IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Cr. Appeal No. D – 82 of **2019**

(*Sultan Bahadur Yousufzai versus The State*)

Present:
Mr. Muhammad Iqbal Kalhoro, J.
Mr. Arbab Ali Hakro, J.

Dates of hearing : **11.10.2023** & **21.11.2023**

Date of announcement : **07.12.2023**

Mr. Raja Bilal Asif, Advocate for appellant.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Being aggrieved by and dissatisfied with a judgment dated 22.05.2019, passed by learned Additional Sessions Judge-I/Special Judge for Control of Narcotic Substances Act (MCTC), Ghotki, in Special Case No.61 of 2016, stemming from FIR No.07 of 2016, registered at Police Station Excise, Ghotki under Section 9(c) of Control of Narcotic Substances Act, 1997, convicting and sentencing appellant to suffer rigorous imprisonment for life with fine of Rs.3,00,000/-, in case of its default, to undergo simple imprisonment for two years more, with benefit of Section 382-B CrPC, the appellant has preferred this appeal.

2. In brief, on 22.10.2016 complainant, Excise Inspector Hussain Bakhsh Larik of Excise Police Station, Ghotki, busy in checking vehicles with his team at Excise Check Post Sindh-Punjab Border, Kamoon Shahed, spotted a truck with registration No. AJK-6641coming in speed from Sadiqabad side at about 05:30 a.m. They stopped it and found two persons including driver available who alighted from the truck and disclosed their identity as Sultan Bahadur Bhatti (Driver) and Yousuf Sultan (Cleaner), residents of Moula Mian Baba, Taluka and District Swabi. They revealed there were corn grains in the truck. Their personal search led to recovery of some cash i.e. Rs.5,000/- and Rs.2,000/ and identity cards. On inspection of vehicle, a registration book in the name of Parvez Ahmed and Muhammad Banaras, and one invoice No.294 of Hamza Mini Goods Transport Company were recovered. On further search, a spare tyre was spotted which on opening was found containing packets wrapped with plastics of red and brown colours, and a word 'Doncafe' was printed on the same. Packets were opened and found with

Charas, on which a word (جمیلان) was printed. The packets were 57 in number, which were weighed and found 1 kilogram each, total 57 kilograms. From each packet, 200 grams of *charas* as samples were segregated for chemical examination and sealed in white paper. Remaining *Charas* available in packets was sealed in two sacks and numbered as 28 and 29. The truck, found loaded with corn grains, accused and recovered property were all brought at Police Station where FIR, as stated above, was registered against the accused.

3. After investigation, the Challan was submitted to the trial Court, where, following due procedure, the charge was framed against the appellant and co-accused Yousif Sultan (since acquitted) to which they pleaded not guilty and claimed trial. In support of the charge, the prosecution examined the complainant at Ex.6. He presented all necessary documents including memo of inspection of place of incident, recovery of *Charas* and arrest of accused, FIR, departure and arrival entries, the letter under which recovered *Charas* was sent to chemical lab through EC Allah Dino, a receipt of submitting property to chemical lab, its report and a letter written to MR Motor Vehicle Registration, Azad Kashmir for verification of the truck. The evidence of *mashir*, Excise Constable Preetam Das was recorded at Ex.7.

4. Thereafter, the appellant and co-accused were examined U/S 342 CrPC. Both of them denied the allegations leveled against them. However, appellant further submitted that he is a retired employee of Pakistan Army, and prior to incident, when he was travelling along with his son (co-accused Yousif Sultan) in a bus having cash amount of Rs.80,000/- for arrangement of his said son's job, the complainant snatched the said amount, which he tried to resist, hence he booked them in this false FIR. He has produced his service documents, a character certificate issued by Tehsil Councilor Tehsil Swabi stating that he is an elected member of General Councilor of Village Council Marghuz Yara Khel (Shargi), and such record of election. Despite the opportunity provided, the appellant neither examined himself on oath, nor presented any evidence in his defense. On conclusion of the trial, learned trial court, while acquitting co-accused Yousif Sultan on a benefit of doubt found the appellant guilty of the offense he was charged with, and sentenced him through the impugned judgment in the terms as stated above.

