

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE MUNIB AKHTAR

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL APPEAL NO. 177 OF 2022

(Against judgment dated 29.06.2018 of the
High Court of Sindh, Sukkur Bench, Sukkur
passed in Cr.J.A.No.D-85/2013)

Zafar Iqbal

...Appellant(s)

VERSUS

The State

...Respondent(s)

For the Appellant(s):

Mr. Muhammad Amjad Iqbal Qureshi, ASC
Syed Rifaqat Hussain Shah, AOR

For the State:

Mr. Zafar Ahmed Khan, Addl. P.G. Sindh

Date of Hearing:

27.05.2022

JUDGMENT

Sayyed Mazahar Ali Akbar Naqvi.- The appellant was tried by the Special Judge (CNSA), Ghotki, pursuant to a case registered vide Crime No. 03/2012 under Section 9 (c) of the Control of Narcotic Substances Act, 1997, at Police Station Excise Ubauro Circle. The learned Trial Court vide its judgment dated 09.10.2013 convicted the appellant under Section 9 (c) of the CNSA, 1997, and sentenced him to imprisonment for life. He was also directed to pay fine of Rs.500,000/- or in default whereof to further suffer six months SI. Benefit of Section 382-B Cr.P.C. was also extended to him. The learned High Court vide impugned judgment maintained the conviction and sentence recorded by the learned Trial Court. Being aggrieved by the impugned judgment, the appellant filed Jail Petition No. S29/2018 before this Court wherein leave was granted on 17.03.2022 and the present Criminal Appeal has arisen thereafter.

2. The facts of the case as given in the impugned judgment, read as under:-

"2. Concisely, the facts aggregated from the FIR, lodged on 03.07.2012 by the complainant Excise Inspector Hussain Bux Larik, are that in the night time preceding to that date, at about 11.30 pm, a party of Excise Police, headed by him, found appellant/accused in possession of 1650 kilograms of "poppy straw" (post-ji-dodi). The said contraband articles were being transported by him through a truck bearing No. KUT/587 in shape of 55 'bortas' at National Highway near Sindh-Punjab border. The appellant was arrested in the said FIR as accused and sample was drawn from recovered case property for chemical examination in presence of official marginal witnesses of the memo of arrest and recovery."

3. After completion of investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. In order to prove its case the prosecution produced two witnesses. When examined under Section 342 Cr.P.C., the appellant stated that he is innocent and has been falsely implicated in the case. However, he neither opted to appear as his own witness under Section 340(2) Cr.P.C. nor produced any defence evidence.

4. At the very outset, learned counsel for the appellant contended that the appellant has been falsely implicated in this case and the Police has planted a fake case upon him. Contends that the narcotic was allegedly recovered from the appellant in a busy thoroughfare but none from the public was associated in the case to depose against the appellant. While relying on the judgment reported as Zulfigar @ Zulfa Vs. The State (2021 SCMR 531), he contended that the allegedly recovered poppy straw is largely used for fodder of animals, therefore, it should not be considered as narcotics substance. Contends that Chemical Examiner's report indicated that sample taken from recovered articles was in "grinded and crushed" form but in recovery memo there was no mention that recovered items from 55 plastic bags were grinded or mixed. Lastly contends that it is only the sack/pouch/doda of a poppy plant which contains narcotics substance and the same would only be

considered narcotic substance if the same contains 0.2 percent of morphine.

5. On the other hand, learned Law Officer has supported the impugned judgment. He contended that the appellant was caught red handed while transporting a huge quantity of narcotics and the Police officials had no enmity to falsely involve him in the present case. Contends that mere technicalities could not absolve the appellant of his criminal liability when the prosecution has proved its case against the appellant beyond any shadow of doubt by producing cogent and confidence inspiring evidence.

