ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.D-37 of 2018
Cr. Appeal No.D-42 of 2018
Cr. Revn. Appln. No.D-09 of 2018

Date of Hearing	ORDER WITH SIGNATURE OF JUDGE
12.03.2019.	

Mr. Abid Hussain Qadri, advocate for appellant Rahamuddin in Cr. Appeal No.D-37 of 2018.

Mr. Mujahid Ali Jatoi, advocate for appellants Imdad Ali Kharani and Mohammad Bux Jatoi in Cr. Appeal No.D-42 of 2018.

Mr. Irfan Badar Abbasi, advocate for applicant in Cr. R. A. No.D-09 of 2018.

Mr. Mohammad Noonari, DPG.

M/s Abid Hussain Qadri and Mujahid Ali Jatoi advocates while further arguing the appeals have referred to Rule 4(2) of the Control of Narcotic Substances Government Analysis Rules, 2001 and in support of their contentions they have placed reliance upon the reported cases of *Mohammad Yousuf v. The State* (2017 MLD 1471), *Umed Ali v. The State* (2018 MLD 1311), *Shoaib Ali v. The State* (2018 MLD 1835). They submit that as per the memo of recovery the appellants were allegedly having certain articles and some of the items were also lying in the cabin, but no inventory was prepared by the I.O. and this fact was admitted by PW/ASI Ashique Ali (Ex.06, at page 81, relevant page 85 of the paper book).

Moreover, co-accused Sardar Khan, who was acquitted, had produced photostat copy of bilty /voucher in his statement under Section 342, Cr.P.C. Though it was mentioned by the Presiding Officer in his own handwriting and the said document is available in the R&Ps of the case, but was not exhibited for the reasons best known to the Presiding Officer. He also examined DW Bakhtiar Ali, who too deposed in line that accused Sardar and Shafi Mohammad were coming from Quetta in Mazda along with crates of apples being loaded and were going towards Jampur (Punjab). He was not subjected to cross-examination properly whether the contraband allegedly found in possession of the appellants was also found from their possession, who

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were also inmates of the cabin of Mazda being driven by acquitted accused Sardar.

We have heard arguments of learned Counsel for the appellants, learned Counsel for the applicant in criminal revision application as well as learned DPG for the State and have gone through the material made available before us on record.

Heard arguments.

We are of the considered view that evidence adduced by the prosecution is full of discrepancies and the defence version brought by the appellants before the trial Court was not kept in juxtaposition nor was discussed at length to discredit their claim. Hence, in our view, the prosecution has failed to prove its case beyond any reasonable shadow of doubt. Accordingly, for the reasons to follow, both appeals are allowed and we by extending benefit of doubt to the appellants, acquit them from the charges. Consequently, the impugned judgment dated 28.5.2018 handed down by learned Sessions/Special Judge (CNS), Jacobabad in Special Case No.16/2017 re-State v. Rahamuddin & others, being outcome of Crime No.37/2017, registered at Police Station Saddar, Jacobabad, under Section 9(c) of Control of Narcotic Substances, Act, 1997, is hereby set aside to the extent and effect of conviction and sentences awarded to appellants Rahamuddin, Imdad Ali Kharani and Mohammad Bux Jatoi. They are in custody; hence, they shall be released forthwith if their custody is no more required in any other custody case.

The trial court while passing property order in impugned judgment has decided the fate of property/vehicle in question viz., Mazda in following words :-

> *"Order for disposal of property*
>
> *20 K.G charas recovered from accused persons Rahamdin, Imdad Ali and Mohammad Bux along with dopatas, towel, packets of Bonus & Express washing power be destroyed in accordance with the law, after expiry of appeal period, while the cash amount recovered from all accused persons not claimed by them be deposited in Government Treasury in proper head after expiry of appeal period,* ***while the Mazda Truck TKR-284 recovered from accused Sardar and Shafi Mohammad be restored to them in accordance with law, after expiry of appeal period.***"

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In view of above, Criminal Revision Application No.D-09 of 2018 is allowed and the impugned order dated 13.9.2018 passed by the trial Court in Cr. Misc. Application No.679 of 2018 re-Sardar Khan Khoso v. The State, is also hereby set aside. As reported, the vehicle in question is standing at Police Station Saddar, Jacobabad, therefore, SHO concerned is directed to release the vehicle to the applicant/owner, namely, Sardar Khan Khoso on proper verification, identification and after obtaining the receipt of delivery from him.

