

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 177 of 2009

Present :

Mr. Justice Faisal Arab

Mr. Justice Nadeem Akhtar

Appellant : Umar Wahid through Mr. Irfan Aziz, Advocate.
Respondent : The State through Syed Ashfaq Hussain Rizvi,
Advocate.
Dates of hearing : 24.05.2012 and 25.05.2012.

J U D G M E N T

NADEEM AKHTAR, J. – Through this Criminal Jail Appeal, the appellant Umar Wahid has impugned the judgment delivered on 15.06.2009 by the learned Judge Special Court-I (CNS), Karachi, in Special Case No.89/2008 (The State V/S Alam Sher, Zahid Hussain and Umar Wahid), whereby he was convicted under Section 9-C of the CNS Act, 1997, and was sentenced to suffer life imprisonment and fine of Rs.100,000/-, and in default of payment of fine, to suffer further simple imprisonment for a period of three months.

2. Before the learned trial Court, the case of the prosecution was that on 18.07.2008 the high-ups of ANF received spy information that the appellant Umar Wahid was bringing huge quantity of *charas* from Peshawar to Karachi in bus No.BE-2175 in collusion with its driver Alam Sher and cleaner Zahid Hussain. In view of this information, a raiding party headed by S.I. Muhammad Afzal and other ANF staff was constituted, which proceeded from police station vide *roznamcha* entry No.10 and reached the Toll Plaza, Super Highway, Karachi. At 1600 hours, bus No.BE-2175 reached the Toll Plaza which was stopped by the raiding party. Upon inquiry, its driver and cleaner disclosed their names as Alam Sher and Zahid Hussain, respectively, and also that the appellant was present on the roof of the bus along with narcotics. The appellant, the driver and the cleaner were apprehended. The driver and cleaner took out one *katta* of yellow colour from the roof of the bus which was owned by the appellant. The said *katta* when opened and checked revealed that it contained 20 packets of *charasgarda* of 1,200 grams each wrapped in yellow tape. The total weight of the recovered *charas garda* was 24 kgs. Ten (10) grams were taken out as sample from each packet which were numbered from 01 to 20 and were then sealed, and the remaining quantity was also sealed in the same *katta*. The samples were sent for

chemical examination. On personal search of the three apprehended persons, their personal belongings such as small amount of cash, driving license, telephone diary, NIC and wrist watch were found, which were secured and *mashirnama* was prepared on the spot. All three apprehended persons along with the recovered *charas* and the bus were brought to the police station and a case was registered against them. Upon completion of investigation, the investigation officer submitted challan before the Court whereafter formal charge against all of them was framed and their pleas were also recorded wherein they pleaded not guilty.

3. In support of its case, the prosecution examined two witnesses. PW-1 S.I. Muhammad Afzal was the complainant (Exhibit 6) and head of the raiding party who produced the memo of arrest and recovery, FIR and chemical report as Exhibits 6/A, 6/B and 6/C, respectively. PW-2 was A.S.I. Naeem Khan (Exhibit 7), the *mashir* of recovery and arrest. Both these prosecution witnesses were cross-examined by the learned counsel for the accused, including the appellant. Thereafter, the prosecution closed its side. Co-accused Alam Sher examined himself (Exhibit 11) and also produced Muhammad Shireen (Exhibit 12) as his witness, and the other co-accused Zahid Hussain also examined himself. Following points for determination were settled by the learned trial Court :

“Point No.1 *Whether accused Alam Sher and Zahid Hussain has (!) facilitated in the commission of offence or played any role in transport (!) of recovered Charras or having conscious knowledge about the Charras weighing 24 Kgs in the bus bearing Registration No.BE-2175 ?*

Point No.2 *Whether accused Umar Wahid was found on the roof of bus bearing Registration No.BE-2175 and ANF officials recovered 20 packets of Charras weighing 24 Kgs from his possession ?*

Point No.3 *What offence, if any, have / has been committed by the accused or any one of them ?”*

4. After hearing the Special Public Prosecutor and counsel for the accused, the learned trial Court decided point Nos.1 and 2 as “not proved” and “proved”, respectively ; whereas, point No.3 was decided by acquitting co-accused Alam Sher and Zahid Hussain and convicting and sentencing the appellant.

5. We have heard Mr. Irfan Aziz, learned counsel for the appellant, and Mr. Ashfaq Hussain Rizvi, learned Special Prosecutor ANF, and have carefully examined the material available on record. In their evidence, both the co-accused Alam Sher (bus driver) and Zahid Hussain (cleaner) had stated that the bus started its journey from Swat ; when it reached Peshawar, one person, who

was standing on the road side, signalled them to stop ; they stopped the bus and asked him about his destination ; he informed them that he was going to Karachi ; since there was no vacant seat in the bus, they asked him if he was willing to sit on the roof of the bus ; the said person went to the roof with one bag and one *bora* ; and, they were not aware about his name. In his deposition, it was stated by PW-1 complainant SI Muhammad Afzal that co-accused Alam Sher (bus driver) and Zahid Hussain (cleaner) had disclosed to him about the presence of one passenger with the name of Umar Wahid on the roof of the bus. In paragraph 19 of the impugned judgment, it has been observed by the learned trial Court that discovery of the name of the appellant from the mouth of driver and cleaner was not sufficient to show their link with the passenger / appellant. The above contradictory statements given by PW-1 and the two co-accused had created a doubt and suspicion as to how the co-accused were able to identify the appellant with his name when the raiding party asked them whether a person with the name of Umar Wahid was travelling in the bus or not.

