

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Jail Appeal No. 118/2018

Mst. Jamila

Vs.

The State

APPELLANT BY: Ms. Qurat-ul-Ain Ayesha, Advocate
alongwith appellant.

STATE BY: Mr. Sadaqat Ali Jahangir,
Ch. Ehtasham ul Haq, SPP, ANF.
Munir, ASI.

DATE OF HEARING: 27.02.2019.

MOHSIN AKHTAR KAYANI, J:- Through instant jail appeal, the appellant has assailed the order dated 28.05.2018, passed by learned Judge Special Court CNS, Islamabad, whereby the appellant has been convicted and sentenced U/S 9-C, CNSA, 1997, to undergo 03 years with fine of Rs.30,000/-, in default of payment, the appellant shall further undergo 03 months S.I, in case FIR No.173/16, dated 02.12.2016, U/Ss 9-C & 15 of CNSA, 1997, P.S ANF, North Rawalpindi. Benefit of Section 382-B, Cr.P.C has also been extended to the appellant.

2. Brief facts, necessary for disposal of the instant appeal are that on 02.12.2016, at about 17:45, Raja Shoaib Ahmed S.I alongwith other constables were on patrolling duty, when a spy information was received that drug peddler Rasool Khan and Mst. Jamila are present at Khanna Pull Bus Stop. The raiding party reached at the spot, where they found a boy and a girl, who were identified as Ghulam Rasool and Mst. Jamila. Both the accused were taken into custody and on their personal search two packets of Charas from each accused have

been recovered, whereas total weight of four packets was 05 Kilogram. The sample was prepared for chemical analysis.

3. Learned counsel for the appellant contends that the learned Trial Court has convicted the appellant on confessional statement without adopting the due formalities required under the law and as such the appellant is a juvenile, but all these factors have not been considered by the learned Trial Court. She further contends that this Court has laid down the parameters for dealing with the cases of juvenile, but the appellant was neither given a proper adjudication nor legal help to understand the complications of confession. She further contends that the conviction awarded to the appellant is illegal and is liable to be set-aside and matter is remanded to the learned Trial Court to record the evidence in accordance with law and decide the matter expeditiously within period two months.

4. Conversely, learned Special Prosecutor ANF contends that the appellant was caught red handed and 2 ½ K.G Charas was recovered from her possession. He further contends that she herself submitted the application for recording of her confessional statement and as such legal requirement of law has been fulfilled.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that appellant was arrested on 02.12.2016 from the area of Police Station Khanna by the ANF Authorities and her personal search, she was found in possession of two packets of Charas containing 1250 wrapped with her body. The appellant was in company of another co-accused namely Rasool Khan, who was also in possession of two and half K.G of Charas in a similar manner. As a result whereof the said recovery, FIR No. 173/16, dated 02.12.2016, U/s 9-C & 15 CNSA, 1997, P.S ANF, North Rawalpindi was registered. The ANF Authorities after completion of the investigation submitted the report before the CNSA Courts, whereby learned Trial Court after recording of confessional statement of

the appellant convicted and sentenced U/s 9-C, CNSA, 1997, to undergo 03 years with fine of Rs. 30,000/-, in default of payment, the appellant shall further undergo 03 months S.I vide order dated 21.06.2017. However, she had filed Jail Appeal No. 162/2017 before this Court, same was allowed on the ground that the learned Trial Court has not appreciated the requirement of law in terms of Section 243 Cr.P.C and the previous conviction was set-aside and matter was remanded to the learned Trial Court to decide the case afresh in accordance with law vide order dated 13.02.2018. However, after remand of the case, the learned Judge Special Court has again received the application from the appellant for recording of confessional statement on 10.05.2018. A Show Cause Notice U/s 243 Cr.P.C was issued on the same date, which was received by the appellant and she has filed her written reply to the Show Cause Notice with her signatures and thumb impression in Urdu before the learned Trial Court. The learned Trial Court has recorded the statement in the following manner:-