JUDGE

JUDGE

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

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Criminal Appeal No. D-37 of 2018
Criminal Appeal No.D-48/2018
a/w Cr.Rev.A No. D -09/2018

Rahmuddin V/S The State

SINDH HIGH COURT, CIRCUIT COURT, LARKANA

Composition of Bench MR. JUSTICE MUHAMMAD SALEEM JEESAR (D.B.)
MR. JUSTICE ADNAN IQBAL CHAUDHRY

Date of last hearing: 12-03-2019

Date of decision:

(a) **Judgment approved for reporting.** Yes ✓

CERTIFICATE

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

NOTE: -

(i) **This slip is only to be used when some action is to be taken.**

(ii) **If the slip is used, the Reader must attach it to the top of the first page of the Judgment.**

(iii) **Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.**

(iv) **Those directions which are not to be used should be deleted.**

SGP, Kar-L (iii) 773-2000-4-2003-III

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANO

Cr. Appeal No.D-37 of 2018

Rahamuddin Bareech

Versus

The State

Cr. Appeal No.D-42 of 2018

Imdad Ali Kharani & another

Versus

The State

and

Cr. Revision Application. No.D-09 of 2018

Sardar Khan Khoso

V.

The State

Appellant Rahamuddin in Cr. Appeal No.D-37 of 2018	:	Through Mr. Abid Hussain Qadri, Advocate
Appellants Imdad Ali Kharani and Muhammad BuxJatoi in Cr. Appeal No.D-42 of 2018	:	Through Mr. Mujahid Ali Jatoi, Advocate
Applicant Sardar Khan Khoso in Cr. R. A. No.D-09 of 2018	:	Through Mr. Irfan Badar Abbasi, Advocate
The State	:	Through Mr. Mohammad Noonari, DPG Sindh
Date of hearing:	:	26.2.2019 & 12.03.2019
Date of Judgment:	:	12.03.2019

JUDGMENT

MUHAMMAD SALEEM JESSAR, J:- Through this common judgment, we intend to dispose of above two criminal appeals arising from a common judgment dated 28.05.2018, passed by Sessions Judge / Special Judge (CNSA), Jacobabad in Special

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Case No. 16 of 2017, and the above criminal revision application, whereby the applicant Sardar Khan Khoso seeks return of the seized vehicle.

2. The above named appellantswere sent-up to face their trial for the commission of offence U/S 9(C), Control of Narcotic Substance Act, 1997 bearing crime No.37/2017 PS Saddar Jacobabad.

3. Briefly, the facts of prosecution case, as narrated in FIR No.37/2017 lodged by Inspector Ayaz Ahmad Pathan at PS Jacobabad on 16.03.2017 are that; on the said date, while patrolling the area, he received spy information that three accused persons are transporting charas from Quetta in a Mazda Truck bearing registration No.TKR-284 Quetta, which was crossing bypass. On receipt of such information, the complainant, alongwith his subordinate staff, held naka-bandi at bypass near Shambay Shah check post. At about 1000 hours, they saw the said Mazda truck coming from Baluchistan side, wherein fivepersons were sitting, out of them one was having black colour bag on his shoulder, other was having black colour shopper in his lap and third person was having bundle (Gandhri) of cloths in his lap. The complainant party got alighted those five persons from the said truck and on enquiry, the person having black colour bag in his shoulder disclosed his name as Rahamuddin Pathan, in whose bag 20 slabs of charas were found and the complainant recovered Rs.1000/- from his possession. The person having black colour shopper disclosed his name as Imdad Ali Kharani and 10 slabs of charas as well as 43 bags of Surf were found in the said shopper and Rs.800/- were also recovered from his possession, while the third person, who was having bundle (Gandhri) of cloths in his lap, disclosed his name as Muhammad Bakhsh Jatoi and 10 slabs of charas, as well as, "rawas" were found lying in said bundle and Rs.700/- were also recovered from his possession. The fourth person disclosed his name as Sardar Khan, who was driver of the truck and fifth person disclosed his name as Shafi Muhammad, who was the cleaner of the truck. They further disclosed that the above named three persons were business men of the charas and they used to give them Rs.30,000/- for each trip. The complainant tried to associate independent person from the passing vehicles to act as mashirs, but they refused. Thereafter, the complainant appointed ASI Ashiq Ali and ASI Munir Ahmad as mashirs, and weighed each slab of charas, which was of 500 grams, thus total of 40 slabs of charas became 20 K.Gs. He prepared such memo of arrest/recovery on the spot. Thereafter, the accused persons and recovered case properties were brought at PS, where the complainant lodged the cited above FIR.

