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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.D-41 of 2016

Date of
Hearing
17.01.2019.

ORDER WITH SIGNATURE OF JUDGE

1. For Hg. of appln. u/s 426, Cr.P.C
on M.A. No.2240/16.
2. For hearing of Case.

Mr. Rukhsar Ahmed M. Junejo, advocate for the appellants.

Mr. Sharafuddin Kanhar, APG.

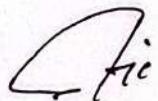
Admittedly the alleged contraband weighing 4000 grams was secured from the holes of the loud-speakers installed in the bus and alleged recovery, as is manifest, was not effected from the exclusive possession of the appellants. Police after effecting recovery brought the contraband outside the bus, where they got it weighed and even memo of its recovery and arrest of the appellants was written by them outside the bus. As is evident from the evidence recorded by the trial Court, entire proceedings with regard to the recovery were carried out inside the bus in presence of passengers, who were about 30 to 35 in number.

None from the passengers, who were independent persons, was made as witnesses. The owner of the bus and earlier driver, who subsequently handed over its charge to the present driver as well as to the staff, was not followed by the investigation officer to ascertain the truth whether the contraband was kept by the earlier staff or was loaded by the appellants themselves. Such discrepancies had made the case of prosecution doubtful, which, by virtue of the settled principle of law, ever goes to favour the accused. We, after hearing the learned Counsel for the appellant as well as the learned Prosecutor, are of the considered view that the prosecution has failed to prove its case against the accused/appellant beyond any reasonable doubt.

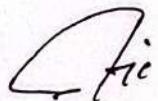


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Accordingly, for the reasons to be recorded later-on, instant appeal is allowed. The impugned judgment dated 04.6.2016 penned down by the Special Judge for CNS, Kashmore at Kandhkot in Special Case No.37 of 2015, being outcome of Crime No.02/2015 of Police Station Excise Circle, Kandhkot, under Sections 6, 8 and 9(c) of CNS Act, 1997, is hereby set aside. Consequently, the appellants, namely, Shoukat Ali, Faqeer Rehman and Syed Ghawas are hereby acquitted of all the charges. The appellants are in custody; therefore, they shall be released forthwith if their custody is no more required in any other custody case.



JUDGE



JUDGE

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANO

Crl. Appeal No.D-41 of 2016

PRESENT:

Mr. Justice Muhammad Saleem Jessar,
 Mr. Justice Adnan Iqbal Chaudhry,

Appellants : Shoukat Ali Pathan and others, through
Mr. Rukhsar Ahmed M. Junejo, Advocate.

Respondent : The State, through Mr. Sharafuddin Kanhar,
Assistant Prosecutor General.

Date of hearing : 17-01-2019.

Date of Judgment : 17.01.2019.

JUDGMENT

Muhammad Saleem Jessar, J.- Appellants, Shoukat Ali son of Saeed Shah, Faqeer Rehman son of Qalandar and Syed Ghawas son of Sher Khan, all by caste Pathan, were tried by learned Special Judge for CNS, Kashmore at Kandhkot in Special Case No.37/2015 - The State Vs. Shoukat Ali Pathan& others, being outcome of Crime No.02/2015, registered at Excise Police Station Kandhkot Circle, for offences under Sections 6, 8 and 9(c) of Control of Narcotic Substances Act, 1997 and were convicted and sentenced vide impugned judgment dated 04.06.2016 to suffer R.I. for eight (08) years and to pay fine of Rs.70,000/- (rupees seventy thousand) each; in default whereof each of them had to suffer simple imprisonment for eight (08) months more. However, benefit of Section 382-B, Cr.P.C was extended to the appellants.

2. As per prosecution case the facts are that, on 13.11.2015, at about 11.00 a.m, Excise Inspector ShamsuddinChachar of Excise Police Station Kandhkot Circle, lodged FIR, stating therein that on the said date i.e. on 13.11.2015, he along with subordinate staff left his office in official vehicle and were busy in

