

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.174/2017

Iftikhar Ahmad Khan Babar

versus

The State, etc.

Appellant by: Raja Rizwan Abbasi, Advocate.

Respondents by: Dr. Waseem Ahmed Qureshi, Special
Prosecutor, ANF.
Zubair, Inspector. ANF.

Criminal Appeal No.132/2018

Ansar Farooq

versus

The State.

Appellant by: Mr. Abdul Rashid Sheikh, Advocate.

Respondent by: Ch. Ehtisham ul Haq, Prosecutor ANF.

Date of Hearing: 21.07.2020.

MOHSIN AKHTAR KAYANI, J: Through this single judgment, we intend to decide the captioned criminal appeals as the same are arising out of one and same FIR No.40, dated 10.10.2011, U/S 9/C, 14, 15, 16 of CNSA, 1997 read with Prohibition as per Schedule V Controlled Chemical Table-I of UN Convention, 1988, P.S. ANF, Rawalpindi.

2. Crl. Appeal No.174/2017 has been filed U/S 48 of CNSA, 1997 against the order dated 18.10.2017, whereby application U/S 227 Cr.P.C. filed by appellant for amendment of charge was dismissed.

3. In Crl. Appeal No.132/2018, appellant Ansar Farooq has filed appeal U/S 48 of CNSA, 1997 against the order dated 05.07.2018, passed by CNS

Court, Islamabad whereby application for amendment/alteration of charge in terms of Section 227 Cr.P.C. has been dismissed.

4. Brief facts referred in both the appeals are that case FIR No.40, dated 10.10.2011, U/S 9/C, 14, 15, 16 of CNSA, 1997 read with Prohibition as per Schedule V Controlled Chemical Table-I of UN Convention, 1988, P.S. ANF, Rawalpindi was registered on the complaint of Riaz Ali, Assistant Director, P.S. ANF, Rawalpindi with the allegations that he received a letter from Secretary Ministry of Narcotics Control dated 18.08.2011, whereby in the 28th Sessions of National Assembly dated 03.02.2011 in response to calling attention notice, Federal Minister for health recorded his stance on the floor of Assembly that two companies who have obtained illegal permission for export of Ephedrine and later on sold out the same to the local manufacturer and unknown persons, their registration have been cancelled through show cause notice and their entire material may also be forfeited for the M/s Burlex Lab International, Multan, who was given quota of 6000 kg of Ephedrine on 25.03.2010, 500 kg quota of Ephedrine on 22.10.2010 for export to foreign country, whereas M/s Danas Pharmaceutical (Pvt) Ltd. was allocated 1500 kg quota of Ephedrine on 15.04.2010, 1000 kg of quota of Ephedrine on 09.06.2010. The Chief Executive of M/s Burlex Lab International, Multan Iftikhar Ahmed Babar and Ansar Farooq of M/s Danas Pharmaceutical (Pvt) Ltd. have used their influence and obtained quota illegally of controlled chemical Ephedrine for export to foreign country in violation of law, which was later on sold out to local manufacturer. The matter was investigated by the ANF and final report U/S 173 Cr.P.C. was submitted against 16 persons including present appellants before the CNS Court, Rawalpindi, which was initially assailed by Iftikhar Ahmed Babar before Lahore High Court, Rawalpindi Bench, Rawalpindi in W.P No.660/2014 and in Crl. Appeal

No.406/2014, decided on 17.11.2014, whereby question of territorial jurisdiction was settled and the matter was to be proceeded by the Court notified in the ICT. The said order was maintained by the Apex Court in CP No.2405/2014 and in Crl. Petition No.697/2014 dated 14.10.2016.

5. Besides the above position, Ansar Farooq has also filed writ petition No.2808/2011 and Iftikhar Ahmed Babar filed writ petition No.3206/2011, they have assailed the very registration of FIR and also claimed that matter could only be filed under Drug Act, 1976 instead of CNSA, 1997, which is not applicable. Both the petitions were dismissed vide order dated 24.04.2012. Challan was submitted in the trial Court at Islamabad, charge was framed on 21.04.2017 against petitioners in terms of Section 9/C, 14, 15 & 16 of CNSA, 1997. The petitioner Ansar Farooq challenged the same through W.P No.1656/2017, which was dismissed vide order dated 25.10.2017 and petitioner/appellant was directed to approach CNS Court for alteration/ amendment in charge. Similarly, Iftikhar Ahmed Babar/appellant has also filed Crl. Appeal No.96/2017 against the same order for alteration and amendment in charge and appeal was dismissed vide order dated 30.10.2017 by this Court. The appellants have filed different application including application U/S 227 Cr.P.C. for alteration of charge which has been dismissed vide order dated 18.10.2017 and order dated 05.07.2018 by the Judge Special Court CNS, Islamabad. Hence, these criminal appeals.