4. A formal charge was framed against the accused persons at Ex.03, to which they pleaded not guilty and claimed their trial vide their pleas at Ex.3/A to 3/E.

5. To substantiate its case, the prosecution has examined complainant Inspector Ayaz Ahmad at Ex.04. He produced memo of arrest/recovery at Ex.4/A, FIR at Ex.4/B, and attested copies of DD entries No.5, 10, 11 (one sheet) at Ex.4/C. PW.2, HC Ghulam Murtaza has been examined at Ex.05. He produced RC No.45 at Ex.5/A, attested copies

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of DD entries No.12 and 28 (one sheet) at Ex.5/B. PW.3, ASI Ashiq Ali has been examined at Ex.06. PW.4, I/O SIP Shabbir Ahmed Sahito has been examined at Ex.07. He produced report of Chemical Examiner at Ex.7/A. Then, learned I/C DPP for the State has closed the side on behalf of prosecution vide statement at Ex.08.

6. The statements U/S 342 Cr.P.C of the accused persons were recorded at Ex.09 to 13, wherein they denied the allegations of the prosecution leveled against them. They claimed their innocence by stating that they have been falsely implicated by the police. However, they neither examined themselves on oath, nor led any sort of evidence in their defence, except accused Sardar, who stated that he was driver of the Mazda truck, police alighted crates of apples from the truck and harsh words were exchanged between him and the Police, on which he has been falsely involved in this case. He produced P.S copy of bilty (receipt for transportation of goods) at Ex.12/A and examined one Bakhtiar Ahmed at Ex. 14 in his defence. However, he did not examine himself on oath u/s 340(2) Cr.P.C.

7. The trial Court, after examining the evidence on record and after hearing the arguments of learned counsel for the parties, ordered as under:

> *"In the light of above discussion, I am of the view that the prosecution has failed to prove its case against accused Sardar and Shafi Muhammad beyond shadow of reasonable doubt, therefore, they are acquitted U/S 265-H(1) Cr.P.C by giving them benefit of doubt from the charge of this case. They are present in custody of District Prison Jacobabad. They are remanded back to District Prison Jacobabad with the direction to the Jail Superintendent to release them at once, if they are not required to be detained in any other custody case. While the prosecution has successfully proved the guilt of the remaining accused persons, namely, Rahamdin, Imdad Ali and Muhammad Bux beyond shadow of reasonable doubt. Admittedly, 10 KG charas lying in black colour bag was recovered from exclusive possession of accused Rahamdin, while 05 KG charas lying in black colour plastic shopper was recovered from exclusive possession of accused Imdad Ali and 05 K.G charas wrapped in clothy pile (Gandhri) was recovered from exclusive possession of accused Muhammad Bux, therefore, it is established beyond shadow of doubt that they have committed the offence, however, while taking lenient view and applying policy laid down in the case of Ghulam Murtaza and another versus the State, reported in PLD 2009 Lahore-362, accused Rahamdin S/O Noor Muhammad Barech was sentenced to under rigorous imprisonment for the period of 12 years and 06 months and to pay fine of Rs.60,000/- and in default in payment of fine, he shall further undergo 09 months S.I, and accused Imdad Ali S/O Sikander Ali Kharani and Muhammad Bux s/o PirBuxJatoi are sentenced to suffer rigorous imprisonment for the period of 07 years and 06 months each and to, pay fine of Rs.35,000/- each and in default in payment of fine, they shall further undergo for the period of 06 months and 15 days S.I each.*

8. Appellants, Rahamuddin, Imdad Ali Kakhrani and Muhammad Bux Jatoi, being aggrieved by their above conviction and sentences, have preferred above criminal appeals, while applicant Sardar Khan Khoso has filed Cr. Revision Application No. 09/2018 seeking return of his vehicle.

