

Cr.A.No.13/K/1997
Cr.Rev.No.09/K/1997

IN THE FEDERAL SHARIAT COURT.
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE HAZIQL KHAIRI, CHIEF JUSTICE.
MR. JUSTICE SALAHUDDIN MIRZA.

CRIMINAL APPEAL NO. 13/K of 1997

State through the Director,
Anti Narcotics Force, Karachi. Appellant.

Versus

1. Muhammad Nawaz son of
Ghulam Hussain
2. Rafi Muneer son of K.M. Muneer Respondents.

CRIMINAL REVISION NO. 09/K of 1997

Arshad Islam Shaikh son of
Muhammad Islam Shaikh Applicant.

Versus

1. The State
2. Muhammad Nawaz son of
Ghulam Hussain
3. Rafi Muneer son of K.M. Muneer Respondents

**Counsel for the
Appellant/State**

... Mr. Rao M.Shakir Naqshbandi,
Advocate for Director A.N.F.
Karachi (in Cr.A.No.13-K/1997)
& for applicant Arshad Islam
Shaikh, (in Cr.Revn. No.9/K/
1997).

**Counsel for the
Respondent.**

... Sheikh Javed Mir, Advocate for
Rafi Muneer (Respondent No.2 in
Cr.A.No. 13.K/1997 &
Respondent No.3 in
Cr.Rev.No.9/K/1997)

**FIR No. date and
Police Station.**

21/1993 dated 10-3-1993
PNCB Unit No.II, Karachi.

**Date of Judgment of
Trial Court.**

... 12-07-1997

Date of Institution

... 13-03-1999

Date of hearing

.... 08-04-2008

Date of decision:

....

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JUDGMENT:

JUSTICE HAZIQUL KHAIRI, C.J.:- By this Judgment we will dispose of Appeal No.13-K of 1997 filed by the State through the Director Anti narcotics Force, Karachi, against the impugned judgment dated 12.07.1997 passed by the learned Sessions Judge, Karachi (West) whereby both the respondents Muhammad Nawaz and Rafi Muneer were acquitted of charge dated 16.08.1993 punishable under Articles 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 read with Sections 8/14 of the Dangerous Drugs Act, 1930. Alongwith this Appeal we will also dispose of Criminal Revision No.9/K/1997 filed by Arshad Islam Shaikh F.I.O. against the State and others praying for expunging the remarks and directions against him.

2. Brief facts as emerged from the impugned judgment are that on 10.05.1993 FIO Arshad Islam Shaikh (Pw.6) registered F.I.R.

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No.21/1993 at P.N.C.B. Unit-II Karachi stating that he had received information of smuggling of a huge quantity of Charas through a container in West Wharf area, Karachi. He formed a raiding party and went to West Wharf. M.I. Yard where he found truck No.LSA-8789, with a container, parked without anybody therein. The FIO secured the truck in the presence of witnesses and found a large quantity of charas in it. He took the container to P.N.C.B. office where the charas was weighed and samples were prepared. A case under Articles 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 was registered without naming any accused person.

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3. After investigation, the FIO P.N.C.B. sent up respondents Muhammad Nawaz and Rafi Muneer for trial and one Sarfraz as absconder. At the trial the respondents were charged under Article 3 & 4 of Prohibition of (Enforcement of Hadd) Ordinance, 1979 read with sections 8/14 of the Dangerous Drugs Act, 1930. The respondents pleaded not guilty and claimed trial. The prosecution examined six witnesses viz: Sarfraz Ahmed Qureshi (Pw.1),

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Muhammad Ayoob Soomro (Pw.2), Abdul Razzak (PW.3), Muhammad Riaz (PW.4), Syed Muhammad Amil (PW.5) and FIO Arshad Islam Shaikh (PW.6). After the prosecution side was closed, statements of respondents under Section 342 Cr.P.C. were recorded and they denied the allegations made against them. Respondent Muhammad Nawaz (DW.1) examined himself on oath and produced two witnesses Rab Nawaz (DW.2) and Allah Ditta (DW.3) in support of his defence. However, respondent Rafi Muneer neither examined himself nor adduced any evidence in his defence.

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4. Respondent Muhammad Nawaz was arrested from Gulshan-e-Iqbal and the allegation against him was that he had purchased the truck involved in this case from Muhammad Ayoob Soomro (PW.2) in the name of Muhammad Anwar for Rs.250,000/- prior to the day when the truck was found with container loaded with the charas. The said truck was registered in the name of Muhammad Ayub Soomro but no entry for transfer of the truck and its registration in the name of

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purchaser was found in record. However, as per the original receipt the truck was sold on 27.4.1993.

5. Respondent Rafi Muneer was arrested and the case against him was that photo copies of shipping documents, original whereof were produced by PW.5 Muhammad Amil were found in his car. A diary was also secured from his car with an entry of the telephone number of the absconding accused Sarfaraz.

6 In his testimony PW.6 Arshad Islam Sheikh FIO reiterated what he had stated in FIR and further deposed that for about two hours, his team kept watch on the truck expecting that somebody would approach it. However, nobody came, he, therefore, opened the container which was unlocked. He found some cartons kept inside the container, one or two of them were opened and he found charas in them. They were again kept in the container and brought it to P.N.C.B. office, where he counted the cartons which were 300 in number. In every carton, there were 40 sippers of charas. He took samples of 10 grams from each carton, thus 300 samples were

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obtained which were sealed separately. He weighed the charas and found the container was 12000 K.Gs. He prepared first mashirnama at M.I. Yard and second in the P.N.C.B. Office on the next day of the recovery, PW.5 Muhammad Amil clearing agent approached him and produced some documents before him which included Export Licence, Receipt of weight-age charges and 'E' Form. He took the raiding party to the house of absconding accused Sarfraz but he was not there. The truck involved in this case was registered in the name of PW.2 Muhammad Ayoob Soomro.

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7. PW.1 Sarfaraz Ahmad Qureshi S.I. in his testimony stated: "on 10.05.1993 I joined the raiding party headed by F.I.O. PW.6 Arshad Islam Shaikh and other staff. The staff took position and waited for about 3/4 hours but nobody came near the truck. Arshad Islam Shaikh then picked up one person Abdul Ghani (not produced) passing nearby, disclosed his identity and informed that he wanted to lay search of the container. He made myself and one Abdul Ghani as witness of search. At about 1600 hours the container was opened

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which was not locked. At our P.N.C.B office cartons were counted which were 300 containing charas. Every cartons contained 40 Kilo charas having slipper of one kilo each. At 1800 hours the proceedings was completed after taking out 10 grams sample from each cartons 300 samples were sealed. The cartons were also sealed individually. Then second mashirnama to this effect was prepared which was signed by myself and Abdul Ghani who put L.T.I. He produced mashirnama. The property produced in the Court is same. On 14.5.1993 at about 12.00 or 1.00 midnight time PW.6 Arshad Islam Shaikh had taken me to Gulshan-e-Iqbal. Muhammd Iqbal (not produced) also joined the raiding party for the arrest of the culprits. At about 2.00 A.M. driver Muhammad Nawaz accused present in court came at Moti Mahal Bus Stop. Iqbal pointed out the accused to be the same driver of the truck to be the driver by name Muhammad Anwar. Arshad Islam Shaikh conducted search of the accused Muhammad Nawaz present in Court and from his search one identity card by the name of Muhammad Nawaz son of Ghulam Hussain, one driving

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The mashirnama of arrest and securing personal search items was prepared which was signed by me and L.T.I. of Iqbal. Respondent Muhammad Nawaz had taken the raiding party to Defence Phase V Khayaban-e-Tanzeem and pointed out the Bungalow. We stood there. At about 7.15 A.M. one Honda Car of gray colour came from outside towards the house. The car was got stopped and the questions were put to the person who was driving the car himself. PW.6 Arshad Islam Shaikh introduced himself and made myself and Assistant Director Muhammad Riaz Soomro as mashirs of the search of the car. From the Dash Board of the car photo stat copies of shipping bills, Export registration and "E" Form all photostats documents. From the Diggi of the car one black colour brief case with number 132 and 032. From this brief case one passport of accused Rafi Muneer, one Identity Card, one Telephone diary and Rs.1,000/- case was recovered. Mashirnamas of arrest and recovery were prepared which was signed by me and Assistant Director Riaz Soomro."

