IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

Mr.Justice Dr.Tanzil-ur-Rahman CHIEF JUSTICE

Mr.Justice Mir Hazar Khan Khoso

CRIMINAL APPEAL No.247/I of 1991

Rehmat Nawaz son of Muhammad Anwar Khan, Resident of Adalzai, Hazro, District Attock.	--	Appellant
	Versus	
The State	--	Respondent
Counsel for the appellant	--	Kh.Muhammad Yusuf Saraf, Advocate.
Counsel for the State	--	Ch.Muhammad Ibrahim, Advocate.
No.date of FIR & Police Station	--	No.38 dt:24-3-1989 P.S.Airport,Rawalpindi.
Date of the order of trial Court	--	15-10-1991
Date of institution	--	13-11-1991
Date of hearing	--	29-1-1992
Date of decision	--	29-1-1992

JUDGMENT

DR.TANZIL-UR-RAHMAN, CHIEF JUSTICE.-- This appeal arises out of judgment dated 15-10-1991, passed by learned Additional Sessions Judge, Rawalpindi, in Hudood Case No.39 of 1989, whereby the appellant Rehmat Nawaz Safdar was convicted under Article 4 proviso II of the Prohibition (Enforcement of Hadd) Order, 1979 and sentenced to life imprisonment, twenty stripes and a fine of Rs.20,000/-; in default to further undergo two years' R.I. for the recovery of 1250 grams of heroin. He was, however, entitled to the concession of section 382-B Cr.P.C.

2. The facts giving rise to the above appeal, briefly stated, are that on 24-3-1989 at 2.00 A.M., the appellant was apprehended in the process of checking passengers of International Flight No.PK-715 at Islamabad Airport. The appellant, a passenger to the said flight, carrying a suitcase of brown colour and a hand bag of black colour with P.I.A.ticket No.214-4111-581-396 entered the departure hall of the airport and placed his luggage at the counter for checking. He was asked by P.W.1 Inam-ul-Haq whether he had any contraband in his luggage upon which he replied in negative. The appellant was asked to open the lock of the suitcase, wherefrom four packets of heroin were recovered, kept in secret cavities made in the bottom of the suitcase. On weighment it came to 1250 grams. Two samples of ten grams each were taken from each of the said packet of the heroin and were sealed into parcel. The remaining quantity Exh.P.1/1-4

was separately sealed into a parcel. All the parcels of heroin, lock P.2 and key P.3 were taken into possession by P.W.1 Inam-ul-Haq vide recovery memo Exh.PA, attested by Javed Ahmad Khan, Deputy Superintendent Custom, Nasir Nazir Barlas, Inspector Custom and Salahuddin, Inspector Custom. The other articles recovered from the appellant including currency, passport and identity card were also taken into possession vide recovery memos Exh.PB and Exh.PD, attested by PWs Javed Ahmad Khan, Nasir Nazir Barlas and Salahuddin. During interrogation the appellant disclosed that the co-accused Muhammad Saleem and Muhammad Iqbal were sitting outside in car No.RIP-6013 who had brought the suitcase alongwith him from Hazro. Thus on the pointation of the appellant the co-accused Muhammad Saleem and Muhammad Iqbal were also apprehended from the car parked in the Airport Car Parking. P.W.1 Inam-ul-Haq drafted the complaint Exh.PC and sent the same to the Police Station through Constable Muhammad Younis for registration of the case. On the basis of the complaint,F.I.R. Exh.PC/1 was recorded by P.W.2 Sarfaraz Ahmad ASI. During investigation it was disclosed that another co-accused Dildar Khan alias Dara pasted the filth of dog on the suitcase so that the heroin may not be detected by the detective dogs. Dildar Khan was, therefore, also arrested. All the documents,case property and the accused including the appellant were handed over to P.W.7 Abdul Majeed Malik, S.I, who took all the relevant papers in his possession vide recovery memo Exh.PE, attested by P.W.8 Waseem Ahmad. The samples of the heroin

recovered were sent to the Chemical Examiner whose report Exh.PG was received in positive. After completion of the investigation of the case he challaned the four accused including the appellant and sent them up for trial in the Sessions Court.

3. The prosecution in all examined eight witnesses. All the accused including the appellant made their statements under section 342 Cr.P.C but declined to make any statement under section 340(2) Cr.P.C.

4. The learned trial Judge after recording all the evidence produced in the case and hearing the counsel for both side convicted the appellant, as aforesaid. He, however, ordered the acquittal of the other three accused, by the same judgment impugned before us.

