

HIGH COURT OF AZAD JAMMU AND KASHMIR

Appeal No.122/2023;
Date of institution 23.08.2023.
Date of hearing. 04.04.2024;
Date of decision 07.06.2024.

Altaf Shah S/o Ismail Shah caste Gillani Syed R/o Nari Panjkot, Tehsil Pattika (Naseerabad), at present Ranjata, Tehsil & District Muzaffarabad, Azad Jammu & Kashmir.

.....Appellant

VERSUS

State through Advocate General having his office at Supreme Court building Muzaffarabad Azad Kashmir.

.....Respondent

APPEAL UNDER SECTION 48 CNSA, 2001

**Before:- Justice Sardar Muhammad Ejaz Khan, J.
Justice Chaudhary Khalid Rasheed, J.**

PRESET:

Raja Aftab Ahmed, Advocate for the appellant.
Ch. Muhammad Manzoor, AAG for the State.

JUDGMENT:

(Chaudhary Khalid Rasheed, J.) The captioned appeal has been preferred against the impugned judgment passed by the learned Additional Sessions Judge, Muzaffarabad dated 27.07.2023 qua accused appellant has been convicted under section 9(C) CNSA, 2001 by awarded six years simple imprisonment with fine of Rs.50000/-, in case of default of payment of fine the convict shall further undergo for five months imprisonment.

Precise facts of the case are, upon the complaint of Syed Wajahat Hussain Kazmi, Sub-Inspector Incharge Police Station, CIA

Muzaffarabad FIR No.374/2022 was registered against the convict appellant in the offence under section 9(C) CNSA, on 11.10.2022. As per allegation against the convict/appellant, 4400 grams of contraband (charas) was recovered from him during raid to his house on 10.10.2022. The police after formal investigation submitted challan before the trial Court on 19.11.2022. Charge was framed against the convict/appellant under section 265-D Cr.P.C. on 29.11.2022. The accused pleaded innocence whereupon prosecution was directed to lead evidence in order to prove the guilt. Upon completion of prosecution evidence statement of the accused under section 342 Cr.P.C. was recorded on 12.06.2023 who again refuted the prosecution evidence and claimed innocence. The accused produced evidence in defence and also got recorded his statement on oath under section 340(2) Cr.P.C. The learned trial Court provided pro and contra opportunity of hearing and at the conclusion of trial convicted the accused under section 9(C), CNSA by awarded him the sentence as mentioned in the preceding paragraph, hence, the captioned appeal.

The learned counsel for the appellant vehemently argued that FIR through which the instant case has been registered and the accused has been tried was not tendered in evidence, hence, after excluding FIR from consideration nothing has been left against the accused for conviction. The learned Advocate further argued that provisions of Rule 4(2) of Control of Narcotic Substances (Govt. Analysts) Rules, 2001 have also been violated because the sample

were not dispatched for analysis within a period of 72 hours, hence, the safe custody of alleged recovered samples has shrouded in mystery. The learned counsel also claimed that the prosecution evidence is a bunch of flagrant contradictions, hence, the accused was entitled to be acquitted of the charge while extending him the benefit of doubt but the Court below while relying upon contradictory statements of the prosecution witnesses awarded impugned sentence which carries no water to hold.

The learned AAG on the other hand supported the impugned judgment on all counts by submitted that the Court below has already taken a lenient view while awarding iota of sentence to the convict appellant, thus he does not deserve further leniency of the Court as the prosecution has proved its case beyond shadow of any reasonable doubt, thus requested that the instant appeal deserves to show the door.

We have heard the learned counsel for the parties, gone through the record of the case with utmost care and caution.

In view of proposed conclusion the evidence led by the prosecution need not to be discussed because keeping in view of the following eventualities we have made up our mind to remand the case to the trial Court for fresh decision. The Court below has observed that the prosecution has proved the guilt of the accused to the hilt through cogent oral and documentary evidence beyond any shadow of reasonable doubt but awarded lesser punishment to the convict for the reasons that FIR has not been produced, samples of

recovered contraband (charas) have been sent to chemical examination with delay and that the accused is not a previous convict. As for as the delay in sending the samples for chemical examination is concerned, that can be considered as a mitigating circumstance as has been held in 2022 SCR 334 wherein at page 343 it has been observed as under:-

“9. A cursory perusal of the abovesaid rule transpires that the sealed parcel should be deposited within seventy-two hours after seizure of the contraband substance with the Chemical Examiner, however, the record is quite barren to justify this delay on the part of the prosecution. Although, it is in judicial notice of this Court that no Forensic Laboratory is established in Azad Jammu & Kashmir, but delay in dispatching the parcel within prescribed time is not justified, however, the said delay on the part of the prosecution can be taken as a mitigating circumstance.”

However, a perusal of record reveals that alleged contraband was recovered at 09:20 pm on 10.10.2022 and as per report of National Forensic Science Agency the same was submitted for Chemical Examination on 13.10.2022, so, it cannot be held that provisions of Rule 4 (2) of the Control of Narcotic (Govt. Analysts) Rules, 2001, have been violated rather it appears that the sealed parcel was deposited to the Laboratory within the stipulated period of 72 hours, hence, the Court below wrongly declared that the convict is entitled to award lesser punishment for the reason that sealed parcel was sent with delay.

The other reason listed by the Court below for award of lesser punishment is that the accused is not a previous convict. As

per record appended with the file of trial Court at page 28, the convict is involved in more than 30 cases of narcotics and has also been convicted in FIR No.52/95, thus the observation recorded by the Court below that the accused is not previously convicted is also not in consonance with the record.

The third reason illuminated by the trial Court for award of lesser punishment is non-production of FIR. It is a well settled precept of law that an FIR needs not to be proved rather it is to be got registered to set the investigation agency into motion for investigation purposes. Reliance may be placed on PLJ 1997 SC AJ&K 60. Hence, non-exhibiting of an FIR in evidence cannot be pondered as a mitigating circumstance for award of lesser punishment. It is an axiomatic precept of law that when an offence is proved the accused deserves normal penalty and for award of lesser punishment the Court is always expected to mention the mitigating circumstance which is a fact or situation that does not justify or excuse a wrongful act or offence but that reduces the decree of culpability and thus may reduce the punishment in a criminal case. In offence under section 9(C), CNSA normal penalty is death but it is noticed that the Courts of trial in a routine award lesser punishment in the offences under CNSA without any justified reasons which tantamount to spoil the very purpose of the enactment of the said Act, hence, highly regrettable because the same does not bring balance in the society which is the basic purpose of awarding sentence. A person who is involved in more than 30 cases of narcotics, who has already been

convicted in one of the case, is always expected to deal in consonance with the spirit of relevant law, hence, any unjustified lenient view of the Court while awarding sentence would tantamount to encourage him for repetition of offence.

The crux and epitome of the above discussion is, the impugned judgment is hereby reversed and the case is remanded to the trial Court for fresh decision in consonance with the relevant law, within a span of two weeks, hence the parties are directed to appear before the trial Court for arguments on 12.06.2024.

**Muzaffarabad,
07.06.2024**

JUSTICE

JUSTICE