

# IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT

JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE

## CRIMINAL APPEAL NO.04-K OF 2024

1. Lal Bux son of Muhammad Amin Jatoi
2. Ramzan son of Muhammad Moosa Jatoi  
Both residents of Village Ghulam Rasool Jatoi,  
Taluka S.F.Rahu, District Badin.

...Appellants

VERSUS

The State

...Respondent

LINKED WITH

## CRIMINAL APPEAL NO.05-K OF 2024

Nadir son of Ghulam Rasool Shahani,  
Resident of Village Chak No.32, Taluka S.F. Rahu, District Badin.

...Appellant

VERSUS

The State

...Respondent

Counsel for the appellants in : Mr. Dur Muhammad Shah & Mr.  
Crl.A.No.04/K of 2024. Chhuto @ Muhammad Chhutan  
Rahimoon, Advocates

Counsel for the appellant in : Mr. Waqar Ahmed & Mr. Adnan  
Cr.A.No.05/K of 2024. Farooq, Advocates.

Counsel for the State : Mr. Iqbal Meo, Deputy Prosecutor General,  
Sindh.

FIR No., Date & Police Station : No. 146, Dated 20.10.2023, Police Station  
Kario Ganhwar, District Badin.

Date of Impugned Judgment : 28.11.2024

Date of Institution : 24.12.2024

Dates of Hearing : 17.04.2025

Date of judgment : 09.05.2025

**JUDGMENT**

**IQBAL HAMEEDUR RAHMAN-CJ.** After conclusion of trial in case

FIR No. 146 of 2023 dated 20.10.2023 registered under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979 (President Order No.IV of 1979) (Hereinafter called Order IV of 1979) at police station Kario Ganhwar, District Badin, the Learned Judicial Magistrate-II, Badin, vide his judgment dated 28<sup>th</sup> of November, 2024 convicted the appellants Lal Bux, Ramzan and Nadir under Article 3 of Order IV of 1979 and awarded sentence of three years rigorous imprisonment each with fine of Rs.30,000/- each and in default to further undergo one month simple imprisonment. Benefit of Section 382-B of the Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called the Code) was also extended in favour of appellants.

2. Being aggrieved and dis-satisfied with the judgment, the appellants Lal Bux and Ramzan preferred Criminal Appeal No.04/K of 2024 while appellant Nadir preferred Criminal Appeal No. 05/K of 2024 calling in question the validity and legality of the judgment impugned.

3. The appellants also filed Criminal Miscellaneous Application No.12/K and 13/K of 2024 for suspension of their sentence and through

order dated 11<sup>th</sup> February, 2025, the sentence awarded to the appellants was suspended subject to furnishing of bonds in the sum of Rs.50,000/- each with one surety in the like amount.

4. The appellants were nominated in crime Report No.146 of 2023 (Exh:3/D) registered under Articles 3 and 4 of Order IV of 1979 with accusation of retaining 72 bottles of wine of different quality recovered by the police party, while checking passing vehicles at Kario Ganhwar Road near Notkani Sim Nala, headed by Ber Rebari, A.S.I. (PW.1) from Qingqi Rickshaw coming from Golarchi.

5. After usual investigation, report under section 173 of The Code was submitted before the learned Judicial Magistrate-II at Badin.

6. The appellants were formally charged under Articles 3 and 4 of Order IV of 1979 who did not plead guilty and claimed to be tried.

7. The prosecution in order to prove its case produced three witnesses i.e. Complainant/ ASI Ber Rebari (PW.1), PC Ali Akber (PW.2) (Eye witnesses) and Investigation Officer/ASI Ghulam Shabir (PW.3), besides production of report of Chemical Examiner Exh.5/E.

8. The appellants in their statements under section 342 of the Code controverted the incriminating evidence led by the prosecution and

pleaded false implication by the police on the direction of their superiors. They neither opted to be examined on oath under section 340 (2) of the Code nor produced any witness in their defence.

9. On conclusion of the trial, the learned Trial Magistrate recorded conviction through judgment dated 28<sup>th</sup> November, 2024 against the appellants.

10. Learned counsel for the appellants Lal Bux and Ramzan contended that appellants while riding on Qingqi Rickshaw were caught having three cartons of wine in their possession in daylight but no person from public was associated to act as witness of recovery of liquor from a busy place.

Continuing the arguments, it was further contended that there was delay of four days in sending the samples to the Office of Chemical Examiner.

Laying great emphasis on the safe custody and delivery of case property to the Office of Chemical Examiner, it was contended that PC Abdul Aziz, who delivered the case property to the Office of Chemical Examiner, was not produced at the trial which is fatal to the case of prosecution.

