JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No.280 of 2023

Rawaiz Khan
Versus
The State

Appellant By :	Raja Muhammad Shafaat Khan, Advocate.
State By :	Rana Zulfiqar Ali, Special Prosecutor ANF.
Date of Hearing:	24.01.2024 and 29.05.2024

ARBAB MUHAMMAD TAHIR, J: Through the listed criminal appeal under section 48 of the Control of Narcotics Substances Act, 1997 ("**Act of 1997**"), appellant *Rawaiz Khan* impugns judgment dated 20.07.2023, passed by the Judge Special Court (CNS), Islamabad, whereby he was convicted under Section 9(C) of the Act of 1997, for trafficking 1200-grams Charas and sentenced to undergo 04 years and 06 months R.I. with fine of Rs. 50,000/-, in default whereof, to further undergo 06 months S.I. with benefit of section 382-B Cr.P.C., in case F.I.R No.77, dated 10.09.2020, under Section 9-C and 15 of the Act of 1997, registered at Police Station ANF-RD North, Rawalpindi.

2- Precisely, on 10.09.2020, at about 11.30 a.m., a contingent of ANF officials, headed by Inspector Taqi Abbas (PW-4), including Saparash Khan (PW-5), Waqas Khan (given up PW), intercepted a public transport vehicle (U-Tong Bus, Master Executive class, registration No. LET-2239, Blackish colour) at Exit-M1, Motorway link Road Islamabad, coming from Peshawar side. The appellant Rawaiz Khan found sitting on the driver's seat while Irfan (co-accused since acquitted) was recognized as cleaner. On checking of the vehicle, a packet of Chars wrapped in white polythene enveloped with insulation tape covered with

black cloth, lying at the dashboard near windscreen was recovered. PW-4/Inspector Taqi Abbas weighed the contraband along with the taping material and found 1200 grams in total. Inspector/PW-4 separated 10 grams from the recovered substance, prepared its sealed parcel while the remaining contraband was sealed in separate parcel. PW-4 took Chars EX-P1 along with packing material black cloth Ex.P2, vehicle Ex. P3 and its key EX-P4 in his possession through recovery memo Ex-PC attested by PW-5 Saparash Khan and PW Waqas Khan Constable. The Inspector/PW-4 also took in his possession personal belongings of the appellant and co-accused Irfan, through separate recovery Memos Ex.PD and Ex.PE, respectively, also attested by PW-5 Saparsh Khan Constable and Waqas Khan Constable. PW-4/Inspector after preparing complaint Ex. PA sent the same to the Police Station for the registration of formal FIR which was recorded by PW-1 on the same day, tendered in evidence as Ex. -PB. After the registration of FIR, investigation was conducted and on being found guilty, both, the appellant and co-accused (since acquitted), report in terms of Section-173 Cr.P.C was submitted before the court of competent jurisdiction for trial in due course.

3- At the trial, prosecution produced five witnesses i.e. PW-1 Yasir Naseer SI, PW-2 Abdul Razaq HC, PW-3 Jawad Ahmed Constable, PW-4 Taqi Abbas Inspector and PW-5 Saparash Khan, Constable. The learned SPP ANF had given up PW Waqas Khan Constable and closed prosecution evidence. The report of NIH is Ex-PG. The gist of the prosecution evidence is as under:-

PW-1 Yasir Naseer SI On 10.09.2020 drafted formal FIR Ex. PB on the basis of complaint Ex.PA sent by Inspector Taqi Abbas PW-4 through constable Farooq. The witness also testified his signatures, Ex.PA/1 on the complaint Ex.PA.

PW-2 Abdul Razzaq Head Constable had been Moharrar Malkhana at the relevant time, deposed to have received case property of this case on 10.09.2020 i.e. sealed sample parcel, parcel of remaining chars, articles wherein the contraband was wrapped, personal belongings of the appellant and co-accused, vehicle along with its key. Kept the case property in safe custody in Malkhana and on 11.09.2020 transmitted sample sealed parcel to the office of NIH Islamabad through Constable Jawad Ahmed, PW-3.

PW-3 Jawad Ahmed constable on 11.09.2020 collected sample sealed parcel from Abdul Razzaq Moharrar PW-2 and deposited the same in the office of NIH Islamabad on the same day.

PW-4 Taqi Abbas Inspector is the complainant as well as investigating officer of this case. The witness deposed to prove the details of investigation conducted by him at the spot on 10.09.2020 and thereafter, tendered in evidence the report of Chemical Examiner NIH, Islamabad, Ex.PG.

PW-5 Saparash Khan constable, had been member of raiding party, is the recovery witness, deposed to prove the interception of the vehicle, recovery of contraband and other proceedings conducted at the spot.

4- After the recording of above prosecution evidence, appellant and co-accused Irfan (since acquitted) were examined u/s 342 Cr.P.C wherein they denied the prosecution evidence. The appellant in his statement has taken the plea that *PWs registered this false case just to show efficiency to their high ups* The appellant in reply to question No.9 *admitted to the extent that he was driver but had taken the stance that no objectionable thing was recovered from the vehicle*, however, opted not to make his statement on oath under section 340(2) Cr PC or to produce any defence evidence. The learned trial court after hearing the counsel for the appellant, co-accused and learned SPP, acquitted co-accused Irfan while convicted and

sentenced the appellant vide judgment dated 20.07.2023, being assailed through the instant appeal.

