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IN THE HIGH COURT OF SINDH, KARACHI

Cr. Revision Application No. 51 of 2011.

Before:-

Mr. Justice Irfan Saadat Khan, J.

Mr. Justice Mohammed Karim Khan Agha, J.

Date of hearing. 15.08.2016 & 23.08.2016.

Date of Order. 26-08-2016

Applicant: Attayatullah Khan Kakar, through
Mr. Asim Mansoob Qureshi, Advocate.

Respondent: The State, through Mr. Dilawar Hussain,
Standing Counsel and Mrs. Firdous Fareedi,
State Counsel.

ORDER.

Mohammed Karim Khan Agha, J:- This Criminal Revision under Section 439 read with Section 435 and 561 Cr.P.C. has been filed by the applicant against the order dated 02.03.2011, whereby learned Special Judge-II, CNS, Karachi dismissed the application filed by the applicant under Section 561-A Cr.P.C for release of vehicle bearing Registration No.TLA-886 (the Vehicle) (the Impugned Order).

2. Briefly stated the facts of the case are that on 01.02.2010 at about 10.00 p.m. at Lucky Chowrangi near Northern By-Pass, RCD Highway, Karachi the Vehicle was stopped by customs officials who on a cursory routine search suspected that it was carrying narcotic substances. Due to this suspicion the Vehicle along with its driver was brought at ASO Headquarter, NMB Wharf, Karachi. However, as it was late at night the Vehicle was not examined until the next morning. Thus 02.02.2010 at 10.00 a.m. a detailed examination of the Vehicle's cargo was conducted in the presence of mashirs and it was found that the Vehicle was

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loaded with 597 jute/polypropylene bags in all out of which 422 bags (each weighing 60 KG) were found containing husk and 175 bags (each weighing 65 KG) were found containing poppy seed. These narcotic substances were seized along with the Vehicle. The driver of the Vehicle Mr. Hazrat Gul (who also failed to produce registration documents of the Vehicle) was arrested and FIR bearing Crime No. 05/2010 was registered on 02-02-2010 under Section 6,7 and 8 punishable under Section 9C of the Control of Narcotic Substances Act, 1997 (CNSA).

3. Learned counsel for the applicant contended that he is the owner of the seized Vehicle which he had rented out to Mr. Mohammed Rafique for use in Mr. Rafique's transport business at the time when the crime was committed and he now wants the Vehicle to be returned to him.

4. In support of his contention that the Vehicle belonged to him learned counsel placed reliance on an Iqarnama dated 9/4/2005 between Haji Shaukat Ali and himself for the sale of the Vehicle to him, a verification certificate dated 25-10-10 from the Excise and Taxation officer V, RTA (Commercial) Quetta to the investigating officer Model Collectorate of Customs, Investigation and Prosecution branch Karachi stating that as at 10-3-10 the Vehicle belonged to the applicant, letter bearing No.0003/ADV/456, dated 09th May, 2011 issued by Askari Bank, showing reference letter dated 11.03.2010 in respect of clearance certificate in the name of Haji Shaukat Ali & Brothers (from whom the applicant Attaullah Khan had purchased the above vehicle), Letter / Clearance Certificate bearing number 0003/ADV/0366, dated 11th May, 2010 along with receipt and copy of book in respect of the Vehicle issued by Askari Bank addressed to Excise & Taxation Officer in favor of Haji Shaukat Ali and Brothers (from whom the applicant namely Attaullah Kakar had purchased the Vehicle), Statement (Halfia Bayan) of Haji Shaukat Ali Khan S/O Haji Jan Muhammad holding CNIC

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No.54400-4367475-3, (coupled with the P.S/true copy of National Identity Card) wherein it has mentioned that Shaukat Ali Khan has sold out the Vehicle.to the applicant namely Attaullah Khan Kakar and Confirmation certificate (Tasdeeqi Certificate) in respect of the Vehicle issued by Haji Shaukat Ali in favor of applicant/Attaullah Khan Kakar.

5. With respect to the leasing of the Vehicle he referred to a lease agreement dated 1-1-2010 between the applicant and Mohammed Rafique which was further corroborated by a statement which he made to the IO of the case in a statement referred to in the IO's Report to the trial court dated 5.01.2011 in connection with his application before the trial court for the return of the Vehicle.