5. Mr.Muhammad Yousaf Saraf, learned counsel for the appellant pleaded before us that it was not a case under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, but it was only a case of attempt to export the contraband articles to a foreign country and, therefore, the appellant, if found guilty, could only be convicted under Article 25 of the said Order and thus will be liable to the half of the punishment provided for the offence under Article 3. The Article 25 reads as under:-

> "Art.25.-Whoever attempts to commit an offence punishable under this Order or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punished, in the case of an offence punishable under Article 8, with rigorous imprisonment for a term which may extend to two years, and in other cases with imprisonment for a term which may extend to one-half of the longest term

provided for that offence, or with such whipping or fine as is provided for the offence, or with any two of, or all, the punishments.

6. In support of his contention the learned counsel for the appellant submitted that the word "attempt" has not been defined in the Penal Code and therefore we have to take into account the various steps in the process of the commission of an offence. The first, learned counsel submitted, is the intention to commit an offence followed by its preparation and then it comes to an attempt for actual commission of offence. The last step to commit crime, the learned counsel further submitted, if proves abortive for reasons beyond its control, the offence is not complete and merely remains an attempt to commit the offence. Reliance was placed by the learned counsel on a number of cases of Indian jurisdiction, as under:-

i) Province of Bihar v. Bhagwat Prasad (A.I.R. 1949 Patna 326).

ii) State v. Haricharan Rakshit (A.I.R. 1950 Orissa 114).

iii) The King v. Tustipada Mandal & others (A.I.R. 1951 Orissa 281)

iv) Vaikuntham Jaganadham v. State of Orissa (A.I.R.1952 Orissa 164).

v) Abhayanand Mishra v. State of Bihar (A.I.R.1961 S.C. 1698)

i) In the first cited case (A.I.R. 1949 Patna 326), it was observed that there is a distinction between an attempt to commit an offence and making preparation for the commission of it. An attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act

or acts neither foresaw nor intended, happens to prevent this. An act done towards the commission of an offence, which does not lead inevitably to the commission of the offence unless it is followed or, perhaps, preceded by other acts, is merely an act of preparation. It was thus held that where an accused who was in charge of a godown where bags of grain were stocked, secreted certain number of bags in one of the rooms after removing them from the part of the godown where they were originally kept, with a view to misappropriate them in future but he had not manipulated the registers accordingly, it could at most be said that the accused had formed criminal intention. The act itself did not amount to conversion. Conversion occurs where a man does an unauthorised act which deprives another of his property permanently or for an indefinite time. Nor did the act amount to an attempt to commit the offence of conversion. It was merely a preparation for the commission of the offence.

ii) In the second cited case (A.I.R. 1950 Orissa 114) it was observed that an attempt to commit an offence does not cease to be an attempt merely because after the attempt is made and before the actual completion of the offence the offender may be able to prevent its completion by doing some other act in pursuance of a changed intention. The question to consider is whether an act was done which if not prevented would have resulted in the full consummation of the act attempted. In the said case the accused was travelling from Puri to Hawrah in a Second Class compartment with a Second Class ticket. The train was a through train to Howrah

and new cloth weighing more than 14 lbs, was found inside the compartment as part of his personal luggage though not booked as such. Neither in his examination under S.342, Criminal P.C., nor in his written statement did he take the plea that the cloth was not meant to be taken by him to Howrah but was meant to be delivered to some other person within the Province of Orissa: It was thus held that it could be reasonably inferred from the above facts that the accused attempted to transport cloth from Orissa to Howrah in contravention of the Notification: It was held further that even if it be held that the accused merely prepared and not attempted to transport cloth by rail outside Orissa even then he was guilty of contravening the Notification in view of R.121,D.I.Rules.

iii) In the 3rd cited case (A.I.R. 1951 Orissa 284) it was observed that the dividing line between preparation & attempt is real though fine. So long as the offender is at the stage of preparation, he is not held punishable as it is still open to him to change his mind. The test, therefore, is whether the overt acts already done are such that if the offender changes his mind & does not proceed further in its progress, the act already done would be completely harmless. But where the thing done is such as, if not prevented by any extraneous cause, would fructify into commission of the offence, it would amount to an attempt to commit an offence. In the present case, Cl.(3) of Orissa Livestock (Control of Movement & Transactions)Order 1947, makes an attempt to move or transport without a permit as good an offence as the completed acts of movement or transport from inside the Province to a place outside. The least movement from one terminus

towards the other must constitute an attempt & will be punishable under S.10 of the Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act (1 (1) of 1947.

iv) In the fourth cited case (A.I.R.1952 Orissa 164) it was observed that where a driver of a lorry intentionally transports foodgrains from a village in Orissa to a village in Madras in contravention of the Orissa Food Grains Control Order, 1947, under instructions of the petitioner, the driver is equally guilty of the offence and is an accomplice. It was thus held that there was a clear case of attempt to transport rice in question without a proper permit from the authorities. The mere possibility that before the lorry crossed Orissa border the petitioner might have changed his mind and thrown away the rice somewhere in Orisssa would not suffice to indicate that the act complained of was still in a preparatory stage and had not ripened to an attempt.

v) In the fifth cited case (A.I.R 1961 Supreme Court 1998) it was observed that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed

the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. .....

