

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Criminal Appeal No.D-95 of 2015

Present:

*Mr. Justice Muhammad Iqbal Kalhoro,
Mr. Justice Irshad Ali Shah,*

Appellants : Gulmat Shah & others, through Mr. Mahfooz Ahmed
Awan, Advocate,
Respondent: The State, through Mr. Khadim Hussain Khooharo,
Additional Prosecutor General.

Dates of Hearing: 05.03.2018 and 12.03.2018.
Date of Judgment: 11-4-2018

J U D G M E N T .

MUHAMMAD IQBAL KALHORO J: This judgment shall dispose of the captioned appeal filed by appellants Gulmat Shah, Sultan Khan and Hussain Alam from jail, against judgment dated 16.11.2015 passed by Special Judge for CNS Kashmore at Kandhkot in Special Case No.03/2014 Crime No.01/2014 registered at Excise Police DIO Larkana Camp at Kashmore under section 9(c) of Control of Narcotics Substances Act, 1997, (CNS Act) whereby they have been convicted and sentenced to undergo life imprisonment with a fine of Rs.100,000/- each, in default whereof to undergo R.I. for one year more, with benefit of Section 382-B, Cr.P.C. duly extended to them.

2. Brief facts of the case are that on 13.2.2014, at about 2.00 p.m. on a tip-off the appellants were arrested by Excise Police headed by complainant Excise Inspector Abdul Hameed Bughio DIO Camp at Kashmore from Excise Check Post near Wardak Petrol Pump, Taluka Kashmore on Indus Highway, when from a truck-trailer registration No.K-7772 Peshawar, they were travelling in, a huge quantity of *charas* weighing 1540 grams stashed in 77 plastic bags (Bachikas) concealed in a cavity on top of the container was recovered. Each bachka (bag) was found containing 20 slabs of *charas*, and each such slab was one kilogram in weight. In all 77 slabs one from each bag were separated and sealed for chemical analysis while remaining *charas* was put back in the same 77 bachkas and sealed separately. Such a memo of arrest and recovery was prepared at the spot. Then the appellants and



property were brought at Police Station DIO Camp at Kashmore, where instant FIR was registered.

3. At the culmination of usual investigation the challan against the appellants was filed leading to framing of a formal charge against them. The appellants, however, pleaded not guilty and claimed trial. The prosecution in order to prove its case examined PW-1/complainant Excise Inspector Abdul Hameed Bughio at Ex.7 and PW-2/mashir EC Ashique Ali at Ex.8. The complainant in his evidence has produced all the relevant documents which include FIR, memo of arrest and recovery, the report of chemical examiner, the driving license of appellant Gulmat Shah, etc. After closure of prosecution evidence, statements of appellants under section 342, Cr.P.C were recorded. They have denied the prosecution case and have professed their innocence. In addition to it, appellant Gulmat Shah examined himself on oath under Section 340(2), Cr.P.C. Finally the trial Court after hearing the parties convicted the appellants vide impugned judgment in the terms as stated in Para No.1. The appellants being aggrieved by the same have filed this appeal.

4. It may be mentioned that during pendency of the appeal, appellant Gulmat Shah died on 19.09.2016 when he was admitted GMMC Hospital Sukkar and such a report was submitted by Senior Superintendent, Central Prison, Sukkur vide his letter of the same date i.e. 19.9.2016. Therefore, the appeal to the extent of said appellant was abated vide order dated 05.3.2018.

