IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Jail Appeal No. D-12 of 2020

Before:
Mr. Justice Naimatullah Phulpoto
Mr. Justice Khadim Hussain Tunio

Appellant:	Ghulam Mustafa son of Qadir Bux Brohi through Mr. Muhammad Shabir Rajput, advocate.
Respondent:	The State through Mr. Ali Anwar Kandhro, Additional Prosecutor General.
Date of hearing:	28.09.2022
Date of decision:	05.10.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J.- Appellant Ghulam Mustafa through captioned criminal jail appeal has challenged the judgment dated 17.02.2020 *(impugned judgment)* passed by the learned Ist Additional Sessions Judge/MCTC Special Judge (CNS) Larkana in Special Narcotics Case No. 177/2019 *(Re: The State v. Ghulam Mustafa)*, outcome of FIR No. 01 of 2019 registered at Police Station Excise Larkana, whereby the learned trial court convicted the appellant under section 9(c) Control of Narcotic Substances Act 1997 (CNSA, 1997) and sentenced him to imprisonment for life and to pay fine of Rs.100,000/-*(Rupees one Lac only)*, in case of failure in payment of fine, the appellant was ordered to suffer further simple imprisonment for one year. However, benefit of section 382-B Cr.P.C. was extended to him.

2. Facts in brief of the prosecution case are that the appellant Ghulam Mustafa, while driving a Toyota Pickup of red colour bearing registration No.KG-9884 was apprehended by the police party of PS Excise Larkana headed by Excise Inspector Abdul Hameed Bughio and they recovered a total of 30 kilograms of chars from 30 packets from concealed box on back side of Toyota Pickup at the road leading from Larkana

towards Ratodero. Memo of arrest and recovery was prepared in presence of mashirs ECs-Imamuddin and Kamran. The complete quantity of chars was sent for chemical examination and report. Thereafter, appellant along with the case property was brought back to the police station where FIR was registered against the appellant under above referred section on behalf of the State.

3. After usual investigation, challan was submitted against the appellant a formal charge was framed against the accused by the trial Court to which he pleaded not guilty and claimed trial. In order to substantiate the charge against the appellant, prosecution examined in all three witnesses namely PW-1 **Excise Inspector Abdul Hameed,** PW-2 **EC Imamuddin** and PW-3 **EC Abdul Qadir** who produced a number of documents and other items in their evidence, which were duly exhibited. Statement of accused was recorded under section 342 Cr.P.C. wherein he has denied the allegations made against him and claimed his false implication. He further stated that real culprits had been released and he was picked up by the Excise Police from barber shop Osta Muhammad one day prior to this case and he was kept by police at some unknown place wherefrom he was shifted to Excise Police Station, Larkana Circle. However, he did not examine himself on oath, nor produced any evidence in his defence.

4. Learned trial Court, after considering the material available before it and hearing the learned counsel for the respective parties, handed down the impugned judgment and sentenced the appellant as stated supra.

5. Learned counsel for the appellant has argued that none from the public was made witness to any of the proceedings of the case; that the appellant had no conscious knowledge of the presence of chars in the Toyota Pickup; that the complainant/I.O. had released the real culprits and involved the appellant in this false case; that Incharge Malkhana has not been examined. In support of his contentions, he relied upon the case law reported as **2022 MLD 1452** ***(Fayaz and another v. The State)***, **PLD**

2022 Sindh 84 (*Akhtar Meen v. The State), Judgment dated 10.11.2000 passed by Supreme Court of India in case titled as Roy V.D vs. The State of Kerala,* **2018 SCMR 2039** (*the State through Regional Director ANF v. Imam Bakhsh and others*), **2020 YLR 2127** (*Ghulam Nabi Shah v. The State*), **2022 P.Cr.L.J. 279** (*Fahad v. The State*), **2022 MLD 150** (*Ayaz alias Cotton Shah v. The State*), **2015 YLR 2085** (*Ghulam Abbas Jamali v. The State*), **2022 P.Cr.L.J. Note 30** (*Muhammad Younis v. The State*) and **2022 YLR Note 5** (*Ahsan Marfani v. The State*).