9. First we will take up Cr. Revision Application No. 9/2018 which has been filed by applicant Sardar Khan, who was driverof the vehicle in which the above appellants were

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travelling at the time of their arrest by police along with alleged contraband items. While disposing of Special Case No 16 of 2017, the trial Court passed the following order in respect of the applicant Sardar Khan Khoso

> *"In the light of above discussion, I am of the view that the prosecution has failed to prove its case against accused Sardar and Shafi Muhammad beyond shadow of reasonable doubt, therefore, they are acquitted U/S 265-H(1) Cr.P.C by giving them benefit of doubt from the charge of this case. They are present in custody of District Prison Jacobabad. They are remanded back to District Prison Jacobabad with the direction to the Jail Superintendent to release them at once, if they are not required to be detained in any other custody case."*

10. So far as the Mazda truck, being driven by the applicant Sardar Khan Khoso is concerned, the trial Court passed the following order for disposal of case property:

> *"Order for disposal of property*
>
> *20 K.G charas recovered from accused persons Rahamdin, Imdad Ali and Mohammad dux along with dopatas, towel, packets of Bonus & Express washing power be destroyed in accordance with the law, after expiry of appeal period, while the cash amount recovered from all accused persons not claimed by them be deposited in Government Treasury in proper head after expiry of appeal period, **while the Mazda Truck TKR-284 recovered from accused Sardar and Shafi Mohammad be restored to them in accordance with law, after expiry of appeal period.**"*

11. Before proceeding any further, we would like to mention that in some cases there are more than one issue and in such case the trial Court should take up each issue separately and decided it in an unambiguous and clear manner so that no ambiguity is attached to the order. In the present case, the vehicle was taken into custody when it was being driven by applicant Sardar Khan Khoso while Shafi Muhammad was cleaner with him. Even a person of ordinary prudence knows that each vehicle, when it is not in the direct control of its real owner, is under the command of the driver. Even a police constable when, when he stops a vehicle, asks the driver for its documents and if he is unable to produce the same he books the driver and not the cleaner of the vehicle. However, while passing the above order for disposal of the case property, ambiguity was created by stating "***while the Mazda Truck TKR-284 recovered from accused Sardar and Shafi Mohammad be restored to them***"which is not the correct position as the said vehicle was recovered from applicant Sardar Khan Khoso. The trial court ought to have ordered for return of the vehicle to the driver Sardar Khan Khoso, in case the real owner of the vehicle did not come forward to claim the same, as it cannot be handed over to the cleaner.

12. After his acquittal and the above order for disposal of the vehicle, the applicant, Sardar Khan, filed an application before the trial Court for return of the said vehicle, however, the same was dismissed in the following words:

> "4. Since, in the above CNS case, appeal has been filed by the accused persons bearing Cr. Jail Appeal No. D-43 of 2018, which is still pending before the Hon'ble High Court of Sindh, Circuit Court Larkana, therefore, at this stage, this application cannot be allowed.... Accordingly, this application is rejected."

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13. While passing order for disposal of case property, the trial Court ordered that the Mazda truck TKR-284 recovered from accused Sardar and Shafi Muhammad be restored to them in accordance with law, **after expiry of appeal period.** The judgment in the instant case was delivered on 28.5.2018 whereby applicant Sardar Khan Khoso, driver of the vehicle, and Shafi Muhammad, cleaner, were acquitted while accused Rahamdin, Imdad Ali and Muhammad Bux were convicted and sentence as above. Accordingly, the above named convicted persons preferred appeals against their conviction and sentences, as noted above, however, driver Sardar Khan Khoso and cleaner Shafi Muhammad were acquitted, meaning thereby that neither they nor the said vehicle was in any manner involved in drug trafficking, and since no appeal was filed by the State against the acquittal of Sardar Khan and Shafi Muhammad, therefore, their acquittal, on the expiry of period of limitation, attained finality and, thus, they, alongwith the said vehicle, were exonerated from the said crime. The fate of the appeals filed by the said convicted accused, whether the same are allowed or dismissed, would not affect the case of the acquitted accused in any manner nor the order for disposal of the vehicle was under challenge before any Court. Therefore, there was no occasion for the trial Court to turn down the application of Sardar Khan Khoso.

