

THE HIGH COURT OF SINDH (SPECIAL APPELLATE
COURT, PREVENTION OF SMUGGLING) AT KARACHI

Special Criminal Appeals Nos.20 of 2009

Special Criminal Appeals Nos.21 of 2009

Special Criminal Appeals Nos.22 of 2009

Present:

Mr. Justice Nazar Akbar

Appellants : Ahmed Nawaz through Mr. Muhammad Faisal Khan, Advocate in Spl. Cr. Appeal No.20/2009.

Minhajuddin through Mr. Muhammad Ashraf Kazi, Advocate, in Spl. Cr. Appeal No.21/2009.

Syed Javed Raza through Syed Khurram Nizam, Advocate in Spl. Cr. Appeal No.22/2009.

Respondents : The State/Customs Department through Mr. Ashiq Ali Anwar Rana, advocate.

Date of hearing : **29.10.2020**

J U D G M E N T

NAZAR AKBAR, J.--- By this common judgment, I intend to disposed of the above three Special Criminal Appeals arising out of the judgment dated **10.7.2009**, whereby learned Special Judge, Customs, Taxation and Anti-Smuggling, Karachi, convicted the appellants in case No.40/1996 arising out of FIR No.DEC/QIAP/Misc/ 1/96 under Section 156(1)(14)(77) of the Customs Act, 1969 and sentenced each one of the appellants to undergo R.I. for 11 months and to pay fine of Rs.200,000/- (Rupees two lac), and in default in payment of fine to undergo S.I. for two months.

2. Precisely, the facts of the case are that M/s. Raza Enterprises imported Machine from M/s. Giesecke & Devrient GmbH, Germany and declared its value as 4,000DM vide Airway Bill No.020-7533-7485 dated 06.07.1995. Bill of Entry No.05077 dated 15.07.1995 was filed by M/s. Taqui Trading Company, Clearing Agent. The documents produced

were allegedly forged and manipulated one and value of machine was assessed by the Appraising Staff at Rs.300,000/- and after obtaining relevant documents from Muslim Commercial Bank, the actual price of the Machine was found to be **DM298,000/-** and not **4,000DM**. The Bank purchased machine for **Rs.1.45 Crore**, whereas it was assessed by appellant only for **Rs.300,000/-** The documents produced by Bank established that the Importer M/s. Raza Enterprises, Clearing Agent M/s. Taqui Enterprises and the Customs staff in connivance with each other defrauded the Exchequer of its legitimate revenue amounting to **Rs.56,52,971/-**.

3. The record shows that FIR against the appellants was registered on **19.2.1996** and the appellants were challaned before the Special Judge, Customs and Taxation and Anti-Smuggling, Karachi to face the trial. After 13 years the Special Court by judgment dated **10.7.2009** convicted the appellants and sentenced as stated above. They preferred these appeals before this Court on **13.7.2009**, **14.7.2009** and **15.7.2009** respectively. Precisely the appellants knew that they have no case to lawfully get a comprehensive judgment of their conviction set aside. Therefore, during last 11 years the record shows that it has always been the request of the appellants to adjourn the cases. On **06.8.2020** after almost 11 years these appeals were listed before this bench when again at the request of appellants while adjourning the cases it was categorically pointed out that no adjournment will be granted for whatever reason on **24.08.2020** at 8:30 am and the appeals should be proceeded on merit. However, on **24.8.2020** on the specific request of learned counsel for the appellants the case was adjourned for **28.8.2020** at 10:00 am, however, on **28.8.2020** a holiday was announced by the Government of Sindh whereafter these appeals came up on **26.10.2020**, however, again on the request of appellants it was

adjourned for the next morning (27.10.2020) by consent to be taken up at 12:30 am. On **27.10.2020** when the matter was taken up, each appellant filed statement in writing requesting the court that instead of hearing the appeals on merit, a lenient view be taken by the Court. (1) Appellant Ahmed Nawaz in Spl. Cr. Appeal No.20/2009 stated that he has been retired from service on 12.8.2019 in BS-16 and lives in a joint family. He requested for a lenient view since he has surrendered himself at the mercy of this court; (2) Appellant Minhajuddin in Spl. Cr. Appeal No.21/2009 stated that by now he is 73 years of age and a retired old person and pleaded mercy and protection as he had suffered the ordeal of the trial since 1996; (3) Appellant Syed Javed Raza in Spl. Cr. Appeal No.22/2009 stated that he is about 62 years of age and suffering from diabetic and had undergone an open heart surgery and is on heavy medicines and living in a rented premises with his wife and 5 children, therefore, a lenient view be taken in his appeal. Therefore, in view of their written request, I directed the counsel appearing for them to assist the Court with some case law or otherwise help the Court to be merciful at appellate stage without compromising the law. The appeals were adjourned by following order:-

Learned counsel for the appellant have been trying to seek adjournments by hook or crook by giving impression on every date that they would come prepared on next date. Yesterday a proposition was advanced that on humanitarian grounds this Court may modify the conviction or not. Learned counsel for the respondent was also of the same view but he refused to assist the Court and said that he cannot say anything in writing to this effect. Today, statements have been filed by the appellants in writing that they are suffering ordeal in facing the Court for the last more than 26 years as the case was registered against them in 1996. **Learned counsel for the appellants are directed to assist the Court by showing some case law or any provision of law which allows this Court to modify the conviction and sentence merely on the ground that appellants have surrendered themselves at the mercy of Court when the prosecution is not ready to change its stance against them even after 25/26 years including 11 years of instant appeal(s).** It means prosecution want

a judgment on merits. As a last chance, the matter is adjourned to 9.10.2020.

