

THE HIGH COURT OF SINDH, KARACHI
SPECIAL APPELLATE COURT
[PREVENTION OF SMUGGLING ACT, 1977]

Spl. Criminal Appeal No. 06 of 2004
Spl. Criminal Appeal No. 08 of 2004
Spl. Criminal Appeal No. 09 of 2004

- Spl. Cr. Appeal 06/2004 : Tariq Irshad son of Irshad Ellahi
versus The State.
- Spl. Cr. Appeal 08/2004 : Zaki Pasha son of Late Amir Ali
versus Anti-Narcotic Force and
another.
- Spl. Cr. Appeal 09/2004 : The State - Anti-Narcotic Force
versus Pervez Ameer Ali and
another.
- For the Appellants : Mr. Ahmed Ali Hussain,
Advocate alongwith Ms. Wahiba
Junejo, Advocate.
[In Spl. Cr. Appeal No. 6/2004]
- Mr. Aamir Mansoob Qureshi,
Advocate, alongwith M/s. Mamoon
A.K. Sherwani and Iftikhar Ahmed
Shah, Advocates.
[In Spl. Cr. Appeal No. 8/2004]
- Mr. Ashfaqe Ahmed Buriro, Spl.
Prosecutor ANF.
[In Spl. Cr. Appeal No. 9/2004]
- For the Respondents : M/s. Gulfaraz Khattak and Alizeh
Bashir, Assistant Attorney Generals
for Pakistan. [In All the Appeals]
- M/s. Aamir Mansoob Qureshi,
Ahmed Ali Hussain, Mamoon A.K.
Sherwani and Iftikhar Ahmed Shah,
Advocates.
[In Spl. Cr. Appeal No. 9/2004]
- Mr. Ashfaqe Ahmed Buriro, Spl.
Prosecutor ANF.
[In Spl. Cr. Appeal Nos. 6 & 8/2004]
- Dates of hearing : 03-05-2023, 18-05-2023, & Re-hearing
on 30-05-2024 & 10-07-2024.
- Date of decision : 30-07-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - These appeals under section 43 of the Prevention of Smuggling Act, 1977 [PSA] are from an order dated 02.06.2004 passed by the Special Judge (Anti-Smuggling), Karachi in Case No. 01/1999, which emanated from information laid before it by the Anti-Narcotics Force [ANF] on 03-02-1999 under section 31 PSA, alleging that certain properties held by Tariq Irshad, Zaki Pasha and his brother Pervaiz Amir Ali, were acquired by way of smuggling narcotics and are liable to be forfeited under section 32(3) of the PSA. By the order impugned, the Special Judge ordered forfeiture of only one of the properties viz. Bungalow No. 159-A, Block 3, PECHS, Karachi [subject plot], held jointly by Tariq Irshad and Zaki Pasha, who thus filed Criminal Appeal No. 06/2004 and Criminal Appeal No. 08/2004 respectively. Forfeiture of the other properties was declined by the Special Judge after holding that the prosecution failed to establish the allegation, thus Criminal Appeal No. 09/2004 by the ANF.

2. In the first round, the appeals by Tariq Irshad and Zaki Pasha were allowed and the appeal by the ANF was dismissed by a common judgment dated 29-08-2005, which held that since the notice under section 31 PSA was not issued in accordance with law therefore the entire proceedings were unlawful and were quashed. However, that judgment was set-aside by a Division Bench of the High Court by a remand order dated 29-10-2020 passed in C.P. No.D-1739/2005 with a direction to this Court to decide the appeals afresh after discussing the merits of the case as well.

3. Mr. Amir Mansoob Qureshi, learned counsel for the Appellant Zaki Pasha, and Mr. Ahmed Ali Hussain, learned counsel for the Appellant Tariq Irshad both submitted at the outset that this Court has already held in *The State/Anti Narcotic Force v. Agha Mehmood Ul Hassan Haravi* (2024 PCrLJ 713) that after the enactment of the Control of Narcotic Substances Act 1997, proceedings for forfeiting an asset

allegedly acquired by proceeds of smuggling narcotics can only be taken under the CNSA, and proceedings taken in that regard under section 31 PSA are without jurisdiction.

