

IN THE FEDERAL SHARIAT COURT  
( Appellate jurisdiction )

(16)

PRESENT

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.228/L/1996.

Ehsan Ullah s/o ..... Appellant  
Nazar Hussain  
Caste Khichi, r/o  
Khichi Kalan  
District Bhakkar.

Versus

The State ..... Respondent

Counsel for the ..... Mr.Massod Mirza,  
appellant Advocate

Counsel for the ..... Mr.Khalid Naveed Dar,  
State Advocate

FIR No. date and ..... 300 dated 21-08-1994  
police station P.S. Saddar Bhakkar

Date of the judgment ..... 31-07-1996  
of the trial court

Date of Institution ..... 12-08-1996

Date of Hearing ..... 30-10-1997

Date of Decision ..... 5-12-1997

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JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment dated 31-07-1996 delivered by the Court of Civil Judge/Magistrate Section-30, Bhakkar whereby he has been convicted under article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 hereafter referred to as the said Order and has been sentenced for three years R.I. and a fine of Rs:10,000/- in default of the payment of the fine to undergo for further R.I./three months.

2. Story of prosecution in brief is that on 21-8-1994 at about 12-00 noon, Musarat Hussain, ASI alongwith Muhammad Tariq, ASI and other constables were present at Pull Sheikh Rao in search of the accused Ehsanullah in case FIR No.281 dated 3-8-1994. On receipt of spy information that the said accused was selling heroin standing near Khichi Kalan Mor, a raid was conducted and the accused was apprehended. On his personal search 18 grams of heroin wrapped in plastic paper were recovered from the right flank pocket of his shirt, which was taken into possession and after registration of the case at police station Saddar Bhakkar and after investigation, the

appellant was challaned, and was charged under articles 3 and 4 of the said order to which he did not plead guilty.

3. Prosecution examined five witnesses. Muhammad Tariq ASI (PW-1) deposed that on 21-8-1994 while posted at police station Saddar Bhakkar, accompanied by other police personnel he was present at Pull Sheikh Rao in connection with the arrest of the accused Ehsan Ullah in a case No.281/94 under section 13/20/65 Arms Ordinance and received spy information that the said person was present at Khichi Mor who also happens to be a habitual seller of narcotics. He has proved the recovery of the contraband item by ASI Musarat Hussain and arrest of the appellant. He has also proved separation of one gram of heroin, preparing a parcel and sealing it. During cross he has admitted that the police party started from police station at 1200 hours and that they had gone by a private wagon and the wagon was brought by him. He has further admitted that around Pull Sheikh Rao there was enough population and that the investigation officer had not joined

any private person. He has further admitted that at the time of leaving the police station entries are made into police diary.

Allah Nawaz (PW-2) H.C. has proved that he joined investigation on 24-8-1993 i.e. three days after the occurrence. He joined

Musarat Hussain ASI, (PW-5) and the appellant/accused was on police remand. During investigation the appellant disclosed

that he used to sell heroin in partnership with Zaman @ Zama and another and that some more heroin was available with

Zaman and that in case he is arrested some more heroin can be recovered and that he could point out the location of Zama. During

cross he has deposed that on 24-8-1993 appellant Ehsanullah

got recovered some more heroin. Muhammad Ashraf ASI (PW-3) has

proved the receipt of <sup>FIR</sup> ~~murasila~~ and record of Ex.PB on 21-8-1994 by

him. He has also proved that on the same date he ~~has~~ received

two parcels of the heroin: one that of sample and another that of the remaining heroin and the sample of heroin was handed

over by him to constable Muhammad Tufail for taking it to the

office of chemical examiner Rawalpindi. / <sup>Whatever</sup> ~~xxxxxx~~ the time the

parcels were in his possession none had tampered with the same.

