

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

Criminal Appeal No.208 of 2019

Muhammad WaseemTaj
Versus
The State

Appellant By: Mr. Shan Zeb Khan, Advocate.
Respondent By: Ms. AneelaJameel, Advocate.
Date of Hearing: 29.09.2020.

GHULAM AZAM QAMBRANI,J.:-This appeal has been directed against the judgment dated 12.06.2019, passed by the learned Special Judge CNS, Islamabad, in case F.I.R No.42 dated 17.07.2016, under Section 156 (1) (8) (ii) (c), 178, 187 Customs Act, 1969, Police Station I & P, MCC, Islamabad, whereby appellant (Muhammad Waseem Taj S/o Muhammad Taj) was convicted for the offences under Section 156 (1) (8) (ii) (c), Customs Act, 1969 and sentenced to undergo imprisonment for life (RI) and fine of Rs.10,00,000/-. In default of the payment of fine, appellant was to undergo S.I for one year. However, benefit of Section 382 (b) Cr.P.C has been extended to the appellant.

2. Briefly stated facts of the appeal are that on 17.07.2016 Chief Collector Custom received a spy information that huge quantity of narcotic is suspected to be smuggled through flight No.PK-785 from Islamabad to London. On the said information, the staff of custom was directed to conduct strict checking of passenger. Meanwhile, the appellant having two suitcases came at the scanning machine ASF Counter the appellant was intercepted, search was conducted, which resulted into recovery of 68 ladies shirts having embroidery work, therein found polythene envelope containing light brown color powder. The

recovered 68 ladies shirts were torn up and contraband recovered from each shirt, which on weighing became 10 Kilograms. Likewise, other suit case of the appellant on checking was also found 68 shirts having polythene bags envelopes alongwith embroidery stitching were also containing heroin powder therein, on weighing the same were also became 10 kilograms. Total 20 kilograms heroin powder was recovered and out of the above said recovered substance of the two suit cases 10, 10 grams of two samples each were separated for chemical analysis purpose, while the remaining contraband were sealed into another parcel.

3. After completion of the investigation, report under Section 173 Cr.P.C, was submitted before the learned trial Court. The learned trial Court after fulfilling codal formalities, framed charge against the appellant to which he pleaded not guilty and claimed trial. On denial of the charge by the appellant, the prosecution was directed to produce evidence.

4. In order to prove its case, prosecution examined the following witnesses:-

- i. PW-1, Sabir Hussain, Inspector, Custom/complainant.
- ii. PW-2, RiazIqbal, Deputy Superintendent Customs
(*witness of the recovery memo*)
- iii. PW-3, Nabeel Nawaz
- iv. PW- 4, Muhammad Jahangir
- v. PW- 5, MuhammadAslam, Inspector Custom.
(*Who chalked out F.I.R.*)
- vi. PW- 6, Shakeel Ahmed, Investigation officer.

5. On closure of the prosecution evidence, appellant/convict was examined by the learned trial Court under Section 342 Cr.P.C wherein, he has categorically denied the whole accusation and did not opted to be examined on oath as envisaged under Section 340(2) Cr.P.C. The learned trial Court after hearing the final arguments, passed impugned judgment dated 12.06.2019 found the appellant to be guilty of the offence under section 156 (1) (8)

(ii) (c), Customs Act, 1969 and sentenced him as mentioned above.

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 (PLD 2012 SC 380); that a sample of the narcotic substance weighing 10 grams was taken from the alleged 68 polythene bags allegedly recovered from the ladies shirts but samples were not taken from each of the polythene bags allegedly recovered from the said each ladies shirts; that each polythene bag was not separately weighed; that at least, the case against the appellant would be for recovery of 20 grams of heroin; that the appellant could not have been convicted for recovery of 20 kilograms of heroin; that the law also warranted each of the alleged recovered polythene bag to be separately weighed. Learned counsel for the appellant prayed for the acceptance of the instant appeal.

