

IN THE FEDERAL SHARIAT COUERT
(Revisional Jurisdiction)

PRESENT:

HON.MR.JUSTICE DR.TANZIL-UR-RAHMAN - CHIEF JUSTICE

HON.MR.JUSTICE MIR HAZAR KHAN KHOSO

CRIMINAL CONST.REVISION NO.37/I OF 1991

Haji Muhammad Ismail ... Petitioner
son of Ali Jan r/o Manari
Tehsil and District Swabi

Versus

The State ... Respondent

Counsel for the ... Sardar Asmat Ullah Khan,
petitioner Advocate

Counsel for the State ... Mr.Muhammad Aslam Uns,
Advocate

FIR No. Date and ... 440, 27-7-1989,
police station Attok Khurd, Attock.

Date of order of ... 15-7-1991
trial court

Date of Institution ... 12-8-1991

Date of hearing ... 26-1-1992

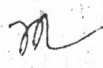
Date of decision ... 26-1-1992

JUDGMENT:

DR.TANZIL-UR-RAHMAN, CHIEF JUSTICE.- This Revision

Petition has been filed by the petitioner under Article 203-DD of the Constitution of Pakistan, 1973, against the judgment dated 15-7-1991 passed by the Magistrate, Section 30, Rawalpindi, whereby, inter-alia, bus No.MA-4199 was confiscated to the State.

2. The facts, briefly stated, relevant to the above Petition are that on 27-7-1989, the Excise Staff, Attock receiving information that a bus No.MA-4199 was plying between Bonir to Karachi would pass Mullah Mansur Checkpost at any time and that the said bus was carrying heavy quantity of heroin. The Excise Staff became more vigilant on receipt of the said information. The said bus reached Excise Checkpost at 12.30 a.m. which was being driven by Mir Bahadur, accused, and Ali Jan Khan, accused, who was sitting on the conductor's seat. The bus was checked and 47 packets of heroin were recovered from the secret cavity of the diesel tank of the said bus. The heroin was packed in white cloth bags and wrapped in plastic covers. Each packet was found to be of one kilogram, thus 47 kilograms of heroin was taken out from the diesel tank of the bus. Two thirty five grams of heroin was separated from the said packets for chemical examination and packed in a sealed parcel. The rest of the heroin packets were packed in a large size cloth bag. Both the sealed parcels of heroin, bus registration book, route permit, a photo copy of identity card and a bus voucher

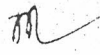


were taken into custody vide recovery memo (Ex.PA). The accused alongwith recovery memo, case property and a complaint were handed over to the Police for registration of the case. The Investigating Officer after usual investigation challaned the accused and on receipt of Chemical Examiner's report (Ex.PE) sent them up for trial before the Magistrate, Section 30. On 18-7-1990 the learned Magistrate formally charged both the accused under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979, (hereinafter referred to as the said Order) who having denied the same, were tried.

3. The prosecution in all produced five witnesses. On the basis of the said evidence, the learned Magistrate convicted both the accused under Article 3 of the said Order and sentenced them to seven years R.I., Rs.25,000/- fine and 20 stripes each with benefit of section 382-B Cr.P.C.

4. The learned Magistrate while convicting the above said accused, by the said judgment, also confiscated the said bus (MA-4199) in favour of the State. It is against this part of the judgment that the above Revision for setting aside the order of confiscation and release of the bus to the petitioner has been made to this Court.

Sardar Asmat Ullah Khan, learned counsel for the petitioner submitted that the petitioner is the owner of the bus and, therefore, the said bus could not have been confiscated without notice to him. Thus, the judgment, according to him, to that extent is bad in law.



5. Learned counsel for the petitioner relied on the following

cases :-

i. Iqbal Ellahi Vs. The State (1987 SCMR 1274).


ii. Haji Ziauddin Vs. The State (1990 P.Cr.L.J. 1213).

