

CERTIFICATE OF THE COURT IN RECORD NO. _____

SINDH HIGH COURT

Cr. Rep. from J. P. Khan No. 113/2016,
C.S. Joint No. 445 of 2017.
Composition of Bench. Single/D.B.
Mr. Justice Mohammed Kasim Agnani Khan
Mr. Justice Zulfiqar Ali Khan

Dates of hearing: 7-11-2020

Decided on 17-11-2020

(a) Judgment approved for reporting.

Yes
No

Kajal

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Revision No. 113/2016

Amil Khan S/o Sela Khan
Through Attorney
Abdul Aziz S/o Abdul Wahab
Muslim, adult, Resident of
Chakwal Shahuzai Post Office
Mastoong District &
Tehsil Mastoong Applicant

VERSUS

The State Respondents

FIR 40/2013
U/S 9-C CNS Act 1997
P.S.ANF Clifton Karachi

CRIMINAL REVISION UNDER SECTION 435/439 Cr.P.C.

Being aggrieved and dissatisfied by the Judgment dated 28-07-2016 passed by the Special Judge II CNS Court Karachi whereby the learned Court confiscated Mazda Minibus Registration No. PE-3328, It is therefore respectfully prayed on behalf of the applicant that this Honourable Court may be pleased to set aside the impugned judgment to the extent of confiscation of Mazda Minibus Registration PE-3328 and also to direct the trial court to handover the possession of the vehicle Mazda.

Certified copy of the impugned order is filed herewith and marked as Annexure "A".

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IN THE HIGH COURT OF SINDH AT KARACHI,
Crl. Jail Appeal No. _____ of 2017

Nazeer Ahmed,
s/o Mohammad Qasim,
Muslim, Adult,
Presently Confined in
Central Prison,
Karachi.

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Appellant in Person

VERSUS

The State _____ Respondent.

Sf. Case No. 1002 of 2013
FIR No. 40/2013
U/S: 9-C C.N.S Act 1997
PS: ANF-Clifton,
Karachi.

CRIMINAL APPEAL UNDER SECTION 410 Cr. P. C.

Being aggrieved by and dis-satisfied with the judgement dated: 28-01-2016 passed by the Ld. Sp. Judge of CNS Court No. II Karachi in Special Case No. 1002 of 2013 whereby the present Appellant alongwith Co-accused was sentenced for R.I. for 12 years & 6 months for the offence under Section 9-C CNS Act 1997, He is also sentenced to pay fine of Rs 69000/- and in default he shall further undergo R.I. for 09 months with benefit of Section 382-B Cr.P.C, the Appellant respectfully prays the present Appeal on consideration of the following facts and grounds.

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HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.113 of 2016

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Appellant Amil Khan s/o Sela Khan,
through Mr. Muhammad Akbar Awan,
Advocate.

Respondent The State through Mr. Habib Ahmed, Special
Prosecutor ANF.

Criminal Jail Appeal No.495 of 2017

Appellant Nazeer Ahmed s/o Muhammad Qasim
through Mr. Habib-ur-Rehman Jiskani,
Advocate.

Respondent The State through Mr. Habib Ahmed, Special
Prosecutor ANF.

Date of hearing: 07.04.2020.

Date of Announcement 17.04.2020.

J U D G M E N T

Mohammad Karim Khan Agha, J:- Accused Nazeer Ahmed s/o Muhammad Qasim was tried by learned Judge, Special Court-II (C.N.S.) Karachi in Special Case No.1002 of 2013 arising out of Crime No.40 of 2013, u/s. 9-C C.N.S. Act, 1997, registered at PS ANF-Clifton, Karachi. After trial vide judgment dated 28.07.2016, the appellant named above was convicted for offence falling under Section 6 punishable under Section 9-C CNS Act, 1997, and sentenced him to suffer Rigorous Imprisonment for twelve (12) years and six (6) months and also fine of Rs.60,000/- (Rupees sixty thousand only). In case of default in payment of fine he shall suffer further Rigorous Imprisonment for nine (9) months. The benefit of Section 382-B of Cr.P.C. was also given to the appellant.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Special Court-II (C.N.S) Karachi, the aforesaid appeal has been preferred by the appellant against his conviction.

