

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

Crl. Appeal No.151/2016

Regional Director Anti Narcotics Force, Rawalpindi
through its Additional Director Law

VERSUS

Muhammad Aslam

Appellant by : Ch. Ehtisham Ul Haq, Special Prosecutor, ANF.
Respondents by : Ms. Kalsoom Akhtar, Ms Mehraj Tareen,
Mr Mohsin Ghaffar Mughal and Mr Saif Ullah
Siddiqui, Advocates.
Date of Hearing : 29-05-2017.

ATHAR MINALLAH, J.- Through this order, we shall
decide the instant appeal and the appeals listed in Annexure "A" attached
hereto.

2. The facts, in brief, are that in all these appeals the
respondents were proceeded against under the Control of Narcotic
Substances Act 1997 (hereinafter referred to as to as the 'Act of 1997').
They were arrested on the charges of possessing or transporting narcotic
drugs. The recovered offending material was of different quantities and
types of narcotic drugs, the details relating to each case are as follows.-

S#	Appe al no	Title of Appeal	Date of FIR	Date of order	Type of Narcotics	Quantity of Narcotics
1.	72/ 2016	Anti Narcotics Force Rawalpindi Region through	16-10-2015	28-01-2016	Charas Garda	1200 grams

		Waseem Ahsan, Assistant Director Law, ANF, Rawalpindi versus Nazabat Mehmood				
2.	179/ 2015	Regional Director ANF Rawalpindi Division, Rawalpindi through AD Law Rawalpindi versus 1. Zubair Niazi 2. The State	22-05-2015	23-09-2015	<u>On personal search drugs recovered:</u> i. Heroin ii. ICE (white) iii. Cocaine white in colour iv. Ecstasy Job	<u>On personal search drugs recovered:</u> i. Heroin weighing= 150 grams ii. ICE white in colour weighing= 18 grams iii. Cocaine white in colour weighing= 02 grams iv. Ecstasy Job weighing= 03 grams On pointation drugs recovered: i. charas garda weighing 2600 grams <u>On pointation drugs recovered:</u> i. charas garda
3.	151/ 2016	Regional Director Force Rawalpindi through its Additional Law Director versus Muhammad Aslam	26-12-2015	31-05-2016	Charas pukhta	03 kg
4.	73/ 2016	Anti Narcotics Force Rawalpindi Region through Waseem Ahsan, Assistant Director Law ANF Rawalpindi versus Umer Farooq	29-10-2015	28-01-2016	Charas garda	02 kg
5.	74/ 2016	Anti Narcotics Force Rawalpindi Region through Waseem Ahsan, Assistant Director law ANF Rawalpinid versus Sabeel Khan	22-10-2015	09-03-2016	Charas Garda	2400 grams

6.	75/ 2016	Anti Narcotics Force Rawalpindi Region through Waseem Ahsan, Assistant Director law ANF Rawalpindi versus Amir Shahzad	28-08-2015	28-01-2016	i. Charas Garda ii. Heroin	i. Charas Garda weighing= 1 kg. ii. Heroin weighing= 1 kg.
7	92/ 2016	Anti Narcotics Force Rawalpindi Region through Waseem Ahsan, Assistant Director law ANF Rawalpindi versus 1. Muhammad Shahid 2. Muhammad Ehsan	24-11-2015	31-03-2016	<u>Personal search of respondent no. 1:</u> Heroin <u>Personal search of respondent no. 2:</u> Charas Garda	<u>Personal search of respondent no. 1:</u> Heroin weighing= 2 kg <u>Personal search of respondent no. 2:</u> Charas Garda weighing = 2 kg
8	93/ 2016	Anti Narcotics Force Rawalpindi Region through Waseem Ahsan, Assistant Director law ANF Rawalpindi versus Zeeshan Ansari	22-12-2015	31-03-2016	Heroin	1 kg
9	143/2 016	Anti Narcotics Force versus Abdul Ghaffar	25-03-2016	04-07-2016	Charas	1200 grams
10	144/ 2016	Anti Narcotics Force versus Naseer Ullah	19-04-2016	04-07-2016	i. Charas ii. Heroin	i. Charas= 1135 grams ii. Heroin = 150 grams
11	145/ 2016	ANF, Rawalpindi through its Regional Director versus 1. Jamshed Ur Rehman 2. Aljaz Ul Haq	06-03-2016	28-06-2016	Personal search of respondent no. 1, Jamshed Ur Rehman= Charas Garda Personal search of respondent no. 2, Aljaz Ul Haq= Charas Garda	Personal search of respondent no. 1, Jamshed Ur Rehman= Charas Garda= 3 kg Personal search of respondent no. 2, Aljaz Ul Haq= Charas Garda= 3 kg
12	146/ 2016	Anti Narcotics Force versus Muhammad Fayyaz	05-03-2016	28-06-2016	i. Charas Garda ii. Heroin	i. Charas Garda = 1500 grams ii. Heroin= 500 grams
13	147/ 2016	ANF versus 1. Waheed 2. Kashif Iqbal	22-04-2016	30-06-2016	Personal Possession of respondent no. 1, Waheed= Heroin	Personal Possession of respondent no. 1, Waheed= Heroin weighing= 1500 grams

