

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.A. No.489-P/2020

Zia Ullah son of Momin Khan,
r/o Banda Nabi, Pabbi District
Nowshera.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant :- Mr. Fayaz Anwar, Advocate.

For State :- Mr. Umar Farooq, AAG..

Date of hearing: 27.01.2021

ORDER

ROOH-UL-AMIN KHAN, J:- Through this common judgment, we, propose to decide the instant criminal appeal and connected Cr.A.491-P/2020, filed by Zia Ullah and Cr.A. No.490-P/2020 & 492-P/2020, filed by Saddam Hussain, the appellants, as all arise out from one and the same judgments dated 06.07.2020, passed by the learned Additional Session Judge-III/JSC/Model Criminal Trial Court, Nowshera, in one and the same FIR No.177 dated 09.05.2017, registered under section 9 (c) Control of Narcotic Substances Act, 1997 and sections 420/468/471 PPC, at Police Station Nowshera Cantt, whereby the appellants have been convicted and sentenced as under:-

Under Section 9 (c) CNS Act, 1997:-To undergo imprisonment for life and to pay a fine of Rs.2,00,000/- or in default thereof to

further undergo 8 months simple imprisonment (S.I), each.

Under sections 468 and 471 PPC:-To undergo each of the appellant under each offence imprisonment for 05 years and to pay a fine of Rs.20,000/- or in default thereof to undergo 20 days S.I. each.

All the sentences were ordered to be run concurrently. Benefit of section 382-B Cr.P.C., was extended to the appellants.

2. The prosecution case as unfolded in the First Information Report (FIR) Exh.PA is that on receipt of spy information qua trafficking of huge quantity of narcotics to Punjab through an Oil Tanker, Zardad Ali SHO (PW.4) along with other police officials on 09.05.2017, conducted a barricade at Police Petrol Pump Peshawar Rawalpindi General Transport (GT) road and at 10.00 hours, intercepted an Oil Tanker bearing Registration No.SAI.249. On query, its driver disclosed his name as Zia Ullah and his companion sitting in front seat as Sadam Hussain (the appellants). The Oil Tanker was brought to Police Station and on search two plastic sacks, one containing 11 packets of heroin, each packet weighing 1025 grams and another sack containing 16 packets of heroin, each weighing 1535 grams, was recovered from its secret cavity. On personal search of appellant Zia Ullah a Q-Mobile along with SIM, his CNIC and cash amount Rs.5750/- were recovered

whereas from personal possession of appellant Saddam Hussain, a Nokia mobile phone, CNIC and cash amount of Rs.930/- were recovered. From switch Board of the Oil Tanker Registration copy of the Oil Tanker in the name of one Rauf was also recovered. Zardad Ali SHO (PW.4), separated 05 grams from each packet as samples for chemical analysis by the FSL and sealed the same in parcels No.1 to 27. The remaining quantity of the heroin was sealed in parcels No.28 and 29. He took into possession the recovered heroin, Oil Tanker, its registration and recoveries effected from personal possession of the appellants vide recovery memo Exh.PW.4/2 in presence of marginal witnesses, issued arrest card of the appellants Exh.PW.4/3 and registered case FIR Exh.PA against the appellants. He also prepared sketch of recovery of heroin from oil Tanker which is Exh.PW4/4.

3. Investigation of the case was entrusted to Inayat Ali Amjid SHO (PW.2), who visited the spot and prepared site plan Exh.PB at the pointation of the Seizing Officer (PW.4), recorded statements of the PWs under section 161 Cr.P.C., obtained physical remand of the appellants, interrogated them and recorded their statements under section 161 Cr.P.C. Vide application Exh.PW.2/5 he applied to ETO concerned for obtaining

MRA report regarding the Oil Tanker and examined the Tanker through FSL report whereof is Exh.PZ shows tampering in its chassis number. He also placed on file FSL report Exh.PZ/1 with regard to samples coupled with various receipts regarding dispatch of samples to the FSL along with attested copy of Register No.19. During investigation Sabz Ali, Tauseef and Gul Akbar were also made as accused in the case. In pursuance of FSL report, he inserted sections 420/468/471 PPC in the case and on completion of investigation, he handed over case file to the SHO, who submitted challan against the appellants under section 9 (c) CNS Act, 1997 and separate challan under sections 420/468/471 PPC.