performing their duty at Indus Highway Road near Sada Bahar Hotel, Dera Moure, Kashmore. At about 5.30 p.m. he noticed one passenger bus coming from Peshawar side, which was stopped by signaling through torchlight. The bus was having Registration No.LET-1133. He went inside the bus and found the bus staff along with passengers available therein. The articles of the passengers were checked but nothing incriminating was secured. After that, search of the bus was conducted by him, during which the loud-speakers installed on sides of the bus were opened and four bags wrapped in pieces of cloth were secured, which were opened and heroin powder was found in the said bags. The driver holding steering of the bus, munshi and cleaner of the bus sitting by the side of driver, were arrested and were enquired about their names etc. The driver holding steering of the bus disclosed his name to be Shoukat Ali son of Syed Shah, by caste Pathan, resident of Katling Mardan and identified himself as driver of the bus, while another person disclosed his name as FaqeerRahman son of Qalandar, by caste Pathan, resident of Mardan and identified himself as munshi of the bus and third person disclosed his name to be Syed Ghawas son of Sher Khan, by caste Pathan, resident of Mardan and identified himself as Cleaner of the bus. Complainant appointed EC Ashique Ali Lashari and EC Zafar Ali Kalwar as mashirs and conducted personal search of the accused. From driver Shoukat Ali, currency note of Rs.1000/-, his original CNIC and driving license were recovered from side pocket of his shirt, while from personal search of another person Faqeer Rahman Rs.5000/- and his original CNIC were recovered, and from personal search of third person Syed Ghawas his original CNIC was recovered. The heroin powder was then weighed at the spot and each of the bag weighed One Kilogram and the total weight of all the four bags became four kilograms. Hundred grams sample from each of the bag was separated and sealed and wrapped with "Bafta" cloth. The Registration Book No.LET 1133 of the bus was found in the dashboard of the bus, which was in the name of Fazal Ameen



son of Abdul Qudoos, Post Office Khas Mangha, Mardan. Such mashirnama was prepared, read-over to the mashirs, who put their signatures thereon and then the passengers of the bus were sent to their respective destination. After that, the accused and property were taken to police station, where FIR was registered.

3. After registration of the FIR, complainant Excise Inspector Shamsuddin Chachar submitted the challan before the Court of Special Judge for CNS, Kashmore at Kandhkot.

4. The trial court after taking cognizance supplied the case papers to the accused as provided by Section 265-C, Cr.P.C. vide receipt at Ex.01 and formal charge was framed against them at Ex.04, to which they pleaded 'not guilty' and claimed to be tried vide their plea (s).

5. In order to prove its charge, prosecution examined PW-1 complainant Excise Inspector Shamsuddin Chachar, Exh.5, who produced mashirnama of arrest & recovery at Ex.5-A, FIR at Ex.5-B, departure & arrival entries No.2 and 1 at Ex.5-C & D respectively, letter regarding verification of registration book issued by Excise Inspector at Ex.5-E & F respectively, verification report of registration book received from Motor Registering Authority, Lahore at Ex.5-G, report of chemical examiner at Ex.5-H, NIC of accused Shoukat Ali at Ex.5-I, driving license of accused Shoukat Ali at Ex.5-J, CNIC of accused Faqeer Rehman at Ex.5-K, CNIC of accused Syed Ghawas at Ex.5-L and registration book of coach at Ex.5-M. PW-2 mashir of recovery EC Ashique Ali was examined at Exh.6.

6. Thereafter, on the basis of 161, Cr.P.C. statement of appellant No.1, one Dilaram was also nominated in the case and charge was amended against accused Shoukat Ali, Faqeer Rehman, Syed Ghawas and Dilaram at Ex.10, to which they pleaded 'not guilty' and claimed to be tried. Then the prosecution again

examined PW-1 Excise Inspector Shamsuddin Chachar at Ex.11 and PW-2 mashir EC Ashique Ali at Ex.12. Thereafter, learned DPP closed the side of prosecution vide his statement at Ex.13.

7. The statements of accused were recorded in terms of Section 342, Cr.P.C at Ex.14 to 17 respectively, whereby they professed their innocence. Accused Shoukat Ali produced PS copy of C. P. No.1408 of 2015 filed by him at Ex.14-A. All the accused did not examine themselves on oath; however, accused Shoukat Ali, Faqeer Rehman and Syed Ghawas examined two defense witnesses, namely, Gul Daraz and Jamshed Khan at Ex.18 and 19 respectively, who both produced photocopies of CNICs as well as tickets at Ex.18, 19-A and B respectively.

8. The learned trial court after hearing the parties and assessment of evidence found the appellants guilty of the alleged charge, therefore, has convicted them under section 245(ii), Cr.P.C for an offence under section 9(c) of CNS Act and sentenced each of them to suffer R.I for eight years, with fine of Rs.70,000/- (seventy thousand rupees) , however, benefit of section 382-B Cr.P.C. was extended to them, hence, this appeal.

