JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT

ISLAMABAD

1- Criminal Jail Appeal No. 268 of 2019
Javed Khan
Versus
The State.

2- Criminal Jail Appeal No. 269 of 2019
Aziz Ahmad
Versus
The State.

3- Criminal Appeal No. 109 of 2020
Javed Khan, etc.
Versus
The State.

Appellants by:	Ms.Qurat-ul-Ain Ayesha and Raja Haseeb Sultan, Advocates,
State by:	Mr. Zulfiqar Ali Tahir, Special Prosecutor A.N.F,
Date of Hearing:	27.01.2021.

FIAZ AHMAD ANJUM JANDRAN, J.- Listed criminal appeals under Section 48 of the Control of Narcotics Substances Act, 1997**('Act of 1997')** are directed against the consolidated judgment dated 27.06.2019, passed by the learned Judge, Special Court (CNS), Islamabad, whereby appellants *(Javed Khan & Aziz Ahmad)* were convicted in F.I.R No. 103, dated 12.10.2017, under Section 9 (C) of the Act of 1997, Police Station ANF/RD Rawalpindi sentenced as under:-

Under Section 9 (C) Act of 1997	***Javed Khan** appellant* *Recovery-**3.6.KG charas*** *06-Years & 06-Months R.I. Fine Rs.30,000/-, in-default six months S.I.*
Under Section 9 (C) Act of 1997	***Aziz Ahmad** appellant* *Recovery-**2.4 KG charas*** *05-Years & 06-Months R.I. Fine Rs.25,000/-, in-default five months and fifteen days S.I.*

The benefit of Section 382-B of Cr.P.C, was also extended to both the appellants.

2. Briefly, the accusation against the appellants in the complaint Ex.P3/A, on the basis of which formal F.I.R, Ex.P3/B, was registered is that on 12.10.2017, at about 21:35, near Faisal Movers, Faizabad, within the territorial limits of Police Station ANF/RD North Rawalpindi, Hasan Feroz, SI PW-5, on the basis of spy information, intercepted appellants Javed Khan and Aziz Ahmad. Appellants Javed Khan was having blue colour shopping bag wherefrom three packets of Charas wrapped in Khaki insolation tape were recovered, on weighing the substance recovered found 3600 grams out of which 10 grams each was separated for chemical analysis and sealed into three separate parcels. The remaining substance was also sealed into a separate parcel. On personal search of Aziz Ahmad appellant two packets wrapped in Khaki insolation tape were recovered from folds of his Shalwar. The substance, on weighing found 2400 grams. 10 grams each from both the packets were separated for chemical analysis, sealed into separate parcels while the remaining substance was also sealed into separate parcels. S.I./PW-5 took all the seven parcels in his possession vide two separate recovery memos Ex.PC & Ex.PD respectively, duly attested by PW-4 Muhammad Naveed constable and constable Riazat Ali. The personal belonging recovered from the appellants were also taken into possession through the same recovery memos. After due investigation, challan was submitted in the Court of learned Judge, Special Judge (C.N.S), Islamabad where the appellants were formally charge sheeted to which they pleaded not guilty and claimed to be tried.

3. At the trial, prosecution examined PW-1 Muhammad Ilyas HC on 13.10.2017 who kept case property of the case including seven parcels of charas handed over to him by PW-5 Hassan Feroz SI. He also dispatched sample parcels to N.I.H, Islamabad through PW-2 Zulfiqar Constable. PW-Zulfiqar constable deposed to prove the deposit of sample parcels in the N.I.H. Islamabad intact on 13.10.2017. PW-3 Shahir ur Rehman on 12.10.2017 drafted formal FIR Ex.P/3-B on the basis of complaint Ex.P3/A. PW-4 constable Naveed is the recovery witness while the PW-5 Hassan Feroz SI deposed to prove the investigation conducted by him and also tendered reports of Chemical Examiner Ex.PG, Ex.PH, Ex.PI, Ex.PJ and Ex.PK.

4. After the recording of above prosecution evidence, appellants were examined under Section 342 Cr.P.C, wherein they denied the allegations. They also made their statements on oath in terms of Section 340(2) Cr.P.C. The appellant Javed Khan had the stance that on the day of occurrence he had been taking tea at a Faizabad hotel where some persons wearing civil dress came and arrested him took him to the Police Station and that he is innocent. Likewise appellant Aziz Ahmad advanced the same plea with slight deviation that the persons wearing civil dress, conducted his personal search and took two mobiles and then brought him in the Police Station and also inquired about having any acquaintance with appellant Javed. The learned trial Court after hearing the counsel for the appellants and learned Prosecutor, convicted and sentenced the appellants as mentioned in para-1 *supra* vide judgment dated 27.06.2019, being assailed through instant criminal appeals.

5. Learned counsel for the appellant Javed Khan argued that the raid was conducted on the basis of spy information but the details of said information were not entered in the daily dairy which is mandatory in terms of Section 21(2) of the Act of 1997; that the recovery memo pertaining to the said appellant did not contain the details qua the shape and colour of the substance; that separate substances were allegedly recovered from the appellant, therefore, in absence of having their inter se nexus, prosecution had to file two separate reports under Section 173 Cr.P.C; that the crime scene was thickly populated area but no witness from the public was associated with the recovery proceedings.