بیان ازاں جمیلہ بی بی دختر ریاض گل عمر 18 سال سکنہ سر بند ضلع پشاور۔
برحلف

بروز وقوعہ میں ڈھائی کلو چرس لیکر آ رہی تھی کہ مجھے ANF والوں نے پکڑ لیا میں اپنا جرم تسلیم کرتی ہوں میں نے لالچ میں آکر یہ کام کیا۔ جس سے اب میں توبہ کرتی ہوں اور مجھے یہ جرم کرنے کا بہت پچھتاوا ہے۔ میں اُنندہ منشیات کا کوئی کاروبار نہ کرونگی۔ میری استدعا ہے کہ میرے ساتھ نرمی کا سلوک کیا جائے۔

7. In the light of above referred confessional statement, the learned Trial Court has convicted the appellant and awarded her sentence U/s 9-C CNSA, 1997 for three (03) years alongwith fine of Rs. 30,000/- while taking the lenient view through the impugned judgment. In order to see the requirements of the law in terms of the confessional statement U/S 164 Cr.P.C read with Section 364 Cr.P.C, we are surprised to see that the Special Court CNS, Islamabad has recorded the statement of the appellant on oath, which is illegality, even otherwise, taking of the oath by the appellant is itself violation of Section 5 of Oath Act 1873, which prohibits the administration the oath to an accused

person in a criminal proceedings as it is opposed to a public policy and such kind of violation is an illegality not curable under the law and Court is bound to express the effect of oath to an individual, who is taking the same, especially in such like satiation. Similarly, Article 163 of the Qanun-e-Shahadat Order, 1984 provides a mechanism to accept or denial through the claim on Oath although it is different from Oath Act, 1873 and though the said article is applicable in the civil proceedings only. The criminal cases cannot be decided on Oath and such proceedings on Oath are not applicable in criminal cases reliance **PLD 1990 SC 83 (Mst. Bashiran Bibi Vs. Ghulam Mohy-ud-Din and others), 1995 P.Cr.LJ 1793 (Abdul Sattar and others Vs. The State)**. However, at this stage, the illegal exercise conducted by the Special Court CNS has its own effect and in such type of situation, we are also gone through recent judgment of the Apex Court dealing with the proposition and effect of Oath by accused person has been considered as illegality. Reliance is placed upon **2016 SCMR 274 (AZEEM KHAN and another Vs. MUJAHID KHAN and others)**, wherein it was held that:-

“16. In the instant case, the Recording Magistrate namely, Ch. Taufiq Ahmed did not observe least precautions, required under the law. He was so careless that the confessions of both the appellants were recorded on oath, grossly violating the law, the same, therefore, has rendered the confession inadmissible which cannot be safely relied upon keeping in view the principle of safe administration of justice.”

8. The appellant in her statement referred above undertakes that she will not commit any such crime again, and as such the other requirements to evaluate a confessional statement are apparent on record, in which the appellant has to show her remorse in her action as held in **PLD 2017 SC 671 (State through the Deputy Director (Law), Regional Directorate, Anti Narcotics Force Vs. Mujahid Lodhi), 1997 PCr.LJ 1930 (Habibur-Rehman Vs. The State), 2010 PCr.LJ 164 (Jantan Bibi Vs. The State)**. However, the basic illegality of taking Oath by the Court creates serious implications in this case, therefore, statement on Oath by the CNS Court rendered the statement illegal.

9. This Court has perused the record and it has been observed with great concern that in the previous round of recording of confessional statement, the appellant put her thumb impression and signatures in Urdu, whereas in the post remand proceedings before the learned Trial Court she has signed the confessional statement, reply of the Show Cause Notice as well as application by way of signature in English (very mature signature) with thumb impression, therefore, this Court passed the order on 16.01.2019 and summoned the appellant through jail authorities, who put her appearance before this Court on 27.02.2019 and she has been confronted regarding her signatures in English before learned Trial Court, whereby she has categorically acknowledged about her signatures, upon all the documents, hence the procedural requirement has been verified by this Court and as such the Appellate Court is equipped with all kind of inherent powers to satisfy its conscious as to whether the requirements of law have been fulfilled by calling the accused, who has recorded her statement before learned Trial Court by way of confessional statement and there is no legal bar to summon any accused /convict at the High Court stage in order to meet the ends of justice.

10. Besides the above referred admission, we were surprised to observe that the appellant is a young girl, who has stated to be born on 04.02.2001 and present she is hardly 19 years old and she was arrested on 02.12.2016 as per judicial record, if we accept the said position reflected on the record, she was 17 years old at the time of alleged occurrence, but the learned Trial Court has not considered her juvenility in terms of Juvenile Justice System Ordinance, 2000 and even not referred this aspect, which is the key factor while determining the quantum of punishment.