Muhammad Tufail constable (PW-4) has proved the receipt of the

parcel containing sample of heroin on 22-8-1994/had handed over the <sup>who</sup>

same in the office of the chemical examiner Rawalpindi on the next day i.e. on 23-8-1994 and that whatever the time parcel was with him none had tampered with it. Musarat Hussain ASI (PW-1) and Investigation Officer has proved that on 21-8-1994 he had gone in the company of other police personnel to find and arrest the appellant in crime case No.281/94 under section 13/20/65 Arms Ordinance. He has also proved that on the basis of the spy information he got hold of the appellant near Khichi Kalan Mor and recovered from him 18 grams of heroin out of which one gram was separated and sealed the sample, The remaining heroin P/1 was taken into possession by him. He recorded the statements of the witnesses of recovery under section 161 Cr.P.C. and then he arrested and challaned the appellant. During cross he has admitted that he did not remember as to whether on the date of occurrence some entry was made in the police diary or not. He has also admitted that they reached at Pull Sheikh Rao at 11-45 hours in the day. He has admitted that around Pull Sheikh Rao there were enough inhabitants and that he did not taken any private persons to be a witness of recovery because no independent person gets ready to become a witness.

191

He has also admitted that they had gone by a wagon. He has admitted that he had himself weighed the heroin on the basis of weights/10, 2, 5 and 1 grams and these weights are part and parcel of the kit.

During his statement under section 342 Cr.P.C. the appellant has denied all the specific questions. During a question as to why this case has been registered against him he has replied.

تمام گواہوں پولیس ملازمین ہیں۔ دراصل قمر مجیب محکمہ پولیس میں آئیڈ پرچہ درج کرایا تھا۔ اس وجہ سے قمر نے دوسرے پولیس ملازمین سے ساز باز کر کے میرے خلاف پلے 13/20/65 آرمنز آرڈیننس کا مقدمہ بنوایا۔ اور پھر یہ مقدمہ درج کرایا جو کہ اسٹی سائزس کا نتیجہ ہے۔

He has declined to be examined on oath under section

340 (2) Cr.P.C. In his defence he has examined one witness

namely Amir Ahmed Moharrer of police station Saddar Bhakkar.

In his examination-in-chief he has deposed that he has

brought the record of crime No.168/89 of his police station

which is Ex.DA. During cross he has admitted that he has

not brought FIR and that the FIR Ex.DA was registered

according to law.

3. I have heard the learned counsel for appellant

and State. The learned counsel for appellant has contended

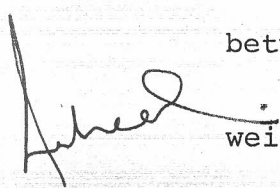
that the story of prosecution in mechanical, fanciful and could not be believed; that the star witness ASI, Musarat Hussain Shah (PW-5) is both the complainant and Investigation Officer and this position has vitiated the proceedings and in this respect reliance has been placed on 1991 MLD, 443, 1995 MLD 1237, 1989 P.Cr.LJ 1334, PLD 1997 SC 408; that there is a conflict between the deposition of PW-2 indicating that the recovery was made on 24-8-1994 and PW-5 who is deposing that recovery of 18 grams of heroin was made on 21-8-1994; that PW-5, the Investigation Officer, has admitted that he does not remember as to whether an entry in police register was made when the police party had proceeded for arresting the appellant in a case and this is an irregularity which cannot be brushed aside; that in case the Investigation Officer had gone to arrest the appellant under any case under section 13/20/65 Arms Ordinance, there was no need of taking the weight kit; that the case is that of two versions, one that of occurrence on 21-8-1994 and another that of recovery on 24-8-1994, hence it is a case of doubtful nature; that an advance spy information was available with the police personnel and they could have arranged independent private persons as