5. Learned Counsel in defence has submitted that appellant is innocent, has been falsely been implicated in this case; that there are

material contradictions in the evidence of witnesses, which have not been appreciated by the trial Court; that the FIR shows that the *Charas* with the name of "**Jameelan** (**جمیلان**)" was recovered, but at the time of evidence, the name "**Geelan** (**گیلان**)" was found printed on the *Charas*; that place of incident is not established as the site plan, a necessary requirement of law, was not prepared; that the IO has stated that he had prepared the memo of arrest and recovery, whereas, the *mashir* has stated that it was written by EC Zulfiqar Ali; that it is alleged that narcotics was recovered from spare tyre available in the truck, but nowhere in the entire evidence, it has been revealed that as to where the said spare tyre was available; that even the spare tyre was not produced at the time of evidence in the Court; that two Assistant Excise & Taxation Officers **(AETO)** available with the raiding team, were supervising the recovery, but none of them has either been made a witness or any document verified by them has been produced; that no photo or video clip of the incident was made, nor produced in the Court. The whole case is premised on a word of complainant and witnesses without any satisfactory documentary record; that in the evidence, both witnesses have stated that endorsement over the property and on the samples was made with blue ink, but at the time of evidence, the ink used was found to be black; that it is not pointed out as to who had separated the samples from the whole, and hence, the case is shrouded in mystery. The safe chain of custody of the narcotics from place of incident to police station and from police station to the office of chemical analyzer has not been proved through any reliable evidence; that it is alleged that at police station, the property was kept in the custody of (AETO) Siraj Ahmed but he has not been examined, nor the Excise Constable, who had taken the property to the chemical lab for examination. Learned Counsel has relied upon the cases of *Qaisarullah and others v. The State* (**2009 SCMR 579**), *The State through Regional Director ANF v. Imam Bakhsh and others* (**2018 SCMR 2039**), *Kamran Shah and others v. The State and others* (**2019 SCMR 1217**), *Mst. Razia Sultana v. The State and another* (**2019 SCMR 1300**), *Faizan Ali v. The State* (**2019 SCMR 1649**), *Zahir Shah alias Shat v. The State through Advocate-General, Khyber Pakhtunkhwa* (**2019 SCMR 2004**), *Haji Nawaz v. The State* (**2020 SCMR 687**), *Mst. Sakina Ramzan v. The State* (**2021 SCMR 451**), *Ameer Zeb v. The State* (**PLD 2012 Supreme Court 380**), *Qaiser Javed Khan v. The State through Prosecutor General Punjab, Lahore and another* (**PLD 2020 Supreme Court 57**), *Nadeem Akhtar v. State and another* (**PLJ 2022 Cr.C. 492 (DB)**) and *Mst. Farzana v. The State* (**2020 MLD 49**).

6. On the other hand, learned Additional Prosecutor General has supported the impugned judgment and submitted that the prosecution has succeeded in establishing the case against the appellant beyond any reasonable doubt, as there is no material contradiction impairing the prosecution case, and on all salient features of the case both the witnesses have supported each other. He has relied upon the cases of *Abdul Wahab and another v. The State* (**2019 SCMR 2061**), *Faisal Shahzad v. The State* (**2022 SCMR 905**), *Liaquat Ali and another v. The State* (**2022 SCMR 1097**), an unreported judgment dated 29.05.2023 of the Supreme Court passed in **Criminal Appeal No.208 of 2022** (*Re: Zain Ali v. The State*) and an unreported judgment of this Court dated 21.09.2023 passed in **Spl. Crl. Jail Appeal No. D-85 of 2018** (*Re: Zanwar Hussain Pathan v. The State*).

7. We have heard the parties and perused material available on record including the case law relied at bar. In this case, the prosecution has examined only two witnesses. One is the complainant/investigation officer of the case and other is the *Mashir* who had witnessed recovery allegedly effected in his presence and which he has verified in his evidence. Although, the record verifies that the whole team which participated in the scoop comprised at least 10 persons including two senior officials with the rank of AETO, but none of them, the prosecution decided to put in the witness box to verity the story. One of AETO namely Siraj Ahmed Samtio, as per evidence, had kept the samples of *Charus* for two days after its recovery on 22.10.2016 until they were dispatched to chemical lab on 24.10.2016. In what capacity he was entrusted with those samples and for what purpose has not been explained. It is not the case that he was Malkahna-In Charge and thus as per rules it was required to be done, as no such claim, the witnesses have made in their evidence. For two days, the samples were with him but where he kept them has neither been disclosed in evidence, nor brought on record by other means. This person i.e. AETO has not been cited as a witnesses, nor his 161 CrPC statement was recorded during investigation to get some clue as to where he had kept the property meanwhile and why. The prosecution case is completely silent on this important aspect of the case, rendering identity of the samples dispatched to the lab uncertain.