4. On receipt of the challans by the learned trial Court, the appellants were summoned. In the meantime, co-accused Sabz Ali was also arrested, therefore, supplementary challan were submitted against him. After compliance of the provisions of section 265-C Cr.P.C., the appellants were charge-sheet by the learned trial Court under section 9 (c) CNS Act, and sections 420/468/471 PPC, to which they pleaded not guilty and claimed trial. To prove the guilt of accused/appellants the prosecution examined as many as six witnesses. After closure of the prosecution evidence, statements of the accused/appellants were recorded under section 342

Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial Court after hearing both the sides convicted and sentenced the appellants as mentioned above, hence, these appeals.

5. Argument of learned counsel for the parties heard and record perused.

6. In support of the prosecution case, Zardad Khan Inspector/Seizing Officer appeared as PW.4. In examination-in-chief, he reiterated the same version as set forth by him in the FIR. He also exhibited the recovered contraband heroin in parcel No.28 as Exh.P.1 and parcel No.29 as Exh.P.2, Oil Tanker SAI.249 as Exh.P.4, and personal belongings of the appellants as Exh.P.5 to Exh.P.8 as well as registration copy of the Oil Tanker as Exh.P.10. He deposed that site plan Exh.PB was prepared on his pointation by the I.O. and that he handed over case property to Zakir Moharrir of Police Station. In cross-examination he admitted that appellant Saddam Hussain was sitting in front seat beside the driver and appellant Zia Ullah was driving the vehicle.

7. Iftikhar Khan ASI is the marginal witness to recovery memo Exh.PW.4/2, who while appearing as

PW.5 has furnished ocular account of the occurrence. He deposed that on 09.05.2017 he along with Zardad Khan SHO (PW.4) and other police officials was present in Nakabandi at Police Patrol Pump Peshawar Rawalpindi GT road. At 10.00 hours, an Oil Tanker bearing registration No.SAI.249 was intercepted by them. Its driver disclosed his name as Zia Ullah and the person sitting beside him in front seat as Saddam Hussain (the appellants). The Oil Tanker was taken to Police Station where the Seizing Officer/complainant recovered two plastic sacks from its secret cavity. One sack was containing 11 packets of heroin, each weighing 1025 grams and another sack was containing 16 packets of heroin each weighing 1535 grams. The Seizing Officer separated 05 grams from each packet for chemical analysis by the FSL and sealed the same in parcels No.1 to 27. The remaining packets of heroin were sealed into parcels No.28 and 29 by affixing three seals of HK. On personal search of appellant Zia Ullah, a Q mobile along with SIM, his CNIC and cash amount of Rs.5750/- were recovered whereas from possession of appellant Saddam Hussain, a Nokia mobile along with SIM, his CNIC and cash amount of Rs.930/- were recovered. Similarly, from switch board of the oil tanker registration copy in the name of Abdul Rauf was taken into possession. He

deposed that the Seizing Officer took into possession the aforesaid narcotics, vehicle, its registration and personal belongings of the appellants through recovery memo Exh.Pw.4/2 in his presence as well as in presence of another marginal witness Irshad Khan SI and to this effect the recovery memo correctly bears his signature.

8. Saleem Khan No.492 (PW.6) deposed that during the days of occurrence he was posted at Police Station Nowshera Cantt. Zakir the then Moharrir handed over him parcels No.1 to 27 containing samples along with receipt No.336/21 on 10.05.2017 which he took the same to the FSL and delivered receipt of endorsement to Moharrir of the Police Station.