5. Mr. Mahfooz Ahmed Awan, learned Counsel for appellants has contended that the deceased appellant namely Gulmat Shah has been shown driving and thus in control and possession of the alleged truck-trailer at the time of incident, while the remaining appellants namely Sultan Khan and Hussain Aalam are stated to be cleaner and helper but no such evidence about them has been produced by the prosecution. According to him, these two accused were merely passengers who had taken a ride from the driver for going to Karachi and they are not associated in any manner with the alleged vehicle or any narcotics recovered from it. No one among them was found driving the vehicle and no document establishing their identity to be driver of the said truck-trailer was recovered either. He urged that the prosecution has not led



any evidence to establish their conscious possession of the narcotics which was found hidden in a secrete cavity, therefore, the case against these two appellants is not free from doubt. In support of his contentions, he has relied upon the case of **2010 SCMR 927, 2012 P.Cr.L.J. 369** and two decisions passed by Honourable Supreme Court in unreported cases of **Zaman Ali, etc. Versus The State (Jail Petition No.248 of 2014)**; and **Abdul Sattar, etc. Versus The State (Jail Petition No.406/2014)**.

6. On the other hand, Mr. Khadim Hussain Khooharo, learned Additional Prosecutor General for the state contended that the prosecution witnesses have fully supported the case and that although they were subjected to a lengthy cross-examination, but no material contradiction has come on record; that the appellants have committed an offence which is against the society and in such cases the courts have to have a dynamic approach; that all the appellants were found in possession and in control of the vehicle from which a huge quantity of narcotics was recovered; that their claim of travelling as passengers is not borne out of the record. He emphasized that all the three appellants including deceased Gulmat Shah are resident of the same area i.e. Kurram Agency and had been driving the vehicle right from that place to the place of incident, therefore they are very much involved in the case; that it is not otherwise conceivable that from such a far-flung area only one person i.e. appellant Gulmat Shah had been driving the vehicle and the other appellants were travelling merely as passengers. That although the appellants have taken a specific plea of being passengers in the vehicle but have failed to prove the same. He stated that each criminal case has to be decided on its own peculiar facts and circumstances. He in support of his arguments relied upon the case law reported in **PLD 2010 SC 1052, 2008 YLR 508, PLD 2009 SC 39**.

7. We have considered the above contentions of the parties, perused the record and have taken guidance from the case law cited at the bar. It may be stated at the very outset that out of entire alleged narcotics i.e. 1540 kilograms of *charas*, which was found in separate pieces / slabs each weighing 1 kilogram, only 77 such pieces / slabs (77 Kilograms), which were separate and independent of remaining pieces / slabs of



alleged *charas*, were sent to Chemical Analyzer regarding which the report has come in positive. From remaining pieces/slabs neither any representative sample was taken for analysis nor is any chemical report establishing them to be narcotics available on record. Now as to the allegations against the appellants, prosecution's own case is that appellant Gulmat Shah, who has since died, was driving the alleged truck-trailer at the relevant time when the *charas* weighing 1540 kilograms was recovered from it. During personal search of the appellants so also from the truck-trailer's search, a driving license of only appellant Gulmat Shah was recovered, which confirms him to be the driver and thus in possession and control of the alleged vehicle. About appellant Sulatan Khan it is said in the memo of arrest and recovery and FIR that he was cleaner of the truck-trailer but the complainant in his evidence has said no word about this fact. Regarding appellant Hussain Alam nothing identifying his position qua the truck-trailer has been stated either in the documents or by the witnesses in their evidence. So in fact there is nothing on record to establish nexus of these two appellants with the alleged truck-trailer in any manner. Although they both were found traveling in the vehicle but no material is available to indicate their knowledge of the secrete cavity and the *charas* available therein. The record confirms this fact in that it shows that the complaint party on its own without being led by the appellants while making a search of the truck-trailer discovered the secrete cavity and the *charas* therein. In view of this matter, it was incumbent upon the prosecution to establish appellants' conscious possession of *charas*, which admittedly was concealed in a secrete cavity in the vehicle, but as the record stands the prosecution has failed to bring on record anything in this regard. The Honourable Supreme Court in recent pronouncements while dealing with such like cases with same story has extended benefit of doubt to the accused found travelling as passenger in the vehicle from which narcotics was recovered.

