

Present: Sardar Tariq Masood, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ
SHARAFAT KHAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 241 of 2020, decided on 28th February, 2022.

(Against the judgment dated 10.02.2016 of the Peshawar High Court, Abbottabad Bench, passed in Criminal Appeal No.111-A of 2013).

Per Syed Mansoor Ali Shah, J; Sardar Tariq Masood, J agreeing; Qazi Muhammad Amin Ahmed, J dissenting. [Majority view]

(a) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 9 & 36---Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 4---Constitution of Pakistan, Art. 10A---Possession of narcotics---Representative sample sent to Government analyst, nature of---[Per Syed Mansoor Ali Shah, J [Majority view]: Representative sample is to be collected from every packet/cake/slab of the alleged narcotic drug and sent for analysis to the Chemical Examiner---Right to fair trial of the accused under Art. 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug]---[Per Qazi Muhammad Amin Ahmed, J [Minority view]: Not essential that every micro part of the contraband in single packet is to be separated for analysis nor is so contemplated by the Control of Narcotic Substances (Government Analysts) Rules, 2001].

Per Mansoor Ali Shah, J [Majority view]:

Before an accused is burdened with a criminal liability under the Control of Narcotic Substances Act, 1997 (the Act) of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the alleged narcotic. drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice.

State v. Iman Bakhsh 2018 SCMR 2039 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug.

The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug. Per Qazi Muhammad Amin Ahmed, J [Minority view]:

Emphasis laid down in the case reported as Ameer Zeb v. The State (PLD 2012 SC 380) is to ensure representative character of the forensic sample and for that it is not essential that every micro part of the

contraband in single packet is to be separated for analysis nor is so contemplated by the Control of Narcotic Substances (Government Analysts) Rules, 2001, which even otherwise are merely directory in nature.

State v. Iman Bakhsh 2018 SCMR 2039 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---

---Ss. 9(c) & 36---Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 4---Constitution of Pakistan, Art. 10A---Possession of 25,000 grams of charas---Re-appraisal of evidence---Sample sent to Government analyst not collected from each independent slab of recovered narcotic---Sentence, reduction in---[Per Syed Mansoor Ali Shah, J [Majority view]: In the present case, 25 packets were recovered from the accused, each having 14 separate slabs of the alleged narcotic drug; thus, in fact, there were 350 (25 x 14) separate physically independent units of the alleged narcotic drug---In order to burden the accused with the liability of the entire quantity of the alleged narcotic drug recovered, the representative sample had to be taken from every physically separate and independent unit of the alleged narcotic drug, i.e., from all the 350 slabs of the alleged narcotic drug recovered from the accused---However only 25 samples of 5 grams were collected from each of the 25 packets, without specifying whether it was taken from one slab out of the 14 found in each packet, or that each 5-gram sample was obtained from all of the 14 slabs found in one packet---Prosecution had not even argued that the representative sample was taken from each of the 350 slabs, rather it is an admitted fact on part of the prosecution that 5-gram sample was taken from only one slab out of the 14 found in each packet---Thus, the prosecution was found to have proved only those parts of the charas allegedly recovered from the appellant to be the narcotic drug of which samples were taken and sent for analysis to the Forensic Science Laboratory, that is, about 1785 grams, not 25,000 grams as alleged---Accused had already served 9-years, 1-month and 20-days in prison---In view of the proved quantity of the charas recovered from him as being a narcotic drug, i.e., 1785 grams, his conviction was maintained but his sentence of life imprisonment was reduced to the imprisonment term already undergone by him while the fine of Rs.200,000/- was maintained]---[Per Qazi Muhammad Amin Ahmed, J. [Minority view]: Contents of the seizure memo confirmed that contraband in each packet comprised of integrated layers, inseparably constituting a composite unit and, thus, 5 grams separated from the corner of each packet squarely presented a representative sample---Samples were not only taken from each packet, they were kept separately for analysis that unambiguously confirmed the narcotic character of the seized contraband and, thus, through no mode of interpretation it could be possibly inferred that the remainder of the parcel was made up of a substance other than cannabis---Prosecution had established each limb of its case on the strength of proof beyond doubt from safe custody to transmission for forensic confirmation; there was no space to entertain any hypothesis other than accused's guilt---Sentence (of life imprisonment) awarded to the accused was mandatory in view of proviso to S.9 of the Control of Narcotic Substances Act, 1997]---Appeal was partly allowed.

Ansar Nawaz Mirza, Advocate Supreme Court for Appellant.

Arshad Hussain Yousafzai, Advocate Supreme Court for the State.

