

JUDGMENT SHEET
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A No.22-B/2018

Shah Naraz
Vs.
The State

JUDGMENT

Date of hearing: **04.3.2020.**

For Appellant: **Mr. Imran Ali Shah, Advocate.**

For State: **Mr. Shahid Hameed Qureshi Addl: A.G.**

9 **SAHIBZADA ASADULLAH, J.-** This judgment shall dispose of two criminal appeals bearing Cr.A. No.22-B/2018, titled Shah Naraz Vs. The State & Cr.A. No.24-B/2018, titled Akram Khan Vs. The State, as both are arising from one and the same judgment dated 24.01.2018, rendered by learned Additional Sessions Judge/Judge Special Court Banda Daud Shah, Karak, in case FIR No.92 dated 02.4.2016, registered under Section 9(C) CNSA at police station Gurguri, District Karak, whereby both the appellants have been convicted under section 9 (C) CNSA and sentenced to life imprisonment with fine of Rs.1,00,000/- each or in default thereof to further undergo six months simple imprisonment. Benefit of section 382-B, Cr.P.C was also extended to them.

2. The prosecution case, as disclosed in the F.I.R Ex.PA, registered on the basis of murasila Ex. PA/1, is that on 02.4.2016, Shah Baraz Khan SHO (PW-4) alongwith police

contingent, after receiving spy information regarding trafficking of Charas in a motorcar, laid a barricade at FRP Check Post Amankot on main Gurguri Road, it was about 1200 hours, when a motorcar bearing registration No.ARS 281/Sindh, came from Gurguri side which was signaled to stop. The driver in suspicious condition was debarked therefrom and was arrested under Section 54, Cr.P.C., who introduced himself as Akram Khan. The motorcar was searched and on the pointation of accused Akram, 21 packets containing *Gardah* Charas concealed in the CNG cylinder fixed in the trunk of the motorcar were recovered. The recovered contraband was weighed on the spot through a digital scale, 1100 grams Charas in each five packets was found, whereas sixteen packets contained 1050 grams each. The total recovered Charas stood 22 Kgs and 200 grams. Five gram sample from each packet were separated for chemical analysis and sealed in parcels No.1 to 21, whereas the remaining contraband was sealed in parcel No.22. The seizing officer prepared recovery memo Ex. PC/1 in this respect. The motorcar alongwith its registration copy and the recovered Charas were taken into possession and accused was booked in the captioned FIR.

3. During course of investigation, the accused confessed his guilt before the Investigating Officer as well as before the Court of Judicial Magistrate on 05.4.2016, wherein he besides confessing his guilt also nominated co-accused

Shah Naraz alias Hashim Daraz. On completion of investigation against arrested accused Akram, complete challan against him was submitted before the learned trial Court. He was charged for the offence to which he pleaded not guilty and claimed trial. During course of trial, co-accused Shah Naraz was arrested and supplementary challan was submitted against him, so charge was re-framed by the trial Court which was denied by both the accused who claimed to face the trial. The prosecution, in order to substantiate charge against the accused, produced and examined as many as twelve (12) witnesses, whereafter, accused were examined under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they opted to be examined under section 340(2) Cr.P.C., nor produced evidence in their defence. Learned trial Court, after hearing both the sides, vide impugned judgment dated 24.01.2018, convicted the accused and sentenced them, as mentioned above, which has been assailed by the appellants in separate appeals.

4. Arguments of learned counsel for appellants and the learned Additional Advocate-General, representing the State heard and record scanned with their able assistance.

5. It was on 02.4.2016, that Shah Baraz Khan SHO received information regarding trafficking of Charas in a motorcar, so he alongwith police *Nafri* laid a barricade at FRP Check Post Amankot on main Gurguri Road, meanwhile at

about 1200 hours, a motorcar bearing registration No.ARS 281/Sindh, appeared from Gurguri side which was signaled to stop. On inquiry the driver could not satisfy the police which increased the suspicion, so the driver was taken into custody under section 54 of the Cr.P.C., who introduced himself as Akram Khan. The motorcar was searched and on the pointation of accused Akram, 21 packets containing *Gardah* Charas concealed in the CNG cylinder fixed in the trunk of the motorcar were recovered. The recovered Charas was weighed on the spot which stood 22 Kgs and 300 grams. After arrest of the convict/ appellant the motorcar was taken to the police lines Karak, whereon 06.04.2016 with the help of official mechanic Abdul Qayyum alongwith private mechanic further 14 packets containing charas was recovered from its secrete cavities, which was taken into possession vide recovery memo Ex: PC, which on wieghment stood 17 Kgs and 560 grams. Out of each packet five grams Charas was separated for chemical analysis which were sealed into separate parcels and so the remaining contraband.

