JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.201/2016
Suleman Khan
Versus
The State

Date of Hearing: 06.12.2018
Appellant by: Mr. Ajmal Khan Khattak, Advocate,
Respondent by: Malik Awais Haider, learned State Counsel.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide jail appeal No.104-J/2014 and criminal appeal No.201/2016, since they entail common questions of fact and law.

2. FIR No.238/2013, dated 25.05.2013 was registered under section 9-C of the Control of Narcotic Substances Act, 1997 ("CNSA") at Police Station Tarnol, Islamabad. The complainant in the said case was Malik Fazal-ur-Rehman, Sub-Inspector in the said Police Station. The appellant, namely, Suleman Khan and co-convict Mukhtar Ahmad were specifically nominated in the said FIR. As per the contents of the said FIR, after receiving spy information as to the smuggling of a large quantity of narcotics from Khyber Pakhtunkhwa to Punjab, the police party stopped vehicle No.RP-4085 at 11:00 a.m. near Chungi No.26 near Shaheen Abad. The above said accused persons were in the said vehicle. From the secret cavities of the said vehicle, 226 packets of *charas* were recovered. 93 out of the said packets were red in colour and each contained 5 slabs of *charas.* 59 packets were blue in colour and each contained 3 slabs of *charas*. 60 packets were yellow in colour and each contained 3 slabs of *charas*. 14 packets on which the letters "Top" were printed each contained 3 slabs of *charas*. 10 grams of *charas* from each packet were separated for the purpose of chemical examination, whereas the rest of the recovered narcotics were sealed and sent to the Police Station. The total weight of the recovered narcotics substance was stated to be 285 kilograms.

3. The appellant and co-convict were sent to the judicial lock-up after the investigation. Report under section 173 Cr.P.C. was submitted in the Court. The appellant and co-convict did not plead guilty to the charge framed against them. Consequently, they were sent-up for trial.

4. The prosecution produced six witnesses, namely, (1) Abdul Hameed A.S.I. (PW.1), (2) Tauqeer Ahmed, No.4751/C (PW.2), (3) Akbar Zaman No.3757/HC (PW.3), (4) Munir Khan S.I. (PW.6), (5) Fazal-ur-Rehman, S.I. (PW.7), and (6) Zeeshan, No.4477/C (PW.8). After the statements of the appellant and co-convict under section 342 Cr.P.C. were recorded, the learned Trial Court, vide judgment dated 21.11.2014 found the appellant and co-convict to be guilty of the offence under section 9-C of CNSA and sentenced them to undergo imprisonment for life. They were also granted the benefit of section 382-B Cr.P.C. The said judgment dated 21.11.2014 was assailed by the appellant in criminal appeal No.5/2015 before this Court. Vide judgment dated 11.05.2016, the said appeal was accepted and the matter was remanded to the learned Trial Court with the direction to ensure the presence of the vehicle from which the narcotics substance was recovered before it and pass a judgment in accordance with the guidelines contained in the judgment of the Hon'ble Supreme Court in the case of *Ameer Zeb Vs. The State (PLD 2012 SC 380)*.

5. In the post-remand proceedings vehicle No.RPT-4085 was produced before the Court as Exh.PF/1. After recording the statements of the appellant and co-convict under section 342 Cr.P.C. once again, the learned Trial Court, vide judgment dated 22.11.2016, convicted the appellant and co-convict under section 9-C of the CNSA and sentenced them to imprisonment for life with the benefit of section 382-B Cr.P.C. The vehicle No.RPT-4085 was directed to be auctioned in accordance with the applicable rules. The said judgment dated 22.11.2016 has been assailed by the appellant in the instant appeal.

6. Learned counsel for the appellant submitted that the impugned judgment is contrary to the law laid down by the

Hon'ble Supreme Court in Ameer Zeb's case *(supra)*; that a sample of the narcotic substance weighing 10 grams was said to have been taken from each of the 226 packets recovered from vehicle No.RPT-4085 but samples were not taken from each of the slabs in the packets recovered from the said vehicle; that as per the contents of the FIR and the complaint, each packet recovered from the said vehicle contained 3 or 5 slabs of *charas*; that although the weight of the total *charas* recovered from the said vehicle was stated to be 285 kilograms but each slab contained in the packets had not been separately weighed; that since each slab from which a sample of the narcotic substance was taken had not been weighed, at best, the case against the appellant would be for recovery of 2,260 grams of *charas* (i.e., 10 grams of *charas* multiplied by 226 samples taken from each packet); that the appellant could not have been convicted for the recovery of 79.11 kilograms of *charas*; that the learned Trial Court in paragraph-16 of the impugned judgment had determined the weight of each slab of the recovered *charas* on the basis of hypothesis and not on the basis of each slab being actually weighed; that the learned Trial Court erroneously assumed the weight of each of the 5 slabs in each of the 93 packets to be exactly the same; that in the same way, the learned Trial Court erroneously assumed that the weight of the each of the 3 slabs in the 133 packets to be exactly the same; that the law warranted samples to be taken from each of the slabs contained in every packet recovered from the said vehicle; that the law also warranted each of the slabs to be separately weighed; that the learned Trial Court erroneously assumed that the slabs from which samples had not been taken to be narcotic substance; and that the impugned judgment was not sustainable on account of being in violation of the guidelines given in Ameer Zeb's case *(supra)*. Learned counsel for the appellant prayed for the instant appeal to be allowed.