11. While considering the above background, we have gone through the Section 11 of the Juvenile Justice System Ordinance, 2000, which is reproduced as under:-

11. Release on Probation: - Where on conclusion of an inquiry or trial, the Juvenile Court finds that a child has committed an offence, then notwithstanding anything to the contrary contained in any law for the time being in force, the Juvenile Court may, if it thinks fit.

(a) Direct the child offender to be released on probation for good conduct and place such child under the case of guardian or any suitable person executing a bond with or without surety as the court may require, for the good behavior and wellbeing of the child for any period not exceeding the period of imprisonment awarded to such child: Provided that the child released on probation be produced before the Juvenile Court periodically on such dates and time as it may direct.

(b) Make an order directing the child offender to be sent to a borstal institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier.

(c) Reduce the period of imprisonment or probation in the case where the Court is satisfied that further imprisonment or probation shall be unnecessary.

12. The above referred provision is mandatory to be considered as state of Pakistan is under legal obligation to follow the mandate of International law relating to child rights and the said ordinance was promulgated to provide a protection of children in criminal litigation, their rehabilitation in society, re-organization of juvenile courts and matter connected therewith.

13. Even otherwise, all the Trial Courts are bound to observe issues while awarding sentence to juvenile keeping in mind the international instruments as referred in **2017 YLR 2031 (Whishal Masih Vs. The State and others)**.

22. In addition to above case studies, it has also been observed that issues relating to sentence of juvenile have been seen in the context of following international conventions and rules:-

- i. convention of rights of child.
- ii. Guidelines for action on children in the criminal justice system, recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997.
- iii. United Nations Rules for the Protection of Juveniles Deprived of their liberty (Havana Rules).
- iv. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

- v. *United Nation Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).*
- vi. *United Nation Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).*

23. In view of the above international documents and standards, Pakistan being signatory of CRC and member of United Nations is under obligation to provide the protection available under the law to the juvenile offenders of the standard settled in the above referred documents. Keeping in view the Juvenile Justice System Ordinance, 2000, the procedure provided in the Punjab Borstal Act, 1926 and the Reformatory Schools Act, 1897, following guidelines are drawn from International Conventions and related documents only for reference for the Juvenile Courts for awarding sentence to the juvenile offender on the basis of International Conventions and Rules.

14. Even otherwise, the law provides the concept of diversion to protect the rights of a child offender and as such the courts are bound to take into consideration the status of a child offender as to whether he or she is a first offender, age at the time of commission of offence and sentence awarded to the juvenile.

15. We are also fortified with the view taken in **PLD 2014 [Peshawar] 127 (Mian Khan Vs. The State), PLD 2012 [Lahore] 345 (Ghulam Qadir Vs. Additional Session Judge and others), 1989 MLD 1514 Supreme Court of India, 2013 PCr.LJ [Peshawar] 800 (Hazrat Bilal Vs. The State and another), PLD 2014 [Peshawar] 69 (Naseebullah Vs. The State), 2011 YLR [Peshawar] 341 (Muhammad Alamgir Vs. The State), 2013 PCr.LJ 584 [Lahore] (Shahrukh Vs. Bashir Ahmed and another), PLD 2010 SC 1080 (Faisal Aleem Vs. The State)**, whereby the Superior Courts have dealt with the similar situations regarding punishment.

16. While considering all these case laws referred above, the Trial Courts are bound to observe the age of the accused at the time of framing of charge or when the accused was produced before the Court for the first time, so that no child shall be deprived from his or her liberty unlawfully and arbitrarily. Similarly, arrest, detention or imprisonment of a child offender shall be in

conformity with law and shall be used as a measure of last resort and for the shortest period of time.

17. We are also shocked with the working of the learned Trial Court Judge, who has neither considered the age of the appellant nor even put any effort to determine the juvenility of the appellant in any manner rather entire judicial record is silent to that effect. On the other hand, the appellant, who is present before the Court with her counsel has categorically mentioned her date of birth as 04.02.2001. Even though, the Investigation Officer in attendance confirmed the age of the appellant being minor at the time of commission of offence. Pakistan is signatory to the Convention on the Rights of the Child and is under International Obligation to take all effective measures to protect the juveniles from any exploitation. The ignorance on the part of Special Judge CNS, Islamabad is considered to be misconduct on her part, who is not aware of the basic laws regarding juveniles and such like Judicial Officers should not be appointed on position of Special Courts.

