

*Judgment Sheet*

**IN THE HIGH COURT OF SINDH, AT KARACHI**

**Criminal Appeal No.527 of 2021**

Zardullah Khan s/o Shuja Alam Khan v.The State

**PRESENT:**

**Mr. Justice Muhammad Karim Khan Agha  
Mr. Justice Arshad Hussain Khan**

Appellant : Zardullah Khan son of Shuja Alam Khan  
through Mr. Ajab Khan Khattak, Advocate.

Respondent : The State through Mr. Habib Ahmed and  
Mr. Shamsheer A. Khan Azeemi, Special  
Prosecutors for the ANF.

Date of hearing 28.11.2022

Date of decision 08.12.2022

**J U D G M E N T**

**Arshad Hussain Khan, J.**— Through this Criminal Appeal, appellant Zardullah Khan has impugned the Judgment dated 23.08.2021, passed by Special Court-II (C.N.S.) Karachi, in Special Case No.1187 of 2013 [Re: The State v. Zardullah and others], arising out of Crime No.64 of 2013, registered at police station ANF-II, Mohammad Ali Society, Karachi, under Section 6/9-C read with Sections 14/15 of the Control of Narcotics Substance Act, 1997, whereby learned trial court after full dressed trial convicted and sentenced him under Section 265-H(2), Cr.P.C. for offence under Section 6/9-C read with Sections 14/15 of the Control of Narcotics Substance Act, 1997, for Life Imprisonment with a fine of Rs.1,000,000/- (Rupees One Million only) and in case of default in payment of fine, it was further ordered that the appellant shall further undergo imprisonment for five (05) years more. However, the benefit of Section 382-B, Cr.P.C. was extended to the appellant.

2. The facts necessary for disposal of instant criminal appeal in brief are that on 02.12.2013 at 1700 hours at examination area, K Yard QICT, Karachi, complainant Inspector/SHO Tahir Ahmed at police station ANF-II, Muhammad Ali Society, Karachi, along with other ANF officials arrested accused Zardullah Khan and recovered heroin powder from a Container bearing No.MSKU-1599141 concealed in 187 *Gatta* carton containing 12/12 Oil Filter each and each Oil Filter found plastic *theli* of

heroin powder wrapped with yellow adhesive tape, the 12 plastic *theli* of heroin powder recovered from each carton were collected together and upon weighing found 02 Kgs of heroin powder, thus, the heroin powder recovered from 187 *Gatta* carton came to 374 Kgs while from one *Gatta* carton recovered one Kg of heroin powder from six plastic *theli* wrapped with yellow adhesive tape concealed in six oil filter, total 375 Kgs of heroin powder recovered from 188 *Gatta* cartons concealed in oil filter. After observing required formalities at the spot, he arrested the accused and recovered contraband narcotics brought at police station where the FIR bearing No.64 of 2013 was lodged.

3. From the record, it appears that after registration of the aforesaid FIR, the investigation was carried out by Inspector Tahir Ahmed of police station ANF-II Mohammad Ali Society, Karachi, who after recording the statements of PWs under Section 161 Cr.P.C. and after completing all the formalities submitted the final report under Section 173 Cr.P.C. against the appellant and the co-accused (Syed Farooq Ali). Thereafter, the Charge was framed under Section 6/9-C read with Sections 14 and 15 of the Control of Narcotics Substance Act, 1997 on 02.04.2014 at Exh.3, inter alia against the present appellant by learned trial court to which accused pleaded not guilty and claimed to be tried, vide his plea recorded at Exh.4.

