

THE HIGH COURT OF SINDH, KARACHI

Spl. Cr. Revision No. 62 of 2023

[Syed Asif Abbas Zaidi v. The State]

Applicant : Syed Asif Abbas Zaidi son of Syed Muhammad Aqeel Hussain through Mr. Muhammad Ashraf Kazi, Advocate along with Syed Muhammad Mustafa, Advocate.

The State : Nemo.

Dates of hearing : 20-02-2025

Date of decision : 04-03-2025

ORDER

Adnan Iqbal Chaudhry J. - The Applicant was arrested at the Jinnah International Airport Karachi on arrival from Dubai. It is alleged that he attempted to get away with 60 tolas of gold bars taped under his feet. On 18-02-2016, charge was framed against him by the Special Judge Customs in Case No. 133/2015 for committing the offence of smuggling, punishable under clause 8 of section 156(1) of the Customs Act, 1969. The Applicant pleaded not guilty and claimed trial. Three PWs were examined by the prosecution. All of them were cross-examined by the Applicant's counsel. The Applicant's statement under section 342 Cr.P.C. was recorded on 29.04.2022. He did not opt to lead evidence in defense. On or about 20.11.2022, when the case was fixed for final arguments, the Applicant made an application for recording a fresh plea under section 265-E Cr.P.C. and for recalling prosecution witnesses under section 540 Cr.P.C. for further cross-examination. Such application was declined by the learned Special Judge Customs by order dated 16.02.2023 [**impugned order**] which has been challenged by the Applicant through this revision under section 185-F of the Customs Act.

2. *Vide* order dated 28.08.2023 passed in this revision, learned counsel for the Applicant dropped the prayer for recording a fresh plea under section 265-E Cr.P.C. and confined the revision to section 540 Cr.P.C. to recall PW-2 for further cross-examination. Learned

counsel submitted that the counsel representing the Applicant at the trial was careless and did not conduct a thorough cross-examination of PW-2 to highlight the Applicant's defense *viz.* that the gold had actually been recovered from another passenger and foisted on the Applicant when an altercation took place between him and Customs officers over the delay at the immigration desk.

3. Heard learned counsel and perused the record. In view of order dated 28.08.2023 recorded in this revision, the only question is whether the case merits a recall of PW-2 under section 540 Cr.P.C. for further cross-examination.

4. It was held by the Supreme Court in *Shah Zain Bugti v. The State* (PLD 2013 SC 160) that the determinative factor under section 540 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing in evidence. Therefore, I proceed to examine the submission that the Applicant's previous counsel was careless in setting-up the defense.

5. PW-2 was the Senior Preventive Officer namely Muhammad Azam Khalid who was one of the *masheers* to the search and recovery. He was cross-examined by the Applicant's initial counsel on 07.08.2017. The suggestions put to him were as follows:

"It is incorrect to suggest that the gold was not hidden by the accused in his shoes. It is incorrect to suggest that I deposed on the instance of complainant Fakhruddin."

Thereafter on 29.04.2022, while recording his statement under section 342 Cr.P.C. the Applicant stated:

"Q.2. It has come on record that during examination of your baggage, Preventive Officer secured gold Slabs (STB) each weighing 10 tolas total 60 tolas, bearing marks as ARY 10 tolas 999.0 Gold Dubai", concealed in a pair of shoes duly pasted under feet of white colour sports shoes bearing marks as "Lecoq Sportify" made in China as container, what you have to say?"

Ans: I had brought this gold but it was not concealed. Gold was in my pocket, receipts were with me. I was not aware about the law of not carrying gold. I myself had disclosed about the gold.

Q.3. Why the PWs have deposed against you?"

Ans: I have no idea.

Q.4. Do you want to depose on oath in disproof of allegations?

Ans: No.

Q.5. Do you want to adduce any evidence in your defence?

Ans: No.

Q.6. Would you say anything else?

Ans: I am innocent''

6. It appears that at the time the Applicant recorded his statement under section 342 Cr.P.C. he had already replaced his previous counsel, and yet he gave no statement to detract from his original stance. He never stated that the gold had been seized from another passenger and foisted on him. Therefore, the submission that the previous counsel failed to set up such a defense, appears to be an afterthought.

7. In view of the foregoing, I am inclined to agree with the learned Special Judge Customs that section 540 Cr.P.C. was invoked only to delay judgment. The revision application is therefore dismissed.

JUDGE

Karachi
Dated: 04-03-2025