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3. The brief facts of the prosecution case, are that an FIR was lodged against the accused by the complainant Inspector Muhammad Afzal on 03.11.2013, at about 1600 hours and he alleged there in that he received spy information that a person namely Nazeer Ahmed was reaching at Karachi Hub Chowki after concealing Charas in the Minibus bearing registration No.PE-3328, therefore, he left his PS alongwith ANF officials in accordance with Entry No.4 at about 1200 hours and reached at Yousuf Goth bus stop, Mawach PS Hub River Road, Karachi at about 1300 hours and held Naka, and at about 1330 hours the above referred Minibus was seen and on the pointation of spy the said Minibus was stopped and its driver apprehended. The passengers were asked to act as witness, but they excused due to fear of narcotic peddlers, therefore, PC Liaquat Ali and PC Muhammad Shahid were nominated as witnesses and parentage of the accused was enquired, who disclosed his name as Nazeer Ahmed son of Muhammad Qasim, r/o Cali No.9, near Ghosia Masjid, Akram Colony, Hub Chowki, Baluchistan and after some prevarication he produced a nylon sack to the complainant which was found to contain ten foil packets of multicolor.

4. Every packet was containing Charas and weight of each packet was one Kg, and total weight of the Charas was 10 Kgs and the Charas was sealed in the same nylon sack for the purpose of chemical analysis. Upon further search one Nokia Mobile 103 along with sim and Rs.6290 was recovered from the accused. Memo of arrest and recovery was prepared at the spot with signatures of the witnesses. Thereafter the accused along with recovered contraband Charas and Minibus were brought at the PS where FIR was lodged and investigation was started by Inspector Muhammad Afzal.

5. After completing the investigation he filed charge sheet against the accused and placed two persons namely Muhammad Saleem s/o Muhammad Noor Khan r/o Hub Chowki permanent address Pasheen Baluchistan and Riasat s/o unknown r/o Golimar Karachi as absconders with the request for proceedings under section 512 Cr.P.C., the proceedings under Section 512 Cr.P.C. were initiated against the absconders, who were declared as proclaimed offenders.

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6. Thereafter formal charge was framed and read over to the accused, to which he pleaded not guilty and claimed to be tried.

7. To prove its case the prosecution examined 02 prosecution witnesses and exhibited numerous documents and other items thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s 342 Cr.P.C. in which he denied all the allegations leveled against him and pleaded to be innocent. He examined himself on oath and called one defense witness in support of his defense case.

8. Learned Special Court-II (C.N.S.) Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 28.07.2016, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 28.07.2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for the appellant has contended that he is completely innocent and has been falsely implicated in this case, that the narcotics belonged to one of the 25 passengers in the minibus and not himself, that there was no safe custody of the narcotics and the complainant also acted as the IO and as such for any of the above reasons he should be acquitted by extending to him the benefit of the doubt. In support of his contentions he placed reliance on **Abdul Khalique Shah V State** (SBLR Sindh 197), **Kamran Shah V State** (2019 SCMR 1217), **Abdul Ghani V State** (2019 SCMR 608), **Ikramullah V State** (2015 SCMR 1002) and **Mst Razia Sultana V The State** (2019 SCMR 1300)

11. Learned counsel in the Criminal Revision application has sought the return of the minibus to him as according to him he is the lawful owner.

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12. On the other hand learned Special Prosecutor for A.N.F. has fully supported the impugned judgment. He has contended that the appellant was the driver of the minibus from which the narcotics were recovered, that he was arrested on the spot with the narcotics which lead to a positive chemical report and that safe custody of the narcotics had been proven and as such his appeal should be dismissed. With regard to the criminal revision application moved by Amil Khan whereby he has claimed return of the mini bus in which the narcotics were being transported he has contended that the mini bus does not belong to him and as such his criminal revision application should also be dismissed.

13. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

14. We would first like to note that the appeal is hopelessly time barred however since the law prefers matters to be decided on merits rather than technicalities and according to the learned counsel for the appellant the appellant is a poor illiterate man in jail we have proceeded to decide the case on merits.

15. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons:-

(a) The FIR was registered with promptitude giving no time for concoction and the S.161 statements were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) That the arrest and recovery was made on the spot and the **appellant was caught red handed with the narcotics** by the police whose evidence fully corroborates each other in all material respects as well as the prosecution case. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has

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been suggested against any of the police PW's and as such the police had no reason to implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the unreported recent Supreme Court case of **Mushtaq Ahmed V The State** dated 09-01-2020 in Criminal Petition No.370 of 2019 where it was held in material part as under at para 3;

"Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); being officials of the Republic, they do not seem to have an axe to grind against the petitioner, intercepted at a public place during routine search. Contraband, considerable in quantity, cannot be possibly foisted to fabricate a fake charge, that too, without any apparent reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring and as such can be relied upon without a demur."

(c) That the spy information about the minibus and its driver and its likely route which was pointed out by the spy informer fully corroborates the prosecution case since this is the minibus which the appellant was driving which was stopped and the appellant was arrested in whilst proceeding along the informed route and the narcotics discovered which was recovered along with the minibus.

