JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No.45/2018
Jalal Khan
Versus
The State

Date of Hearing:	25.09.2019
Appellant by:	M/s Najeeb Ullah Khan Khattak and Mubashir Najib, Advocate.
Respondent by:	Mr. Sadaqat Ali Jahangir, learned State Counsel.

MIANGUL HASSAN AURANGZEB, J:- Through the instant criminal appeal, the appellant, Jalal Khan, assails judgment dated 03.04.2018 passed by the Special Judge/Control of Narcotic Substance, (East) Islamabad whereby he was convicted in case F.I.R. No.127, dated 08.07.2017, registered under Section 9-C of the Control of Narcotic Substance Act, 1997 ("C.N.S.A.") at Police Station Shehzad Town, Islamabad.

2. The complainant in the said case was Tasadduq Hussain, Sub-Inspector. As per the contents of the said F.I.R., after receiving spy information on 08.07.2017, a car having registration No.LEB-6773 approaching from *Khanna* and going towards *Taramari* on *Lehtrar* Road, was apprehended. The appellant and Mst. Fouzia Bano were sitting in the said vehicle. The said vehicle and its passengers were searched by the police party. 1,000 grams of *charas* was recovered from Mst. Fouzia Bano; 350 grams of *charas* was recovered from the appellant; and 5,000 grams of *charas* in the shape of *lithers* in five packets was recovered from under the driver seat of the said vehicle. The total quantity of *charas* came to 6,350 grams. From each packet, 10 grams of *charas* was taken as a sample and sent for chemical analysis.

3. The appellant and the co-accused Mst. Fouzia Bano were sent to the judicial lock-up after the investigation. Report under Section 173 Cr.P.C. was submitted in the Court. The appellant and the co-accused did not plead guilty to the charge framed against them. Consequently, they were sent up for trial.

4. The prosecution produced five witnesses, namely (i) Abdul Sattar, A.S.I. (PW-1), (ii) Muhammad Ali, A.S.I. (PW-2), (iii) Muhammad Aslam Shah, Constable (PW-3), (iv) Shafaqat Ullah Khan, A.S.I. (PW-4), and (v) Tasadduq Hussain, S.I. (PW-5). After the statements of the appellant and the co-accused were recorded under Section 342 Cr.P.C., the learned Trial Court vide judgment dated 03.04.2018 acquitted the co-accused, Mst. Fouzai Bano, and convicted the appellant for the offence under Section 9-C C.N.S.A. and sentenced him to undergo rigorous imprisonment for a term of eight years and six months along with a fine of Rs.40,000/-. In the event of the failure to pay the said fine, the appellant was to undergo simple imprisonment for seven months. He was also granted the benefit of Section 382-B Cr.P.C. The said judgment dated 03.04.2018 has been assailed by the appellant in the instant appeal.

5. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the impugned judgment is contrary to the law laid down by the Hon'ble Supreme Court in the case of Ameer Zeb Vs. The State (PLD 2012 S.C. 380); that a sample of narcotic substance weighing 10 grams was said to have been taken from each of the packets recovered from the appellant, the co-accused and from under the driver seat of vehicle registration No.LEB-6773; that the order dated 28.02.2018, passed by the learned Trial Court shows that the sealed parcels containing *charas* had been produced before the learned Trial Court and that there were a total of six packets; that one of the packets was de-sealed in an open Court and the same contained 10 *lithers*; that the said order also shows that the investigation officer had contended that the remaining five packets also contained the same number of *lithers* and of the same size; that the law required that a sample had to be taken from every *lither* for chemical analysis and that every *lither* had to be separately weighed; that it could not be presumed that every *lither* was a narcotic substance; that since each *lither* had not been separately weighed, and since a sample from each of the *lithers* contained in all the packets had not been taken, at best,

the case against the appellant would be for recovery of 70 grams of *charas*, which was the net weight of the seven samples sent for chemical analysis to the National Institute of Health, Drugs Control and Traditional Medicines Division, Islamabad; that the appellant could not have been convicted for the recovery of 5,350 grams of *charas*; that the learned Trial Court erroneously assumed that there were ten *lithers* in all the six packets; that the learned Trial Court relied on the bald statement of the I.O. that the remaining five packets also contained the same number and size of *lithers* as in the packet which was de-sealed in the Court; and that the report of the chemical analysis is not in accordance with the law laid down in the cases reported ***2018 SCMR 2039*** and ***2019 SCMR 326***. Learned counsel for the appellant prayed for the appeal to be allowed and for the appellant to be acquitted.