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					Personal Possession of respondent no. 2, Kashif Iqbal= Charas	Personal Possession of respondent no. 2, Kashif Iqbal= Charas weighing= 1200 grams
14	148/2016	ANF versus Abdullah	05-03-2016	28-06-2016	Charas Garda	2.500 grams
15	149/2016	ANF versus Syed Muhammad Ramzan	12-04-2016	29-06-2016	iii. Charas Garda iv. Heroin	iii. Charas Garda = 1200 grams iv. Heroin= 300 grams
16	150/2016	ANF versus 1. Abdul Akbar 2. Safaid Gul	04-02-2016	30-06-2016	Personal Possession of respondent no. 1, Abdul Akbar= Heroin Personal Possession of respondent no. 2, Safaid Gul = Heroin	Personal Possession of respondent no. 1, Abdul Akbar = Heroin= weighing= 03 kg Personal Possession of respondent no. 2, Safaid Gul =Heroin= weighing= 02 kg
17	152/2016	ANF, Rwp versus Noman	27-02-2016	31-05-2016	Charas pukhta	02 kg
18	153/2017	ANF versus Zeeshan Ali	13-03-2016	31-05-2016	Charas Garda	1200 grams
19	177/2016	ANF versus Muhammad Bashir	15-04-2016	05-09-2016	Charas	3600 grams
20	178/2016	ANF versus Bashir Ahmed	19-03-2016	05-09-2016	Charas	03 kg
21	196/2016	ANF versus 1. Syed Kamran Hussain Shah 2. Zulfiqar Ali	28-05-2016	31-10-2016	Narcotics found in bag at the foot of respondent no. 1= Charas Garda Narcotics found in car, respondents were using, on disclosure of respondent no. 2= Charas Garda	Narcotics found in bag at the foot of respondent no. 1= Charas Garda= 03 kg Narcotics found in car, respondents were using, on disclosure of respondent no. 2= Charas= 2 kg
22	197/2016	ANF versus Bashir	21-06-2016	27-10-2016	Charas	1200 grams
23	207/2016	ANF versus Abdullah Khan	26-04-2016	28-10-2016	Charas	650 grams
24	208/2016	ANF versus Abul Hassan	07-04-2016	07-09-2016	Charas	1500 grams

