

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**

Cr. Appeal No.D-74 of 2018.

**PRESENT:**

**Mr. Justice Zafar Ahmed Rajput,  
Mr. Justice Shamsuddin Abbasi,**

Appellant Syed Azam Shah & another, through Mr. Nisar  
Ahmed G. Abro, Advocate.

Respondent The State through Mr. Aitbar Ali Bullo, Deputy  
Prosecutor General.

Date of hearing: 11.02.2020.

Date of Decision: 11.02.2020.

**J U D G M E N T**

**Shamsuddin Abbasi, J.-** This appeal is directed against the judgment dated 12.12.2018, passed by the learned Sessions Judge/Special Judge for CNS, Kashmore at Kandhkot, in CNS Case No.05 of 2018 re-State v. Syed Azak Shah & another, emanating from Crime No.01 of 2018 registered at Excise P.S Kashmore Circle, whereby appellants 1) Syed Azak Shah son of Qaisar Shah, and 2) Jawad Maqbool son of Maqbool Shah, both Syed Pathan, have been convicted for offence under Section 9(c), Control of Narcotic Substances Act, 1997 and sentenced to suffer imprisonment for life, and to pay fine of Rs.100,000/- (Rupees one lac) each and in default in payment of fine to undergo S.I. for one year more, extending them benefit of Section 382-B, Cr.P.C.

2. The facts of the prosecution case are that on 04.01.2018, complainant Excise Inspector Amir Khan Kalwar lodged FIR at Excise P.S Kashmore Circle, stating therein that on the said date he received information in his office through his cell phone that charas was being transported in Bus No.BSB-855, hence on such information he left his

office along with his staff and at about 10.30 a.m., impounded the said bus coming from Punjab side and during search he found one locked box containing 03 & 04 numbers written on it from the roof of said bus, for which the driver and cleaner disclosed to be of passengers, but no passenger was found available at Seat Nos.3 & 4 of the bus. On unlocking, 20 packets of charas concealed under the clothes were secured from the said box; each of the said 20 packets on being weighed were found to be of 01 kilogram, whereby the entire charas became 20 kilograms; 500 grams charas from each packet was separately sealed as sample for sending to the Chemical Examiner, while remaining charas was also sealed separately. From personal search of driver of bus, namely, Syed Azam Shah, his CNIC, Driving License and cash Rs.3000/- were recovered, while on personal search of cleaner of bus, namely, Jawad Maqbool, cash Rs.1000/- and his CNIC were recovered. The passengers were allowed to leave for their respective destinations; such mashirnama of arrest of above-named driver and cleaner and recovery was prepared at the spot under the signatures of mashirs EC Asif Majeed and EC Mohammad Ibrahim, whereafter the accused and the recovered articles were taken to excise office, where such FIR was registered by the complainant on behalf of State. After usual investigation the appellants were sent up with the challan to face trial.

3. After completing all the formalities, a formal charge was framed against the appellants/accused at Ex.2, to which they pleaded 'not guilty' and claimed to be tried.

4. In order to prove its case, the prosecution examined complainant Excise Inspector Amir Khan Kalwar as PW-1 at Ex.3, who produced entries, mashirnama of arrest and recovery, FIR, letter, CNICs,

cash amount and Chemical Examiner's report at Exs.3-A to 3-H respectively; mashir EC Asif Majeed as PW-2 at Ex.4; and also second mashir EC Mohammad Ibrahim at Ex.6 and then the prosecution closed its side at Ex.7. The statements of accused/appellants under Section 342, Cr.P.C were recorded at Ex.8 & 9, wherein they, denying the allegations leveled against them, professed their innocence and false implication. They, however, neither examined themselves on oath under Section 340(2), Cr.P.C nor did they examine any person in their defence. At the conclusion of trial and after hearing the Counsel for the appellants and DPP for the State, the learned trial Court has convicted and sentenced the appellants, as mentioned in paragraph-1 supra.