6. In the first cited case, Iqbal Ellahi Vs. The State (1987 SCMR 1274), one passenger in the vehicle secretly carried narcotics without involving, direct or indirect, of others either present in the vehicle or in its control and charge. It was held by the Hon'ble Supreme Court that the order of confiscation of such vehicle would manifestly be inconsistent. As a result, the appeal was allowed and the order of confiscation of car was set aside. The facts of this case are distinguishable inasmuch as one kilogram of heroin was recovered from the possession of a passenger having no connection with the vehicle as driver or owner of the said car.

7. In the second cited case, Haji Ziauddin Vs. The State (1990 P.Cr.L.J. 1213), the petitioner had filed a miscellaneous application in the Sessions Court, Nawabshah for the return of the said confiscated truck to him claiming ownership of the same. The said application was rejected by an order dated 27-3-1989. After hearing the Advocate for the applicant, as the said truck was found registered in the name of one Nooruddin and not in the name of the applicant. The applicant then filed an appeal

which was treated as application as the same was filed as an attorney of a person named Nooruddin. Learned Sessions Judge after hearing the arguments from both sides dismissed the same. The petitioner then filed a Revision application in the High Court alleging that the truck in question originally belonged to the petitioner who had sold the same to the said Nooruddin on instalment basis but before having paid complete instalments the said Nooruddin had got the same transferred in his name. However, he obtained General Power of Attorney from the said Nooruddin in his favour. It was contended that the order of confiscation under section 15(2) was passed without an inquiry and without notice. The contention found favour with the learned Single Judge of the High Court of Sind who was pleased to set aside the order of confiscation of the truck and remanded the case to the S.D.M., Naushahro Feroze to pass a fresh order in accordance with law after giving notice and an opportunity of being heard to the owner of the truck. The facts of the cited case are distinguishable to the present case as in the instant case the ownership was claimed by the accused, Ali Jan, in his statement under section 342 Cr.P.C.

8. On the other hand Mr. Muhammad Aslam Uns, learned counsel for the State placed his reliance on the case of Said Shah and two others Versus The State (PLD 1987 288).



9. It is pertinent to note that in the first case Said Shah & others Vs. The State (1985 SCMR 1476) leave to appeal was granted on 13th May, 1985, to examine the following questions:-

- (a) Whether the principle enunciated in the case of Nazir Hussain 1971 SCMR 404 will apply to the present case or it will have to be decided in accordance with the rule laid down in Muhammad Shah etc. V. The State PLD 1984 SC 278, as the offence involved in the latter case was the same as in these three petitions;
- (b) Whether under the relevant law namely, Prohibition (Enforcement of Hadd) Order, 1979 it is necessary for the Court to examine questions other than those of possession and/or transport, simplicitor and in that connection whether it is relevant to examine who owned and/or placed the liquor in the Suzuki Van;
- (c) Whether it can be treated as a general effective defence for the driver/conductor of a public carrier in cases like the present one to plead that they were unaware of the contents of baggages/packages/boxes containing liquor or other commodity covered by the relevant law, and whether the law relating to public carries places any additional responsibility on drivers and/or conductors;
- (d) Whether in this case there was enough evidence to show that the three petitioners were in possession of the liquor and/or were transporting them;
- (e) Whether the Suzuki involved in the case should have been confiscated; and
- (f) all other related questions. Order accordingly. To be heard with similar Peshawar case."

In the appeal in was observed that -

"the perusal of the provisions contained in Articles 3 and 4 of the Prohibition Order it has to be straightaway observed that the findings relating to the ownership of the intoxicant would not be necessary for proving an offence/s under those provisions; though, if evidence

is led in that behalf it may be relevant for purpose of determining the question relating to the culpable acts specified therein. Accordingly, the plea of Said Shah or for that matter the other appellants that they did not own the liquor would not make any difference."