14. Accordingly, we allowed criminal revision No. 09 of 2018 by our short order dated 12.03.2019 in the following terms:

> *"In view of above, Criminal. Revision Application No.D-09 of 2018 is allowed and the impugned order dated 13.9.2018 passed by the trial Court in Cr. Misc. Application No.679 of 2018 re-Sardar Khan Khoso v. The State, is also hereby set aside. As reported, the vehicle in question is standing at Police Station Saddar, Jacobabad, therefore, SHO concerned is directed to release the vehicle to the applicant/owner, namely, Sardar Khan Khoso on proper verification, identification and after obtaining the receipt of delivery from him."*

15. Above are the reasons for our short order dated 12.03.2019 in respect of Criminal Revision Application No.D-09 of 2018.

16. Now, we will take up the above two criminal appeals filed by appellants Rahamuddin, Imdad Ali and Muhammad Bux Jatoi.

17. Case of the prosecution, in a nutshell, is that on 16.03.2017, complainant Inspector Ayaz Ahmed was patrolling in the area when they received spy information that **three persons** are smuggling contraband items from Quetta to Jacobabad. He intercepted such vehicle and arrested five persons on charge of smuggling 20 Kgs charas and such FIR was lodged by him at PS Saddar and the arrested accused persons and the case property was handed over by him to SIO Shabeer Ahmed Sahito, who was IO of the case, who after completion of investigation presented challan before the trial Court.

18. In order to prove the guilt of the accused, the prosecution examined the complainant as PW-1 (Exh.04). He deposed as under:

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" I alongwith ASI Ashiq Ali, ASI Muneer Ahmad, PC Nazeer Ahmad, PC Liaquat Ali, PC Babal Khan and driver PC Abdul Wahab left PS for patrolling in the area in official vehicle and after patrolling at various places at about 09.30 am, we reached at Moulabad Phatak, where I received an spy information that in a blue colour Cargo truck bearing registration TKR-284, 03 narcotic sellers were bringing narcotics from Quetta to Jacobabad. On receiving the information, I proceeded to the bypass at Shambay Shah Point leading to Shikarpur. We took the positions at the Police post. At about 1000 am, I noticed a Cargo truck TKR-284 coming from Quetta side. We signaled the truck driver to stop. I noticed that there were 04 persons sitting with the driver on the front seat. I opened the door of the driver and noticed that the man sitting with the driver had black bag. I enquired the man about his name, who disclosed his name as Rahamdin Pathan and I asked him to hand over the bag to me, which I took in my custody. The second person to the driver disclosed his name as Imdad Kharani. He had black colour shopping bag in his hands. I asked him to hand over shopping bag to me. I took the bag in my custody from Imdad and next person disclosed his named as Habibullah Jatoi. He was holding a pile of a cloth in his lap and I asked him to hand over the pile to me, which I took in my custody and the fifth person sitting at the passenger gate of truck disclosed his name as Shafi Muhammad Golo and said that he was cleaner of the vehicle, while driver disclosed his name as Sardar Khoso. I asked all the five persons to alight from the vehicle. I opened the bag recovered from accused Rahamdin, where from 20 dopatta of different colours were recovered, besides a pink colour towel, when I removed dopattas and towel from the bag, noticed that slabs of charas were lying in the bag. I took out the charas and counted them, which were 20 slabs of the charas. I conducted personal search of accused Rahamdin and recovered a currency note of Rs.1000/- from the right side pocket of his shirt. I opened the shopping bag of accused Imdad, where from 43 plastic packets of Bonus and Express washing powder were recovered and I noticed that there were slabs of charas under the washing powder which I took out and found that there were 10 slabs of the charas. I opened the pile of the cloth recovered from accused Habibullah, where from 19 dopattas, an old pair of the male cloth, towel were recovered and noticed that there were 10 slabs of the charas in the bottom of the pile. Again says that the pile was recovered from Muhammad Bux s/o Habibullah. I conducted personal search of accused Imdad and recovered 08 currency notes of Rs.100/- from the left side pocket of his shirt, while from personal search of accused Muhammad Bux, 07 currency notes of Rs.100/- were recovered from the right side pocket of his shirt. Nothing was recovered from the possession of driver Sardar and cleaner Shafi Muhammad. Driver Sardar and cleaner Shafi Muhammad on interrogation disclosed that they used to bring the accused persons from Quetta/Shikarpur Jacobabad on payment of fare of Rs.30,000/-. PC Liaquat brought the electronic scale from our vehicle to weigh the charas. I signaled many vehicles and asked the passengers to act as mashirs of the proceedings but they apologized. I nominated ASI Ashiq Ali and ASI Muneer as mashirs of the proceedings, weighed the charas recovered from the accused persons. I weighed the each slab of the charas recovered from accused Rahamdin and each was weighing 500 grams. I cut all the 20 slabs into two pieces and sealed them separately, one as sample to the Chemical Examiner while the other as case property. I weighed the slabs of the charas of accused Imdad and each slab was weighing 500 grams (total 05 K.G). I cut each slab into two pieces and sealed them separately and I weighed 10 slabs of the charas of accused Muhammad Bux and each was weighing 500 grams (total 05 K.G). I also cut the slab of the charas into 02 pieces and sealed them separately. I got the sealed packets signed by the witnesses. I arrested the accused persons accordingly and prepared memo of arrest and recovery at the spot, read over to the mashirs, which they admitted correct and signed. I produce memo of arrest of accused persons and recovery as Ex.04-A which is same, correct, bears my signature and signatures of the mashirs. I seized the truck in my custody and brought the accused persons and truck at PS, where I registered FIR against the accused persons. I produce FIR No.37/2017 as Exh.04-B, which is same, correct

