

## **JUDGMENT SHEET**

### **ISLAMABAD HIGH COURT, ISLAMABAD,** **JUDICIAL DEPARTMENT**

**Criminal Appeal No.190/2016**  
Syed Karam Hussain Shah & another  
versus  
The State

Appellants by: Syed Hamid Ali Bukhari, Advocate.

State by: Ch. Ehtisham-ul-Haq, Special Prosecutor, ANF.

*and*

**Criminal Appeal No.196/2016**  
Anti Narcotics Force  
versus  
Syed Karam Hussain Shah & another.

Appellant by: Ch. Ehtisham-ul-Haq, Special Prosecutor, ANF

Respondents by: Syed Hamid Ali Bukhari, Advocate

Date of Hearing: 17.04.2019.

**MOHSIN AKHTAR KAYANI, J:** Through this single judgment, we intend to decide the captioned criminal appeals as both the appeals are arising out of case FIR No.24, dated 28.05.2015, under Section 9-C read with Section 15 of CNSA, 1997, P.S. ANF Dina, Region (RD) Rawalpindi.

2. Brief facts as referred by PW-5 Fareed Ahmad Tonio/S.I. in his complaint (Exh.P1-A) are that on 28.05.2015, when he along with other police constables was present near Tramari Chowk, Islamabad on official vehicle (RIG-1115), he received spy information that Syed Karam Hussain Shah/appellant No.1 along with his companion Zulfiqar Ali/appellant No.2 is about to deliver huge quantity of contrabands in their vehicle (LRU-6885) to one of their client at Hascol Petrol Pump, Khanna Pul, Islamabad,

whereupon PW-5 Fareed Ahmad Tonio/S.I. along with police party reached at the said place and started secret surveillance there. At about 13:10 hours, they observed the said vehicle i.e. (LRU-6885) coming from South side in which two persons were sitting, which was signaled to pull over and on inquiry, the person sitting on the front seat was identified as Syed Karam Hussain Shah/appellant No.1 and a black color shoulder bag with a lock was placed between his feet, which he opened himself with a key and got recovered three packets of charas, 1kg each (total 3kg), wrapped in khaki solution tape and *momi lifafa*, whereupon three samples parcels from the said three packets were prepared, whereas the black shoulder bag, key and lock were also taken into possession through separate recovery memo and the charas was sealed in fourth packet with seal mark "NT". Similarly, the person who was driving the vehicle was identified as Zulfiqar Ali/appellant No.2, who disclosed that charas garda has been concealed in front doors of the vehicle and on his disclosure, the front doors were opened and two packets of charas garda each weighing 1 kg (total 2kg) wrapped in khaki solution tape and *momi lifafa* were got recovered, from which sample of 10 grams was taken from each packet and all three parcels were sealed with mark "NT". On further search of the vehicle, registration book of the vehicle (LRU-6885) registered in the name of one Saqlain Ali along with color photocopy of Zulfiqar Ali's CNIC were recovered and taken into possession through recovery memo. The recovery memos of these articles were prepared as Exh.P3-A and Exh.P3-B. The complaint was converted into vide FIR No.24, dated 28.05.2015, under section 9-C r/w Section 15 CNSA, P.S. ANF Dina, Region (RD) Rawalpindi (Exh.P1-B). The Investigation Officer submitted the samples to NIH Drugs Control and Traditional Medicines Division,

Islamabad on 29.05.2015, which were declared as charas garda through Exh.P5-C to Exh.P5-G, dated 18.06.2015. The Investigation Officer submitted the challan before the learned Trial Court and after conclusion of evidence and recording of statements of appellants, the learned trial Court vide impugned judgment dated 31.10.2016 convicted and sentenced Syed Karam Hussain Shah/appellant No.1 for three (03) years rigorous imprisonment along with fine of Rs.60,000/-, whereas Zulfiqar Ali/appellant No.2 was convicted and sentenced for two (02) years rigorous imprisonment along with fine of Rs.30,000/-, whereas their vehicle (LRU-6885) was released. After passing of the impugned judgment, both the appellants have challenged their sentence through captioned Criminal Appeal No.190/2016, whereas the ANF authorities also filed captioned Criminal Appeal No.196/2016 seeking enhancement of sentence awarded to the appellants and confiscation of their vehicle (LRU-6885).

