JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No. 198 / 2023

Bangal Khan
Versus
The State.

Crl. Appeal No. 204 / 2023

Muhammad Murad
Versus
The State.

Appellants by: Ch. Abdul Rehman Hur Bajwa, Sanaulah Bugti, Afrasiab Ahmed Rana, and Gohram Gichki Baloch, Advocates.

Respondents by: Makhdoom Syed Fakhar Imam Ali Shah, State Counsel.
Mr. Tahir Kazim, Law Officer, on behalf of I.G Police, ICT.
Inam, S.I.

Date of Hearing: 28.03. 2024.

MOHSIN AKHTAR KAYANI, J:- By way of this common judgment, we intend to decide captioned criminal appeals arisen out of one and same judgment dated 29.05.2023, passed by learned Special Judge CNSA (West), Islamabad, whereby appellant Bangal Khan was convicted in case FIR No.647, dated 26.07.2022, offence u/s 9 (c) CNSA 1997, P.S Karachi Company, Islamabad and sentenced six years R.I with fine of Rs.30,000/-, in default of fine payment he shall further undergo six months S.I. Benefit of Section 382-B Cr.P.C. was also extended to the appellant/accused. Learned trial court has also ordered for confiscation of vehicle No.AZP-853 [Sindh] Toyota Corolla, which was involved in this

case, in favour of state, which has been challenged by the appellant Muhammad Murad through criminal appeal No.204 of 2023.

2. Brief facts referred in the instant case are that complainant Sudheer Abbasi, ASI/PW-2 was posted at PS CIA on 26.07.2022. He received spy information that vehicle AZP-853 [Sindh] silver colour was standing in Karachi Company Bus stand wherein huge quantity of narcotics is present. Upon receiving such information PW-2/complainant along with other police officials at about 07:00 p.m. reached at the pointed place and on pointation of spy vehicle AZP-853 was checked in which present appellant was sitting on driving seat, who disclosed his name as Bangal Khan and got recovered two packets wrapped in yellow solution tape from cabin containing heroin powder 870 grams each, total 1740 grams, which was taken into possession through recovery memo Ex.PB. Samples were prepared and complaint Ex.PC was drafted, which was transmitted to PS through Umar Arbab, constable and after registration of FIR, all the record and documents were handed over to Inam Ullah, S.I/I.O of the case who prepared site plan and recorded statements of witnesses U/S 161 Cr.P.C. Samples were transmitted to the NFSA, who issued report Ex.PF and confirmed the status of narcotics as of heroin. Challan U/S 173 Cr.P.C. was submitted in the trial court, where-after trial court framed the charge on 07.02.2023 and recorded testimony of six PWs as well as statement of accused U/S 342 Cr.P.C., convicted the appellant accordingly.

3. Learned counsel for the appellants contends that CIA officer has no authority to investigate the crime, even the very basis of the FIR is against the police rules where Section 21 of the CNSA put restriction on police

officer not below the rank of Sub Inspector shall proceed in the case of narcotics and there is no authorization available on record to subscribe the investigation; that scribe of FIR was not produced, even recovered contraband was deposited with Moharrar Malkhana of CIA, who has no legal authority to kept the narcotics; that appellant Muhammad Murad being owner of vehicle in question was not served with notice U/S 33 of CNSA, 1997 prior to passing the confiscation order by the trial court, therefore, same be set-aside and vehicle be released in favour of appellant Muhammad Murad.

4. Conversely, learned State counsel has opposed these appeals and contends that due authorization was obtained from SP (Investigation) for the purpose of investigation by CIA, which covers the legal aspect of this case; that learned trial court has rightly convicted the appellant/ accused as well as passed the order of confiscation of vehicle in question which was used for transportation of huge quantity of narcotics.

5. Arguments heard, record perused.

6. Perusal of record reveals that appellant Bangal Khan has been arrested in the above mentioned case on 26.07.2022 by Sudhair Abbasi, ASI/CIA (Pw-2) who received a spy information that vehicle No.AZP-853/Sind was parked in the Karachi Company bus stand with huge quantity of narcotics. A raid was conducted and the appellant was apprehended whereby *on inspection of vehicle two packets wrapped in yellow solution tape placed in a cabin present under the screen tap. 'Off white' heroin powder was recovered on unwrapping the packets.* Each packet contained 870 grams heroin weight on digital scale and total containing 1740 grams.