6. Learned counsel for the appellants have raised similar questions and contend that very registration of FIR under CNSA, 1997 is illegal as Ephedrine does not fall within the definition of drug or psychotropic substance; that in order to confer the jurisdiction under CNSA, 1997, it is necessary for prosecution to build up their case in terms of Section 6, 7 & 8 of the CNSA, 1997, which contain prohibition of possession of narcotic drugs etc.,

prohibition of import or export of narcotic drugs etc., prohibition on trafficking or financing the trafficking of narcotic drugs etc. but Ephedrine was allocated through a process to the appellants' companies by the Government of Pakistan and any of the violation of terms of allocation quota is to be governed under Drug Act, 1976 or DRAP Act, 2012; that as per United Nations office on Drug and Crime Ephedrine is not to be considered as drug and comes within the purview of DRAP being member of United Nations Convention, 1998, which discloses that Ephedrine is mentioned at S.No.3 of the convention referred in Division-I, Table-I; that learned trial Court has not considered the reference of CNSA as well as Drug Act before framing the charge, even not gone through the relevant provisions of law to evaluate the status of Ephedrine, which does not fall within the definition provided in CNSA, 1997 and offences U/S 9-C, 14, 15, 16 CNSA, 1997 are not attracted.

7. Conversely, learned Special Prosecutor, ANF alongwith I.O contends that all these questions have already been settled by the Court of competent jurisdiction and same case in W.P No.2808/2011 & W.P No.3206/2011, dated 24.04.2012, whereby Division Bench of Lahore High Court, Rawalpindi Bench, Rawalpindi considered all these aspects and declared very registration of FIR legal after considering the Drug Act, 1976 viz. a viz. CNSA, 1997; that question of violation of law has to be considered after recording of evidence and trial Court can alter the charge at any stage of the trial subject to availability of evidence or material relevant to the proposition, as such that stage has not yet arrived; that charge framed by the trial Court in both the appeals is in accordance with law and no illegality has been highlighted by the appellants rather it is premature stage.

8. Arguments heard, record perused.

9. Perusal of record reveals that both the appellants are aggrieved with the framing of charge dated 21.04.2017, whereby following charge has been framed:-

Like-wise on 22.10.2010, you accused Iftikhar Ahmed Khan Babar as Chief Executive/Owner of M/s Burlex Lab International Multan again obtained exceptional allocation of 500 Kilograms ephedrine a control substance for export purpose.

On 15.04.2010, you accused Ansar Farooq Chief Executive and you accused Tahir-ul-Wadood Lahoti partner Danas Pharmaceutical Pvt. Ltd. Industrial Triangle Kahuta Road Islamabad had obtained exceptional allocation of 1500 Kilograms ephedrine control substance for export purpose.

On 09.06.2010, you accused Ansar Farooq Chief Executive and you accused Tahir-ul-Wadood Lahoti partner Danas Pharmaceutical Pvt. Ltd. Industrial Triangle Kahuta Road Islamabad had obtained exception allocation of 1000 Kilograms.

All of you accused Iftikhar Ahmed Khan Babar, Ansar Farooq & Tahir-ul-Wadood Lahoti with active connivance with

- (i) Accused Makhdoom Shahab-uddin Ex-Minister Ministry of Health, Islamabad.*
- (ii) Accused Syed Ali Moosa Gillani son of Syed Yousaf Raza Gillani Ex-Prime Minister of Pakistan.*
- (iii) Accused Sheikh Ansar Ahmed Drug Controller National Regulation and Services Division, M/o Health, Islamabad.*
- (iv) Accused Abdul Sattar Sohrani Deputy Drug Controller Ministry of Health Islamabad.*
- (v) Accused Asad Hafeez Ex-Director General Ministry of Health Islamabad.*
- (vi) Accused Abdul Khaliq.*

All of you did not comply with the provision of Control of Narcotics Substances, regulation of drug abuse, control chemical, equipment and materials Rules 2001, hence you also committed offence punishable u/s 16 of CNSA, 1997.