6. Learned counsel for the applicant further contended that he had no knowledge that the Vehicle was being used to transport narcotic substances and as such he had not committed any offense under the CNSA. In this respect he placed reliance on Section 32 and 74 CNSA and the following case law; **Allah Ditta v. The State** (2010 SCMR 1181), **Shareef Khan v. The State** (2004 P.Cr.L.J. 2060 Karachi), **Abdul Salam v. The State** (2003 SCMR 246, 4). **Muhammad Sarwar v. The State** (2005 P.Cr.L.J. 1005 (Federal Shariat Court), **The State v. Rashid Ali** (2006 MLD 1529 Karachi), **Amin Nawaz Baloch v. The State** (2013 YLR 1626 Peshawar) **Naseem Rahman v. The State** (2014 MLD 587 Peshawar), **Javed Hayat & another v. The State** (PLD 2006 Lahore 167), **Askari Leasing Limited through Branch Manager v. The State** (2007 P.Cr.L.J. 755 Lahore) and **Syed Zaman v. Muhammad Javed & another** (2001 P.Cr.L.J. 423 Peshawar).

7. Furthermore, he had not been named in the FIR, Challan and not been charged for an offense under CNSA and as such he had no involvement in the commission of the

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crime. That for all the above reasons he was entitled to the return of the Vehicle.

8. On the other hand learned counsel for the Customs Department supported the Impugned Order and submitted that the Vehicle did not belong to the applicant. That as per records the Vehicle was transferred to him on 10-03-2010 which was after the registration of the FIR on 02-02-210 and as such the documents produced by the applicant to prove ownership were all false and fabricated and the application had been malafidely made in order to ensure that the Vehicle was not confiscated since it was carrying a huge consignment of drugs. She further submitted that the actual owner of the Vehicle was Mr. Shaukat Ali who had not come forward to claim the Vehicle as he was a part of the crime. Thus, at the time when the crime was committed the applicant was not the registered owner of the Vehicle and as such he has no right to take possession of it which has been correctly confiscated under S.32 CNSA for carrying illegal narcotic substances in violation of CNSA. In support of her contentions learned counsel placed reliance on the cases of **Abdul Salam V the State** (2003 SCMR 246) and **Abdul Rasheed V State** (SBLR 2005 1275). Learned standing counsel adopted and reinforced the arguments of learned counsel on behalf of the Customs Department.

9. We have heard learned counsel at length, carefully perused the record and considered the applicable law as well as the case law cited at the bar.

10. In our view in order to have the Vehicle returned to him the applicant has to cross two hurdles. Firstly, he has to show that the Vehicle belongs to him and then if he can successfully do this secondly show that the customs authorities have not proved that he knew the Vehicle was being used to transport narcotics contrary to the CNSA. ✓✓

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11. Firstly, turning to the ownership of the Vehicle. In our view if we were to take the vehicle verification certificate dated 25-10-10 from the Excise and Taxation officer V, RTA (Commercial) Quetta to the investigating officer Model Collectorate of Customs, Investigation and Prosecution branch Karachi and the registration book of the Vehicle in isolation it would appear that the applicant only became the registered owner of the Vehicle on 10-3-2010 after the registration of the FIR and he was not the lawful owner at the time when the Vehicle was confiscated and had no right to claim it as was found by the learned Judge in the Impugned Order.

12. However, on a close and holistic examination of all the documents placed on record (which may not have been available to the learned Judge when passing the Impugned Order) it appears that the applicant was substantially or at least in very large part the legal owner of the Vehicle.

13. This is because as established by the documents the following chain of events/chronologies seem to be applicable in respect of the Vehicle.

(a) It appears that in around early 2005 Shaukat Ali and Brothers availed finance from Askari bank in order to purchase the Vehicle which finance was to be paid back by Shaukat Ali and Brothers through agreed monthly installments.

(b) Shortly thereafter, probably without the consent of Askari Bank, it appears that through Iqarnama dated 09-04-2005 between Shaukat Ali and Brothers and the applicant Shaukat Ali and Brothers sold the Vehicle to the applicant on a similar installment basis repayable within 5 years. Namely, the applicant would pay to Shaukat Ali a monthly installment who would then it appears ensure that the due monthly installment was paid to the bank. Since this was a private arrangement between Shaukat Ali and the applicant the Vehicle remained registered in the name of Askari bank although it had in fact been sold by Shaukat Ali and Brothers to the applicant who was using the Vehicle as

he saw fit. The Vehicle could not have been registered in the applicants name until the bank loan was paid off on around 10-3-2010. It may be observed that this application does not concern any illegality/breach of contract which may have been made by Shaukat Ali and Brothers with the lending bank.