6. The record transpires that the appellant Akram Khan was arrested on the spot and huge quantity of narcotics was recovered from his motorcar on his pointation. The test samples were dispatched to the office of chemical examiner for analysis wherefrom a positive report was received. The prosecution produced as many as 12 witnesses and all the witnesses remained consistent on material aspects of the case.

The motorcar was taken into possession and no rival claimant turned up to claim its ownership and even the appellant could not disassociate himself from the car in question. The witnesses were put to lengthy cross-examination but nothing favourable could be extracted from their mouth to favour the appellant. The record is silent that what mala fide was attributed and proved against the witnesses who arrested and effected the recovery. The quantity recovered was huge and we see no reasons that witnesses were so interested that the contraband was planted against the appellant to implicate him in the instant case. There is nothing on record that either the Investigating Officer or the seizing officer had any personal grudge with the appellant, which could result in planting the narcotics against the convict/ appellant. The mode and manner of arrest has left no room to disbelieve the prosecution. Though the seizing and Investigating Officer were thoroughly cross-examined regarding the recovery, its weighment and dispatch to the office of chemical examiner, but nothing was brought which could discredit these witnesses, as they went coherent and consistent.

All went well with the seizing and Investigating Officer and never ever they deviated from the procedure laid down for the purpose. The defence failed to create dents in the prosecution case and even the visit to the spot by the seizing officer alongwith police *nafri* interception of the motorcar, arrest of the accused and recovery of the

contraband is established on record and such was the status of the Investigating Officer whose testimony could not be discredited. Though the learned counsel for the appellant pointed out some contradictions in the statements of the witnesses but those were trivial in nature and cannot be made basis for dislodging the prosecution case. The contradictions so referred did not strike the material aspects of the case as the recovery stood proved and the confession of the convict/appellant increased its worth.

7. The investigation was conducted honestly after observing the legal and procedural formalities and we sense no malafide on part of the witnesses to falsely implicate the appellant in the case. The recovery of the contraband is proved on record and even the constable who took the test samples to the office of the chemical examiner has been examined as PW-09, who stated that it was he who took the test samples to the laboratory for its chemical analysis. The recovery was effected on 02.04.2016 whereas the test samples were received by the laboratory on 04.04.2016, which excludes the possibility of tempering with the parcels, while in transit. No mala fide was suggested to this witness and even his veracity was not questioned. The learned counsel for the appellant stressed that no private witness was associated with the process of recovery and that even the Investigating Officer did not record the statement of the informer and to him the recovery was effected in utter disregard of law. We

are afraid that the learned counsel for the appellant went ignorant of section 29 of the Control of Narcotics Substances Act, 1997, which has done away with such formalities. Even otherwise police officials are as good witnesses as others are, that too when no *mala fide* was either alleged or proved against them as is held in case titled "Abdur Rashid Vs the State (2009 SCMR 306)".

"The prosecution witnesses being members of the raiding party were the natural witnesses and their testimony cannot be discarded merely on the ground that they were the employees of the police force."

8. The accused after his arrest was produced before the Judicial Magistrate, where he confessed his guilt and explained that how he came into possession of the contraband and he also named the other appellant i.e. Shah Naraz as the owner and himself attained the status of a carrier. The Magistrate was examined as PW-6, who was thoroughly cross-examined but nothing detrimental to the case of the prosecution was brought on record, he stated that the convict/appellant was produced before him and sufficient time was provided to him to think over again and again and after fulfilling the legal formalities his statement was recorded. The accused was produced on 05.04.2016 before the Judicial Magistrate, where he opted to confess and so his confession was recorded. The learned Judicial Magistrate while recording the confession of the accused has followed the

procedure and also put the needed questions and it was then he got satisfied and recorded the statement. The appellant was warned time and again that he was not supposed to make confession, the Magistrate got satisfied that no threat, influence or coercion was used. The learned counsel for the appellant stressed that when the subsequent recovery was not admitted by the appellant then the confession so recorded holds no ground as to him the Court is either to accept or reject the confession holistically, but we are conscious of the fact that had the subsequent recovery been effected in his presence or on the day then we could say yes to the defence, but as the later recovery was effected in absence of the accused, so to our mind the same cannot dislodge the case of the prosecution, when so this Court is left with no other option but to hold that the confession is voluntary and deserves respect.

