IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.84/I of 1999.

Muhammad Hussain, S/o Qadir Bukhsh, Caste Lango, r/o Killi Ismaeel, Quetta	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Mr.Muhammad Aslam Uns, Advocate
Counsel for the State	.....	Qari Abdul Rashid, Advocate
FIR No. Date and Police station	.....	158/97 dated 17-9-1997 P.S Saddar, Quetta
Date of decision of trial Court	.....	17-5-1999
Date of Institution	.....	7-6-1999
Date of hearing	.....	23-8-1999
Date of decision	.....	17-9-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI,J:- Appellant has assailed a judgment delivered by the Court of Additional Sessions Judge-II, Quetta on 17-5-1999 whereby he has been convicted under Article 3 of the Prohibition (Enforcement of Hadd) Order 1979, hereafter to be referred to as the said Order, and has been sentenced to R.I for 7 years and fine of Rs: 30,000/-/in default of payment of the said fine to undergo further S.I for one year. The recovered narcotics, weighing scale, small plastic bags and Rs:34850/- being sale proceeds are also confiscated to the State. Benefit of Section 382-B Cr.P.C has also been extended to the appellant.

2. One Malik Muhammad Ali (PW-4), Inspector of police/ SHO P.S Saddar, Quetta filed a complaint Ex.P/4-A at P.S Saddar Quetta wherein he alleged that the DSP of Saddar, Quetta had received a secret information that the appellant was indulging into the business of narcotics at Killi Ismail Area. Upon this information, the DSP/SDPO Saddar, AC/SDM, Saddar and Magistrate first class, Quetta led a police party which included the complainant as well and there were some lady constables also attached with the raiding party. The raiding party made a raid at 2-30 P.M in the night of 17-9-1997 on the

house of the appellant. The house was searched and with the northern wall of the bedroom were attached beds and from the underneath these beds one bag of plastic containing heroin weighing 800 grams and another bag of plastic containing heroin weighing 25 grams, 10 tikies of baked charas weighing 130 grams, three pieces of opium weighing 70 grams and one bottle of liquor of London Drygin were recovered. From one iron made Almirah which was lying towards the southern wall, one small balance, 1012 small bags of plastic which are usualy used for the sale of charas, one bag in which heroin is being kept and on which category B was written and Rs:34,850/- in the shape of notes in different denominations were also recovered. This amount was the result of the sale proceeds of the narcotics. After having prepared the sealed parcels and having completed necessary procedure, the complaint was sent through constable Muhammad Amin to the P.S where an FIR was immediately lodged.

Appellant was arrested from spot and was challaned and charged under Article 4 of the said order to which he did not plead guilty.

3. To prove its case prosecution examined five witnesses. Ghulam Ali (PW-1), AC-I, Quetta has proved to be one of the

members of the raiding party. He has also proved that from the western side of the room of the residence of appellant heroin, charas, opium and one bottle of liquor were recovered. He has also proved that from the same room cash of Rs:34,850/-, one small balance, some small bags of plastic were also recovered. He has corroborated the complaint Ex.P/4-A. He has exhibited the memo of recovery as Ex.P/1-A on which his signatures are there. Syed Abdul Jabbar (PW-2), Chemical Expert, FSL, Quetta has proved that on 18-9-1997 he received five sealed parcels of the suspected material for chemical examination from the P.S Saddar, Quetta. He checked all parcels and found from parcel No.1 800 grams, from parcel No.2 25 grams from parcel No.3 130 grams, from parcel No.4 70 grams and from parcel No.6 suspected liquid. Later on he examined all the parcels chemically and found in parcel No.1 that it did not contain heroin, in parcel No.2 he found heroin very weak in strength, from parcel No.3 he found charas, from parcel No.4 he found opium and parcel No.6 contained alcohol. He has exhibited his report of chemical exminer as Ex.P/2-A. Riaz Ahmed (PW-3), has proved that on 17-9-1997 he worked as ASI at P.S Saddar. He has proved being one of the members

of the raiding party and has corroborated the complaint Ex.P/4-A in its details. He has proved being a signatory on the memo of search and recovery being Ex.P/1-A. He has deposed that the amount which was recovered was in fact the outcome of the sale proceeds of the narcotics. He has produced all the parcels containing narcotics which were opened in the open court. Malik Muhammad Ali (PW-4), complainant/SHO has proved contents of the complaint made by him which is Ex.P/4-A. He has also proved that the investigation of the case was handed over to S.I Abdul Aziz (PW-5),, who after having completed investigation, submitted the papers to him and after completing the challan which is Ex.P/4-B, he submitted the case for trial before the trial court. Abdul Aziz (PW-5), I.O of the case, has proved to be one of the members of the raiding party which was led by the DSP Saddar. He has also proved that alongwith the other personnel of police, AC/SDM of Saddar and Mr. Ghulam Ali Baloch Magistrate first class were also the members of the raiding party. He has proved the contents of the complaint in details, He has proved various steps taken by him during the investigation. He handed over the papers to the SHO on 28-10-1997.

In his statement under Section 342 Cr.P.C the appellant has denied all the specific questions. However, he has admitted that an amount of Rs:34850/- has been recovered from his house. He has examined himself on oath under Section 340 (2) Cr.P.C. The relevent portion of his deposition is re-produced as under:-

میں اور امان اللہ شوروم سے گھر کی طرف جا رہا تھا۔ اس روز [illegible]
کے سامنے [illegible] کا دنگا ہوا تھا۔ میں شوروم سے تقریباً چار اور پانچ بجے دن کے قریب
اپنے گھر جا رہا تھا۔ ہمیں گاڑی سمیت روکا گیا۔ اور مجھ سے پولیس والوں نے
گاڑی کے کاغذات طلب کئے اور میں نے ان کو کاغذات دیئے تو پولیس والوں نے
کاغذات کو چیک کرنے پر میری گاڑی کے کاغذات کو جعلی قرار دیا جس پر میں نے
پولیس والوں کو کہا کہ میری گاڑی کو بذریعہ کمپیوٹر چیک کر لیں۔ تو میری گاڑی کو بذریعہ
کمپیوٹر چیک کیا گیا اور کمپیوٹر والے نے کہا کہ گاڑی ٹھیک ہے اس کے باوجود پولیس
والوں نے میری گاڑی تھانہ میں بند کر دی۔ اس کے علاوہ میرے ساتھی کو چھوڑ دیا گیا
لیکن مجھے حراست میں لے لیا گیا۔ میری گاڑی کے ٹول میں ایک لاکھ پچھتر ہزار روپے
(175000) نقد پڑے تھے جو کہ میں نے ایک گاڑی صالح آغا نامی شخص پر اسی روز
فروخت کی تھی اور مذکورہ رقم حاصل کی تھی۔ اور پولیس والوں نے وہ ایک لاکھ پچھتر
ہزار روپے کی رقم لے لی۔ تاکہ ختم ہونے پر SHO ملک [illegible] اور [illegible] سردار
نے مجھے اپنے کمرے میں بلایا اور مذکورہ رقم ایک لاکھ پچھتر ہزار روپے واپس دینے پر
میں نے اصرار کیا اور انہوں نے کہا کہ تم کچھ پیسے دے دو تو تمہیں چھوڑ دیں گے ورنہ
تمہارے خلاف مقدمہ بنائیں گے۔ میں نے انکار کیا اس بات پر میرے اور ان کے
درمیان جھگڑا ہوا تھا۔ اور پھر مجھے لاک اپ میں بند کر دیا۔

Appellant has also produced one witness in his defence who is Amanullah (DW-1). He has deposed to be that same person who had accompanied with the appellant in the car and on their way both of them were intercepted by the police and the sale proceeds of a car of appellant which amounted to Rs:1,75000/- were usurped by the police. The quarrel on this money finally culminated into the present case which according to him is false.