- (c) As such since around mid 2005 the Vehicle for all intents and purposes, although strictly legally speaking it belonged the Askari bank, it was also to a large extent owned by the applicant since it appears to have been in his absolute control and possession and he had replaced in effect Shaukat Ali and Brothers as the person paying the installments on the Vehicle finance
- (d) By lease agreement dated 01-01-2010 between the applicant and Mohammed Rafique the Vehicle was leased to Mohammed Rafique for use in his transport business (which seems to be corroborated by the driver Hazrat Gul in the interim challan dated 18-02-2010).
- (e) That only by 10-3-2010 had the Askari Bank's Vehicle loan been repaid by Shaukat Ali and Brothers and thus only on receiving the NOC from Askari bank could the Vehicle be legally registered in the name of the applicant in line with his agreement with Shaukat Brothers from whom he had already purchased the Vehicle way back in 2005.
- (f) Thus, only on 10-3-2010 could the Vehicle be legally transferred into the name of the applicant who in effect had all but owned the Vehicle since the Iqarnama dated 09-04-2005 between Shaukat Ali and Brothers and the applicant.

14. The chances of the applicant fabricating so many documents from varying sources e.g. Askari Bank, Motor Registration Authority etc in our view seems remote. Even otherwise these documents were all verified by the IO of the case in his Report to the trial court dated 05-01-2010 in respect of the applicant's application under S.561 (A) Cr.PC which is an important document and for ease of reference is set out below:

"IN THE COURT OF SPECIAL JUDGE CNS-II
KARACHI

Case No.71/2010
FIR No.ASO-05/2010

StateV/s.....Hazrat Gul s/o. Gul Jan

Subject: REPORT ON APPLICATION FILED
UNDER SECTION 516-A CR. P.C. ON
BEHALF OF ATTA ULLAH KHAN

It is respectfully submitted on behalf of the state that this Honorable Court was pleased to direct the undersigned to submit report in response to an application filed by Attaullah Kakar s/o Inayatullah Kakar in the captioned case for the release of seized Truck No.TLA-886. **The Court was further pleased to direct the applicant to join the investigation so as to ascertain his complicity in the offence.**

In this connection the undersigned, wrote letter's to M/s. Askari Commercial Bank Ltd., Quetta, ETO Excise & Taxation Quetta for providing details of present and previous owner of the truck and Deputy Collector Customs Quetta for verification of all documents submitted by the applicant in this Honorable Court. **M/s. Askari Commercial Bank Ltd., Quetta has now replied that the truck No.TLA-886 was financed to one Haji Shaukat Ali & Brothers who had paid the final installment and have confirmed that NOC dated 11.03.2010 for transfer in his name was also issued. The reply of Excise & Taxation Officer, Motor Registration Authority Quetta has also been received. According to their letter No.6162 / MV / TLA-886, dated 25.10.2010 the vehicle was registered in the name of Askari Commercial Bank (Pvt.) Ltd. A/C Haji Shaukat Ali & Brothers Quetta on 13.04.2005. A Clearance Certificate No.0003/ADV/0366 dated 11.03.2010 issued by the Askari Commercial Bank for No Objection Certificate to transfer of said vehicle in the name of Haji Shoukat Ali & Brothers. After that the said vehicle was transferred in the name of Mr. Attaullah s/o. Inayatullah on the basis of production of transfer letter and other relevant papers by owner Haji Shaukat Ali (copy ETO letter enclosed). Now as per record of Excise & Taxation Quetta, the**

owner of the seized truck TLA-886 is Attaullah s/o. Inayatullah.

As per direction of this Honorable Court Attaullah s/o. Inayatullah appeared before the undersigned on 03.01.2011 and was examined. He stated that he had rented out the seized truck to Muhammad Rafiq s/o. Noor Ali R/o. Quetta on 01.01.2010 on monthly rent of Rs.85000/- and deposit of Rs.500,000/- (copy of his statement is enclosed.) It may be mentioned here that at the initial stage the driver Hazrat Gul disclosed during the interrogation that he was hired/appointed on this vehicle by one Rafiq and this fact was incorporated in the interim Challan.

The vehicle was seized for transportation of 25320 Kgs. Poppy Straw on 01.02.2010 and presently parked in CPF Bonded Ware House of Customs at Maripur, Karachi.

Report is submitted accordingly. (bold added))

(Faridullah Khan)
Investigating Officer"

15. Thus, to our mind in order to do substantive justice in this case based on the above chronology of events and taking into account all the above documents and other material on record we do not consider that it would be just or equitable to find that the ownership of the Vehicle vested in either Askari bank or Shaukat Ali and Brothers at the time of the commission of the offense.