Date of hearing: 28th February, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---Upon suspicion, the appellant was apprehended by Police, and 25,000 grams of charas was allegedly recovered from the "bori" (big bag) he was carrying on his head. 25 packets of charas were found in the "bori", each packet carrying 14 slabs of charas, and every packet was weighed to be of 1000 grams. In this background, the appellant was booked in case FIR No.1 dated 01.01.2013 registered at Police Station City, Mansehra for the alleged commission of offence punishable under section 9(c) of the Control of Narcotic Substances Act, 1997 ("CNSA"), for being in possession of 25,000 grams of charas.

2. After a regular trial, the appellant was convicted and sentenced by the trial court to life imprisonment and fine of Rs.200,000/- or in default to suffer simple imprisonment for a term of six months. Benefit of section 382-B, Cr.P.C. was extended to him. On appeal, the said conviction and sentence was up-held by the High Court vide impugned judgment dated 10.02.2016. Leave to appeal was granted by this Court, vide

order dated 21.04.2020, to examine whether the courts below have correctly examined the case in the light of State v. Iman Bakhsh (2018 SCMR 2039) and Ameer Zeb v. The State (PLD 2012 SC 380).

3. The main contention of the learned counsel for the appellant is that the samples taken by the Police and sent to the FSL for analysis were not the representative samples of the narcotic drug (charas) allegedly recovered from the appellant; as a result, the appellant could not be burdened with the liability of the entire quantity (weight) of the alleged narcotic drug. He explains that 25 packets of charas were allegedly recovered from the appellant, while every packet had 14 slabs of charas; however, the representative sample collected was only 5 grams charas from each packet, not from every slab found in each packet, which was sent to the FSL and the positive report of the FSL is only with regard to that sample. He submits that the samples had to be taken from each of the 14 slabs allegedly found in each of the 25 packets. He relies, in support of his contention, on the Ameer Zeb s case.

4. Learned counsel for the State, however, supports the impugned judgment and submits that the samples taken were representative in nature and were taken from each of the 25 packets, and there was no further requirement of obtaining samples from every slab of the charas within the 25 packets.

5. We have considered the arguments of the learned counsel for the parties, read the cases cited by the learned counsel for the appellant and examined the record of the case.

6. Section 36 of CNSA provides that a sample of the narcotic drug has to be submitted with the Government Analyst for the test and analysis, while Rule 4 of the Control of Narcotics Substances (Government Analyst) Rules, 2001 ("Rules") provides that reasonable quantity of samples from the narcotic drug shall be drawn and dispatched to the testing laboratory. According to the Ameer Zeb s case, which is a decision of a five-member larger Bench of this Court and thus has the binding effect on this three-member Bench, a representative sample is to be collected from every packet/cake/slab of the alleged narcotic drug and sent for analysis to the Chemical Examiner. The relevant portion of the Ameer Zeb s case is reproduced here for ready reference:

"...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. It may be true that at least in some situations the Control of Narcotic Substances Act, 1997 stipulates disproportionately long and harsh sentences and, therefore, for the purposes of safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate chances of miscarriage of justice on account of exaggeration by the investigating agency. Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty which cannot be left at the mercy of verbal assertions of police officers which assertions are not supported by independent evidence provided by a Chemical Examiner.

(emphasis added)

Thus, in the present case, as every packet contained 14 slabs of the alleged charas, the narcotic drug, samples had to be collected from each and every slab present in the 25 packets.

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7. The underlining principle that emerges from the reading of the Act, Rules and the Ameer Zeb s case is that before an accused is burdened with a criminal liability under the Act of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by

the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the alleged narcotic drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice. Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug. In this regard, the mode of packaging of the alleged narcotic drug by the accused is totally inconsequential; for example, in this case each of the 25 packets have 14 slabs of the alleged narcotic drug, which could have easily been re-packaged as separate 350 packets with one slab each of the alleged narcotic drug or one big packet of 350 slabs of the alleged narcotic drug. The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.

8. In the present case, 25 packets were recovered, each having 14 separate slabs of the alleged narcotic drug; thus, in fact, there were 350 (25 x 14) separate physically independent units of the alleged narcotic drug. In order to burden the appellant with the liability of the entire quantity of the alleged narcotic drug recovered, the representative sample had to be taken from every physically separate and independent unit of the alleged narcotic drug, i.e., from all the 350 slabs of the alleged narcotic drug recovered from the appellant. In this case, 25 samples of 5 grams were collected from each of the 25 packets, without specifying whether it was taken from one slab out of the 14 found in each packet, or that each 5-gram sample was obtained from all of the 14 slabs found in one packet. The prosecution has not even argued that the representative sample was taken from each of the 350 slabs, rather it is an admitted fact on part of the prosecution that 5-gram sample was taken from only one slab out of the 14 found in each packet. Thus, the prosecution is found to have proved only those parts of the charas allegedly recovered from the appellant to be the narcotic drug of which samples were taken and sent for analysis to the FSL, that is, about 1785 grams,¹ not 25,000 grams as alleged.