5. I have heard the counsel for appellant and State. The counsel for appellant has contended that no proof of ownership of the place of occurrence which is a house has been obtained or provided by the prosecution; that there is no proof that the house was in the sole possession of the appellant and that there were no other residents of the house; that the evidence brought on the record proves that it was a house of joint possession and therefore, the appellant cannot be held responsible for the offence allegedly committed by an all alone person; that there is violation of the provisions of Section 103 Cr.P.C; that no search warrant was obtained or issued or available on the record; that the Fundamental Rights of the non-violability of the house have been violated; that the legal procedure for searching a house

has not been followed; that the principles about the privacy of house as ordained in Surat Noor of the Holy Quran have been violated; that parcel No.5 is not finding any place in the report of chemical examiner (Ex.P/2-A); that there are such conflicts and discrepancies in the evidence which can be termed as substantial; that nothing has been said about the safe custody of the recovered narcotics by the PWs; that the sale of narcotics is not proved and, therefore, it cannot be safely said that the recovery of the confiscated money is that of the sale proceeds of the narcotics; that the defence version is that the enmity between the appellant and the police developed at the sudden and spontaneous quarrel about the money which was usurped by the police. As an alternative plea it has also been contended that the punishment which has been awarded is not a balanced punishment in view of the fact that the report of chemical examiner does not indicate any heroin coming from the parcel No.1 and parcel No.2 contained only very weak heroin in strength which parcel contained only 25 grams. The remaining parcels did not contain heroin at all. The sale of narcotics is also not proved. Therefore, there are mitigating circumstances in the case. The learned counsel for State, on the other hand,

has argued vehemently that whatever the defence plea has been taken by the appellant and is deposed by defence witnesses during their examination-in-chief does not find any trace in the cross being made upon the PWs and therefore, plea for defence is an after thought and needs outrigt rejection.

6. At the outset, I have noticed that the appellant, during his statement under section 342 Cr.P.C, has admitted raid upon his house and the recovery of the amount from his house. Naturally then the recovery of the amount was not from the car as taken up as a defence plea during his statement under section340(2) Cr.P.C and the deposition of DW-1.Some of the relevant questions in his statement under section 342 Cr.P.C and the replies thereof are reproduced as under:-

Q. Is it correct that you are arrested in the present case on 17-9-1997.

Ans. It is correct.

Q. Is it correct that on 17-9-1997 at about 12-30 A.M the police raid your house situated at Killi Ismail in the supervision of Zulfiqar Durrani and Ghulam Ali EAC.

Ans. It is incorrect.

Q. Is it correct that from the search of your house, from a room of the said house heroin, charas, opium, liqour, small balance,the bags of plastic and an amount of Rs:34850/- were recovered.

Ans. Only the amount was recovered. Nothing else was recovered from the house.

This very answer that an amount of Rs:34850/- was recovered from the house is indicative that the reply to Q.No.2 is false and that the story of the recovery of the amount from the car has been developed later as an after thought. Even otherwise I do not find a single suggestion made either to Abdul Aziz (PW-5), I.O., or to Malik Muhammad Ali (PW-4), SHO and complainant to the effect that an amount of Rs:34850/- was recovered from the car and not from house. However, from the complainant a question has been asked during the cross that at the time of arrest Rs:1,75,000/- were recovered from his possession which amount was the outcome of the sale proceeds of a car. This question has been replied in negative. Another suggestion which has been also replied in negative is that the appellant was arrested after 4-00 A.M in the morning time. This very suggestion is again falsifying the plea of defence that both the appellant and DW-1 came out of their showroom around 4 or 5 P.M and on their way they were intercepted by the police which resulted into the present case. From this discussion it stands proved beyond reasonable doubt that the statement of appellant on oath as well as the deposition of DW-1 is an after thought to create a plea of

enmity with a police but the defence has utterly failed to prove its plea.

When confronted with this situation, the counsel for appellant has contended that the prosecution cannot rely upon the weaknesses of the defence. Proseuction has to prove its case while standing on its own legs.

