IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT
MR.JUSTICE HAZIQUL KHAIRI CHIEF JUSTICE
MR.JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO.30/K OF 2006

Wahab Ali son of Ali Haider and Bashir Ahmad son of Muhammad Ameen both residents of H.No.1160, Street No.15, Allama Iqbal Colony, Karachi	--	Appellants
	Versus	
The State	--	Respondent
Counsel for the appellants	--	Mr. Mehmood A..Qureshi, Advocate
Counsel for the State	--	Mr. Agha Zafir Ali, Assistant Advocate General
No.date of FIR and Police station	--	No.01/97 dated 12.06.1997 Excise (Crime Branch) KARACHI
Date of the order of trial Court	---	31.05.2006
Date of institution	--	04.07.2006
Date of hearing	--	01.11.2007
Date of decision	---	14.1.2008

JUDGEMENT

SALAHUDDIN MIRZA, J:- Appellants Wahab Ali and Bashir Ahmad have challenged their conviction under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, (hereinafter referred to as "the Order"), whereunder they have been sentenced to life imprisonment and payment of fine which, in the case of Wahab Ali, is Rs. 25,000/- or to S.I. for two months in default of its payment whereas in case of Bashir Ahmad the amount of fine is Rs. 50,000/- and simple imprisonment in default of its payment is four months. The judgement was passed on 31.5.2006 by learned 1st. Additional Sessions Judge Karachi South.

2. According to the prosecution, Excise Inspector Nazir Ahmad of Crime Branch, Sindh Excise Police, Karachi, acting on spy information that three persons ----- Muhammad Iqbal, Wahab Ali and Bashir Ahmad ----- were engaged in the nefarious trade of smuggling heroin powder from 'Ilaqa Ghair' to Karachi and disposing it off to various retailers in the city, he obtained special permission from Excise & Taxation

Officer Malik Muhammad Hayat to undertake special patrolling in the suspected areas of the city and commenced patrolling the suspected areas on 12.6.1997 with a team of the excise staff consisting of AETO Syed Fazal Abbas Shah, Inspectors Mirza Ameer Anwar and Choudhry Muhammad Maqsood and some subordinate staff, and at about 1900 hours they stopped two persons near Madani Masjid, Dhobi Ghat, in the presence of two witnesses Amanullah and Saif Ali, who were carrying a shopping bag in their right hand. The two men gave their names as Muhammad Iqbal and Wahab Ali. On personal search conducted by Inspector Nazeer Ahmad, an old national identity card and Rs.500/- were recovered from Iqbal and Wahab Ali's search yielded copy of his national identity card and Rs. 300/- in cash. Both of them were then formally arrested. Search of the shopping bag of Wahab Ali yielded one cloth 'theli' containing heroin powder and search of Iqbal (absconder) also yielded heroin powder. When weighed at the spot, both the 'thelies' weighed one K.G. each. 20 grams of powder was taken from each 'theli' and separately sealed in two plastic 'thelis' which were then stapled and

then sealed in two separate khaki envelopes for chemical examination. The two shopping bags were also sealed and musheernama of their securing was prepared. Both the apprehended accused took the police party to House No. 95, Gali No. 33, Noor Muhammad Village, Juna Dhobi Ghat, Liyari, Karachi, and disclosed that more heroin was stocked there and their third accomplice was present in the house. Inspector Nazeer then raided the house alongwith his staff and the two witnesses, found its door open and entered the same and found a man in a room on ground floor who gave his name as Bashir Ahmad (one of the appellants) whose personal search did not yield any incriminating article but the search of the room yielded a polythene 'bori' from under a 'charpoy', containing 21 cloth-thelies full of heroin powder. Bashir Ahmad was then also arrested. Each of the 'cloth-thelies' was weighed at the spot and found to contain 1 KG heroin. Thus 21 KG of heroin was recovered from the 21 'thelies'. Inspector Nazeer took out twenty (20) gram powder from each of the 21 'thelies' and packed them in plastic 'thelies' which were all then sealed in a khaki paper envelope. The 21

'thelies' were then sealed and ~~were then~~ put back in the 'bori' which was then also sealed and secured and musheernama in this regard was also prepared. The recovered heroin, weighing in all 23 KG, and the three accused were then brought to Excise Police Station at Block-64, Sindh Secretariat, Karachi, where the case against the accused was registered under Article 4 of "the Order". During the investigation, the three arrested accused disclosed that Tariq Khan Afridi, Behram Khan Afridi and Aitbar Shah were also involved in this racket and had supplied to them the recovered heroin powder. These three persons could not be arrested and were eventually declared proclaimed offenders. After the completion of investigation, the three arrested accused were sent up for trial in the Sessions Court Karachi South where they were charged on 3.8.1998 under Articles 3 and 4 of "the Order". Accused Iqbal was granted bail during the trial but jumped his bail and absconded and could not be arrested thereafter and he was also declared proclaimed offender.