3. Learned counsel for appellants in Criminal Appeal No.190/2016 contended that the recovery has not been proved against the appellants and they have been planted by the ANF authorities, whereas Zulfiqar Ali/appellant No.2 has taken the specific stance that he is a taxi driver and his taxi was hired by Syed Karam Hussain Shah/appellant No.1, who was to attend the Court in relation to a murder case and after the court hearing, when they had dropped their counsel at Jabba, they were taken into custody by the ANF authorities at about 02 p.m. at Alipur and nothing has been recovered from them; that the recovery proceedings have not been conducted in accordance with law and the entire contraband is foisted upon the appellants.

4. Conversely, learned Special Prosecutor ANF in the captioned Criminal Appeal No.196/2016 contended that the learned Trial Court has not considered the parameters laid down in PLD 2009 Lahore 362 (Ghulam Murtaza vs. The State) as well as PLD 2012 SC 380 (Ameer Zeb vs. The State) as the appellants should have been convicted and sentenced for 08 years and 06 months as per the quantity of contraband recovered from them; that when recovery has been proved from the vehicle and same was exhibited, the learned Trial Court should not have released the vehicle used for the purpose of transportation of contraband, rather its confiscation order should have been passed.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that the ANF authorities arrested the appellants namely Syed Karam Hussain Shah and Zulfiqar Ali on 28.05.2015, when PW-5 Naveed Ahmad Tonio/S.I. along with other police constables boarded on official vehicle (RIG-1115) and present near Tramari Chowk, Islamabad, received a spy information that Syed Karam Hussain Shah/appellant No.1 along with his companion Zulfiqar Ali/Appellant No.2 are transporting heavy quantity of charas in their vehicle (LRU-6885). At about 01:10 p.m., the police party seen the vehicle (LRU 6885) near Hascol Petrol Pump, Khanna Pul, Islamabad in which two persons were sitting, who were signaled to stop by the police constables and on inquiry, the person sitting on the front seat was identified as Syed Karam Hussain Shah/appellant No.1, in whose feet black color shoulder bag with lock was placed. Due to suspicion, he was asked to open up the bag, who took out a key from his pocket and got opened the lock of the shoulder bag, from which

three packets of *charas garda* wrapped khaki solution tape and weighing 03 kg were recovered, whereafter sample of 10 grams from each packet was taken for chemical examination and a separate fourth parcel was prepared with seal "NT", whereupon all the articles including the key and bag were taken into possession. On the other hand, the person sitting on driving seat was identified as Zulfiqar Ali/appellant No.2, who disclosed that *charas garda* has been concealed in front doors of vehicle, whereupon the inner components of both the fronts door were got opened, from which two packets wrapped in khaki solution tape of *charas garda*, weighing 02 kg, with *momi lifafa* were discovered, and accordingly, two samples parcels were taken from the packets and all three packets were sealed with seal "NT". On further search of the vehicle, registration book in the name of one Saqlain Ali and copy of Zulfiqar Ali's CNIC were also taken into possession vide separate recovery memo. The Investigation Officer drafted the complaint (Exh.P1/A), which was converted into FIR No.24/2015 (Exh.P1/B).

7. PW-5 Investigation Officer, on the next day of the occurrence, sent the sample parcels to NIH Drugs Control and Traditional Medicines Division, Islamabad for chemical examination, which confirmed the same as *charas garda* vide reports referred as Exh.P5/C to Exh.P5/G. The Investigation Officer submitted final challan under Section 173 Cr.P.C., whereafter both the appellants have been tried. Ultimately, the learned trial Court vide impugned judgment 31.10.2016 convicted Syed Karam Hussain Shah/appellant No.1 and Zulfiqar Ali/appellant No.2 for 03 years and 02 years rigorous imprisonment, respectively.