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8. In his cross-examination he stated that "in my 161 Cr.P.C. statement I had not mentioned that accused Muhammad Nawaz had taken the raiding party to Defence Phase V Khayaban-e-Tanzeem and pointed out the Bungalow. Likewise I did not mention in my 161 Cr.P.C. statement that at 7.15 a.m. one Honda car of gray colour came from outside towards the house and the car was got stopped and questions were put to the person who was driving the car himself and that Arshad Islam Sheikh introduced himself and made myself and Assistant Director Muhammad Riaz Soomro as mashirs of search of the car. Likewise I have not mentioned in my statement that from the Dash Board photo stat copies of shipping bills, export registration and "E" Form were recovered and from the diggi of the car one black colour brief case was secured and that accused Rafi Muneer opened the brief case with number 132-032 and that from this brief case one passport of accused identity card and telephone diary and Rs.1000/- were recovered. I have also not mentioned in my statement that in my presence the mashirnama was prepared and I was made a witness in

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Amil son of Muhammad Aqil on his own came to P.N.C.B. Police Station. He gave statement to the effect that he got the container for the use by absconding accused Sarfraz Khan son of Jahangir Khan. It is correct that on 11.5.1993 PW Muhammad Amil had produced the original documents of Ex.11, 12 and 13. There are other houses also around Khayaban-e-Tanzeem.”

9. PW.2 Ayub Soomro in his examination-in-chief stated ‘I sold my truck to Anwar (points out accused Muhammad Nawaz) for Rs.2,50,000/- I handed over the original receipt to accused Anwar and kept the photo copy with me. I produce that photo copy of receipt as Ex.18.’

10. PW.3 Abdul Razzak is a neighbour of PW.2 Ayoob Soomro deposed that in his presence Anwar had paid amount to Ayoob Soomro. The receipt was signed by Anwar, himself and Muhammad Shafi (not produced) as attesting witnesses. The truck was then driven by Iqbal driver who left it at the house of accused Muhammad Nawaz.

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Accused Muhammad Nawaz present in Court is the same who disclosed his name as Anwar.

11. PW.4 Muhammad Riaz was Assistant Director P.N.C.B. in his testimony stated that on 14.5.1993 respondent Nawaz driver present in court was with them. On the pointation of Nawaz they came to Defence Housing Authority Phase 5, Street No.17 at 7.15 a.m. They saw respondent Rafi Muneer coming in his Honda Civic No.S-4272. He stopped his car in front of his house. He was pointed out by accused Nawaz and thereafter I.O. disclosed his identity to respondent Rafi Muneer and then conducted search of the car. From the dash board of the car E Form, Export Register Form and shipping bill all photostats were secured. From the diggi of the car a brief case of black colour was recovered in which there was one passport in the name of Rafi Muneer, one National Identity Card and one diary containing telephone number which had mobile telephone number which was of accused Sarfaraz. Mashirnama was prepared by I.O. PW.6 which was signed by him and Sub-inspector Sarfaraz Qureshi.

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He had examined the charas which was recovered in this case. He issued such certificate which he produced. Accused Rafi Munir was also arrested.

12. In cross-examination to the counsel for Rafi Muneer, he admitted that his statement under Section 161 Cr.P.C. was also recorded on 14.5.1993. It was not mentioned in his 161 Cr.P.C. statement that at 7.15 a.m. accused Rafi Muneer came in his Honda Civic Car and stopped in front of his house. It was not mentioned in his statement before police that Nawaz pointed out that Rafi Muneer sitting in the car. It was not mentioned in his statement that I.O. Arshad Islam Shaikh introduced himself and thereafter conducted the search. He had not mentioned in his statement that the diary containing mobile telephone number of Sarfaraz absconding accused was there nor Rafi Muneer had stopped his car outside his house.