Pw-2 also confirmed the vehicle Ex.P1 from where such heroin was recovered. He had prepared the sample parcel 10 grams each of heroin packets at spot and recovered heroin Ex.P2 was entered into recovery memo Ex.PB duly attested by Aamir zaman 7229/C (Pw-6) and Azhar Mehmood 935/C. Pw-2 referred the complaint Ex.PC and sent the same for registration of FIR through Umar Arbab (Pw-5). After registration of FIR Inam Ullah SI (Pw-4) came on spot and started investigation, site plan was prepared. The star witness of this case (Pw-2) and the other recovery witness (Pw-6) have been cross examined at length. However, there is no document on record which confirms that departure and entry in the police station has been entered in the record. It has been admitted by (Pw-2) in cross examination that when he alongwith other police officials reached at Karachi Company bus stand the car was parked and the appellant was sitting on the driving seat. During the course of cross examination (Pw-2) confirms that recovered substance is recovered beneath the cavity between the dashboard and screen tap and in this regard picture Ex.DA was confronted to him, thereafter, he acknowledges three cavities were existed on record and also confirmed that *it is correct that beneath the screen tap no cavity is existed.*

7. The second star witness Aamir Zaman 7229/C (Pw-6) also narrated the same story as of (Pw-2) and also additionally explained the personal search of the appellant in which Mobile Phone Ex.P2, mobile phone Nokia Ex.P3, CNIC, Ex.P4, driving license Ex.P5, wallet brown color with different cards Ex.P6 & Rs.3100/- Ex.P7 were recovered which were taken into possession by Muhammad Inam Ullah, S.I vide recovery memo Ex.PE

but the last astonishing factor in the evidence of (Pw-2) & (Pw-6) is that both the star witnesses have not uttered a single word qua the disclosure and subsequently the recovery of narcotics on the pointation of the appellant which is the key factor. Ordinarily Article 40 of the Qanun-e-Order, 1984 plays a significant role in such type of cases to connect the accused with the subsequent discovery in consequence of information received qua any fact deposed by the accused at the relevant time before the Police Officer, however, if no such discovery has been made consequent to the information it would be presumed that the Investigating Officer is well aware qua the presence of narcotics which is visibly seen or could no excluded from the vision but that is not the case in hand. As per stance of the prosecution the narcotics has been recovered from the secret cavity of the dashboard beneath the screen tap and such recovery has been affected by the I.O himself without any disclosure made by the appellant, therefore, it is incumbent upon the State to demonstrate that appellant has some connection with the vehicle except that he was sitting on the driving seat in a parked car at the place of occurrence i.e. the bus stand G-9 Markaz, Islamabad but no person from the public has been associated with the recovery proceedings. Such lapse on the part of the I.O goes against the prosecution as held in ***2022 PCrL.J N 102 Sind tiled 'Mst. Shahzadi vs. State', 2022 YLR Notes 46 Sind titled 'Hidayatullah alias Gudoo vs State', 2017 MLD 288 Baluchistan titled 'Shahid Dada vs. State'.***

8. In the light of above principles we attended the proposition in the light of Section 25 of the CNSA, 1997 whereby code of criminal procedure 1898 except those of section 103 shall, *mutatis mutandis*, apply to all

searches and arrests in so far as they are not inconsistent with the provisions of sections 20, 21, 22 and 23, therefore, the application of Section 103 Cr.P.C is excluded from its application under this law, even though the private witnesses have not been associated despite the fact that alleged recovery has been affected at the bus stand.