8. The glance of evidence divulges that the evidence brought on record by PW-5 Naveed Ahmad Tonio/S.I. is important in nature, who narrated the abovementioned story in details and prepared the recovery memo of 03 kg charas (P1), black shoulder bag (P2), lock of the bag (P3), key of the bag (P4), CNIC card of Syed Karam Hussain Shah/appellant No.1 (P5), PKR 700/- (P6), Nokia Phone (P7), Wallet (P8), different visiting cards (P9/1-7), and birth certificate of Syed Karam Hussain Shah/appellant No.1 (P10). The said articles were recovered from Syed Karam Hussain Shah/appellant No.1 vide recovery memo Exh.P3/A, which was witnessed by Muhammad Ilyas/Constable and PW-3 Azhar Ali/Constable. Similarly, PW-5 Naveed Ahmad Tonio/S.I. also prepared recovery memo Exh.P3/B of the charas recovered on disclosure and pointation of Zulfiqar Ali/appellant No.2, which was identified as (P11), registration book as (P12), and copy of coloured ID card as (P13), which was also witnessed by the said constables. During the course of cross-examination, PW-5 Naveed Ahmad Tonio/S.I. acknowledged that he received spy information and incharge Niaz Rahim AD was also present at the crime scene, where they have checked three different vehicles at that time. He acknowledged that Marasla (Exh.P1/A) does not contain element of colour of vehicle, however he stated that accused driver did not try to accelerate the vehicle when he was stopped by the constables. He also made personal search of the accused and he stated that both Syed Karam Hussain Shah/appellant No.1 and Zulfiqar Ali/appellant No.2 disclosed about the charas. He also acknowledged that site plan (Exh.P5/A) does not contain the presence of witnesses and on the day of working, the HASCOL Petrol Pump was operational. He also acknowledged that employees of petrol

pump were called to witness the recovery proceedings, but they refused to become witnesses of narcotics case.

9. The other witness of recovery is PW-3 Azhar Ali, who narrated the entire story mentioned above, however he acknowledged during the course of cross-examination that at the time of preparation of parcel Article P/1, the overwritten date was mentioned and the seal of article P1 is not intact and found broken. On the request of defence counsel, parcel No.4 (P1) was de-sealed and on de-sealing, three packets wrapped in khaki solution tape were found and it was observed by the Court that three packets have a small cut at the corner from where sample substances were taken out. PW-3 Azhar Ali further acknowledged that the substances were present in solid slab shape and not in a powder form. He further acknowledged that seal of article P11 is also found broken and not intact, therefore, on the request of defence counsel, the parcels were de-sealed, whereafter PW-3 Azhar Ali acknowledged that two packets were found in same position at the time of recovery other than a corner found cut from where a sample was got separated and the substance is found in a solid slab form and not in a powder form. The said witness has been crossed examined at length, but no material contradiction has been achieved by the appellants' side.

10. Nasir Hayat/Constable appeared as PW-4 and stated that on 29.05.2018, PW-5 Naveed Ahmad Tonio/S.I. called him and handed over him an application drafted in Urdu and docket in English for onward transmission to Moharrar Malkhana namely Muhammad Jahwar Ali/ASI, who in return handed over him 05 sample parcels of *charas garda*, weighing 10 grams each, in a sealed manner with seal "NT" along with road certificate.

PW-4 Nasir Hayat/constable after depositing the said 05 parcels with the Chemical Examiner, NIH submitted receipt of the said samples to ANF Dina and recorded his statement under Section 161 Cr.P.C.

11. Muhammad Jawwad Ali/ASI appeared as PW-2, who received 05 sample parcels along with 02 parcels for remaining recovered substance with seal "NT" and personal search articles together with vehicle and key given by PW-5 Naveed Ahmad Tonio/S.I. PW-2 Muhammad Jawwad Ali/ASI entered all these articles in Register No.19 and he handed over the parcels to PW-4 Nasir Hayat/Constable for onward transmission to NIH.