In case titled **"Shaukat Ali Vs the State and another" (2019 SCMR 577)**, wherein it is held that:

"Though the appellant when indicted claimed trial and retracted from his confessional statement during his examination under Section 342 of the Code of Criminal Procedure, 1898, nonetheless, on a careful examination we have found his confessional statement free from all taints. Seemingly voluntary

without duress or inducement; inculpatory in nature the confessional statement reflects a complete and truthful narration of event leading to deceased's death. The learned Magistrate has taken due care to administer necessary warnings to the appellant and recorded each detail thereof in his own hand. It does not appear to have been fabricated to advance prosecution's case and thus can be squarely relied upon without any reflection on safe administration of criminal justice. It is by now well settled that a retracted confession can form basis for conviction if found voluntary and truthful."

9. We have two recoveries before us, one that was effected on 02.04.2016 when the convict/ appellant was arrested and the other on 06.04.2016, when the convict/ appellant was confined in the judicial lockup, the subsequent recovery could not be proved against the appellant as, when the motorcar was intercepted and was thoroughly searched only the recovery from the CNG Cylinder fitted to the car was effected and subsequent recovery was effected by the time, when the appellant Akram Khan had already been sent to the judicial lockup. At the time of initial recovery the seizing officer thoroughly searched the vehicle but no further recovery from the secrete cavities could be made and it was on 06.04.2016, when further recovery was effected, the

subsequent recovery could not be proved against the convict/ appellant as the mode and manner in which it was effected is shrouded in mystery and also the appellant was not present, so to this extent the prosecution failed to establish the link between the appellant and the subsequent recovery.

10. The principal accused Akram Khan after his arrest was produced before the court of Judicial Magistrate and it was then when he introduced one Hashim Daraz being the actual owner and the police went in search and at the end arrested the appellant Shah Naraz. The Investigating Officer was asked that how Shah Naraz was arrested as Akram Khan has mentioned the name of co-accused as Hashim Daraz, the Investigating Officer replied that in fact Hashim Daraz was the nickname of Shah Naraz of which the principal accused was not in the knowledge. This explanation was not only strange rather it surprises us as to wherefrom this information was collected that too when he was not previously known to the Investigating Officer. The Investigating Officer did not record the statement of any person who could say that it was he who disclosed the name of the appellant. The only evidence against the appellant Shah Naraz is the statement of the principal accused and even the principal accused did not mention his name rather he mentioned one Hashim Daraz to be the owner of the charas and motorcar. The prosecution failed to collect evidence on record where the involvement of the appellant could be established and even after his arrest

nothing incriminating was recovered either on his pointation or from his possession, so much so the prosecution could not bring on record his previous involvement in such like cases, when so this Court reaches to a conclusion that the prosecution could not establish the charges against the appellant Shah Naraz and his involvement was the only confessional statement of co-accused which cannot be made the sole basis for his conviction, being circumstantial evidence. In this respect Article 43 of the Qanun-e-Shahdat Order, 1984 gains significance which reads as:-

43. Consideration of proved confession affecting person making it and others jointly under trial for same offence: *When more persons than one are being tried jointly for the same offence and a confession made by one of such persons is proved,-*

(a) such confession shall be proof against the person, making it and;

(b) the Court may take into consideration such confession as circumstantial evidence against such other person.

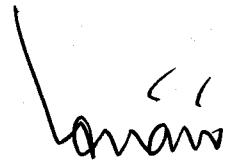

Explanation: "Offence" as used in this Article, includes the abetment of or attempt to commit the offence.


11. After thoroughly evaluating the evidence available on file this court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against convict/appellant Shah Naraz. So, Cr.A. No.22-B/2018 is accepted, the conviction and sentence awarded to the appellant Shah Naraz by the learned trial Court/Judge Special Court is set aside and he is acquitted of the charges levelled against him. He be set-at-liberty forthwith, if not required to be detained in connection with

any other criminal case, however, the prosecution proved its case against the convict/appellant Akram Khan. Resultantly, criminal appeal No.24-B/2018, is devoid of merit stands dismissed.

12. Above are the detailed reasons of our short order of even date.

Announced.
Dt: 04.3.2020
Kifayat/*


JUDGE

JUDGE


28/4/2020

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah