

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.23/P OF 2004 (LINKED WITH)
CRIMINAL APPEAL NO.24/P of 2004

1. Ashraf Gul son of Muhammad Gul,
2. Abdul Aziz son of Abdul Wahid
both residents of Dargai, Harichand
Banglow Lndi Shah

--- Appellants respectively

Versus

The State

--- Respondent

For the Appellants

--- Ms Saeedullah Khan and Abdul
Fayyaz, Advocates respectively

For the State

--- Mr. Azi-ur-Rehman, Advocate

FIR No, date and
Police Station

--- 246, 20.7.2002 P.S. Mandani

Date of the Order of the
Trial Court

--- 8.7.2003

Date of Institution

--- 1.6.2004 and 1.6.2004
respectively

Date of Hearing

--- 8.11.2006

Date of Decision

--- 18-1-2007

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JUDGMENT.

HAZIQUL KHAIRI, CHIEF JUSTICE:- These two appeals

bearing Nos. Criminal Appeal No.23/P of 2004 and Criminal Appeal No.24/P of 2004 filed by appellants Ashraf Gul and Abdul Aziz respectively were directed against the Judgment dated 8.7.2003 of Additional Sessions Judge-I, Charsadda whereby they were convicted under Article 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979 read with section 9 (c) Control of Narcotics Substances Act, 1997 and sentenced to imprisonment for life along with a fine of Rs.100,000/- (One Lac) each or in default in payment of fine to further suffer six months S.I. by each of them. By this common judgment we propose to dispose of both these appeals.

2. Facts briefly stated in the impugned judgment are that on 20.7.2002 at 2.15 p.m., Muhammad Siddiq Khan, Inspector CIA got registered an FIR at P.S. Mandani that he received information that at any time during the day, narcotics will be smuggled from Prang Ghar to Dargi by road. Accordingly he took along with him Fazal Muhammad Khan SHO, Mandani and C.I.A. staff to the said road and

encircled it. They found a car No.5928-Peshawar coming from Prang

Ghar, which was signalled to stop by them but it did not, instead the

driver accelerated the car, which compelled the police party to fire at

the tyre of the car whereupon it stopped. On search three bags of

charas weighing 90 Kilograms were recovered from the degi from

which 4/4 grams of parcels were made out and sealed. Appellants

Abdul Aziz, driver and Ashraf Gul who were in the car were arrested

whereas other accused persons namely Kaki, Muhammad Jan, Saleem

Anwar and Faraz absconded, and were declared proclaimed offenders.

After completion of the investigation the appellants were challaned to

face the trial in the Court of Additional Sessions Judge-I, Charsadda.

3. The appellants pleaded not guilty and claimed trial. In support

of its case, the prosecution examined five PWs. whereas the appellants

adduced their own evidence under section 340, Cr.P.C. but did not

produce any other defence witness.

4. PW.1 Muhammad Sadiq Khan, Inspector, C.I.A. Charsadda

reiterated what he had stated in F.I.R. He arrested the appellants,

drafted murasila, made recovery memo, site plan, application for

examination of charas to FSL and received its report. He recorded the

statements of PWs., obtained warrants under section 204 Cr.P.C.

against absconding accused, obtained proclamation notices and

submitted chalan against the accused persons on 10.9.2002. PW.2

Abdul Rehman, A.S.I. Police station Khan Mahi supported the version

of PW.1' in all material aspect. PW.3 Sardar Alam No.704, C.I.A.

Charsadda stated that he was entrusted with warrants issued against

the absconding accused and returned them unserved. He was also

entrusted proclamation notice, a copy of which he had pasted on

Notice Board. PW.4 Atta-ur-Rehman (Retd) A.S.I., resident of

Nazimpur, Noushera deposed that he prepared the recovery memo and

the case property was also brought by him to Police Station. PW.5

Abdul Rashid, LHC., brought murasila to Police Station.

5. Appellant Ashraf Gul deposed that he is a resident of Harichand and had gone to Plai to meet his relatives. After meeting them while he was coming back and reached near Shakoor village he saw a car heading towards him. He signalled the car for a lift and got it. After a while he heard of firing and saw people running. On seeing them the

car in which he was sitting stopped and the police party rushed toward it and asked the appellants to take some thing wrapped in plastic bag to Police Station in the car. They did so but when they reached the Police Station they were locked.

6. Appellant Abdul Aziz, a taxi driver, stated on oath that on the day of occurrence he had taken some passengers to Dargai to Spankari Beecha Sahib to Hujra of Gul Sahib and while he was coming back after dropping them, appellant Ashraf asked for a lift. After crossing a distance of a furlong they heard fire shots and were asked by police party to stop. They told them that there was encounter between them and some vagabonds who had left behind some bags. They requested them to take the bags in the car to the Police Station.

7. The contention of learned counsel for the appellants Mr. Saeedullah Khan and Mr. Abdul Fayyaz is two fold. Firstly the CIA personnel who had lodged the F.I.R. and carried out investigation of the case were not authorised persons to do so under law and secondly the narcotics being charas in possession of the appellants its punishment cannot be awarded to life sentence.