13. PW.5 Syed Muhammad Amil is the proprietor of a clearing agency carrying on business under the name and style of "S. A. Enterprises" testified that one Sarwar had brought accused Sarfaraz to

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him for a container for the purpose of transporting cotton yarn for export to Montreal. Sarfaraz gave me original documents. He submitted the documents before custom authorities and gave him Photostat documents. Sarfaraz rang up someone on mobile telephone bearing mobile No.385301. Driver Anwar brought the truck alongwith Sarfaraz. He then supplied the container to the truck which was attached with the truck. After 5/6 days Sarfaraz rang him and returned the container duly loaded. He found that the container was parked at West Wharf Road. It was about 2.00 or 2.30 P.M. He did not find the driver. He searched for him till 12.00 midnight time but he was not found. At about 4.00 or 4.30 P.M. he again came and found that truck with the container was not there. Afterwards he came to know that Narcotics Authorities had taken away the truck with container. He then came to the office of Narcotics Control Board and was informed about the recovery of charas. He then took the officers of Narcotics Control Board and was informed about the recovery of charas. Then took the officers to the house of Sarfaraz situated near Ayoob Manzil,

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Passport, Identity Card, Rifle etc. were secured. When they came out he found Toyota Car parked. He pointed out to the Narcotics Control Board Officers that the car was of Sarfaraz in which there was one black colour brief case containing two 'tbellies' of heroin powder, passport, identity card, domicile, pistol. P.W.6 Arshad Islam was the officer who secured these articles. He had handed over the original documents viz Manifest, export licence, copy of invoice, packing list, L/C copy to Arshad Islam. In cross-examination he stated that it is correct that when container enters inside K.P.T., pass is issued but in the present case container did not enter in to the customs bounded place. Voluntary stated that he had paid the K.P.T. charges of the container. Accused Nawaz did not come with the truck and did not take container. It is correct that the appraisement of the goods are done when the goods are inside the custom bound.

14. Respondent Muhammad Nawaz in his statement under Section 342 Cr.P.C. simply denied all the allegations against him. However,

respondent Rafi Muneer in reply to the question whether he has any thing else to say, replied as under:-

“I was at home. I just got up at 7.30 A.M. when the P.N.C.B. staff Riaz Soomro and others entered my house forcibly and forced me to accompany them. They picked up my brief case and diary and also took my car and did not allow my driver to drive it. They drove it themselves. They took me to P.N.C.B. Office. They demanded money from me and threatened to involve me in a serious case if it was not paid. I refused and they involved me in this case. This mobile number in my diary is not in my handwriting but it was written subsequently. The copies of the documents were put in my car by them when they took my car. I have no knowledge of these documents. I am innocent.”

15. Both the respondents however examined themselves on oath. Respondent Muhammad Nawaz (DW.1) stated that he was an employee of absconding accused Sarfaraz for two years. He was at Muzaffargarh at the time of the incident and the Narcotic Force had arrested his brother Rab Nawaz who was brought to Muzaffargarh where he was arrested on 12.5.1994 and then brought to Karachi. S.I. Sarfaraz himself wrote the name of Anwar on stamp paper and he did

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not know how to sign. He was not in a position to buy the truck. He left the job of accused Sarfaraz six months before his arrest. In cross-examination he admitted that he used to drive the car of Sarfaraz and took him to the house of respondent Rafi Muneer twice.

16. As per the facts of the case we agree with learned trial judge that the prosecution had purposely overlooked the role of PW.2 Ayub Soomro, the owner of the truck and PW.5 Syed Muhammad Amil, Proprietor of S.A. Enterprises, a clearing agent of the firm. There is no reason to believe why appellant Muhammad Nawaz would purchase the truck from Ayub Soomro under a fake name of Anwar vide a Photostat receipt dated 27.4.1993 with an endorsement bearing another date after two months i.e. 30.6.1993. The entry with the registration office was still in the name of Ayub Soomro and there is no plausible reason why he was not prosecuted. There is no evidence that the appellant Muhammad Nawaz was holding himself out as Anwar. As per the deposition of PW. Ayub Soomro, the alleged sale of truck had taken place in the presence of his driver Iqbal who has

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not been produced. Appellant Muhammad Nawaz was arrested not at his house (where no attempt to arrest him was made) but at Motil Mahal Bus Stop at the pointation of the said driver Iqbal of P.W Ayub Soomro. There is no other evidence against him either of recovery of charas nor of any shipping documents etc. He however had admitted that he was the driver of Safraz but left his job with him six months before his arrest.