9. Inayat Ali Amjid SHO (PW.2), who has conducted investigation in the case substantiated the testimony of the Seizing Officer by deposing that after registration of the case he proceeded to the spot and prepared site plan Exh.PB at the pointation of the Zardad Khan Inspector/complainant, recorded statements of the PWs under section 161 Cr.P.C., placed on file MRA and FSL reports Exh.PW.2/5 and Exh.PZ, respectively, in respect of the Oil Tanker as well as placed on file FSL report Exh.PZ/1 regarding the samples and receipts No.336/21 and Exh.PW.2/7. Both, the Seizing Officer and marginal witness to the recovery memo have been

subjected to taxing cross-examination, but nothing beneficial to defence could be extracted from them rather they remained stuck to their stance and corroborated each other on all material aspects of the occurrence such as the day, date, time and place of arrest of the appellants and recovery of contraband from the Oil Tanker in the mode and manner as alleged in the FIR. The positive FSL report Exh.PZ/1 qua the samples further supplements the prosecution case. The prosecution has also proved the chain of circumstances under which the samples were sent to the FSL right from the spot till its receipt in the FSL. The defence failed to point out any discrepancy in the testimony of the PWs. Incriminating statements of the prosecution witnesses recorded on oath are enough to prove recovery of huge quantity of heroin from secret cavity of the Oil Tanker which was in exclusive possession and control of appellant Zia Ullah. A shred of evidence has not been brought by the defence to show any enmity of the PWs with the appellants. In this view of the matter, we are of the considered view that prosecution through overwhelming evidence has proved the recovery of huge quantity of heroin from the oil Tanker which was in exclusive possession and control of the appellant Zia ullah being its driver.

10. The appellant Zia ullah failed to discharge his burden by proving to the contrary in terms of section 29 of Control of Narcotic Substances Act, 1997. In the cases registered under the CNS Act 1997, once the prosecution prima facie established its case against an accused, then under section 29 of Control of Narcotic Substances Act, 1997, the burden shifts upon the accused to prove contrary to the plea of the prosecution.

11. As regards the role of co-appellant Saddam Hussain, all the prosecution witnesses have admitted in their statements that nothing incriminating was recovered from his personal possession and that appellant Saddam Hussain was sitting in front seat of the vehicle. An iota of evidence has not been brought on record by the prosecution to establish that appellant Saddam Hussain was in conscious knowledge of the concealed narcotics in oil Tanker or that he was dealing in the business of narcotics. Nothing in black & white is available on file to show previous involvement or conviction of appellant Saddam Hussain in such like cases. In this view of the matter, the learned trial Court by holding appellant Saddam Hussain as guilty of the offence under section 9 (c) CNS Act, 1997 has landed into the field of error.

12. So far as conviction and sentences of both the appellants under sections 468 and 471 PPC are concerned, on scrutiny of the record we did not find any evidence to prove that tampering in chassis number of the Oil Tanker was made by the appellants. The registration of the vehicle was recovered by the seizing officer from the dash board of oil tanker, which is in the name of one Rauf. The investigation officer has not bothered to investigate about the real owner of the vehicle or about the person who made tempering in the chassis number. In this view of the matter, conviction and sentences of the appellants under the aforesaid sections of law are not sustainable.

13. For what has been discussed above, instant criminal appeal filed by appellant Zia Ullah against his conviction and sentence u/s 9 (c) CNS Act, 1997, being meritless is hereby dismissed. Conviction and sentences awarded to him by the learned trial Court under section 9 (c) CNS Act, 1997, are maintained.

14. Connected Cr.A. No.491-P/2020, filed by Zia Ullah and Cr.A. No.492-P/2020, filed by Saddam Hussain, the appellants, against their conviction and sentences under sections 468/471 PPC, are allowed and both of them are acquitted from the charge under the aforesaid offences.

15. Similarly, Cr.A. No.490-P/202, filed by appellant Saddam Hussain, against his conviction and sentence under section 9 (c) CNS Act, 1997, is also allowed and he is acquitted from the aforesaid charge. He be set at liberty forthwith, if not confined in any other case.

16. These are the reasons of our short orders of even date placed in **Cr.A. No.490-P, 491-P and 492-P of 2020.**

Announced:
27.01.2021

M. Siraj Afridi PS

Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Ijaz Anwar.