JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal appeal no. 161 of 2023
Ali
versus
The State

Criminal appeal no. 177 of 2023
Waseem
versus
The State

Criminal appeal no. 178 of 2023
Mst. Qurat-ul-Ain
versus
The State

Criminal (Jail) appeal no. 179 of 2023
Ali
versus
The State

Appellants by:	M/s Shan Zeb Khan and Tayyab Abbasi, Advocates in criminal appeal 161 of 2023
	Mehr Muhammad Irfan Khan and Syed Naqash Ali Shah Advocates, in criminal appeal 177 of 2023
	Mr. Sajeel Jan, Advocate in jail appeal 178 of 2023
Respondent by:	Rana Zulfiqar Ali, Special Prosecutor, ANF along with Inspector Bashir Khan
Date of hearing:	**01.02.2024**

Sardar Ejaz Ishaq Khan, J.: The three appellants before us were convicted by the Special Court vide judgment dated 14.04.2023, in FIR no. 33/2022 dated 21.03.2022, for the offence of possession of narcotics under sections 9(c) and 15 of *the Control of Narcotic Substances Act, 1997* (CNSA), registered at police station ANF, Islamabad. They were sentenced to rigorous imprisonment for life and further 5 months simple

imprisonment in default of payment of fine of Rs.100,000/-. Benefit of section 382-B of CrPC was also extended to them.

2 Per the FIR, on a tip-off from its secret informer, the ANF intercepted the car driven by the appellant *Ali*, with the appellant *Waseem* occupying the front seat and the appellant *Qurat-ul-Ain* in the rear seat with her 6 years old daughter and 5 years old son. On questioning, the front-seater Waseem disclosed the presence of charas under his seat, whereupon the ANF recovered 5 packets of charas from under his seat, each weighing 1200 grams aggregating to 6 kgs of charas. Next, the appellant Qurat-ul-Ain disclosed the presence of drugs in her (زیر قبضہ) travel bag, which was then opened and found to contain opium in 4 packets weighing 1200 grams each aggregating to 4.8 kgs of opium. Next, after further investigation, the appellant Ali the driver disclosed the presence of narcotics in the car boot, which was then opened and found to contain heroin in 14 packets weighing 1 kg each aggregating to 14 kilograms of heroin.

Even though, according to the prosecution case, each accused made a separate and independent disclosure of possession of narcotics that were recovered from such individual discloser's possession, and even though none of the appellants had anything to say of the drugs recovered from and at the pointing of each other accused, the learned trial Court applied the doctrine of joint possession and sentenced the three accused for the aggregate quantity of 6 kgs charas, 4.8 kgs opium and 16 kgs heroin, relying on *The State vs Rashm Ali Khan*[1].

3 We have reviewed the judgment under appeal and, except on the point of sentencing, find it conforming to the record. The judgment notes the various exhibits assigned to the complaint, the FIR, the case property, the recovery memo, the signatures of the witnesses to the recovery memo, and the test reports of the samples by the National Institute of Health (NIH) in arriving at its conclusion of conviction. We therefore do not need to repeat the numbers of those respective exhibits. Further, no occasion arises

[1] PLD 2016 SC 471

on the basis of the memo of appeal or the submissions of the learned counsel for us to deal with any specific exhibit in any further detail in the context of the testimony of the respective witnesses, except to the extent hereinafter mentioned.

4 The prosecution witnesses, all ANF officers, remained consistent in their testimony overall and no major breakthroughs accrued to the defence in the cross examination. The analysis of their testimony in the judgment under appeal is accurate and we therefore do not consider it necessary to repeat it all over again.

