

## **Judgment Sheet**

IN THE PESHAWAR HIGH COURT,  
PESHAWAR

**JUDICIAL DEPARTMENT**

**Cr.A No. 837-P of 2016.**

### **JUDGMENT**

Date of hearing.....13.10.2017.....

Appellant(s)...(Imtiaz Ali): By Mr. Noor Alam Khan, Advocate.

Respondent(s)/State: By Mian Arshad Jan, AAG.....



**QALANDAR ALI KHAN, J:-** Having been convicted under Section 9 ( c ) CNSA, 1997, the appellant, Imtiaz Ali, invoked the appellate jurisdiction of this Court under Section 410 Cr.PC read with Section 48 CNSA, thereby, assailing the judgment/order dated 30.11.2016 of the learned Additional Sessions Judge/Judge, Special Court-IX, Peshawar, whereby, he was awarded

sentence of rigorous imprisonment for six years, with fine of Rs.100000/- or in default of payment of fine to further six months S.I; while extending benefit of Section 382-B Cr.PC to him; however, acquitting him of the charge under Section 170 PPC.

**2.** The facts of the case as gleaned from FIR No.630 dated 12.08.2015 under Sections 9 (c) CNSA and 170/419/420/468/471 PPC P.S Regi, Peshawar, briefly stated, are that while acting on a prior information about smuggling of narcotics in black colour Honda Motorcar No.368/ICT from tribal territory to Punjab, Ahmed Gul SHO/complainant along with ASI Sadaqat Khan, Shafique No.2914 and Sheher-Yar No.1344 laid barricade at *Tango* stop near Kafoor Dehri Bridge, and after some time, the said car arriving there was stopped and driver of the car disclosed his name as Imtiaz Ali, the accused/appellant. According to the FIR, keeping in view the prevailing situation, the vehicle was taken to the police Station, where

the accused/appellant was interrogated in the presence of Qisro Khan OII, Mohib Gul SI and Zahirullah MHC, and as a result of interrogation, a plastic sack in a carton, tagged on to bonnet of the vehicle above the engine containing ten packets of heroin, weighing one kg each, total ten kgs, was recovered, and after the recovery, 1/1 gram heroin was separated from each of the ten packets and sealed in separate parcels for chemical analyses in FSL while the remaining heroin weighing 9990 grams was sealed in a separate parcel No.11 on the spot. The motorcar was taken into possession, and the accused/appellant was arrested, who reportedly, disclosed that the heroin belonged to Nadar son of Qadar Khan resident of Sangu Sarband, who had handed over the same to him for delivery to one Javed resident of Millat Chowk, Faisalabad. The personal search of the accused/appellant also, reportedly, led to the recovery of a card of intelligence agency from his pocket which was

found fake on verification. The case/FIR was registered and investigation was entrusted to Qisro Khan Oll by the complainant/SHO.

**3.** The I.O. prepared site plan of the place of recovery as well as that of Police Station Regi, Peshawar, where the motorcar was searched and the alleged recovery was made there-from. The samples in sealed parcels, prepared after the alleged recovery, were sent to the FSL, Peshawar, and report there-from was received in the affirmative, confirming the samples to be that of heroin. After proceeding against the absconding co-accused, namely, Nadar and Javed under Sections 204 and 87 Cr.PC, challan was submitted against them under Section 512 Cr.PC; whereas complete challan was submitted against the appellant/accused facing trial; whereupon, the learned trial Court/ASJ-IX/Judge, Special Court, Peshawar, complied with the provision of Section 265-C Cr.PC, in the first instance, and then proceeded to frame formal charge under Section 9 ( c ) CNSA 1997 and Section

170 PPC against the accused/appellant, to which he pleaded not guilty and claimed trial.

4. In order to prove its case against the appellant/accused, the prosecution produced a total of four PWs, including, Ahmed Gul Khan SHO/SI (PW.1), the seizing officer; Mohib Gul Khan SI (PW2), marginal witness to the recovery memo EXPW1/1; Izzatullah constable No.3134, who took the samples to the FSL; and Qisro Khan OII/I.O. (PW4). After prosecution closed its evidence, statement of the accused was recorded under Section 342 Cr.PC. In his statement, the accused/appellant denied allegations of the prosecution levelled against him, but declined to be examined on oath or produce defence evidence. Having heard arguments of learned SPP for the State and learned counsel for the accused/appellant, the learned Additional Sessions Judge/Judge, Special Court-IX, Peshawar, convicted the accused/appellant under Section 9 ( c ) CNSA and sentenced

him to six years R.I and fine of Rs.100000/- and in default of payment of fine to further six months S.I; while acquitting him of the charge under Section 170 PPC; hence the instant appeal against conviction of the appellant/accused and award of sentences to him by the learned trial Court, as mentioned hereinabove.