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and bears my signature. I produce attested copy of roznamcha entry No.05 as Ex.04-C. I handed over the custody of accused persons, FIR, memo and case property to SIO Shabeer Ahmed Sahito for investigations". Accused persons present in the Court are same. He also identified the case property present in Court to be same."

19. As per complainant's own statement on oath, the complainant received spy information that **three narcotic sellers were bringing narcotics from Quetta to Jacobabad**. However, for some inexplicable reasons, when he stopped the vehicle he also involved the two other persons i.e. the driver and the cleaner of the vehicle, in the crime. This proves one thing: either the spy was wrong or the complainant was wrong. The complainant alleged that the driver of the vehicle informed him that Rs.30,000/- is being paid to him for each trip by the drug traffickers. However, this statement of the complainant does not find support from evidence on record. On the contrary the evidence on record points to the other direction. As per the complainant, he carried out personal search of the three alleged narcotic sellers and a total sum of Rs.2,500/- was recovered from their possession. According to the complainant, nothing was recovered from the driver and cleaner of the vehicle. Thus, there is nothing to prove that either there were Rs.30,000/- available with the three alleged narcotic sellers which were to be paid to the driver at the end of journey nor is there anything on record to show that the said amount was already paid to the driver and was available with him. Therefore, the evidence on record does not support the statement of the complainant in any manner whatsoever.

20. As stated above, the complainant himself did not believe the spy information to be true as the spy, as per the statement of the complainant, clearly stated that **three persons** are bringing narcotics from Quetta to Jacobabad, however, the efficient SHO got hold of five persons by also roping in the driver and cleaner of the vehicle although he was unable to prove the same. It has come on record that the alleged recovery was made from each of the three drug traffickers and nothing was recovered either from the possession of the driver or cleaner or from some hidden cavity in the vehicle. Therefore, the credibility of the complainant is tarnished, particularly more so when all the witnesses in the case are police officials.

21. The next thing which creates further doubt in the prosecution case is that though the complainant alleged that the driver and cleaner of the vehicle were involved in the drug trafficking, however, still the alleged recovery was made from the laps of the three accused persons. In case the driver and cleaner were hand in glove with the alleged narcotic sellers, who were paying the driver a huge sum of Rs.30,000/- per trip, then prudence demands that the narcotics should have been hidden somewhere in the vehicle, otherwise, if a person is travelling as a passenger only he will a fraction of the above amount of Rs.30,000/- for his journey from Quetta to Jacobabad. It is well known that vehicles coming from Quetta are usually checked at various check posts and in case if the

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passengers are keeping 20 Kgs of charas in their laps, the same would be recovered by any chance searcher on the long way from Quetta to Jacobabad. Therefore, this is not believable that though the narcotic traffickers were paying Rs.30,000/- to the driver but still in the return they were not getting any help from the driver for safe keeping of the contraband items. As per the statement of the complainant, there were groceries in the vehicle, if, for the sake of arguments, it is assumed that the contraband was hidden in the groceries, it would not have been so easy for the complainant to recover the same and in that case it would have been proved that the driver and cleaner were also party to such illegal trafficking of the drugs.