(d) That there are no major contradictions in the evidence of the PW's and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(e) **Most significantly** the narcotics were recovered from the minibus which was being driven by the appellant and he handed the narcotics to the police when he was stopped and thus there is no doubt that the accused had actual knowledge of the narcotics which were being transported. The minibus was recovered along with the narcotics. In this respect in the similar case of **Nadir Khan V State** (1998 SCMR 1899) it was held as under,

"We have gone through the evidence on record and find that the petitioners had the charge of vehicle for a long journey starting from Peshawar and terminating at Karachi. They had the driving licenses also. As being person incharge of the vehicle for such a long journey,

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they must be saddled with the necessary knowledge with regard to the vehicle and its contents. The probabilities or the presumptions are all dependents on the circumstances of each case and in the present case the circumstances fully establish their knowledge and awareness of the contents and their explanation showing the ignorance actually strengthens that conclusion rather than weakening it".

In this regard reliance is also placed on **Hussain Shah and others V The State** (PLD 2020 SC 132) which is similar to the facts and circumstances of this case.

Furthermore, Under Section 29 CNSA 1997 once the recovery has been proven as in this case the onus shifts to the accused to show his innocence in that at least he had no knowledge of the narcotics. The appellant has not been able to do so in this case. In the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) it was held as under in this respect at P485 Para 14

"Under the provisions of section 29 of the C.N.S. Act once the recovery of contrabands was made from a private car which was by then in control of the two appellants, the burden to explain the possession whether actual or constructive was on the appellants to discharge but neither they have led any evidence in defence nor have appeared in disproof of the prosecution evidence under section 340(2), Cr.P.C. thus the charge laid upon them has remained unrebutted".

That the appellant's defense that whilst he was driving one of his 25 passengers called the police because they suspected a bomb in a bag which turned out to be narcotics is in our view simply not believable. It certainly does not appeal to logic, reason or common sense. Had there been a grain of truth in his defense then rather than making a phone call whilst the minibus was in transit his passengers would simply have told him to pull over so that they could get out of the minibus before the bomb exploded. **The fact of the matter is that according to the evidence the appellant has admitted being the driver of the van and the narcotics was found under his seat**

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which he handed over to the police. He was thus caught red handed with the narcotics

(f) That it would be extremely difficult to foist such a large amount of charas being in total 10 KG's as mentioned in **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(g) That there was no delay in sending the chemical report for analysis which turned out to be positive.

(h) That the recovered narcotics were kept in safe custody from the time of their recovery to the time when they were taken for chemical analysis and no suggestion of tampering with the same has even been made. The narcotics were sealed on the spot, remained sealed in the malkhana before being transported to the chemical examiner in a sealed condition as per the chemical report. In this respect reliance is placed on the recent Supreme Court case of **Zahid and Riaz Ali V State** dated 03-03-2020 (unreported) in Jail Appeal No.172 of 2018. Although this case concerned rape since it concerned the safe custody of certain swabs being sent to the chemical examiner we consider its findings to be equally applicable to the safe custody of narcotics being sent to the chemical examiner which held as under at para 5 in material part;

"The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals, therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals."

(i) All relevant police entries were duly exhibited.

(j) That although no independent mashir was associated with the arrest and recovery of the appellant it has come in evidence that no private person was willing to become an independent mashir at the time of arrest and recovery. Even otherwise S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of Section 25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V The State** (2003 SCMR 1237).

(k) That there is no absolute legal bar on the complainant also being the IO. In this respect reliance is placed on **Zafar V State** (2008 SCMR 1254)

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(1) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defense case which we disbelieve for the reasons we have already discussed above.

16. With regard to the criminal Revision application we note the evidence of PW 1 Muhammed Afzal who states as under:

“During interrogation as per version of the accused that he is in fact driver of one Abdul Aziz son of Abdul Wahad who is otherwise owner of the said vehicle as per version of the accused. I issued notice to said Abdul Aziz u/s 160 Cr.PC who joined the investigation and I recorded his statement u/s 161 Cr.PC on 30-12-13 who claimed to be owner of the said seized vehicle as he purchased the vehicle from his previous owner namely Amil Khan.” (bold added)

17. It is notable at the time that of the offense Mr. Amil Khan did not come forward to join the investigation or to claim ownership of the vehicle and his claim now seems to be an after thought especially as there is evidence to show that the vehicle belongs to Abdul Aziz.

18. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant and the impugned judgment is upheld and the appeal is dismissed. We also dismiss the criminal revision application as being without merit

19. The appeal and revision application are disposed of in the above terms.