10. As to the plea that although the crates contained the liquor were found in the appellant's vehicle. They were not aware of the fact that they contained liquor. The Chairman of the Shari'at Appellate Bench of the Supreme Court (now Chief Justice of Pakistan) observed that -

"if Article 3 is strictly construed, would not be of any benefit to them because, it is, amongst others, the transport of the intoxicant which has been made culpable. And it cannot be denied that in fact liquor was being transported in the vehicle which was in the control and possession of these two appellants. But in reality what the law intends is that the culprits should be found, amongst other acts, to have transported or possessed the intoxicant with consciousness about the commodity that it is an intoxicant. It will, however, depend upon the circumstances of each case as to whether the driver or conductor of a public vehicle is conscious regarding the contents of goods he is transporting or carrying as the luggage of a passenger."

11. As regards the order of the trial Court confiscating the Suzuki van, the question was concluded as the learned counsel for the appellant conceded that "it was within the power of the trial Court to do so and that confiscation took place in the discretionary jurisdiction of the trial Court".


12. We may, however, like to refer to the case of Haji Abdul Razzak Vs. Pakistan (PLD 1974 SC 5) relied on in the judgment of the



Supreme Court (PLD 1987 SC 288) and also relied on by learned Single Judge of the High Court of Sind in the case referred to above. In Abdul Razzaq's case seven gunny bags containing cloth of foreign origin, the import of which was restricted was found in a jeep. The three occupants of the vehicle jumped down from the vehicle and disappeared. On the same day an FIR was lodged by the appellant Haji Abdul Razzaq at Kharadar police station West Karachi alleging that the said pick-up had been stolen by somebody unknown. The actual culprits transporting foreign cloth could not be traced out. However, the vehicle was confiscated under item (12-A) of section 167 of the Sea Customs Act. The Hon'ble Supreme Court, inter-alia, observed that "the mere fact that the FIR about the theft of the vehicle was lodged after the vehicle had been seized at another place by the Customs authorities does not mean that the appellant must have had earlier knowledge of the illegal or improper use of the vehicle. The authorities should have made some attempt to show at least that the knowledge of the seizure had been conveyed to the appellant before he lodged the report at the police-station." In those circumstances, the appeal was allowed and the order of Customs Authorities for confiscation of the property was set aside and the property released to the appellant forthwith. We have given the facts of the above case in some detail in order to show that it was a case when the actual culprits remained

untraceable and the jeep had been stolen by the culprits in respect of which an FIR was lodged the same day. The Hon'ble Supreme Court seems to have been impressed by these two abovesaid facts and did not go further into other aspects of the matter. In our view to place reliance on that authority while considering the case of confiscation of the vehicle used for transportation of the contraband article under Article 3 of the said Order, will not be safe.

13. It now seems pertinent to state facts peculiar to the case before us. Firstly, one of the co-accused, namely, Ali Jan while making statement under section 342 in reply to a specific question put to him by the Magistrate claimed the ownership to the truck to himself. The said assertion as to the claim made by Ali Jan as to the claim of bus in question was affirmed by the other co-accused, namely, Mir Bahadur. Secondly, Haji Muhammad Ismail, petitioner before us, never appeared before the Magistrate or made any application to the said Magistrate. Learned counsel for the petitioner produced before us a photo copy of the order shown to have been passed by some Magistrate section 30, Attock, whose signatures are not legible, whereby it is submitted that the said bus was given to the petitioner on 'Supurdiginama'. The said order was passed in some case (without mentioning any number or the year) titled as میرداد وغیرہ VRS. سرکار. This Court and the learned counsel for the petitioner as well as learned counsel for the State, all searched



if the said order was on the file of the trial court. It was not there. We also looked into the diary of the case if any mention of making some application by the petitioner or the order passed thereon has been mentioned therein. It was not again there. We directed the learned counsel to produce the copy of the application, even a simple one, if in his possession which he regretted to produce on the ground that he had none on his file. He, however, submitted that this application seems to have been consigned to record and he thus took time to produce the copy of the said application allegedly made by the petitioner in the said case claiming ownership of the bus in question and for making delivery of the same to him on Spurdginama. We accordingly adjourned the case for a week and today the learned counsel for the petitioner failed to produce the copy of the application as undertaken by him on the last date of hearing i.e. 19-1-1992.