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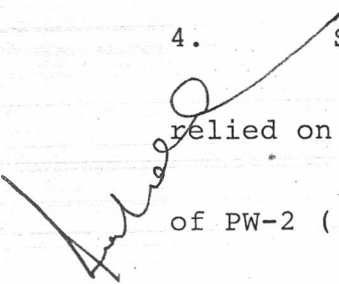
- 8 -

the witnesses of recovery yet it has not been done and in this context reliance has been placed on 1986 PSC 28, that the raiding party should have arranged a fake purchaser in the presence of the information of the sale of heroin yet it was not done and in this context reliance has been<sup>placed</sup> on 1992 P.Cr.LJ 1750; that an enmity with another police official is emerging from the evidence of the case per Ex.DA which is indicative of the direct enmity between Qamar khichi and the appellant, yet it has not been considered and finally it has been contended that the appellant is not a previous convict and therefore it is a case of mitigating circumstances. The learned counsel for the State has contended that PW-2 had joined the investigation on 24-8-1994 and was not a recovery witness on 21-8-1994 and therefore there is no discrepancy between the deposition of PW-2 and PW-5; that the kit of weight is usually a part of investigation/patrolling team and they normally keep it with them for use at the proper occasion; that the Investigation Officer and complainant can be the same person and the cases cited are distinguishable from the present case; that there is no violence of provisions of section/103 Cr.P.C. as it is not applicable on the persons





who are not in a place and in this context the reliance is placed on the majority view of the case cited as PLD 1996 SC 574; that the police is not in any way inimical to the appellant and in case many FIRs have cropped up at various police stations under different provisions of law it is due to ~~the~~ appellant's own nature of being a habitual criminal and in this respect reliance is placed on 1997 P.Cr.LJ 1088 (FSC) and finally it has been contended that the Investigation Officer, PW-5 has already explained that normally public do not co-operate with the police to become an independent witness and therefore the Investigation Officer was constrained to have kept police personnel as the witnesses of recovery and that officials of the police are as good witnesses as is the general public.

4.  Since the learned counsel for appellant has mainly relied on the apparent discrepancy between the deposition of PW-2 ( constable Allah Nawaz ) and PW-5 (ASI Musarat Hussain Shah), the Investigation Officer of the case, I propose first of all to deal with this contention. Allah Nawaz, PW-2, has clearly mentioned that he was made to join investigation on 24th of August and that on that day the appellant, while being

in police custody, had disclosed that he could lead to his partner Zaman @ Zama from whom heroin could be recovered and in fact it appears that this recovery on 24-8-1994 was made from that person Zaman on the pointation of the present appellant and there is no nexus with the recovery of 18 grams of heroin on 21-8-1994 in the present case in which there are witnesses other than the PW-2 and that recovery is the subject matter of the present case. The recovery memo Ex.PA is indicative that the witnesses of the recovery of 18 grams of heroin are Muhammad Tariq ASI, (PW-1), Shaukat Ali and Musarat Hussain (PW-5). Both the recovery witnesses namely PW-1 and PW-5, have proved the recovery of 18 grams of heroin and this is that narcotic about which the report of the chemical examiner Ex.PE is also positive. Consequently I am of the considered view that this contention of the counsel for the appellant is misconceived and in fact the recovery of 18 grams of heroin from the appellant has been proved beyond any reasonable doubts.

5. It has been contended that PW-1 (Muhammad Tariq) has replied to a suggestion during cross that the police

party started from police station at 12 hours during the day time, whereas PW-5 (Musarat Hussain ) has admitted that the police had reached Pull Sheikh Rao at 11-45 hours during the day and this is the conflict between the two witnesses.

I do not find any force in this contention because it makes a difference of half an hour to 45 minutes as the police party had gone in a wagon and not on foot. This so called contradiction is minor in nature and could not be considered substantial to set aside the story of prosecution. Even otherwise the witnesses are supposed neither to be parrot like nor identical to be/cassets of the tape-recorders in which the programmes are set and when the swich of the tape recorder is made on the cassetes start repeating the same words. It is an age-old principle of justice that such minor discrepancies which are not substantial in nature do inspire confidence in the witnesses and in case the witnesses go on repeating the same words they are considered to be the tutored ones. Consequently this contention is rejected outrightly.