6. On the other hand, learned Additional Prosecutor General supported the impugned judgment while arguing that the appellant being driver of the vehicle was responsible for the contraband material available in the said pickup; that a huge quantity of chars alongwith pickup have been recovered; that no enmity or ill-will has been alleged or proved by the appellant against the Excise officials. In support of his contentions learned Additional Prosecutor General has relied upon the case law reported as **2017 P.Cr.L.J. Note 158** (*Ghulam Dastagir and another v. The State*) **2018 P.Cr.L.J.257** (*Liaquat Ali and another v. The State*) **and 2022 SCMR 905** (*Faisal Shahzad v. The State*).

7. We have heard the arguments advanced by the learned counsel for the respective parties and have gone through the entire material available on record with their assistance.

8. From re-examination of evidence, it is established that appellant was driving the vehicle from which narcotics substance was recovered by excise officials. Driver cannot be absolved from his responsibility, we have found that prosecution witnesses have constituted an uninterrupted chain of facts ranging from seizure and forensic analysis of the contraband. All the witnesses are in a comfortable unison on all the salient features regarding interception of 30 kilograms of chars as well as all the steps taken subsequently. At the time of the arrest, appellant Ghulam Mustafa was the driver of the Toyota Pickup and from concealed boxes inside a secret cavity in the back of the said Toyota Pickup, 30 kilograms of chars was secured in the shape of 30 different packets each

containing two patties hence making the appellant responsible for the same being the driver. We have also scanned the report of the chemical examiner available on the record and have also found that it totally corroborates the evidence of the prosecution witnesses, whose stance is supported by the chemical examiner's report. It is a matter of record that the chemical examiner did not find any tampering with the sealed parcels of the contraband, so secured from the pickup and the report of the chemical examiner was received positive. More so, all the three witnesses have testified that the case property available in the Court is the same and they were not cross-examined on the said aspect of the case by the defence counsel at any point. According to the memo of arrest and recovery produced by the complainant, the same had been prepared at 04:00 p.m. on 09.12.2019 which is when the search had taken place and the FIR was lodged upon their return to the police station on 09.12.2019 at 7:00 p.m. at which point the case property had remained at the place of occurrence with the raiding party as the formalities took them around 3 hours for completion by which time, normal office hours of the laboratory had already passed. The case property was sent to the chemical examiner through one EC Abdul Qadir on 10.12.2019 i.e. on the very next day vide letter No. EX-54 dated 10.12.2019, available on record at Ex.3/L. The case property was sealed on the spot, deposited in the Malkhana by the complainant / Investigating officer who also made such entry in the Register No.19 produced at Ex.3-G, then took out the same from Malkhana through departure entry No.2 at 09:00 hours dated 10.12.2019 and handed it over to EC Abdul Qadir for depositing the same in the office of chemical examiner, who deposited the same and such arrival entry dated 10.12.2019 at 04:00 p.m was prepared. Such entries are available on record as Ex.3-F. Such fact has also been fully corroborated by the chemical examiner's report wherein it was mentioned that *"One sealed plastic katta bearing 04 seals. Seals perfect and as per copy sent."* Therefore, the contention with regard to safe custody of the property does not have any sanctity as the property viz. chars so recovered from the appellant had been proved adequately by examining the PWs, even otherwise, they were not cross-

examined on this either. Furthermore, as per the chemical examiner's report, the seals were received in intact condition which rules out any question of tampering and it was in fact the examiner who had broken the seals to open the packets. Reliance, in this respect, is placed on the case of ***Zahid and another v. The State*** **(2020 SCMR 590)**. Resultantly, the chars so recovered from the secret cavity of the pickup which was driven by the appellant has been established to the extent of realization and safe custody of the same from the time of the recovery from the pickup to the time when it was delivered to the chemical examiner has been proved. As far as the contention of the learned counsel for the appellant that the evidence of PWs is not reliable as the same suffers from material contradictions and inconsistencies is concerned, we found contradictions that were of only a minor nature and not material and as such do not affect the prosecution case. Furthermore, no enmity has been suggested against any Excise officials, which might have led them to falsely implicate the appellant in this case. Minor contradictions on procedural or technical plane are bound to occur due to flux of time and the same do not shake their trustworthiness as expressed by the Hon'ble Supreme Court in the case of ***State/ANF v. Muhammad Arshad*** ***(2017 SCMR 283)***.