5 While answering to the charge being framed against him, the appellant Waseem confessed before the trial Court that the other two appellants were innocent and he alone was responsible for concealing the drugs in the car trunk and, by implication, the prosecution story of distinct recoveries from Ali and Qurat-al-ain from within the car was not true. The learned trial Court disbelieved the confession on the basis that the ocular testimonies of prosecution witnesses were too categorical in relation to distinct disclosures and individual recoveries from each of the appellants for the Court to believe to the contrary. The learned trial Court also repelled the submission that it could not convict Waseem on the basis of the confession while ignoring its exculpatory part in relation to the other two accused, by observing at paragraph 14 of the impugned judgment that it was convicting Waseem on the basis of the prosecution evidence in its totality and not on the basis of his confession. This submission was repeated before us at the bar, citing *Javed Iqbal vs The State*[2], that a confession had to be believed or disregarded in toto. However, we are in agreement with the learned trial Court's rejection of the confession in toto for the reason that the prosecution evidence was overwhelmingly strong and consistent in terms of distinct disclosures and recoveries from each of the accused and could not be subordinated to the confession of the accused, especially where he could not produce any evidence in support of the

[2] 2023 SCMR 139

antecedental elements of his confession taken in his statement under section 342 CrPC, namely, the particulars of the funeral in the family at Peshawar which he went to attend with his sister-in-law, the co-accused Qurat-ul-Ain, in the rented car with Ali the co-accused driver; these two antecedent secondary facts had to be established as 'relevant facts' under Articles 21 and 22 of the Qanun-e-Shahadat Order, 1984, for the particulars of the confession and the defence narrative in the statement under section 342 CrPC to carry any weight. With no car rental agreement or affidavit of the rental agency on record, with no particulars of the overnight stay at Peshawar brought in evidence, with no member of the bereaved family from Peshawar turning up to give evidence of the particulars of the deceased and the holding of the funeral ceremony, these secondary facts remain unproven and therefore the edifice of Waseem's confession qua a primary fact also falls.

6 Having read the impugned judgment in light of the evidence on record, we do not find any reason to overturn the judgment of conviction of the appellant, which is therefore maintained. However, we are not in agreement with the sentence premised on the conclusion of joint possession, to which we now turn after a discursive analysis of the relevant case law on the subject.

7 It must be remembered that the offences under the CNSA are of the cultivation, possession, import, transport and transhipment of the narcotics specified in the CNSA. These are all positive acts. The CNSA does not create an offence of 'knowledge' of narcotics; the offence, in the context under discussion, is 'possession' of narcotics. There is nothing in the CNSA to construct an extended doctrine of criminal liability of 'knowledge of possession by other persons', when that knowledge itself does not translate into possession, actual or constructive, of the person possessing that knowledge. Just to give an illustration, a co-passenger coming to know that the passenger on the adjacent seat has drugs in his travel bag, when the latter opened it to take out his lunch, does not by any means make the former jointly and collectively liable for the possession of drugs by the

latter. And this is what a closer analysis of the judgments holds, contrary to the quick and dirty conclusion urged by the prosecution that the knowledge by X of the possession of drugs by a co-passenger Y in a car *ipso facto* makes X a 'joint possessor' of the drugs in the actual possession of Y: the case law is that, for the aforesaid conclusion of fact to follow, additional evidence must be present corroborating that conclusion and it cannot be so concluded by implication alone.

(a) In *Amanat Ali vs The State*[3], the driver of a taxi car was deemed to be in exclusive possession of the heroin that was concealed in secret cavities where the prosecution did not establish beyond reasonable doubt conscious knowledge on the part of the co-passengers, accepting indirectly that mere presence of a person as a passenger in a taxi car was not sufficient evidence of his participation in the crime. The Supreme Court observed that "*There was no evidence that they [the co-passengers] being companions of Amanat Ali [the driver] had the conscious knowledge of heroin in the taxi car to treat them in joint possession of recovered heroin*." That is to say, joint possession depends on the evidence of conscious knowledge and acquiescent control of the joint possessor.

(b) The joint and collective liability principle in drug offences is founded on the principles of common intention and common design. In *The State vs Rashm Ali Khan*[4], a five-member bench of the Supreme Court affirmed this as follows:

> 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. To elucidate and fortify this view, reference may be made with advantage to Sections 34, 35, 149, 394, 396, 460 etc. of the Pakistan Penal Code. (emphasis added)

The conditional 'if' in Rashm Ali was ignored by the learned trial Court in this case in concluding joint liability, forgetting that the Supreme Court in Rashm Ali was hearing appeals from the High Court's decisions with an affirmed finding of fact that the '*narcotic substance was recovered from the possession of more than one*

[3] 2008 SCMR 991
[4] PLD 2016 SC 471

convict', but in order to reduce the sentences, the High Court apportioned the total recovered quantity over the various accused for each to be deemed carrying a portion only of the total quantity. It was this last act that was set aside by the Supreme Court. The learned trial Court applied the joint liability principle without due regard to the factual basis of the application of that principle, namely, that the narcotics must first have been found on evidence to have been recovered from the possession of more than one convict.

