JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 09 of 2022
Afaq Ali
Versus
The State

Criminal Appeal No. 14 of 2022
Naseer Ahmed
Versus
The State

Jail Appeal No. 30 of 2022
Naseer Ahmed
Versus
The State

Jail Appeal No. 31 of 2022
Noor ud Din
Versus
The State

Jail Appeal No. 32 of 2022
Afaq Ali
Versus
The State

Appellants by:	Raja Nasir Mehmood, Raja Wasim Akbar and Mr. Faisal Nawaz Advocates
State by:	Mr. Sohail Khan Jadoon, Special Prosecutor ANF
Date of Hearing:	**13.06.2022**

Sardar Ejaz Ishaq Khan, J.: By this common judgment we decide the captioned 5 appeals. Naseer Ahmad is the appellant in criminal appeal no. 14/2022 and in jail appeal no. 30/2022. Afaq Ali is the appellant in criminal appeal no. 09/2022 and in jail appeal no. 32/2022. Noor-ud-din Afridi is the appellant in jail appeal no. 31/2022.

2 The three appellants were convicted in case FIR no.129/2020 dated 25.12.2020 registered at police station ANF-RD North under section 9(c)/15 of the Control of Narcotic Substances Act, 1997 (CNSA), vide judgment dated

21.12.2021 passed by the learned Judge, Special Court (CNS), Islamabad. Finding a case of joint possession, all the appellants were sentenced to 5 years and 6 months rigorous imprisonment with fine of Rs.25,000/-, and further simple imprisonment of 2 months in default of payment of fine, with the benefit of section 382-B CrPC extended.

3 The prosecution's case per the FIR (Ex-PB), registered on receipt of the IO's complaint (Ex-PA), is that 5 ANF officers, while present at Islamabad Motorway link road for prevention of narcotics trafficking, stopped a car approaching from Peshawar, with Naseer as the driver, Afaq in the front seat, and Noor on the rear seat, all residents of Jamrod. On interrogation, all the accused, one-by-one, disclosed the presence of narcotics. Naseer himself produced a white polythene packet from his shirt's side pocket, which contained ICE. Afaq produced a polythene packet from under his seat, which contained charas. Noor produced a polythene packet lying between his feet, which also contained charas. Weighed at the spot within the packing, ICE was 100 grams, and the charas packets weighed 1200 grams each. Test samples of 10 grams were extracted from each packet and sealed. The handwritten complaint was sent through the driver constable to the police station, where the FIR was registered and a copy returned to the IO on the spot where he completed the recovery memos, that included memos for items recovered from the personal search of the accused and from the car.

4 At the trial, the prosecution led testimonies of the following police officers:

i) PW-1, Mohammad Shah, ASI, deposed to being the duty officer at the police station on 25.12.2020, receipt of complaint (Ex-PA) sent by the Inspector and brought by Altaf Hussain constable (driver of the official vehicle per the complaint), recording of the FIR (Ex-PB), returning a copy of the FIR at the hand of the constable who had brought the complaint, and identified his signature (Ex-PA-1) on the complaint. His cross-examination was insubstantial and inconsequential;

ii) PW-2, Abdul Razzaq, constable, deposed to being the moharrir malkhana, receipt of the narcotics parcels and the sample parcels

from the Inspector, the car the accused were in, the items recovered from the accused and the car, and recording the receipt of the aforesaid items in register no. 19. He also deposed to the delivery of the sample parcels to constable Waqas Khan (PW-3) on 28.12.2020 for delivery to NIH, and receiving the delivery receipt from Waqas Khan after deposit of the sample parcels at NIH. His cross-examination too was insubstantial and inconsequential;

iii) PW-3, Waqas Khan constable, deposed to being the eye witness to the apprehension of the accused and the recovery of narcotics, all consistent with the complaint and the FIR, witnessing the recovery memos Exhibits PC to PJ, and identified his signatures thereon as Exhibits PC-1 to PJ-1 and collection and delivery of the test samples to NIH on 28.12.2012. His cross-examination too was insubstantial and inconsequential; and

iv) PW-4, Nazim Shahzad Virk, Inspector, the head of the police party and the investigation officer, deposed to the facts narrated in his complaint, the recovery memos, the deposit of the recoveries with the moharrir at the police station, recording of the statements of the witnesses, all consistent with the complaint and the FIR. His cross-examination was on the lines discussed later in this judgment with reference to the grounds of appeal, but his testimony remained consistent with the rest of the witnesses.

5 Afaq produced a defence witness, his uncle as DW-1, who testified that Afaq had only taken a lift in the car to come to Islamabad to appear in the ANF recruitment exam scheduled to be held a few days later. However, the learned trial court disbelieved his testimony for the reasons that Afaq did not take this plea in his section 342 CrPC statement, and that no document attesting to the said recruitment process nor any call letter from ANF was produced. We agree with the learned trial court.

