

THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Crl. Appeal No.D-14 of 2020
(*Azizullah Brohi v. The State*)

Before:-
Justice Muhammad Faisal Kamal Alam
Justice Tasneem Sultana

Appellant : Azizullah S/o Jorak Brohi, through Mr.Ghulam Murtaza Korai, Advocate.

Respondent : The State, through Mr. Aijaz Ali Bhatti, Special Prosecutor, ANF, Sukkur.

Dates of hearing(s) : **06.08.2026 & 11.08.2026.**
Date of Judgment : **09.09.2026.**

J U D G M E N T

TASNEEM SULTANA, J:- Through this Special Criminal Appeal, the appellant Azizullah S/o Jorak Brohi has challenged the judgment dated 28.01.2020 passed by the learned Additional Sessions Judge-1/Special Judge Narcotics/M.C.T.C, Sukkur, in Special Case No.30 of 2019, arising out of Crime No.02 of 2019 registered at Police Station ANF, Sukkur, under Section 9(c) of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as “**the CNS Act**”), whereby he was convicted under Section 9(c) of the CNS Act and sentenced to suffer imprisonment for life and to pay a fine of Rs.500,000/-, and in default thereof, to undergo one year’s further simple imprisonment. The benefit of Section 382-B, Cr.P.C. was extended to the appellant, while co-accused Mir Hassan S/o Khair Muhammad Brohi was acquitted of the charge.

2. Brief facts of the prosecution case are that on 10.01.2019, SI Muhammad Ahsan of ANF, Sukkur, received spy information that the appellant Azizullah was going to supply narcotic substance at Gate No.1 of the Vegetable Market, Sukkur. Acting upon such information, an ANF party under the supervision of Assistant Director Muhammad Faisal proceeded to the pointed place and reached there at about 0645 hours, where the appellant and co-accused Mir Hassan were apprehended. According to the prosecution, the appellant was carrying a black-coloured travelling bag from which ten packets of opium, each weighing one kilogram, were recovered, while four

white nylon bags lying nearby were found to contain 97 packets of charas weighing 97 kilograms in all. PC Karim Bux and PC Muhammad Azeem were associated as mashirs. The recovered narcotic substances were weighed, sealed and taken into possession through a memo of arrest and recovery prepared at the spot. Certain personal articles and cash were also recovered from both accused, whereafter the present case was registered.

3. After usual investigation, SI Muhammad Ahsan, Investigating Officer, submitted the charge-sheet under Section 173, Cr.P.C. against appellant Azizullah and co-accused Mir Hassan. Having been supplied the requisite documents as provided under Section 265-C, Cr.P.C., the learned trial Court framed a formal charge against the appellant and co-accused, to which they pleaded not guilty and claimed to be tried.

4. To prove its case, the prosecution examined three witnesses. PW-1 SI Muhammad Ahsan, complainant as well as Investigating Officer, was examined at Ex.08; he produced the relevant departure entry at Ex.08/A, memo of arrest and recovery at Ex.08/B, FIR at Ex.08/C, forwarding letter at Ex.08/D, correspondence regarding criminal record of the accused at Ex.08/E and Chemical Examiner's report at Ex.08/F. PW-2 SI Attaullah Khan Jadoon, Malkhana Incharge, was examined at Ex.09; he produced the attested copy of the relevant entry of Register No.19 at Ex.09/A. PW-3 PC Karim Bux, mashir of arrest and recovery as well as carrier of the case property, was examined at Ex.10; he produced the relevant departure and arrival entries at Ex.10/A. Thereafter, the prosecution closed its side.

5. The statements of appellant Azizullah and co-accused Mir Hassan under Section 342, Cr.P.C. were recorded at Ex.13 and Ex.12 respectively, wherein they denied the allegations levelled against them by the prosecution and claimed false implication. They neither examined themselves on oath under Section 340(2), Cr.P.C. nor produced any evidence in defence.

6. The learned trial Court, after hearing learned counsel for the parties and examining the evidence available on record, vide impugned judgment dated 28.01.2020, convicted and sentenced the appellant as stated above, while co-accused Mir Hassan was acquitted of the charge. Hence, the present appeal.