Thereby all of you accused persons have committed an offence punishable under sections 9 (c), 14, 15 & 16 of the CNSA, 1997, within the cognizance of this Court. And I hereby direct all of you to be tried by this Court for the above said charges.

10. The appellants have filed separate application for alteration and amendment of charge U/S 227 Cr.P.C. but both the applications were dismissed vide order dated 18.10.2017 & 05.07.2018 respectively with common background and reasons by the Judge Special Court (CNS), Islamabad.

11. Before going into the relevant extract of allegations, it is necessary to go through the relevant provisions of Section 9, 14, 15 of CNSA, 1997, whereby charge was framed against the appellants. Section 9 of CNSA, 1997 deals with punishment of narcotics offence which have been provided for contravention of Sections 6, 7 & 8 of CNSA, 1997. The said provisions are dealing with:-

Section 6. Prohibition of possession of narcotic drugs etc.

Section 7. Prohibition of import or export of narcotic drugs etc.

Section 8. Prohibition on trafficking or financing the trafficking of narcotic drugs etc.

Section 14. Prohibition on aiding, abetment or association in narcotic offences.

Section 15. Punishment for contravention of section 14.

Section 16. Punishment for offence for which no punishment is provided.

12. The entire scheme of CNSA, 1997, deals with all kinds of narcotics, drugs, psychotropic substance, even control of production processing and trafficking of such drugs and substance, whereby the concept of manufactured drug is defined in Section 2(q) and narcotic drug has been defined in Section 2(s). Similarly, psychotropic substance defined in Section 2(za). The definition clause also provides the concept of manufacturer as well as concept of opium, opium derivative, opium poppy, opium poppy straw etc. The Act also provides psychotropic substance in Section 2(ii)(a) that 85 enlisted psychotropic substance with international non-proprietary names viz. a viz. chemical names.

13. Section 77 of CNSA, 1997 empowers Federal Government to make rules for carrying out the purpose of the Act where-under Control of Narcotics Substances (Regulation of Drugs, Abuse, Controlled Chemicals, Equipment & Materials) Rules, 2001 were framed which provides the definition of controlled chemical in terms of Rule 2(v) referred in the substance list in schedule V, whereas schedule V also governs and includes substance designated by their international non-proprietary names or the names used in

the international conventions in force referred in Division-I of the 1988 convention which hereby referred "Ephedrine".

14. While considering this background, the primary allegation against the appellants which came into limelight is that a calling attention notice was filed in the National Assembly of Pakistan, whereupon minister for health issued direction for constitution of JIT comprising of officials of Ministry of Health, Ministry of Narcotics and Director General ANF, who probed into the matter and submitted their report on quota allocation of ephedrine whereby it revealed that allocated quota of ephedrine to the appellants' company namely M/s Bulrex Lab International Multan and M/s Danas Pharmaceutical (Pvt.) Ltd, Islamabad of 500 kg, 6000 kg, 1500 kg, 1000 kg on different dates was misused and sold out to local manufacturer companies and to unknown persons who have misused the ephedrine which has been subsequently used in the manufacturing of narcotics by different drug dealers.

15. Learned trial Court has framed the charge in terms of Section 9/C, 14, 15, 16 of CNSA, 1997 and appellants have raised their voices that their matter does not fall within the concept of CNSA, 1997 rather it could only be considered under Drug Act, 1976. That might be the case but in order to reach at just conclusion at this pre-mature stage Section 2 of the Drug Act, 1976 does not bar the application of other laws rather the said Act is in addition to and not in derogation of Dangerous Drug Act, 1930 or any other law for the time being in force, as such Section 74 of CNSA, 1997 provides the application of other laws when offence punishable under this Act is also offence under any other law. Similarly, Section 76 of the Act has given overriding effect to CNSA, 1997 notwithstanding anything contained in any other law. All these provisions left nothing in favour of appellants to claim the exclusive jurisdiction under Drug Act, 1976 at this pre-mature stage when their plea

could not be sorted out without recording of evidence as to whether ephedrine is a controlled substance and violation of its allocation quota falls within the purview of Drug Act, 1976 or under CNSA, 1997.

16. In similar situation when question of conflicting jurisdiction or overlapping jurisdiction of two special legislations are in question before the Court, the matter has to be dealt with initially in terms of the allegations referred in the FIR or other incriminating material collected by the investigation agency referred in the final report U/S 173 Cr.P.C.

