

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.**

Cr. Appeal No.D-131 of 2012.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro.

Appellants: Muhammad Ismail and Dilawar Khan
Through Mr. Nandan A. Kella, Advocate.

The State: Through Syed Meeral Shah Bukhari, D.P.G.

Date of Hearing: 02.02.2017.

Date of Judgment: 15.02.2017.

J U D G M E N T

RASHEED AHMED SOOMRO, J. Appellants Muhammad Ismail & Dilawar Khan were tried by learned Sessions Judge/ Special Court for C.N.S. Shaheed Benazirabad, in Special Case No.155 of 2010, arising out of crime No.03 of 2010, registered at Police Station Excise Nawabshah for offence under section 9(c) Control of Narcotic Substance Act 1997. Appellants were found guilty by Judgment dated 19.04.2012 and were convicted under section 9(c) Control of Narcotic Substance Act 1997, and sentenced to imprisonment for life and to pay the fine of Rs.500,000/- each. In case of the default in payment of the fine they were further directed to undergo S.I. for six (06) months more. Benefit of Section 382(b) Cr.P.C. was also extended to the accused. The appellants have challenged the impugned Judgment through instant appeal.

2. The brief facts of the prosecution case as disclosed in the F.I.R. are that on 30.04.2010 at 6-00 p.m. Excise Inspector Anwar Ali Solangi of

Excise Police Station Nawabshah Town left alongwith Excise Inspector Ashraf Ali Leghari and his subordinate staff namely Excise Constables Nisar Ahmed, Mumtaz Ali, Mashooque Ali, Hyder and others vide 'Roznamcha' entry No.3 in the Government Vehicle bearing No.GS 4008, when reached at Excise Check Post National Highway Sakrand near Mir Khan Leghari they saw a Truck bearing No.ISA-3607 on the road coming from Sakrand side. Excise officials got it stopped and saw two persons were sitting in the Truck one was driving it and another was sitting besides the driving seat. Excise officials found them in suspicious manner and enquired from the driver about his name to which he disclosed as Muhammad Ismail s/o Nasir Khan by caste Khilji Pathan resident of Quetta another person disclosed his name as Dilawar Khan s/o Juma Khan by caste Khilji r/o Quetta. Excise Inspector in presence of the Mashirs conducted personal search of accused Muhammad Ismail and two currency notes of Rs.1000/- and a copy of the C.N.I.C. and his driving license from the front pocket of his shirt. Thereafter, Excise Inspector conducted personal search of another accused Dilawar Khan and secured one currency note of Rs.500/-. Thereafter Excise officials conducted search of the Truck and found two fuel tanks. The Excise officials in the fuel tank from the driver side found green colour plastic bags lying in it. In all there were five plastic bags. The same were opened there they found that there were 40 bundles in each green coloured plastic bag total 200 bundles were found in five bags. Excise Inspector opened the bundles in presence of the Mashirs and found 'Charas' in Rod shapes. Thereafter, tank on the otherside was checked it contained three plastic bags. The same were opened there were total 40 plastic packets 30 plastic packed were found in it total 110 packed bundles were recovered. He opened the plastic bags full of the 'Charas' in the shape of rods total 310 bundles of 'Charas' were recovered. ASI weighed the 'Charas' in presence of the Mashirs total weight of the 'Charas' was 310 Kilograms. Thereafter Inspector took two bundles from each thereafter Inspector separated two

Kilograms 'Charas' from each plastic bag and total 16 Kilograms 'Charas' was sealed by him as a sample in white colour plastic bag for sending to the Chemical Examiner. The same was sealed in presence of the Mashirs remaining property was also sealed in presence of the Mashirs namely Nisar Ahmed and Mumtaz. Excise Inspector secured one original Registration Book from the Truck in the name of one Abdul Qayoom s/o Dad Muhammad by caste Khilji Pathan r/o Quetta. Thereafter Inspector brought both accused, Truck and the 'Charas' to the Excise Police Station Nawabshah where he lodged F.I.R. against the accused on behalf of the State vide crime No.03 of 2010 under section 9(c) Control of Narcotic Substance Act 1997.

