

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT JUDICIAL DEPARTMENT.

Criminal Appeal.....No.....200-P.....of.....2014

J U D G M E N T

D.O.Hearing: 17.01.2017 D.O.Announcement 02.02.2017

Petitioner(s): (Ihsan Ullah) by Mr. Arshad Ali Nowshervi
Advocate.

Respondent(s): (State) by Mr. Rab Nawaz Khan, Additional
Advocate General.

ISHTIAQ IBRAHIM, J.- Ihsan Ullah, the

appellant, was found in possession of 490 kilograms of “Charas” while transporting the same through truck to Kohat alongwith two un-licenced Kalashankov rifles. A case under Section 9(c) of the Control of Narcotic Substances Act, 1997 / Section 13 of the Arms Ordinance, 1965 was registered against him vide FIR No.134, dated 31.01.2013 in Police Station City, Kohat. After his arrest and completion of investigation, he was sent to the Court of learned Additional Sessions Judge / Judge, Special Court, Kohat for trial, who, on its conclusion, convicted him under Section 9(c) of the CNSA and sentenced him to “Imprisonment for Life” with a fine of Rs.10,00,000/- or in default thereof, to suffer further two years imprisonment. He has also convicted him under Section 13 of the Arms Ordinance and sentenced him to “Three Years” simple

imprisonment by extending him benefit of Section 382-B, Cr.PC vide judgment dated 18.03.2014. Hence, this appeal.

2. It was vehemently contended by the learned counsel appearing on behalf of the appellant that neither the appellant is driver of the vehicle nor its owner; that he has no concern, whatsoever, with the alleged contraband as well as the Kalashankov rifles; that the police officials in order to let the actual culprits, who have committed the crime, made him scapegoat in the instant case in order to show their efficiency to their high-ups; that neither he was present on the spot nor was arrested there-from; that the major portion of the entire evidence was conducted by the complainant himself in a very haphazard manner; that neither the alleged truck nor the alleged Kalashankov rifles were produced before the Court during the trial for exhibition; that the FSL report totally negates the alleged recovery of the contraband; that the original owner was neither made accused nor made witness so as to dig out the hidden truth; that the impugned judgment is based on misreading and non-reading of evidence and is also against the law and facts of the case, is based upon surmises and conjectures; that despite of busy place, no private witness was mentioned in the murasila nor was associated with the investigation; that there are many material contradictions between the statements of the star witnesses of the

prosecution, which creates doubts in the recovery of contraband; that there is un-explained delay in sending the samples to the FSL, which seriously affects its genuineness; that sealing of the entire stuff is also doubtful, which also makes the case of the prosecution doubtful. In the end, the learned counsel submitted that inflicting punishment of 'life imprisonment', with a huge amount of fine, in view of the afore-noted infirmities and loopholes in the prosecution case, is too harsh and not justified therefore, the appellant be acquitted from the charges levelled against him.

3. As against that the learned Additional Advocate General appearing on behalf of the State by supporting the impugned judgment vehemently argued that the appellant was arrested red-handed on the spot while he was attempting to smuggle a huge quantity of narcotics weighing 490 kilograms of 'Charas' alongwith two un-licenced Kalashankov rifles; that such a huge quantity of narcotics, amounting millions of rupees, couldn't be planted against him; that he has failed to establish any malice or mala fide on the part of the prosecution witnesses and he couldn't dispute his presence on the spot; therefore, his conviction and sentences are justified and legal, be upheld accordingly.

4. We have gone through the available record carefully and considered the submissions made by the learned counsel for both the parties.

5. The record of the case would reveal that there are glaring major and material contradictions between the statements of the material witnesses of the prosecution i.e. Iqbal Muhammad, Inspector / complainant (PW-2), Rehmatullah Khan, ASI / marginal witness (PW-3); Gul Razim Khan, SI / IO (PW-4) and Majid Khan, constables (PW-6), who was present with the complainant at the relevant time. They are not consistent with each other on very important point that where-from the truck was coming and where it was proceeding / going; which constable / driver took the truck to the police line; which type of tools / machinery used in cutting of the secret cavities; who brought those and what were the names of the same; how many secret cavities in the truck / vehicle and how many packets were in each cavity and from which portion / cavity of the truck, the Kalashankov rifles were recovered.