17. The superior Courts while dealing with the principle of interpretation of two laws, whether specific or general, laid down certain criteria to resolve the controversy for the purpose of application of jurisdiction. In order to resolve the controversy, we have gone through the case reported as 2017 SCMR 1218 (Syed Mushahid Shah and others v. FIA and others), 2013 SCMR 85 (Muhammad Mohsin Ghuman v. Government of Punjab), PLD 1991 SC 258 (Packages Limited v. Muhammad Maqbool), PLD 1961 SC 585 (Mian Iftikhar ud Din v. Muhammad Sarfraz), 1965 SCR 603 (Shri Ram Narayan vs. Shimla Banking and Industrial Company Ltd.) AIR 1977 SC 265 (Sarwan Singh vs. Kastori Lal), AIR 2007 SC 683 (Morgan Securities (Pvt.) Ltd. vs. Modi Rubber Ltd.), 2004 SCMR 1397 (I.G. HQ Frontier Corps, etc. v. Ghulam Hussain, etc.), PLD 1992 SC 353 (A. Habib Ahmad v. M.K.G. Scott Christian), PLD 2014 SC 531 (Province of Sindh through Chief Secretary v. MQM through Deputy Convener) and PLD 2008 SC 779 (Aftab Shahban Mirani v. Muhammad Ibrahim), whereby following principles have been laid down:

- a) General law was one that was unrestricted in terms of its applicability to all issues covered by a subject matter, whereas specific law may be restricted to certain locality, persons or types of cases.

- b) Whether a law was general or special dependent on particular features of the statute in issue and was ultimately a question of relatability between two or more statutes on common subject matter.
 - c) Where there was conflict between a special law or general law the former would prevail over the latter.
 - d) Conflict between two laws providing different punishments for same offence, law providing greater punishment must relent in favour of the law ordering lesser punishment.
 - e) When there were two special laws both of which contain overriding clauses, and there was conflict between them, generally the statute later in time would prevail over the statute prior in time.
 - f) The application of law later in time is based upon different factors including object, purpose and policy of both the statutes and legislative intention, as expressed by language implied therein, needed to be considered in order to determine which of the two special laws were to prevail.
 - g) If two special enactments contain provision which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and policy underlining the two acts and the clear intendment conveyed by the language of relevant provisions.
18. While applying the above principles, it is necessary to compare both the laws pertaining to the case in hand i.e. CNSA, 1997 and Drugs Act, 1976 for the purpose of its application:

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| Object | CNSA, 1997: An act to consolidate and amend the laws relating to narcotics and psychotropic substance and control the production, processing and trafficking of such drugs and substances. |
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| | <p>Drugs Act, 1976: To regulate the import, export, manufacture, storage, distribution and sale of drugs.</p> |
| Purpose | <p>CNSA, 1997: An Act to consolidate and amend the laws relating to narcotic drugs, psychotropic substances, and control the production, processing and trafficking of such drugs and substances;</p> <p>Drugs Act, 1976: An Act to regulate the import, export, manufacture, storage, distribution and sale of drugs.</p> |
| Procedure | <p>CNSA, 1997: Search and investigation in terms of Sections 20, 21, 22, 23, 24 & 25.</p> <p>Section 47: Application of Criminal Procedure Code, 1898</p> <p>Drugs Act, 1976: Drugs Registration Board, Expert Committees, Provincial Quality Control Board, Federal Drugs Laboratory and Institutes, Provincial Drugs Testing Laboratory, Government Analysts</p> <p>Inspector and Powers of Inspector</p> |
| Penalty | <p>CNSA, 1997: Sections 37, 38 39 and 40: Freezing and forfeiture of assets.</p> <p>Drugs Act, 1976: Section 27: Offences, Penalties and Procedures</p> |
| Jurisdiction | <p>CNSA, 1997: Section 45: Special Court appointed under this Act shall have exclusive jurisdiction to try an act triable in this Act.</p> <p>Drugs Act, 1976: Section 31: Drugs Court</p> |
| Punishments | <p>CNSA, 1997: Under Sections 5, 9, 11, 13, 15, 16, 26 & 42 for contravention</p> |