3. The prosecution examined PW 1 Amanullah taxi driver as a musheer of recovery of contraband material from the personal search of

Iqbal and appellant Wahab, of raid on the house from where appellant Bashir was arrested and further quantity of heroin powder was recovered, PW 2 Shah Wali, excise Head Constable is the second musheer of the 'karrawai', PW 3 is the complainant and investigating officer Inspector Nazeer Ahmad. These are the only three witnesses examined by the prosecution in support of its case.

4. In his 342 Cr.P.C. statement, appellant Bashir Ahmad did not reveal any material fact except denying the truth of the prosecution case. However, he examined himself on oath under section 340(2) Cr.P.C. in which he said that he was arrested from his residence in Lyari on 12 June at about 0500/0600 hours. He claimed to be a member of a welfare committee by the name of "YAKJEHTI COUNCIL" and that he worked for extermination of drug peddling from his mohalla. He alleged that excise staff demanded bribe for his release and on his refusal to do so he was challaned in the Court. Appellant Bashir also examined his brother Mushtaq Ahmad as DW 1 who said that he lived a kilometer or so away from the house of Bashir and at about 8 A. M. Bashir's wife came to him

and informed him that police in civil clothes had taken away Bashir from the house whereupon he went to Ilaq police station and CIA Centre but could not find any clue about his brother and then at about 21 hours he learnt that Excise staff had arrested him whereupon he went to Excise Police Station and met inspector Nazeer who said he had already lodged FIR against his brother.

5. Appellant Wahab Ali in his 342 Cr.P.C Statement stated that he was arrested from Hotel Shaheen in Shershah at about 2200 hours when he was taking his meals and Rs. 25,000/- were recovered from his possession and was taken to Excise Police Station and on the way he was promised that he would be released if he did not insist on the return of his money to which he did not agree whereupon he was involved in the case.

6. We have gone through the evidence on record with the help of learned counsel of the appellant and learned State counsel.

7. The first objection raised by learned counsel for the appellants is that PW-1 and PW-2 have not given names of the members of the

raiding party. However, PW 1 Amanullah is a taxi driver who was available on the spot when absconder Iqbal and appellant Wahab Ali were searched and then arrested. He was an outsider and was not expected to know the names of the police party. Even so, no question to that effect was put to him in this regard. The second witness, although a jamadar of the excise department, was also not asked to name the members of the raiding party. There is no law which enjoins that each and every witness should give names of all the members of the raiding party in his examination-in-chief. It was for the defence advocate to put questions to these two witnesses in respect of the names of the raiding party, if they were so inclined, and this objection could have been raised only if these witnesses were put questions in this regard and they failed to give names of the members of the raiding party. As such, the objection raised is without any basis.

8. There are however some serious contradictions in the prosecution evidence which make it highly suspect. **Firstly**, PW 2 HC Saif Ali, one of the musheers of recovery of heroin from the person of Wahab and

Iqbal, and who is also a member of the excise party which had set out to search, find out and arrest the culprits in the light of spy information received by PW 3 Nazeer, says in his cross examination that *"before leaving police station, entry was made in roznamcha regarding departure"*. On the other hand, PW 3 Inspector Nazeer Ahmad, who is head of the excise party which allegedly intercepted appellant Wahab and absconder Iqbal and who is complainant as well as investigating officer of the case, stated that *"It is correct that I have not mentioned about my departure in any diary of P.S. Voluntarily says that such diaries were used to be maintained much earlier but now no such diaries are maintained"*. PW3 Inspector Nazeer then contradicted himself when during the very next lines he stated that *"it is correct to suggest that at the time of departure entries in the roznamcha is (are) to be made. It is correct that such entry number has been mentioned in the present case"*. Thus, while PW 2 stated that entry in roznamcha was made about the departure of the excise party from the excise police station but the head of the raiding party, who is the complainant and investigating

officer of the case as well, first stated that no such entry was made because such practice was no longer in vogue but then admitted that such roznamcha entry was made. Inspector Nazeer has thus shown himself to be an unreliable person who could say two contradictory things in one and the same breath. This roznamcha entry has, at any rate, not been produced in evidence and in the light of what has been held in the judgements reported as **2001 P Cr. L J 1875** (Hakim Ali Vs State) and **1998 P Cr. L J 1287** (Arif Khan Vs State) this failure of the prosecution throws further doubt on the authenticity of the whole prosecution case about the inspector going on gasht on the date and time when the two accused were apprehended from the roadside and the third apprehended from the house to which the two accused led the police party. **Secondly,** PW 1 Amanullah says that 'mushirnama of recovery was not prepared at the police station. All the formalities in the shape of writing were made **at the bonnet (of the car)**' but this is contradicted by the other musheer PW 2 Excise Jamadar Saifullah who said that 'the memo of arrest and recovery of accused Wahab was prepared **while**