18. It has also come to our notice that the prosecution Department, Islamabad is not in a working order and the Special Prosecutors have not been appointed in the Special Courts, even there is no mechanism to provide the assistance to the Special Courts during the course of trial by the State to prosecute the cases and as such the State is under constitutional obligations to provide the infrastructure as well as the prosecutors, judges and law enforcement agencies to ensure the early disposal of criminal cases in order to restore the confidence on general public.

19. We have also gone through the record, in which the learned Trial Court has not made any effort to peruse the certificate of test/analysis of the laboratory of NIH, Drugs Control and Traditional Medicines Division, Islamabad dated 09.01.2017, which refers the person holding four (04) packets nominated in the case is Rasool Khan/co-accused and it has not been referred in any of the report that the sample has ever been taken from the Charas recovered from the

appellant and the same was sent for the purposes of chemical examination, therefore, in such type of situation, the Trial Court is bound to call the evidence, although the accused confessed her guilt by way of recording of confessional statement, the Courts have to call the evidence to clear its conscience, so that the basic ingredients of offence, with which the accused was charged, have been thrashed out by way of evidence. It is settled law that Courts are not bound to pass conviction or sentence merely on the confessional statement with reference to Section 265-E(2) Cr.P.C and where the charge of an offence carrying capital punishment of death or transportation of life, the Court is required to examine the prosecution evidence, even if the guilt is admitted by the accused in response to a charge. Reliance is placed upon **1976 PCr.LJ 204 (Loung Vs. The State), 1997 PCr.LJ 1930 (Habib-ur-Rehman Vs. The State).**

20. At last, the Special Court CNS, Islamabad while awarding the conviction to the appellant, who is admittedly a juvenile and earns certain rights under Juvenile Justice System Ordinance, 2000 has not given her due right and the learned Trial Court has passed the conviction in a mechanical manner, therefore, at this stage, when total period served by the appellant starting from date of her arrest on 02.12.2016 till to date, which is approximately 27 months, whereas punishment provided in the reported judgment as **PLD 2009 [Lahore] 362 (Ghulam Murtaza Vs. The State)** is R.I five (05) years and six (06) months with fine of Rs. 25,000/-, in case of recovered Charas exceeds from two K.G upto three (03) K.G has been referred in the schedule of the said judgment. However, at this stage, keeping in view the statement of appellant regarding his date of birth as 04.02.2001 as well as admission on the part of Investigation Officer regarding the appellant being juvenile at the time of her arrests, the special law comes into play i.e. Juvenile Justice System Ordinance, 2000, which provides the reduction of period of imprisonment in terms of Section 11(c) of the Juvenile Justice System Ordinance, 2000. But this entire legal proposition revolves around the illegal oath conducted by the Trial Court while recording the

confessional statement of the appellant, who was juvenile at the time of occurrence and even the Trial Court has not adopted due measures to conduct the trial in terms of JJSO, 2000, therefore, we are of the considered view that the entire criminal trial conducted by a Special Judge CNS is illegal and unlawful. The defects noted by this Court in the proceedings are neither curable nor falls within the ambit of irregularities, therefore, the jail appeal No. 118/2018 is hereby **Allowed** and judgment dated 28.05.2018, passed by learned Judge Special Court CNS, Islamabad in FIR No.173/16, dated 02.12.2016, U/Ss 9-C & 15 of CNSA, 1997, P.S ANF, North Rawalpindi is hereby **Set-Aside** and matter is remanded to the learned Trial Court to decide it afresh within period of Sixty (60) days under intimation to this Court.