5. The learned Counsel for the appellants has, *inter alia*, contended that though the complainant received spy information in advance, yet he did not associate any private person to act as witness or mashir of the alleged recovery proceedings; that even none from the passengers of the alleged bus was cited as witness/mashir in the instant case; that the charas was not recovered from exclusive possession of any of the appellants/accused and the same was shown to have been recovered from a box lying on the roof of the bus in question, on which seat numbers 3 & 4 were also written; that prosecution has not produced any evidence connecting the appellants/accused with the alleged contraband; that the learned trial Court has not properly appreciated the evidence brought on record, therefore, the conviction awarded to the appellants/accused, which is not based on satisfactory and confidence-inspiring evidence, is not sustainable and is liable to be set aside and the appellants are entitled to acquittal.

6. The learned Deputy Prosecutor General has mainly contended that the prosecution has proved its case against the appellants/accused beyond a reasonable doubt by examining P.Ws, namely, complainant Excise Inspector Amir Khan Kalwar and the two eyewitnesses/mashirs EC Asif Majeed and EC Mohammad Ibrahim, who, per him, have fully supported the prosecution case and the Chemical Examiner's report in respect of contraband material was also received in positive. He, therefore, prays that the instant appeal having no merit may be dismissed.

7. We have considered the submissions of learned Counsel for the appellants/accused, learned Deputy Prosecutor General and have gone through the evidence with their assistance. We find that no independent person was associated or cited as witness or mashir, although the excise police on an advanced tip-off had impounded the alleged bus; even none of the passengers of the said bus was cited as witness or mashir of recovery of alleged contraband; no sincere effort is shown to have been made by the complainant to associate any independent person while proceeding from his office to the alleged recovery proceedings. The other material aspect of the case is that the prosecution has failed to produce any evidence on record showing connection of any of the appellants/accused, in any manner, with the box in question, from which the alleged contraband material was recovered, whereby the prosecution has not been able to establish conscious possession of the alleged contraband material against the appellants/accused; even the prosecution failed to establish as to whom the clothes, in which the alleged contraband material was concealed, belonged. Furthermore, when the bus in question was a passenger bus

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and at the relevant time the passengers travelling therein were also available in it along with their respective luggage, it was bounden duty of the prosecution to have at-least examined any of the passengers about the particular seats No.3 & 4, which according to the prosecution case were found vacant at that time. In the case of *Gul Amin v. State* (PLD 2007 Cr.C. (Peshawar) 702), it has been held that: -

*"no credible evidence on record to connect accused with the commission of offence. Question of conscious possession of charas and opium from accused. Prosecution even had failed to disclose any connection of accused either with the car from which contraband charas and opium were recovered, either as its owner or driver or in any other capacity or with the ownership of contraband charas and opium, which were recovered from its dickey and foot mats of the car, where contraband material was found lying concealed in a vehicle in a manner that it was not discoverable from inspection of the vehicle and it was necessary to have special knowledge about its concealment to recover it, in such cases mere presence."*

8. In such circumstances, we are of considered view that the prosecution has completely failed to establish conscious possession of any of the appellants with the box in question containing alleged contraband material. Apart from that, it may not be out of place to observe here that the expert opinion under Article 59 read with 65 of the Qanun-e-Shahadar Order, 1984, is merely a circumstantial corroborative evidence, which cannot be used against the accused unless the prosecution successfully proves connection of the accused with the alleged contraband material and the same is also not binding on the Courts, whereas, in absence of any other independent corroborating evidence the conviction cannot be awarded merely in view of positive chemical report. From perusal of the impugned judgment it reveals that the learned trial Court while passing the said judgment, convicting and sentencing the appellants has not at all taken into consideration the aforesaid infirmities etc. of the prosecution case, therefore, the impugned judgment suffers from misreading and non-

reading of the evidence and under these circumstances the conviction and sentence awarded to the appellants cannot sustain, for, it is well-settled principle of law that the benefit of reasonable doubt appearing in the prosecution case appealing to a prudent mind about the guilt of the accused is to be extended to him as a matter of right. Reliance in this context is placed on the case of **Muhammad Akram v. The State (2009 SCMR 230)**, wherein Hon'ble Supreme Court of Pakistan has held that:

***"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."***

9. In view of the above, we are of the considered opinion that the prosecution has failed to prove its case against the accused/appellants beyond a reasonable doubt, therefore, the appeal deserves to be allowed and conviction and sentence awarded to the appellants vide impugned judgment dated 12.12.2018 are liable to be set aside.

10. Above are the reasons of short order announced by us on 11.02.2020, whereby the instant appeal was allowed, conviction and sentence were set aside and the appellants were acquitted of the charge.