

HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

Criminal Revision No. D-01 of 2025

Present:

Mr. Justice Amjad Ali Bohio.

Mr. Justice Dr.Syed Fiaz ul Hasan Shah.

Applicant/ accused: Jeendal Shah s/o Mukhtiar Ali Shah
Through Mr. Bhooro Bheel, Advocate,

Respondent: The State
Through, Mr. Shahzado Saleem, A.P.G Sindh

Date of hearing: 04.02.2025.

Date of Order: 04.02.2025.

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ORDER

Dr. Syed Fiaz-ul-Hassan Shah, J: The Applicant Jeendal Shah was indicted in a case FIR No.101/2024 registered under section 9(1)(3)(a) of Control of Narcotics Substances, 1997 with PS Kunri, District Umerkot. After filing of application for admission of guilt with prayer to take lenient and sympathetic view by putting himself in the clutches of Court. The learned trial Court through Order dated 19.09.2024 convicted the Applicant under section 9(1)(3)(a) of the Control of Narcotics Substance (Amendment) Act, 2022 read with section 243 of the Criminal Procedure Code, 1898 and Sentence for One-year simple imprisonment together with fine of Rs.5000/- or in default of payment of fine amount to further undergo 10 days' simple imprisonment. The benefit of section 382-B of the ibid Code was also extended to the Applicant. Being aggrieved with the said Order, the Applicant has filed Criminal Appeal No.09/2024 under Section 408 ibid Code which was dismissed through the Judgment dated 05.12.2024 which has impugned before us.

2. As per facts narrated in the F.I.R. lodged by complainant ASI Muhammad Sharif Khoso, PS Kunri that on 17-05-2024 at 0900 hours "he, along with his subordinate staff, namely HC Shamro Mal, PC Chetan Kumar, left the PS in an official vehicle driven by PC Danish, as per roznamcha entry No. 26 at 0600 hours for investigation of Crime No. 99/2024 registered under section 420, 381-A PPC at the same police station. During patrolling when they reached at Gohar pump where received spy information that wanted accused Jeeandal Shah is standing near Dharo stop for going towards some place; on such information they reached at the pointed place on 0750 hours, where saw that a person was standing at the Northern side of the road; he to see the police mobile tried to slip away but they apprehended him. On inquiry he disclosed his name as Jeendal Shah s/o Mukhtiar Ali Shah r/o village Taj Muhammad Shah, Shaikh Bhurkio Tando Muhammad khan. From his personal search, one black colored plastic shopper was recovered from the side pocket of his shirt, which contained 29 small and big pieces of chars. The recovered chars were weighed which became 215 grams about which he disclosed to Police Official that he sells it. The recovered chars were sealed at the spot. After preparation of such memo, they brought arrested accused and recovered property at PS, where complainant lodged instant F.I.R."

3. The Counsel for the Applicant has contended that impugned judgment of conviction and sentence is against the provisions and guidelines of superior courts; that learned trial court has not considered that no independent witness of the occurrence is available and only police officials are the prosecution witnesses; that place of incident is

thickly populated area but police/I.O has failed to associate any private person even the FIR was registered on spy information; that narcotics contraband was not recovered from the possession of the Applicant and it has been foisted upon the Applicant with malafide intention; that doctrine of safe custody and safe dispatch was violated by prosecution's side as neither Malkhana Incharge has appeared to prove the safe custody nor entry of Malkhana has been produced. Lastly he prayed for setting aside the conviction. On the other hand, learned Additional Prosecutor General supported the impugned judgment. However, he candidly suggested to reduce the sentence which has undergone.

4. We have heard the Counsel for Applicant as well as learned Addl. Prosecutor General Sindh and perused the available record alongwith the impugned Judgment with their assistance and observed that the Applicant has initially filed Criminal Appeal No.D-66/2024 under section 410 Criminal Procedure Code, 1898 and later on his oral request vide Order dated 22.1.2025 same was allowed and the Criminal Appeal was converted into Criminal Revision Application No.D-01/2025. The law provides distinctive treatment of the Criminal Appeal and Criminal Revision. The grounds for institution of Appeal are quite different from the grounds of Revision.