3. During investigation Excise Inspector recorded 161 Cr.P.C. statements of the prosecution witnesses namely Nisar Ahmed and Mumtaz and dispatched the samples to the Chemical Examiner on 3.5.2010. He received positive Chemical report. On the conclusion of the investigation, he submitted challan against both accused for offence under section 9(c) Control of Narcotic Substance Act 1997.

4. A formal charge against both accused was framed by trial court at Ex.6. Accused pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined P.W.1 Excise Inspector complainant at Ex.12 and he has produced Mashirnama of 'Arrest' & 'Recovery' at Ex.12-A, F.I.R. at Ex.12-B, Chemical report at Ex.12-C, attested copy of 'Roznamcha' Entries 3 & 4 at Ex.12-D, original 'Roznamcha' Book Entries No.3 & 4 at Ex.12-E and F.P.W. 2 Mashir Excise Constable Nisar Ahmed Bughio at Ex.13. Thereafter, the prosecution side was closed vide statement closed at Ex.14.

6. Statements of accused were recorded under section 342 Cr.P.C. at Ex.15 and 16, in which both the accused have denied the allegations of the prosecution. Muhammad Ismail has raised plea that owner of the Truck went to him and asked to work as driver and he was not aware about the narcotics. Owner was with him when the Truck reached at

Sakrand. Truck was stopped and 'Charas' was recovered from it. According to the accused police released owner after taking some money and involved him in this case falsely. Accused Muhammad Ismail has deposed that prosecution witnesses have deposed against him however, the accused declined to examine himself on oath. No evidence has been lead by him.

7. Accused Dilawar Khan has also denied the prosecution allegations and has raised plea that he is resident of Shikarpur and he does not know the driver. He has also declined to examine himself on oath and did not lead any evidence of any witness in defence. In a question he has replied that he informed the police that he had taken lift in the Truck but he was not heard. Excise police demanded money from him to which he refused and claimed that he has been falsely implicated in this case.

8. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced both the accused as stated above.

9. Mr. Nandan A. Kella, learned counsel for the appellants did not press the appeal filed on behalf of the appellant driver Muhammad Ismail. However, argued that appellant Dilawar Khan had taken lift in the Truck at the relevant time and he has been falsely implicated by the Excise Officials. It is also contended that prosecution has failed to prove the case against the accused Dilawar Khan.

10. Learned D.P.G. argued that prosecution has proved its case against both accused by cogent evidence and explanation furnished by Dilawar Khan that he had taken lift has not been substantiated at trial. Learned D.P.G. lastly argued that there is no merit in appeal and the same is liable to be dismissed. In support of his contention he relied upon the cases reported as **GHULAM QADIR v. THE STATE** (PLD 2006 SC 61), **KASHIF AMIR v. THE STATE** (PLD 2010 SC 1052) and **MUHAMMAD KHAN v. THE STATE** (2008 SCMR 1616).

11. We have carefully heard learned counsel for the appellants, learned D.P.G. and scanned the entire evidence available on record.

12. From the perusal of the evidence it transpires that P.W. 1 Anwar Ali Solangi Excise Inspector has deposed that on 30.4.2010, he along with Excise Inspector Ashraf Ali Leghari and his subordinate staff left Excise Police Station in the Government vehicle bearing No.GS 4008 for checking the vehicles on the National Highway. Thereafter Excise officials reached at Excise Check Post National Highway Sakrand. It is stated that one Truck emerged on the road from Sakrand side. It was stopped Excise police officials saw driver and one person sitting in the Truck in the suspicious manner. Excise Inspector enquired the name of the driver to which he disclosed his name as Muhammad Ismail s/o Nasir Khan by caste Khilji Pathan. Another person sitting beside the driver disclosed his name as Dilawar Khan s/o Jumma Khan by caste Khilji Pathan r/o Quetta. He conducted personal search of accused Muhammad Ismail driver and secured two currency notes of Rs.1000/- from his front pocket. Copy of the CNIC and copy of the Driving License then he took the personal search of another accused namely Dilawar Khan and secured one currency note of Rs.500/-. Thereafter took the search of the Truck and found two fuel tanks. Excise Inspector then opened the driver side fuel tank it contained five green colour plastic bags. The same were opened in presence of the Mashirs which contained 'Charas'. Inspector found 200 bundles of 'Charas' in the shape of the rods. He then opened fuel tank from the cleaner side. It also contained three green colour plastic bags total bundles were 110. Inspector weighed the 'Charas' in presence of the Mashirs Nisar and Mumtaz which was 310 Kilograms. Inspector separated 2 Kilograms 'Charas' from each Plastic bag and total 16 Kilograms 'Charas' was sealed as samples in white colour plastic bags for sending to the Chemical Examiner. Excise Inspector search the front side dashboard of the Truck and secured one Registration Book in the name of Abdul Qayoom s/o Dad Muhammad by caste Khilji Pathan r/o Quetta.