7. Conversely, learned counsel for the Customs/ respondent submitted that the impugned judgment dated 12.06.2019 does not suffer from any illegality; that the appellant was caught red handed at the airport along with recovered heroin and the case was proved against the appellant by the prosecution; that samples of 10 grams of the narcotic substance was taken from each suitcase for the purpose of chemical examination; that the mere fact that from each of the polythene bag, samples were not separated did not in any way weaken the prosecution's case; that the chemical examiner's report as to the narcotics substance recovered from the appellant was in positive; and that the appellant had been rightly convicted by the learned trial Court under the Customs Act. Learned counsel urged for dismissal of the appeal.

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

9. The facts of the appeal, have been mentioned hereinabove, therefore, need not be reproduced.

10. **PW-1 Sabir Hussain** Inspector Customs has deposed that on 17.07.2016, he was posted at International Departure Hall, Benazir Bhutto International (BBI) airport, Islamabad. A credible information was received that heavy quantity of narcotics is expected to be smuggled. On such information a strict checking of passengers was started. During this checking, the appellant, along with his two suitcases, black in colour Marka RI were brought to check through scanning machine at ASF counter. On asking, appellant answered that no prohibited item is lying in his luggage. Both suitcases were checked. On checking ladies embroidered shirts were found therein, which were further deeply checked it found extraordinary heavy that's why the embroidery stitched along with neckline was torn. Polythene packets were found lying under embroidered part of shirt, wherein light brown colour heroin were found. In one suit case, the shirts were 68 in numbers all the shirts were checked wherein heroin powder was found fitted in embroidered part which was taken out and weighed. On weighing, it found 10 kilograms. Likewise, second suit case marka RI black in colour were also checked Out of which 68 shirts were recovered. All of the shirts were embrioded and checked. Out of these shirts, heroin powder packed in packets light brown its colour were recovered, which was weighed totally found 10 kilograms. From both of the suit cases total 20 kilograms heroin powder was recovered. From recovered substance of one suit case 10/10 grams 2/2 sample got separated for chemical analysation and sealed in 2 sample parcels. Likewise from second suit case 10/10 grams 2/2 sample got separated for chemical analysis purpose and sealed in two sample parcels. Total four

sample parcels were prepared out of 20 kilograms heroin. Two for chemical analysis report and two kept along remaining recovered substances. Suitcases recovered substance and shirts etc. taken into possession. Thereafter, prepared murasla Ex.P/1-A, F.I.R Ex.P/1-B, notice under Section 171 Customs Act Ex.P/1-C, prepared inventory memo Ex.P/1-D. On 19.07.2016, took the sample parcel to N.I.H- Islamabad for chemical analysis. During cross-examination, stated that the substance recovered from each shirt was collected at side on the table. The recovered packets from shirts were kept in polythene sheets. All the packets were made transparent plastic sheets. All the packets were closed. All the packets were taken into possession as it founds. The 10/10 grams samples were taken from four packets out of 68 packets. We took first one suit case checked it completely and finalized. Then taken other suitcase for checking. All the 68 packets of each suitcase was not weighed, separately. It is correct to suggest that no chemical analysis report was obtained in respect of case property produced before the Court. **PW-2, Riaz Iqbal, Deputy Superintendent Custom**, deposed that on 17.07.2016, he was posted at International Departure Hall, BBI airport, Islamabad. At 8:00 a.m., briefing was started. On the same day, appellant entered into briefing area. Sabir Hussain, Inspector, was on checking. In his presence, two suitcases of the appellant/ accused were checked. From the suitcases, ladies shirts embroidered neckline was found with concealed substance. All the shirts checked one by one, out of shirts polythene packets containing heroin were recovered. From the each suitcase, 68 shirts were recovered out of which heroin was concealed in packets. In his presence, a notice under Section 171 Customs Act was served to appellant. From the personal search, 650 pounds, PKR 19,500, British passport, PIA ticket were also recovered from the possession of the accused. Sabir Hussain prepared recovery memos EXP/I-D and Ex.P/I-E which were signed by him as witness.