6. We have heard learned counsel for the parties and have perused the case record with their able assistance.

7. The appellant was caught red handed by the Police while he was driving a truck and from the secret cavities of the truck, 55 plastic gunny bags containing poppy straw were recovered. Each bag was weighing 30 kilograms, therefore, the total weight became 1650 kilogram. One kilogram of poppy from each bag was taken out for chemical examination. The same was sealed up in separate envelopes and sent to the office of Chemical Examiner. To bring home the guilt of the appellant, the prosecution relied upon the statements of Hussain Bux, Excise Inspector, (PW-1) and Farhan Ali (PW-2). Both these witnesses have narrated the prosecution story in a natural manner and remained consistent throughout and their testimony could not be shattered by the defence despite lengthy cross-examination. The said witnesses had no enmity with the appellant to falsely implicate him in the present case. Even otherwise a huge quantity of 1650 kilograms of poppy straw in no circumstances can be planted by the Investigating Officer of his own. This Court in a number of judgments has held that testimony of official witnesses is as good as any other private witness unless it is proved that they have animus against the accused. However, no such thing could be brought on record by the appellant in this case. This Court has time and again held that reluctance of general public to become witness in such like cases has become

judicially recognized fact and there is no way out to consider statement of official witnesses, as no legal bar or restriction has been imposed on such regard. Police/official witnesses are as good witnesses and could be relied upon, if their testimonies remain un-shattered during cross-examination. In this view of the matter, the statements of the official witnesses are sufficient enough to sustain conviction of the appellant. However, so far as quantum of punishment is concerned, we note that this is a case of lesser punishment and for this we will firstly examine as to what actually is the 'poast'/opium. In Zulfiga @ Zulfa Vs. The State (2021 SCMR 531) this Court while relying on earlier judgments of this Court has defined as to what actually is the poast/opium. It would be in order to reproduce the relevant portion of the judgment, which reads as under:-

"In Section 2(t) of the Control of Narcotics Substances Act, 1997, 'opium' has been defined as under:-

"(t) 'opium' means:-

- (i) *poppy straw, that is to say, all parts of the poppy plant (papaver somniferum or any other species of Papaver) after mowing, other than the seeds,*
- (ii) *the spontaneously coagulated juice of capsules of poppy which has not been submitted to any manipulations other than those necessary for packing and transport; and*
- (iii) *any mixture, with or without natural materials, of any of the above forms of opium, but does not includes any preparation containing not more than 0.2 per cent of morphine;"*

7. As per definition clause of CNSA, after mowing, all parts of the poppy plant except seeds are considered to be poppy straw. However, this Court in the case reported as Taimoor Khan Vs. State (2016 SCMR 621) while referring to earlier judgment of this Court reported at Muhammad Imran v. The State (2011 SCMR 1954) has held that it is only the basket, sack or pouch (also known as 'Doda') excluding the seeds, which contains narcotic substance and that all poppy straw may not necessarily be 'poast'/doda because poppy straw can be any other part of the mowed poppy plant as well, excluding the seeds. It would be advantageous to reproduce the relevant portion of the said judgment, which reads as under:-

"What exactly is that which is called 'Poast'?

It has been agreed before us by the learned counsel for all the parties and it is also borne out from the authoritative works

referred to above that in the local parlance Poast is the name given to that part of a poppy plant which has the shape of a basket, sack or pouch and it contains the seeds of such plant. This natural pouch or bulb made of the skin of the plant is meant by the nature to hold and protect the seeds of the plant contained therein. In some parts of this country this natural pouch of the poppy plant is also known as Doda. The Control of Narcotic Substances Act, 1997 calls this part of a poppy plant as 'capsule' of poppy and this finds a specific mention in section 2(t) (ii) of the said Act. The authoritative works mentioned above as well as the learned counsel for all the parties before us are also in agreement that if an unripe capsule of a poppy plant is given an incision then a fluid oozes out of the same containing meconic acid and a number of alkaloids including narcotine and morphine which fluid thickens within a short time and becomes brown in colour and such substance is pure opium. It is also agreed at all hands that even ripe and dry capsules of poppy contain morphine and other alkaloids, i.e. apium, although less in quantity, which can be used for sedative and narcotic action. Most of the authoritative works produced by the learned counsel for the parties also confirm that alkaloids can be extracted even from a mature and dry plant of poppy or poppy straw whether it is in its natural shape or is in a crushed form. However, the seeds contained in a capsule of a poppy are free from morphine. After its mowing every part of a poppy plant, including its capsule/Poast/Doda but excluding the seeds, is generally called poppy straw and, thus, every Poast/Doda is a part of a poppy straw but all poppy straw may not necessarily be Poast/Doda because poppy straw can be any other part of the mowed poppy plant as well, excluding the seeds.