4. At the trial, in order to establish accusation against the appellant/accused, prosecution had examined the following witnesses:-

- (i) PW-1/Complainant/IO Inspector Tahir Ahmed at Exh.6, who produced *roznamcha* entry of departure at Exh.6/A, duplicate copy of Form-E at Exh.6/B, invoice cum packing at Exhs.6/B-1 and 6/B-2 respectively, consignment note "WeBoc" at Exh.6/B-3, memo of recovery and arrest at Exh.6/C, FIR at Exh.6/D, letter by which the samples had been sent to the chemical examiner at Exh.6/E, chemical examiner report at Exh.6/E-1, photocopy of CNIC of accused Zardullah and undertaking in original respectively at Exhs.6/F and 6/F-1, memo of recovery of documents dated 05.12.2013 at Exh.6/F-2, letter addressed to Collector Export (MCC PaCCs) for verification of Form-E at Exh.6/G, reply of MCC at Exh.6/G-1, letter addressed to Chief Commissioner, RTO-I for provision of record at Exh.6/G-2, reply of RTO at Exh.6/G-3, letter addressed to Deputy Collector (Licensing) at Exh.6/G-4, reply of (Licensing) at Exh.6/G-5, letter addressed to Manager Safmarine Shipping Line at Exh.6/G-6, reply of Safmarine at Exh.6/G-7, letter addressed to Manager Operation, QICT, at Exh.6/G-8, letter addressed to IO by QICT, Karachi at Exh.6/G-9, letter to Manager National Bank Nadir House Branch at Exh.6/G-10, reply of NBP at Exh.6/G-11, letter addressed to Managers, QICT, PICT and KICT at Exh.6/G-12,

reply of QICT at Exh.6/G-13, letter addressed to Deputy Collector (Export) Customs at Exh.6/G-14 and reply of Deputy Collector at Exh.6/G-15;

- (ii) PW-2 Shakeel Ahmed, Customs Clearing Forwarding Agent at Exh.7;
- (iii) PW-3 Khalid Ahmed, Clearing Agent at Exh.8;
- (iv) PW-4 Aamir Ali Shaikh at Exh.9;
- (v) PW-5 Zubair Ali, Trailer Driver at Exh.10;
- (vi) PW-6 Zubair Rana, Cargo Agent at Exh.11;
- (vii) PW-7 HC [PS ANF] Abdul Razzaque, *mashir* of arrest and recovery at Ex.12, who produced memo of recovery and arrest dated 01.01.2014 at Exh.12/A;
- (viii) On the application filed by Special Public Prosecutor, ANF under Section 540, Cr.P.C., PW-8 Mr. Anees-ur-Rehman, Judicial Magistrate at Exh.15, who produced memo of sampling at Exh.15/A, memo of burning at Exh.15/B, burning certificate at Exh.15/C; PW-9 Riaz Ahmed Sarki at Exh.16, who produced *roznamcha* entry at Exh.16/A; and PW-10 Inspector Tahir Ahmed, *Malkhana* Incharge at Ex.17.

The above witnesses were cross-examined by learned counsel for the appellant. Thereafter, learned Special Prosecutor for the ANF closed the prosecution side, vide Statement at Exh.18.

5. It also appears from the record that the statement of accused was recorded under Section 342, Cr.P.C. at Exh.19 in which appellant denied all the allegations and stated that he is innocent and nothing was recovered from his possession and claimed false implication by ANF. However, the appellant did not give evidence on oath nor produced any DWs in support of his defence.

6. Learned trial court, after hearing the parties' counsel and on the assessment of evidence, convicted and sentenced the appellant as stated above whereas the co-accused namely; Syed Farooq Ali was acquitted under section 265-H(1) Cr.P.C. Hence, the appellant preferred this appeal against the impugned judgment.

7. Mr. Ajab Khan Khattak, learned counsel for the appellant contended that the appellant is innocent and falsely dragged into this case due to malafide intention and ulterior motives; that the impugned judgment is bad in law and on facts and the learned trial court has failed to appreciate that there is no signature of appellant on the basic documents i.e. Form-E of export, on which export proceedings were initiated; further the signature of