9. Apart from the above, the defence plea that has been agitated by the appellant is that he had been falsely involved by the complainant and he was arrested from barber shop Osta Muhammad one day prior to this case, he was kept by police at some unknown police wherefrom he was shifted at P.S Waleed where police captured his pictures with one Toyota Pickup. He has no knowledge of vehicle and chars, police snatched cash of Rs.17400, ATM Card, CNIC and purse at the time of his arrest. He miserably failed to establish his specific defence plea by producing documentary or oral evidence. The defence plea of false implication in absence of sound evidence to prove the same could not be considered in view of Article 121 of Qanun-e-Shahadat Order, 1984. It was observed by the Hon'ble Apex Court in the case of ***Anwar Shamim and another v. The State*** ***(2010 SCMR 1791)*** that it is duty and obligation of an accused person to prove the plea taken by him in his defence in

terms of Article 121 of Qanun-e-Shahadat Order, 1984. More so, Section 29 of CNSA, 1997, casts burden upon an accused to establish his innocence and absolve himself from the allegations of the recovered substance. Prosecution only has to show, by tangible evidence, that accused dealt with narcotic substance or has had physical custody of it or was directly concerned with it, unless accused proves by preponderance of probability that he did not knowingly or consciously possess the articles; without such proof, accused can be held guilty by virtue of Section 29 of the CNSA, 1997. It would be sufficient for an ordinary person of prudent mind to realize that such huge quantity of contraband could not be foisted upon the appellant. In this respect, we are fortified by the dictum laid down in the case of ***Shazia Bibi v. The State*** **(2020 SCMR 460)**. With regard to there being no independent or private person being cited as witness, the evidence of Excise officials was based upon truthfulness without any hint of uncertainty, enmity and ambiguity. There is no universal rule that evidence of an interested witness *per se* must be invariably corroborated by independent evidence either. If that were the case, courts would not at all take into account the testimony of an interested witness. Excise officials are as good witnesses as any other private witness and their evidence is subject to the same standard of proof and the principles of the scrutiny as applicable to any other category of witnesses; in absence of any animus, infirmity or flaw in their evidence, their testimony can be relied upon without demur. Reliance is placed on the case of ***Hussain Shah and others v. The State*** **(PLD 2020 Supreme Court 132)**. Even otherwise, Section 103 Cr.P.C. is excluded for offense falling under the CNSA 1997 by virtue of Section 25 of that Act which principle was enunciated by the Hon'ble Apex Court in the case of ***Muhammad Hanif v. The State*** **(2003 SCMR 1237)**.

10. Regarding the establishment of role and the question of exclusive possession, it is well established principle of law that the driver of the vehicle in which the contraband is being transported is solely responsible for the same. In this regard, the Hon'ble Apex Court in the case of ***Hussain Shah and others v. The State (supra)*** has held as under:-

> *"3. Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that the recovered substance was chars.* The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses."
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> *(emphasis supplied)*

11. In the case of ***Kashif Amir v. The State (PLD 2010 SC 1052)*** the Hon'ble Apex Court has also observed that:-

> *"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 CNS Act 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 reported as Muhammad Noor v. The State (2010 SCMR 927). Similarly, in the case of Nadir Khan v. The State (1988 SCMR 1899) this Court has observed that knowledge and awareness would be attributed to the in charge of the vehicle."
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> *(emphasis supplied)*

12. Keeping in view the above position, discussion and circumstances, we are of the opinion that the prosecution has undoubtedly proven the guilt of the appellant beyond reasonable shadow of any doubt. The appellant has failed to point out any material or procedural illegality in the impugned judgment or any infirmity committed by the trial Court while passing the judgment. Thus, the captioned criminal appeal is dismissed being meritless and the impugned judgment, needing no interference, is upheld with slight modification in sentence, in case of default in payment of fine appellant shall suffer S.I for six months instead of twelve months.

JUDGE 5.10.2022

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