4. In support of the merits of Criminal Appeal No. 08/2004, Mr. Amir Mansoob Qureshi Advocate submitted that the entire case against Zaki Pasha was set-up on a prior conviction in Canada in the year 1980; that firstly, the prosecution had only produced a photocopy of that decision which was inadmissible evidence; and secondly, that photocopy itself recited that the conviction was on the count of trafficking narcotics 'within' Canada, and not for 'smuggling' narcotics into Canada, which was a pre-condition for attracting the provisions of sections 30 to 32 PSA.

In support of the merits of Criminal Appeal No. 06/2004, Mr. Ahmed Ali Hussain Advocate submitted that though Tariq Irshad was implicated as an 'associate' of Zaki Pasha, there was no evidence whatsoever to show that the subject plot was purchased from proceeds of smuggling; and that Tariq Irshad had led evidence to explain how he came to purchase part of subject plot.

Mr. Ashfaq Ahmed Buriro, Special Prosecutor ANF opposed the above appeals and supported the impugned order to the extent of forfeiture of the subject plot. As the appellant in Criminal Appeal No. 09/2004, he submitted that the Special Judge failed to appreciate the material placed before him with regards to the other properties which too had been acquired by way of smuggling narcotics.

5. Heard learned counsel and perused the record.

6. Regards Criminal Appeal No. 09/2004 by the ANF, that no longer requires a deliberation on the merits. The law as it presently stands is that against an order dismissing information placed under section 31 PSA, the ANF is not a 'person aggrieved' within the meaning of section 43 PSA, and therefore it cannot maintain an appeal thereunder. That has been so held by Supreme Court of

Pakistan by judgment dated 23-11-2023 in Civil Appeal No. 277/2014, *The State through ANF v. Obaid Khan*, and then by a learned Division Bench of the Sindh High Court by a common judgment in C.P. No. D-5490/2023, *Ayesha Zafar v. Federation of Pakistan* and C.P. No. D-5822/2023, *The State (ANF) v. Agha Mehmoodul Hassan Haravi*. Therefore, Criminal Appeal No. 09/2004 is not maintainable.

7. On the merits of Criminal Appeals No. 06 and 08 of 2004 the only question is whether there was sufficient evidence before the Special Judge to conclude that the subject plot, said to have been purchased by Tariq Irshad and Zaki Pasha under a Power of Attorney in 1997, was from proceeds of smuggling narcotics ?

8. Tariq Irshad was not the principal accused but was implicated as an 'associate' of Zaki Pasha within the meaning of section 2(a) PSA. That he was such an associate was inferred from the fact that he was co-owner of the subject plot along with Zaki Pasha. There was otherwise no investigation into his wealth and source of income.

9. The informant and I.O. of the case, namely Qadir Iftikhar of the ANF, was not examined by the prosecution. It was stated that he had been dismissed from service in the year 2000 and had moved abroad. The prosecution therefore examined Manzoor Ali Rana, the Assistant Director ANF. Though he stated that the erstwhile I.O. had gathered the tax and wealth record of Zaki Pasha, but none was produced in evidence. In fact, the entire testimony of Manzoor Ali Rana was based on what he had allegedly learnt from the I.O. at the time and thus heresy. On cross-examination he admitted that:

"There is no document in my knowledge showing the details of the wealth or assets of Zaki Pasha and the amount of wealth and income tax he was paying."

I did not carry out any investigation regarding the property Zaki Pasha had shown to have inherited from his father. Inspector Qadir Iftikhar had carried out the investigation. I did not verify from the Bank regarding the liability of Zaki Pasha for raising money to purchase the property."

To my information there is no conviction of Zaki Pasha in Pakistani Court of law."

Admittedly, at the relevant time, Zaki Pasha was engaged in the business of car-dealing as 'Zaki Motors'.