Nevertheless, we have decided to clarify the legal position about the specific concept of appeals. Every person convicted of an offence has a right of appeal under the Criminal Procedure Code, 1898. An appeal may be filed both against conviction and sentence and on facts and law. A convicted person is entitled to ask an appellate court to re-appraise the evidence and come to its own conclusion. An Appellate court has the

undoubted power to dismiss an appeal in limine but it must be exercised sparingly and with circumspection. However, Section 404 of the Code direct and require a legal mechanism to administer and assign appeals to Court juridical and it does not ordain to file an appeal at one's whims and wishes. The said provision is re-produced as under:

"404. Unless otherwise provided, no appeal to lie: No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

5. Keeping in view the above administration, an appeal against conviction by Magistrate empowered under Section 30 of the Code would either lie to Court of Sessions in terms of Section 408 of the Code or to the High Court in terms of Section 410 of the Code subject to the Sentencing guidelines which has elaborately enumerated in the enabling provisions itself. The relevant provision of law which deals with the instant case is Section 408 of Criminal Procedure Code, 1898. The said provision is reproduced hereunder:

"408-Appeal from sentence of Assistant Sessions Judge or [Judicial Magistrate]. Any person convicted on a trial held by an Assistant Sessions Judge, or any [Judicial Magistrate] [Special Magistrate] or any person sentenced under Section 349 [...] may appeal to the Court of Session:

Provided as follows:

(a) Clause (a) Rep. by Act 12 of 1923, S 23.]

(b) When in any case an Assistant Sessions Judge [...] passes any sentence of imprisonment for a term exceeding four years, [...] the appeal of all or any of the accused convicted at such trial shall lie to the High Court:

(c) When any person is convicted by a Magistrate of an offence under Section 124-A of the Pakistan Penal Code, 1860 the appeal shall lie to the High Court.

6. The above provision has two distinguish situations. Any person who is convicted on a trial held by Judicial Magistrate, Special Magistrate or Assistant Sessions Judge or sentenced under Section 349 may appeal to the Court of Sessions in terms of Section 408 of the Code whilst the proviso sub-sections (b) & (c) of Section 408 of the Code are clearly mentioned that in any case if Assistant Sessions Judge (excluding Judicial Magistrate) passes any sentence of imprisonment for a term exceeding four years, the appeal of accused who has been convicted at such trial shall lie to the High Court. The appeal prior to the amendment under the said provision of Criminal Procedure Code, 1898 was competent before the High Court against the judgment passed by a Magistrate Section 30, wherein sentence of imprisonment for a term exceeding four years was awarded to the accused. The words "or a Magistrate specially empowered under Section 30", were omitted by Law Reforms Ordinance (XII of 1972). Nevertheless, after the amendment under Section 408 of the Code in a case where sentence of imprisonment exceeding 04 years is passed by a Magistrate empowered under Section 30, the appeal would lie before the Court of Sessions and not before the High Court as held in various reported cases.¹

7. Since the judgment of conviction of Applicant has not been passed by an Assistant Sessions Judge, the same has been passed by Magistrate empowered under Section 30 and that too not exceeding 04 years' sentence, therefore, the Applicant/Convict has rightly preferred Criminal Appeal under section 408 of the Code before the Court of Sessions. Conversely, after dismissal of Appeal preferred under section

¹ "Khadim Hussain v. The State" (2006 YLR 1718); "Amanullah v. The State" (2005 P.Cr.L.J. 1435)

408, the Applicant has again impugned the Judgment of Appellate Court/ Session Courts before the High Court by filing Appeal under section 410 of the Code although it has been converted into Criminal Revision under section 439 but for the sake of clarity we have decided to elaborate the concept. Section 410 of the Code provides:

“410. Appeal from sentence of Court of Session: Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.”

An appeal against conviction before the High Court can only be instituted in the manner provided under Sections 408 (b) & (c) or 410 of the Code. The former enables appeal against the Judgment of Magistrate with specific classification and later homologated statutory right when the Court of Sessions held a regular trial and passes a Judgment of Conviction. Thus the present appeal unfortunately repeats some of the obsolete stipulation. If somebody has exhausted a remedy of Appeal under section 408 of the Code before the Court of Sessions, the law does not permit second appeal under section 410 against the Judgment of Conviction passed by Sessions Court being the Appellate Court. The provision of Code gives distinct authoritative command whilst dealing with appeal or revision towards jurisdiction sine non quo sentencing to adjudicate the cases and the extent of power to issue order and legal decision. Unlike the Civil laws², the legislative framework of the Country on criminal side does not provide the theoretical existence of second appeal by invoking the provision of section 410 of the code before the High Court except to invoke the remedy of Revision under section 439 of the Code in case someone is aggrieved or frustrated with any Judgment

² For instance; Second Appeal under section 100 Civil Procedure Code, 1908,

of Conviction passed by the Sessions Court in its Appellate jurisdiction under section 408 of the Code. Understandingly, the appeal before the High Court against Appellate Court Judgment of Conviction would have been failed being jurisdictional error and contravention of Section 404 of the Code.