5- Learned counsel for the appellant argued that there are material contradictions in the statements of prosecution witnesses with regard to the proceedings conducted at the spot and safe transmission of sample sealed parcels; that under the law, investigation must be conducted by an independent officer, while in the instant case, the complainant himself conducted investigation and that, too, without permission of the high-ups; that crucial witness, constable Farooq, who was also member of the raiding party and took the complaint to the Police Station for the registration of FIR, was neither cited as a witness in the relevant list nor produced in the court in order to testify the proceedings conducted at the spot, therefore, impugned conviction and sentence recorded by the Trial Court vide impugned judgment are liable to be set aside. Learned counsel relied upon case law reported as PLD 1997 SC 408, 2021 P.Cr.L.J 1294, 2022 P.Cr.L.J 1233, PLD 2019 SC 527, 2012 P.Cr.L.J 1151 and 2018 P.Cr.L.J 1476.

6- On the other hand, learned Special Prosecutor ANF repelled the above submissions by contending that the prosecution evidence is firm to establish unbroken chain of events that is corroborated by the positive report of N.I.H. Further argued that the prosecution evidence being of unimpeachable character establishes charge against the appellant who despite lengthy cross-examination failed to bring on record any material discrepancy, therefore, impugned judgment does not call for any interference.

7- We have heard the learned counsel for the appellant, learned Special Prosecutor ANF and have gone through the record with their able assistance.

8- In the present case, narrative begins when a contingent of ANF officials intercepted a public transport vehicle at Exit-M1 Motorway link Road, Islamabad, being driven by the appellant while co accused, since acquitted, was also present in the said vehicle as a cleaner. As per complaint and recovery memo chars wrapped in polythene envelope with yellow insulation tape, in a black colour cloth, was recovered, "lying at dashboard near wind screen" whereas both the witnesses i.e. PW-4 Taqi Abbas Inspector and PW-5 Saparash Khan constable in their examination in chief stated that 01 packet chars wrapped in block cloth was recovered which was lying on the dashboard near the front wind screen.There is no mention in their statements that chars was wrapped in polythene envelope with yellow insulation tape. PW-4, Investigating Officer admitted in cross-examination that recovery effected in present case was neither from personal possession of the accused facing trial, nor from the secret cavity made in the vehicle. The witness also admitted that other passengers were also present in the vehicle from which the accused facing trial was apprehended. PW-5 Saparash constable further elaborated in cross-examination that "around 19 passengers were present in the seized bus at the time of apprehension of the accused facing trial besides some vacant seats."

9- It is established from the evidence, highlighted above that the contraband was lying open at dashboard near wind screen. Neither the contraband was recovered from personal possession of the appellant nor from co-accused, since acquitted. It is further established from the evidence that contraband was also not recovered from any secret cavity of the vehicle and that at the relevant time; around 19 passengers had been onboard. In such eventuality when there is no incriminating material

establishing direct nexus of the appellant with the recovered substance and that, too, particularly when disclosure made by the appellant and co-accused had already been disbelieved by the trial Court, it would not be safe to hold the appellant guilty for the offence charged. No other incriminating material was recovered from the appellant which could be made basis to establish his direct link with the recovered substance. It is also an admitted position that at the relevant time, there were 19 passengers onboard but none of them was joined in investigation, particularly the passengers, who at the relevant time, were holding front seat. Even otherwise, it does not appeal to a prudent mind that contraband was being transported by placing it open on dashboard near front screen, visible to everyone, instead to conceal the same in any secret cavity.

10- Under the law, testimony of a witness is to be accepted or discarded in its totality as the principle of 'sifting chaff from the grain' has since been evolved and the principle "falsus in uno falus in omnibus" has been made integral part of our criminal justice system. The Supreme Court of Pakistan in case reported as (**PLD 2019 SC 527**) *(Notice to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement: In the matter of Criminal Miscellaneous Application No.200 of 2019 in Criminal Appeal No.238-L of 2013, decided on 4th March, 2019.)* has held that:-

"Holding that the rule falsus in uno, falsus in omnibus is inapplicable in this country practically encourages commission of perjury which is a serious offence in this country. A court of law cannot permit something which the law expressly forbids.

16. It can be seen from the analysis of the judgment mentioned above that the main reasoning given for not applying the rule relates to the social conditions prevalent in the country. It seems that because it was felt by the

superior Courts that generally witnesses testifying in criminal cases do not speak the whole truth and have a tendency to exaggerate or economies with the real facts, there is a danger of miscarriage of justice in the sense that a real culprit may go scot free if a court disbelieves the whole testimony on account of reaching the conclusion that the testimony was false in some respect.

11- The Supreme Court of Pakistan in the judgment ***supra*** henceforth made the rule '*falsus in uno, falsus in omnibus*' as an integral part of our jurisprudence in criminal cases in following terms:-

> *"We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against for committing perjury."*

12- The dictum referred above guides to hold that statement of a witness has to be accepted or discarded in its entirety and not in piecemeal. Under the principle *ibid*, statements of both the recovery witnesses i.e. PW-4 Taqi Abbas Inspector and PW-5 Saparash Khan constable are to be read as a whole. Their statements explicitly reveal that contraband was not recovered from personal possession of appellant or co accused, since acquitted, it was not kept in any secret cavity rather was found

lying open on dashboard, close to wind screen and that about 19 passengers were on board but none of them were joined in investigation. In presence of these facts, it would not be just to hold the appellant guilty for the offence charged and the observation of the trial court contained in paragraph 18 of the judgment i.e. *"accused Rawaiz Khan at least cannot escape the liability for keeping the contraband concealed in the bus.."* is result of misreading of evidence in its true perspective as the contraband was not concealed rather found lying open on dashboard of the vehicle near wind-screen.