12. Sajid Ali/Constable appeared as PW-1, who stated that on 28.05.2015, he was duty officer at ANF Dina, Rawalpindi and after receiving Murasla (Exh.P1/A), he registered the FIR (Exh.P1/B) and handed over copy of it to Sajid Hussain/constable.

13. After conclusion of the evidence, the appellants got recorded their statements under Section 342 Cr.P.C. and took their defence with the stance that when they dropped Mr. Gardezi, Advocate at his residence in Jabba, the ANF authorities arrested them. In this regard, appellants have produced defence evidence of Muhammad Aslam/S.I. as DW-1, the Security Incharge in Federal Judicial Complex, Islamabad, who produced the entry gate details as Exh.D1/A, which reveals the entry of appellants at Serials No.119 and No.121. However, DW-1 Muhammad Aslam acknowledged during the course of cross-examination that the record produced by him in shape of Exh.D1/AA is without any time of entry and exit in the columns.

14. Keeping in view the above background and the evidence recorded in the trial Court, we are of the view that recovery of contraband i.e. 03 kg of



charas in black colour shoulder bag with lock from Syed Karam Hussain Shah/appellant No.1 has fully been proved as the incriminating articles i.e. Charas (Exh.P-1), black colour shoulder bag (Exh.P-2), lock of the bag (Exh.P-3) and key of the lock (Exh.P-4) have been produced and identified in the Court. All these things, if seen in the light of results tendered by the chemical examiner vide Exh.P5-C to Exh.P5-G, dated 18.06.2015, it substantially proves that the recovered contraband is *charas garda*.

15. Similarly, the other recovery of 02 Kg *charas* from Zulfiqar Ali/appellant No.2 was also proved on the basis of testimonies of recovery witnesses as vehicle bearing registration No.LRU-6885, white colour, (P-14) was produced before the Court along with its registration book (P-12) and recovered *charas* of 02 kg (P-11) substantially proved the Exh.P3-C, even otherwise, Zulfiqar Ali/appellant No.2 was driver of the said vehicle and it is settled law that liability of driver in narcotics cases has to be seen with reference to his necessary knowledge. As per the view opined by the Hon'ble Apex Court in 1988 SCRM 1899 (Nadir Khan Vs. The State) and 2010 SCMR 927 (Muhammad Noor and others Vs. The State), we are fortified to hold that the driver/accused was having conscious knowledge and control of the said vehicle as he disclosed about the contraband concealed in secret cavities of doors of vehicle, which also makes him liable for prosecution.

16. It is also settled by the superior Courts that if the property was lying open with the view of accused then situation would be different as in this case the contraband was concealed in front doors of the vehicle, therefore, onus is upon the appellants to prove in terms of Article 122 of the Qanun-e-Shahadat Order, 1984 as to how the contraband was concealed in the car and as such, the appellants have not explained the circumstances. At last, the apex

Court has also laid down heavy burden of proof upon the driver of vehicle, against whom the prosecution has discharged its onus and the driver of the vehicle is to be declared responsible person for transportation of narcotics as no condition or qualifications are made in Section 9(6) of CNSA, 1997. Even otherwise, the possession should be considered exclusive one and can be joint with other co-accused persons, especially when a person is driving the vehicle, he is the incharge of the same and it would be considered that all the articles lying in vehicle are under his control and possession as also held in PLD 2010 SC 1052 (Kashif Ameer Vs. The State).

17. While considering the above legal background, we have gone through the impugned judgment of the trial Court, which reflects that the trial Court has awarded sentence of 03 years R.I to Syed Karam Hussain Shah/appellant No.1 for having in possession 03 Kg of charas, whereas Zulfiqar Ali/appellant No.2 has been sentenced for 02 years R.I for having in possession 02 Kg charas, however the vehicle (LRU- 6885) has been released in favour of Zulfiqar Ali/appellant No.2 by declaring that the contraband is of meager quantity. However, we are of the view that the referred view of the learned trial Court is contrary to the law settled by the Lahore High Court in PLD 2009 Lahore 362 (Ghulam Murtaza Vs. The State) as the following sentencing policy/criteria has been defined with respect to charas exceeding 01 kg to 03 kg.