6. On the other hand, learned State Counsel submitted that the appellant had been specifically nominated in the F.I.R.; that 350 grams of *charas* had been recovered from the person of the appellant; that 5,000 grams of *charas* were recovered from the driver seat of the vehicle which was being driven by the appellant when he was apprehended by the police party on 08.07.2017; that the protocols are clearly mentioned in the chemical analysis report dated 21.08.2017 which is in the positive; that the investigation officer did not commit any illegality by taking one sample from each of the packets containing 10 *lithers* of *charas*; and that the appellant had committed a heinous offence and the judgment of the learned Trial Court is strictly in accordance with the law. Learned State Counsel prayed for the appeal to be dismissed.

7. We have heard the contentions of the learned counsel for the appellant as well as the learned State Counsel and have perused the record with their able assistance.

8. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 4 above, and need not be recapitulated.

9. Tasadduq Hussian, S.I. appeared for the prosecution as PW-5 and deposed *inter-alia* that from beneath the driver seat, five

packets of *charas* tied with the yellow tape, weighing 5,000 grams, were recovered. He also deposed that one packet of *charas* weighing 350 grams was recovered from the appellant. According to his testimony, he had taken 10 grams of *charas* and had prepared seven parcels for samples and three parcels of the recovered *charas*.

10. Order dated 28.02.2018, passed by the learned Trial Court shows that the case property in sealed parcels was produced in the Court. The case property comprised of six sealed packets. One of the sealed packets was de-sealed in open Court. The Presiding Officer counted ten *lithers* in the packet which was de-sealed. It is clearly recorded in the said order that the I.O. had contended that the remaining five packets also contained the same number of *lithers*. Additionally, in paragraph 13 of the impugned judgment dated 03.04.2018, it has been observed as follows:-

> *"The case property that is sealed parcles of the charas were produced in the court which were comprising six packet (06) properly sealed. One of the packet on the request of defense counsel was allowed to be de sealed in the open court. The number of Lithers counted firstly, by the counsel of the accused, then by the learned SPP and I.O of the case. I (presiding officer) also counted the same which are ten(10) lithers in the packet de sealed. The I.O has contended that the remaining five packets also contain the same number of lithers of the same size. The packet de sealed was sealed properly again with the sample seal of the District & Sessions Court Islamabad."*

11. There is nothing on the record to show that each packet of the recovered narcotic substance from the person of the appellant and from under the driver seat of the vehicle had been separately weighed by the police. We are of the view that not just should each packet have been separately weighed but each of the *lithers* in each of the packets should have been separately weighed by the police. This, in our view, was most essential in the case at hand given the fact that samples had not been taken from each of the *lithers* contained in each of the recovered packets. As mentioned above, the prosecution's case was that each of the 6 packets contained 10 *lithers* of *charas.* What the police did was to

take samples of 10 grams of *charas* from each of the 6 packets but not from each *10 lithers* contained in all the packets.

12. Although the entire quantity of the recovered substance is said to have weighed 6,350 grams (including the 1,000 grams recovered from the co-accused) but it is our view that since samples for chemical examination were not taken from each of the 10 *lithers* of the 6 packets (i.e., one recovered from the person of the appellant and five from underneath the driver seat of the vehicle) and since each of the *lithers* had not been separately weighed, it could not be assumed that the entire 5,350 grams (excluding the 1,000 grams recovered from the co-accused) of the recovery was narcotic substance. Samples taken from one *lither* in each of the 6 packets cannot be considered to be a *"representative sample"* of all the 10 *lithers* contained in each of the 6 packets. The question that crops up in the mind is whether the *lithers* from which samples were not taken be considered as narcotic substance? We would say, certainly not especially when sentences under the C.N.S.A. would depend on the quantity of the recovered narcotic substance. Since the police did not take a sample from each of the 10 *lithers* in each recovered packet, the guidelines laid down in Ameer Zeb's case *(supra)* were violated. The relevant portion of the said judgment is reproduced herein below:-