9. The next important factor is as to whether the recovered heroin from the vehicle Ex.P1 if not recovered on discovery and pointation of the appellant then what would be the affect and how the prosecution has to discharge the burden to demonstrate that the appellant has a conscious knowledge qua the presence of the narcotics in the secrete cavity and the appellant has some relationship with the vehicle. In this regard the I.O Muhammad Inam Ullah, S.I (Pw-4) has not put any serious effort to demonstrate from the record in respect of the ownership of the vehicle nor it is the case of the prosecution that the appellant owns the subject vehicle. In such scenario, it is the duty of the prosecution to demonstrate from the record firstly, that the accused knew about the existence of the cavity in the body of the vehicle if yes the same should have been demonstrated from some evidence secondly, the accused appellant has a requisite knowledge about the availability of narcotics substance in such cavity of the vehicle but entire evidence of I.O suggest that no evidence worth its name had been brought on the record to establish that accused was conscious about the availability of the narcotics substance in the secret cavity of the relevant vehicle in which he was sitting such aspect has been appreciated in ***PLD 2020 SC 132 'Hussain Shah and another vs. State'*** and accused in this regard has been acquitted. Even the I.O has not put any serious effort

to verify the registration number of the vehicle from the Excise and Taxation Office nor any report was called in this regard even the recovery memo of personal search Ex.PE is silent qua availability of registration book on record. All these aspects lack the ingredients of exclusive knowledge of the appellant as no connection has been made by the I.O in the investigation to the extent of appellant with the vehicle in question. Such aspect has been appreciated in ***2008 SCMR 991 titled 'Amanat Ali vs. State'.***

10. Now adverting towards the violation of Section 21 of CNSA, 1997, made by (Pw-2) Sudhair Abbasi, ASI of CIA whereby, *an officer, not below the rank of Sub Inspector of police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and a warrant for arrest or search cannot be obtained against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may a) enter into any such building, place, premises or conveyance and even can cease any narcotics drugs and arrest any person*. But (Pw-2) who initially made a search and arrested the appellant is ASI who is not authorized by any stretch of imagination to effectively made a search under the law. Such search and recovery has lost its significance and legal worth, which is in violation of the law at the very initial process of the case in the light of principles settled in ***2008 YLR 1562 Lahore titled 'Muhammad Younas vs.***

State', 2004 YLR 1303 Lahore titled 'Muhammad Yaseen vs. The State' 2018 MLD 1917 titled 'Siraj ud Din Vs. The State'.

11. Another important aspect of conducting search and arrest of the appellant is made by CIA official (Pw-2) at the initial stage. Such aspect reflects that the very foundation of this case is defective as CIA has no legal jurisdiction to proceed in such type of cases unless they have specifically been notified in this regard by the SP (CIA). The facts narrated above confirm that initially the compliant was lodged by Sudhair Abbasi A.S.I / PW.2 of CIA who has not been assigned with any special duty in terms of the Police Rules, 1934. The role of Central intelligence Agencies has been explained in Rule 21.35 of the Police Rules 1934, which only caters to assist the Superintendent of Police and his Supervising staff in coordinating the preventive and detective work of the District Police and in order to act as clearing house for criminal intelligence for the use of investigating officers in the district and in other districts. This body shall be formed from the establishment sanctioned for the district for the prevention and detection of crime and their functions are as under:

> "(a) *The preparation of crime maps relating to offences against property classified under the methods employed by the criminals.*
>
> *(b) The receipt, consideration and filing according to classification, of information received from investigating officers.*
>
> *(c) The comparing of the data collected under (a) and (b) and the communication of any deduction there from to the investigating officers concerned.*
>
> *(d) The preparation of a crime index of cases from the materials collected under (a) and (b) classified*

according to; (1) methods employed by the criminals and (2) various clues provided by the criminals such as nicknames used, special clothing worn; peculiarities of the culprits noticed by witnesses; special weapons used; special signals used, etc.

(e) The preparation of a crime index of criminals. This shall normally be in two parts:-

(i) an index of names of known criminals classified according to their methods of operating:

(ii) an index of known criminals classified according to their peculiarities of appearances, gait, speech, nicknames, etc.

(f) The provision of information by means of which the Superintendent of Police may be assisted in controlling the crime of his district, forestalling outbreaks of crime and directing preventive operations.