7. Learned counsel for the appellant contended that the appellant is innocent and has been falsely implicated in the present case; that the prosecution has failed to prove the alleged recovery beyond reasonable doubt;

that material contradictions and discrepancies exist in the evidence of the prosecution witnesses; that despite the alleged recovery having been effected at a public place, no independent person was associated as mashir; that safe custody and safe transmission of the case property to the Chemical Examiner have not been established; and that the Chemical Examiner's report does not cure the defects in the prosecution case. He further contended that co-accused Mir Hassan has been acquitted on the same prosecution evidence, whereas the appellant has been convicted without proper appreciation of the material available on record. Lastly, he prayed that the impugned judgment be set aside and the appellant be acquitted of the charge.

8. Conversely, learned Special Prosecutor for ANF supported the impugned judgment and contended that the appellant was apprehended at the spot and the narcotic substances were recovered in the presence of mashirs; that the prosecution witnesses have supported the recovery proceedings and remained consistent on material particulars; that the case property remained in safe custody and was transmitted to the Chemical Examiner without any material break in the chain; and that the Chemical Examiner's report confirmed the nature of the recovered substances. He further contended that once possession and recovery were established, the statutory presumption under Section 29 of the CNS Act became applicable, which the appellant failed to rebut. He, therefore, prayed for dismissal of the appeal.

9. Heard. Record perused.

10. On a careful reassessment of the evidence available on record, it appears that there were two separate recoveries, namely, 10 kilograms of opium contained in a black-coloured travelling bag and 97 kilograms of charas contained in four white nylon bags. The learned trial Court treated the entire quantity as having been recovered from the exclusive physical possession of the appellant. However, the evidence relating to these two recoveries is different and requires separate consideration.

11. PW-1 SI Muhammad Ahsan, complainant as well as Investigating Officer, deposed that when the raiding party reached the pointed place, the appellant was carrying a black-coloured travelling bag, while four white nylon bags were lying nearby. According to him, ten packets of opium, each weighing approximately one kilogram, were recovered from the black travelling bag. PW-3 PC Karim Bux, mashir of arrest and recovery, substantially supported this account and also stated that the black travelling bag was with the appellant. Their cross-examination further clarifies this distinction. PW-1

stated that the appellant was having the travelling bag in his hand and “nothing besides it”, whereas the remaining narcotic substance was lying near both accused. PW-3 likewise stated that the black travelling bag was with the appellant, while the remaining narcotic substance was lying near them. Thus, insofar as the 10 kilograms of opium is concerned, the prosecution evidence consistently connects the appellant with the very bag from which the opium was recovered.

12. It is settled that possession under Section 6 of the Control of Narcotic Substances Act, 1997 must be conscious possession. The prosecution must first establish some direct connection of the accused with the narcotic substance, either through physical custody or control, or by showing that he was otherwise directly concerned with it. Once such connection is established, the presumption under Section 29 comes into operation and the burden shifts to the accused to explain such possession. Mere presence near narcotic substance, without anything further connecting the accused with its custody or control, would not by itself amount to conscious possession. Reference may be made to Muhammad Noor and others v. The State (2010 SCMR 927).

13. Applying the above principle, we find that the prosecution has proved the recovery of 10 kilograms of opium from the appellant beyond reasonable doubt. The black travelling bag was in his hand and the opium was recovered from inside that very bag. This was, therefore, not a case of mere presence near the narcotic substance. The appellant was in physical possession of the bag containing the opium and Section 29 of the Act, therefore, comes into play. Nothing appears on record sufficient to rebut the presumption arising from such possession. The position regarding 97 kilograms of charas is different. The four nylon bags containing the charas were not in the hands of the appellant. PW-1 stated that the remaining narcotic substance was lying near both accused, while PW-3 further stated, when referring to co-accused Mir Hassan, that the property lying on the ground was beside him. There is no evidence that the appellant had been seen carrying, transporting, unloading or placing those bags at the spot. Nor is there any other circumstance on record showing that those bags were under his control.

14. Mere presence near narcotic substance, without anything further connecting an accused with its custody or control, is not enough to establish possession. In the present case, no such material is available in respect of the

four nylon bags. Section 29 cannot be invoked unless the prosecution first establishes some connection between the accused and the narcotic substance. The prosecution also relied upon a statement attributed to the appellant regarding the substance contained in those bags. Even if that statement is considered to the extent permissible under law, it does not remove the doubt arising from the fact that the bags were lying on the ground near both accused. It would, therefore, be unsafe to hold that those four bags were in the exclusive possession of the appellant on that basis alone.