13- Under the circumstances, case of the appellant and co accused, since acquitted is at par as no incriminating material was recovered from the possession of both of them, the appellant, being driver of the vehicle, cannot be held responsible for the recovered substance in the light of evidence on record whereby it is established that contraband was lying open at the dashboard, which is commonly used by the passengers holding front seat for laying their luggage, 19 passengers were on board but no one was joined in investigation. Since the same set of evidence has been disbelieved qua involvement of co accused, as such, same evidence cannot be relied upon in order to convict the appellant. Reliance is placed upon case of *"Muhammad Akram V. The State" (2012 SCMR 440)* wherein it was observed that:-

> *"Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, as such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of both the eyewitnesses do not find any corroboration from any piece of independent evidence."*

14- Reliance is also paled upon case of *"Muhammad Ali v.The State"* (**2015 SCMR 137**), *"Shaban Akhtar and another v. The*

State through Prosecutor General Punjab" (**2021 SCMR 395**), *"Liaqat Ali and others v. The State and others"* (**2021 SCMR 455**) and *"Muhammad Yasin and another v. The State through P.G. Punjab and others"* (**2020 SCMR 1237**).

15- In order to substantiate the charge, the prosecution was under obligation to establish knowledge of the appellant regarding contraband recovered from the vehicle by producing convincing and trustworthy evidence but they failed to do so, for reasons stated above and, therefore, in absence of the same, it would not be just to hold the appellant guilty for the offence charged. The Supreme Court of Pakistan in the case of "*Riaz Mian and another v. The State*" (**2014 SCMR 1165**), in appeal against conviction and sentence of Life Imprisonment under section 9C of the Act of 1997, entailing recovery of 420-kilogram chars and opium weighing 17-kilogram from a bus, acquitted driver, co-driver and conductor of the bus by observing that *"prosecution was unable to point to any piece of incriminating evidence against the driver, co-driver and conductor of the bus to saddle them with knowledge that they were privy to commission of the subject crime."*

16- Having examined the case from every angle, we have reached to the conclusion that prosecution has failed to establish nexus of the appellant with the recovered contraband, therefore, there left no need to dilate upon rest of incriminating material i.e. safe transmission of sample sealed parcel to the office of NIH Islamabad and its positive report as the same only explores kind of substance recovered i.e. 'chars' and in no way connects the appellant with the commission of alleged offence. Consequently, listed criminal appeal is **allowed**, conviction and sentence of the appellant recorded by the Special Court CNS Islamabad vide impugned judgment dated 20.07.2023 are set-aside. The

appellant is acquitted from the charge by extending him the benefit of doubt. The appellant is in jailwho shall be released forthwith, if not required in any other case.

(SAMAN RAFAT IMTIAZ)
JUDGE

(ARBAB MUHAMMAD TAHIR)
JUDGE

22.02.2024

Announced in open Court on 29.05.2024.

JUDGE

JUDGE

*Luqman Khan,**

APPROVED FOR REPORTING.

SAMAN RAFAT IMTIAZ, J.

17. I have had the pleasure of reading the judgment of my learned brother, Mr. Justice Arbab Mohammad Tahir. I agree with the conclusion drawn by him to allow the instant appeal and consequently to set aside the conviction and sentence of the Appellant awarded vide the Impugned Judgment dated 20.07.2023 passed by the Judge, Special Court (Control of Narcotics Substance), Islamabad. Nevertheless, I feel the need to write this separate concurring opinion due to the significant legal and factual questions involved. For the sake of brevity, I shall adopt the statement of facts as recorded in the judgment of my learned brother as well as the synopsis of arguments submitted by the learned law officers and counsel contained therein.

18. The reason for this separate note is that whilst there is a plethora of judgments containing discussion in respect of the culpability of the driver, conductor and/or passengers for possession of controlled substances including narcotics found in the secret cavities of a vehicle, judgments where such substances have been recovered from the interior of the vehicle lying in plain view are far and few in between. In the instant case, narcotics were found wrapped in a black cloth lying openly on the dashboard of a public transport vehicle with 19 passengers onboard apart from the Appellant/Driver and the Co-accused/Conductor yet only the latter two were apprehended and only the Appellant/Driver was convicted. Therefore, I consider it important to examine past precedent in order to elicit the basic principles involved in affixing liability for 'possession' of controlled substances under Section 6 of the Control of Narcotics Substances Act, 1997 ("**CNSA**") and to elaborate on how such principles have been applied to reach the conclusion to allow the instant appeal and in particular to highlight what the prosecution was required to do to bring home the charges against the Appellant/Driver for future purposes.

(i) *Said Shah Vs. The State*, PLD 1987 SC 288:

(a) The appellants before the Supreme Court in this case were convicted of the offence of illegal transport of liquor under Article 3 of the Prohibition (Enforcement of Hadd) Order, 1979. The bottles of

liquor were found packed in wooden crates in a Suzuki van being driven by one of the three appellants while another was acting as his conductor and the third was an occupant. The driver and the conductor pleaded that although the liquor was found in their vehicle they did not know that the wooden crates contain bottles of liquor as the occupant owned them and had represented that they contain soap whereas the occupant named yet another person as the owner of the liquor.