9. Learned Counsel for the appellants has mainly argued that the appellants are innocent and have been falsely implicated in this case; that the evidence adduced by the prosecution is not confidence-inspiring; that the alleged contraband weighing 4000 grams was secured from the holes of the loud-speakers installed in the bus and the alleged recovery, as is manifest, was not effected from the exclusive possession of the appellants; that police after effecting recovery brought the contraband outside the bus, where they got it weighed and even memo of its recovery and arrest of the appellants was written outside the bus; that entire proceedings with regard to the recovery were carried out inside the bus in presence of passengers, who were about 30 to 35 in number,



but none from the passengers, who were independent persons, was made as witness; that the owner of the bus and earlier driver, who subsequently handed over its charge to the present driver as well as to the staff, was not followed by the investigation officer to ascertain the truth whether the contraband was kept by the earlier staff or was loaded by the appellants themselves; that there are contradictions and discrepancies in the evidence of the witnesses on material aspects, which have made the prosecution case entirely doubtful. He has lastly submitted that in view of such glaring contradictions and discrepancies in the evidence, the appeal may be allowed and the appellants be acquitted. In support of his contentions, he has relied upon the cases reported as *Ghulam Murtaza v. The State* (PLD 2009 Lahore 362), *Ameer Zeb v. The State* (PLD 2012 SC 380), *Riaz Mian v. The State* (2014 SCMR 1165), *Abdul Sattar v. The State* (2016 SCMR 909) and *Ameer Hamza alias Hamza v. The State* (2015 P.Cr.L.J 1402).

10. On the other hand, learned A.P.G has supported the impugned judgment and contended that there are no material contradictions in the prosecution evidence; that the prosecution witnesses have fully supported each other on all material aspects of the case, therefore, the learned trial Court has rightly convicted the appellants. He has relied upon the following reported cases in support of his contentions:-

1. The State/ANF Vs. Muhammad Arshad (2017 SCMR 283),
2. Ameen Vs. The State (2017 MLD 1514),
3. Mehar Vs. The State (2009 P.Cr.L.J 47),
4. Mst. Haseena Vs. The State (2018 YLR Note 32),
5. Muhammad Sarfraz Vs. The State (2017 SCMR 1874),
6. Budho Vs. The State (2018 P.Cr.L.J 1393),
7. Roshan Vs. The State (2018 P.Cr.L.J Note 26),

11. We have considered the submissions of learned Counsel for the parties and have examined the material available on record.



12. At the very outset, it may be clarified that section 25 of the Control of Narcotics Substance Act, 1997 has expressly excluded applicability of section 103 of the Cr. P.C., therefore, there is no force in the submission of the learned counsel for the appellants that no independent witness has been associated although 30-35 passengers were available in the bus at the time of alleged recovery of the contraband. In this regard reference may be made to the case of Mst. Naseem Baloch v. The State (2018 YLR 32), wherein it was held that section 103 of the Cr.P.C. was not applicable in the case of Narcotics as section 25 of the Control of Narcotics Substance Act, 1997 has excluded the applicability of section 103, Cr.P.C. in the cases falling under the said Act.

13. Now, we will take up the other submissions made by learned counsel for the appellant. Perusal of record shows that the alleged contraband weighing 4000 grams was not recovered from the exclusive possession of the appellants, but it was secured from the holes of the loud-speakers installed in the bus. Thus, it is an admitted position that the contraband was recovered from the body of the bus and was not recovered from possession of any of the accused / appellants. The pivotal question which arises for consideration is as to who is responsible for keeping the said contraband in the holes of the speakers in the body of the bus. It may also be pointed out that on the basis of alleged statement of the accused / appellant Shoukatullah, a person, namely, Dilaram was also included in the list of accused persons although his name does not transpire in the FIR which was recorded by the complainant / IO himself. Thus, there are four persons i.e. the present appellants, namely, the driver, cleaner and munshi of the bus as well as Dilaram who have been charged with the offence of having contraband items in their possession, however, the prosecution has not been able to prove by any cogent evidence that the contraband was recovered from their possession or from possession of any one of the above four persons. We are constrained to note that

it is a very pathetic situation prevalent in the investigation of cases of contraband items that without ascertaining the real owner of the contraband some persons are involved in the case and then the prosecution is unable to prove that such person(s) is / are the real carrier of the contraband as in number of cases it is found that the contraband was not recovered from the possession of any particular person rather the same was recovered from some place which cannot be said to be exclusively belonging to such accused. It would have been a different scenario if the contraband was recovered from a shop, office or home / house of any particular person as in that case the owner of the house would have been, *prima facie*, responsible for the same unless such person is able to prove otherwise. But, in the present case, it cannot be said with any degree of confidence that the contraband was placed in the hole by the accused / appellants or any one of them or by some other person for example the owner of the bus. Then it is also important to note that in this manner of investigation, not only the prosecution's case is weakened but also the chain of drug carriers / suppliers remains intact as neither the actual carrier is apprehended and convicted nor the person to whom the contraband is being supplied at the destination is identified. Instead, some persons are arrested and prosecuted about whom it cannot be said without any doubt that they are the owners / carriers of the contraband as in the present case. There is no proof that the contraband was hidden in the holes of the speaker by the driver, or the cleaner or the munshi of the bus or for that matter by the said Dilaram or the owner of the bus.