Mashirnama of Arrest and Recovery was prepared by Inspector Anwar Ali in presence of Mashirs ECs Nisar Ahmed and Mumtaz Ali. After sealing the samples and the 'Charas' Excise Inspector brought both accused, Truck and 'Charas' to the Excise Police Station where he lodged F.I.R. against the accused on behalf of the State. He has further deposed that he had recorded 161 Cr.P.C. statements of prosecution witnesses and sent the samples / parcels to the Chemical Examiner Sukkur at Rohri and he produced F.I.R. Ex.12-B and positive Chemical Report Ex.12-C, Registration Book of the vehicle Ex.F, Excise Inspector had also produced attested 'Roznamcha' Entry No.3 Ex.12-D and original 'Roznamcha' Entry No.3 Ex.12-E. He was cross examined by learned advocate for accused. Excise Inspector denied the suggestion that he was deposing falsely against the accused.

13. P.W.2 Excise Constable / Mashir Nisar Ahmed was the member of the raiding party and acted as Mashir of arrest of the accused and recovery of the 'Charas'. He has narrated the whole episode as stated by the Excise Inspector. Excise constable Nisar Ahmed has deposed that Excise Inspector made him as a Mashir on 30.04.2010. A truck was stopped on the National Highway on 30.04.2010, it was being driven by accused Muhammad Ismail and the accused Dilawar Khan was sitting beside the driver in the Truck at that time. He has further stated that bundles of the 'Charas' were recovered from two fuel tanks of the Truck. It was 'Charas' in the shape of Rods. Total weight of the 'Charas' was 310 Kilograms. He was made as Mashir. Co-Mashir has stated that Excise Inspector took two bundles from each green plastic bag viz. 16 Kilograms of 'Charas' were separated as samples while keeping in white colour plastic bags for sending to the Chemical Examiner. Thereafter, samples were sealed. He acted as Mashir and the Mashirnama of Arrest and Recovery was prepared. Truck was seized. Thereafter both accused, recovered substance, samples were brought at Excise Police Station Nawabshah, where Mashir has stated that Excise Inspector registered

F.I.R. against the accused on behalf of the State under section 9(c) Control of Narcotic Substance Act 1997, and recorded his statement under section 161 Cr.P.C. He was also cross examined at length and denied the suggestion that he was deposing falsely.

14. From the minute examination of the prosecution evidence it is established that accused Muhammad Ismail was driving the Truck at the time of his arrest and appellant Dilawar Khan was sitting beside the driver in the Truck at the relevant time. It has also been established that during the search of the Truck 310 Kilograms of 'Charas' was recovered from the fuel tanks of the Truck. It may be mentioned here that learned advocate for appellants has not pressed the appeal on behalf of accused Muhammad Ismail the driver of the Truck but pressed the appeal of appellant Dilawar Khan on the ground that he had no concern with the driver and he had taken lift on the way for reaching to his destination. This court for its satisfaction has carefully examined the case of both the appellants and we are satisfied that case against both appellants has been proved and defence plea raised by both the appellants appeared to be afterthought and the same have not been substantiated by reliable evidence at trial. Knowledge and awareness of drug could be attributed to the appellant Muhammad Ismail as he was Incharge of the Truck at the relevant time. Appellant being the driver could not be absolved from responsibility regarding the narcotics being carried in his vehicle. It may be mentioned here that appellant Muhammad Ismail in his statement under section 342 Cr.P.C. has raised plea that he was driving the Truck at the request of the owner and 'Charas' was recovered from the Truck by the Excise officials and owner was released by Excise officials on some consideration. Such plea is not appealable. In fact appellant Muhammad Ismail in his statement under section 342 Cr.P.C. has admitted the prosecution case to the extent that he was driving the Truck at the relevant time. Legal position is very much settled in the case of **GHULAM QADIR** (supra) wherein Honourable Supreme Court has held as follows:-