While deciding jail petition No. 406 of 2014 (**Abdul Sattar, etc. versus the State**) involving recovery of 3200 kilograms of *charas* from a truck, the Honourable Supreme Court has maintained conviction and sentence of the driver namely Abdul Satter but has acquitted co-accused Muhammad Khan vide order dated 27.01.2016 by observing as under:-



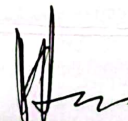
"As regards petitioner No.2 namely Muhammad Khan we have noticed that he was merely travelling in the relevant truck at the time of the alleged recovery and admittedly he was not in the driving seat at the relevant time. It was, therefore incumbent upon the prosecution to establish conscious possession on the part of the said petitioner vis-à-vis availability of narcotics substance in the vehicle in which he was travelling but the prosecution had failed to bring anything on the record to discharge its onus in that regard. If at all anything was to be presumed in this case then that was innocence of the said petitioner rather than his guilt. In this view of the matter we have decided to extend the benefit of doubt to Muhammad Khan petitioner. This petition is, therefore, converted into an appeal to the extent of Muhammad Khan petitioner and the same is allowed, the conviction and sentence of the said petitioner/appellant recorded and up-held by the courts below are set-aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith, if not required to be detained in connection with any other case."

In jail petition No. 138 of 2015 (**Muhammad Shafique and Mazhar Iqbal versus The State**) involving recovery of 1600 kilograms of charas from an Oil-tanker, the Honourable Supreme Court has maintained conviction and sentence of accused Mazhar Iqbal, the driver, but has acquitted co-accused Muhammad Shafique vide order dated 11.02.2016 on the basis of following reasons.

"As regards Muhammad Shafique petitioner we have noticed that he was merely a passenger in the relevant vehicle when contraband substance had been recovered from some secret cavities of the same. It was, thus, incumbent upon the prosecution to establish conscious possession of narcotic substance on the part of the said petitioner but the prosecution had failed to bring anything on the record to establish that Muhammad Shafique petitioner was aware of availability of narcotic substance in the vehicle in which he was travelling as a passenger. In this view of the matter we have decided to extend the benefit of doubt to Muhammad Shafique petitioner. This petition is, therefore, converted into an appeal and the same is partly allowed the extent of Muhammad Shafique petitioner/appellant, his conviction and sentence recorded and upheld by the courts below are set-aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required to be detained in connection with any other case.

In jail petition No.368/2015 (**Abdul Nabi, etc. Vs. The State**) involving recovery of 60 kilograms of charas from the cabin on top of the wagon, the Honorable Supreme Court has maintained the conviction and sentence of driver namely Abdul Nabi but acquitted co-accused Kashmir and Saffaruddin vide order dated 23.02.2016 by observing as under:-

"As regards Kashmir and Saffaruddin petitioners we have straightway observed that even according to the prosecution itself they were passengers travelling in the vehicle being driven by their co-convict namely Abdul Nabi and, thus, it was incumbent upon the prosecution to establish conscious possession of the narcotic



substance on the part of the said petitioners but the prosecution had utterly failed to bring anything on the record establishing that the said petitioners were aware of availability of narcotic substance in the vehicle in which they were travelling as passengers. In these circumstances we have decided to extend the benefit of doubt to the said petitioners. This petition is, therefore converted into an appeal and the same is allowed to the extent of Kashmir and Saffaruddin petitioners/appellants, their convictions and sentences recorded and up-held by the courts below are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case."

8. In the light of above discussion and particularly after taking guidance from above cited decisions of the Honourable Supreme Court, we are of the view that prosecution has not been able to establish on the part of the appellants namely Sultan Khan and Hussain Aalam the conscious possession of the alleged narcotics hidden in a secret cavity in the truck-trailer. Therefore, the appeal to the extent of said appellants is allowed, the conviction and sentence awarded to them by the learned trial Court are hereby set-side, and they are acquitted of the charge on the basis of benefit of doubt. They shall be released forthwith, if not required in any other custody case.

The appeal stands disposed of in the above terms.


JUDGE


JUDGE

announced by us in open court.
approved.
11/4/18


11/4/18