25	209/ 2016	Anti Narcotics Force, Rawalpindi versus 1. Haroon Khan and 2. Ayaz Gul	29-04-2016	06-09-2016	Narcotics found in vehicle driven by respondent no. 1= Charas Garda Narcotics found in vehicle driven by respondent no. 2= Charas Garda <i>Narcotics found in car at some other place as disclosed by respondent no. 2= Cocaine</i>	Narcotics found in bag at the foot of respondent no. 1= Charas Garda= 3.500 Narcotics found in vehicle driven by respondent no. 2= Charas Garda= 04 kg <i>Narcotics found in car at some other place as disclosed by respondent no. 2= Cocaine= 420 grams</i>
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3. The respondents were sent up for trial before the Court of the learned Judge, Special Court (CNS), Islamabad (*hereinafter referred to as the 'Special Court'*). In all the cases the accused respondents had recorded their respective confessional statements and pursuant thereto, the learned Special Court passed the respective orders. The accused, on the basis of their confessional statements, were found guilty and thus convicted, while regardless of the period of incarceration or quantity of the narcotic drugs involved in each case, a stereotype formula for awarding sentence was adopted in all the cases i.e the imprisonment which had been undergone till the date of conviction was handed down as sentence. In addition, fines were also imposed. The quantum of sentence awarded in each case obviously gave rise to an anomalous situation, since those convicted for possession and transporting less than 2000 grams of narcotic drugs were treated at par with an accused who had confessed to having committed the offence in respect of more than one kilogram of the same kind or even more harmful drugs. This formula, adopted for the purposes of awarding sentence despite confessional statements recorded

by the offenders, has given rise to the present appeals. It is obvious from perusal of the impugned orders that the facts, circumstances and the relevant factors in each case were not taken into consideration by the learned Special Court for the purposes of determining the quantum of sentence. It appears that the learned Special Court took a lenient view and has adopted a novel method of awarding sentence in each case. The sole question for our consideration is whether or not the methodology adopted by the learned Special Judge regarding awarding of sentence and the determination of its quantum is sustainable, particularly in the context of the legislative intent in promulgating the Act of 1997.

4. The learned Special Prosecutor, who has appeared on behalf of the Anti Narcotics Force (*hereinafter referred to as the 'appellant'*), has contended that the learned Special Court, by adopting an extremely lenient and stereotype approach, has defeated the object and purpose of the enactment of the Control of Narcotic Substances Act 1997 (*hereinafter referred to as the 'Act of 1997'*). He has stated that the respondents have been sentenced in a perfunctory and mechanical manner and that the same is not sustainable in law. The learned Special Prosecutor has placed reliance on the judgment of the Lahore High Court reported as '*Ghulam Murtaza and another v. The State*'[PLD 2009 Lahore 362].

5. When confronted with the above, the learned counsels appearing on behalf of the respondents were not able to give a plausible explanation for the mode adopted by the learned Special Court for determining the quantum of sentence in each case.

6. The learned Special Prosecutor and the learned counsels for the respondents have been heard and the record perused with their able assistance.

7. We have noted above that the sole question involved in these appeals for our consideration is the mode adopted by the learned Special Court for awarding sentence in relation to offences committed and confessed under the Act of 1997. Based on the confessional statements of the accused, the period of imprisonment undergone was considered as an adequate sentence, regardless of the quantity of narcotic drugs involved or other attending circumstances e.g. criminal history of the convict, aggravated or mitigating factors, the gravity of the act etc. It is evident from perusal of the impugned judgments that the learned Special Court has sentenced the convicted respondents without having regard to the type or quantity of the narcotic drugs or other relevant factors. The conviction and sentences in all these appeals are in the context of the Act of 1997 and as such it would be beneficial to examine the relevant provisions for discovering the legislative intent.

8. The Act of 1997 was enacted and notified in the official gazette of 11-07-1997. The object and purpose, as mentioned in the preamble, was to consolidate and amend the laws relating to narcotic drugs and psychotropic substances. Moreover, the object and purpose was also to regulate the treatment and rehabilitation of narcotic addicts and the matters connected therewith and incidental therewith. Section 7 prohibits the import into, export from and transporting within Pakistan of any narcotic drug, psychotropic substance or controlled substance, save in