15. The acquittal of co-accused Mir Hassan does not automatically entitle the appellant to the same relief, as the evidence against the two is not identical. No narcotic substance was found in the hands of Mir Hassan, whereas the black travelling bag containing opium was specifically attributed to the appellant. His case is, therefore, distinguishable to that extent. So far as the four nylon bags containing charas are concerned, however, the evidence does not furnish a sufficient basis for holding that they were in the conscious possession of the appellant.

16. It may also be observed that this distinction does not mean that the prosecution witnesses are being believed in respect of one recovery and disbelieved in respect of the other. Their account regarding the manner in which both sets of narcotic substances were found is being accepted. The difference lies in the appellant's connection with each recovery. The opium was recovered from the black travelling bag which was in his hand, whereas the four nylon bags containing charas were lying near both accused and there is no sufficient evidence showing that they were in his custody or control. The principle of *falsus in uno, falsus in omnibus*, as explained by the Honourable Supreme Court in Notice to Police Constable Khizar Hayat (**PLD 2019 SC 527**), applies where a witness is found to have deliberately made a false statement on a material aspect. No such finding is being recorded against PW-1 or PW-3 in the present case.

17. As regards safe custody and transmission of the case property, the prosecution has satisfactorily established the chain of custody. PW-2 SI Attaullah Khan Jadoon, Malkhana Incharge, deposed that the sealed case property was handed over to him on 10.01.2019 and deposited in the Malkhana vide Entry No.483 of Register No.19, an attested copy whereof was produced as Ex.09/A. On the following day, the property was handed over to PW-3 PC Karim Bux for delivery to the Chemical Examiner, Rohri. Ex.08/D dated 11.01.2019 records transmission through PC Karim Bux of four sealed

nylon bags containing a total of 97 kilograms of charas and one sealed black travelling bag containing 10 kilograms of opium. The Chemical Examiner's report, Ex.08/F, shows receipt of the same property on that date with the seals intact and corresponding with the specimen seal supplied. The expression "sample charas and opium" used by PW-2 does not create any material doubt, as Ex.08/D, Ex.08/F and the testimony of PW-3 show that the entire sealed case property was transmitted to the Chemical Examiner, where portions thereof were consumed for analysis. The report also confirms the narcotic nature of the substances examined. Thus, safe custody and transmission of the case property have been established. Reference may be made to Zain Ali v. The State (2023 SCMR 1669).

18. The prosecution has, therefore, proved the appellant's possession of 10 kilograms of opium recovered from the black travelling bag, but has failed to prove his possession of 97 kilograms of charas beyond reasonable doubt. The finding of the learned trial Court to the contrary cannot be maintained. The sentence awarded to the appellant also requires reconsideration. The offence was committed in the year 2019 and is governed by Section 9(c) of the Act as it then stood. Since the quantity proved against the appellant is exactly 10 kilograms of opium, the sentence is to be determined in the light of the guidelines laid down in Ghulam Murtaza and another v. The State (PLD 2009 Lahore 362), which were subsequently referred to with approval by the Honourable Supreme Court in Ameer Zeb v. The State (PLD 2012 SC 380). Under those guidelines, opium exceeding 9 kilograms and up to 10 kilograms attracts rigorous imprisonment for twelve years with a fine of Rs.16,000/-, and in default thereof, simple imprisonment for eight months and fifteen days. Accordingly, the sentence of imprisonment for life awarded to the appellant is reduced to rigorous imprisonment for twelve (12) years and the fine is reduced from Rs.500,000/- to Rs.16,000/-. In default of payment of fine, the appellant shall undergo simple imprisonment for eight months and fifteen days. The benefit of Section 382-B, Cr.P.C. shall remain available to the appellant.

19. Consequently, the appeal is partly allowed. The conviction of the appellant under Section 9(c) of the Control of Narcotic Substances Act, 1997 is maintained to the extent of 10 kilograms of opium, while the finding regarding 97 kilograms of charas is set aside. The sentence is modified accordingly.

Judge

Judge