention of him receiving the case property and not from whom. An entry from register No. 19 was produced by the complainant (Exhibit 6-E), however the same has no worth when no other witness makes even a mention of the malkhana or the said entry. Even the malkhana in-charge was not examined who would have otherwise been of great help to the prosecution case given the failure to establish safe

[4] See Sakina Ramzan v. The State, 2021 SCMR 451

custody by other means. As such, the recovery is no longer safe to be relied on despite the positive chemical examiner's report.

Disposition

11. The prosecution wishes to establish that two individuals who were driving in a car chose to escape on foot after ditching their car as a means of escape and that they had a shopper filled with three large pieces of narcotics on open display for the police to recover; all this falls short of favour of logic. As against this, the appellants contend that the recovery of the narcotics was fabricated and that nothing had been recovered from them. When put in juxtaposition with the facts as set out by the prosecution, keeping in view the inconsistencies and the lack of details furnished by the prosecution witnesses, the incident appears to be nothing short of fabrication and the depositions appear to be carefully procured and rehearsed.

11.1. All the above noted factors create more than reasonable doubt in the prosecution case and there can be no cavil to the proposition that a criminal case has to be proven beyond reasonable doubt. The favour of any doubt in the prosecution case goes to the accused as a matter of right because he is the favourite child of the law. A reference to the case of *Muhammad Riaz versus Khurram Shehzad*[5] we deem appropriate:

> "*[...]* the farsightedness and prudence, 'let a hundred guilty be acquitted but one innocent should not be convicted'; or that it is better to run the risk of sparing the guilty than to condemn the innocent. The raison d'être is to assess and scrutinize whether the police and prosecution have performed their tasks accurately and diligently in order to apprehend and expose the actual culprits, or whether they dragged innocent persons in the crime report on account of a defective or botched-up investigation which became a serious cause of concern for the victim who was deprived of justice. The philosophy of the turn of phrase "the accused is the favourite child of law" does not imply that the Court should grant any unwarranted favour, indulgence or preferential treatment to the accused, rather it was coined to maintain a fair-minded and unbiased sense of justice in all circumstances, as a safety gauge or safety contrivance to ensure an even-handed right of defence with a fair trial for compliance with the due process of law, which is an integral limb of the safe administration of criminal justice and is crucial in order to avoid erroneous verdicts, and to advocate for the reinforcement of the renowned doctrine "innocent until proven guilty"."

11.2. Therefore, no cogent reason has been agitated before this Court to justify why the conviction of the appellants Noor Muhammad and Faiz Muhammad should not be struck down. Under such circumstances, the State has failed to make out any case against the appellants who ought not have been convicted by the Trial Court in the

[5] 2024 SCMR 51

absence of concrete evidence. For these reasons, we allowed the appeal against conviction vide short order dated 01.04.2024 in the following terms:

> "For the reasons to be recorded later on, this appeal is allowed along with listed applications and the Appellants are acquitted of the charge in Crime No. 68/2023, under Section 9-1(3)(c) CNSA (Amendment) Act, 2022 registered at Police Station Makli. They shall be released from jail forthwith, if they are not required in any other custody case."

Judge

Judge

KARACHI
16th April, 2024