Despite repeated directions of court to the learned counsel to assist the court by referring to case law or any provision of law, no assistance was provided to the Court in this regard. Evidently the appellants have been nominated in the FIR as Appraising Staff for assessing the value of imported machine and clearing agent. The appellants have admitted that they were Appraising Staff and cleared the Automatic Currency Processing System ICSS 300P including spare parts and accessories on the document provided to them by the checking agent. Appellant **Ahmed Nawaz** in reply to question No.8 admitted that he being Appraiser has examined and assessed the value of the machine. Appellant **Minhajuddin** has not denied that he was not Principal Appraiser with co-accused Ahmed Nawaz at the time of assessing the imported machine. He admitted this position in reply to question No.9 by answering it in affirmative. The third appellant has also not denied that he has presented the relevant documents as clearing agent.

4. Today on the query by the Court that whether offences committed by the appellants are compoundable or not, learned counsel for the prosecution referred to **Section 32B** of the Customs Act, 1969, which is reproduced below:-

“32B. Compounding of offence.- Notwithstanding anything contained in Sections 32 and 32A or any other provisions of this Act, where any person has committed a duty or tax fraud, the Collector may, with the prior approval of the Board, either before or after the institution of any proceedings for recovery of duty or tax, compound the offence if such person pay the amount of duty or tax due along with penalty as is determined under the provisions of this Act.”

And Mr. Muhammad Ashraf Kazi, Learned counsel for the appellant in Spl. Cr. Appeal No.21/2009 has relied on the following case laws and provided photocopies:-

- i. Ghulam Ali vs. the State (**1997 SCMR 1411**);
- ii. Munawar Ali vs. the State (**2020 P Cr.LJ 1465**);
- iii. An unreported judgment dated 11.12.2017 passed by a Single Bench of this Court in Criminal Appeal No.151/2015.

By referring to the above judgments, Mr. Muhammad Ashraf Kazi, Advocate submitted that this court has ample powers to convert/modify the punishment to the accused. Unfortunately, after perusal of these judgments it transpires that none of the three case laws referred by Mr. Muhammad Ashraf Kazi, Advocate are of any assistance to the appellants in the given facts of these appeals. The appellants namely Ahmed Nawaz and Minhajuddin have not undergone any period of imprisonment for seeking modification of sentences on the basis of these case laws. In the case reported in **1992 SCMR 1411** the Hon'ble Supreme Court has held as under:-

Nevertheless in view of the statement made by the complainant that he has compromised the matter and had received the entire amount from the convict, we convert this petition into appeal and **reduce the sentence imposed upon the petitioner to that already undergone by him** and also reduce the amount of fine from 10,000 to Rs.200. The appeal in terms indicated above is disposed of.

In the case reported in **2020 P Cr. L J 1465** again it was held as under:-

Accordingly, conviction is maintained **but sentence is reduced to already undergone by the appellant** including payment of fine. Appellant shall be released forthwith if not required in any other custody case.

In third unreported judgment dated **11.12.2017** passed in Criminal Appeal No.151/2015, a single bench of this Court has held that appeal against conviction is dismissed as not pressed and sentence awarded to the appellant is altered into imprisonment which appellant had already undergone.

5. In the case in hand the appellants namely Minhajuddin and Ahmed Nawaz were shown absconders in the interim challan and at the time of final challan they had obtained bail before arrest. Only appellant Syed Javed Raza was in jail who was granted bail by this Court on **27.3.1996**. The ratio of the case law relied upon by learned counsel is that the accused who had been in jail for certain period before or after the trial their term of imprisonment was reduced to the period they had been in jail. Therefore, at least in the cases of appellants Ahmed Nawaz and Minhajuddin the cited cases have no relevance. Nor they are on the proposition mentioned in the order in para-2 above.

6. Be that as it may, since the appellants are not pressing their appeals on merits and seeking modification of sentence and the assistance of their counsel in the given facts of the case is almost zero as may be appreciated from the facts narrated in preceding paragraphs, I have to examine myself the legality of such plea in the light of facts and law involved in the case in hand. The genesis of the prosecution against the appellants is violation of **Section 32** of the Customs Act, 1969 and the punishment for such offence is provided under **Section 156(1)** read with **clauses (77), (81) and (82)** of the Customs Act, 1969. Two of the appellants being officers of Customs were found guilty of willful breach of Customs Act, 1969 for the prevention of smuggling, practices, or attempts to practice, any fraud for the purpose of injuring the customs revenue, or abets or connives at any such fraud, or any attempt to practice any such fraud (**Clause 81 and 82 of Section 156(1)** of the Customs Act, 1969). The injury to the Customs Revenue as alleged in the FIR was established before the trial Court and the appellants do not want to contest the findings on merit. This is an admitted position that despite conviction the Customs authorities have not taken any disciplinary action against the appellants and each of the