22. The complainant in his deposition stated that he personally searched the accused i.e. all the five accused, and although some meager amount of recovered from the above appellants, nothing was recovered from driver Sardar and cleaner Shafi Muhammad. This single fact creates a lot of doubt in the prosecution case. The statement of the complainant that nothing was recovered from these two persons i.e. Sardar Khan Khoso, the driver, and cleaner Shafi Muhammad, cannot be believed as the said vehicle was coming from Quetta and was going to Jacobabad. On this long journey, they would eat and drink and would also get petrol / diesel for the vehicle for which they would need money. They would also be keeping themselves ready for any mishap on the road like accident or breakdown of the vehicle etc. Is it believable that these two persons, while leaving Quetta for Jacobabad, were travelling with empty pockets. In the cross examination, it was put to the complainant that Rs.5000/- were taken away by Shamby Shah Police from the driver and Rs.1000/- were taken away from Shafi Muhammad, the cleaner. Although this suggestion was denied but this denial raises more questions than it answers, as stated above.

23. The prosecution also examined PW-ASI Ashiq Ali as Exh.6 in support of its case. His initial story is similar to that of PW-1, except that he does not say that "three narcotic sellers" were bringing narcotics from Quetta to Jacobabad. On the contrary he stated that "a cargo Mazda Truck bearing registration No. TKR-284 of light blue colour was coming from Quetta wherein the narcotic was being transported..." When the deposition of this witness, particularly his cross-examination, is examined in juxtaposition with the deposition of the complainantand the contents of the FIR, it transpires that there are many contradictions in the evidence of these witnesses.

24. In the FIR, the complainant stated that "At around 0930 hours, we reached Shambay Shah bypass, having hidden the official vehicle, blockaded the road. At time around 1000 hours, a cargo Mazda truck with given colour and number was coming from the side of Baluchistan. As soon as the vehicle reached near us, we instantly came out on the road alongwith above mentioned staff...". However, there is no such statement made by the complainant during his examination in chief. PW-3, ASI Ashiq Ali, however, tells a different story in his deposition. He states that "It is correct that the

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place of incident is located in an open area", which means that the place is open and there is no place to hide the vehicle and the staff of police. On the contrary, presence of a permanent check post at Shambay Shah makes it clear that police would be present at the place at all the time. Therefore, the statement of the complainant becomes doubtful and unreliable.

25. PW-3 Ashiq Ali also states that the recovered charas was packed in diaphone plastic. However, no such statement was made by the complainant. Even PW-3 himself admits that this fact was not mentioned in Exh.4/A (mashirnama of recovery). Thus, there is contradiction with regard to packing of the alleged recovered charas in the evidence of two prosecution witnesses, namely, PW-3 Ashiq Ali and PW-1 Inspector Ayaz Ahmed.

26. PW-4 SIP Shabeer Ahmed is I.O. of the case who was examined as Exh.07 who stated that the case property was deposited in the Malkhana. However, no such Malkhana entry was produced and the keeper / incharge of Malkhana was also not produced as a witness nor any other person connected with the safe custody of the seized charas was produced. In this regard reliance may be placed on the case of **Umed Ali v. The State** (2018 MLD 1311), wherein it was observed that in such circumstance chemical report cannot be relied upon.

27. The most glaring omission on the part of the I.O. was that during his cross examination he admitted that he did not inspect the place of wardat. During his cross examination PW-04/IO further admitted that there is a permanent building of police post at Shambay Shah and police officials are present round the clock at such post. He further submitted that the road coming from Quetta is a straight road and any person standing at the police post Shambay Shah can be seen from a distance of half kilo meter. He further admitted that he did not try to get information from the police lines Jacobabad, which is responsible for posting police officials at Shambay Shah check post, about the police officials posted at Shambay Shah on the day of incident i.e. 16.3.2017 nor did he visit the said check post in day time to collect information about the incident regarding arrest of five persons on 16.3.2017. When a suggestion was put to this witness that he did not properly perform his duties as an investigation officer, he denied the same. However, in our opinion, he completely failed to perform his duties properly as an I.O. His failure to interrogate the police officials posted on the Shambay Shah check post on 16.3.2017 shows and proves that he did not perform his duty as an I.O. honestly and in a professional manner. This creates a serious dent in the prosecution case as all the witnesses in the present case, even the I.O. himself, are police officials and also subordinate to the complainant. There was no hindrance in the way of the I.O. to trace and record statement of any police official posted at Shambay Shah on the said date, but he deliberately and negligently failed to do so. Investigation of a case does not mean to simply follow the statements made in the FIR by the complainant. It is the duty of the I.O. to collect all the available information and place the same in juxtaposition to reach a

conclusion by separating the grain from chaff which, we are constrained to note, was not done by the I.O. in the present case which has adversely affected the case of the prosecution.