(b) The Supreme Court at the very outset noted that ownership of the intoxicant would not be necessary for proving the offence under Article 3 (Prohibition of manufacture, etc, of intoxicants) and Article 4 (Owning or Possessing Intoxicants) of the Prohibition (Enforcement of Hadd) Order, 1979. Thus the plea that the appellants did not own the liquor would not make any difference.

(c) Another important principle of law enunciated in this judgment is that no hard and fast rule can be laid down as to presumption regarding driver or conductor of a public vehicle and that it would depend upon the circumstances of each case as to whether the driver or conductor of a public vehicle is *conscious* of the contents of the goods he is transporting or carrying as luggage of a passenger. In the said case the Supreme Court dismissed the appeals filed by all three convicts and held that since there were concurrent findings of facts that the appellants were aware about the contents of the crates there was no justification for interference with them. Though the judgment does not discuss the basis on which the lower courts held that the driver and conductor were aware about the contents of the crates, the takeaway from this judgment is that the prosecution, in order to prove the commission of the offence of possession, is required to prove that possession was conscious.

(ii) *Nadir Khan Vs. The State*, 1988 SCMR 1899:

(a) Heroin was found in the secret cavities of a car with two occupants including the driver. Both the driver as well as the occupant denied knowledge and awareness of the presence of heroin hidden in the car. The driver contended that the car had been given to him for a job by a third person. It was argued on behalf of the petitioners that they could not be said to have knowledge of the presence of narcotics in the vehicle and convicted on that presumption alone and that they have given a plausible explanation and finally that at the most they could be held as carriers for which lenient view ought to be taken.

(b) The Supreme Court observed that the petitioners had the charge of the vehicle for a long journey starting from Peshawar and terminating at Karachi and they had driving licenses also. Thus leave to appeal was refused by holding that the petitioners must be saddled with the necessary knowledge with regard to the vehicle and its contents as persons in charge of the vehicle for a long journey. It was acknowledged that probabilities and presumptions are all dependent on the circumstances of each case but the court opined that the circumstances in the case before it fully established knowledge and awareness of the contents by the petitioners. Thus knowledge and awareness was required but it was presumed based on the circumstances of the case.

(c) Interestingly enough it was held that under the circumstances the petitioner's explanation showing ignorance actually strengthens the conclusion rather than weakening it. Insofar as claiming leniency on account of being carriers is concerned the court held that confessing accused are dealt with leniently as a confession even if belated assists in the administration of justice but that such leniency cannot be claimed or shown to a person who denies the commission of the offence itself to the end rendering no help to identify the real and major culprits and only resorts to it by way of an alternative argument to rely on. Thus a presumption of knowledge and awareness arises against occupants of a vehicle especially on a long journey which presumption cannot be rebutted by a simple denial and claim of ignorance. Furthermore, leniency, if at all, can be shown to a carrier who confesses and thereby assists in locating the persons with greater responsibility in the matter but not one who resorts to such defense only as an alternative at the fag-end only to save himself without providing any assistance in the administration of justice.

(iii) *Shah Wali Vs. The State*, PLD 1993 SC 32:

(a) Heroin was found packed in a plastic and cloth envelope recovered from the seat of a Suzuki driven by one of the petitioners while the other petitioner was seated in the front along with the driver.

(b) The Supreme Court observed that in such cases it was almost impossible to determine as to who the exclusive owner of the narcotics is yet it could not be concluded that neither of the two petitioners was in possession of the heroin nor that only one was in possession and the other had no concern with it and as such it was held that it was in their joint possession. The takeaway from this case therefore is that the prosecution is not required to prove exclusive possession of the narcotics if found openly inside a vehicle occupied

by more than one person and all occupants may be convicted for joint possession.

(iv) *Sherzada Vs. The State*, 1993 SCMR 149:

The conviction of the driver of a car from the secret cavities of which heroin was found was upheld by the Supreme Court in this case. According to the documents recovered from the car it belonged to another person. Two children of the car owner were also traveling in the car with the driver. The counsel's argument that the appellant did not have conscious possession of the contraband and that the possibility that the heroin was put in the secret chambers of the car by the owner without the knowledge of the driver could not be ruled out was repelled as follows:

> *"10. **It is true that the offence cannot be made out against any person unless he has the conscious possession of the contraband article, but the knowledge is an inner quality which can only be inferred from the circumstances of the case.** There is no hard and fast rule which can be laid down in this respect. **It depends upon the circumstances whether the knowledge and conscious possession have been reasonably inferred from the facts proved on the record.** In the present case the appellant was driving the car from Mardan and it is not believable that he had no knowledge of the articles found in the car. **Had he taken the plea that the articles were found in the secret chambers and they were put by the owner without his knowledge, this point can be helpful to him, but in the instant case he did not take such a plea,** He did not only deny the fact of recovery, but also claimed that the secret chambers were created by the Excise party itself. In such a case it cannot be held that he did not have the knowledge of the articles found in the car driven by him. ..." [Emphasis added]."*

(v) *Zahoor Ahmad Awan Vs. The State*, 1997 SCMR 543:

(a) Heroin was recovered during search of the driver's cabin from the ceiling of a truck above the driver's seat. The driver as well as his companion sitting in the front seat next to the driver were both apprehended.

