

**IN THE SUPREME COURT OF PAKISTAN**

( Appellate Jurisdiction )

**PRESENT:**

MR. JUSTICE ANWAR ZAHEER JAMALI, CJ  
MR. JUSTICE MIAN SAQIB NISAR  
MR. JUSTICE AMIR HANI MUSLIM  
MR. JUSTICE IQBAL HAMEEDUR RAHMAN  
MR. JUSTICE KHILJI ARIF HUSSAIN

**CRIMINAL APPEAL NOS. 12-P,13-P OF 2011**

(on appeal from the judgment of the Peshawar High Court, Peshawar dated 21.07.2010 passed in Criminal Appeals No.264 & 270 of 2009)

**AND**

**CRIMINAL APPEAL NOS. 17-P & 18-P OF 2011**

(on appeal from the judgment of the Peshawar High Court, Peshawar dated 03.03.2011 passed in Criminal Appeals No. 390 & 415 of 2009)

**AND**

**CRIMINAL APPEAL NOS. 7-P TO 9-P OF 2012**

(on appeal from the judgment of the Peshawar High Court, Peshawar dated 21.09.2011 passed in Criminal Appeals No. 186, 190 & 244 of 2009)

The State through Director ANF Peshawar ...**Appellant**

**VERSUS**

Rashmali Khan	(in Cr.A 12-P/11)
Islam & another	(in Cr.A 13-P/11)
Murad Khan	(in Cr.A 17-P/11)
Said Ahmed	(in Cr.A 18-P/11)
Sher Mohammad	(in Cr.A 7-P/12)
Ameerzeb & another	(in Cr.A 8-P/12)
Ahmedzeb	(in Cr.A 9-P/12)
	<b>...Respondents</b>

For the Appellants:

(in all cases)

Raja M. Inam Amin Minhas, Sp.Prosecutor ANF

For the Respondents:

(in Cr.As 12,13/11 & 9-P/12)

N.R.

(in Cr.As 7-P,8-P/12) Nemo.

(in Cr.As 17,18-P/12) Mr. Jaffar Raza Khan, ASC

Date of Hearing: 24.02.2016.

**JUDGMENT**

**Anwar Zaheer Jamali, CJ.**— These appeals, with leave of the Court, arise out of various judgments passed by the Peshawar High

Court, Peshawar, in the cases where the respondents were charged, convicted and sentenced under the provisions of Section 9(c) of the Control of Narcotics Substance Act, 1997 (hereinafter referred to as "CNSA"). As the moot point is common in all cases, therefore, we propose to decide them with this single judgment.

2. Before proceeding further to examine the crux of controversy involved, it will be appropriate to summarize the facts of these cases as under:

3. Criminal Appeals No. 7-P to 9-P of 2012, arise out of common FIR No.16 dated 21.04.2007 registered under Section 9(c) of CNSA at Police Station ANF Kohat, wherein it was alleged that the respondents, who were four in number, were trafficking 68.2 Kg of Chars Garda to Karachi in a bus bearing No.PA-0085. The Trial Court, vide judgment dated 13.05.2009, convicted and sentenced each one of them with imprisonment for life along with a fine of Rs.50,000/- or in default whereof to undergo one year S.I. and benefit of Section 382-B Cr.P.C. was extended to them. The respondents assailed this judgment by filing separate appeals before the Peshawar High Court, Peshawar, whereby vide judgments dated 21.09.2011, their sentences were reduced to 10 years R.I. and the fine was reduced to Rs.25,000/- or in default whereof to suffer further six months S.I. The benefit of Section 382-B Cr.P.C. was kept intact. The reasons for reduction in sentence assigned by the High Court were two fold; firstly, the quantity of Chars Garda, weighing 68.200 Kg in powder form could have been reduced in weight up to 30-40% and even upto 50% when processed. Therefore, the quantity to be considered in determining the quantum of sentence would be reduced to 40 Kg. Thus, all the respondents for the purpose of quantum of sentence were saved from the rigours of proviso to Section

9(c) of CNSA, providing minimum punishment of life imprisonment in those cases where the total quantity recovered exceeds 10 Kilograms.

4. Criminal Appeals No. 12-P and 13-P of 2011, arise out of FIR No.15 dated 20.04.2007 registered under Section 9(c) of CNSA at Police Station ANF Kohat, wherein it was alleged that the respondents, who were three in number, were carrying 12.5 Kg of Chars Garda in a bus bearing No.BK-3875. They were accordingly charged and tried by the CNS Court and vide judgment dated 09.06.2009, convicted and sentenced with imprisonment for life along with a fine of Rs.50,000/- each or in default whereof to undergo one year S.I. The benefit of Section 382-B Cr.P.C. was also extended to them. The respondents assailed this judgment by filing separate appeals before the Peshawar High Court, Peshawar, whereby vide judgment dated 21.07.2010, their sentences of life imprisonment were reduced to four years R.I. and fine was also reduced to Rs.25,000/- or in default whereof to undergo further six months S.I. The benefit of Section 382-B Cr.P.C. was kept intact. The reasons assigned by the High Court were two fold; firstly, the recovery of Chars Garda, weighing 12.5 Kg in powder form could have invariably been reduced in weight up to 30% when processed, therefore, the case of the appellants was outside the ambit of the provisions of Section 9(c) of the CNSA and further the total quantity was to be equally distributed among the number of convicts therefore each of them was liable for quantum of sentence befitting  $\frac{1}{3}$ <sup>rd</sup> quantity of processed Chars Garda.

