

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr. Appeal No.882-P/2022

Musa Khan Shinwari s/o Aman Khan,
 resident of Nangarhar Afghanistan.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-	<u>Barristers M. Hassan Adil & Zaland</u> <u>Ali Shah</u>
For State :-	<u>M/S Sanaullah Addl. Attorney</u> <u>General, Daulat Khan Assistant</u> <u>Attorney General and Muhammad</u> <u>Nisar Khan AAG along Jamroz</u> <u>Khan Afridi Advocate.</u>
Date of hearing:	<u>07.11.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- Through this common judgment, we propose to decide the instant criminal appeal and connected **Cr.A. No.1159-P of 2022**, as identical question of law is involved therein.

2. This criminal has been filed by Musa Khan Shinwar, the appellant, against the judgment dated 31.05.2022, (“impugned judgment”), rendered by learned Sessions Judge/Judge Special Court District Khyber, whereby the appellant has been convicted section 9 (d) Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (“Act of 2019”) and sentenced to undergo imprisonment for life and to pay rupees ten lac as fine and in default of payment thereof to further undergo two years simple imprisonment vide FIR

No.111/2021 dated 19.12.2021, registered under sections 6, 7, 8 & 9 (c) Control of Narcotic Substances Act, 1997 (**"Act of 1997"**) at Police Station Investigation & Prosecution Branch Collectorate of Customs (Enforcement) Custom House, Peshawar. Benefit of Section 382-B Cr.P.C. has been extended to him.

3. Connected Cr.A. No.1159-P of 2022, has been filed by Shah Faisal, the appellant, against the judgment dated 07.11.2022, passed by learned Sessions Judge/Judge Special Court District Khyber, whereby the appellant has been convicted section 9 (d) Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (**"Act of 2019"**) and sentenced to undergo imprisonment for life and to pay rupees ten lac as fine and in default of payment thereof to further undergo two years simple imprisonment vide FIR No.113/2021 dated 31.12.2021, registered under sections 6, 7, 8 & 9 (c) of the Act, 1997 at Police Station Investigation & Prosecution Branch Collectorate of Customs (Enforcement) Custom House, Peshawar. Benefit of Section 382-B Cr.P.C. has been extended to him.

4. The prosecution's case as per contents of First Information Report (**"FIR"**) in the instant appeal is that pursuant to information received by Mr. Amjad ur Rehman Collector Customs (Appraisement)

Peshawar on 19.12.2021 that an attempt will be made to smuggle narcotics in a specially designed cavity in a Bedford Truck bearing Registration No.C.8831 from Afghanistan to Pakistan via Customs Station Torkham. On the said information, Muhammad Tayyab Additional Collector Customs (Appraisement) Torkham constituted a special team in the supervision of Assistant Collector Saifullah. At 1500 hours, the said vehicle entered at Import Terminal Customs Station Torkham and was stopped for necessary checking. Cursory checking of the vehicle revealed presence of specially designed cavity which was covered with welded metallic sheet. The same was cut open with the help of welding machine. On query driver of the vehicle disclosed his name as Musa Khan Shinwari (appellant) son of Aman Khan r/o Nangarhar Afghanistan. On search, heroin contained in eight packets weighing total 9315 grams, Hashish contained in eight packets weighing total 10415 grams, opium weighing total 70681 grams and methamphetamine (ICE) weighing 4460 grams were recovered from the secret cavity. The Seizing Officer separated samples from each packet of the recovered narcotics for chemical analysis by the FSL and sealed the same into parcels. He also sealed the remaining quantity of heroin, opium, Hashish and ICE into a steel box and

deposited the same in State Ware House as per procedure. The appellant was arrested and case was registered against him.

5. The prosecution's case in the connected Cr.A. No.1159-P/2022 is that on 31.12.2021 at 1400 hours, at Import Terminal Custom Torkham, within the criminal jurisdiction of Custom Station Torkham, appellant Shah Faisal while trafficking narcotics from Afghanistan to Pakistan in a Mazda Mini truck bearing registration No.P.942, was intercepted by the Custom officials and from his vehicle 368 packets of Hashish and 323 packets of opium were recovered from secret cavity made in floor of the truck, hence, he was arrested and case FIR No.113/2021 dated 31.12.2021 under section 6, 7,8 and 9 (c) of the Act of 1997 was registered against him at Police Station Custom Station Torkham.

6. On completion of investigation in both the cases, challans under the relevant provisions of the Act of 1997 were submitted against the appellants before the learned trial Court, where the appellants were summoned and formally charged sheeted under section 9 (d) of the Act of 2019 instead under the Act of 1997 to which they pleaded not guilty and claimed trial. On closure of the prosecution's evidence statements of the appellant was recorded under section 342 Cr.P.C.,

wherein they denied the prosecution's allegation and professed their innocence. They, however, neither wished to be examined on oath or to produce evidence in defence. On conclusion of trial, after hearing the parties, the learned trial Court convicted and sentenced the appellants vide judgments impugned in these appeals.