6 Having found the prosecution evidence worthy of credence in terms of the occurrence and recovery of narcotics from the accused, the learned trial

court convicted the appellants. The sample test reports on record, Exhibits PL, PM and PN, are positive for ICE and charas, and correspond to the date of delivery and identity of the police officer Waqas Khan who delivered the samples to NIH, per the testimonies of the prosecution witnesses led at the trial. The safe custody and transmission of the samples is not open to reasonable doubt on record. We have reviewed the judgment and agree with its findings and analysis, except for the finding on joint liability, to which we return later in this judgment.

7 The grounds of appeal urged by the appellants' learned counsel are now addressed.

a) **Delay in dispatch of samples**

It was argued that the samples were sent on 28.12.2020, which was 3 days late, as the occurrence was on 25.12.2020. This plea is baseless, as Rule 4(2) of the CNSA (Government Analysts) Rules, 2001, prescribes 72 hours for delivery of test samples to the lab, the occurrence is reported at 3:00 pm on 25.12.2020, and so delivery of the test samples on the 28th does not violate the said Rules.

b) **Rented car**

It was argued that, per the car rental receipt recovered from the personal search of Afaq per recovery memo Ex-PG, given Afaq's defence that was to have taken a lift in the car, it was incumbent on the prosecution to prove the fact of car rental by producing the car rental agency Alfalah's owner, who was not produced. Per the testimonies led the trial, the narcotics were got recovered by each of the accused himself, and the question of the car being a rented one or not is rather immaterial.

c) **Joint and collective possession not proven**

(i) It was next submitted that the prosecution did not prove joint and collective possession of the narcotics, and the learned trial court was wrong to convict all the accused under section 9(c) CNSA and to sentence for joint and collective possession. We agree to this submission.

(ii) Separate recovery memos for narcotics were prepared for the recovery from each accused. The complaint states that each accused disclosed, one after the other, the drugs in his possession and produced them one by one – Naseer produced ICE from his shirt's side pocket (and there is nothing in the prosecution evidence that Afaq and Noor had knowledge of Naseer carrying ICE in his pocket), Afaq produced his packet from *under* his own seat, and Noor produced his packet from between his feet at the rear seat. The fact that the 3 were in the same car is a subsidiary fact, and does not in and of itself establish the primary fact of joint and collective possession. After all, what prevented them from putting all the drugs in one packet instead of carrying them separately given that the quantities are relatively small? If all the drugs were found in one packet, the evidence and its analsyis would have been nuanced differently. The prosecution evidence, seen as a whole, shows that each accused possessed his own merchandise, and merely travelling together in the same car is not sufficient *per se* under the circumstances of this case to bring home the charge of joint and collective possession where each possessed his own load. Given the severity of punishments that these offences entail, a criminal court ought not to attribute joint and collective possession on the facts of this case by inferential reasoning alone, but ought to require of the prosecution to validate that there was actually only one load of drugs which the 3 accused divided up amongst themselves.

(iii) Being in a conveyance from which narcotics are recovered has never been, *per se*, the sole proof of the offences of 'possession' and/or 'transport' under section 6 of CNSA for which punishment is prescribed under section 9 of the CNSA. In Amanat Ali versus the State (2008 SCMR 991), 2 co-accused were not attributed actual knowledge of the narcotics in a secret cavity in the car, despite there being the *presumption* on the facts of that case that the co-accused ought to be attributed that knowledge, an inferential exercise, and the High Court had actually convicted on the basis of that presumption, which conviction was set aside by the Supreme Court for the two passengers, while maintaining the conviction of the driver for the reason of his 'exclusive control' of the vehicle. The Supreme Court

notes the defence submission, and decides in accord, "…*that mere presence of a person as passenger in the taxi car is not as such an evidence of his participation in crime*…", i.e., the crime by the other riders, even though riding in the same car.

(iv) A Division Bench of the Peshawar High Court elaborated on the *actus reus* of 'possession', for the purposes of CNSA, in Rafiq and another vs The State (2010 PCr.LJ 567) as follows:

> "The word possession implies a physical capacity to deal with the thing as one likes to the exclusion of anyone else ... [I]t implies dominion over an object that he has it and that he can exercise it. Possession, therefore, must be conscious and intelligent possession and [not] merely the physical presence of the accused … The fatal question would be *conscious possession* and *knowledge* of contraband. Unless these two facts are proved, the accused-appellants cannot be connected with the guilt."[1]

That is to say, both the elements of possession and knowledge are essential to convict for the charges of possession and transport per section 6 CNSA read with section 9, and knowledge alone is not sufficient. As a matter of logic, A's knowledge of B's possession of anything (and not just narcotics) is not *per se* the proof of the distinct fact of A being in joint possession of that thing with B merely because the two happen to be within the same confined space.

v) Another test for the purposes of the offence of 'possession' under CNSA is the 'direct relationship'[2] test that was laid down in Inzar versus The State (2013 PCr.LJ 843), stating that "…*it is necessary for the Prosecution to establish that the accused has some direct relationship with the narcotics*…". In the context of this case, employing this test requires the direction relationship of each accused with the narcotics carried by each of the other accused to be proven. The prosecution's argument for this direct relationship to be inferred can be reduced to a deductive syllogism as follows:

> One who rides in a car from which drugs are recovered possesses all those drugs.