A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. In the said case the appellant applied to the Patna University for permission to appear at the 1954 M.A.Examination in English as a private candidate, representing that he was a graduate having obtained his B.A. Degree in 1951 and that he had been teaching in a certain school. In support of his application, he attached certain certificates purporting to be from the Head-master of the School and the Inspector of Schools. The University authorities accepted the appellant's statements and gave permission and wrote to him asking for the remission of fees and two copies of his photograph. The appellant furnished these and proper admission card for him was despatched to the Head Master of the School. Information reached the university about the appellant's not being

a graduate and being not a teacher. On inquiry the information was found to be correct and the certificates to be false. As a result the admission card was withheld and the appellant was prosecuted and convicted for the offence of attempt to cheat punishable under Ss.420/511 I.P.C.

7. The above contention of the learned counsel is misconceived. Article 4 of the Prohibition Order provides owning or possessing intoxicant as a complete offence by itself whereas Article 3 provides for import, export, transport, manufacturing, processing, bottling, selling or serving any intoxicant or allowing any of the aforesaid acts upon premises owned by him or in his immediate possession. Both offences are separate and distinct. In the instant case there is abundant evidence which goes to prove to the hilt that the appellant was in possession of the suitcase wherein the contraband was hidden in its secret cavities. The suitcase was opened by him with the key in his possession and,then, during the process of checking, the contraband was recovered from it. The offence under Article 4 was,therefore, complete in all its essentials. Had it been a case that the suitcase would have been cleared and was in the process of being carried on for loading on the aircraft or it was actually loaded to the aircraft, the offence might, perhaps, have fallen under Article 3.

8. In the facts and circumstances of the case it cannot, by no stretch of imagination, be said that the contraband was not recovered from the possession of the appellant and,therefore, any attempt to bring the case under Article 3 of the Prohibition Order, for which he was neither charged

nor convicted is a vain attempt on the part of the learned counsel without any substance.

9. The case-law submitted by the learned counsel is of no avail to him as none of the provisions of the Acts/Ordinances for which the accused in the said cases were charged and convicted did not provide that mere possession of the aforesaid articles was an offence.

10. Learned counsel for the appellant next submitted that no public witness was examined in the case and to believe and convict a person merely on the evidence of police officials will not be a healthy tendency and, therefore, the judgment is liable to be set aside on that ground alone. It has been invariably held in many cases that the Islamic law does not make the evidence of a witness as inadmissible merely because the witness is a police or Government official unless it is shown that there was previous enmity between the accused and the police officials or it was malicious on the part of the police officials to get the appellant convicted. In the instant case, there is not even an acquaintance between the accused and the official witnesses. No enmity or ill-will is even alleged. This plea, therefore, has no merit.

11. The last contention as raised by the learned counsel is that Article 4 is to be read as a general provision contained in the said Order whereas Article 3 is to be read as its special provision and, therefore, the provision of Article 3 will be attracted to the facts of the case and will override the general provisions of Article 4. The contention, to say the

the least, is fallacious. The whole Order is a special law as it applies notwithstanding to any other law on the subject. The contention as raised by the learned counsel is without any substance and is entirely devoid of any merit.

12. In the end, the learned counsel pleaded for reduction of sentence. It is a settled principle of law that when the prosecution proves a case to the entire satisfaction of the trial Court for an offence commited by him and the learned trial Court gives a sentence which is quite legal, the punishment or in other words sentence should not be reduced. The discretion exercised by the trial Court judiciously should not be interferred with unless some special circumsances are available on the record for grant of some concession in the sentence passed by the learned trial Court. We do not find any such circumstance which may warrant us to interfere with the discretion exercised by the learned trial Court in awarding the sentence.

13. No other plea or contention was raised by the learned counsel.

14. In result, the appeal is dismissed.

(Dr. Tanzil-ur-Rahman)
Chief Justice

Approved for reporting.

CHIEF JUSTICE

Sd/-
(Mir Hazar Khan Khoso)
Judge

Islamabad, dated the
29th January, 1992.
ABDUL RAHMAN /***