

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

24

PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI.

CRIMINAL APPEAL NO.39/I OF 1994.

1. Wasal Khan son of Shamas Khan, resident of village Kunda, Tehsil and District Swabi. and ... Appellants
2. Zaman Khan son of Nazeer Khan, r/o village Kunda, Tehsil and District Swabi.

Versus

The State ... Respondent

For the appellants ... Mr.Muftakhiruddin, Advocate.

For the State ... Mr.Sohail Akhtar, Law Officer, NWFP.

No.& date of F.I.R Police Station ... No.517, dt.7.11.1992, P.S Lahor, District Swabi.

Date of order of the trial court ... 18.1.1994.

Date of Institution in this Court ... 19.2.1994.

Date of hearing and decision ... 9.3.1994.



JUDGMENT

NAZIR AHMAD BHATTI, J.- Muhammad Azam Khan,

ASI, Police Post Sher Abad and some other police officials had laid a picket on Swabi-Jehangira road in front of the Police Post on 7.11.1992 when a car No.IDB-8681 came on that road at 11.00A.M which was stopped by the said ASI. Wasal Khan and Zaman Khan appellants herein, were sitting on the rear seat of the car while it was being driven by accused Muffariq Shah driver. Personal search of both the appellants was carried out by the ASI and he recovered two plastic packets each from the trouser folds of both the appellants each containing 250 grams of heroin powder. The said ASI took out one gram each from all the 4 packets as sample and made separate parcels of the recovered heroin and the samples. He also apprehended the appellant and the driver and sent them to Police Station Lahor for registration of the case and investigation. FIR No.517 was recorded in the said police station on the same day.

2. During investigation by Muhammad Ajmal Khan Sub Inspector/S.H.O Police Station Lahor, appellant Zaman Khan disclosed that he had concealed more heroin powder in his house and he led the investigating officer there and at his instance 5½ kilograms heroin was recovered from under the maize stalks on the roof top of his house.



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

4. After the conclusion of the trial the learned Sessions Judge acquitted accused Mufarriq Shah driver of all the offences. Accused Zaman Khan was also acquitted of the charge with regard to recovery of 5½ kilograms of heroin allegedly recovered from his house. However, both the accused Wasal Khan and Zaman Khan were convicted of the offence of transporting 500 grams each of heroin powder and each of them was sentenced to undergo rigorous imprisonment for 6 years, to suffer 10 stripes and to pay a fine of Rs.20,000/- or in default to further undergo rigorous imprisonment for one year. Both the convicts have challenged their conviction and sentence by the appeal in hand.

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

6. Only 4 prosecution witnesses were produced by the State in proof of the case against both the appellants. P.W.1 Muhammad Azam Khan, ASI, confirmed the contents of the written complaint which he had sent to the police station for registration of the case. He stated that he had himself

33
27

carried out search of both the appellants and had recovered two packets from the folds of the trouser ~~from~~ each of them.

This witness also stated that he had prepared the samples and the recovery memo at the spot which were attested by P.W.2 Amas Khan F.C. The latter confirmed the testimony of the P.W.1 regarding attestation of the recovery memo.

P.W.3 Mr.Ihsanullah Khan, Magistrate 1st Class, had recorded confession of accused Mufariq Shah on 12.11.1992.

Ne P.W.4 Muhammad Ajmal Khan, Sub Inspector/S.H.O had carried out investigation with regard to the alleged recovery of 5½ kilograms of heroin from the house of ~~xxxx~~ appellant Zaman Khan.

7. It was pointed out by the learned counsel for the appellants that no evidence was produced by the State with regard to the circumstance as ~~whether~~ the bulk heroin and samples were kept after recovery of the same from the appellants. He also pointed out that although samples were prepared on 7.11.1992, the very day on which the heroin was allegedly recovered from the appellants, but the same were sent to the office of the Chemical Examiner on 15.12.1992, after more than 5 weeks but no evidence had been produced to show as ~~on~~ whyt this delay had occurred and whether the samples were kept in safe custody.



it was the contention of the learned counsel that it was a case of suppression of evidence which had cast a great cloud of doubt on the entire prosecution case. No plausible explanation was made available by the learned counsel for the State with regard to the aforesaid contention of the learned counsel for the appellant.

8. I have seriously considered the contention of the learned counsel for the appellant. It appears that the full and complete evidence, which was available to the State, had not been produced during the trial. No evidence had come on the record as to prove that after the recovery of the alleged heroin from the appellants whether the parcels were kept in the Malkhana, or to whom the parcels were handed over and whether the same were kept intact during all the period before the samples were sent to the Office of the Chemical Examiner. No doubt it is a case of suppression of evidence. It is the duty of the State to produce all the evidence which is available in a case and withholding of the evidence would raise a presumption against the truthfulness of the prosecution case. It will raise a presumption of doubt in favour of the accused. No evidence is available on the record to show that the sample parcels were kept in the safe custody and they were not interfered with during all the time before they were sent to the Office of the Chemical Examiner.

20
29

The delay in sending the parcels to the latter office raises a doubt about the recovery of any narcotic from the possession of the appellants.

9. It shall thus be seen that more than sufficient doubt had been created in the whole matter of recovery of narcotic from the appellants and they are entitled to get the benefit therefrom. Much doubt had been created in the whole evidence. Consequently the appeal is accepted. The conviction and sentences of both the appellants recorded on 18.1.1994 by the learned Sessions Judge Swabi are set aside and they are acquitted of the offence for which they were convicted and sentenced. They shall be set at liberty forthwith if not wanted in any other case.

Fit for reporting.

M. Akram

Islamabad, 9.3.1994.
M. Akram/

M. Akram
JUDGE