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[1] emphasis supplied
[2] At para 7 of the judgment.

The accused was riding in the car.

Therefore, the accused possessed all the drugs.

The first premise is wrong as a proposition of law – see Amanat Ali case above. If the major premise of a deductive syllogism is wrong, the conclusion too is wrong in logic.

vi) The standard for attribution of joint and collective liability laid down in The State through Director ANF Peshawar versus Rashm Ali Khan (PLD 2016 Supreme Court 471) is somewhat misunderstood and mis-cited at the bar. That standard laid down by the 5 member bench of the Hon'ble Supreme Court ought not be read as an absolute standard *sans* the factual context of that case, for the 3 cases under appeal before the Supreme Court concerned huge quantities of 68.2 kgs, 12.5 kgs, and 28.8 kgs, recovered in large bags with the accused travelling, in two cases, in buses, and in one, in a car with the narcotics concealed in the CNG cylinder. It does not take much effort of visualisation to distinguish men loading very large bags with dozens of kgs versus a passenger with a small packet of 1200 grams in his pocket which he puts *en route* under his seat or between his feet to lighten the burden in his pocket. The Rashm Ali standard is that "*…if in a case narcotic substance is recovered from the possession of more than one convict then, following the principle of their joint and collective liability, each one of them will be liable for punishment on the basis of the whole quantity of narcotic substance so recovered*".[3] The underlined words in the standard rest on a conditional to appear proven on the record: that narcotic substance was, in fact, *recovered from the possession of all the accused*. This conditional cannot be read as also meaning its inverse without doing violence to the syntax of the standard, without bypassing the rule of abundant caution in finding guilt by inference, or without losing sight of the circumscribed meaning given to the word 'possession' for the purposes of CNSA in Rafiq case (*supra*); the *non sequitur* inverse of the conditional being, on the facts of this case, that joint and collective possession is to be inferred conclusively from the fact alone of 3 riders being in the same car,

[3] At para 12 of the judgment, reproduced in the headnotes. The underlining is ours.

despite that each carried his own load and each yielded his own load to the police 'one after the other'. The difference is subtle, but important. It might not be apparent to some, but it mustn't be lost on a criminal court.

vii) The charge framed at the trial reads '*You accused persons disclosed regarding the presence of narcotics in your possession*'. Grammatically, this is a joint declaration of common possession, whereas the complaint reads to the contrary that each accused, one after the other, disclosed and yielded a separate and distinct load of narcotics, which circumstance, as a matter of law per the discussion in the preceding paragraphs, is not *per se* the proof of joint possession. The charge framed then jumps to the *respective recoveries* from each accused. Thereafter, the charge reads "*Thus you accused, by associating with each other, have committed offences punishable under sections 9(c)/15…*". The only link between the disclosure and the recoveries from each person, to justify each accused being liable for the entire 2500 grams, are the words '*by associating with each other*', which emanate from section 14 of the CNSA. But the circumstances to be demonstrated that each of the accused associated with the other to carry 2500 grams (as opposed to each riding a common transport to carry his individual load only), are neither spelt out in the complaint, nor in the FIR or the prosecution evidence. That is, neither the complaint nor the charge or the prosecution evidence sound any additional circumstances by which the *mens rea* to carry a total quantity of 2500 grams of narcotics is proved as common to the accused, instead of 100 grams, 1200 grams, and 1200 grams, that each accused carried in his own domain and himself alone got recovered. The former is a *presumption* asked to be drawn from the circumstances, the latter are proven facts on the evidence. The former carries an element of doubt, the latter does not.

viii) Conviction and sentence to the extent of the proven facts is the proper and safer recourse for a criminal court than to extend the conviction and sentence on the basis of a presumption drawn from

those proven facts alone without any independent evidence corroborating that presumption.

8 Resultantly, these appeals are dismissed, however, the sentences are modified as follows:

a) Naseer is convicted under section 9(a) CNSA for possessing and transporting 100 grams of ICE. Per the sentencing guidelines laid down in Ghulam Murtaza and another versus The State (PLD 2009 Lahore 362), his sentence is modified to rigorous imprisonment for 1 year and 1 month and fine of Rs. 9,000/- and simple imprisonment for 3 months in default of payment of fine. The benefit of section 382-B CrPC is extended; and

b) Afaq and Noor-ud-din are convicted under section 9(c) CNSA for each possessing and transporting 1200 grams of charas. The Ghulam Murtaza sentencing guidelines do not provide any intermediate slabs between 1 and 2 kgs of charas. Keeping in view that the quantity above 1 kg is one-fifth of the next increment of 1 kg, and keeping in view the mitigating circumstances that both are first offenders and Noor-ud-din is a student, each is sentenced to rigorous imprisonment for 1 year and 3 months and fine of Rs. 10,000/- and simple imprisonment for 3 months in default of payment of fine. The benefit of section 382-B CrPC is extended.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on _____.

Judge **Judge**

Approved for reporting.

Imran