5. Lastly, Criminal Appeals No. 17-P and 18-P of 2011, arise out of FIR No.7 dated 25.07.2008 registered under Section 9(c) of CNSA at Police Station ANF Kohat, wherein it was alleged that the respondents, who were two in number along with co-accused lady, were found in possession of 24 packets of Chars Garda weighing 28.8 Kg and

a packet of opium weighing 500 grams, which were concealed in CNG cylinder of a car bearing No.LEE-9846-07. They were accordingly charged, proceeded and the Trial Court, vide judgment dated 04.08.2009, extending benefit of doubt acquitted the lady accused, Sultana, while convicted and sentenced each of the respondents with imprisonment for life along with a fine of Rs.50,000/- each or in default whereof to undergo one year S.I. and the benefit of Section 382-B Cr.P.C. was also extended to them. The respondents assailed this judgment by filing separate appeals before the Peshawar High Court, Peshawar, whereby vide judgment dated 03.03.2011, their sentence of imprisonment for life was reduced to 10 years R.I. and fine was also reduced to Rs.25,000/- each or in default whereof to undergo further six months S.I. The benefit of Section 382-B Cr.P.C. was kept intact. The reasons assigned by the Court were two fold; firstly, the quantity of Chars Garda in powder form, weighing 28.8 Kg recovered from the possession of two convicts was liable to be reduced in weight up to 30-35% when processed. Thus, the quantity to be considered in determining the quantum of sentence would be reduced to 20 Kg, which was to be equally divided between the two accused for the purpose of determining their quantum of sentence.

6. We have heard arguments of learned Special Prosecutor ANF on behalf of the appellants and Mr. Jaffar Raza Khan, ASC. The learned Special Prosecutor ANF argued that after the promulgation of CNSA, innumerable cases have been proceeded and decided up to the level of Apex Court, yet this novel procedure of reducing the quantity of Chars Garda from 30 to 50 % on the pretext of being reduced when processed has never been applied or followed as it is entirely alien to the provisions of CNSA; Section 9 whereof clearly contemplates quantum of sentences based on the recovered quantity of narcotic substance.

Moreover, the approach of the Hon'ble Peshawar High Court regarding equal distribution of recovered quantity of Chars Garda among the number of convicts involved, also lacks any legal backing or moral justification. In this regard, the arbitrariness of impugned judgments is further exposed from the fact that they contain no useful discussion or sound reason on either of these two points.

7. When learned ASC for the respondents was confronted with these legal questions, he was unable to offer any factual or legal foundation elucidating or defending the identical view taken by the Peshawar High Court in all these cases.

8. It is pertinent to note that in these appeals, various judgments of the trial Courts which were impugned before the Peshawar High Court were maintained to the extent of conviction of respondents and remained unchallenged; therefore, we do not need to advert to this aspect of the matter but only to the quantum of sentences modified and awarded by the High Court through its impugned judgments. The learned ASC for the respondents also conceded to this position for the reason that against the impugned judgments of the Peshawar High Court, whereby respondents were convicted and sentences awarded to them by the trial Court were reduced, they did not prefer any appeal challenging their convictions, which thus attained finality. To this extent, facts in all these cases are quite similar and undisputed, therefore, in order to decide these cases, following points for determination are formulated:

- (a) whether the trial Court or the appellate Court could proceed on the assumption that for determining the quantum of sentence, recovered quantity of Chars Garda is to be first processed and then its net quantity is to be made basis for this purpose?

- (b) whether the quantum of sentence awarded to a convict under section 9(a), (b) or (c) of CNSA shall commensurate with the exact quantity of the recovered narcotic substance or the self invented formula for processing of Chars Garda, purportedly reducing its weight from 30 to 50 %, is to be applied to extend its benefit to the convict, while determining his quantum of sentence, if so, on what legal basis?
- (c) whether in a case involving several convicts, the total quantity of narcotic substance recovered from their possession is to be equally distributed between them to determine the quantum of their sentence, if so, then on what legal principle or analogy?