PW-5, Muhammad Aslam, Inspector Custom, has deposed that on 17.07.2016, he was posted at Investigation & Prosecution Branch, Model Customs Collectorate, Islamabad that on the same day, muraslaEx.P/1-A was brought by Gull Hassan Zaid, Head Constable, for registration of case whereupon he chalked out F.I.R No.42/2016.

PW-6, Shakeel Ahmed, Inspector Custom has deposed that on 18.07.2016, he was posted at Investigation & Prosecution Branch, Model Customs Collectorate, Islamabad. Investigation of this case was entrusted to him. After conducting investigation, Challan of the case was prepared and submitted by him. He produced incomplete challan as EX.P/6-A. On receiving chemical analysis reports from National Institute of Health, Islamabad, he prepared Tatima challan. He has produced chemical examination reports as EX.P/6-B and EX.P/6-C and Tatima challan as EX.P/6-D.

11. As per prosecution case, the entire quantity of the recovered substance is said to be weighed 20 kilograms, but it is our view that since samples for chemical examination were not taken from each of the alleged recovered polythene bag stitched with each shirt, it could not be assumed that the entire 20 kilograms of the recovery was narcotic substance. Samples taken from two polythene bags in each suitcase cannot be considered to be a "representative sample" of all the 136 polythene bags recovered from two different suitcases. The punishment of the appellant depends upon the quantity of recovered substances but in the case in hand, samples have not been taken from each recovered polythene bag stitched with each shirt. The guidelines laid down in "Ameer Zeb vs the State" (PLD 2012 SC 380) 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."

12. As mentioned above, each polythene bag, from which a sample for chemical examination had to be taken, had not been weighed. It is the entire recovered substance which has been stated to have weighed 20 kilograms.

13. That there is no denial that each polythene bag was not weighed and only 10/10 grams from the allegedly recovered contraband from each suitcase were separated for chemical analysis purpose. On receiving the chemical examination report Ex.P/6-B, the learned trial Court considered the whole 20 kilograms as narcotic substance, thus the learned trial Court has acted in derogation of the law laid down in Ameer Zeb's case (supra) wherein, the Hon'ble Apex Court has held 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. 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."

14. That only 10/10 grams, total 20 grams, had been taken from the whole 136 polythene bags, which were sent for chemical examination, the same were found to be narcotic substance/heroin. Each polythene bag was not separately weighed, the weight of each bag cannot be determined accurately. The case of prosecution became highly doubtful to the extent of rest of the alleged recovered contraband, therefore, the benefit of doubt is extended in favor of the appellant and taking into consideration the guidelines given in Ameer Zeb case and for the safe administration of justice, we hold that at least the appellant could have been convicted for the possession of only 20 grams of the recovered contraband, which have been proved to be heroin.

15. That the recovery of heroin is proved only to the extent of 20 grams, which fact is supported by the chemical examiner report. The offence under Section 156 (1) (8) (ii) (c) of the Custom Act, 1969 provides that if the quantity of narcotic drug, psychotropic substances or controlled substance is hundred grams or less, imprisonment, which may extend to 02 years or with fine or with both. In the judgment reported as "Ghulam Murtaza and another Versus the State" (PLD 2009 Lahore 362), the approved standard sentences for different quantities of various contraband narcotics substances recovered in connection with the Control of Narcotic Substances Act, 1997 as provided upto 30 grams the punishment is for seven months rigorous

imprisonment with fine of Rs.5000/-, therefore, the impugned judgment is not sustainable in the eyes of law.

16. That appellant is behind the bar since his arrest on 17.07.2016, for more than four years two months. In view of the same, appellant's conviction is sustained, his appeal stands **dismissed** with modification in his sentence from life imprisonment to already undergone by him with benefit of Section 382 Cr.P.C.

17. In the above circumstances, the appellant namely Muhammad WaseemTaj, is directed to be released if, not required in any case.

(AAMER FAROOQ)
JUDGE

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open court, on 30th day of September, 2020.

JUDGE

JUDGE

"Rana.M. Ift."