> *"7. ...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. ..."*
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> *"8. For the purposes of clarity and removal of confusion it is declared that where any narcotic substance is allegedly recovered while contained in different packets, wrappers or containers of any kind or in the shape of separate cakes, slabs or any other individual and separate physical form it is necessary that a separate sample is to be taken from every separate packet, wrapper or container and from every separate cake, slab or other form for chemical analysis and if that is not done then only that quantity of narcotic substance is to be considered against the*

accused person from which a sample was taken and tested with a positive result."

13. It is an admitted position that each *lither* from which a sample was taken had not been weighed. It cannot be presumed that the weight of all the 10 *lithers* in each of the 6 packets was the same. There is nothing on the record to show that a sample was taken from each of the 10 *lithers* in each of the 6 packets. It also cannot be presumed that *lithers* from which samples were not taken and sent for chemical analysis was *charas*/narcotic substance. By not appreciating this, the learned Trial Court has acted in derogation of the law laid down in Ameer Zeb's case *(supra)* to the following effect:-

> *"It is of paramount importance to notice in this context that the sentences specified in the Control of Narcotic Substances Act, 1997 depend upon the quantity of the recovered narcotic substance and not upon the narcotic content of the recovered substance and, thus, quantity in such cases is the determinative factor as far as the sentences are concerned. It is, therefore, absolutely necessary that in all such cases there should be no room for doubt as to the exact quantity of the substance recovered and also as to the entire recovered substance being narcotic substance. We may also observe that in such cases it is the accused person who is at the receiving end of long and stringent punishments and, thus, safeguards from his point of view ought not to be allowed to be sacrificed at the altar of mere comfort or convenience of the prosecution."*
> **(Emphasis added)**

14. In the case at hand, the total quantity of the narcotic substance sent for chemical examination was 70 grams. Out of this, 10 grams were taken from the *charas* recovered from the co-accused. The quantity sent for chemical examination was found to be narcotic substance/*charas*. Since the *lithers* from which the said samples were taken had not been separately weighed, the weight of each such *lither* cannot be determined with precision. It would have been a different matter, had each *lither* from which a sample was taken had been separately weighed. Had a sample been taken from each of the 10 *lithers* from each of the 6 packets, and had each *lither* from which such sample was taken separately weighed, and their weight from more than 6 *kilograms*, there would have been no reason to alter the sentence awarded by the learned Trial Court. By giving the benefit of the doubt to the appellant and taking into consideration the guidelines given in

Ameer Zeb's case *(supra)*, it would be safe to hold that at best, the appellant could have been convicted for possession of 60 grams of *charas* (excluding the sample from the *charas* recovered from the co-accused). 60 grams of *charas* being the weight of the 6 samples which were sent for chemical examination and which had been tested positive.

15. This Court, in its judgment dated 28.10.2013, passed in criminal appeal No.63/13 titled "Taeb Hussain Vs. The State", held as follows:-

> *"8. It is the case of prosecution and it has also come in evidence that allegedly 40-packets of charas total weighing 40-kgs & 900-grams was recovered and each packet was containing 10-strips, but the sample was not taken from each strip/Lither, rather the same was taken from each packet. Thus, the I.O. has committed irregularity."*

16. In view of the above, we find that the recovery of *charas* is proved only to the extent of 60 grams against the appellant which fact is supported by the chemical examiner's report. Therefore, the appellant could be convicted for possession of the said quantity of *charas* only.

17. The appellant has been behind bars since 08.07.2017. Therefore, we find this case is a fit one for converting the sentence awarded to the appellant by the learned Trial Court to a sentence for a term of imprisonment already undergone by the appellant with the benefit of Section 382 Cr.P.C.

18. In the above circumstances, the appellant is directed to be released if not required in any other case. The instant appeal is accordingly disposed of in the above terms.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(CHIEF JUSTICE) **(JUDGE)**

*Qamar Khan**

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