14. In this regard, reference may also be made to the deposition of defense witnesses. DW-1 Gul Daraz who stated in his deposition that he was travelling in the said bus. He stated that when the bus started from Mardan it was being driven by another driver and after crossing Bannu, the present accused / appellant Shoukat took over the driving seat. He further stated that when it was stopped at Kashmore on 13.11.2015 at 5.30 a.m. 2/3 persons of Excise Police conducted

search of the vehicle but nothing was recovered from inside the bus or from possession of the driver, conductor or munshi of the bus. He also stated that after searching the bus the persons belonging to Excise Police got down from the bus and came back after some time and stated that some articles have been recovered from the vehicle and took away the bus and he [Gul Daraz] went to Karachi in another bus. Similar statement was made by the other defense witness, namely, Jamshed Khan. It is also a shortcoming on the part of the IO of the case that he did not note the names of the passengers of the bus as it cannot be denied that the said defense witnesses were on board the vehicle at the time of its interception and search by the Excise Police at Kandhkot / Kashmore. Learned trial Court has not given any reason for discarding the deposition of the above witnesses. Since the deposition of the above two defense witnesses was on record, therefore, it was incumbent upon the trial Court to discuss the same and either admit or reject the same for valid reasons. However, the learned trial Court simply ignored deposition of these two witnesses.

15. In the case reported as *Riaz Mian v. The State* (2014 SCMR 1165), and relied by learned counsel for the appellants, contraband was recovered from the roof of the bus in boxes keys whereof were with the owner of the bus. The Hon'ble Supreme Court allowed the appeals of the driver, co-driver and cleaner of the bus and acquitted them and their conviction and sentence was set aside.

16. It may also be pointed out that the owner of the bus and earlier driver of the bus, who handed over charge of the bus to the present appellant /driver Shoukat at Bannu, were not followed by the investigation officer to ascertain the truth whether the contraband was kept in the bus by the earlier driver or the same was concealed by the appellants themselves. In case it is assumed for the sake of arguments that the bus driver was in possession of the bus and the contraband concealed in the bus would be deemed to be in the possession of the driver, even then the question would arise as to whether the past driver or the present or both

are to be prosecuted for the same. 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."

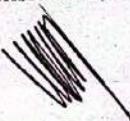
17. Moreover, original entries of departure and arrival were not produced by the complainant in his evidence before the trial Court. Such discrepancies had made the case of prosecution doubtful, which, by virtue of the settled principle of law, ever goes to favour the accused.

In the case of Mour Vs. The State reported in 2016 P. Cr. L.J. 1706 this Court, while dealing with the point of non-production of roznamcha entry, held as under:

"Another point is that the complainant party left police station vide roznamcha entry No.42 but as per prosecution evidence said entry has not been produced at the time of recording of their evidence. Non-production of this vital document in evidence has also created serious doubt regarding departure of police from police station."

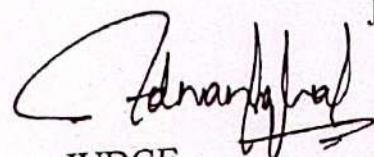
18. Learned APG relied on the case of Muhammad Sarfraz and Mst. Haseena Baloch (supra) in support of his contentions. However, these cases are distinguishable on facts as in both these cases the recovery was made from the possession of these accused persons while in the present case the recovery was not made from exclusive possession of the appellants but was made from a common place which was accessible to many persons meaning thereby that it cannot be said with certainty that the contraband was kept in the holes of the speaker by the present driver, the earlier driver or the cleaner or the munshi or any other person like the owner of the bus.

19. We, after hearing the learned Counsel for the appellants as well as the learned Prosecutor, are of the considered view that the prosecution has failed to

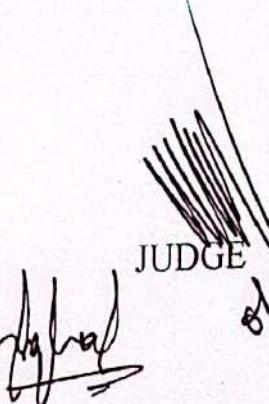


prove its case against the accused/appellant beyond any reasonable doubt. The case-law cited by learned APG being distinguishable on facts and circumstances are not applicable to the case in hand.

20. Accordingly, by short order dated 17.01.2019, instant appeal was allowed by us, the conviction and sentence by the impugned judgment dated 04.6.2016 penned down by the Special Judge for CNS, Kashmore at Kandhkot in Special Case No.37 of 2015, being outcome of Crime No.02/2015 of Police Station Excise Circle, Kandhkot, under Sections 6, 8 and 9(c) of CNS Act, 1997, was set aside and the appellants were acquitted of the charges. Above are the detailed reasons of said short order.



JUDGE



JUDGE

84/02-2019