two officers/ appellants have completed their term of service till the age of superannuation during 25 years of trial from **19.2.1996**, the date of registering of the FIR. The Customs authorities irrespective of the fact that a huge amount of **Rs.56,00,000/-** was said to have been lost by the Government did not even preferred an appeal against the lesser punishment awarded by the trial Court not only to the Customs officers but even to the Customs clearing agent who were the main culprits for placing the forged and fabricated documents for evasion of custom duty (**Section 32 of Customs Act**). Therefore, it can be safely presumed that the prosecutors namely Customs authorities have by conduct compounded the offences with the appellants without claiming amount of duty and taxes in terms of **Section 32B** of the Customs Act, 1969. The convicts were peacefully allowed to serve the complainant department for a period of at least more than 20 years from the date of registration of the FIR and for several years after conviction. They are also enjoying pensionary benefits. This conduct of prosecution shows that the appellants and prosecution both have connived with each other and made no efforts to recover loss of revenue caused by the appellants and after lapse of 25 years by sending them to jail for a period of only 11 months, the injury caused by them to custom revenue would remain uncured.

7. According to **Section 185(F)** of the Customs Act, 1969 while hearing appeals, this Special Appellate Court has all the powers of a High Court under the Criminal Procedure Code, 1898, therefore, in exercise of powers under **Section 423(d)** of the Cr.P.C I find it appropriate to convert the sentence of imprisonment from 11 months to only fine amounting to **Rs.500,000/-** in lieu of imprisonment to each of the appellants. In support of my findings, reliance is placed on judgment of Hon'ble Supreme Court in the case of Muhammad Munshi

vs. the State (**1976 SCMR 354**) wherein a short sentence of imprisonment was converted into a fine on the ground that the appellant had remained on bail for five years. Relevant portion of the judgment is reproduced below:-

In the state of evidence re-capitulated above, we find ourselves in agreement with the learned Judge in the High Court that the appellant had filed a false affidavit in support of the application under Order XXXIX, rule I and 2, C.P.C. and thereby committed contempt of Court. No **exception can, in the circumstances, be taken to the sentence of imprisonment awarded to the appellant under Article 123 of the 1962 Constitution but as the appellant was allowed bail as far back as 12.8.1971, it appears too late to send him back to prison in 1976.** Accordingly in lieu of imprisonment we sentence him to pay a fine of Rs.1000 for committing contempt of the High Court to default he will undergo the term of one month's imprisonment imposed on him by the High Court.

8. Another ground for converting the sentence of imprisonment to fine in the present case is that the punishment provided in column 2 of the table given in **Section 156(1)** of the Customs Act, 1969 for offence under **clause 77, 81 and 82 of Section 156** of the Customs Act, 1969. The punishment is **imprisonment not exceeding three years, or to fine or to both**. A bare reading of the punishment prescribed under the law shows that law makers have given wide discretion to the court to award punishment to the accused guilty of causing injury to the customs revenue as deem fit in the given facts of each case. In Customs Act the offences are invariably relating to the evasion of custom duties or taxes and therefore, the legislatures have not controlled the sentence of “**fine**” to be imposed by the court. It would be in the nature of compensation to the revenue loss. The emphasis is not on putting the culprits in jail. The punishment to sentence the accused to undergo imprisonment is minimized by imposing mandatory check on the powers of court by use of the phrase “**should not exceed three years**”. But there is no mention of the minimum or the maximum amount of fine to be imposed, if any. If we read this sentencing policy with **Section**

32B of the Customs Act, 1969 reproduced in para-4 above it would further clarify the intention of law maker is to ensure recovery of tax and duty. But for this reason it is optional for the court to send the accused to jail and or convict him only by imposing any amount of fine. The repeated use of word “or” in the penalties, to which the accused could be liable, empowers the court to convict the accused by imposing only fine and it could still be enough conviction without sending him to jail. Therefore, by sending appellant to jail for 11 months would not be even partial recovery of the revenue and therefore, in consideration of 25 years of prosecution during which period the appellants were on bail and also on the ground that the appellants have no criminal record, I am convinced to convert their punishment of sentence of imprisonment into fine. In modifying the sentence of imprisonment to fine, the injury caused to the Government revenue could be compensated to some extent.

9. In view of the above facts and law, the appeals are dismissed and the conviction is maintained. However, the appellants are directed to pay an amount of **Rs.500,000/-** each as fine in lieu of sentence of 11 months imprisonment. This fine is in addition to the fine imposed by the trial court and already paid by them. The fine in lieu of imprisonment has to be deposited by the appellants within a period of **one week** in the office of Nazir of this Court. It is clarified that in case of default in payment of additional fine of Rs.500,000/- each within one week, warrants of arrest of the appellants will be issued immediately on **09.11.2020** and they shall be sent to jail to serve 11 months imprisonment awarded by the trial Court.

JUDGE

Karachi, dated
Nov. 3rd 2020.
Ayaz Gul