7. The counsel for appellant has tried to prove that there were many residents of the house from which alleged recovery was made. In this context he has relied upon the reply of Riaz Ahmed (PW-3), ASI to a suggestion in which he has admitted that the narcotics which were recovered from the room was on the northern side and one or two other rooms were also searched and that there were some other people also present in the house. Reliance has also been made on the following reply to a suggestion made to Abdul Aziz (PW-5) the I.O "In this house women and children were residing." Indeed it stands proved from the evidence that there were some women and children also residing in the house. The present appellant appears to be an adult person and shall naturally be considered as the head of the family which family consisted of the appellant, some female and some children. No such defence plea is appearing from the

record that the house from which the incriminating material was recovered was a joint possession or joint ownership of many adult male persons. On the contrary the reply of appellant to question No.3 in his statement under section 342 Cr.P.C is enough to indicate that the amount of Rs:34850/- was recovered from his own house which was within his own ownership and none else owned it. Appellant being the head of a family consisting of females and children cannot shift the vecarious liability to them to save himself from the responsibility of an offence committed by him all alone as in our society females and children are usually subservient to the sole head of the family. Consequently I do not find any force in this contention for the appellant and reject it outrightly.

8. Another contention for the appellant is that the procedure of obtaining the search warrant for a house has not been adopted. In this context reliance has been made upon the reply of Ghulam Ali (PW-1), Magistrate first class, to a suggestion that he had not issued any warrant of search and that before the raid he had not prepared a report for raid.

What I find from the record is that the complaint Ex.P/4-A is making the reference to a secret information having been

received by DSP that the appellant was induldging into the business of narcotics. This information was covering the posibility of the offence being committed either under Article 3 or under Article 4 of the said order.Article 16 of the said order reads as under:-

> "Cognizance of certain offences. (1) The following offences shall be cognizable, namely:-
>
> (a) an offence punishable under Article 3; and
>
> (b) an offence punishable under Article 4, Article 8 or Article 11, if committed at a public place.
>
> (2) No Court shall take cognizance of an offence punishable under:-
>
> (a) Article 12 or Article 13, save on a complaint made by the person in respect of whom the offence has been committed; and
>
> (b) Article 20, save on a complaint made by, or under the authority of, a Prohibition Officer.

It means that in case the offence was being committed under Article 3 of the said order, it was a cognizable offence even if committed at a closed place. But if the offence was being committed under Article 4, then it was cognizable after it was committed at a public place. At the time of raid, admittedly it was not surely known as to whether sale of narcotics was going on inside a covered place or whether it was only the possession of the recovered narcotics. It is also an admitted position that at the time of the raid at least two Magistrates of first class were present and they

were AC/SDM Saddar and EAC Magistrate first class of the Area. Since a raid and search was conducted in the presence of at least two Magistrates and the directions about the arrest etc were originating from them to the raiding police party, therefore, I am of the humble opinion that section 64 and 65 of Cr.P.C shall be applicable on the present case. These two sections read as under:-

> 64. "Offence committed in Magistrate's presence.-- When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail commit the offender to custody."
>
> 65. Arrest by or in presence of Magistrate:- Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant."

Consequently, then I find that the counsel for the appellant is being led by a misconception of law so far as his contention for the non-issuance of the search warrants is concerned. Therefore, this contention is rejected as mis-concieved.

9. Another contention is that the fundamental right of non-violability of the home of the appellant has been violated as conferred by Article 14 (1) of the Constitution

of the Islamic Republic of Pakistan. This sub Articles reads as under:-

> "(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable."

This Article ensures the privacy of home as inviolable subject to law. The circumstances of the present case are indicative that an spy information was available about heineous cognizable crime of dealing in narcotics being committed in the home of the appellant. Law permits in the present case to have been dealt with as it has been dealt with. Time and again it has been decided by the superior courts that the privacy of home is inviolable only when a crime or an offence of hienous and cognizable nature is not committed in the said home but if there is a secret information that such a heinous crime is being committed in a home, then the inviolability of the said house is placed udner suspension. Consequently this contention fails.

10. It has also been contended that there is no mention of parcel No.5 either in the report of chemical expert Ex.P/2-A or in the deposition of Syed Abdul Jabbar (PW-2), the chemical expert. I wonder as to how the learned counsel for the appellant has expected to send the sealed parcel No.5 which containd notes worth Rs:34850/- to the chemical expert.

This contention is totally mis-leading and is repelled as such.

