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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAFI MUHAMMADI

CRIMINAL APPEAL NO.83/I OF 1996

Abdul Majid son of Khushi Muhammad r/o Mohallah Cobristan Wala, Kharian Gujrat.

... Appellant

Versus

The State ... Respondent

Counsel for the appellant ... Syed Anwarul Haq, Advocate

Counsel for the State ... Mrs.Anwar Raza, Advocate

FIR No., Date & Police Station ... 887, 23-8-1994, Attock Khurd, Attock

Date of order of trial Court ... 3-4-1996

Date of institution ... 16-5-1996

Date of hearing ... 26-6-1996

Date of decision ... 03.07.1996

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JUDGMENT:

SHAFI MUHAMMADI,J.- Appellant Abdul Majeed son of Khushi Muhammad was convicted under Article 4 of the Prohibition(Enforcement of Hadd) Order, 1979, (hereinafter referred to as the Prohibition Order or the said Order) by Judicial Magistrate 30 of Attock vide his judgment dated 3-4-1996 who sentenced him to undergo three years R.I., five stripes and to pay a fine of Rs.5,000/- (in default thereof 6 months R.I.) in a case arising out of FIR No.887/94, dated 24-8-1994 registered under Articles 3/4 of the said Order and lodged at P.S Attock Khurd on the bases of murasila sent by Attaullah ASI who is the complainant and I.O of the case.

Being aggrieved by and dis-satisfied with the conviction and sentence, the appellant preferred the appeal in hand.

2. Brief facts of the case unfolded by the FIR are that on 23-8-1994 the complainant alongwith other police-officials was present at Attock Khurd check-post in connection with checking of Narcotics and un-licenced weapons. At about 1215 hours a bus No.364/LHC, which arrived there from Peshawar, was stopped by the police for checking purposes. The appellant/accused was found suspected, hence, his personal search was carried out which resulted in recovery of 50 grams of heroin and 100 grams of opium. Five grams of material from each item was separated and sent to the chemical examiner. After usual investigation, the accused was challaned and sent up for trial to the court of learned Magistrate where he pleaded not

guilty and claimed trial.

It is notable that body of the FIR shows the time of arrival of the bus in which the appellant was travelling but nothing has been mentioned about the time of incident i.e. recovery of the intoxicants or the time of report. It reflects the working of that police-officer who registered the FIR as well the carelessness of the I.O whose murasala was found silent on this aspect.

3. The prosecution examined following witnesses in support of its case:

(i) Sanaullah Khan (P.W.1). He had kept parcels of seized material in malkhana and handed over the samples to Mohammad Miskin for onward deliver to the Chemical Examiner;

(ii) Mazhar-ul-Haq (P.W.2). He incorporated murasala/complaint into the FIR;

(iii) Atta-Ullah Khan (P.W.3). He is complainant and I.O of the case;

(iv) Mohammad Ilyas (P.W.4). He is head-constable and witness of search and recovery.

Besides these witnesses Khalid Iqbal appeared as court-witness in place of Mohammad Miskeen because Mohammad Miskeen had left for U.K after his dismissal from service. Recovery memos of seized material and personal search produced as Ex.PB and Ex.DC respectively contain names of two witnesses namely Mohammad Ilyas and Mohammad Anar but Mohammad Anar was dropped by the prosecution. No reason has been shown by the prosecution for not examining that witness when he was easily available on account of being a constable.

Not a single witness appears to have been cross-examined.

4. This is not the first case decided by the said Magistrate where the witnesses were not cross-examined. It could be presumed by me that the appellant/accused did not like to cross-examine the witness if one important aspect relating to the statement of appellant/accused recorded u/s 342 Cr.P.C had not attracted my attention. The last question and its answer asked by the court runs as under:

سوال: "کیا آپ اپنا بیان زیر دفعہ 340(2) ض ف دیں گے۔
جواب: میرے اس بیان کو میرا بیان زیر دفعہ 340(2) ض ف سمجھا جاوے"۔

The same question and similar answer was found in an other case arising out of FIR No.1022 dated 26-11-1993 of the same police station and decided by the same court on 14-2-1996 while in the present case FIR No.887 was registered on 24-8-1994 i.e. after about 9 months from the first mentioned FIR and the judgment was pronounced on 3-4-1996 i.e. after about two months from the judgment pronounced in FIR No.1022/93. It leaves no doubt for me to hold that the learned Magistrate is working mechinically like a robot. The learned Magistrate also wrote the following words soon after that question.