(g) The publication of weekly Criminal Intelligence Gazette.

(h) To co-ordinate and guide the efforts of police station staff throughout the district in securing the arrest of absconders and proclaimed offenders and in locating absentee bad characters, and other untraced persons and to maintain close co-operations with the Central Intelligence Agencies of other districts in this work.

(i) When information received from records or otherwise indicates that a series of cases, whether in the jurisdiction of one or of several police stations, is the work of the same criminal or of a gang, to co-ordinate or, under the orders of the Superintendent of Police, direct the investigation of such cases."

12. If we consider the above functions read in conjunction with CNSA Act, 1997, it appears that the CIA officials could not perform any other

duty except the functions enumerated above and duly assigned by the Superintendent of Police in this regard, however, they are not debarred from being part to resist any crime if happened in their presence, but certain functions in this regard are to be observed as explained in Rule 25.3 of the Police Rules, 1934 that:

> *"The occurrence of cognizable offence in other police station jurisdiction is reported, the fact shall be recorded in the daily diary and information shall be sent to the officer-in charge of the police station in the jurisdiction of which the offence was committed. Meanwhile, all possible lawful measures shall be taken to secure the arrest of the offender and the detection of the offence."*

Similarly, in terms of Rule 25.4, which caters another eventuality:

> *"If a police officer after registering a case and commencing investigation discovers that the offence was committed in the jurisdiction of another police station he shall at once send information to the officer-in charge of such police station.*
> *(2) upon receipt of information such officer shall proceed without delay to the place where the investigation is being held and undertake the investigation. "*

But, surprisingly, in the present case the CIA staff directly proceeded with the recovery, arrested, searched the accused, though CIA officers were not covered in terms of section 156 Cr.P.C. to investigate any cognizable case which could only be conducted by officer-in charge of the police station, therefore, very basis of this case is against law as explained in the basic judgment of **PLD 1997 [SC] 408 *(The State Vs. Bashir)***, though the exception has been referred in the Bashir case supra, that any violation committed by CIA personnel may not vitiate trial if no serious prejudice

has been caused to the accused person resulting in miscarriage of justice, and if we go through this concept the investigation report in the present case is silent qua any permission of investigation. When confronted the Investigation Officer of this case has placed a copy of letter dated 26.07.2022, issued from the office of Superintendent of Police Investigation, but it refers the FIR No.647 of police station Industrial Area which is entirely different and even otherwise, the SSP Investigation allowed the same on 30.07.2022, but surprisingly, the I.O has not referred a single daily diary nor incorporated the authorization in daily diary which reflects that the letter submitted by the I.O is an afterthought and even there is no ex *post facto* approval from the SSP Investigation. Such concept negates the entire working of CIA staff.

13. Another important angle which place a key role is that initially complainant PW.2 / Sudhair Abbasi ASI of CIA performed all the functions including search, recovery and arrest of the accused / appellant and investigated the matter at the initial stage which was later on handed over to PW.4 / Muhammad Inam Ullah S.I, even he was not authorized to investigate the matter, therefore, basic test laid down in Bashir case supra has been violated. We have also attended judgment reported as **2009 YLR [Karachi] 249 (*Dodo Vs. The State*),** and **1999 PCr.L.J [Lahore] 924 (*Rafaqat Ali Vs. The State*)**. Similarly, PW.2 / Sudhair Abbasi A.S.I, was also not authorized to conduct investigation at the initial stage which is in violation of section 21 of CNSA, 1997 as held in **2018 MLD [Peshawar] 1917 (*Siraj ud Din Vs. State*).** We have also attended the evidence of the Investigation Officer Muhammad Inam Ullah S.I / PW.4 who is unable to