Similarly, WHC Dost Muhammad Chhargri whom case property was entrusted for safe custody was also not produced at the trial putting further dent to the case of prosecution.

On the other hand, learned counsel for the appellant Nadir adopted the arguments advanced by the learned counsel for the appellants Lal Bux and Ramzan.

11. Controverting the arguments, learned Law Officer appearing on behalf of the State contended that the case property of the instant case was safely deposited in the Office of Chemical Examiner whose seal was intact and no traces of tampering were found on it. Furthermore, no question regarding the breaking of seal, tampering or safe transmission was put nor any such suggestion was made.

Making reference to recovery of 72 bottles of wine it was submitted that such huge quantity of wine being costly cannot easily be foisted.

The learned Law Officer went on saying that defence could not point out material contradiction nor suggested any animosity towards the police, moreover, in disproof of the allegation, the defence did not produced any witness in their defence.

Explaining the delay of four days in depositing the case property in the Office of Chemical Examiner, it was contended that occurrence took place on 20.10.2023 at 17:00 hours while FIR was lodged on the same day at 18:30 hours and the parcel remained for one day at the P.S, while 21<sup>st</sup> October, 2023 was Sunday and government offices remain closed being Sunday. Finally, it was deposited in the Office of Chemical Examiner on 23.10.2023.

Summing up the arguments, it was submitted that defence could not attribute animosity to the police and could not even point out any misreading or non reading of evidence. Hence, the offence committed by the appellants is established beyond any shadow of doubt.

12. Conscious consideration has been given to the arguments advanced at the bar as well as perusing the record.

13. Contents of FIR reveal that three persons, who were riding on Qingqi Rickshaw allegedly transporting three cartons of wine of different quality, each containing 24 bottles, were arrested and nominated by the police party. It has been alleged that driver of rickshaw, on signal by police to stop, tried to reverse the rickshaw, but nowhere it has been shown that the said driver has either been

nominated in the FIR or has been arrested. In this regard, the prosecution case is completely silent, which also creates a dent in the case of the prosecution. The complainant/PW.1 during cross examination stated that *"it is correct to suggest that I have not mentioned in the FIR about the person who was riding the rickshaw"*. This fact was also confirmed by PW.2 during his cross examination. Moreover, there is nothing on record to reveal the ownership of the Qingqi Rickshaw, wherefrom the alleged case property of three cartons of wine were recovered. Thus, factum of driver of the rickshaw and its ownership was suppressed by the complainant/PW.1 and PW.2, who are eye witness of the occurrence, appears to be intentional and deliberate, casting a serious doubt on the veracity of their statements. Moreover, when the defence had also come up with the suggestion to the complainant (PW.1) during his cross examination as well as during argument that one Jan Muhammad Shahani, who was actual culprit, had been let off by the complainant (PW.1) and in his place the appellants have been booked and the alleged recovered wine which was later on foisted upon them, cannot be overlooked, specially, at the time of alleged recovery of wine, no independent witness from the public was joined to act as

witness of the alleged recovery nor any reason for non-joining of such independent witness from the place of incident has been given, though, the Investigation Officer during his cross examination has admitted that *"It is correct to suggest that place of incident is busy road."* Non-joining of independent witness, when place of incident is admitted to be a busy place, in absence of any reason, makes the recovery doubtful being in violation of the section 103 of the Code. Reliance is placed on the case law reported as "STATE through Advocate-General, Sindh vs. BASHIR and others" (PLD 1997 SC 408). Relevant portion of the case law is as under:-

"It may be observed that it has been repeatedly held that the requirement of section 103, Cr.P.C., namely, that two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."

14. Strangely enough, names of WHC Dost Muhammad Chhalgri, whom case property was handed over for keeping in safe custody and PC Abdul Aziz, who delivered the case property to the Office of Chemical Examiner, had been cited as witness number 6 & 7 in column 5 of the report under section 173 of the Code. After examining Complainant, ASI Ber, Rebari, (PW.1), PC Ali Akbar (PW.2) witness of



arrest of the appellants and alleged recovery and ASI Ghulam Shabbir Chandio, Investigating officer (PW.3), the side of prosecution was closed.