9. As discussed in the earlier part of the judgment, in the instant proceedings sentences awarded to all the respondents have been saved from the rigours of proviso to section 9 (c) of CNSA by following the principle of (presumed) reduction in the quantity of recovered Chars Garda, when processed, though in none of these cases Chars Garda was processed or even asked for or directed to be processed, and further by adopting the formula of equal/even distribution of such remaining quantity amongst all the convicts followed by the Peshawar High Court. In two appeals, showing recovery of 68.2 Kg and 28.8 Kg and number of convicts as four and two respectively, the sentences of convict respondents have been reduced to 10 years R.I. with fine of Rs. 25,000/-, while in the third appeal, showing recovered quantity as 12.5 Kg with three convicts, it has been reduced to 4 years R.I. with fine of Rs. 25,000/-.

10 Before proceeding further, at this stage, it will be useful to reproduce section 9 of CNSA which reads thus:

***“Section 9. Punishment for contravention of sections 6,7 and 8. Whosoever contravenes the provisions of Sections 6,7 and 8 shall be punishable with—***

*(a) Imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug, psychotropic substance or controlled substance is one hundred grams or less;*

*(b) Imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds one hundred grams but does not exceed one kilogram;*

*(c) Death or imprisonment for life or imprisonment for a term which may extend to fourteen years and shall also be liable to pay fine which may be upto one million rupees, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds the limits specified in clause (b).*

*Provided that if the quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life.”*

11. A bare reading of the above reproduced provision of law reveals that a person convicted under Section 9 CNSA, for the purposes of sentencing, is to be placed in three categories depending upon the quantity of narcotic substance recovered. Section 9 (a) specifies the quantum of sentence if the quantity recovered is 100 gm or less; section 9 (b) provides quantum of sentence for cases where the quantity recovered is more than 100 gm but less than 1 kg; and section 9 (c) specifies the quantum of sentence for any quantity exceeding 1 kg. Additionally, the proviso to section 9 (c) provides for the quantum of minimum sentence in those cases where the quantity of narcotic substance recovered exceeds 10 kg. Thus, it is evident that nowhere in

the entire scheme of CNSA, the Courts have been empowered to either send the recovered quantity of Chars Garda for processing or arbitrarily reduce its quantity without any supporting material in this behalf or any intelligible criteria or legal justification for this purpose, as has been done by the Peshawar High Court in all the impugned judgments. Such view of the matter is, therefore, disapproved and rejected as being conjectural and unlawful. In this context it will be pertinent to mention here that the exercise to be undertaken by the Investigating Officer for the purpose of obtaining test report regarding narcotic drug, psychotropic substance and controlled substance from the chemical examiner as visualized under Section 36 of the CNSA read with Control of Narcotic Substances (Government Analyst) Rules, 2001 has no nexus to the above discussed theory of processing of Chars Garda advanced by the High Court.

12. Similarly, the provisions of CNSA do not permit the practice of equal distribution of total quantity of narcotic substance recovered from the possession of more than one convict in order to determine their individual sentences within the parameters of Section 9 of CNSA. The conclusion contrary to it recorded in the impugned judgments has also no legal sanctity; therefore, it could not be endorsed or approved. To put it in simple words, 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, which is the general law applicable to criminal cases, as unless expressly declared inapplicable the principles of general law are deemed to be applicable to a special law.



13. In the case of Ameer Zeb v. The State ( PLD. 2012 SC 380 ) passed by a larger Bench of five Hon'ble Judges of this Court, the question of quantity of recovered narcotic substance for the purpose of sentencing has been discussed as under:

*"It is of paramount importance to notice in this context that the sentences specified in the Control of Narcotic Substances Act, 1997 depend upon the quantity of the recovered narcotic substance and not upon the narcotic content of the recovered substance and, thus, quantity in such cases is the determinative factor as far as the sentences are concerned. It is, therefore, absolutely necessary that in all such cases there should be no room for doubt as to the exact quantity of the substance recovered and also as to the entire recovered substance being narcotic substance."*

The above conclusion thus, aptly encapsulates this aspect of the matter.

14. Admittedly, in these cases, at no stage of the proceedings, either before the Trial Court or the Appellate Court, the actual quantity of Chars Garda recovered from the possession of respondents was disputed; neither any plea that Chars Garda when processed would be reduced in quantity was raised by the respondents nor any such exercise was ever undertaken or warranted by law. The definition Clauses provided under Section 2 of CNSA covers different categories of narcotic drugs and psychotropic substance in detail, which leave no further room for any speculation about their net quantity. Additionally, Section 3 of the CNSA only confines the question of calculation of percentage of narcotic substance to liquid preparations. Thus, these admitted facts, evident from the case record, and the legal position, are sufficient to show that the exercise of jurisdiction of Peshawar High Court in this context was entirely capricious, fanciful and contrary to the case record.

15. As a sequel of above discussion, the points for determination formulated in the earlier part of this judgment are

answered as (a) Negative; (b) Exact quantity of the recovered narcotic substance; and (c) Negative.

16. Foregoing are the reasons for our short order passed in these appeals on 24.2.2016.

Chief Justice

Judge

Judge

Judge

Judge

ISLAMABAD.  
24<sup>th</sup> February, 2016.  
Mudassar/★

*“Approved for reporting.”*