8. It was pointed out by them that PW.1 Muhammad Sadiq Khan is an inspector of C.I.A., Charsadda and PW.3 Sardar Alam is also an official of C.I.A. These officials of CIA were not authorised under law neither to lodge any complaint nor to take any step in the investigation proceedings in view of express provisions contained in Section 156(1), Cr.P.C. which would render the entire proceedings *void, ab initio*. It would be advantageous here to reproduce Section 156, Cr.P.C. as under:

156. *Investigation into cognizable cases.*—(1) Any officer-in-charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

(4)

9. Learned counsel for the State Mr. Aziz-ur-Rehman conceded

the position that none of the CIA staff was authorised to investigate into this matter, however, such an irregularity will not render the entire proceedings void unless it is shown that it has highly prejudiced an accused person to the extent that it renders the interest of justice a mockery. In support he placed reliance on the case of **State vs Bashir & others reported in PLD 1997 SC 408**, in which the Hon'ble Supreme Court of Pakistan had held:

“Adverting to the above first submission of Mr.M.M.Aqil that since Shamim Ahmed was the complainant in the case as well as the Investigation Officer, the trial vitiated, it may be observed that in support of his submission he has referred to the case of Aksar Khan v. The State (1995 MLD 1237) in which a learned Single Judge of the Peshawar High Court, while dealing with an appeal of a convict under section 13 of the Explosive Substances Act 1908, inter alia held that a Police Inspector could not legally assume dual function as a complainant and also as an Inspector as it had rendered the trial a sheer mockery. We are unable to subscribe to the above broad legal proposition. There is no legal prohibition for a police officer to be a complainant if he is a witness to the commission of an offence and also to be an Investigating Officer so long as it

does not, in any way, prejudice the accused person. The Court will have to appraise the evidence produced by the prosecution as a whole and will have to form the opinion after evaluating the same. In the case in hand, since Shamim Ahmed was heading the C.I.A. party involved and arrested the accused persons and made recoveries of the arms and ammunition, he could have sent the complaint to the Police Station New Fojdari, Shikarpur. The question, as to whether he could investigate as a C.I.A. Officer, is a different issue, had he been covered by the definition of the Station House Officer employed in Section 156(1) of the Cr.P.C. or had he been authorised by the competent authority, there would not have been any legal infirmity because of the factum that he investigated the case"

10. Having said so the Supreme Court observed that 'violation of Section 156(1), Cr.P.C. by committing illegality/irregularity by C.I.A. personnel may not vitiate trial if no serious prejudice has been caused to the accused person resulting in miscarriage of justice in view of Section 156(2), Cr.P.C. but that does not mean that C.I.A. personnel should knowingly violate the provisions of Cr.P.C.

11. Next Mr. Aziz-ur-Rehman referred to the case of *Muhammad Afzal vs State 1997 P.Cr.L.J. 1775* in which C.I.A. personnel got

registered F.I.R. and conducted the proceedings under section 156,

Cr.P.C., it was held that apparently no prejudice has been caused to the appellant by conducting investigation by the C.I.A. and that "official irrespective of the fact whether they belong to the police force or any other Agency are as respectable as civilian citizens; therefore, whatever evidence is given by them subject to scrutiny under the recognised principles of law, is bound to receive same credence which is ordinarily given to civilian witnesses".

12. The present case is in way different rather in this case appellant Ashraf Gul has admitted in his cross-examination that police has no enmity towards them. Learned counsel for the appellant was unable to pinpoint what prejudice has been caused to the appellants by the investigation carried out by CIA personnel. So far as registration of FIR is concerned it can be lodged by any one if it relates to a cognizable offence. We are therefore, of the view that although C.I.A. personnel were not duly authorised by the competent authority under subsection (1) of section 156 of Cr.P.C. but this irregularity

may be regularised under section (2) thereof by necessary implications and as such the proceedings do not stand vitiated.

13. The other objection raised by the learned counsel for the appellant was that possession of Charas does not warrant very harsh punishment of sentence to life to the appellants. He placed reliance on the case of Faizullah vs The state 1983 SCMR 640 in which the petitioner was found in possession of 1700 grams of Charas and was sentenced under section 4 of the Prohibition (Enforcement of Hadd) Order, 1979 to two years R.I. which was reduced by the learned Judges of the Hon'ble Supreme Court to one year R.I. while increasing fine from Rs.1000/- to Rs.5000/- This order was passed on a petition for leave to appeal. The present case of the appellants is very different and distinguishable on facts as well as on law than the case reported in 1983 SCMR 640 in as much as in the present case the appellants were in possession of 90 kilograms of charas and were convicted for sentence to imprisonment for life under proviso to section 9 of the Control of Narcotics Substances Act, 1997 which envisages that if the quantum exceeds ten kilograms the punishment

shall not be less than imprisonment for life. Thus this objection is also

not tenable. It was next stated by the learned counsel that the trial

Court did not consider the deposition of the appellants. This is not so.

The learned trial Court while holding that the testimony of

prosecution witnesses has not been shattered has discussed their

defence plea supported by their deposition under section 340 Cr.P.C.

It may be added here that appellant Ashraf Gul could have produced

any of his relatives from the village Plai where he had gone to meet

them but he did not do so. Similarly appellant Abdul Aziz could have

produced any of the passengers whom he had taken to Hujra of Gul

Sahib but he has not done so. However, it is admitted by both the

appellants that the car in which they were travelling was seized/taken

over by the police and the said contraband was brought in it to the

Police Station. The laboratory report about the contraband is also

positive. What is pertinent to note is that the appellants have not set up

the plea of enmity with police officials rather in cross-examination

they have conceded that police has no enmity with them. Lastly it was

urged by the learned counsel for the appellants that no witness from

the public was produced by the prosecution as required under section

103 of Cr.P.C. which, renders its evidence highly incredible. This

position is repelled by the fact that there was no human habitation

near the road from where the contraband was seized.

14. Accordingly, we find no substance in the appeals which are

hereby dismissed.

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JUSTICE HAZIQUL KHAIRI

Chief Justice

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DR.FIDA MUHAMAMD KHAN

Judge

Islamabad, the

18th January 2007

Bashir/*

Approved for reporting.

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CHIEF JUSTICE