21. For what has been discussed above, the appellant being a juvenile earns her right to be released on bail in terms of Section 497 Cr.P.C, even otherwise, she is a woman and her case falls within first proviso of Section 497(1) Cr.P.C. The appellant has also spent 28 months behind the bars and instant matter has crossed the period of statutory delay and as per opinion of this Court, the reasonable ground for believing that the appellant is not guilty of an offence, which is punishable with death at this stage and she has been detained for an offence U/s 9-C CNSA for a continuous period exceeding one year, although in case of woman, the period is Six (06) months and as such the trial has not yet been concluded, therefore, while exercising the powers conferred U/s 497 Cr.P.C read with Section 561-A Cr.P.C to protect the life and liberty of an individual i.e. appellant, who is a woman and was juvenile at the time of commission of offence, therefore, she is admitted to bail subject to furnishing of bail bonds of Rs. 50,000/- with one surety to the satisfaction to the learned Trial Court.

22. Before parting with this judgment, we are constrained to observe that the Investigation Officer, who has submitted the challan in this case has attached the punishment slip, which contains the details of appellant, whereby she was referred to be a lady of 18 years old, which is incorrect statement on his part, who has not considered the rights of a child offender in its proper manner and he is bound to follow the rationale behind the Juvenile Justice System Ordinance, 2000 and similar

is the position with the court of CNS, who was under obligation in terms of Section 7 of the Juvenile Justice System Ordinance, 2000 to determine the age of child offender at the first instance, may call a report from medical expert or may initiate an inquiry to determine all these factors by conducting an ossification test, birth certificate, school leaving certificate, Form-B or any other documents, which confirms the age of a child offender. Similarly the Special Court (CNS) has also not considered the wisdom and application of Juvenile Justice System Ordinance, 2000 while awarding the sentence to the appellant, therefore, learned Presiding Officer, Judge Special Court (CNS), Islamabad shall not be appointed on such kind of sensitive position by the respective High Courts in future. Copy of this judgment may also be sent to the Director General, Anti Narcotics Force and Inspector General of Police for educational and/training purpose of their Investigation Officers, who should follow the spirit of Juvenile Justice System Ordinance, 2000 in line with the child right convention and other international instruments, where rights of child offender have been explained.

23 Keeping in view the peculiar circumstances of this case, we hereby issue the following directions to the Federal Government:-

- a) To appoint Special Prosecutors in terms of Section 50 of CNSA 1997 in each and every Court dealing with the narcotics cases with immediate effect.
- b) In case of non-availability or non-appointment of special prosecutors in the CNS Court the Federal Government shall notify temporary Special Prosecutors in terms of Section 50(2) of CNSA 1997 for the prosecution of offenders, well equipped and trained in this regard and such temporary special prosecutors shall be paid from the public fund unless the regular appointee will be notified on these positions.
- c) The Special Court CNS may also appoint any special prosecutors in consultation with the Chief Justice of the High Court for a short period of time and no trial shall be conducted without the presence of special prosecutors.
- d) Special Courts CNS or any other court dealing with the narcotics cases shall not record any confession of any offender without observing the legal requirements and Assistance of the special prosecutors.
- e) The Federal Government shall appoint a legal practitioner for providing legal assistance to a child accused in accordance with the Section 3(2) of JJSO, 2000 and shall also provide legal assistance at the expense of the State to every child accused (if unrepresented) facing trial in any Court, however, in case where

child is unrepresented. Legal practitioner be appointed in terms of Rule 3 of The Juvenile Justice Rules, 2001.

- f) The Federal Government shall appoint the probation officers in terms of probation offender ordinance 1960 within Islamabad Capital territory.
- g) The Federal Government may also provide the timelines for the construction of jail premises with all facilities for juvenile offenders within the Islamabad Capital territory.

In this case Mst. Qurat ul Ain Ayesha, Advocate was appointed by this Court as Legal Assistant for providing legal assistance to the appellant, who has conducted the jail appeal at the state expense and as such she is entitled to receive Rs. 10,000/- in accordance with Rule 3(3) of Juvenile Justice System Rule 2001 Islamabad territory by the Sessions Judge West Islamabad. The respective Sessions Judge of Islamabad, Judges of Anti terrorist Court, Special Courts are directed to provide the details of all those offenders who are juvenile as to whether they have been provided legal assistance in accordance with law and special prosecutors have been appointed in their Courts or otherwise. Copy of this judgment may also be referred to the Secretary Interior, Secretary Cabinet, Chief Commissioner Islamabad for their information and compliance of the above directions within period of 06 months.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

JUDGE

Approved for reporting