6. At the tail end of submissions, learned counsel stated that the appellant had already undergone substantive portion of sentence and retains no criminal record and being first offender deserves moderate reduction in his sentence.

7. Learned counsel for the appellant Aziz Ahmad while adopting the same course pointed out that appellant had already undergone substantive portion of his sentence i.e. 39 months and therefore, does not press the appeal on merits, and would be satisfied if the sentence is reduced to one already undergone.

8. On the other hand, learned Special Prosecutor confirms that both the appellants retain no criminal record and that if the conviction is not pressed, he would have no objection as the discretion lies with the Court.

9. We have heard the learned counsel for the appellants, learned Special Prosecutor and have gone through the record with their able assistance.

10. The prosecution case rests upon statements of PW-4 Naveed constable and PW-5 Hasan Feroz SI. It transpires from their statements that they were consistent on material aspects of the case i.e. apprehension of the appellant at the time and venue mentioned in Ex.P3-A, their search and recovery of 3600 grams and 2400 grams charas respectively. Three samples parcels were prepared out of the substance recovered from appellant Javed Khan while two out of the substance recovered from Aziz Ahmad. All the sample parcels were taken into possession along with the remaining substance, vide recovery memos. The substance was immediately deposited in the Malkhana and thereafter it was transmitted to N.I.H, Islamabad intact and the reports Ex.PG, Ex.PH, Ex.PI, Ex.PJ and Ex.PK testifies that the recovered substance was charas, a narcotics substance which can be used to cause intoxication.

11. In presence of above prosecution evidence, learned counsel for the appellants rightly opted not to contest the case on merits.

12. For deciding instant appeal, beneficial guidance is taken from the judgment reported as "***Niaz-ud-Din v. The State"*** *(2007 SCMR 206)* wherein 5 KG of heroin was recovered from the possession of accused, sentenced to 10 years R.I. with fine of Rs.50,000/- in default, to undergo further R.I. for six months. The conviction of 10 years was converted into six (6) years, already undergone by the accused by observing in paragraph 6 as under:-

> *"However, coming to the question of sentence we note that it has been conceded by learned A.A.G. that petitioner is a previous non-convict and there is no other instance of petitioner's involvement in drug trafficking. It has also been brought in*

> *evidence that at the time of this arrest he met custodial violence and on that account he received injuries. Perhaps those who arrested him wanted to extract confession for his alleged involvement with some other narcotic dealer. In these circumstances petitioner need to be given a chance in his life to rehabilitate himself."*

13. The Hon'ble Supreme Court of Pakistan in the case supra has reduced the sentence to one already undergone on the basis of being first offender and future prospects of the convict. This view was followed by the Hon'ble Sindh High Court in judgment reported in ***"Muhammad Arshad Hussain alias Gul Khan v. The State"*** *(2012 YLR 1630 Sindh),* wherein 1100 grams heroin was recovered, sentence of accused was reduced from 7 years to one already undergone by him (four years, nine months and two days). The practice was also followed in ***"Raees Khan Jadon v. The State"*** *(2010 YLR 3240 Karachi),* wherein on the recovery of 5 KG heroin, sentence of 7 years and three months, was reduced to 4 years, 11 months and 3 days, the period already undergone by the convict. The practice can also be witnessed in case reported as "***Shahid Hussain v. The State"*** *(2010 YLR 2170 Karachi),* wherein the accused was first offender and his sentence was reduced from 10 years to one already undergone.

14. Now we advert to the quantum of sentence. Every sentence has a purpose though the way in which it is to be accomplished might vary or differ. The case of a repeater or habitual offender where the probability of reformation is little and the case of a first time novice offender, cannot be measured on same yardstick and the latter case deserves a lenient view.

15. The High Court of Sindh in case law reported as ***"Saeed Ahmed Kalhoro v. The State"*** *(PLD 2017 Sindh 592)* held that "***a jail term should normally be enough to wipe out the stain of guilt, but the sentence which the society passes on convicts is relentless. The ignominy commonly associated with a jail term and the social stigma which attaches to convicts often render the remedy verse than the disease and the very purpose of punishment stands in the danger of being frustrated.***"

16. The appellants are first offenders. They have already undergone substantive portion of their sentence i.e. 03-years & 03-months. This is without any remissions, if they had.

17. In view of above, by following the precedents laid down by the superior courts, it is held that the appellants being first offender, with no criminal record are entitled to leniency. Consequently, instant criminal appeals are ***dismissed*** with modification of sentence awarded to one already undergone by the appellants. Benefit of Section 382-B Cr.P.C, is also extended to the appellants. The appellants shall be released forthwith if not required in any other case.

(MOHSIN AKHTAR KAYANI) JUDGE

(FIAZ AHMAD ANJUM JANDRAN) JUDGE

Imran

Announced in open Court on _____.

JUDGE **JUDGE**