11. Another contention which has been vehemently argued/is that there are clear principles about the inviolability of the privacy of home in Soorah Noor of the Holy Quran which have been violated. Although the verse numbers of the Soorat Noor which is 24th Soorah of the Holy Quran have not been quoted by the counsel,but I think that he has made a reference to Ayat Nos.27 and 28 of the said Soorah which Ayats read as under:-

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَدْخُلُوْا بُيُوْتًا غَيْرَ بُيُوْتِكُمْ حَتّٰى تَسْتَاْنِسُوْا وَتُسَلِّمُوْا عَلٰٓى اَهْلِهَا ۚ ذٰلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ تَذَكَّرُوْنَ ۝ فَاِنْ لَّمْ تَجِدُوْا فِيْهَآ اَحَدًا فَلَا تَدْخُلُوْهَا حَتّٰى يُؤْذَنَ لَكُمْ ۚ وَاِنْ قِيْلَ لَكُمُ ارْجِعُوْا فَارْجِعُوْا ۚ هُوَ اَزْكٰى لَكُمْ

27. Ye who believe! Enter not houses other than Your own, until ye have Asked permission and saluted Those in them: that is Best for you, in order that Ye may heed (What is seemly).

28. If ye find no one In the house, enter not Until permission is given To you: if ye are asked To go back, go back: That makes for greater purity

What I find from the evidence is that Riaz Ahmed (PW-3), has replied to a suggestion that before entering the house the outer gate was knocked and PW-4 Malik Muhammad Ali (Complainant) has also deposed that lady constable Lal Khatoon

and Jan Bibi were also with the raiding party. He has also deposed that when he knocked the outer gate of the home, one person came out and opened the door and that person who opened the door was permitted to take his personal search and then the personal search of that another person was taken. This proves that the procedure for searching the house was properly followed and, therefore, this contention is rejected.

12. Now emerges the question about the quantity and quality of the narcotics and as to whether the sentences awarded are balanced ones. It stand proved from the deposition of Syed Abdul Jabbar (PW-2), chemical expert, as well as report of chemical expert Ex.P/2-A that out of five parcels sent to the Forensic Science Laboratory, parcel No.1 did not contain heroin. It was an allegation of the prosecution that parcel No.1 contained 800 grams of suspected material in powder form, gray in colour. It means that this allegation of the recovery of 800 grams of heroin from parcel No.1 is not proved. The allegation of the recovery of 25 grams of heroin from parcel No.2 stands proved to the extent that it was a heroin of very weak strength as per Ex.P/2-A. The chemical examiner (PW-2) has replied to a suggestion that he cannot exactly say as to how much percentage of heroin was

there in parcel No.2. However, he can state that approximately there was 3 to 5 percent of heroin in parcel No.2. It means that out of alleged 25 grams of heroin in parcel No.2, if it is calculated at the maximum of 5%, it will come to 1.25 grams. The 3rd parcel admittedly contained 130 grams of charas and 4th parcel admittedly contained 70 grams of opium. The 6th parcel was found to contain alcohol and it has been alleged by the prosecution that it was one bottle of Dry gin. It is also proved from the evidence that no sale of narcotics was going on at the time of raid which was 2-30 A.M.

In view of this position, I have come to the conclusion that the conviction of the appellant under Article 3 of the said order is erroneous. This conviction is converted from Article 3 to 4 of the said order. Since the quantity of the heroin stands proved to be that of 1.25 grams and the quantity of opium as recovered is 70 grams, therefore, proviso to Article 4 is also not attracted. However, the possession and keeping in his custody such intoxicants are attracting punishment which may extend to 2 years. It stands proved beyond reasonable doubt, therefore, that an offence under Article 4 of the said order is committed. Consequently, the punishment of R.I for 7 years is reduced to R.I for 2 years and the fine of Rs:30,000/- is

reduced to fine of Rs:10,000/- and in case this fine is not paid then the appellant shall have to undergo S.I for 6 months more. Benefit of Section 382-B Cr.P.C shall remain intact. Since sale of narcotics is not proved from evidence, confiscation of recovered amount of Rs:34850/- is not warranted by law. This amount shall be returned to the appellant in case appeal/revision is not preferred in the higher forum within the statutory period. With these modifications in the conviction and sentence, the impugned judgment is upheld and the appeal is dismissed.

Approved for Reporting

(Abdul Waheed Siddique)
Judge

Announced in the open Court

Judge

Islamabad, the
17th September, 1999.
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