6. There are two episodes of the prosecution case, first is initial interception of truck by Shahidur Rehman, LHC and his companions; second is the recovery, which was effected in police lines, when truck was taken there. Only one PW namely, Majid Khan, who apprehended the truck in

question, was examined from the police contingent. This witness is mute that who was driving the truck at the relevant time. Besides, he is eyewitness of the occurrence, but has not seen the person, who was sitting on the steering wheel of the vehicle in question at the relevant time because when the SHO arrived on the spot, the truck was already stopped by them and was parked there. Complainant is admittedly not witness to the effect that the person-appellant was in fact was on the steering wheel of the vehicle and he was driving it at the time of occurrence. It has been established from this witness (PW-6), who disclosed it in the manner that *“we didn’t accompany the SHO to the police lines to see the other proceedings carried out in the police lines, Kohat. No other proceedings were carried out in my presence afterwards”*. He refers the police contingent including Shahidur Rehman, who intercepted the truck in question at the first instance, then how PW Shahidur Rehman signed the recovery memo, which was as per prosecution version was prepared in police lines, Kohat. The evidence of the prosecution is also inconsistent regarding the opening of the secret cavities.

7. It is very strange to observe that very important witness of the prosecution i.e. Shahidur Rehman, LHC, who first received the information about transporting of huge quantity of narcotics in the vehicle / truck, number of which

was specifically told to him by his informer, was not produced before the Court during the trial and was abandoned by the prosecution being unnecessary, from his statement, many hidden things could have come on the surface because he was the prime witness of the prosecution, that too, when he was very much present on the spot, when the truck was intercepted at the first instance and thereafter, the entire proceedings were conducted by the complainant in his presence at police lines, therefore, his statement was very necessary; whereafter he also signed the recovery memo, Exh.PW-2/1.

8. So far as, role of Gul Razim, SI (PW-4), who has conducted the so-called investigation in the instant case is concerned, except recording stereotype statements of the PWs; preparation of site plan and obtaining custody of the appellant, he has done nothing important, which could go in his favour. Despite the fact that it was come on the record that the truck / vehicle was actually owned by one Malik Muhammad Younas, neither he made him accused nor witness nor made any efforts that whether he sold this vehicle to the present appellant and, interestingly, he didn't make any efforts to trace out him. He didn't inquire from any witness qua the direction of the truck because it is still mystery. Neither the case property was handed over to him nor he seen

it in the opened condition. He was totally unaware about the weighment of the recovered contraband and from which scale, the same was done and also was unaware about the separation of samples from each packet. He had also not investigated the case on the line that who was the actual seller of the narcotics and who was its purchaser. No doubt, the appellant remained in his custody for five days but he failed to extract even a single word from his mouth qua the ownership of the narcotics. Even he didn't record statement of any mechanic / person, who opened the secret cavities of the vehicle nor he took into possession of those tools, nor the scale, bottles etc.

9. Another striking feature of the case is that, the persons / police officials, who took the case property / samples to the FSL and, in whose custody, it was lying till its despatch i.e. 04.02.2013, were not examined during trial. Besides, the "Truck", from which, huge quantity of narcotics recovered, was not produced before the Court, so as to be examined by the Court that whether actually the truck existed and there were secret cavities, which could contained such a huge quantity of narcotics and were opened with machine or tools and also those tools / machines were not produced before the Court for exhibition rather for awarding stringent punishment to the appellant, only photographs of the truck

were not sufficient for the perusal of the Court. Likewise, the Kalashnikov rifles were also not produced before the Court during the trial so could see whether those, actually, were in working condition or not or were dummy weapons. When this being the state of affairs, we come to the safe conclusion that besides defective investigation, the mode and manner of arrest of the accused and recovery of contraband are highly doubtful as the prosecution didn't prove its case beyond any shadow of doubt and, any doubt, if arising in links of the chain of prosecution story, the benefit of same would go to accused and such like contradictions in the prosecution evidence doesn't justify the conviction and sentence of the appellant for the safe administration of criminal justice. It is not necessary that there should be many circumstances creating doubt. If there is a circumstance, which creates reasonable doubt in the prudent mind about the guilt of accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right and even a single doubt, if found reasonable, is sufficient to warrant the acquittal of the accused. We, in the circumstance of the case, don't think that the case can be said to have been proved against the appellant beyond any shadow of doubt.

10. For the reasons discussed above, this criminal appeal is allowed, the conviction and sentences recorded by

the learned Trial Court vide the impugned judgment dated 18.03.2014 are set aside and the appellant namely, Ihsan Ullah, is acquitted of the charges, levelled against him. He be set free forthwith, if not required in any other criminal case.

Announced

02. 02. 2017

J U D G E

J U D G E

(Fayaz)