

Judgment Sheet

IN THE PESHAWAR HIGH COURT,  
PESHAWAR.

**JUDICIAL DEPARTMENT**

**Cr.A No. 81-P of 2013.**

**JUDGMENT**

Date of hearing.....21.09.2017.....

Appellant(s)...(Shan Muhammad) by Mr. Ghulam Mohy-ud-Din  
Malik, Advocate.

The State: By Mr. Mujahid Ali Khan, AAG.



**QALANDAR ALI KHAN, J:-** The complainant,  
Mazhar Abbas, HC Marai Police Post, along with  
constables Aziz-ur-Rehman No.318, Kiramat Ali  
No.898 and Noor Aslam No.298, during checking  
on road from *Kacha Pakka* to Kalaia, Orakzai  
Agency opposite Marai Police Post, received spy  
information from Kalaia, Orakzai Agency, about  
three persons smuggling narcotics in a white

colour motorcar via the Check Post; and stopped motorcar No.JF-485/Islamabad, having three persons inside the car, out of whom, the driver disclosed his name as Shan Muhammad son of Ikram Khan resident of Mohallah Saidan, Hangu, the person occupying the front seat disclosing his name as Hamid Ali son of Said Mir and the third person in the rear seat disclosing his name as Burhan Ali son of Zamin Ghulam, both residents of Paskalay, Hangu; and they all three furnishing reason for their visit as seeking religious blessing (*Dua*). They were, however, de-boarded from the motorcar and on search of the motorcar, a plastic sack recovered from *digi* of the car, apparently, having walnuts; but search of the sack led to recovery of ten packets of chars (*Garda*), and further search of the motorcar, leading to recovery of 5/5 packets, total 10 packets of chars (*Garda*) from secret cavities of both left and right front doors of the motorcar. Similarly, artfully concealed two packets containing opium were recovered from underneath the driver seat. The weighment of ten packets of chars (*Garda*) recovered from *Digi*

of the car revealed 1000/1000 grams each, and the ten packets recovered from the front doors of the car were also 1000/1000 grams each; while each of the two packets of opium also weighed 1000/1000 grams. The complainant/HC, according to the *murasila* and recovery memo, drafted by him, separated 5/5 grams samples from each packet of chars (*Garda*) and Opium for chemical analysis in FSL and also sealed separately the remaining contraband in separate parcels on the spot. All the three accused, who, according to the complainant/HC, were jointly involved in the smuggling of chars and opium were arrested on the spot; and the *murasila* was sent to P.S Usterzai, where FIR No.265 dated 23.10.2011 under Section 9 ( C ) CNSA was registered. The samples so prepared on the spot on 23.10.2011 were received in the FSL on 03.11.2011; and the chemical examiner reported the same to be samples of chars and opium in his report dated 05.11.2011.

2. Ghazi Usman SI/I.O (PW3) prepared the site plan on the pointation of complainant and

marginal witnesses to the recovery memo, namely, constable Aziz-ur-Rehman No.318 and Kirmat Ali No.898 and also produced all the three accused to the Judicial Magistrate, on the expiry of their police custody, for recording their confessional statements under Section 364/164 Cr.PC; but they refused to make confessional statements. After recording statements of PWs under Section 161 Cr.PC, and completion of investigation, complete challan was submitted in the case by SHO P.S Usterzai.

3. After receipt of challan in the Court, the learned trial Court/Additional Sessions Judge, Kohat, framed joint formal charge against all the three accused, to which they pleaded not guilty and claimed trial.

4. During trial the prosecution produced a total of five PWs, comprising Saeed Khan Inspector/SHO P.S Usterzai, Kohat (PW.1), who submitted complete challan in the case; Muhammad Arshad Khan Muharrir P.S Usterzai, Kohat (PW.2), registered FIR EXPA/1 on the receipt of *murarsila*; Ghazi Usman SI (PW3),

conducted investigation in the case; Mazhar Abas HC (PW4), complainant and seizing officer in the case; and Aziz-ur-Rehman No.318 (PW.5), witness to the alleged recovery and also marginal witness to the recovery memo.

5. After prosecution closed its evidence, statements of the accused were recorded under Section 342 Cr.PC, wherein they denied charges of the prosecution, but declined to be examined on oath under Section 340(2) Cr.PC and/or produce defence evidence.

6. Following arguments of learned APP and learned defence counsel, the learned trial Court/Additional Sessions Judge-V, Kohat, rendered impugned judgment dated 10.01.2013, whereby, the appellant/accused Shan Muhammad was convicted under Section 9 ( C ) CNSA and sentenced to imprisonment for life and fine of Rs.50,000/- or in default to S.I for one month; while, at the same time, acquitted the remaining two accused namely Hamid Ali and Burhan Ali of the charges against them. The vehicle used in the

commission of the offence and taken into possession by the police was already released on *superdari* to the owner namely Shahadat Khan, therefore, the learned trial Court directed that the same be returned to him being its lawful owner (if not yet returned); hence the instant criminal appeal against his conviction and sentence by the convict-appellant.

7. Arguments of learned counsel for the convict-appellant and learned AAG heard; and record perused.

8. The complainant was Head Constable, posted in the Police Post at some distance of the Police Station but he did not inform SHO of P.S Usterzai despite receiving information 2 1/2 hours before at 1000 AM prior to the alleged recovery at 1230 hours. The marginal witnesses to the recovery memo were also police constables posted in the same police post with the complainant/HC, being their Incharge, with no independent evidence, which assumed importance to the detriment of the prosecution case in view of the fact that the entire proceedings, including initial investigation, were

conducted on the spot by the HC, as only site plan was prepared by the S.I/O, who also conducted further partial investigation of obtaining police custody of the accused and producing them before the Judicial Magistrate for recording their confessional statement and also recorded statements of the PWs under Section 161 Cr.PC; thus warranting close and cautious scrutiny of the evidence adduced by the prosecution.

9. The samples separated from the bulk on 23.10.2011 were received in the FSL after considerable delay of 11 days, with no evidence forthcoming about safe custody of the samples during the intervening period, thus making report of the chemical examiner in this respect seriously doubtful.

10. The learned trial Court/Additional Sessions Judge-V, Kohat, acquitted the remaining two accused namely Hamid Ali and Burhan Ali on the basis of the same set of evidence, which was made basis for conviction and sentence of the appellant/accused, albeit on the sole ground that he was found on the driving seat, without proof of his

ownership or being driver of the motorcar. The motorcar was released on *superdari* to the owner, namely, Shahadat Khan, without bringing anything on the record to either show the appellant/accused as driver of the motorcar or the fact that the contraband were concealed by him in the motorcar and not by the said owner. It may be added here that, otherwise, all the three accused were found in the motorcar wherefrom the contraband chars and opium were recovered from *Digi* and left and right doors of the motorcar and also underneath the driving seat; which, according to the FIR, were jointly being smuggled by all the three accused.

11. All the above stated discrepancies in the prosecution case were over looked by the learned trial Court while awarding the sentence of imprisonment for life to the appellant/accused under Section 9 C CNSA. Therefore, the appeal is accepted, and the impugned judgment/order of the learned trial Court/ASJ-V, Kohat dated 10.01.2013 is set aside, together with conviction and sentence recorded by learned Judge Special Court/ASJ-V, Kohat dated 10.01.2013. Consequently, the appellant is



acquitted of the charges leveled against him, and be set free forthwith, if not required in any other case.

Announced.  
21.09.2017.

**J U D G E**

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**\*Ayub\***

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