

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa, CJ
Mr. Justice Faisal Arab
Mr. Justice Qazi Muhammad Amin Ahmed

Criminal Appeal No. 7-P of 2017

(Against the judgment dated 15.05.2013 passed by the Peshawar High Court, Peshawar in Criminal Appeal No. 768 of 2010)

Hussain Shah, etc.

...Appellants

versus

The State

...Respondent

For the appellants:

Mr. Altaf Samad, ASC
Mr. Tasleem Hussain, AOR

For the State:

Mr. Muhammad Tariq Kakar, State
Counsel

Date of hearing:

20.09.2019

JUDGMENT

Asif Saeed Khan Khosa, C.J.: Hussain Shah and Abdul Sattar appellants were booked in case FIR No. 33 registered at Police Station Anti-Narcotics Force, Peshawar on 31.05.2009 in respect of an offence under section 9(c) of the Control of Narcotic Substances Act, 1997. The allegation leveled by the prosecution was that a trailer-truck being driven by Hussain Shah appellant was intercepted by a raiding party and from a secret cavity of that vehicle *Charas* weighing 12000 kilograms contained in 600 bags, each bag containing 20 packets, was recovered and samples of the recovered substance had subsequently been tested positive by the

Chemical Examiner. It was alleged by the prosecution that at the relevant time Abdul Sattar appellant was sitting on the front seat of the said vehicle next to the driver's seat. It was maintained by the prosecution that Abdul Sattar appellant was a cleaner and a helper of the driver of that vehicle. After a regular trial the appellants were convicted by the trial court for an offence under section 9(c) of the Control of Narcotic Substances Act, 1997 and were sentenced to imprisonment for life each and to pay fine which convictions and sentences of the appellants were subsequently upheld and maintained by the High Court. Hence, the present appeal by leave of this Court granted on 27.09.2017.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that the recovered substance was *Charas*. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses. Both the courts below had undertaken an exhaustive analysis of the evidence available on the record and had then concurred in their conclusion regarding guilt of the said appellant having been proved beyond reasonable doubt and upon our own independent evaluation of the evidence we have not been able to take a view of the matter different from that concurrently taken by the courts below *vis-à-vis* the said appellant.

4. It has been argued before us that the report submitted by the Chemical Examiner did not mention the necessary protocols followed or tests applied but we have seen the said report available on the record of the trial court and have found that the said report not only referred to the protocols adopted but also to the tests applied and, thus, we have not been able to find any deficiency in the said report. It has further been argued before us that the Chemical Examiner who had prepared the relevant report was not qualified to hold that position and in that connection Rule 3 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 has been relied upon but we have found that there is nothing available on the record to conclude or hold that the Chemical Examiner preparing the relevant report was not qualified to hold that office. Apart from that a Notification is available on the record according to which the relevant Chemical Examiner had been duly notified by the Government as a Federal Government Analyst. The record further shows that the said Chemical Examiner had prepared the relevant report at a time when he was being assisted in the matter by Mrs. Farhana Shaukat who held the degree of M.Sc. Biochemistry and she too was notified by the Government as the Federal Government Analyst through the same Notification. In this view of the matter the objection raised before us regarding the Chemical Examiner in this case not being qualified to hold that office has failed to impress us. Yet another argument was raised before us regarding the trial court having no jurisdiction to take fresh samples from the recovered substance so that they may be examined by the Chemical Examiner but even that argument has not been found by us to be holding much water. The record of the case shows that initially 600 samples taken from the 600 bags recovered from the relevant vehicle had been sent to the Chemical Examiner for analysis but the Chemical Examiner had returned those samples and had required that a sample had to be taken from each and every packet of the substance recovered in this case and such packets were 12000 in number and it was in that backdrop that the trial court had instructed a Magistrate and under the supervision of that Magistrate fresh and separate

samples had been secured from all the 12000 packets recovered which samples were then sent to the Chemical Examiner and thereafter a report was submitted by the Chemical Examiner in the positive. It has also been argued before us that the appellants were not associated with the process of taking of fresh samples by the supervising Magistrate but the learned counsel for the appellants has failed to refer to any provision of law requiring that the accused persons had to be associated with such taking of samples. There are some precedents available which require that at the time of destruction of the recovered substance an accused person is to be associated with such process but neither any legal provision nor any precedent case has been referred to before us in support of the contention raised regarding association of the accused persons with taking of fresh samples by the trial court. Apart from that presumption of regularity and correctness was attached to the exercise undertaken by the trial court in that regard and there is nothing on the record to dislodge that presumption.

5. For what has been discussed above we have entertained no manner of doubt that the prosecution had succeeded in proving its case against Hussain Shah appellant beyond reasonable doubt. This appeal is, therefore, dismissed to his extent and his conviction and sentence recorded and upheld by the courts below are maintained.

6. As far as Abdul Sattar appellant is concerned it was alleged by the prosecution that he was a cleaner and a helper of his co-convict namely Hussain Shah and he was travelling in the same vehicle when the said vehicle was intercepted by the raiding party. It has been pointed out before us that according to the evidence brought on the record Abdul Sattar appellant also knew about existence of a cavity in the body of the relevant vehicle but nothing had been said by any prosecution witness about the said appellant having the requisite knowledge about availability of narcotic substance in such cavity of the vehicle. As a matter of fact no evidence worth its name had been brought on the record to

establish that the said appellant was conscious about availability of narcotic substance in a secret cavity of the relevant vehicle in which he was traveling along with its driver. The law is settled by now that if the prosecution fails to establish conscious possession or knowledge in that regard then a passenger cannot be convicted solely on the basis of his availability inside a vehicle at the relevant time. This appeal is, therefore, allowed to the extent of Abdul Sattar appellant, his conviction and sentence recorded and upheld by the courts below are set aside and he is acquitted of the charge by extending the benefit of doubt to him. Abdul Sattar appellant shall be released from the jail forthwith if not required to be detained in connection with any other case.

Chief Justice

Judge

Judge

Islamabad/Video Link at Peshawar

20.09.2019

Approved for reporting.

Arif