

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Jail Appeal No. 69/2016
Aakash Ahmed
Versus
The State

Appellant by: Barrister Syeda Jugnoo Kazmi, Advocate.
Respondent: Dr. Waseem Ahmed Qureshi, learned
Special Prosecutor, ANF with Shiraz
Inspector, ANF.
Date of Hearing: 22.07.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- The instant criminal appeal under Section 48 of the Control of Narcotics Substances Act, 1997 ("Act of 1997"), is directed against the judgment dated 08.03.2016, passed by the learned Judge, Special Court (CNS), Islamabad, whereby the appellant was convicted under Section 9(C) of the Act of 1997, and sentenced to Fourteen years R.I. with fine of Rs.500,000/-, in default to pay the amount of fine, to further undergo SI for two years in case FIR No.70, dated 31.12.2012, under Sections 9/C & 15 of the Act of 1997, Police Station ANF-RD, Rawalpindi. The benefit of Section 382-B of Cr.P.C was also extended to the appellant.

2. Briefly, the accusation against the appellant in the complaint Ex.PA, on the basis of which FIR No.70, Ex.PA/1 was registered is that, on 31.12.2012 spy information was received by S.I. Munir Abid that an interprovincial smuggler Akash Ahmed (appellant) will smuggle huge quantity of narcotics in vehicle No.-LWC-0062, Honda White Colour through G.T. Road from KPK to inner Punjab via Rawalpindi and about at 17:00 hours will pass near Tarnol Railway Crossing. On the basis of said information, a raiding party was constituted which reached at the spot. At about 17:10 hours, the said vehicle was stopped and the person driving the said vehicle was apprehended, who disclosed his name as Akash Ahmed son of Kala Khan (appellant). During the

search of the said car, 23 packets of opium wrapped in white polythene bags, lying under the back seats of the vehicle, twenty packets of opium wrapped in white polythene bags were recovered from the secret cavities made inside the dashboard. All packets of opium were weighed and found 1250/1250 grams each, total 53.750 kilograms. From each packet 10/10 grams opium was separated for chemical analysis. After due investigation, challan was filed in the Court of learned Special Judge (C.N.S.), Islamabad where the appellant was formally charge sheeted to which he pleaded not guilty and claimed to be tried.

3. At the trial, prosecution examined Naveed Ahmed Tonio ASI as PW-1, to whom 43 sample parcels, two parcels of remaining opium alongwith motor-car and other belonging of the appellant were handed over for safe custody and onward transmission to the office of Chemical Examiner. On 02.01.2013, he handed over the sample parcels to Usman Aslam constable for its onward transmission to the office of Chemical Examiner, Rawalpindi. Mehboob Hussain Shah, Head Constable, PW-2 chalked out FIR Ex.PA/1 on the basis of complaint Ex.PA. Usman Aslam constable appeared as PW-3 to whom 43 sealed parcels said to contain sample of opium 10 grams each were handed over by the I.O. for its onward transmission to the office of Chemical Examiner, Rawalpindi and he delivered the said parcels on the same day in the said office. Jahan Kamal Constable was examined as PW-4, who is a recovery witness through recovery memos Ex.PA & Ex.PC. Muhammad Munir Abid S.I. complainant and the Investigating Officer of the case, was examined as PW-5. The said witness testified that 53.750 Kilograms opium was taken into possession by him vide recovery memo Ex.PA, it was deposited in the Malkahana, drafted the complaint Ex.PA and sent the same to the Police Station for registration of formal FIR Ex.PA/1.

He also inspected the place of recovery and prepared rough site plan Ex.PD, recorded statements of the PWs under Section 161 Cr.P.C. He produced the accused in the Court on next day for judicial remand. On 02.01.2013, deposited the samples in the office of Chemical Examiner and received chemical report as positive Ex.PE. He has got declared three persons namely Malik Tanveer, Akbar Ali and Naqeeb Khan as P.O. and submitted supplementary challan against them.

4. After the recording of above said prosecution evidence, the appellant was examined under Section 342 Cr.P.C, wherein he denied the allegations and opted to make statement on oath and produce witnesses in his defence. However, on 03.02.2016, he again recorded statement, wherein he opted not to make his own statement on oath u/s 340(2) Cr.P.C. or to produce any defence witness. The learned Trial Court after hearing the counsel for the appellant and the learned Prosecutor ANF, convicted and sentenced the appellant as mentioned in para-1 *supra* vide judgment dated 08.03.2016, being assailed through the instant jail appeal.

5. Learned counsel for the appellant submits that, the report of chemical examiner is in violation of Section 36 of the Act of 1997 and Rules 5&6 of the Rules, 2001; that there is contradictions in the statements of witnesses qua delivery of sample parcels in the office of chemical examiner; that no private witness has been associated despite the fact, the place of occurrence is a public place; that at the time of occurrence, the appellant was of tender age; that he has already undergone 8 years rigorous imprisonment. Learned counsel placed reliance upon case laws reported as 2018 SCMR 772, 1995 SCMR 1345, PLD 2019 SC 64, 2018 YLR 860, 2018 SCMR 2039, PLD 2002 SC 1408, 2011 MLD 1491 (Sindh).

6. On the other hand, learned Prosecutor-ANF stands behind the judgment by certifying the fact that the prosecution has successfully proved its case by producing evidence of unimpeachable character.

7. We have heard the learned counsel for the appellant, learned Prosecutor-ANF and have gone through the record with their able assistance.

8. The careful scrutiny of the prosecution evidence reveals that the samples were duly taken from each packet. The raiding party, after the raid and recovery proceedings, reached the police station at about 11:50 pm and as per the statement of PW-5/IO, soon on arrival at the police station, he handed over the case property along with the vehicle and other articles recovered from the appellant as per the recovery memos to PW-1 Naveed Ahmad, Moharrar Malkhana. On the very next morning at about 09:00 am, PW-3 Usman Aslam constable received said sample parcels from PW-1 Naveed Ahmad Moharrar Malkhana for onward transmission to the office of Chemical Examiner which he deposited in the said office on the same day. The report of Chemical Examiner Ex.PE testifies that all 43 sample parcels contain opium which can be used to cause intoxication. There is not a single document on record which could rebut these facts.

9. The prosecution evidence comprising compliant Ex.PA, the statements of two recovery witnesses PW-4 and PW-5 and the report of Chemical Examiner Ex.PE proves the recovery of 53.750 Kg opium from the vehicle in question being driven by the appellant. There is no contradiction in the statements of the two recovery witnesses, particularly the statement of PW-5, who is the complainant and the Investigating Officer of the case which could lead to hold that the opium was not recovered from the possession of the appellant at the time when he was intercepted by the raiding party.

10. Needless to mention that for drawing a view contrary to one contained in the impugned judgment, there should be some material on record which could suggest that the opium was not recovered from the possession of the appellant rather if the evidence is evaluated, keeping in view the supporting material, it is established that nothing is available on record which could rebut the statements of the recovery witnesses. Both the recovery witnesses were consistent on material aspects regarding recovery of narcotics substance, the number of persons associated with the raid, the quantity of packets, the colour of contraband and even the colour of the ink used on the docket which was handed over to PW-3 Usman by the IO./PW-5. Both were also consistent on the point that at the time when PW-5/IO had received spy information, only the informer and the IO were present and there was no other person. Both had even been consistent qua the nature and colour of the contraband, 'brown' and 'soft'.

11. In the present case, 43 packets of opium were recovered from the vehicle, driven by the appellant and out of the said 43 packets, 10 grams were taken out from each packet and 43 sample parcels were prepared which were sent to the office of Chemical Examiner. The report of Chemical Examiner Ex.PE confirms that 43 sample parcels received were of opium which can be used to cause intoxication. This factual position is totally in line with the guidelines for such like cases expounded by the Hon'ble Apex Court in case of Ameer Zeb V. The State (PLD 2012 SC 380). It was held as under:-

"It is our considered opinion that a sample taken of a recovered substance must be a representative sample of the entire substance recovered and if no sample is taken from any particular packet/cake/slab or if different samples taken from different packets/cakes/slabs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample and it would be unsafe to rely on the mere word of mouth of the prosecution witnesses regarding the substance of which no sample has been taken or tested being narcotic substance."

12. The careful analysis, lead to conclude that the prosecution evidence does not suffer from any material discrepancy or flaw which could lead to draw an inference in favour of the appellant or create any dent in the prosecution case.

13. The gravity of the guilt of the appellant is on higher pedestal as being a driver of the vehicle. In *Kashif Amir V. The State (PLD 2010 SC 1052)*, it was held that *“the person on driving seat of vehicle shall be held responsible for transportation of narcotics having knowledge of the same as no condition or qualification has been made in Section 9(6) of the Act of 1997 that the possession should be an exclusive one and can be joint one with two or more persons. 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.”*

14. The Act of 1997 is a special law, Section 25 whereof excludes the provision of Section 103 Cr.PC and mere fact that the prosecution witnesses belong to Anti Narcotics Force cannot be considered a valid reason to discard their statements. Reliance is placed upon *Ismail V. The State (2010 SCMR 27)*, wherein it was held that:-

“It is a settled principle of law that mere fact that prosecution witnesses belonged to Anti-Narcotics Force, by itself cannot be considered a valid reason to discard their statements. See Naseer Ahmed's case 2004 SCMR 1361 and Riaz Ahmad's case 2004 SCMR 988. It is an admitted fact that aforesaid Charas and opium was recovered from the four doors of the car which was being driven by the petitioner coupled with the fact that only the petitioner was present in the car. Therefore, Courts below were justified to give finding against the petitioner qua his guilt. Findings of the Courts below are in consonance with the law laid down by this Court in various pronouncements. See:-

(i) Muhammad Shah's case PLD 1984 SC 278, (ii) Said Shah's case PLD 1987 SC 288, (iii) Nadir Khan's case 1988 SCMR 1899, (iv) Rab Nawaz's case PLD 1994 SC 858, (v) Ikram Hussain's case 2005 SCMR 1487.”

15. In, Zafar Ahmad V. The State (2008 SCMR 1254), it was also held that non-inclusion of any private witness is not a serious defect to vitiate conviction while applicability of Section 103 Cr.P.C. in narcotics cases has been excluded. The objections to this effect put forth by the learned defence counsel are of no significance. Likewise, the case law relied upon by the learned defence counsel entail distinct facts and circumstances and therefore, do not extend any help to the appellant.

16. The sequel of above discussion is that the impugned judgment does not suffer from any legal infirmity. Consequently, the appeal fails and accordingly dismissed.

(MOHSIN AKHTAR KAYANI) (FIAZ AHMAD ANJUM JANDRAN)
JUDGE JUDGE

A.R. ANSARI

Announced in open Court on 26.08.2020

JUDGE

JUDGE