

IN THE HIGH COURT SINDH BENCH AT SUKKUR

Spl. Criminal Jail Appeal No. D-161 of 2018

Present:

Justice Zafar Ahmed Rajput

Justice Irshad Ali Shah

Appellants : 1. Amjad Khan s/o Jan Bar
2. Toheed Khan /o Jan Bar, both through
Mr. Sohail Ahmed Khoso, advocate

Respondent : The State, through
Mr. Aftab Ahmed Shar, Addl. P.G. Sindh

Date of Hearing : 11.01.2023
Date of Order : 19.01.2023

J U D G M E N T

ZAFAR AHMED RAJPUT-J:- The appellants were tried by the Sessions Judge/Special Judge (CNSA), Ghotki in Special Case No.23 of 2017, arising out of Crime No.02/2017, registered under section 6, 9(c) of the Control of Narcotic Substances Act, 1997 (*"the Act"*) at Excise Police Station (*"EPS"*) Ghotki. After a full-fledged trial, the learned trial Court vide its judgment, dated 08.12.2018, convicted the appellants for the offence under section 9(c) of the Act and awarded them sentence to endure life imprisonment and to pay a fine of Rs. 3,00,000/- each or, in default thereof, to undergo simple imprisonment for four months more. The benefit of section 382-B, Cr. P.C was extended to them. It is against that judgment that the instant Crl. Jail Appeal has been preferred by the appellants.

2. Succinctly, the facts of the prosecution case as narrated in FIR are that, on 06.06.2017 at 12:00 noon, the appellants were arrested at National Highway, near Imran Petrol Pump, Ghotki by Excise Inspector Hussain

Bux Larik of P.S. Excise Ghotki on being found in possession of 40 kilograms of charas during search of secret cavity of a bus bearing registration No. JB4345, being driven by the appellant Amjad Khan in presence of mashirs E.C. Shah Nawaz and E.C. Liaquat Ali.

3. After usual investigation, Excise Police submitted report under section 173, Cr.P.C. before the trial Court showing the present appellants in custody and one Baghi Shah, the owner of the bus as absconder. After conducting proceedings under section 87 and 88, Cr.P.C. against the said absconding accused, the trial Court framed formal charge against the appellants as Exh.5, to which they pleaded not guilty and claimed to be tried vide plea recorded at Exh.6 and 7. At the trial, prosecution in order to substantiate the charge examined two witnesses, namely, P.W-1, Inspector Hussain Bux Larik of Excise Police, the complainant/I.O., at Exh.8 and P.W-2, E.C. Shah Nawaz, the mashir, at Exh.9. They produced relevant documents in their evidence.

4. The statements of the appellants under section 342, Cr.P.C were recorded at Exh.11 and 12, respectively, wherein they denied the allegation against them and pleaded innocence. They opted for their examination on oath under section 340 (2), Cr.P.C. and produced one Nisar Ahmed as their defense witness. The appellants in their statements on oath recorded at Exh. 13 and 14, respectively, deposed that, on 06.06.2017, Excise Police arrested them from a bus when they were going to Karachi from Rawalpindi to see their relative Nisar. Appellant Amjad also deposed that the bus driver and cleaner handed them over to Excise Police on account of quarrel between them; thereafter, they were booked in the instant case.

They claimed that neither they were driver nor cleaner of the bus and the Excise Police left the actual culprits and challaned them. D.W Nisar Ahmed was examined at Exh: 15, who deposed that the appellants are sons of his paternal aunt; he was ill about 1 ½ year back, the appellants contacted him to see him at Karachi and when they did not reach Karachi, he contacted their father, who disclosed him that they were booked in a case by Excise Police Ghotki.

5. Learned counsel for the appellants has contended that the impugned judgment being against the law, facts and equity is not sustainable in law; that despite prior information, Excise Police failed to associate any private person to witness the alleged recovery of chars; even no passenger of the bus has been cited as witness/mashir; that no evidence has been brought on record to prove that the case property before sending for chemical analysis remained in safe custody in 'MALKHANA' and even the relevant entry regarding keeping the case property in 'MALKHANA' in safe custody has not been produced by the prosecution witnesses, which has rendered the prosecution case against the appellants doubtful entitling them for such benefit; hence, the conviction and sentence awarded to the appellants are liable to be set aside. In support of his contentions, learned counsel has relied upon the case of Subhanullah v. The State (2022 SCMR 1052); Zahir Shah alias Shat v. v. The State through Advocate-General, Khyber Pakhtunkhwa (2019 SCMR 2004); Muhammad Noor and others v. The State (2010 SCMR 927) and Waqas Ali v. The State (2017 YLR 878).