6. The contention that same person is a complainant and Investigation Officer in the present case is an irregularity

(22)

has been dealt with at length in a recent unreported case of a DB of this court in Cr.Appeal No.142/I of 1996. (Re: Taga Khan etc Vs. The State) at para No.5 of the judgment. The said para is reproduced here.

"At the outset, the first and foremost point which has agitated our mind is that in the presence of clear and binding rulings of the superior courts of Pakistan as well as judicial principles accepted by the civilised world since times immemorial, it is totally unjust that same person becomes a complainant, investigation officer, is Station House Officer of the police station in which complaint is lodged as FIR, is the first informer and also holds powers of a criminal court being a Naib Tehsildar recording partly judicial confessional statements and remanding the appellants to himself. The age old principles and practices of the courts given below are trampled in this case in maxims (1) a communi observantia non est recedendum (from common observance there shall be no departure), (2) Cursus curia est lex Curiae

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(the practice of the court is the law of the court), (3) nemo debet esse judex in propria

(None should be a Judge in his own cause) causa sua / (a maxim which is philosophical

background of section 556 Cr.PC which reads:

"Case in which Judge or Magistrate is personally interested: No Judge or Magistrate shall, except with the permission of the court to which an appeal lies from his court, try any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself."

(4) nemo dubus utatur officiis (No one should hold

two offices), (5) nemo jus sibi dicere potest ( no

one can delare the law for himself ), (6) nemo potest

gldii potestam sibi vel cujus alterius coercionis ad

alium trasferre (No one, to whom is delegated a power

of coercion can himself transfer it to another), (7)

nemo sibi esse judex vel suis jus dicere debet (no one

ought to be his own judge or the tribunal in his own affairs.

What has happened is that Riaz Ahmed (PW-10) is addressing

himself as جناب عالی in his murasila/complaint dated 4.8.94

(23)

(Ex.P.O) to which he himself gives caption as ابتدائی اطلاع رپورٹ  
or F.I.R. giving information about the incident. As admitted  
by him is his deposition he was Naib Tehsildar, Kingri on  
the same date was also S.H.O. of police station Levies,  
Kingri. His original complaint addressed to himself being  
S.H.O. and captioned as F.I.R does not indicate the name  
of the first informer, but during examination-in-chief he  
has disclosed that first informer was Jamadar Levies Rarasham  
who came to him at 7 A.M. on 4-8-1994 and told him about the  
decoity at Saratay. Neither this first informer was examined,  
nor his name appears in the clendar of witnesses in the  
challan. The challan was finalised by the same complainant/  
Naib Tehsildar as Investigation Officer and S.H.O. of police  
station Levies, Rarasham, but mysteriosly in column No.1 of  
the challan one Wadera Asad Khan s/o Wadera Hasan Khan  
Jahanani Khetrان of District Barkhan is appearing as first  
informer and complainant. But again he was neither examined  
nor included in the calender of witnesses. Throughout the  
evidence in the Court, only once Wadera Asad comes into  
picture and immediately fades away when during cross to  
counsel for appellant Shah Gul, to a suggestion Riaz Ahmed

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(PW-10) has denied the company of Wadera Asad and Wadera Gulzar from the beginning till end of investigation and that appellant Shah Gul was arrested on their instance. This Asad Khan s/o Hasan Khan is now petitioner in Cr.Revision 8-8-1996 Petition No.38/I/96 dated/in which he has not disclosed his relationship with deceased, but has prayed for enhancement of sentence to death. It appears that he has not signed this petition and signatures are that of his counsel Muhammad Munir Peracha. No affidavit is attached with the petition. To our surprise, there is one another person Karam Khan s/o Murad Khan by caste Khetran of District Barkhan who claims in para No.1 of his application dated 13-10-1996 that he is the petitioner in application 38 (i.e. Cr.Rev.38/I-96) and that he and the people of the area investigated and with much difficulty got arrested the accused/appellants. In para No.3 of this application Karam is disclosing:

”سائل کا ایک معتبر آدمی قتل ہوا ہے“

There is one application dated 18-9-1994 available in the police file and has not been exhibited at all. It is addressed to Assistant Commissioner, Moosa Khel and is in the nature of a direct complaint under section 200 Cr.P.C. The complainant is Wadera Asad Khan s/o Hasan Khan and is indicating that

(24)

deceased was a paternal cousin of the complainant. In this complaint he named appellant No.1 to 6 as the respondents/accused and is silent about appellant No.7 i.e. Syed Essa Shah. This complaint has been disposed off by the Magistrate (A.C.Moosa Khel) in violation of the mandatory provisions of chapter XVI of Cr.P.C. It has simply been forwarded to Naib Tehsildar Kingri (i.e PW-10) with directions " حسب ضابطہ کاروائی آئی جائے " on 18-9-1994. On the same date there is another

order in different writing and appears to be that of Riaz Ahmed (PW-10) himself but in his capacity as a Magistrate.

The order reads: مستغیث کے استغاثہ کی نائب میں گواہیاں طلب ہوں۔

That is also the reason, prima facie, that in challan dated 27-9-1994 Asad Khan has been shown in column No.1 as first informer and complainant. It appears that remand of appellant Wazir from 15-9-1994 to 18-9-1994 was given by this complainant cum-Investigation Officer while officiating as a Magistrate.

All this illegality has clearly vitiated the proceedings as the Investigation Officer Riaz Ahmed has worked out of jurisdiction, and all his actions are found to be corum non judice. Such officers create a mockery of law. In this context clear rulings are available, inter alia, cited as NLR 1989 SD 11, NLR 1995 Cr.105. This irregularity is not cureable as it

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is a view held since times immemorial that any act out of jurisdiction is void and a nullity in the eyes of law.

Now it can well be seen that all proceedings get vitiated for being void upon a complainant-cum-Investigation Officer who also act or pose to act as a magistrate in the same case which act in itself is either corum non judice or calls for a writ of quo warranto. Section 556 Cr.P.C. is clear on this point. In the present case the complainant-cum-Investigation Officer (PW-5) has neither acted as a criminal court nor has posed as such. Hence the proceedings cannot be termed as void. So far as the maxim nemo duobus utatur officiis (No one should hold two offices) is concerned, in the present case Musarat Hussain Shah (PW-5) has held one office of Investigation Officer.

Complainant is State as an abstract idea and he only represents it as a concrete living rational object. As such, in my humble opinion, it is no office. Other maxims quoted in the above-mentioned unreported judgment are not applicable. Consequently, this contention fails in the circumstances of the present case.

7. All other contentions regarding section 103 Cr.P.C or admission of PW-5 that he does not remember whether entry was made in police diary or not whereas other PWs have admitted such entries

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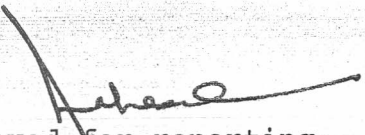
are misconceived. Appellant was found on the road selling heroin and his personal search resulted into the recovery of 18 grams of the said intoxicant and therefore no violation of section 103 Cr.P.C. has taken place.

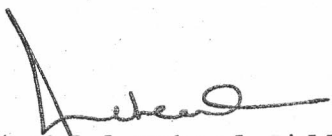
8. I do not find any mitigating circumstances as the appellant has already been awarded with lesser punishment.

Consequently the impugned judgment is upheld. Appeal fails.

Benefit of section 382-B Cr.P.C is extended to the appellant.

Appeal dismissed.

  
Approved for reporting

  
( Abdul Waheed Siddiqui )  
Judge

Islamabad, the 5th  
December 1997.  
Zain/\*