7. On the other hand, learned State Counsel submitted that the impugned judgment dated 22.11.2016 does not suffer from

any illegality; that the appellant and co-convict specifically nominated in the FIR; that although 285 kilograms of *charas* were recovered from the appellant and co-convict, the learned Trial Court had held that recovery of only 79.11 kilograms from the appellant and co-convict had been proved by the prosecution; that samples of the narcotic substance was taken from each of the 226 packets for the purpose of chemical examination; that the learned Trial Court had correctly determined the approximate weight of each of the 5 slabs in 93 packets to be 0.25 kilograms and each of the 3 slabs in the remaining 133 packets to be 0.42 kilograms; that the mere fact that each of the 3 slabs in the 133 packets or each of the 5 slabs in the 93 packets was not separately weighed did not in any way weaken the prosecution's case against the appellant; that the chemical examiner's report as to the narcotics substance recovered from the appellant was in positive; and that the appellant and co-convict had been correctly convicted by the learned Trial Court under section 9-C of the CNSA to undergo imprisonment for life. Learned State Counsel prayed for the appeals to be dismissed.

8. We have heard the contentions of the learned counsel for the appellant and the learned State Counsel and have perused the record with their able assistance.

9. The facts leading to the filing of the instant appeals are set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

10. Fazal-ur-Rehman, Sub-Inspector, who was serving as Station House Officer ("SHO"), Police Station Tarnol, Islamabad, gave evidence for the prosecution as PW.7 and deposed *inter-alia* that 226 packets of *charas* were recovered from the hidden cavities in the floor of the vehicle No.RPT-4085 which was driven by the co-convict, Mukhtar Ahmad and the appellant Suleman Khan seated along with him. Furthermore, it was deposed that out of the 226 packets, 93 packets were red in colour and out of each packet, 5 slabs of *charas* were recovered; 59 packets were blue in colour and out of each packet, 3 slabs of *charas* were

recovered; and 60 packets were black and yellow in colour and out of each packet, 3 slabs of *charas* were recovered.

11. Now 93 plus 59 plus 60 packets add up to 212 packets and not 226 packets. This unexplained discrepancy casts a degree of doubt in the prosecution's case.

12. PW.7 further deposed that *"On weighing all the charas it was 285-Kg."* There is nothing on the record to show that each packet of the recovered narcotics substance from the said vehicle had been separately weighed by the police. We are of the view that not just should each packet have been separately weighed but each of the slabs in each of the packets should have been separately weighed by the police. This, in our view, was most essential in the case at hand given the fact that samples had not been taken from each of the slabs contained in each of the recovered packets. As mentioned above, the prosecution's case was that each of the 93 packets contained 5 slabs of *charas*, and each of the remaining 133 packets contained 3 slabs of *charas*. What the police did was to take samples of 10 grams of *charas* from each of the 226 packets but not from each slab contained in all the packets. PW.7's deposition in this regard was: *"Out of the recovered charas from each packet I separated 10/10 grm of charas and made 226 parcel and remaining 226 parcels containing 10 cotton/tarora (Total 236 parcels) were sealed".*

13. Although the entire quantity of the recovered substance is said to have weighed 285 kilograms but it is our view that since samples for chemical examination were not taken from each of the slabs contained in the 226 packets and since each of the slabs had not been separately weighed, it could not be assumed that the entire 285 kilograms of the recovery was narcotic substance. Samples taken from one slab in each of the 226 packets cannot be considered to be a "representative sample" of all the 3 or 5 slabs contained in each of the 226 packets. The question that crops up in the mind is whether the slabs from which samples were not taken be considered as narcotic substance? We would say, certainly not especially when

sentences under the CNSA would depend on the quantity of the recovered narcotic substance. Since the police did not take a sample from each of the slabs, the guidelines laid down in Ameer Zeb's case *(supra)* were violated. The relevant portion of the said judgment is reproduced herein below:-

> ***"7. ...It is our considered opinion that a sample taken of a recovered substance must be a representative sample of the entire substance recovered and if no sample is taken from any particular packet/cake/slab or if different samples taken from different packets/cakes/slabs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample and it would be unsafe to rely on the mere word of mouth of the prosecution witnesses regarding the substance of which no sample has been taken or tested being narcotic substance. ..."***
>
> ***"8. For the purposes of clarity and removal of confusion it is declared that where any narcotic substance is allegedly recovered while contained in different packets, wrappers or containers of any kind or in the shape of separate cakes, slabs or any other individual and separate physical form it is necessary that a separate sample is to be taken from every separate packet, wrapper or container and from every separate cake, slab or other form for chemical analysis and if that is not done then only that quantity of narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result."***

