

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.140/I OF 1994.

Ahmad Nawaz son of Qadir ... Appellant
Khan, resident of Manri,
Tehsil and District Haripur.

Versus

The State ... Respondent

For the appellant ... Mr.Saeed Akhtar Khan,
Advocate

For the State ... Syed Amjad Ali,
Advocate

No.& Date of F.I.R ... No.118,dt.3.2.1993
Police Station P.S Haripur

Date of order of ... 28.5.1994
the trial court

Date of Institution ... 2.6.1994.

Date of hearing ... 26.10.1994.
and decision

24
(22)

JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Complainant Omar Khitab

I.H.C Police Post K.T.S was on patrol duty alongwith two constables on 3.2.1993 at 915 hours. The police party confronted appellant Ahmad Nawaz near the Tarbela Lake bank in the limits of village Padhiana and the complainant recovered one shopping bag from his hand.

On the search of the shopping bag the complainant recovered two other plastic bags each containing paper bag containing heroin weighing one kilogram and 20 grams each. The complainant separated one gram of heroin powder from each packet for chemical analysis and recovery memoes were attested by P.W.3 Maroof F.C. The complainant arrested the appellant and sent written complaint to Police Station Haripur where F.I.R No.118 was recorded.

2. After investigation the appellant was sent up for trial before Additional Sessions Judge Haripur who charged him under Article 4 of the Prohibition(Enforcement of Hadd) Order, 1979, to which the appellant pleaded not guilty and claimed trial.

3. Four prosecution witnesses were examined on behalf of the State. The appellant made a deposition under section 342 Cr.P.C. The appellant also made a deposition on oath and produced two defence witnesses.

4. After the conclusion of the trial the learned Additional Sessions Judge convicted the appellant under Article 4 of the Prohibition Order and sentenced him to undergo rigorous imprisonment for 5 years,

22

to suffer 10 stripes and to pay a fine of Rs.50,000/- or in default

to undergo simple imprisonment for 6 months. The convict has challenged his conviction and sentence by the appeal in hand.

5. I have heard learned counsel for the parties at length and have also very carefully gone through entire record of the case.

6. P.W.2 Omar Khitab I.H.C corroborated the contents of the written complaint which he had sent to the Police Station for registration of the case. He deposed that he had himself recovered two packets of heroin from the possession of the appellant and out of each bag he had separated one gram for chemical analysis and had packed and sealed in two different parcels at the spot. He further stated that he had himself sent the sample parcels to the office of the Chemical Examiner. P.W.3 Maroof F.C attested the recovery memo as a marginal witness. The witness also took murasila to the police station for registration of the case.

7. On the contrary the contention of the appellant was that no narcotic was recovered from him. He further stated that his brother was murdered for which one Akhtar Nawaz was tried and convicted and the relatives of the convicted Akhtar Nawaz had fabricated a false case against him in connivance with the complainant. The appellant also made a statement on oath and produced Chemical Analyst and Director Forensic Science Laboratory as defence witnesses. From the defence evidence produced by him it had come to light that the samples which were earlier sent to the office of the Chemical Examiner were not found

to be heroin powder and fresh samples were sent to the said office on 21.3.1993 which were found to be heroin. In this connection the letter of the Office of the Chemical Examiner, copy Ex.DW.1/2 was also produced.

8. It shall be seen from the evidence reproduced above that the samples were not kept in the police station for safe custody and there was no evidence to prove that the samples which were allegedly taken by the complainant by hand to the office of the Chemical Examiner were found to be heroin. The report of the Chemical Examiner Ex.P.W.2/3 which was produced in defence evidence shows that the samples received in his office on 21.3.1993, more than two months after the seizure, were again taken from the bulk. The parcel of the remaining bulk powder recovered from the possession of the appellant and weighing 2 kilograms and 38 grams was also sealed separately at the spot according to the recovery memo Ex.P.W.2/1 and according to the provisions of section, 516-A read with section 523 Cr.P.C it was under the control, disposal and orders of the court, and the seal of this bulk powder could not be removed, for getting an other sample therefrom, without the express orders of the court. The defence evidence produced in the case would clearly indicate that the second sample which was sent to the office of the Chemical Examiner on 21.3.1993 was either not taken from the parcel of the aforesaid bulk powder or the seals of that parcel were removed without the order of the court for taking fresh sample.

This entire proceeding was unauthorised, illegal and invalid.

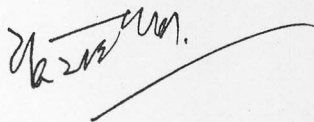
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There was no evidence available on the record that the second sample
sent to the office of the Chemical Examiner was also taken from the (25)
bulk powder. In such a circumstance the report of the Chemical Examiner
dated 21.3.1993, Ex.PW.2/3, could not be taken into consideration for
holding ~~xxxx~~ the appellant guilty of being found in possession of heroin.

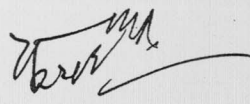
9. It shall thus be seen that much doubt had been created about
the sending of the samples in the office of the Chemical Examiner.

If the samples had been sent again then there was no evidence available
on the record as from where the heroin of those samples was procured
and whether the two bags containing the remaining bulk powder were
reopened to prepare the second samples and any authority from any court
was obtained from the said process. The State had failed to bring home
the guilt of the appellant beyond any reasonable doubt.

Consequently the appeal is accepted. The conviction and sentence of the
appellant recorded on 28.5.1994 by the learned Additional Sessions Judge
Haripur are set aside and he is acquitted of the offence for which he was
convicted and sentenced. He shall be set at liberty forthwith if not
wanted in any other case.

Fit for reporting.




CHIEF JUSTICE

Islamabad, 26.10.1994.
M.Akram/