7. On 31.10.2023, this court after hearing learned counsel for the parties at some length passed the following order:-

"In this case recovery has been effected at Torkham terminal by the Custom Offices and initially FIR was registered under sections 6, 7 8 & 9 Control of Narcotic Substances Act, 1997 and thereafter the charge was framed under section 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 on 13.04.2022 by the learned trial Court. The attention of this court was drawn to the order of the apex court rendered in Criminal Petition No.7 of 2021, decided on 12.01.2022, we, therefore put the worthy Additional Attorney General and the worthy Advocate General KP on notice to assist us on the question that when the recovery was effected at the border or airport, whether the accused would be prosecuted under

the Khyber Pakhtunkhwa Control of
Narcotic Substances Act, 2019 or under
Control of Narcotic Substances Act,
1997?

8. We have heard the arguments of learned counsel for the parties on the above legal point and perused the relevant laws on the subject as well as judgments of this court and hon'ble Apex court.

9. As stated above, as per contents of FIRs, huge cache of narcotics consisting of heroin, Hashish, opium, Methamphetamine (ICE), has been shown recovered from vehicles entering into Pakistan viz Torkham Terminal by the Customs Officials being driven by the appellant, resultantly, FIRs under sections 6, 7, 8 & 9 of the Act of 1997 were registered against the appellants followed by submission of *challans* under the Act of 1997, however, during trial, the learned trial court indicted the appellants under section 9 (d) of the Act of 2019. Admittedly, record is silent for doing the aforesaid exercise, however, we are mindful of the fact that the learned trial court has proceeded with the trial of the appellants under the Act of 2019 in pursuance of judgment of this court in WP No.2889-P/2020. We deem it appropriate to furnish brief history of the said judgment on the point.

10. After promulgation of the Act of 2019 on 4th September, 2019, one Muhammad Siddique filed **Writ Petition No.2889-P/2020, titled, "Muhammad Siddique Vs Federation of Pakistan & others"** before this court wherein he questioned vires of the Act of 2019 and sought issuance of the following writ:-

"To declare that arrest/seizures, investigation conducted by respondent No.4 within the territorial jurisdiction of Khyber Pakhtunkhwa after the commencement of the Act of 2019 as illegal, unlawful without jurisdiction, without lawful authority, coram-non-judice and beyond the mandate of the Act of 2019.

To direct the respondent not to submit challan before the court of Judge Special Court (CNS) under the CNS Act, 1997 against the petitioner.

The Writ Petition (*ibid*) was contested by the respondents and after hearing both the sides, this court vide judgment dated 01.12.2020, observed and held as under:-

"The Courts established under section 22 of the Act of 2019, in view of section 23 have the exclusive jurisdiction to try all offences cognizable under the Act of 2019, which read as:-

"S.23. Jurisdiction to Try offences:- The special court shall have the exclusive jurisdiction to try all offences cognizable under this Act.

Therefore, the Special Court established under section 46 of the Act of 1997, could not take cognizance of any offence, under the Act of 2019, as in view of Section 45 of the Act of 1997, such courts established under section 46 of the Act of 1997 could exercise power against offences, committed under the Act of 1997, however, the Special Court, established under section 46 of the CNS Act, 1997, could proceed in accordance with law, in cases already registered before the promulgation of the Act of 2019. Such cases could not be effected thereof by promulgation of the Act of 1997.

Therefore, for the reasons mentioned hereinabove, this and the connected writ petitions are disposed of with direction to ANF, to substitute relevant provision of law, provided thereunder the Act of 2019, for the concern offence and report under section 173 Cr.P.C. be submitted before the Special Court CNSA established under section 22 of the Act of 2019, and cases already submitted before the Special Court CNS established under section 46 of the


Act of 1997, registered after promulgation of the Act of 2019, shall be transferred to competent Special Courts, established under section 22 of the Act of 2019 and the Special Courts on receipt of cases, may substitute, charge the accused under relevant provision of the prevailing law of the Act of 2019, accordingly.” (Bold and underlines are ours for emphasis).

11. Being discontented, the Regional Director Anti-Narcotics Force (ANF), filed Review Petition No.178-P/2020 for review of the judgment (*supra*) but the same too was dismissed by this court vide judgment dated 20.06.2022, for the reasons that no mistake or error could be pointed out in the judgment under review and secondly that the matter is subjudice before the Hon’ble Supreme Court. Operative part of the judgment is reproduced below:-

“We are of the firm view that review is not available for reconsideration or re-hearing of the case. We find that the points urged by the learned counsel for the petitioners have elaborately been discussed and answered by this court in the impugned judgment; therefore, the same cannot be re-opened in review petition. Nothing has been shown by the petitioners that there has been mistake or error apparent on the face of the record, whereby judgment passed by this court could be reviewed, particularly, when civil petition for leave to appeal against the impugned judgment is

sub-judice before the Hon'ble Supreme Court of Pakistan. In the circumstances no case for review is made out, consequently, this review petition is dismissed.