explain as to why complainant of this case Sudhair Abbasi A.S.I of CIA / PW.2 handed over the complaint alongwith recovery memos and case property / recovered narcotics substance to him and on his pointation he inspected the place of occurrence as well as prepared un-scaled site plan, conducted personal search of accused, interrogated the accused and after receiving formal copy of FIR and original complaint completed all the proceedings, even proceeded to CIA Staff and detained the accused in lockup and handed over case property to Moharrar mallkhana. All these actions are without any authorization as to why he could exercise his *suo-moto* powers considering him investigation officer. No evidence to that effect has been brought on record in his affirmative evidence. In cases where CIA staff officer has conducted any investigation and submitted report under section 173 Cr.P.C. in the court it is mandatory upon such officer to place the copy of the authorization alongwith challan under section 173 Cr.P.C., failing which the effect should have been considered in terms of Article 129 (g) of Qanun-e-Shahadat Order, 1984, that the primary authorization has been withheld and adverse presumption comes on record, therefore, any superstructure raised in this regard is also illegal.

14. Another glaring violation is the handing over of all the recovered contraband and personal search articles as well as vehicle in question to the moharrar mallkhana of CIA / PW.3 / Tariq Ali, Head Constable who in his affirmative evidence has not stated on oath that he entered all the recovered narcotics as well as the vehicle to be enlisted in register No.19, nor any copy of register No.19 has been appended with the final challan. There is no justification on record as if the complaint / Exh.PC was

transmitted by Sudhair Abbasi A.S.I / PW.2 for registration of case in police station Karachi Company, but the recovered narcotics, vehicle, as well as personal search of the accused appellant was taken to CIA and why those articles were not submitted to the Moharrar mallkhana of police station Karachi Company, Islamabad? The absence of any logical explanation of these important questions created a technical knockout of the prosecution case and all these aspects were not looked into by the trial court in proper manner.

15. In light of above discussion we are of considered view that entire initiation of arrest, search and investigation of this case by CIA is against the law and even otherwise the secret cavity has not been proved. The contraband has not been recovered from the personal search of the appellant, even no relationship of accused with vehicle AZP-853 is demonstrated on record, nor any effort was made to verify the credentials of the vehicle, therefore, instant appeal is **ALLOWED**. The impugned judgment dated 29.05.2023 is hereby **SET-ASIDE**. Appellant is acquitted from the charge and he shall be released forthwith if not required in any other case.

16. Now adverting towards the question raised in the connected appeal No.204 of 2023, for release of vehicle No. AZP-853, Toyota Corolla, confiscated in this case by the trial court in judgment of conviction, but it is astonishing to see that investigation officer has not uttered a single word as to what effort has been made by him for verification of the vehicle or owner of the said vehicle, even he had not issued any letter in terms of section 31 of CNSA to the Excise and Taxation Officer calling for

information for the purposes of satisfying himself in respect of the vehicle in question, even otherwise it is settled proposition of law that articles connected with narcotics, the material, apparatus and utensils in respect of which, or by means of which, such offence has been committed shall be liable to confiscation including the vehicles, vessels and other conveyances used in carrying such drugs and substances, but sub section (2) of section 32 of CNSA 1997 is restricted with the following proviso:

> *"provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner thereof knew that the offence was being, or was to be, committed.",*

However, no material has been placed on record by investigation officer in respect of owner of the vehicle i.e. Muhammad Murad, even trial court has not taken any step to verify the credentials of the vehicle or the owner of the vehicle from any authentic source, therefore, the confiscation of the vehicle AZP-853 is not justiciable as appellant Muhammad Murad was not given due right of fair trial in terms of Article-10-A of Constitution of Islamic Republic of Pakistan, 1973, especially, when, the procedure provided in section 32 of CNSA, 1997 has not been attended to, but, this Court attended the Excise and Taxation department record i.e. original registration record, which confirms the owner name as Muhammad Murad (appellant) in respect of vehicle AZP-853, Toyota Corolla and confronted the Investigation Officer of this case in court who is unable to refute this aspect nor able to place any justification as to why owner of the vehicle has not been associated in investigation even no effort was made to connect the vehicle with the main accused, therefore, criminal appeal

No.204 of 2023 *"Muhammad Murad Vs. The State"* is **ALLOWED** and the vehicle in question be released in favor of Muhammad Murad forthwith.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on**: 04.04.2024.**

JUDGE **JUDGE**

A.Waheed/-

Approved for reporting.