(b) The argument put forward was that the prosecution did not succeed in proving that the appellants had knowledge that contraband material was concealed in the truck or they were owners of the drug or the vehicle. The argument was found impressive inasmuch as the prosecution did not produce the evidence to demonstrate that it was in the exclusive knowledge of the appellant that heroin was found in the truck they were travelling in. The Supreme Court held that the possibility that the appellants did not know that heroin was concealed in the truck along with fodder could not be excluded and as such the

appeal was accepted and the conviction and sentence of the appellants were set aside.

(vi) *Ghulam Qadir Vs. The State*, PLD 2006 SC 61:

The driver of the bus contended that he cannot be held responsible for transporting 320 kg of poppy flowers if they were lying openly on the roof of the bus and at best his responsibility would start only if narcotics had been recovered from cavities of the bus. The Supreme Court referred to Article 29(d) of the CNSA where under unless otherwise proved, presumption would be that an accused has committed an offence under this Act in respect of any material which have undergone any process towards the production or manufacture of narcotics, drug psychotropic substance or controlled substance or any residue left of the materials from which a narcotic drug, psychotropic substance or controlled substance has been produced or manufactured for the possession of which he fails to account satisfactorily. It was noted that presence of petitioner being driver in the vehicle is not denied and that invariably the driver claims not to have knowledge when narcotics are recovered from their possession but that such contention has been rejected in cases referred to in the said judgment. The Supreme Court was not inclined to believe that the petitioner who was driving the vehicle would be unaware of eight sacks on the roof of the vehicle and the contents recovered from them despite the fact it was argued that a number of passengers were travelling along with their luggage in the bus and therefore the possibility cannot be overruled that the recovered articles were owned by one of them and the Supreme Court dismissed the petition.

(vii) *Qaisarullah Vs. The State*, 2009 SCMR 579:

Charas recovered from the secret cavities of a car was pointed out by the driver and the passenger sitting in the front seat. The Supreme Court held that the driver was rightly convicted, however, the other appellant was acquitted by extending him the benefit of doubt as the prosecution failed to connect the other appellant with the ownership of the car whose defense from day one was that he merely took a ride with the driver and that he knew nothing about the concealment of narcotics in the car which was neither driven by him nor owned by him.

(viii) *Muhammad Noor Vs. The State*, 2010 SCMR 927:

(a) The narcotics in this case were recovered from the secret cavities of a jeep on disclosure of the driver and co-accused out of a total of five occupants. Both the driver and the co-accused who

pointed out the location of the narcotics were convicted while the remaining occupants were acquitted.

(b) This judgment firstly reiterates that Section 6 of the CNSA does not require exclusive possession and that possession can be joint between two or more persons.

(c) It was argued before the Supreme Court on behalf of the convicts that possession *simplicitor* would not constitute an offence unless it is accompanied with *mens rea*. The Supreme Court interpreted the word "possess" as used in Section 6 of the CNSA to mean that the prosecution must prove that the accused was knowingly in control of something in the circumstances which showed that he was assenting to being in control of it but that it is not necessary to show that he had actual knowledge of that which he had. The Supreme Court relied upon *Warner Vs. MPC*, (1969) 2 A.C. 256 (11.L) whereby it was held that it is not necessary to prove *mens rea* apart from the knowledge involved in the possession of the article. The majority held that in a case of this nature it is not necessary for the prosecution to prove that the accused had consciousness of the guilt or the nature of the thing possessed and that it would be sufficient if it is proved that the person was knowingly in possession of the article. It was pointed out that in most cases it will be very difficult for the prosecution to prove that the accused was knowingly in possession of narcotic drugs and that is why the Legislature enacted a provision in the shape of Section 29 of the CNSA to shift the burden upon the accused to disprove the possession once the prosecution proves that the accused was in possession of narcotic drugs.

(d) Thus the Supreme Court explained that in the case of possession of narcotic drugs first the prosecution has to establish the fact that the narcotic drugs were secured from the possession of the accused then the court is required to presume that the accused is guilty unless the accused proves that he was not in possession of such drugs. Therefore, it is necessary for the prosecution to establish that the accused has some direct relation with the narcotic drugs or has otherwise dealt with it. If the prosecution proves the detention of the article or physical custody of it then the burden of proving that the accused is not knowingly in possession of the article is upon him. It was further explained that mere physical custody without knowledge of an offence is not sufficient to constitute an offence and conscious possession is necessary nevertheless it is a different thing to say that the prosecution should prove that the accused was knowingly in possession. By virtue of Section 29, CNSA the prosecution only has to show through evidence that the accused has dealt with the narcotic substance or has physical custody of it or was directly concerned with

it unless the accused proves that he did not knowingly or consciously possess the article and without such prove the accused will be held guilty.

(e) In the same case the Supreme Court reiterated with regard to the driver of the vehicle that the driver is in-charge of the vehicle, therefore, it would be under his control and possession and whatever articles lying in it would be under his control and possession.

(f) The case of the other occupants who were sitting in the vehicle and did not point out the location of the narcotic drugs was distinguished. It was held that in such cases the prosecution is required to produce evidence to show that the said persons were in joint possession and control of the vehicle or that they had concern or dealt with the narcotic substances particularly when they are concealed in secret cavities. It was also observed that if on the other hand property was lying in open view of the said persons or they knew of the placement of the property then the situation would be different and they would be required to explain their position in terms of Article 122 of the Qanun-e-Shahdat, 1984 and without such explanation their involvement in the case would be proved. However, in the case before the Supreme Court the prosecution was only able to prove their presence in the vehicle and mere presence was held not to be sufficient to involve them in the case.