14. As mentioned above, each slab, from which a sample for chemical examination had been taken, had not been weighed. It is the entire recovered substance which has been stated to have weighed 285 kilograms. In the case at hand, the learned Trial Court adopted a novel rather strange mode to determine the weight of each slab from which a sample was taken for chemical examination. In this regard paragraph-16 of the impugned judgment is reproduced herein below:-

> ***"16. Out of 226 packets, 93 packets were containing five slabs each. If the total weight of 226 packets is 285 kilograms, than the approximate weight of one packet would be 1.26 kilograms and approximate weight of one slab would be 0.25 kilograms. Considering one slab from 93 packets, weighing 0.25 kg. The prosecution has proved recovery of 93x0.25=23.25 Kilograms of Charas. The rest of 133 packets were containing three slabs each. In sequel to above discussion, the weight of one slab would approximately be 0.42 kilograms. The prosecution has thus proved only the recovery of 0.42x133=55.86 kilograms Charas. In this way, the prosecution has proved the recovery of 55.86+23.25=79.11 kilograms Charas, only."***

15. It is an admitted position that each slab from which a sample was taken had not been weighed. Perusal of the said paragraph shows that the learned Trial Court has assumed the weight of each of the 5 slabs contained in the 93 packets to be 0.25 kilograms, and each of the 3 slabs contained in the 133 packets to be 0.42 kilograms by adding up the weight of all these slabs in the 226 packets to be 285 kilograms. This mode of determination of the weight of each slab is, in our view, based on an impermissible surmise. The learned Trial Court has proceeded on the assumption that each of the 5 slabs contained in each of the 93 packets had weighed exactly the same to the last decimal. This is also true as regards the weight of each of the 3 slabs contained in the remaining 133 packets. The learned Trial Court has then only considered the quantity of the slabs from which a sample was taken to be the quantity of the recovered narcotic substance i.e. 79.11 kilograms of *charas*. By doing so, the learned Trial Court has acted in derogation of the law laid down in Ameer Zeb's case *(supra)* to the following effect:-

> ***"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. We may also observe that in such cases it is the accused person who is at the receiving end of long and stringent punishments and, thus, safeguards from his point of view ought not to be allowed to be sacrificed at the altar of mere comfort or convenience of the prosecution."***
>
> **(Emphasis added)**

16. In the case at hand, since 226 samples weighing 10 grams of *charas* each had been taken from not all but one slab in each of the 226 packets, the total quantity of the narcotic substance sent for chemical examination would come to 2,260 grams. The quantity sent for chemical examination was found to be narcotic substance / *charas*. Since the slabs from which the said samples were taken had not been separately weighed, the weight of each

such slab cannot be determined with precision. It would have been a different matter had each slab from which a sample was taken had been separately weighed. Had each slab from which sample was taken been weighed and their weight from more than 10 kilograms, there would have been no reason to alter the sentence awarded by the learned Trial Court. As mentioned above, we could not bring ourselves to agree with the mode adopted by the learned Trial Court for determining the weight of each of the 226 slabs from which the samples were taken. By giving the benefit of the doubt to the appellant and taking into consideration the guidelines given in Ameer Zeb's case *(supra)*, it would be safe to hold that at best, the appellant could have been convicted for possession of 2,260 grams of *charas*.

17. This Court, in its judgment dated 28.10.2013, passed in criminal appeal No.63/13 titled "Taeb Hussain Vs. The State", held as follows:-

> ***"8. It is the case of prosecution and it has also come in evidence that allegedly 40-packets of charas total weighing 40-kgs & 900-grams was recovered and each packet was containing 10-strips, but the sample was not taken from each strip/Lither, rather the same was taken from each packet. Thus, the I.O. has committed irregularity."***

18. In view of the above, we find that the recovery of *charas* is proved only to the extent of 2,260 grams which fact is supported by the chemical examiner's report. Therefore, the appellant could be convicted for possession of the said quantity of *charas* only. The offence under section 9-C of the CNSA is punishable of death or imprisonment of life or imprisonment for a term which may extend to 14 years but according to the proviso, if the recovered quantity of the narcotic substance exceeds 10 kilograms, the punishment cannot be less then imprisonment for life. As the quantity of *charas* recovered from the possession of the appellant does not, in our view, exceed 10 kilograms, he could not be sentenced to undergo imprisonment for life.

19. The appellant has been behind bars since 28.05.2013, when the narcotic substance / *charas* was recovered from him and

remained behind bars for more than 5-1/2 years. Therefore, we find this case is a fit one for converting the imprisonment for life into a sentence for a term of imprisonment already undergone by the appellant with the benefit of section 382 Cr.P.C.

20. In the above circumstances, the appellant is directed to be released if not required in any other case. The instant appeal as well as jail appeal are accordingly disposed of in the above terms.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(CHIEF JUSTICE) **(JUDGE)**

*Qamar Khan** ***APPROVED FOR REPORTING***