8. Now turning towards another extricate law point about “appeal in plead guilty cases”. The Code has eminently provided a barricade by insertion of Section 412 for filing appeal where an accused person has put himself defenseless against the mercy of Court. From a reading of Sections 410 & 412 of Code, it is clear like a blue sky that the legislature has conceived that appellate remedy is provided by that provision, which deals with appeal from conviction. However, a bar is engrafted by the legislature Section 412 of Code in certain cases where the Accused/Applicant is guilty, it is mandated under section 412 of Code that:

412. No appeal in certain cases when accused pleads guilty: Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a High Court, a Court of Session or Magistrate of the First Class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

9. Therefore, in view of the provision contained in Section 412 of the Code, where the judgment of conviction is on the basis of plea of guilty as conceived in section 412 of the Code, then an appeal, which is otherwise maintainable as authorized by section 410 of the Code, is barred. But at the same time, the legislature in its wisdom has also carved out the exception of **extent** or **legality** of sentence impose upon the

Accused to the extent of which the bar in entertaining appeal will not apply in a case, where what is sought to be challenged in the appeal is regarding the **extent** or the **legality** of sentence, even if, the impugned judgment of conviction is on the basis of plea of guilty.

10. The bar as per Section 412 of the Code is not absolute. Section 412 intercept the Appellate Court for entertaining an appeal against conviction when there is genuine plea of guilty made freely and voluntarily. Additionally, the administration of justice rule that even where the facts averred or pleaded by the prosecution do not amount to an offence and pleading by the Accused that he is guilty, it does not preclude him from filing an appeal against the conviction for the convincing reason and rationality that such plea may amount only to the admission of facts averred by the prosecution which even if true, may not be sufficient to constitute an offence which may ultimately led basis for conviction and incarceration through sentencing. In such situation a legal obligation lies upon the prosecution by introducing conceptual legal work about meticulous “pre-trial scrutiny”³ for placement of admissible and tangible evidence generally while conclusive material before the Court for recording the plea of guilty and awarding Conviction and Sentence to an accused person in particularly.

11. In the present case, the Applicant has not challenged the extent or legality of sentence and simultaneously the Applicant has no quarrel with his plea of guilty and it has not agitated before us that his plea of guilty was not free and voluntary that led the consequential conviction

³ Section 9,9(a) and 10 of the Sindh Criminal Prosecution (Constitution, Functions & Power) Act, 2009 and Section 19(b) of the Anti-Terrorism Act, 1997

rendered against him. Even the Applicant has not disputed the extent and legality of the Sentence relating to the simple imprisonment and fine quantum or that it is highly disproportionate and unreasonable. In view of above circumstances, the Applicant is barred from challenging his conviction by way of appeal under section 408 of Code before the Sessions Court or would also be barred under section 410 before the High Court. The Applicant cannot be allowed approbate and reprobate in same breath as once he has admitted his guilty voluntary by putting himself defenseless at the mercy of court, subsequently he is precluded to dispute the conviction and he would be bound by his free stance before the trial Court as held in various cases.⁴ Therefore, the Applicant has no vested right to challenge the Sentence as illegal or improper by filing an appeal in terms of Section 408 of the Code and the Appeal is overtly barred under section 412 of the Code. For the foregoing reasons we do not find interference in the judgment dated 05-12-2024. The Criminal Revision is dismissed with modification that the sentence recorded in Order dated 19.09.2024 passed by the Learned Judicial Magistrate, Samaro in Criminal 162/2024 arising out of Crime No.101/2024 under Section 9(1)(3)(1) of the Control of Narcotics Substance (Amendment) Act, 2022 registered at PS Kunri which has been maintained through impugned Judgment dated 05.12.2024 passed by Addl Sessions Judge-I, Umerkot in Cr. Appeal No.09/2024 is reduced to one as already undergone while looking to the mitigating factors that the Applicant is first offender and he is only breadwinner of his family

⁴ "Mst.Ubaida versus Makhdoom Abrar Ahmed & 02 others" (1986 P. Cr.L.J 539); "Sakhwat Ali versus The State" (1999 P Cr.L.J.450); "Faiz Mohammad versus Abdu Rauf & others" (1999 P. Cr.L.J. 864); "Ataullah versus Abdul Razzak & another" (PLD 2002 SC 534)

and as conceded by the Addl; Prosecutor General before us. Office to issue Release Order accordingly.

JUDGE

JUDGE

Saleem