10. To hold that the subject plot was the fruit of smuggling narcotics, the only evidence cited by the Special Judge was a photocopy of short order dated 28-11-1980 by a Sessions Court of Ontario, Canada against Zaki Pasha (and his brother Pervaiz), and the order in appeal dated 05-08-1981 by the Supreme Court of Ontario, Canada. Even assuming those photocopies to be admissible evidence, those reflected that while Zaki Pasha was charged with offences under the Narcotic Control Act of Canada, he was convicted and sentenced only on the charge of trafficking narcotics within the Municipality of Metropolitan Toronto, but acquitted of the charge of importing (or smuggling) narcotics into Canada. In any case, there was no evidence before the Special Judge to even suggest that Zaki Pasha was involved in the smuggling of narcotics in the period of 17 years from his conviction in Canada in 1980 to the time he purchased the subject plot in 1997. Except for drawing an inference from the above mentioned conviction, the information placed before the Special Judge did not reveal any effort made to tie the subject plot to proceeds of narcotic smuggling. In other words, the ANF had never discharged the initial burden under section 31 PSA to demonstrate that the subject plot could be 'reasonably suspected to be acquired by smuggling'.

11. Having complied with the remand order of the Division Bench to discuss the merits of the case as well, I now turn to the question whether sections 30 and 31 of the PSA were even applicable in the given circumstances after the enactment of the Control of Narcotic Substances Act 1997 [CNSA].

12. Relying on the case of *Hussain Abdullah Salum v. The State* (PLD 2001 Karachi 283) decided by a Full Bench of the Sindh High Court, and the case of *The State v. Nasim Amin Butt* (2001 SCMR 1083) decided by the Supreme Court, it was held by this Court in *The State/Anti Narcotic Force v. Agha Mehmood Ul Hassan Haravi* (2024 PCrLJ 713) that:

“19. While section 30 of the PSA prohibits the holding of property acquired from proceeds of smuggling and makes it liable to forfeiture, again, it does not classify that as an offence. On the other hand, as discussed above, after the enactment of the CNSA, sections 12 and 13 stipulate that it is an offence to knowingly possess, acquire or use any assets derived or obtained by means of smuggling prohibited narcotics, and that such assets are liable to forfeiture. Said offence is triable exclusively by the Special Court appointed under the CNSA. As per sections 19 and 39 of the CNSA, the order for forfeiting assets of the offender and persons holding assets on his behalf is also to be passed by the Special Court. Ultimately, as per section 76 of the CNSA, it has overriding effect. Therefore, after the enactment of the CNSA, where the allegation is that an asset held by a person is the fruit of smuggling narcotics and liable to forfeiture, proceedings can only be taken under the CNSA and sections 30 and 31 of the PSA have no application nor does the Special Judge appointed under the PSA have any jurisdiction. In other words, sections 30 and 31 of the PSA can only be invoked where smuggling is alleged of goods other than narcotics.”

The finding above was upheld by a learned Division Bench of the Sindh High Court by a common judgment in C.P. No. D-5490/2023, *Ayesha Zafar v. Federation of Pakistan* and C.P. No. D-5822/2023, *The State (ANF) v. Agha Mehmoodul Hassan Haravi*.

13. In the facts of the present appeals as well, the PSA was invoked for forfeiting assets allegedly acquired by way of smuggling narcotics, and the information laid by the ANF before the Special Judge under section 31 PSA was on 03-02-1999 i.e. after the enactment of the CNSA. Therefore, as held in the case of *Agha Mehmoodul Hassan Haravi*, sections 30 and 31 PSA had no application in the given circumstances, nor did the Special Judge under the PSA have any jurisdiction. The entire proceedings before the Special Judge were therefore *coram non iudice*.

14. In view of the foregoing, Criminal Appeal No. 06/2004 and Criminal Appeal No. 08/2004 are allowed and the order dated 02.06.2004 passed by the Special Judge (Anti-Smuggling), Karachi in Case No. 01/1999 is set-aside; whereas Criminal Appeal No. 09/2004 is dismissed.

JUDGE

Karachi
Dated: 30-07-2024