(ix) *Kashif Amir Vs. The State*, PLD 2010 SC 1052:

(a) The petitioner was apprehended while driving a car along with another person sitting in it. The search of the car led to the recovery of *charas* and opium from its secret cavities. Both accused persons were convicted but in the case before the Supreme Court only the driver challenged the conviction.

(b) The Supreme Court held that it is well settled principle that a person who is in the driving seat of the vehicle shall be held responsible for the transportation of narcotics, having knowledge of the same as no condition or qualification has been made in Section 9 (b), CNSA that possession should be in exclusive one and that it can be joint.

(c) Further that when a person is driving a vehicle he is in charge of the same and it would be under his control and possession hence whatever articles lying in it would be under its control and possession and that possession would be attributed to the in charge of the vehicle. The Supreme Court also noted that once the prosecution has *prima facie* establish its case then the burden shifts upon the accused under Section 29, CNSA to prove the contrary. In the case before the

Supreme Court it was held that the prosecution discharged its initial burden while proving that narcotics were recovered from the petitioner, as such, the burden had shifted to the petitioner to prove his innocence, which he failed to do so.

(x) *Haji Inayat Vs. The State*, 2010 P.Cr.L.J. 825:

(a) *Charas* was recovered from a secret cavity near the fuel tank of a truck occupied by the driver and his helper both of whom were apprehended.

(b) The Sindh High Court at Karachi noted that Section 6 of CNSA comprises of a number of different and distinct elements and the contravention of any element is an offence punishable under Section 9. In the case before the Sindh High Court only two elements namely 'possession' or 'transportation' of *charas* were involved and the question before the court was whether possession or transportation of *charas* had been established beyond reasonable doubt. The court observed that the answer to the question whether the prohibited substance was being transported by the accused lies in whether he can be said to be in possession thereof since for example the drug may be onboard the conveyance unknown to the accused.

(c) It was held that the accused can be said to have possession of prohibited drugs onboard the conveyance if either (i) the drugs were in actual physical possession of the accused or (ii) the facts admitted or proved at trial establish beyond reasonable doubt that the accused knew or must be regarded as having known that the drugs were in or onboard the conveyance.

(d) The court followed *Zahoor Ahmad Awan (Supra)* while acquitting the appellants and took into view that the appellants were simply the driver and his helper and not the owner of the truck. Further that the *charas* was found from a secret compartment located upon search of the truck by the Excise Officer and not pointed out by the appellants. The court especially took note of the fact that the *charas* was not lying in the truck in an open and easily accessible place or manner unlike the case of *Shah Wali (Supra)* in which the heroin was found wrapped in a plastic and cloth envelop lying on the passenger seat of the car and in *Ghulam Qadir (Supra)* in which the prohibited substance was found lying openly in eight sacks on the roof of a coach and in both cases the appeals were dismissed. The reasoning of the court is as follows:

> *15. In our view, for the reasons hereinafter stated, the answer to the above question must be in the negative. Neither of the appellants was the owner of the truck. They were simply its driver and his helper. The Charas itself was not lying in the*

truck in an open or easily accessible place or manner, e.g., in the back of the truck under the driver's seat (whether openly or in a locked container or box). (In Shah Wali and another v. The State PLD 1993 SC 32, the heroin was found wrapped in a plastic and cloth envelop which was lying on the passenger seat of the car, while in Ghulam Qadir v. The State PLD 2006 SC 61, the prohibited substance was found lying openly in eight sacks on the roof of the coach. In both cases, the appeals of the convicted accused were dismissed). In the present case however the Charas was hidden in a secret compartment inside the body of the truck (near the petrol tank). This secret compartment was not pointed out or revealed by either of the appellants, but was located upon a search of the truck's body by the excise officers. ***The compartment had to be opened with the help of a hammer, i.e., it was locked or sealed in some manner. Although the appellants were searched, the record does not show whether any key or other tool to open the compartment was found on their person or in the truck. The Charas was in packets of one kg each kilogram was wrapped in plastic. The record does not show whether any attempt was made to determine whether appellants had handled the packets. For example, the packets could have been dusted for fingerprints for comparison with the fingerprints of the appellants. If such an exercise had revealed a match with either (or both) of the appellants. That would have established that they had handled the packets, e.g., while placing them in the secret compartment.*** *These are just a few factors which come readily to the mind of any reasonable person when considering the question whether the appellants knew or could be regarded as knowing that the Charas was on board the truck. No doubt a professionally trained team, carrying out a properly conducted search, could think of many more ways of connecting the appellants with the Charas in a legally relevant and permissible manner. No such method was however, adopted nor was any such exercise carried out. There is also nothing on the record to show the destination of the truck or the duration of the journey; the only thing that is established is that the truck was coming from Sukkur side. (In Nadir Khan and another v. the State 1988 SCMR 1899, it was held that the person in charge of a vehicle on a long journey (in that case, from Peshawar to Karachi) can be saddled with knowledge of the contents of goods being carried in the vehicle.) In our view therefore, it cannot be said to have been established beyond reasonable doubt that the appellants knew or could be regarded as knowing that the Charas was in or onboard the truck. This is so notwithstanding the existence of other facts that could be said to point in the opposite direction. For example, the truck sped away instead of stopping when signalled to do so, and the secret compartment was located near the petrol tank. These facts can reasonably raise a suspicion. However, suspicion is not proof, and it is certainly not proof beyond reasonable doubt." [Emphasis added].*

(xi) *Rehmatullah Vs. The State*, 2011 YLR 2477:

(a) A passenger bus was stopped and the driver and another person were apprehended both of whom disclosed that *charas* was stored by them in a secret cavity of the bus.