9. According to the report dated 24.02.2022 received from the Superintendent, Central Prison, Haripur, the appellant has already served 9-years, 1-Month and 20-Days in prison. In view of the proved quantity of the charas recovered from the appellant, as being a narcotic drug, i.e., 1785 grams, we while maintaining the conviction of the appellant reduce his sentence to imprisonment for the term already undergone while retaining the fine of Rs.200,000/- or in default to suffer simple imprisonment for a term of six months and the benefit of section 382-B, Cr.P.C as held by the trial court. This appeal is partly allowed in these terms.

10. Foregoing are the reasons for the majority view of short order dated 28.2.2022, which is reproduced hereunder:--

For reasons to be recorded separately and by majority of two-to one (Qazi Muhammad Amin Ahmad, J., dissenting), this criminal appeal is partly allowed in the terms that conviction of the appellant is maintained while the sentence awarded to him is reduced to imprisonment for a term already undergone.

Sd/-

Judge
Sd/-
Judge
Sd/-
Judge

ORDER OF THE BENCH:

By majority of two-to-one (Qazi Muhammad Amin Ahmad, J., dissenting), this criminal appeal is partly allowed in the terms of para-9 above.

Sd/-
Judge
Sd/-
Judge

Islamabad,
28th February, 2022.

Sd/-
Judge

QAZI MUHAMMAD AMIN AHMED, J.---By unanimity, we entertain no manner of doubt on appellant's guilt for being in possession of cannabis weighing 25000 grams on the eventful day, nonetheless, opinion divides on quantum of sentence having regard to the number of samples, dispatched to the Chemical Examiner for forensic analysis so as to be in line with the law declared by this Court in the case of Ameer Zaib (PLD 2012 Supreme Court 380).

My profound admiration for his vast and versatile erudition in law, notwithstanding, I have not been able to persuade myself to subscribe to the opinion proposed by Syed Mansoor Ali Shah, J. with the concurrence of Sardar Tariq Masood, J.

2. The dissent for its contextual clarity necessitates, a reference to the facts, at the cost of some repetition, hopefully tolerable. The prosecution successfully established that the appellant was intercepted by a police contingent within the remit of Police Station City Mansehra with a sack that contained 25 packets, each weighing 1000 grams of cannabis wherefrom 5 grams were separated and sealed for forensic analysis; the contraband is vividly described in the seizure memo, reproduced in extenso for the convenience of reference:--

01-01-2013

It unmistakably confirms that the contraband in each packet comprised of integrated layers, inseparably constituting a composite unit and, thus, 5 grams separated from the corner of each packet squarely presented a representative sample to qualify the riders laid down in the supra case, relevant portion whereof, is advantageously reproduced to substantiate the above legal position:-

"In 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/s labs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample "

In the present case samples were not only taken from each packet, these were kept separately for analysis that unambiguously confirmed the narcotic character of the seized contraband and, thus, through no mode of interpretation it can be possibly inferred that the remainder of the parcel was made up of a substance other than cannabis. The emphasis laid down in the supra case is to ensure representative character of the forensic sample and for that it is not essential that every micro part of the contraband in single packet is to be separated for analysis nor is so contemplated by the rules, referred to in the majority opinion, even otherwise merely directory in nature.

The menace of drugs, spreading ubiquitously, targeting our youth has jeopardized the very fabric of the society; it poses existential threat that must be combated with a pragmatic and dynamic judicial response,

a responsibility in accord with the legislative intent, articulated under section 29 of the Control of Narcotic Substances Act, 1997 and, thus, in the absence of any express position taken by the convict during the trial to prove the contrary, the proposed reduction in his sentence, in my estimation, is a concession neither conscionable nor expedient.

3. The prosecution has established each limb of its case on the strength of "proof beyond doubt" from safe custody to transmission for forensic confirmation; there is no space to entertain any hypothesis other than appellant's guilt. Sentence awarded to the appellant is mandatory in view of proviso to section 9 of the Act *ibid*. Appeal fails.

MWA/S-12/SC Order accordingly.

¹ Total quantity of 25 packets containing 14 slabs each weighs 25000 grams. Average weight of one slab = 71 grams ($14 \times 25 + 35 = 350$ slabs. $25000/350 = 71$ grams). 25 slabs actually tested and analysed weigh = 1785 grams (71×25)