<b>Recovered Substance</b>	<b>Quantity</b>	<b>Normal Sentence</b>
Charas	Exceeding 1 kilogram and upto 2 kilograms	Imprisonment: RI for 4 years 6 months and Fine: Rs.20,000/- or in default SI for 5 months.
Charas	Exceeding 2 kilograms and upto 3 kilograms	Imprisonment: RI for 5 years and 6 months and Fine: Rs.25,000/- or in default SI for 5 months and 15 days.

18. The aforesaid sentencing policy/criteria has further been upheld by the apex Court in PLD 2012 SC 380 (Amir Zeb V/s. The State). Even otherwise, it is trite law that when accused persons sitting in a vehicle individually led to recovery of contraband then they should be held equally liable for the total quantity of the recovered contraband as held in PLD 2016 SC 471 (The State through ANF Peshawar vs. Rashm Ali Khan). However, both the appellants in this case have got possession of their own charas, which was separately recovered on their pointation, therefore, it could not be presumed that they both are in joint possession of the total recovered charas i.e. 05 kg.

19. The above background, if seen in the light of statement of the appellants under Section 342 Cr.P.C. read with defense evidence of DW-1 Muhammad Aslam/S.I, we are of the view that the defense taken by the appellants is of no use and there is neither any ill-will, malafide or enmity nor the same has been demonstrated against the ANF authorities, even otherwise, not a single discrepancy has been noted in the evidence of prosecution witnesses and even the samples were sent to the NIH within proper time, whereby the recovered contraband was proved to be *charas garda*. Nonetheless, the appellants themselves raised an objection in the trial Court to open up the remaining contraband, which otherwise was properly exhibited, and this left no stone unturned in favour of prosecution, who have successfully proved its case against the appellants, but the learned trial Court has misapplied the law, especially with respect to the sentencing portion of the judgment.

20. For what has been discussed above, we are of the view that the appellants were given sentence by the learned Trial Court on its lower side, which requires enhancement, but at this stage, when Syed Karam Hussain Shah/appellant No.1 and Zulfiqar Ali/appellant No.2 have already served their sentences of 03 years and 02 years rigorous imprisonment, respectively,

the sentences awarded to appellants could not be enhanced as they have already completed their legal sentence and it is settled that when legal sentence is already completed and offender has been released, his sentence could not be enhanced as held in 2002 SCMR 93 (Bahadur Ali, etc. vs. The State), 2006 SCMR 1091 (Mehrban Khan vs. Ghulam Murtaza, etc.) and 2008 SCMR 817 (Haji Tahir Hussain vs. Saqlain, etc.), therefore, the sentences of appellants could not be enhanced at this stage, rather their conviction as awarded by the learned trial Court is maintained. Accordingly, captioned Crl. Appeal No.190/2016 (Syed Karam Hussain Shah & another. vs. The State) is hereby **DISMISSED**, whereas, the captioned Crl. Appeal No.196/2016 (Anti Narcotics Force vs. Syed Karam Hussain Shah & another) is **PARTLY ALLOWED**, and the order of the learned trial Court to the extent of release of vehicle (LRU-6885) is **SET-ASIDE**. The ANF authorities are directed to take over the said vehicle as the same has been used for transportation of contraband concealed in secret cavity of the said vehicle and it should be confiscated in terms of Section 32 of the CNSA, 1997 in favour of the State, which shall be auctioned under the Disposal of Vehicles and other Articles (Involved in the Narcotic Cases) Rules, 2001 by the Director General, ANF, accordingly.

(AAMER FAROOQ)  
JUDGE

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 06.05.2019.

JUDGE

JUDGE

**\*\*\*APPROVED FOR REPORTING\*\*\***

Khalid Z.