8. Further, the complainant in his evidence has claimed that he had prepared the memo (of recovery and arrest) in presence of the Mashirs and obtained their signature thereon. The Mashir in his evidence has added EC Zuilfqar in the episode and has named him as the author of memo.

The documents retrieved from the vehicle showed that its owner was one Parvez Ahmed, and not the appellant, yet nothing was done to investigate that person and ascertain his role in the case. It was important because the complainant in his evidence has admitted that he had not investigated the fact, nor he had any material in his possession to show, that appellant had a prior knowledge of presence of concealed *Charus* in the spare tyre. That spare tyre was neither sealed at the spot being a curial piece of evidence supporting accusation, nor was it even produced in the court at the time of evidence to reinforce such part of allegation. Further complainant has claimed that endorsement i.e. crime number, serial numbers, identification marks on each sample was written ***by him*** with a blue marker pen. Yet, at the time of evidence such writing was found to have been made with a black marker pen, and further PW-2 has revealed that such endorsement on the samples and remaining property was made by ***EC Zuilfqar***.

9. The remaining property, apart from samples sent to lab for analysis, was not deposited in the court at the time of submission of the Challan as required. But on the day of deposition of witnesses it was purportedly brought from the Malkhana of relevant police station and produced in the court but without any document subscribing to such fact. Therefore, nothing, with a certainty, could be said about its genuineness or the fact that meanwhile it was not manipulated or arranged. Further, the FIR reflects that the *Charus* in each packet was found with letters 'JAMEELAN' printed in Urdu over it. But at the time of evidence the letters 'GEELAN' were found written over the *Charus*. Apart from such anomalies going to the roots of the case making it suspicious, the fact that both the accused arrested at the spot are father and son cannot be lost sight of. Father was found on the wheel, hence he was assumed to be the driver and his son sitting next to him was presumed to be the Cleaner. The trial court considering the appellant as the driver held him responsible for keeping the *Charus* in the spare tyre and let the son go off the hook treating him as totally ignorant of presence of the *Charus*, which approach is fundamentally defective largely predicated on skewed reasoning. How it can be assumed that only father knew of the *Charus* and kept it secret from son, although he was with him right from beginning of their travel. Then, if at the given time, the father was found deriving the truck, would it imply that all the way from Swabi he had been doing it at a stretch and the son did not relieve him at any time and drove the truck? Furthermore, being the cleaner and son at the same time it is not hard to extrapolate

that he must have helped his father in taking care of the truck in all respects including preparing it for a long sortie.

10. The two persons, if they happen to be father and son, traveling together a long journey as driver and cleaner alone in the situation like the present one. They normally would tend to share each and everything with each other not only as a routine but also as a measure to protect each other in case of some emergency, and hence would be privy to all the skeletons in the cupboard. But the trial court while convicting the father presumed the son as a naive ignorant and acquitted him. It completely overlooked the fact that in fact it is cleaner's duty to look after the vehicle, supervise loading and unloading of the goods in it and everything the vehicle is meant to be including maintenance and upkeep of its tyres and spare tyre etc. But, be that as it may, it was not even the case of prosecution that only father knew of the *Charus* and son was not aware of its presence, but the trial court proceed to presume the same without there being any evidence in this regard, and acquitted the son. So when the son was found entitled by the trial court to a benefit of doubt on assumption of his being ignorant of presence of the *Charus* in the vehicle. In our view, father would also be entitled to such a benefit because there is no evidence that he had any prior information of the *Charus* present in the vehicle, which was not even owned by him but by someone else, who the prosecution failed to investigate for ascertaining his role in the case. So even from this angle – no investigation against the owner of the truck -- the prosecution case is weak and does not inspire confidence. It is settled that once there is a single doubt in the case, its benefit shall go to the accused not as matter of grace but as a right.

11. We have found so many circumstances, as highlighted above, which have created a doubt in the prosecution case. Therefore, giving its benefit, we allow the appeal and acquit the appellant of the charge he was booked in. He shall be released forthwith, if not required in any other case. Resultantly, the appeal is **disposed of**.

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Abdul Basit