16. The applicant in effect was the legal owner of the Vehicle especially as nearly all the installments had been paid by the applicant by the time of the commission of the offense.

17. In the case of **Amin Nawaz Baloch v. The State** (2013 YLR 1626 Peshawar) it was held that where a party had taken a vehicle on lease from the bank where it had paid the majority of the installments to the bank it could make a claim under S.74 CNSA as the lawful owner especially when there were no rival claims as in the instant case.

18. Thus, we find the applicant to be the lawful owner of the Vehicle.

19. The next hurdle that the applicant needs to cross is to show that the Customs authorities have not proved that he knew that the Vehicle was being used to transport drugs prohibited under CNSA.

20. S. 32 CNSA provides as under:

"S.32 Articles connected with narcotics.—

(1) Whenever an offence has been committed which is punishable under this Act, the narcotic during, psychotropic substance or controlled substance, materials, apparatus and utensils in respect of which or by means of which, such offence has been committed shall be liable to confiscation.

(2) Any narcotic drug, psychotropic substance or controlled substance lawfully imported, transported, manufactured, possessed, or sold along with, or in addition to, substance which is liable to confiscated under sub-section (1) **and the receptacles or packages, and the vehicles, vessels and other conveyance used in carrying such drugs and substance shall likewise be liable to confiscation.**

Provided that, no vehicle, vessel, or other conveyance shall be liable to confiscation unless it is proved that the owner thereof know that the offence was being, or was to be, committed." (bold added)

21. S.74 CNSA Provides as under:

"S.74 CNSA. Application of other laws.--- If an offence punishable under this Act, is also an offence in any other law for the time being in force, nothing in that law shall prevent the offender from being punished under this Act. -

Provided that nothing contained in Section 523 of the Code of Criminal Procedure, 1898 (Act V of 1898), or any other provision of the said Code or any other law for time being in force, the custody of narcotic drugs, psychotropic substances, controlled substances, any material unless used

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for production or manufacture of such drugs or substances or any conveyance used in import, export, transport or transshipment thereof or for commission of any offence under this Act, **shall not be given in custody to the accused or any of his associate or relative or any private individual till the conclusion of the case [except as provided in the second power subsection (2) of Section 33].** (bold added)

22. The Hon'ble Supreme Court whilst analyzing S.32 and 74 CNSA has also held in the case of **Allah Ditta v. The State** (2010 SCMR 1181), with regards to knowledge and S.74 on a case with relatively similar facts at P.1186 Para 9 as under

“We, thus, conclude that the proviso of section 74 does not prohibit the release of the vehicle involved in the trafficking of narcotics to its owner, who is not connected in any way with the commission of the crime or the accused and was unaware that his vehicle was being used for the crime.”

23. It would appear that it has never been the case of the prosecution that the applicant knew that the Vehicle was being used for the transportation of illegal narcotics under the CNSA and there is no evidence on record to indicate that the applicant did so know. In fact, according to the driver of the Vehicle Mr.Hazrat Gul (who was the only person charged in this case) as mentioned in the challan he had been hired by one Rafique to deliver the goods which fits in with the applicant's contention that he had leased the Vehicle to Mr.Rafique under the lease agreement.

24. The learned Counsel for customs has candidly conceded that the applicant was not nominated in the FIR, was not named anywhere in the challan, was not charged and was not even a part of the prosecution case. Furthermore, the IO's above reproduced Report into, amongst other things, the applicant's complicity in the case came up with nothing.

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25. As per learned counsel for customs the only accused (namely the Vehicle driver Hazrat Gul) has now died and the case has abated. Thus, there are no longer any trial proceedings.

26. As discussed above the Customs authorities have produced no material at all to show that the applicant knew that the Vehicle was being used to transport banned Narcotic Substances and indeed this was never their case as according to them the Vehicle was owned by Shaukat Ali who interestingly was not even challaned in this case which seems to indicate that in Customs' own view Shaukat Ali had no knowledge that the Vehicle was being used in the commission of a crime under the CNSA.

27. Thus, since we have found that the applicant is the legal owner of the Vehicle and he had no knowledge that it was being used for the transportation of banned narcotic substances under the CNSA and the trial has abated due to the death of the only accused we find that S.32 CNSA is not applicable in the given circumstances and order that the Vehicle be returned to the applicant forthwith.

Dated: 26-08-2016