(b) The Sindh High Court at Karachi upheld the conviction of the driver by concluding that it is a trite proposition of law that items recovered from the vehicle in possession of the driver are presumed to be in his control and knowledge and that in case the drugs were secured from the possession of an accused then it is normally believed that he has direct relationship with the drugs and the burden of proof lies heavily on him.

(c) On the other hand, the other person was acquitted. The court noted that although the prosecution alleged that *charas* was recovered from the secret cavities of the bus on the disclosure of both the accused but it failed to prove the connection of the second accused with the crime as not a single word has been said as to whether he was a cleaner or a passenger. The court also noted that although PW-1 admitted that there were other passengers also on the bus neither inquiry was made from such other passengers nor any record kept about them.

(xii) *Jangi Khan Vs. The State*, 2012 P.Cr.L.J. 109:

(a) Narcotics were recovered from the secret cavities of a coach in which there was a driver and a conductor whereas a third person escaped during interrogation.

(b) The Baluchistan High Court dismissed the appeal of the driver and conductor by holding that the argument that they were not owner of the bus has no force and that since recovery was made from the secret cavities affected on the disclosure of both the appellants the disclosure was within the ambit of Article 40 of the Qanun-e-Shahdat Order, 1984. The court held that since they were the driver and conductor of the bus they were under legal obligation to have satisfied the conscience of the court justifying the inference that neither of them was aware of concealment of contraband on the bus.

(xiii) *Bakht Gul Vs. The State*, 2012 P.Cr.L.J. 338:

(a) *Charas* and opium were recovered from the trunk of a taxi on search by police officials. All five occupants including the driver were apprehended. On appeal before the Supreme Court, the driver pleaded that he was only a driver of a taxi and not the owner, thus he had no control over items in the vehicle's storage compartment and had he been aware of the contraband, he would have concealed it. Additionally, it was contended that the contraband might belong to a passenger who hired his services.

(b) However, the Supreme Court, while upholding his conviction, ruled that while driving, the driver assumes responsibility for the vehicle, and therefore anything lying in the vehicle would be under his control and possession.

(c) With regard to the remaining occupants who were allegedly found sitting in the car as passengers, the Court explained that mere presence of the appellants in the vehicle would not involve them in the case, and that the prosecution is required to produce evidence to show that the occupants had joint possession and control of the vehicle or that they had any concern or dealt with the property in any manner. This obligation arises particularly when the narcotics substance is concealed or hidden from other persons in the vehicle, such as in the trunk.

(d) It was also noted that if the contraband was lying open within the view of the remaining occupants or they were aware of its placement, then they would be required to explain their position in terms of Article 122 of the Qanun-e-Shahadat Order, 1984. Failure to do so would result in their involvement in the case being considered proven. The Supreme Court acquitted the remaining occupants since the contraband was not within their view and they had no knowledge of its placement.

(xiv) *Muhammad Saleem Vs. The State*, 2013 P.Cr.L.J 1837:

The owner, driver, second driver and conductor of a bus were apprehended who pointed out several boxes and sacks containing *charas* and opium lying openly on the roof of the bus and as such their appeals were dismissed by the Sindh High Court at Karachi.

(xv) *Hussain Shah Vs. The State*, PLD 2020 SC 132:

(a) *Charas* was recovered in this case from a secret cavity of a vehicle which was intercepted by the raiding party. The conviction of the driver was upheld by the Supreme Court whereas the conviction of the cleaner/helper was set aside.

(b) The Supreme Court observed that the prosecution witnesses deposing about the alleged recovery were public servants who have no ostensible reason to falsely implicate the driver. On the other hand as far as the co-accused was concerned who according to the prosecution was a cleaner and helper the Supreme Court held that it is settled by now that if the prosecution fails to establish conscious possession or knowledge with regard to presence of narcotics in the secret cavity of the vehicle then the passenger cannot be convicted solely on the basis of his availability inside the vehicle at the relevant time.

(xvi) *Fayaz Vs. The State*, 2022 MLD 1452:

(a) *Charas* was found in two bags on the roof of a passenger bus/coach. On inquiry the driver and conductor of the bus disclosed that the bags belong to certain passengers.

(b) The Sindh High Court observed that the *charas* had not been recovered from exclusive possession of the accused passengers and that investigation was defective on account of failure to examine the bus driver and its cleaner so also the passengers who were travelling in that bus to establish the ownership of the accused with regard to the bags lying on the roof of the bus. Thus the passengers were acquitted on appeal.

19. The principles that can be gleaned from the above case law can be summarized as follows:

(I) Ownership of narcotics is not necessary for the offence of 'possession'.

(II) The prosecution has to first establish the fact that the narcotic drugs were secured from the 'possession' of the accused.

(III) Possession must be conscious.

(IV) 'Conscious possession' can be inferred from the circumstances.

(V) 'Conscious possession' can be established if it is proved that the accused was knowingly in possession of the article even if he was not conscious of the nature of the substance he is in possession of.

(VI) Presumption regarding driver or conductor of a public vehicle depends upon the circumstances of each case as to whether the driver or conductor is conscious of the contents of goods he is transporting or carrying as luggage of a passenger.

(VII) An accused can be said to have possession of prohibited drugs onboard the conveyance if either (i) the drugs were in actual physical possession of the accused or (ii) the facts admitted or proved at trial establish beyond reasonable doubt that the accused knew or must be regarded as having known that the drugs were in or onboard the conveyance.