the appellant on the Undertaking is not the genuine; in fact the appellant's signature has been forged, actually, the appellant is a watchmen of co-accused-Syed Farooq who has been acquitted from the charge; that the appellant is more than seventy years old and suffering from epilepsy and other diseases; that the prosecution has not been able to prove the guilt as alleged against the appellant beyond the shadow of reasonable doubt; that the complainant and investigation officer is the same, therefore, false implication of the appellant in this case and tampering with the alleged case property cannot be ruled out; that the trial court has seriously erred by not considering the material evidence brought on the record, which absolutely shatters the case of the prosecution; that the impugned judgment is based on the surmises and conjectures and no proper appreciation of evidence has been made by learned trial court; that the evidence led by the prosecution does not support the conviction and it is a fit case for acquittal; that neither the appellant is exporter nor alleged contraband recovered from his possession; that no link has been established by the prosecution with regard to the said consignment financed by the appellant or otherwise. It is also argued that learned trial court while passing the impugned judgment has failed to consider the material fact that the samples were not taken from each packet/theli of the alleged recovered narcotics separately nor it has been sent to the chemical examiner for separate analysis, as such the appellant could at best be held liable only for the quantity which was sent for chemical examination, which is in the present case is 7.230 Kg. He has lastly argued that in the above facts and circumstances, the appellant is entitled for his acquittal. Learned counsel in support of his argument has relied upon the cases of *Gulshan Ara v. The State* [2010 SCMR 1162] and *Khuda Baksh v. The State* [2015 SCMR 735].

8. Conversely, Mr. Habib Ahmed, learned Special Prosecutor for the ANF while supporting the impugned judgment has argued that the prosecution has proved its case against the appellant; that on 02.12.2013, complainant Inspector Tahir Ahmed along with subordinate officials upon spy information on checking the Container No.MSKU-1599141 recovered 188 Gatta cartons and where from inside the oil filter he recovered 375 Kgs of heroin powder in presence of the appellant; that ANF officials have no enmity to foist such a huge quantity of heroin upon the appellant; that all the prosecution witnesses, which include private witnesses have fully

supported the case of the prosecution; that samples of recovered contraband narcotics sent to the chemical examiner without any delay and the report whereof is received in positive. It is contended that learned trial court after hearing the parties has rightly appreciated the evidence, convicted and sentenced the appellant in accordance with law; hence, he has prayed that instant appeal may be dismissed.

9. We have heard learned counsel for the parties and scanned the entire evidence available on the record. The whole evidence produced before the trial court find an elaborate mention in the impugned judgment as such the same are not required to be reproduced here so as to avoid unnecessary repetition.

10. Perusal of the record shows that the prosecution in order to substantiate the charge against the appellant/accused examined as many as 10 PWs including private witnesses and all of them supported the stance of the prosecution. Whereas learned defence counsel failed to point out any material discrepancy in the evidence available on the record. The prosecution on its part had established the recovery of the narcotics from the subject container, shipment whereof belonged to the appellant. The FIR was lodged within a reasonable period after a thorough search of the subject container and a huge quantity of contraband narcotics was recovered in presence of the mashirs. Samples have been taken from the recovered narcotics and sent for chemical examination. We have also noticed that the samples were sent within time for chemical examination and Chemical Examiner's report is in positive. It is also worth mentioning here that there is no any suggestion from the defense side] regarding any enmity of prosecution witnesses against the appellant for implicating him falsely and foisting such a huge quantity of contraband narcotics upon him.

11. Insofar as the contention of learned defence counsel with the regard to the quantum of sentence awarded to the appellant is not in accordance with law is concerned, Section 36 of CNSA provides that a sample of the narcotic drug has to be submitted with the Government Analyst for the test and analysis, while Rule 4 of the Control of Narcotics Substances (Government Analyst) Rules, 2001 provides that a reasonable quantity of samples from the narcotic drug shall be drawn and

dispatched to the testing laboratory. The Honorable Supreme Court of Pakistan in the case of *Ameer Zeb v. The State* [PLD 2012 SC 380] while dilating upon the issue of punishment depended upon the quantity of narcotics, inter alia, has held as under:-

“..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. It may be true that at least in some situations the Control of Narcotic Substances Act, 1997 stipulates disproportionately long and harsh sentences and, therefore, for the purposes of safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate chances of miscarriage of justice on account of exaggeration by the investigating agency. Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty which cannot be left at the mercy of verbal assertions of police officers which assertions are not supported by independent evidence provided by a Chemical Examiner.”