سرٹیفکیٹ: "بیان بالا ہماری موجودگی اور سماعت میں قلمبند ہوا ہے۔ بیان بالا کا متن سلزم کو پڑھ کر سنایا اور سمجھایا گیا ہے جس نے بیان کو درست تسلیم کر کے انگوٹھا ثبت کیا ہے"

Similar type of certificate is found on the record of case arising out of FIR No.1022/93. In the light of this so-called certificate, if the whole statement of the appellant is treated to be a statement on oath then the court was not justified to disbelieve the appellant

regarding his denial in respect of alleged recovery of intoxicants besides his assertions that (i) the police concocted a false case against him; and (ii) he is innocent particularly when neither any question was put by the court nor by the counsel for the State to shatter these assertions.

5. Recovery memo of personal search also shows recovery of Rs.120/- but depositions of P.W.3 (I.O) and P.W.4 mention recovery of only Rs.20/-. It has created doubt about the actual amount recovered from the accused/appellant. The police may take a stand that inadvertantly amount of Rs.120/- was mentioned in the memo in place of Rs.20/- which was actually recovered from the appellant. I need not to comment upon this aspect but I have taken this aspect very seriously. Hence it would be proper for all concerned I.Os to mention the amount recovered not only in figures but also in words otherwise such things may be fatal to their career if the courts reached a conclusion that the concerned police officer was a dishonest person.

6. Although it is mentioned at the end of the impugned judgment that "the case property is confiscated to the State and shall be distroyed in accordance with existing rules after the period of appeal or revision, if any, yet that is no mention of production of seized material in the court in accordance to Ex.PB. This is not a proper compliance of proviso to section 516-A Cr.P.C. by the learned court particularly with reference to the words contained in the proviso i.e. "under its supervision and control, obtain and prepare such number of

samples of the property as it may deem fir for safe custody and production before it or any other court and cause destruction of the remaining portion of the property under a certificates issued by it in that behalf".

(underlining is my own)

On account of non-compliance of section 516-A Cr.P.C. the material believed to have been proved can be only that which was sent to the chemical examiner i.e. five grams of heroin and five grams of opium. In the light of this legal position conviction and sentence awarded to the appellant for possessing intoxitants more than 5 grams is not sustainable.

7. It is noticeable that the appellant has also not produced any convincing defence. I have no doubt in my mind that an accused belonging to a different area, much awar from native place, may not be able to produce any defence witness but, if the accused considers himself to be innocent, the law permits him to get himself examined on oath and therefore, he should not hesitate in examining himself. At the same time courts are also not barred to ask court questions to search out the truth particularly in such circumstances where an accused has no sources to engage a defence counsel and is found to be at the mercy of police. The conduct of the court by not asking court questions to find out the truth as observed in this case, is not limited to this particular court but is being observed by this Court in several other cases too which were decided by other courts. In such cases where justice is relied upon the statements of police officials and court is found totally un-interested

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to search out the truth then such proceedings can be termed persecution and not the prosecution in its real sense. Similarly, in most of the cases, it was observed that even the learned advocates do not pay any attention to the importance of getting their client examined u/s 340(2) Cr.P.C and consider that mere denial may be sufficient for acquittal. No doubt, an accused cannot be forced to get himself examined on oath and burden is on the prosecution to prove its case but even a small piece of evidence can become a foundation for conviction in similar manners as a slightest doubt in the case of prosecution can prove fatal to prosecution case. However there is much difference between a doubt and technical lacunae. It is only the doubt which gives benefit to an accused but the technical lacunae cannot be a guarantee for acquittal of an accused in each and every case.

On the bases of this proposition the appeal in hand is dismissed because technical lacunae shown by the prosecution in this case are not sufficient to create doubt in recovery of seized intoxicants but undoubtedly doubt has been created regarding quantity of the heroin and opium as has been discussed above in para-6.

8. Upshot of the discussion is that sentence of three years R.I. is reduced to one year R.I. and fine is reduced from Rs.5000/- (in lieu thereof two months S.I.). Sentence of stripes is being dropped in the light of Act VII of 1996. The appellant would be

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entitled for benefits of section 382-B Cr.P.C.

It may be necessary to point out that sentence in the appeal in hand has been modified in accordance to the judgment passed in an un-reported case in Criminal Appeal No.94/I of 1996 which was preferred against the judgment pronounced by the same Magistrate in FIR No.1022 of 1993 as mentioned in para-4 above who passed the impugned judgment, which is the subject matter of the appeal in hand.

With this modification in the sentence, the appeal is dismissed.

(Shafi Muhammadi)
Judge

Approved for reporting.

(Shafi Muhammadi)
Judge

Islamabad, the
03.07.1996
Iqbal