8. From the above, it is clear that 'Poast' is the name given to that part of a poppy plant which has the shape of a basket, sack or pouch and it contains the seeds of such plant."

8. From the above, it is clear that it is only sack/pouch/basket of the whole poppy plant, which is called poast and the same is the only part of the poppy plant excluding its seeds, which contains morphine. In the Zulfiqar supra case, the Court further observed that in common parlance, it has been seen that oftenly stems and leaves of the poppy plants are used as animal food. The plant can reach the height of about 1-5 meters (3-16 feet). The poppy plant is a spontaneous plant and is often seen grown on roadsides. Poppy straw is derived from the plant *Papaver somniferum*, which has been cultivated in many countries of Europe and Asia for centuries. This has medicinal impact as well, which is largely used as a tonic for wellness of nervous system. The purpose of its cultivation was actually the production of poppy seeds. The latter is used as a food stuff and as a raw material for manufacturing poppy-seed oil, which is

used for making various varnishes, paints and soaps etc. Therefore, every cultivation of poppy straw unless it is proved that it is made for the sole purpose of extracting narcotics after a proper method cannot be considered a criminal act. We have noted that in the FIR as well as in the recovery memo it has been mentioned that poast/poppy straw was recovered in 55 plastic gunny bags but there is no mention that recovered items were got grinded or mixed and then sent to the Chemical Examiner. On the other hand, contents of the report of Chemical Examiner indicate that samples sent to it were in grinded form i.e. grinded material of black and yellow coloured straws, seeds and stalks, which means that whole poppy plant would have been recovered from the appellant. From a bare perusal of Section 2(t)(iii) of the Control of Narcotic Substances Act, 1997, referred above, it is manifest that 'poast' in the mixture form would only be considered a narcotics substance within the meaning of the Act if the same contains 0.2 percent of morphine. However, the report of the Chemical Examiner reveals no such percentage. It has also not been brought on record as to whether from the 1650 kilograms of poast, which was in the shape of whole poppy plants, how much quantity was the sack/pouch/doda as it is only the sack/pouch/doda which contains narcotic substance. Therefore, in absence of such report, it is difficult to determine as to whether the case against the appellant falls within the purview of section 9(A), 9(B) or 9(C) of the Act. While dealing with the question as to whether ascertainment by a Chemical Examiner regarding the actual quantity of morphine in the recovered substance is necessary in a case of recovery of poast, this Court in the case of Muhammad Imran v. The State (2011 SCMR 1954) has held that *"the question of percentage of morphine is relevant only to the case of a mixture referred to in clause (t)(iii) of section 2 of the said Act and such a question has no relevance to opium in the form of parts of the poppy plant or in the form of juice of the capsules of poppy. Section 3 of the said Act is confined to 'liquid preparations' only and refers to calculation of percentages only in the context of such liquid preparations. Poast or Dodo by itself cannot be termed as a 'mixture' or*

'liquid preparation' for the purposes of section 2(t)(iii) or section 3 and, therefore, in a case of recovery of Poast or Doda no ascertainment by a Chemical Examiner is required regarding quantity of morphine, etc., available in such Poast or Doda." As discussed above, the report of the Chemical Examiner, leaves no doubt that the recovered poast from the possession of the appellant was in grinded/mixed shape, therefore, the report of the Chemical Examiner ought to have mentioned the percentage of morphine in the whole mixture. While examining the whole record of the matter pertaining to recovery of contraband poast, we deem it appropriate that the prosecution branch must consider all aspects of the case narrated above prior to sending a person for trial in the court of law as the shortcomings pointed out might hamper the liberty of a person which in other words is a precious right, which has been guaranteed under the Constitution of Islamic Republic of Pakistan, 1973.

9. For what has been discussed above, we while maintaining the conviction of the appellant, reduce the sentence of imprisonment for life into what he has already undergone. The appellant shall be released from jail forthwith, unless detained/required in any other case. This criminal appeal is accordingly partly allowed and the impugned judgment is modified accordingly.

Islamabad, the

27th of May, 2022

Approved For Reporting

Khurram