6. On the other hand, learned Addl. P.G. has fully supported the impugned judgment. He has maintained that no enmity has been alleged

by the appellants with Excise Police to implicate them falsely in the case; that both the prosecution witnesses have given un-contradicted and trustworthy account of alleged recovery of charas in huge quantity. He has relied upon the case of Faisal Shahzad v. The State (2022 SCMR 905) and Liaquat Ali and another v. The State (2022 SCMR 1097).

7. We have heard the learned counsel for the appellants as well as learned Addl. P.G for the State and have examined the material available on record with their assistance.

8. It divulges from the evidence of prosecution witnesses that, on 06.06.2017, P.W-1 Hussain Bux Larik, Excise Inspector Ghotki, the complainant/I.O was available on his duty at EPS, Ghotki along with his subordinate, namely, E.Cs Liaquat Ali, Shah Nawaz, Imtiaz Ahmed, Azizullah, Zahid Hussain and Pritam Das, when at 09.30 a.m. he received spy information through cell phone that a bus bearing registration No: JB-4345 was coming from Punjab to Karachi, on which narcotic was loaded. On receiving such information, they proceeded from EPS under entry No. 04 at 10.00 a.m. (Exh. 08/E) on official vehicle and reached Imran petrol pump, National Highway Ghotki where, at 12.00 noon, they got the bus stopped, wherein 19 persons including driver and cleaner were available. They searched the bus and found a secrete cavity in its floor on the backside of VIP seat; they opened it and recovered 40 coloured plastic packets, each containing single slab of charas weighing 1 Kg, total 40 Kgs. On personal search, P.W-1, Inspector Hussain Bux secured cash Rs.5000/- and original CNIC from appellant No.1/driver of the bus and cash Rs.1000/- and original CNIC from appellant No.2/cleaner of the bus. He

took out 200 grams of charas from each packet as sample for chemical analysis and sealed them separately on the spot, and sealed remaining charas in two plastic bags. Such memo of arrest and recovery (Exh. 8/A) was prepared by E.C Pritam Das under dictation of said P.W-1 in presence of mashirs E.Cs Shah Nawaz and Liaquat Ali. Thereafter, the appellants and recovered charas were brought at EPS Ghotki, where P.W-1, Inspector Hussain Bux recorded FIR (Exh: 08/B) on behalf of the State. He sent the sample to the chemical examiner, from where a positive report, dated 20.06.2017 (Exh. 08/C) was received. He also got the registration of the bus verified from concerned department. As per verification report, dated 15.06.2017 (Exh. 08/D) the bus was owned by the proclaimed offender Baghi Shah. Case properties viz. charas, cash and CNICs of the appellants were produced before the trial Court during evidence of both the P.Ws, while the bus was parked outside the Court room at the time of recording evidence of P.Ws.

9. Both the P.Ws have implicated the appellants, who are brothers *inter se*, to have been apprehended on/at aforementioned day, time and place on being in possession of 40 kilograms of charas, which they were transporting through their bus keeping it in its secret cavity. The evidence of P.Ws. in respect of arrest of appellants and recovery of charas is consistent and confidence inspiring. There appears no material contradiction in the depositions of P.Ws rendering the prosecution case as doubtful. Admittedly none of the prosecution witnesses had any enmity with the appellants nor was it suggested.

10. So far the arguments of the learned counsel for the appellants are concerned, it may be observed that the testimony of police officials are as good as any other private witness unless it is proved that they have animus against the accused. However, the appellants could bring no such thing on record. As held in the case of Liaquat Ali (*supra*) reluctance of general public to become witness in such like cases has become judicially recognized fact. It is pertinent to note that the alleged charas was recovered on 06.06.2017 and the same was sent to Chemical Examiner promptly on the second day i.e. 07.06.2017 and it was not the case of the appellants before the trial Court that the case property was tampered with while lying in the *MALKHANA*. Even otherwise, nothing pointed out from the record by the learned counsel for the appellants, which could suggest that the safe chain of custody of the recovered charas was compromised. It may be observed that once the prosecution *prima facie* establishes its case, then under Section 29 of the Act of 1997 burden shifts upon the accused to prove contrary to the case of the prosecution, and in the instant case, the appellants have failed to do so.

11. For the foregoing facts and reasons, we have not found any misreading or non-appreciation of evidence and any illegality or legal or factual infirmity in the impugned judgment so as to justify interference by this Court in recording sentence and conviction to appellants by the trial Court. Hence, instant criminal appeal is dismissed.

JUDGE

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