accordance with the rules made under sub-section (2) *ibid*. Trafficking or financing the trafficking of narcotic drugs is prohibited under section 8. Section 9 describes distinct punishments for contravention of the prohibitions contained in sections 6, 7 and 8 of the Act of 1997. Punishments are divided into three categories i.e. in clauses (a), (b) and (c) of section 9. Clause (a) of section 9 prescribes punishment of imprisonment which may extend to two years or with fine or with both if the quantity of narcotic drugs, psychotropic substance or controlled substance is one hundred grams or less. Clause (b) of section 9 is in respect of narcotic drugs, psychotropic substances or controlled substances which exceed one hundred grams but do not exceed one kilogram and prescribes a punishment of imprisonment which may extend to seven years besides imposition of fine. Likewise clause (c) of section 9 is in respect of a quantity which exceeds the limit specified in clause (b) i.e. more than one kilogram and the punishment prescribed is death, or imprisonment for life or imprisonment for a term which may extend to 14 years and the person shall also be liable to a fine up to rupees one million. The proviso to section 9 provides that if the quantity exceeds ten kilograms, then the punishment shall not be less than imprisonment for life. When the statute is read as a whole it becomes obvious that the legislature, by promulgating the Act of 1997, had intended to create sufficient deterrence in society so that the prohibitions provided therein are effectively enforced. In the case of narcotic drugs in excess of one kilogram the legislature has prescribed three alternative punishments, the maximum being death. Likewise if the quantity is more than ten kilograms then the punishment handed down cannot be less than life imprisonment. The legislative intent is unambiguous i.e. very strong reasons and

extenuating or mitigating circumstances would be required for justifying a sentence lesser than death if the quantity is more than one kilogram.

9. The punishments have, therefore, been prescribed by the legislature and have been divided into four categories, depending on the quantity of narcotic drugs, psychotropic substance or narcotic substance. There is no cavil to the proposition that a sentence ought to be adequate. Although there is no hard and fast rule as to what quantum of sentence would be adequate in particular facts and circumstances, nevertheless some guidelines, though not exhaustive, have been provided by the august Supreme Court in various judgments. It would, therefore, be beneficial to survey the precedent law.

10. The august Supreme Court in the case of '*Collector of Customs, Collectorate of Customs, Rawalpindi v. Khud-e-Noor and others*' [2006 SCMR 1609] as follows.-

"However, we are of the opinion that in absence of any mitigating circumstance, the Court may have not taken the lenient view because if such culprits are allowed to treated leniently, the object and the purpose of promulgation of penal law would be frustrated. It is well-settled by the time that if an offence has been established against an accused, he is bound to be punished adequately under the law. Muhammad Sharif v. Muhammad Javed alias Jeda Tedi PLD 1976 SC 452."

11. In the case of '*Joshua Chigbogu v. The State*' [2006 SCMR 1539] in the august Supreme Court it was held that being a foreigner could not be a relevant consideration for determination of the quantum of sentence. It was held that the quantum of sentence was required to be determined in the light of the relevant penal law and that it had to be applied with the same rigour to everyone subjected to it, regardless of his or her nationality. In the context of section 9 of the Act of 1997, it was held that sentence is to be proportionate to the heroin powder in the form in which it is marketable, regardless of its composition.

12. In the case of '*Zahid Imran and others v. The State*' [PLD 2006 SC 109] the apex Court has quoted with approval the principles and law to the effect that sentence must be weighed in golden scales as it were, properly balanced, to punish the offender in proportion to the character and extent of his guilt and that it has the effect of deterrence, not only for the accused but for the rest of the society as well. Moreover, it has been held that all the circumstances surrounding the guilt must be carefully borne in mind. A sentence ought to be an effective punishment for the person who has done the wrong. The law indicates the gravity of the offence by the maximum penalty and the courts have to judge whether the act committed falls short of the maximum degree of gravity and if so, to what extent. In the context of the sentence under section 302 of the Pakistan Penal Code, 1860 it has been held that the Court would not be justified in imposing the lesser of the two sentences provided by law unless it is satisfied about the presence of mitigating circumstances. It has been further held that the law should be interpreted in a manner which would advance the object and suppress the mischief

for which a statute has been enacted and not in such a manner that would defeat its object.

13. In the case of '*Faisal Aleem v. The State*' [PLD 2010 SC 1080] the apex Court, in the context of section 302 of the Pakistan Penal Code, 1860, has held that the youth of an accused alone would not constitute such an extenuating circumstance as would justify the imposition of the lesser penalty prescribed by law.