14. Now, we would like to state the legal position as to the confiscation of a vehicle used in the transportation of a contraband article as provided under Articles 14 and 15 of the said Order. It will be advantageous to reproduce them in full :-


"14. Things liable to Confiscation. In any case in which an offence has been committed under this Order, the intoxicant, still, utensil, implement or apparatus in respect or by means of which the offence has been committed shall be liable to confiscation alongwith the receptacles, packages, coverings, animals, vessels, carts or other vehicles, used to hold or carry the same."

"15. Confiscation how ordered. (1) In any case involving anything liable to confiscation under this Order, the Court deciding the case may order such confiscation despite the acquittal of the person charged.

(2) When an offence under this Order has been committed but the offender is not known or cannot be found, or when anything liable to confiscation under the Order and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the Collector or other Prohibition Officer in charge of the District or any other officer authorised by the Provincial Government in this behalf, who may order such confiscation:

Provided that no such order shall be made until the expiration of fifteen days from the date of seizure of the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and evidence, if any, which they produce in support of their claims."

15. A bare reading of the above said provisions will show that Article 14 provides that if utensil, implement or apparatus in respect or by means of which the offence has been committed "shall be liable to confiscation" alongwith the receptacles, packages, coverings, animals, vessels, carts or any other vehicles, "used to hold or carry the same". We are concerned with the last mentioned item i.e. vehicle. Admittedly, the bus, a vehicle, was used by means of which 47 kilograms of heroin in 47 packets hidden in the secret cavity of the diesel tank of the bus was being held and carried through the said bus. It is again a fact proved that the two accused, namely,



Mir Bahadur and Ali Jan Khan were the employees of the bus owner, whoever he may be, even if the assertion of the petitioner, for the sake of argument, is accepted that he was the owner of the bus. Article 14 of the said Order is an enabling provision to the extent that the vehicle used to hold or carry the contraband article in respect of which the offence was committed is liable to confiscation. Article 15 of the said Order, however, gives the power to the Court that in any case involving anything liable to confiscation under the order, the Court deciding the case relating to main offence of carrying the contraband article, may order such confiscation of the vehicle despite the acquittal of the person charged. It means that it is the vehicle which has been made the subject of offence even if the driver or conductor or even the owner of the bus is acquitted if the recovery is made from the bus and it is proved to the satisfaction of the Court and the guilt cannot be fixed reasonably on a particular person.

Sub-section(2) of Article 15 of the said Order, is to be read as an exception to the main rule provided under Article 14 read with Article 15(1) of the said Order that it relates to a situation where the offender is not known or cannot be found, or when anything liable to confiscation under the Order and "not in possession of any person" cannot be satisfactorily accounted for, the case shall be inquired into and determined by the authority concerned who may order such confiscation.

There is, however, a proviso attached to it and that calls upon such authority to act in the following manner:-

- (i) That no such order shall be made until expiration of fifteen day from the date of seizure of the things intended to be confiscated;
- (ii) Without hearing a person, if any, claiming any right thereto.

16. In the instant case, the vehicle was seized on 27-7-1989 and the judgment of confiscation was passed on 15-7-1991 so the first part of the proviso does not apply. As regard second proviso relating to the notice to the owner is concerned, it is meant for in such cases only where the offender is not known or cannot be found (as in Abdul Razzaq's case) or where the article liable to confiscation is not found to be in possession of any person or if found in possession of a person it cannot be satisfactorily accounted for. Only in such situation notice is necessary. In the instant case, the offenders are not only known but have committed offence under Article 3 of the said Order. They have been proved to be in possession of the vehicle used for the purpose of holding and carrying the heroin and on the top of it, one of them claiming the right of the ownership before the trial court under section 342 Cr.P.C., which is affirmed by the other co-accused in his favour. No application is made by the owner before the learned trial Court who remains silent perhaps watching for the result of the proceedings. Even after the disposal of the case he does not make an application before the same Magistrate perhaps because he had already obtained an

order surreptitiously in respect of the bus getting on Supurdaginama.

It may be mentioned that delivery of a vehicle on Supurdaginama is meant primarily for the purpose of protection of the property and to avoid further deterioration. It cannot be used as a proof of ownership.

