

(19)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE

CRIMINAL APPEAL NO.28/P OF 1995 (Linked with)
CRIMINAL APPEAL NO.30/P OF 1995

1. Sahib Gul son of Zarif, r/o Khazana		
2. Muhammad Shah son of Roghan Shah, r/o Dosara	...	Appellants respectively
3. Sarmast Khan son of Lal Baz, r/o Dagai and		
4. Rafiullah son of Nasrullah, r/o Jamroud Khyber Agency, Mardan		
The State	Versus	Respondent
For the appellants	...	M/s Muhammad Ismail Fehmi and Abdul Sattar Khan, Advocates respectively
For the State	...	Mr. Fateh Muhammad Khan Advocate.
F.I.R. No., date and Police Station	...	633, 18.6.1991 P.S. 'B' Division, Mardan
Date of the Order of the Trial Court	20.4.1995
Date of Institution	...	8.5.1995 and 21.5.1995 respectively
Date of hearing	...	17.8.1995
Date of decision	...	17.8.1995

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Judgment:

Nazir Ahmad Bhatti, Chief Justice.— Muhammad Sharif Khan,

S.H.O., Police Station, 'B' Division, Mardan was on patrol duty in the area alongwith some other police officials on 18.6.1991 when he received spy information that accused Sahib Gul, Muhammad Shah and Rafiullah, residents of Jamroud Khyber Agency, Mardan, who were international smugglers of heroin, will smuggle heroin some time on the said date in suzuki pick up No.PRM 1557 and will bring the same to a tea hotel, situate in Mall Mandi, Mardan and owned by accused Sarmast Khan. The S.H.O. laid a picket and at 1220 hours the said vehicle reached the said hotel in a hurry. The vehicle was overpowered by the police party. Search of the hotel was also carried out and heroin weighing 3 kilograms contained in 3 cloth bags was recovered from under a quilt lying on a cot in the store room of the hotel. The S.H.O. separated one gram of heroin powder from each packet as sample and prepared 3 sample parcels. He also took into possession the remaining bulk powder. The vehicle was registered in the name of accused Rafiullah. The S.H.O. arrested the aforesaid 3 accused and accused Sarmast Khan, owner of the hotel and also sent written complaint to the Police Station where F.I.R. No.633 was recorded on the same date at 1300 hours. On 26.6.1991 accused Rafiullah,

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Muhammad Shah and Sarmast Khan made confessional statements which were recorded by P.W.1 Mr.Jehangir Khan, EAC-II, Mardan.

2. After investigation all the 4 accused were sent up for trial before Additional Sessions Judge, Mardan, who charged all the 4 accused under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979 to which all the accused pleaded not guilty and claimed trial.

3. During the trial the State produced 4 witnesses in proof of the prosecution case whereas all the 4 accused made depositions under section 342 Cr.P.C. Accused Rafiullah and Sarmast Khan also made depositions on oath. But none of the accused produced any defence evidence. Complainant Muhammad Sharif Khan, S.H.O. was also re-examined as C.W.1.

4. After the conclusion of the trial the learned Additional Sessions Judge convicted all the 4 accused under Articles 3 and 4 of the Prohibition Order and for each of the offences sentenced each of the accused respectively to undergo rigorous imprisonment for 7 years, to suffer 10 stripes and to pay a fine of Rs.5,000/- or in default to further undergo rigorous imprisonment for 6 months each. Convict Sahib Gul, Muhammad Shah and Sarmast Khan have challenged

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their conviction and sentences by criminal appeal No.28/P of 1995 in hand whereas convict Rafiullah has challenged his conviction and sentence by criminal appeal No.30/P of 1995. Since both the appeals have arisen from the same judgment, they are being disposed of by one judgment being written in criminal appeal No.28/P of 1995 in hand.

5. I have heard learned counsel for the parties at length who have also led me through the entire record of the case.

7c 6. P.W.1 Jehangir Khan, M.I.C. deposed about recording the confessional statements of appellants Muhammad Shah, Sarmast Khan and Rafiullah on 26.6.1991. P.W.2 complainant Muhammad Sahrif Khan, S.H.O. corroborated the contents of the F.I.R. which were recorded on the written complaint sent by him to the Police Station. He deposed that he had himself carried out search of the room of the hotel and he recovered 3 cloth bags each containing one kilogram heroin. He further stated that he separated one gram each from the 3 packets and made 3 sample parcels for chemical analysis. He also produced in evidence before the court another parcel containing 20 grams of heroin which according to him was kept from the bulk while the remaining bulk heroin powder was destroyed. P.W.3 A.S.I.