14. A Bench of the august Supreme Court, consisting of five Honourable Judges, has held in the case of '*Ameer Zeb v. The State*' [PLD 2012 SC 380] that in the context of section 9 of the Act of 1997 the quantum of sentence would depend upon the quantity of the recovered narcotic substance and not upon the content thereof.

15. The august Supreme Court, in the case of '*Khuda Bakhsh v. The State*' [2015 SCMR 735], has expounded various guidelines and it has been held that the quantum of sentence in narcotic substance cases depends upon the quality of the recovered substances, and it has been further held that.-

"In determining the quantum of sentence it would also be appropriate to consider the nature of the narcotic substance, since some narcotics are more dangerous and harmful than others. We are cognizant that the Act does not explicitly state that the type of narcotic substance determines the

quantum of sentence, however, the fact that the Act provides for a range of sentences implies as much."

16. In the above judgment it has also been observed and held that a court has the discretion to award any sentence which it may deem fit in the facts and circumstances of a certain case.

17. In the case of '*Secretary, Government of Punjab and others v. Khalid Hussain Hamdani and 2 others*' [2013 SCMR 817] the august Supreme Court has emphasised the principle of proportionality in the context of determining the quantum of sentence i.e. having regard to the gravity of the offence or charge.

18. The august Supreme Court in '*Hassan and others vs The State & others*', [PLD 2013 SC 793], dilated on the question of the alternate sentence provided under Section 302 (b) of the Pakistan Penal Code, 1860 (*hereinafter referred to as the "PPC"*), in the light of Section 367 (5) of the Cr.P.C. The relevant portion is as follows:-

"We have not been able to find anything in the said provision of law even hinting at the sentence of death being the normal sentence in such a case section 302(b), P.P.C. clearly provides for two alternative sentences, i.e. sentence of death or sentence of imprisonment for life for the offence of murder and it does not state that any one of those sentences is to be treated as the normal sentence. As a matter of fact section 302(b), P.P.C. itself mentions that any one of the two alternative sentences provided for therein is

to be passed "having regard to the facts and circumstances of the case". There are cases wherein "the facts and circumstances of the case" do not warrant a sentence of death and what is required by subsection (5) of section 367, Cr.P.C. is that such facts and circumstances of the case ought to be mentioned by the trial court in its judgment so that the higher Courts may straightaway become aware of the same while entertaining or deciding a challenge thrown against the trial Court's judgment".

19. The august Supreme Court followed and reaffirmed the above principle in the case of '*Ghulam Mohy-ud-Din alias Haji Babu and others vs. The State*', [2014 SCMR 1034]. After holding that the two sentences, as provided in Section 302(b), are alternative to one another, the august Supreme Court observed that awarding one or the other sentence shall essentially depend upon the facts and circumstances of each case. It would be beneficial to reproduce paragraph 21 of the judgment and the same is as follows:-

"A single mitigating circumstances, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. If the Judge/Judges entertain some doubt,

albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.

Albeit, there are multiple factors and redeeming circumstances, which may be quoted, where awarding of death penalty would be unwarranted and instead life imprisonment would be appropriate sentence but we would avoid to lay down specific guidelines because facts and circumstances of each case differ from one another and also the redeeming features, benefiting an accused person in the matter of reduced sentence would also differ from one another, therefore, we would deal with this matter in any other appropriate case, where, it proper assistance is given and extensive research is made. In any case, if a single doubt or ground is available, creating reasonable doubt in the mind of Court/Judge to award death penalty or life imprisonment, it would be sufficient circumstances to adopt alternative course by awarding life imprisonment instead of death sentence”.


20. Lastly it would be appropriate to refer to a Full Court judgment of the august Supreme Court rendered in the case of '*The State through Director ANF Peshawar v. Rashmali Khan and others*' [PLD 2016

SC 471] wherein the approach adopted by the Courts for reducing the sentence of a convict on the basis that the quantity of recovered narcotic substance could be reduced in weight when processed was held as conjectural and unlawful. Moreover, it was held as follows.-

"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 quality of narcotic substance so recovered."