**5.** Arguments of learned counsel for the appellant and learned AAG heard; and record perused.

**6.** The most striking feature of this case is that neither any recovery was made from the motorcar at the place where the vehicle was stopped by the complainant/SHO nor the police officials present with the complainant/SHO at that time, namely, Sadaqat Khan ASI, Shafique No.2914 and Sheher-Yar No.1344 were produced by the prosecution as witnesses at least, to driving of the vehicle by the appellant/accused, which was stopped by them and then taken to the

police station on the usual pretext of 'prevailing situation'; and instead Mohib Gul Khan S.I (PW2) was produced as marginal witness of the recovery memo (EXPW1/1). In view of the fact that no recovery was made from the motorcar after it was stopped for checking, and the alleged recovery, if any, made in the police station in the presence of police officers other than those present with the complainant/SHO at the time of stopping of the vehicle at *Tango* stop near Kafoor Dehri bridge, including even I.O. in the case namely Qisro Khan, makes, the recovery and case against the appellant/accused doubtful, and testimony of the marginal witness (PW2) not worthy of reliance in view of his own admission that he was "not the eye witness of the occurrence". In the absence of independent witnesses from the general public inspite of prior information to the complainant/SHO, and also non production of police officers present with the complainant/SHO at the relevant time who

could have, at least, proved the factum of stoppage of the motorcar, driving of the same by the appellant/accused and taking the vehicle to the police station situated at a distance of about six kilometers from the place where the motorcar was stopped; but withholding their testimony, certainly, cast shadow of doubt on recovery of the contraband from the car in the police station.

7. Apart from the alleged recovery in questionable circumstances, the recovery of ten packets containing ten kgs of heroin tagged on to the bonnet of the motorcar over the engine, and covering of considerable distance by the vehicle, generating heat from the engine, would also make the recovery more doubtful, for the obvious reason of heroin changing its very nature in the face of so much heat.

8. The alleged recovery was made on 12.08.2015, but the samples separated from the recovered packets and sealed on the spot were received in the FSL for chemical



analysis after delay of five days on 17.08.2015, without any evidence proving safe custody of the samples from the date of recovery upto their receipt in the FSL; and the only statement of Izzatullah constable No.3134 (PW3), in this regard, further compounded mystery about safe custody of the samples during the intervening period, who said that he did not remember the date on which the samples were handed over to him. Moreover, he admitted this fact that he was not examined by the I.O under Section 161 Cr.PC. In other words, the non-provision of a copy of his statement U/S 161 Cr.P.C to the accused/appellant in compliance with the mandatory provision of Section 265-(c) Cr.P.C, deprived the appellant/accused of his valuable right of preparing defence accordingly.

9. Moreover, there is nothing on the record to establish nexus of the appellant/accused with the recovered narcotics, as neither evidence was brought on

the record to show him either owner of the car or its driver. In fact, nothing was brought on the record to establish ownership of the car, or to prove the appellant/accused as driver of the motorcar.

10. The acquittal of the appellant/accused under Section 170 PPC by the learned trial Court, and non-filing of appeal by the State against the order of acquittal, would not only shake the very foundation of the case in the shape of FIR but would also raise serious question about case and evidence of the prosecution against the appellant/accused.

11. In short, the prosecution failed to prove recovery of the narcotics/heroin from the possession of the accused/appellant, which could have justified his conviction under Section 9 ( c ) CNSA and award of six years R.I and fine of Rs.100000/- to him. Therefore, the appeal is accepted, and the judgment as well as conviction of the appellant/accused and sentences awarded to him by the learned trial Court are set aside. The

accused/appellant is acquitted of the charges  
and be set free, forthwith, if not required in  
any other case.

**Announced.**  
**13.10.2017.**

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*(D.B) Hon'ble Mr. Justice Lal Jan Khattak.  
Hon'ble Mr. Justice Qalandar Ali Khan.*