Aurengzeb Khan recorded F.I.R. on the basis of the complainant.

P.W.4 A.S.I. Muhammad Khan was witness of the recovery memos prepared by the complainant after the recovery of 3 packets of heroin from the godown of the hotel.

7. In rebuttal all the 4 appellants in their depositions under section 342 Cr.P.C. denied the recovery of any heroin from their possession. Appellant Rafiullah stated on oath that he was innocent and had been falsely charged. Similarly, appellant Sarmast Khan deposed on oath that he was also innocent and had been falsely charged. He admitted his ownership of the hotel. He further stated that although heroin had been recovered from inside his hotel but it did not belong to him and he did not know as who had brought it and kept there. In their confessional statements both appellants Muhammad Shah and Rafiullah disclosed that they had travelled in the said vehicle upto Mardan but they were apprehended by the police when they were making purchases of vegetables in the Mardan market. Appellant Sarmast Khan deposed in his confessional statement that on the said date he was running a hotel in Mall Mandi, Mardan and on 18.6.1991 packets of heroin were recovered from inside of his hotel but he did not know as who was the owner thereof.

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7. The circumstances which came to light during the trial would show that the police had allegedly recovered 3 packets of heroin each containing one kilogram from under a quilt lying on a cot ~~from~~ inside a room of the hotel, that no person, either any customer or the owner of the hotel, was present in that room at the time of alleged recovery, that no narcotic of any kind was recovered from the vehicle or from the possession of the 3 appellants who travelled therein or from appellant Sarmast Khan, owner of the hotel, that there was also brought ~~no evidence~~ on the record that the said heroin had actually been transported, that the search of the premises had been carried out but the I.O. had neither obtained any search warrant nor had associated two respectable persons of the locality with the search proceedings.

8. It shall also be seen that none of the appellants had admitted or denied about the ownership of the heroin allegedly recovered from the hotel. The confessional statements of the two appellants, who had travelled by the said vehicle, are clearly exculpatory and no one confessed that heroin was either being transported in that vehicle or that of any of them was found in possession thereof. Appellant Sarmast Khan confessed that heroin was found from inside a room of his hotel but he denied



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any knowledge about its being kept there or whether he owned it. It is also interesting to note that only 3 grams of heroin was taken as sample, allegedly one gram from each packet, while there were one thousand grams in each packet. Also it is interesting to note that the remaining bulk powder was destroyed by the complainant but without any order from any court and only 20 grams were produced in the court at the time of trial as the remaining case property. This will show that in all only 23 grams of heroin powder was involved in the whole affair. Sending only one gram of heroin powder as a sample for chemical analysis is a very easy exercise. It involves the procurement of actually only 3 grams of heroin powder in all and later on it was also not very difficult to procure another 20 grams for production before the court as a case property. The whole affair appears to be very suspicious and doubtful. After taking into consideration all the aforesaid circumstances I have come to the conclusion that no heroin powder was recovered from any of the appellants or from the vehicle or from the hotel and this all was a fictitious exercise of the complainant.

9. It transpires that a news had appeared in the newspapers that some smugglers of vehicles had been arrested by the police and to prove that point the court had called the complainant

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again as C.W.1 where this question was asked from the complainant and he contradicted it. Even otherwise no evidence was brought on the record that the heroin was being transported in the aforesaid vehicle when it was allegedly apprehended by the complainant. Also there was no evidence available on the record that any of the appellants was found in possession of any heroin powder. Moreover by not complying with the provisions of section 103 Cr.P.C. and by not obtaining search warrant to carry out search of the premises of the hotel and also without associating two persons of the locality with search proceedings, the I.O. had committed a grave illegality. He flagrantly violated the provisions of section 103 Cr.P.C. and also carried out illegal search of the premises without obtaining a search warrant. It shall thus be seen that the whole affair was not only fictitious but also illegalities of grave nature were committed during the said proceedings.

10. The net result of the above discussion is that the State had failed to prove any of the offences for which the appellants were charged and tried. Consequently both the appeals are accepted. The conviction and sentences of appellants

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Sahib Khan son of Zarif Khan, Muhammad Shah son of Roghan Shah,

Sarmast Khan son of Lal Baz and Rafiullah son of Nasrullah are

set aside. They are acquitted of the offences for which they

were convicted and sentenced by the learned Additional Sessions

Judge on 20.4.1995. They shall be set at liberty forthwith if

not wanted in any other case.

[Signature]

CHIEF JUSTICE

FIT FOR REPORTING

[Signature]

CHIEF JUSTICE

Peshawar,
17th August, 1995.
Bashir/*