28. So far as all witnesses being police officials are concerned, it has come on record that efforts were made to stop passing cars to associate any private person as a witness. However, none was prepared to act as mashir. Since, in the present case police was acting on spy information, therefore, the complainant was well aware of drug traffickers coming from Quetta. therefore, he should have made efforts to arrange a mashir from the locality well in advance as the time of incident is about 10-00 a.m which is a busy hour and people are available freely. Reliance is placed once again on the case of **Umed Ali** (supra) wherein similar observations were made.

29. Learned counsel for the appellants argued that provisions of Rule 4(2) of the Control of Narcotic Substances Government Analysis Rules, 2001 were not complied with and in support of their contentions they have placed reliance upon the reported cases of **Muhammad Yousuf v. The State** (2017 MLD 1471), **Umed Ali v. The State** (2018 MLD 1311), **Shoaib Ali v. The State** (2018 MLD 1835).

30. Rule 4 of the above Rules reads as under:

> "4. Dispatch of sample for test or analysts. (1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances or the controlled substances seized, shall be drawn on the spot of recovery and dispatched to the officer-in-charge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.
>
> (2) Samples may be dispatched for analysis under the cover of a Test Memorandum specified in Form-I at the earliest, **but not later than seventy-two hours of the seizure**. The envelope should be sealed and marked "Secret Drug Sample/Test Memorandum".

31. Perusal of sub-rule (2) of rule 4 of the above Rules, clearly stipulates that the samples so drawn from the narcotic drugs, psychotropic substances or the controlled substances seized, are to be sent for analysis at the earliest, but not later than seventy-two hours (i.e. within three days) from the date and time of seizure. In the present case, the samples from the narcotic drugs were seized on 16.3.2017 but were sent to the Laboratory on 20.3.2017 i.e. after about five days. Thus, the codal formalities prescribed for dispatch of samples of seized drugs were not complied with and renders the chemical examiner's report doubtful.

32. Moreover, co-accused Sardar Khan, who was acquitted, had produced photostat copy of bilty /voucher for transport of goods, in his statement under Section 342, Cr.P.C. Though it was mentioned by the Presiding Officer in his own handwriting and the said document is available in the R&Ps of the case, but it was not exhibited for the reasons best known to the Presiding Officer nor it was discussed by the trial Court in the impugned judgment. This leads us to the conclusion that the trial Court has not examined

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the evidence pro and for in juxtaposition and has unilaterally examined and relied upon the evidence produced by the prosecution only. This creates doubts in the impugned judgment as the stand of the other side has not been considered by the trial Court.

33. The accumulative effect of the abovesaid contradictions in the evidence of prosecution witnesses and infirmities / flaws in the prosecution case is that serious dents have been put and doubts have been created in the prosecution case. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

> *"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

34. For the aforesaid reasons, by a short order passed on 12.3.2019, instant appeals were allowed in the following terms:

> *"We are of the considered view that evidence adduced by the prosecution is full of discrepancies and the defence version brought by the appellants before the trial Court was not kept in juxtaposition nor was discussed at length to discredit their claim. Hence, in our view, the prosecution has failed to prove its case beyond any reasonable shadow of doubt. Accordingly, for the reasons to follow, both appeals are allowed and we by extending benefit of doubt to the appellants, acquit them from the charges. Consequently, the impugned judgment dated 28.5.2018 handed down by learned Sessions/Special Judge (CNS), Jacobabad in Special Case No.16/2017 re-State v. Rahamuddin& others, being outcome of Crime No.37/2017, registered at Police Station Saddar, Jacobabad, under Section 9(c) of Control of Narcotic Substances, Act, 1997, is hereby set aside to the extent and effect of conviction and sentences awarded to appellants Rahamuddin, Imdad Ali Kharani and Mohammad Bux Jatoi. They are in custody; hence, they shall be released forthwith if their custody is no more required in any other custody case.".*

35. Above are the reasons for the said short order dated 12.03.2019.

JUDGE

JUDGE