6. Some very important admissions were made by the main prosecution witness PW-1 SI Muhammad Afzal who was the complainant and head of the raiding party, such as, the yellow *katta* containing *charas* was taken out from the roof and off-loaded from the bus by co-accused Alam Sher (bus driver) and Zahid Hussain (cleaner) ; during interrogation on the spot, both the co-accused had disclosed to him that they had knowledge about the presence of *charas* in the recovered *katta*, but they had accepted the appellant's baggage because of fear ; baggage of other passengers was also stored on the roof of the bus ; the recovered substance was not recovered from the personal possession of the appellant nor was it recovered on his pointation ; and, no documentary proof was recovered from the recovered *katta* to indicate that it belonged to the appellant. It was also admitted by PW-1 that he did not produce any order to show that he was appointed as I.O. of the case ; he did not know where and when the spy information was received by his high-ups ; he was issued verbal directions by the high-ups, but such entry was not made by him ; the *mashirnama* of arrest and recovery prepared by him did not disclose the type of balance that was used for weighing the recovered *charas* ; the envelopes of consumed samples were not produced before the trial Court ; and, the appellant was not involved in any other case of narcotics. Similarly, PW-2, who was the *mashir* of arrest and recovery, admitted in his deposition that the spy who had given the spy information had not accompanied the raiding party at the time of the raid ; baggage of other passengers was also available on the roof of the bus; and, name of the appellant was not written on the recovered *katta* nor was any documentary proof recovered from the *katta* to show that it belonged to the accused persons.

7. Perusal of the impugned judgment shows that the above admissions made by the prosecution witnesses in their evidence were noticed by the learned trial Court as the same are mentioned in detail in the impugned judgment. However, these important admissions were not considered nor was any reason given in the impugned judgment for not giving any weight to the same. On the contrary, undue importance was given to the prosecution's version by simply holding that the prosecution's witnesses have supported the case of the prosecution and had implicated all the accused persons to connect them with the commission of the offence and their evidence remained un-shattered. Interestingly despite this finding, both the co-accused persons were acquitted. It has not been explained or discussed in the impugned judgment as to how the appellant was found to be connected with the commission of the alleged offence in the given circumstances when admittedly the recovered *katta* was taken out and off-loaded by the two co-accused, it was not recovered from the appellant or on his pointation, the recovered *katta* did not bear the name of the appellant, and baggage of other passengers was also lying on the roof of the bus.

8. From paragraph 17 of the impugned judgment, it appears that the appellant was convicted in view of the admissions made by the two co-accused regarding their own presence in the bus, recovery of *charas* and the appellant's presence in the bus. It is, therefore, clear that there was no independent or direct evidence on which the appellant was convicted. In paragraph 18 of the impugned judgment, it was held by the learned trial Court that prosecution had successfully established the arrest of all the accused in the bus, seizure of the bus, recovery of *charas* weighing 24 kgs and drawing of samples from the recovered *charas* ; but it is yet to be determined whether or not the two co-accused had facilitated in the commission of the offence or played any role in transportation of *charas* or were having any conscious knowledge about the recovered *charas*. Paragraph 19 of the impugned judgment shows that the co-accused were acquitted on the ground that there were no eye witnesses to prove commission of offence by them. The learned trial Court failed to appreciate that the case of the appellant was also on the same footing as the prosecution had failed to prove that the appellant was the owner of the recovered *katta* containing *charas*, which was admittedly brought down by the co-accused from the roof of the bus, or that the appellant had the possession thereof or he was responsible for its transportation. Moreover, there were no eye witnesses in the case of the appellant also to prove his direct involvement in the commission of the offence.

9. Another aspect which perhaps prevailed with the learned trial Court while convicting the appellant, as observed in paragraph 19 of the impugned judgment, was that the appellant was alone on the roof of the bus when the bus was

intercepted. It was an admitted position that the bus had started its journey for Karachi from Swat and the appellant boarded the bus in Peshawar with the permission of both the co-accused, and also that baggage of about 30 to 40 other passengers were also lying on the roof of the bus. It is unimaginable that throughout such a long journey of over 1,000 kms which must have taken more than 24 hours, the appellant remained alone and no one else went to the roof of the bus, or the baggage lying on the roof was not reshuffled. Even the co-accused did not claim in their evidence that the appellant remained alone on the roof of the bus throughout the journey, and such was also not the case of the prosecution. This aspect of the case has not been appreciated by the learned trial Court.

10. We do not agree with the finding of the learned trial Court that the evidence of the prosecution witnesses remained un-shattered, as most of the aforementioned admissions were made by both the prosecution witnesses during their cross-examination by the appellant's counsel. The admitted facts and material available on record clearly indicate that the prosecution was unable to prove beyond all reasonable doubts the connection of the appellant with the recovered *charas* and his direct involvement in the alleged crime, and as such the benefit of doubt ought to have been exercised in favour of the appellant. We are of the considered view that this is a case of misreading and non-reading of evidence as important admissions and facts were not given due consideration and the material available on record was not appreciated in its true perspective. In such circumstances, the impugned judgment cannot be allowed to remain in the field, which is hereby set aside.

11. Foregoing are the reasons of the short order announced by us on 25.05.2012, whereby this Criminal Jail Appeal was allowed, the conviction of the appellant was set aside, and it was ordered that the appellant be sent back to the prison and be released forthwith if he was not required in any other case.

JUDGE

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