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17. As regards respondent Rafi Munir, the prosecution case against him is that the investigation officer apprehended him when he was coming in his car and on search of the car, he recovered Photostat copies of documents from his car. It is pertinent to note that there was no independent witness of this search. We agree with the learned trial court that even if these documents were recovered from the car of the accused, they were not sufficient to prove that the accused Rafi Muneer was involved in the transportation of the charas. Further these documents produced by the prosecution have no nexus with the charas detected on 10.5.1993, as the consignment under the documents

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reached inside West Wharf on 2.5.1993 and West Wharf charges were paid on 4.5.1993 when the consignment was also shipped.

18. Even otherwise the prosecution case is full of lacunas and lapses which cannot be overlooked. PW. 5 had stated that he opened the container which was unlocked where he found some cartons, one or two of them were opened and he found charas in them. The container was brought to P.N.C.B. office where the cartons were counted and samples were obtained from all the 300 cartons and each one of the samples was weighed. At no stage anyone from public was involved as required under section 103 Cr.P.C. except one Abdul Ghani an alleged passerby who was not produced. Muhammad Shafi who is stated to be the attesting witness of the alleged receipt (Photostat) was not produced nor the prosecution produced driver Iqbal who took the truck to the house of appellant Nawaz. Similarly one Sarwar who had brought absconder Sarfraz to PW.5 Syed Muhammad Kamil was also not produced. According to him Sarfraz did not come with the truck and did not take the container. Sarwar

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also pointed out to the Narcotic Control Board Officer to the car of Sarfraz in which there was one black colour briefcase containing two 'thellies' of heroin powder, passport, identity card, domicile, pistol etc. none of them was produced by the prosecution. Even if it is presumed that the appellant Muhammad Nawaz had purchased the truck in his fake name Anwar it will not by itself would make him liable either under Article 3 & 4 of the prohibition (Enforcement of Hadd) Order or under section 8/14 of the Dangerous Drugs Act 1930. Neither possession nor transportation nor sale, export or manufacture of charas has been proved against him or appellant Rafi Munir as provided under the said laws. In SAID SHAH & 2 others vs. The STATE, PLD 1987 S.C. 288, it was held that 'intention of law being that the culprits should be found to have transported or possessed the intoxicant with consciousness about commodity that it was an intoxicant' This decision was followed in another supreme court decision namely AYUB vs. STATE, 1992 SCMR 108. Further there was no Chemical Examiner's Report which is mandatory to identify

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and certify that the contraband was charas as was held in Muhammad

Kaleem vs. THE STATE 1995 MLD 1152.

19. There is no doubt that the prosecution had conducted the entire proceedings in a very dishonest and perverted manner. We fully agree with the learned Session Judge, West, Karachi that:

“Since the investigation officer Arshad Islam Shaikh has intentionally conducted the investigation in this case dishonestly and let off the actual culprits, probably for unlawful consideration, a fresh proper investigation is necessary in this case to prosecute the actual culprits.”

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20. Learned counsel for the parties informed us that they are not sure if any action was taken against the investigation officer of the case Arshad Islam Shaikh and whether the case has been reinvestigated as directed by the learned Sessions Judge. We therefore while approving the directions given by the learned Sessions Judge require the Secretary, Control of Narcotics Division, Government of Pakistan, Islamabad, Director General Anti-Narcotics Force Karachi to take necessary action against Arshad Islam Shaikh and to reinvestigate the case within 2 months hereof under intimation to us.

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21. As a result the appeal fails. The criminal Revision No.9/K/97 filed by Arshad Islam Shaikh is also dismissed for reasons given hereinabove. It was however a matter of grave concern for us that ^{shakir} Rao.M.~~Shikh~~ Naqshbandi advocate had made appearance before us as advocate for the state in the appeal and also as advocate for Arshad Islam Sheikh in revision.

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JUSTICE HAZIQUL KHAIRI
CHIEF JUSTICE.


JUSTICE SALAHUDDIN MIRZA.

Announced on 13.8.2008

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Arshad Mirza
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