It is observed while examining the record and perusal of report under section 173 of the Code, the prosecution had cited total of number of eight witnesses out of whom only three witnesses have been produced at the trial while WHC Dost Muhammad Chhalgri and PC Abdul Aziz being material witnesses of safe custody and transmission of the case property were not produced without any lawful explanation, similarly, PC Allah Bux, DPC Ashfaq Ahmed, Inspector/SHO Ghulam Haider Panhwar, who were also cited as witnesses in the police report under section 173 of the Code, had not been produced at the trial nor any statement had been rendered regarding they being unnecessary or having been won over or declared hostile. The prosecution closed its side by making statement on 27.07.2024. In light of the above, it would be considered that prosecution withheld material evidence, in view of the same; an adverse inference can be drawn against the prosecution under Article 129 (g) of the Qanun-e-Shahadat Order, 1984. The failure to produce material witnesses, without any cogent reason, is deemed to

be fatal and creates serious dent to the case of prosecution. In this regard, the dictum has been laid down in the case of "LAL KHAN vs. The STATE" (2006 SCMR 1846). Relevant portion of the case law is reproduced as under:-

"The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."

15. The prosecution has substantially failed to prove the safe custody and transmission of the case property to the Office of Chemical Examiner. In this regard, fatal blow has been caused to the case of prosecution by non-production of WHC Dost Muhammad Chhalgri to whom case property was handed over vide entry No.99 of register 19 (Exh.5/A) by the Investigation Officer as per his statement while appearing as PW.3, which aspect was rightly pointed by the learned counsel for the appellants. In addition to this, non-production of PC Abdul Aziz, at the trial, who vide Exh.5/C was handed over the case property, for onward transmission to the Office of Chemical Examiner on 23.10.2023 also creates further dents to the case of prosecution, which could not complete chain of evidence of safe custody and safe

transmission of case property for chemical analysis rendering the report of Chemical Examiner doubtful. Any break in the chain of safe custody and safe delivery of the samples to the Office of Chemical Examiner will create a serious dent to the case of prosecution.

The Apex Court in plethora of judgments has held that safe custody of case property as well as its transmission to the Office of Chemical Examiner must be established in order to complete chain of evidence. The chain of custody begins with the alleged recovery of wine by the police and includes separation of respective samples of the seized wine and its safe transmission to the Office of Chemical Examiner.

These parameters and yardsticks were highlighted by the Hon'ble Supreme Court of Pakistan in the case of "IKRAMULLAH and others vs. The STATE" (2015 SCMR 1002), "MUHAMMAD SHOAB and another vs. The STATE" (2022 SCMR 1006), "The STATE through Regional Director ANF vs. IMAM BAKHSI and others (2018 SCMR 2039) and "ZAHIR SHAH alias SHAT vs. The STATE through Advocate-General, Khyber Pakhtunkhwa" (2019 SCMR 2004).

Ratio expounded in the above referred case law is reproduced here in below:-

(2015 SCMR 1002)

“In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit.”

(Emphasis added)

(2022 SCMR 1006)

“It has been observed by us that although Jahangir Khan, H.C. (PW-1) claimed that complainant had handed over the sample parcels to him which he further handed over to Moharrar Investigation for safe custody for sending them to Forensic Science Laboratory, Peshawar. The said Moharrar Investigation who according to Jahangir Khan, H.C. (PW-1) kept the sample parcels in safe custody was never produced by the prosecution. So the safe of sample parcels was not established by the prosecution. Ajmal Khan, Constable, who allegedly took the sample parcels to the concerned laboratory was also not produced. In that eventuality, prosecution failed to establish safe custody and safe transmission of the sample parcels to the concerned quarter and the prosecution could not give any plausible explanation for not producing said important witnesses. The said defect in the prosecution case goes into the root of the case creating serious doubt regarding the narcotics and its recovery.”

(Emphasis added)

(2018 SCMR 2039)

“The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken,

unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction."

(Emphasis added)

(2019 SCMR 2004)

"This court has repeatedly held that safe custody and safe transmission of the drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory must be satisfactorily established. This chain of custody is fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspicious, safe and secure. Any break in the chain of custody i.e., safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction."

(Emphasis added)

16. In the light of above discussion, the prosecution has failed to prove its case against the appellants beyond the reasonable doubt, therefore the judgment of conviction against the appellants cannot be maintained in view of the safe administration of criminal justice. Resultantly, Cr. Appeal No.04/K of 2024 and Criminal Appeal No.05/K of 2024 are allowed. The impugned judgment of the learned Trial Magistrate is set-aside. The appellants are acquitted from the charge. They are present on bail. Their bail bonds stand cancelled and sureties discharged.

**IQBAL HAMEEDUR RAHMAN**

CHIEF JUSTICE

Announced in open Court,

Islamabad, : May 09, 2025

Ajmal/\*

Approved for Reporting.

**Chief Justice**