[Emphasis supplied]

12. A Larger Bench of the Hon’ble Supreme Court of Pakistan in its very recent judgment- *Sharafat Khan v. The State* [PLD 2022 SC 281], while discussing and endorsing the Judgment of *Ameer Zeb [supra]*, it is, inter alia, held per majority view as under:-

“7. The underlining principle that emerges from the reading of the Act, Rules and the *Ameer Zeb*’s case is that before an accused is burdened with a criminal liability under the Act of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the

alleged narcotic drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice. Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug. In this regard, the mode of packaging of the alleged narcotic drug by the accused is totally inconsequential; for example, in this case each of the 25 packets have 14 slabs of the alleged narcotic drug, which could have easily been re-packaged as separate 350 packets with one slab each of the alleged narcotic drug or one big packet of 350 slabs of the alleged narcotic drug. The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.”

13. In the present case, PW-7 (*mashir of arrest and recovery*) in his deposition, states as under:

“...1561 card board carton were lying in the container which were opened and found oil filters in it and from each carton 12/12 oil filters recovered and the filters were cut down through cutter and from 187 cartons containing 12/12 filters heroin powder in polythene bags wrapped with yellow adhesive solution tape recovered, all the heroine powder collected together and from each carton two Kgs heroine was found and the total weight of the heroin was 374 Kgs and from one of the carton amongst the 12 filters from only 6 filters one Kg heroine recovered and from 188 carton total 375 Kgs heroine recovered and in 15 large polythene bags 25 Kgs each heroine put and from each 15 large polythene bags the sample of 500 grams each withdrawn and put in transparent polythene bags and sealed in the white cloth bag for the purpose of chemical analysis, total 15 samples were prepared, whereas 15 large polythene bags were put in the plastic sacks for the purpose of its protection and sealed”.

14. The chemical examiner report Exh. 6/E-1 also supports the deposition of PW-7, which reveals that he received 15 parcels each containing one transparent plastic thelli/ polythene bags, each polythene bags contained 500 gram off white colored power. Gross weight of the contents was  $15 \times 500 = 7.500 \text{Kg}$  whereas Net weight of the contents without any wrapper was  $15 \times 482 = 7.230 \text{Kg}$ .

15. In the case in hand, in order to burden the appellatant with the liability of the entire quantity of the alleged narcotic drugs recovered, the representative sample had to be taken from every physical separate and independent unit of the alleged narcotic drugs, i.e., from all the polythene bags recovered from each filter. Whereas, only 15 samples of 500 grams were collected from 15 accumulated sacks of 25Kg each. The prosecution has not even argued that the representative sample was taken

from each of polythene bags recovered from the filters, rather it is an admitted fact on the part of the prosecution that 500-gram sample was taken from 15 bags. Thus, the prosecution is found to have proved only those parts of the heroine allegedly recovered from the appellant to be the narcotic drug of which samples were taken and sent for analysis to the FSL, that is, about 7.230 Kg. and not 375 Kg. as alleged.

16. In the circumstances of the case, as per sentencing policy only 7.230 Kg heroine sent to the chemical analyzer was to be considered while convicting the appellant and he could not be burdened for the said remaining quantity of heroine powder. Thus, keeping in view the law laid down by the Hon'ble Supreme Court in the case of Ameer Zeb v. The State [PLD 2012 SC 380] and by applying the sentencing policy laid down in the case of Ghulam Murtaza and another v. The State [PLD 2009 Lahore 362], we hold that the appellant is responsible only for the recovery of 7.230 Kg heroine powder. Hence, while maintaining conviction of the appellant under section 9(c), CNS Act 1997; the punishment awarded to the appellant is reduced from life imprisonment to 12 years R.I, with benefit of section 382-B, Cr.P.C., and fine is also reduced from Rs.1,000,000/- [Rupees One Million] to Rs.1,50,000/- [Rupees One Lack Fifty Thousands] and in default of payment of fine to under further one (1) year's more S.I. The appeal is accordingly disposed of in the above terms.

Judge

Judge