(VIII) Driver is in-charge of the vehicle therefore it would be under his control and possession and whatever articles lying therein.

(IX) Persons in charge of a vehicle for a long journey must be saddled with the necessary knowledge and awareness with regard to the vehicle and its contents which cannot be rebutted by a simple denial and claim of ignorance.

(X) Driver is presumed to be in conscious possession of contraband discovered from secret cavity unless he can show that they were put there by the owner of the vehicle without his knowledge.

(XI) Mere presence in the vehicle not sufficient to involve other occupants in the case by itself. Prosecution is required to produce evidence to show that the occupants/passengers had joint possession and control of the vehicle or that they had any connection, concern or dealt with the property in any manner particularly when the narcotics substance are recovered from the secret cavities or when they are concealed or hidden especially when there are other passengers onboard. Connection is not established if no inquiry is made from such other passengers nor any record kept about them.

(XII) If the contraband was lying open within the view of the remaining occupants/passengers or they were aware of its placement, then they would be required to explain their position in terms of Article 122 of the Qanun-e-Shahadat Order 1984. Failure to do so would result in their involvement in the case being considered proven.

(XIII) Once the prosecution has *prima facie* established possession then the burden shifts upon the accused under Section 29, CNSA to prove the contrary.

(XIV) Where the accused persons are unable to discharge their burden but it is impossible to determine exclusive possession of the narcotics lying in open view inside a vehicle occupied by more than one person yet it cannot be concluded that none was in possession all occupants including driver and other occupant may be convicted of joint possession.

20. Thus in order to establish the offence of 'possession' under Section 6, CNSA ownership of the substance is not necessary. In cases of recovery of narcotics from vehicles, the offence of 'possession' is made out if the narcotics are recovered either from the physical possession of the accused or if facts admitted or proved through evidence establish that the accused knew or must be regarded as having known that narcotics were in or onboard the conveyance.

21. However, possession must be conscious in order to constitute the offence but conscious possession can be established if it is proved that the

accused was knowingly in possession of the article even if he was not conscious of the nature of the substance he is in possession of.

22. The bulk of the case law discussed herein above upholds the conviction of the driver in cases of recovery made from secret cavities of a vehicle on the presumption that driver being in charge of the vehicle has knowledge and awareness of the articles lying in the vehicle. It has been consistently held by the apex Court that the driver, even if not the owner of the vehicle, is in control and in possession of the vehicle, hence there is a presumption that he is in conscious possession of the articles lying in it with the exception of *Zahoor Ahmad Awan (Supra)* followed by the Sindh High Court in *Haji Inayat (Supra)*.

23. This presumption has also been applied in cases and conviction of drivers upheld where narcotics were found lying in open view inside the vehicle. However, for purposes of the case at hand, it is noteworthy that in such cases where narcotics were found lying in open view inside the vehicle in which there were other occupants i.e., conductor, helper or passengers all such occupants were also apprehended. It has also been observed repeatedly that mere presence in the vehicle is not sufficient to establish the offence of 'possession' under Section 6 of the CNSA when the narcotics are recovered from secret cavities or are concealed or hidden and the prosecution is required to prove that the accused had joint possession of the vehicle or had some concern with or otherwise dealt with the narcotics. Where however, contraband is found lying in plain view or in an open and easily accessible place inside the vehicle all occupants of a vehicle are required to explain their position in case of recovery of contraband.

24. Once prosecution *prima facie* establishes its case of possession then the burden shifts upon the accused under Section 29, CNSA to prove the contrary. In all the cases of recovery of contraband from inside the vehicle lying in open view that have been examined by me hereinabove the driver and all occupants/passengers have been convicted of joint possession.

25. In the case at hand, the narcotics were not found in the exclusive physical possession of the Appellant/Driver. The narcotics were found

wrapped in a cloth lying openly on the dashboard of the bus. Although the prosecution alleged that both the Appellant/Driver and the Co-Accused, after some hesitation, disclosed that *charas* is wrapped in the black cloth recovered from the bus during the search, the learned Trial Court has already rightly rejected such evidence in respect of the Co-Accused/Conductor by holding that joint disclosure has no evidentiary value[1]. Neither finger printing was conducted to establish that the Appellant/Driver dealt with the contraband nor was any other connection established. Admittedly there were 19 passengers onboard the bus apart from the Appellant/Driver and Co-Accused/Conductor yet none of the 19 passengers were questioned nor implicated in the case. At best the Appellant/Driver could have been charged with joint possession with one or more of the other occupants/passengers but such charge could not be proved without implicating the other passengers. On the other hand, the Co-Accused/Conductor has been acquitted for lack of evidence. In such circumstances, the prosecution has failed to establish beyond a reasonable doubt that the *charas* recovered from a place inside the bus to which all occupant/passengers had access to was in the exclusive or joint 'possession' of the Appellant/Driver.

26. For the aforesaid reasons this appeal is **allowed**, the conviction and sentence of the Appellant recorded by the Judge, Special Court (Control of Narcotics Substance), Islamabad is set-aside and he is acquitted of the charge by extending him the benefit of doubt. He shall be released from the jail forthwith if not required to be detained in connection with any other case.

(SAMAN RAFAT IMTIAZ)
JUDGE

Approved for Reporting

JUNAID

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[1] *Khurram Vs. The State*, 2019 SCMR 1317