12. It is important to mention here that judgment dated 01.12.2020 in WP No.2889-P of 2020, was followed and relied upon by this court in the judgment dated 14.01.2021, rendered in WP No.1237-P/2021, titled, "Gul Khan Vs the State", relevant part of which is reproduced below for ready reference:-



"We have before us the judgment of this Court passed in case titled, "Muhammad Sidique Vs Federation of Pakistan" (Writ Petition No.2889-P/2020). In the said petition, the petitioner had challenged his arrest and investigation by the ANF in the cases whereby the contraband were recovered from him. The question of jurisdiction of ANF to investigate in the matter and submission of challan before the court was extensively discussed in the said judgment. This court while considering section 6 of the CNSA, 1997, has held that ANF has the jurisdiction to arrest and investigate any matter relating to narcotic. However, in view of section 59 of the KP CNSA, 2019 repealing the jurisdiction of all courts established under CNSA 1997, this court has held that ANF after completion of investigation shall submit

challan before the Special Court established under section 22 of the KP CNSA 2019. The judgment of this court was followed in the subsequent judgment dated 14.01.2021 passed in WP No. 654-D/2020, therefore, we are not inclined to hold a different view.

In view of the above, we direct the ANF to submit complete challan in all these cases before the Special Court established under section 22 of the KP CNSA 2019 within fifteen (15) days from receipt of this judgment. Similarly, if any challan is submitted before the Special Court established under CNSA 1997, the said Court shall transmit the cases to the Special Court established under section 22 of the KP CNSA 2019 forthwith. (Bold and underlines are ours for emphasis).

In compliance of the judgments (supra) of this court all the cases registered by the ANF, after promulgation of the Act of 2019 and pending trial before the Special Court (CNS) established under the Act of 1997, were transferred to the special courts empowered under section 22 of the Act of 2019 for trial and conclusion.

13. Admittedly, this case has been registered on 19.12.2021 i.e. after the judgments (supra) of this court, that's why the learned trial court, in compliance of the judgments (ibid) has tried the appellants under

the Act of 2019. Though the judgments (ibid) of this court have been questioned before the Hon'ble Supreme Court by the Government and are still in the field as the same have not been suspended, however, the learned trial court has misconstrued the situation because the mode and manner of the occurrence and the place of recovery in the present cases is Torkham Border Custom Terminal and the narcotics were being smuggled inside Pakistan.

14. Though under section 59 of the Act of 2019, Control of Narcotic Substances Act, 2997 has been repealed but to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc **within the Province to the extent of the Khyber Pakhtunkhwa**, which for the sake of convenience and ready reference is reproduced below:-

"S.59. Repeal and savings:- (1) The Control of Narcotics Substance Act, 1997 (Act No.XXV of 1997), to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc **within the Province, to the extent of the Khyber Pakhtunkhwa** is hereby repealed." (Bold and underlines are ours for emphasis).

The words "**within the Province to the extent of the Khyber Pakhtunkhwa**" are of the paramount importance, which excludes the applicability of the Act

of 2019 to the present cases as in these cases huge quantity of narcotics of various kinds being smuggled from Afghanistan to Pakistan was seized at Torkham border at Import Terminal, therefore, the provisions of the Act of 1997 would be applicable. Besides, section 59 of the Act of 2019, has also been interpreted by the Hon'ble Supreme Court in order dated 12.01.2022, rendered **Criminal Petition No.7 of 2021**, wherein the following was observed:-

“Insofar as the second ground in the impugned order regarding the repealing effect of section 59 of the KP Act is concerned, we may observe that the contraband was seized at the Peshawar Airport whilst the respondent was on his way to take Flight No.DG.0785 to Riyadh, Saudi Arabia via Bahrain. **Consequently, the said seizure was made on the customs frontier which is within the jurisdiction of the Federation notwithstanding section 59 ibid. With respect to such seizure the jurisdiction of the CNS Court remains intact. It goes without saying that as the CNS Act 1997 is valid and operative within the Federal Legislative field, therefore, the detention and seizure as well as the investigation conducted by the ANF pursuant to the said law is valid and legally effective.**” (Bold and underlines are ours for emphasis).

15. For what has been discussed above, we are firm in our view to hold that this and the connected case have rightly been registered under the relevant

provisions of the Act of 1997. The learned trial Court has misconstrued the situation, thus landed into the field of error by trying the appellants under the Act of 2019.

16. Accordingly, convictions and sentences of the appellants recorded by the learned trial Court vide judgments 27.08.2022 and 07.11.2022 are hereby set aside. The cases are remanded to the learned trial Court for trial *denovo*. *Challan* in both the cases have been submitted under the provisions of the Act of 1997, therefore, the learned trial court shall frame charge against the appellants afresh under the relevant provisions of the Act of 1997 and thereafter shall proceed with the cases in accordance with law. The appellants shall remain under trial prisoners. It is expected that the learned trial court while keeping in view the agonies of the appellants already faced by them shall conclude the trial expeditiously. The parties would be at liberty to place reliance on the already recorded evidence, if they so desire and to this effect the learned trial Court shall record their joint statement. Copy of this judgment be placed on connected Cr.A. No.1159-P of 2022.

Announced:
07.11.2023
M.Siraj Afridi CS

Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim senior Puisne Judge
And Hon'ble Mr. Justice Sahibzada Asadullah.