“6. Keeping in view the pronouncement made in the reported judgments of this Court we are of the opinion that the driver cannot be absolved from the responsibility if the contraband items are being transported openly on the roof of the vehicle, being driven by him.”

In another case of **KASHIF AMIR** (supra) it has been observed as under:-

“It is well settled principle that a person who is on driving seat of the vehicle, shall be held responsible for transportation of the narcotics, having knowledge of the same as no condition or qualification has been made in section 9(b) of CNSA that the possession should be an exclusive one and can be joint one with two or more persons. Further, when a person is driving the vehicle, he is Incharge of the same and it would be under his control and possession, hence, whatever articles lying in it would be under his control and possession. Reference in this behalf may be made to the case of Muhammad Noor v The State (2010 SCMR 927). Similarly, in the case of Nadir Khan v State (1988 SCMR 1899) this court has observed that knowledge and awareness would be attributed to the Incharge of the vehicle.”

15. Keeping in view the huge evidence against the appellants we are satisfied that case against Muhammad Ismail who was driving the Truck is proved beyond any shadow of doubt.

As regards to the case of appellant Dilawar Khan is concerned learned advocate for appellant has argued that he had taken lift in the Truck for his destination and he had not committed the offence as alleged by the prosecution. Appellant Dilawar Khan has not entered into the witness box to record his statement under Section 340(2), Cr.P.C in disproof of prosecution allegations nor he has produced any evidence in defence. There is no cavil with the legal proposition that an accused is not

bound to take special plea regarding innocence, even in normal criminal cases once an accused takes special plea then he is required to prove the same. In the cases under Control of Narcotics Substances Act, 1997 The prosecution is required to discharge initial proof, whereas in this case both appellants do not dispute their arrest at relevant time from Truck and recovery except lack of knowledge of 'Charas' on their part. Evidence reflects that Muhammad Ismail was driving Truck and Dilawar Khan was sitting beside him.

16. Plea of accused Dilawar Khan that he had taken lift was not believable for the reason that it was Truck not bus. As such accused Dilawar Khan could not be absolved from equal responsibility, therefore, accused were under legal obligation to have satisfied the conscious of the Court by creating reasonable circumstances justifying that both of them were in fact not aware about the 'Charas' in the fuel tanks. The business of Narcotic is a menace for the entire society and requires to be curbed through iron hands. It is settled law that approach of Court must be dynamic and pragmatic approach in the Narcotic cases. Rightly reliance has been placed upon the case of **ISMAIL vs THE STATE** (2010 SCMR page 27) relevant at page 31 in which it is held as follow:

“It is now settled proposition of law by afflux of time that in the case of transportation or possession of narcotics, technicalities of procedural nature or otherwise should be overlooked in the larger interest of the country, if the case stands otherwise proved the approach of the Court should be dynamic and pragmatic, in approaching true facts of the case and drawing correct and rational inferences and conclusions while deciding such type of the cases. The Court should consider the entire material as a whole and if it is convinced that the case is proved then conviction should be recorded notwithstanding procedural defects as observed by this Court in Munawar Hussain's case 1993 SCMR 785”

17. Moreover, learned counsel for the appellants could not point out any material discrepancy or contradiction or technicalities of procedural nature in the prosecution evidence, suggesting slightest doubt in the

prosecution case. Adverting to the sentence we find that legal sentence has been awarded to both appellants by trial court. Impugned judgment dated 19.04.2012 passed by Special Judge (CNS) Shaheed Benazirabad, is based upon sound reasons and requires no interference by this court.

Resultantly, there is no substance in this appeal and the same is dismissed.

Judge

Judge

Arif.