(c) Dating as far back as 1988, the Supreme Court in *Nadir Khan vs The State*[5] applied the principle of 'constructive knowledge' on the two accused taking a vehicle from Peshawar to Karachi with 49 kgs of heroin in secret cavities in the following words:

> For being persons in-charge of the vehicle for such a long journey, they must be saddled with the necessary knowledge with regard to the vehicle and its contents. The probabilities or the presumptions are all dependent on the circumstances of each case….
>
> [emphasis supplied]

(d) In *Muhammad Noor vs The State*,[6] elaborating on the word 'possess', the Supreme Court observed:

> It is necessary to show that the accused had the article, which turned out to be narcotic drug. In other words the prosecution must prove that the accused was knowingly in control of something in the circumstances which showed that he was assenting to be in control of it. …
>
> The Legislature could not have intended to make mere physical custody without knowledge an offence, therefore, the possession must be conscious possession. [emphasis supplied]

And we say, by the same token, that the Legislature could not have intended to make *mere knowledge absent possession with control an offence*!

The Supreme Court enunciated the following principle of law:

> … In such type of cases the prosecution is required to produce evidence to show that the said persons were in the joint

[5] 1988 SCMR 1899
[6] 2010 SCMR 927

> possession and control of the vehicle or that they had any concern or dealt with property in any manner, particularly, in the case when the narcotics substance was concealed in the secret cavities or digi or hidden from all other persons… if the property was lying open within the view of the said persons or they knew the placement of the property then the situation would be quite different.
>
> Thus mere presence of the appellants in the vehicle would not involve them in the case unless conspiracy or abetment of the offence is shown and proved.

Applying the above principles, the Supreme Court acquitted the three passengers due to want of evidence that they had the knowledge and control of the drugs present in the concealed cavities of the car.

(e) In *Kamran Shah and others vs The State*[7], in acquitting the co-passengers travelling in a bus with secret cavities out of which drugs were recovered, the Supreme Court expressed the principle under discussion as follows:

> It was thus incumbent upon the prosecution to establish conscious possession of the contraband substance on the part of the present appellants but no evidence worth its name had been brought on record in that respect.

(f) In *Hussain Shah vs The State*[8], the cleaner of a trailer-truck was acquitted while its driver convicted for concealing 12000 kgs charas in 600 bags in the secret cavities of the trailer, even though the cleaner sat on the front seat of the vehicle next to the driver seat when apprehended, and even though the prosecution urged that the cleaner by common norms was a helper of the driver of the trailer. The Supreme Court acquitted the cleaner because it concluded on the basis of the record as follows:

> 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 the vehicle at the relevant time.

8 It must always be remembered that section 29 CNSA creates the presumption of the commission of an offence under that Act where a person

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[7] 2019 SCMR 1217
[8] PLD 2020 SC 132

is found in possession of narcotics, *for the possession of which he fails to account satisfactorily*. Possession comes first, and accounting for it comes later. If there is no possession, there is no accounting for such possession, and mere knowledge of the presence of drugs without such possession does not suffice even to raise the presumption under section 29 CNSA.