sitting inside the car'. **Thirdly,** PW 2 Saif Ali says that '*accused persons tried to run away but failed. Accused covered about 10 paces in running but were arrested by us'* but PW 3 Inspector Nazeer Ahmad says that *'the accused Wahab Ali did not attempt to escape from the scene ..... all raiding party personnel were standing scatteredly'* . **Fourthly,** Jamadar Saif Ali (PW2) says that 'the 'thelies' of heroin recovered from the house were weighed by HC Eidha Khan' but Inspector Nazeer Ahmad (PW3) says that 'Sepoy M. Dawood had weighed the 'thelies' of heroin .....'.In our view, the official who weighted the heroin should also have been examined in the Court but neither Eidha Khan nor Sepoy M. Dawood has been examined as a witness. Learned State counsel argued that these are minor discrepancies and a mountain may not be made out of a molehill. We are not inclined to agree with him. These are not minor discrepancies but serious contradictions which throw doubt on the entire prosecution case.

9. The mystery of the FIR number on the plastic bag inside the bag (bora) could not be satisfactorily explained by the prosecution. All the

three prosecution witnesses say that the 'bora' recovered from the house was sealed at the spot. Admittedly, the FIR was not recorded by that time and it was recorded after the accused and the contraband material was brought to the excise police station. However, after the 'bora' was opened in the Court, PW3 Inspector Nazeer Ahmad had to admit that *'I see cloth bag No.1 of heroin powder taken out from the bag (bora) and it bears FIR number'* . Learned State counsel could not clarify as to how the FIR number was found written on the 'clothe bag No. 1 recovered from the bora' when the 'bora' was sealed at the spot and by that time FIR was not lodged. The obvious inference is that the 'bora' had not been sealed at the spot and it was sealed at the excise police station afterwards after the recording of the FIR.

10. The report of the Chemical Examiner (Ex. 42) shows that the samples sent to him were found to be 'identical with heroin'. However, the samples were sent to the Chemical Examiner vide letter dated 13.6.1997 but were received by him on 16.6.1997. The prosecution has not been able to clarify as to where the samples remained for these three

or four days. Learned counsel for the appellants has referred us in this regard to the judgements reported as **1996 P Cr. L J 843** (Muhammad Akram Khan Vs The State), **1986 P Cr. L J 1723** (Mst. Sultan Zari Vs The State) and **1998 P Cr. L J 1462** (Javed Akhtar Vs The State) where such unexplained delay in the receipt of the samples by the Chemical Examiner has been held to be fatal to the prosecution case.

11. We also note that out of the two musheers, who authenticated all the proceedings in the investigation, one is an excise jamadar (PW 2) but the other musheer PW 1 taxi driver Amanullah also does not appear to be an independent witness and it is highly unlikely that he was just picked up from the road, as stated by Inspector Nazeer Ahmad. In cross examination he (Amanullah) admits that he has been the servant of the brother of Excise Inspector Mirza Ameer Anwar who was a member of the raiding party which apprehended appellant and absconding accused Iqbal. Not only this, Amanullah further admits that he had acted as prosecution witness in two other excise cases bearing FIR numbers 2/97 and 5/97. In view of this old relationship between Amanullah and the

excise staff, it is amusing to note that PW 3 Inspector Nazeer says in his examination-in-chief *"AETO Abbas Shah (one of the members of the raiding party) stopped one person on the road and informed him that he (Shah) has to arrest some persons in connection of supply of heroin powder and express(ed) his desire to become witness. The said person whose name was Amanullah consented to become a witness"*. These words were evidently uttered by Inspector Nazeer to deceive the Court into believing that Amanullah was a stranger to the excise party and thus an independent witness whereas Amanullah was well-known to the excise staff, he was an ex-servant of the brother of an excise inspector who was a member of the raiding party. In this regard we are referred to the judgement reported as **1976 P Cr. L J 768** (Abdul Ghaffar Vs The State) in which the testimony of such stock witnesses is held unreliable and it is held that "I find that Azizullah PW2 is a stock witness, who has admittedly appeared in a number of theft cases. His testimony cannot therefore be relied upon".

12. In the light of observations made in the preceding paragraphs, we cannot agree with learned trial Judge that the prosecution had proved its case beyond any shadow of doubt. Contradictions and discrepancies noted by us in the evidence do entitle the appellants to the benefit of doubt. We therefore accept the appeal, set aside impugned judgement and the conviction of the appellants and direct that the appellants be released forthwith if not required in any other case.

JUSTICE SALAHUDDIN MIRZA

JUSTICE HAZIQUL KHAIRI
Chief Justice

Announced at Karachi
On 14-1-2008
ABDUL RAHMAN/**