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| | <p>under Sections 6, 7 8 for term ranging from one year up to life imprisonment/death sentence.</p> <p>Drugs Act, 1976:</p> <p>Under Sections 41 and 42: Cancellation of licenses and registration of registered drugs.</p> |
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19. While considering the above comparison of two special laws, it has been observed that both the laws are different in object and nature, even their underlining principles are different to each other and not supplementing each other for the purpose of deciding the question of jurisdiction. The CNSA, 1997 is exclusively a special law dealing with the crimes of narcotics and psychotropic substance with reference to its sale, purchase, manufacturing, trafficking, transportation and usage, whereas the Drugs Act, 1976 deals with regulating activities of drugs defined in Section 2(g) and also provides a mechanism to exclude the adulterated drugs from the society. The drugs referred in Drugs Act, 1976 are meant for treatment, prevention or diagnosis of deceases in human beings or in animals, whereas the drugs defined under the CNSA, 1997 are considered to be under the concept of addiction, usage of which is not allowed for betterment of human life. Similarly, the Drugs Act, 1976 provides the concept of registration, manufacturing, import/export and sale through a regulated activity, while the Quality Control Board regulates its concept, even if its registration or license is denied, appellate board is available to deal with the situation, whereas in the CNSA, 1997, there is no concept of license of manufacturing.

20. Similarly, the concept of punishments is entirely different to each other in said special laws as the CNSA, 1997 is providing harsh punishment opposite to the Drugs Act, 1976 and even same is later in time. The position in hand, if considered on the touchstone of above referred

discussion, it is not the case of appellants that they are manufacturing, transportation or possessing the drugs in terms of Sections 6, 7 & 8 of the CNSA, 1997, rather they have been given license for ephedrine by the Government of Pakistan for the purpose of manufacturing of drugs in terms of Section 2(g) of the Drugs Act, 1976 with reference to pharmaceutical dealings, but the said quota was misused, sold out and transferred to different companies and individuals for undefined purpose, including manufacturing of drugs in terms of Sections 6, 7 & 8 of the CNSA, 1997, whereby the ephedrine was used in the manufacturing of narcotics drugs or psychotropic substance in terms of Section 2(p) of the Act in combination to other plant drugs referred in the CNSA, 1997. The investigating agency has submitted the challan with reference to similar allegations and as such, there is a thin line to settle this question as to whether the charge framed at this premature stage of the trial is to be considered only under the Drugs Act, 1976 or CNSA, 1997, but it is settled law that charge should be framed on the basis of the allegations at the initial stage and subsequently on the basis of a final report prepared by the Investigating Agency in terms of Section 173 Cr.P.C.

21. There is no cavil to the proposition that charge can be amended at any stage in terms of Section 227 Cr.P.C. and under this backdrop the determining factor has to be evaluated when initial evidence has been recorded or at the stage where evidence was completely recorded. Reliance in such type of situation has to be made on 2018 P.Cr.L.J 1719 (Malik Tariq Ayub and another Vs. The State and 5 others), where question of application of Anti-Terrorism Act was dealt with by the Court on the basis of different definitions of terrorism settled by the Apex Court as to whether that particular case falls

within the jurisdiction of Anti-Terrorism Court. The principle has been laid down in para-26 in the following manner:-

In view of the foregoing, instant petition is allowed and the impugned order dated 22.12.2016 is set aside. Consequently, the applications filed by respondents Nos.3 and 4 shall be deemed to be pending before respondent No.2 and the question of deletion of section 7 of the Act, shall be determined by the learned trial court after recording material evidence by the prosecution. In this regard, learned trial Court shall follow the aforementioned guidelines/principles propounded by the Hon'ble Supreme Court.

22. The principle referred in the case of *Malik Tariq Ayub supra* has been upheld by the apex Court vide C.P No. 3009/18 dated 31.01.2019, whereby it was settled that the question of jurisdiction could only be concluded in such type of situation after recording of material evidence by the prosecution, which is the key factor for its consideration by the Court, therefore, the orders passed by the learned Trial Court dated 18.10.2017 and 05.07.2018 at this stage are considered to be well within the four corners of law. Hence, the learned Trial Court is directed to record the material evidence to be submitted by the prosecution and then settle the question of jurisdiction on the basis of evidence recorded in the Court before its final decision, however, the aggrieved party reserves the right to approach this Court again.

23. The petitions stand DISPOSED OF in the above terms.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 25th August, 2020.

JUDGE

JUDGE

Zahid