9 The principles can therefore be summarised as follows:

a) A driver will almost always be fastened with knowledge and possession of drugs found in the vehicle, whether in secret cavities or otherwise concealed from plain sight, such as in a bag or in the car boot. The onus will shift on to him under section 29 CNSA to account for their possession under any exceptions under the Act, failing which the offence of possession under section 6 CNSA will be complete.

b) The passengers' case will vary according to whether (i) the drugs were in plain sight, or (ii) were hidden in a secret cavity or otherwise concealed, such as in a bag that did not belong to that passenger or in the car boot:

i) If former, knowledge of presence of drugs in the car will be a straight-forward inference and the passenger will be liable for the entire quantity on the principle of joint and collective liability;

ii) If latter, the onus will remain on the prosecution to adduce evidence of the passenger's knowledge of the presence of drugs in the vehicle in order to attract the principle of joint and collective liability. Only if the prosecution produces such evidence that the onus will shift to the co-passenger under section 29 of the CNSA to disprove knowledge so as to exclude the doctrine of joint and collective liability;

c) Where the driver and the passenger each makes a distinct disclosure of a cache of drugs recovered from his personal possession and control, the prosecution will have to adduce additional evidence that each was jointly and collectively liable for the aggregate quantity. Although the threshold for such a deduction will be lower than, say, where the recovery is from a secret cavity, if the disclosure remains confined to the cache recovered from the discloser and no disclosure is made regarding the caches recovered from the other passengers under their respective disclosures, joint possession by each of each other's caches, and *vice versa*, will require additional evidence and cannot be just assumed to be joint by a presumption alone.

10 Applying the aforesaid analysis to the case in hand, the prosecution case firmly believed by the learned trial Court, and by us too, was that each accused made his and her own independent disclosure and got recovered the drugs under his and her possession and control: Waseem from under his front seat, Qurat-ul-Ain from the travel bag under her possession[9], and Ali from the car boot. There is nothing at all in the evidence for us to conclude, as a fact established beyond reasonable doubt, that each of the passengers had control and possession of the drugs carried by his or her co-passengers, their knowledge of their co-passengers' caches notwithstanding. We reiterate; joint and collective liability rests on joint and collective possession – when per the prosecution's own case each co-passenger makes a distinct disclosure and gets recovered only the drug caches that was in his or her possession, we would be remiss in attributing an implied statement or admission to the appellants that each one of them had asserted some sort of possessory right and control over his or her co-passengers' drug caches. The prosecution's zeal to secure the maximum sentences must not let the

[9] See PW-5, the I.O, testifying that the bag was in her possession. The FIR also says that it was her (زیر قبضہ). The recovery memo also says the same. None of these items of evidence or any other says that her travel bag was in the car boot. Nor can such an inference be drawn because both under the FIR and the IO's testimonies, the car boot was opened after the opium was already recovered from the bag carried by Qurat-ul-Ain. That leads us to conclude that the bag was with her in the back seat of the car.

Court be blinded to the fundamental burden of proof beyond reasonable doubt, which cannot be replaced by a presumptive argument of each accused being assumed to be in equal possession and control of the other co-passengers' caches for an incantation of the doctrine of joint and collective liability.

11 The FIR was registered on 21.03.2022, that is, before the 2022 amendments to the CNSA were promulgated on 06.09.2022, and therefore the sentencing regime prescribed under *Ghulam Murtaza vs The State*[10] will apply. Accordingly:

a) Ali's sentence in terms of the trial Court's judgment is maintained, as the quantity of heroin recovered from him exceeds 10 kgs;

b) For possessing 6 kgs charas, Waseem is sentenced to rigorous imprisonment for 8 years and 6 months with fine of Rs.40,000/-, or in default simple imprisonment for 7 months; and

c) For possessing 4.8 kgs of opium, the sentence on a male convict would be rigorous imprisonment for 7 years with fine of Rs.11,000/-, or in default simple imprisonment for 6 months. However, under paragraph 9 of Ghulam Murtaza judgment, a woman is to be awarded 1/3rd less sentence of imprisonment (that too simple imprisonment only), fine, and sentence in default of payment of fine than would be awarded to a male convict. Accordingly, Qurat-ul-Ain is sentenced to simple imprisonment of 4 years and 6 months with fine of Rs.7,333/- and in default simple imprisonment of 4 months.

12 The benefit under section 382-B CrPC already extended by the learned trial Court is maintained and, accordingly, any accused who has

[10] PLD 2009 Lahore 362

served the sentence with remissions included will be released from the prison if not required in any other case.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on _____.

Judge **Judge**

Approved for reporting

Imran