

[Supreme Court of Pakistan]

Present: Mushir Alam, Mazhar Alam Khan Minakhel and Syed Mansoor Ali Shah, JJ

TASNEEM JALAL---Appellant

Versus

DEPUTY DIRECTOR ANF and others---Respondents

Criminal Appeal No. 01-L of 2015, decided on 15th January, 2020.

(On appeal from the judgment of Lahore High Court, Lahore dated 31.07.2002, passed in Criminal Misc. 1192-M of 1995)

Control of Narcotic Substances Ordinance (VI of 1995) [since repealed]---

---S. 37--- Constitution of Pakistan, Art. 12--- Possessing and distributing narcotics---Conviction by a foreign court---Forfeiture of property in Pakistan under S. 37 of the Control of Narcotic Substances Ordinance, 1995 ("Ordinance") for an offence that was committed prior to the promulgation of said Ordinance---Protection against retrospective punishment---Scope---Said Ordinance was promulgated on 29-11-1995 whereas the offence took place in September, 1992 and the convict was convicted and sentenced by a foreign court on 26-09-1993---At the time of the offence (i.e. the year 1992), the punishment of forfeiture of properties of the convict in Pakistan was not available under the law as the Ordinance was promulgated in the year 1995---Fundamental Right under Art.12 protected a person against punishment for an offence (act or omission) that was not punishable at the time of the offence--Clearly, the punishment of forfeiture of the properties of the convict in Pakistan against a conviction of a foreign court did not exist at the time of the offence or the conviction, therefore, S. 37 of the Ordinance was not applicable to an offence committed by the convict before its promulgation---Appeal was allowed accordingly.

Khan Asfandiyar Wali v. Federation of Pakistan PLD 2001 SC 607; Abdul Rehman v. State 1978 SCMR 292 and Maqbool Ahmad v. State 2007 SCMR 116 ref.

Waqar Hassan Mir, Advocate Supreme Court and Ahmed Awais, Advocate Supreme Court for Appellant.

Kamran Murtaza, Senior Advocate Supreme Court for Applicant.

Zafar Iqbal Chohan, Special Prosecutor ANF, Ch. Inam Amin Minhas, Special Prosecutor ANF, Muhammad Nazir, DD ANF and Ch. Ehtisham, Special Prosecutor ANF for Respondents.

Date of hearing: 15th January, 2020.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The legal question that concerns us is the application of the punishment of forfeiture of property under section 37 of the Control of Narcotic Substances Ordinance, 1995 ("Ordinance") to an offence that was committed prior to the introduction of such punishment in law.

2. The facts of the case are simple and admitted. The predecessor-in-interest of the appellant namely; Tasneem Jalal was convicted for the offences of possessing, aiding and abetting with the intent to distribute Heroin vide judgment dated 26.09.1993, passed by the United States District Court in the District of New Jersey, USA for a term of 108 months under the relevant law.

3. Subsequently, in Pakistan, the Federal Government through their authorized representative moved an application under section 37 of the Ordinance before the Lahore High Court, Lahore on 28.09.1995, praying for forfeiture of the properties acquired by the predecessor-in-interest of the appellant in Pakistan. List of the said properties was attached with the application. Leave was granted vide order dated 26.01.2015 to consider whether section 37 of the Ordinance is applicable to the present case?

4. We have heard the learned counsel for the parties and examined the record of the case with their able assistance. The Ordinance was promulgated on 29.11.1995 having, inter alia, repealed the

Dangerous Drugs Act, 1930 ("DDA"). Section 37 of the Ordinance provides that where a citizen of Pakistan is convicted by a foreign court for an offence which is also an offence punishable under the Ordinance, the Court (i.e., High Court) may on an application by the Director-General or any other authorized officer of the Federal Government order that the assets acquired in Pakistan of such a citizen are forfeited. Section 37 is reproduced hereunder for reference:-

"37. Forfeiture of assets of person convicted abroad.---(1) Notwithstanding anything contained in any other law for the time being in force, where a citizen of Pakistan is convicted by a foreign Court for an offence which is also an offence punishable under this Ordinance, the Court may, on an application made by the Director-General or any other officer authorized by the Federal Government, order that the assets acquired in Pakistan by such citizen shall be forfeited to the Federal Government:

Provided that the judgment or order of conviction---

- (a) is passed by the foreign Court of competent jurisdiction;
- (b) has been pronounced on the merits of the case;
- (c) has not been obtained by fraud;
- (d) has not been made in contravention of any law in force in Pakistan;
- (e) has assumed finality through appeal, revision or review and is not sub judice before any appellate forum:

Provided further no order under this section shall be made without providing an opportunity of being heard to such citizen:

Provided also that, notwithstanding anything contained in clauses (a) to (e) of the first proviso, during the pendency of the application the Court may, by an order, freeze all or any of the assets or restrain such citizen, his associate and relative from alienating such assets by lease, sale, gift, transfer or in any other manner.

Explanation.---For the purpose of this section, the expression 'Court' means the High Court of the Province where the assets or any portion thereof are located."

5. The said Ordinance was promulgated on 29.11.1995 whereas the offence took place in September, 1992 and the predecessor-in-interest of the appellant was convicted and sentenced on 26.09.1993 in the USA. Therefore, at the time of the offence (1992), the punishment of forfeiture of properties of the appellant in Pakistan was not available under the law as the Ordinance was promulgated in the year 1995. Article 12 of the Constitution is very clear on the subject and provides as follows:-

"12. Protection against retrospective punishment

(1) No law shall authorize the punishment of a person:-

- (a) for an act or omission that was not punishable by law at the time of the act or omission; or
- (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

Fundamental right under Article 12 protects a person against punishment for an offence (act or omission) that was not punishable at the time of the offence. Clearly, the punishment of forfeiture of the properties of the accused in Pakistan against a conviction of a foreign court did not exist at the time of the offence or the conviction. Therefore, section 37 of the Ordinance is not applicable to an offence committed by the predecessor-in-interest of the appellant before its promulgation. See *Khan Asfandiyar Wali v. Federation of Pakistan* (PLD 2001 Supreme Court 607), *Abdul Rehman v. State* (1978 SCMR 292) and *Maqbool Ahmad v. State* (2007 SCMR 116).

6. The erstwhile DDA, which was in force prior to the Ordinance and at the time of the offence, did not provide for any such punishment. Reference to section 35-C of the DDA by the prosecution is grossly misplaced. Section 35-C reproduced hereunder does not give effect to conviction of a foreign court in Pakistan, hence the sentence referred to in section 35-C cannot be read to give effect to a sentence awarded by a foreign court as has been clearly done in section 37 of the Ordinance. Section 35-C, for convenience, is reproduced hereunder:-

"35-C. Court to order forfeiture of assets: When any person found guilty of an offence punishable under Chapter III is sentenced to imprisonment for a term of two years or more, the Court shall also order that his assets shall stand forfeited to the Federal Government and impose on him a sentence of fine which shall not be less than twice the value of the assets."

7. In this view of the matter, this appeal is allowed and the impugned judgment dated 31.07.2002 is set aside and the forfeited properties of the predecessor-in-interest of the appellant shall stand released, unless encumbered or attached in some other proceedings.

8. Criminal Misc. Application No.221-L of 2018: This is an application filed by an intervener who has statedly acquired interest in the properties in question. In the light of the above judgment, this application has become infructuous, and the applicant is free to pursue his remedy available to him under the law. Disposed of.

9. Criminal Misc. Application No.189-L of 2019: This is a reply filed by respondent No.1. The said reply has been entertained and considered. Application allowed.

MWA/T-1/SC Order accordingly.