17. It seems interesting to mention by way of illustration that during the days of Holy Prophet (ﷺ) when the Commandment relating to prohibition of wine (خمر) was revealed the utensils made of clay in which the wine was stored were broken into pieces and so was the case with leather bags (مشكيزه). There is an incident related to Hadrat Ali who had ordered to put ~~to~~ fire the house wherein the liquor-trade was being carried on. Reference may be made to the following Athār (آثار) of the Companions of the Holy Prophet (ﷺ) :-

وجد في بيت رجل من ثقيف خمر وكان قد جلد عرفت الخمر
فحرق بيته وقال ما اسمك قال رويشد قال بل انت فويسق .
(المصنف لعبد الرزاق ج ٦ ص ٢٧٢ محمد رواه قلعجي : موسوعة
فقه عمر ص ١٦٦ الطبعة الاولى ١٩٨١ الكويت)

A person from Thaqeef, who was punished by Hazrat Umar on the commission of offence of drinking was preparing wine in his house. Hazrat Umar put his house on fire, and asked him his name. He said that his name was Ruwaishid (رويشد). Hazrat Umar replied that you are Furaisique (فويسق).

(Al-Musannaf Abdur Razzaque Vol.6. p.77)
(Muhammad Rawwas Qalaji, Mosoo'ah Fiqh Umar
p.166 First Print 1981 (Alkuwait).

امر عمر بن الخطاب وعلي بن ابي طالب بتحريق
المكان الذي يباع فيه الخمر (مجموع فتاوى ابن تيمية
(الحسبة) ج ٢٨ ص ١١٠ طبع ١٣٩٨)

Hazrat Umar and Hazrat Ali ordered to put on fire
the house in which wine was being carried on.

(Majmoo Fatawa Ibne-Taimiyya (Al-Hisba)
Vol.28 p.110 print 1398).

وقد روى يحيى بن يحيى انه قال ارى ان يحرق بيت الخمار
قال وقد اخبرني بعض اصحابنا ان مالكا كان يستحب ان
يحرق بيت المسلم الخمار الذي يبيع الخمر من المسلمين قال
اذا تقدم اليه فلم ينته فارى ان يحرق عليه بيته بالنار
قال وحدثني الليث ان عمر بن الخطاب حرق بيت رويشد
الثقفى لانه كان يبيع الخمر وقال له انت فويسق ولست برويشد
(محمد بن قيم الجوزية : الطرق الحكيمة ص ٢٥٨
دار نشر الكتب الاسلامية لاهور .)

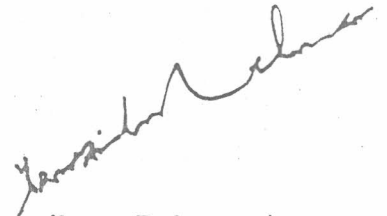
It has been narrated from Yahyah bin Yahyah that he
opined that the house of the maker of wine should be put
on fire.

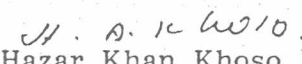
He said that some of the teachers informed me that
Imam Malik preferred that the house of such a person who
sells wine to Muslims may be put on fire. He further said
that if such a person does not stop after warning I think
that his house may be put on fire.

He said that it has been narrated to me by Lais
that Hazrat Umar ordered to put on fire the house of a
person of Banu Thaqeef on the offence that he used to sell
the wine. Hazrat Umar also said to him that you are
Fuwaishique instead of Ruwaishid.

(Ibne Qayyim, Al-Turuq at Hukmiyyah p.258.
Dar Nashr al Kutub at Islamiyyah Lahore).

18. In result, the Revision Petition is dismissed and the bus, if in possession of the petitioner, about which the learned counsel for the State was not sure, is to be taken into possession by the concerned police and the same be disposed of according to law.


(Dr. Tanzil-ur-Rahman)
Chief Justice


(Mir Hazar Khan Khoso)
Judge

Approved for reporting.


CHIEF JUSTICE

Islamabad, the
26th January, 1992.
Naseer.