21. The above guidelines, though not exhaustive, are broad enough to be kept in mind and followed while a Court is exercising its discretion in the context of determining the quantum of sentence in the facts and circumstances of each case. After the guilt of an accused has been established and accordingly convicted only then the Court has to determine the quantum of punishment or sentence. Conviction, therefore, precedes punishment by handing down adequate sentence. The Court has to take a variety of factors into consideration. In general, aggravating factors would justify a harsher penalty whereas mitigating circumstances would call for a lesser punishment. The approach of a Court while considering the quantum of sentence cannot be arbitrary. The discretion exercised by the Court in awarding a sentence ought to be guided by the broad principles and law enunciated by the august Supreme which have been discussed above. They may, therefore, be summarized as follows;

- (a) The Court has the discretion to award an adequate sentence having regard to the facts and circumstances of the case at hand.
- (b) Discretion has to be structured and exercised by applying an independent mind, uninfluenced by irrelevant or extraneous considerations. Such application of mind ought to be obvious from the reasoning recorded in each case.
- (c) While determining the quantum of sentence the underlying object and purpose of the relevant statute and the gravity of offence ought to be taken into consideration. Sentence has to be proportionate to the gravity of the offence.
- (d) The gravity of an offence is indicated by the maximum punishment prescribed under the relevant statute and it is for the Court to judge the extent to which an act committed falls short of the maximum punishment prescribed by the legislature.
- (e) If the relevant statute prescribes two or more punishments for an offence then imposing the lesser punishment would only be justified if the Court is satisfied that extenuating or mitigating circumstances exist for doing so.

- (f) The nature of proof has no relevance with the character of the punishment.
 - (g) All the circumstances surrounding the guilt must be carefully borne in mind. The punishment or sentence should be adequate so as to have an effective deterrence for the offender as well as the rest of the society.
 - (h) If the sample sent for chemical examination is not a representative sample of the entire substance recovered then the quantum of sentence would be determined on the basis of the weight of samples sent for examination.
 - (i) The sentence prescribed by the legislature in the relevant statute has to be applied with the same rigour to every person subjected to it regardless of his or her nationality, age, social or financial status etc.
 - (j) The nature of the recovered substance would be a relevant factor to consider. The quantity of recovered substance and not the weight on the basis of processing thereof will be taken into consideration.
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- (k) When the recovery is made from possession of more than one convict then each would be liable on the basis of the whole quantity.

22. We are afraid that the methodology adopted by the learned Special Judge in the context of handing down sentences in all these appeals is not in consonance with the broad guidelines and law enunciated by the august Supreme Court and highlighted above. As an illustration, by no stretch of the imagination can a sentence of three to six months be justified in cases wherein the quantity of narcotic substance is more than one kilogram. It is evident from the details of the appeals reproduced above that accused charged for 630 grams was treated at par with a person from whom 04 kilogram of narcotic drugs were recovered. The legislature has prescribed three alternative punishments in section 9(c), the maximum being death. Strong and convincing reasons would be required for awarding a lesser sentence.

23. The convictions in these appeals are based on confessional statements made by the respondent convicts before the learned Special Court. None of the convicted respondents have challenged the convictions by preferring appeals. The convictions have, therefore, attained finality and accordingly maintained. However, the impugned judgments are not sustainable to the extent of the sentences handed down in each case. The stereotype formula adopted by the learned Special Court for awarding sentence in each case is declared as an illegal, arbitrary exercise of discretion and in violation of the principles and law enunciated by the august Supreme Court.

24. For the above reasons we maintain the convictions and allow the appeals to the extent of the sentences awarded in each case. The respondents shall be taken into custody and produced before the learned Special Court on 16-06-2017. In case the respondents fail to appear before the learned Special Court then the latter shall issue their non bailable warrants of arrest and thereafter proceed in accordance with law. The learned Special Court after affording an opportunity of hearing to the parties shall decide the quantum of sentence in each case, inter alia, having regard to the principles highlighted in paragraph 21 above.

(MOHSIN AKHTAR KAYANI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Approved for reporting.