IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 5/P OF 2008

1. Ishfaq Ahmed son of Mushtaq Ahmed
   R/o Chairman Office, Peshawar.
2. Kamran son of Abdul Wadood,
   R/o Faqir Abad No.1 Peshawar

.... Appellants

Versus

The State	....	Respondent
Counsel for appellant	....	Malik Amjad Inayat, Advocate
Counsel for the State	....	Raja Shahid Mahmood Abbasi Deputy Prosecutor General
FIR. No. Date & Police Station	....	772, 13.11.2007 Faqirabad, Peshawar
Date of judgment of trial court	....	11.06.2008
Dates of Institution	....	22.07.2008
Date of hearing	....	20.01.2009
Date of decision	....	20.01.2009

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JUDGMENT

SYED AFZAL HAIDER, JUDGE.- Through this Criminal Appeal Ishfaq Ahmad and Kamran have challenged their conviction and sentence passed by Mr. Muhammad Ayaz, learned Judicial Magistrate VI, Peshawar under Articles 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 whereby both have been sentenced to three years simple imprisonment on each count and to pay a fine of Rs.2000/- each on both counts. Both the sentences were ordered to run concurrently.

2. A crime report was registered under Articles 3 & 4 of Prohibition (Enforcement of Hadd) Order, 1979 as FIR No.772 dated 13.11.2007 regarding an occurrence said to have taken place in the area of Police Station, Faqirabad District Peshawar on receipt of a murasala Ex.P-5/1, sent by Khurshid Khan, Inspector/SHO from Government College Chowk. This written intimation became the basis for registration of formal FIR No.772 by Sultan Roam Khan S.I. PW.2, in the Faqir Abad Police Station.

3. The basic facts, stated in the crime report are that on 12.11.2007 Khurshid Khan, Inspector received a spy information that a huge quantity of liquor was about to be transported for distribution among the customers through Suzuki car bearing registered number FXD-9048. The police party thereupon set up "Nakabandi" and in the meanwhile the same vehicle came at the spot. It was made to halt for checking. The driver disclosed his name as Kamran and his companion identified himself as Ishtiaq Ahmad. The search of car led to recovery of 130 bottles of liquor. On further interrogation both the accused disclosed a further haul and on their pointation a drum containing 215 kilograms liquor was also recovered by the police from a garrage. Hence the murasala Ex.PW.5/1 was drafted by PW.5 Khurshid Khan Inspector/SHO on the basis of which formal FIR No.772. Ex.P.W.2/1 was registered against the accused on 13.11.2007.

4. After completing codal formalities of the investigation the local police submitted in the Court a report under section 173 of the Code of Criminal Procedure requiring the accused to face trial under Articles 3 &

4 of Prohibition (Enforcement of Hadd) Order, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced five witnesses during the trial. Abdul Rasheed Khan, SHO appeared as PW.1. He had drafted murasala Ex.PW.5/1 on the basis of which formal FIR was registered by Sultan Roam Khan P.W.2. Shafiullah P.W.3 is a marginal witness of recovery memo Ex.P.W.3/1 whereby 130 bottles of liquor were seized by the Investigating Officer, Murad Ali, S.I. P.W.4. The latter investigated and interrogated them in the instant case after formally arresting the accused. He also recorded their statements under section 161 of the Code of Criminal Procedure. He produced both the accused before Magistrate for recording confessional statement under section 164/364 of the Code of Criminal Procedure but both the accused refused to confess the guilt. Khursheed Khan, SHO appeared at the trial as P.W.5. He deposed almost in line with the terms of murasala written by him on the basis of which the FIR, mentioned above, was registered.

6. The trial court after close of the prosecution evidence examined both the accused Kamran and Ishfaq Ahmed under section 342 of the Code of Criminal Procedure wherein both of them took the plea that no person from the locality was called to witness the recoveries and further that the officers of raiding party were interested. None of them availed the opportunity provided by 340(2) of the Code of Criminal Procedure and no evidence in defence was produced at the trial. The learned trial court after considering the facts and circumstances of the case found the accused guilty under articles 3 and 4 of the Prohibition Order No.4 of 1979 and convicted and sentenced them as mentioned above. Hence the present appeal against convictions and sentences.

7. The matter put up before the Court for hearing today is an application, Cr. Misc.A.No.12/P of 2008, moved under section 426 of the Code of Criminal Procedure for suspension of sentence awarded to the appellants. Learned Counsel at the very outset stated that since the grounds mentioned in the application for suspension of sentence relate to the appreciation of evidence so he would not press the

miscellaneous application but would earnestly request that the main appeal be heard on merit and decided today subject to notice to the State. Learned Counsel for the State has no objection to the early disposal of the appeal. He accepts the notice and states that he has no objection if the entire case is decided today. In this view of the matter I propose to decide the appeal on merits in the light of evidence available on record.

8. I have gone through the record and perused the evidence including the statement of both the accused and the judgment of the trial court. The learned trial court has surveyed the entire evidence and come to the conclusion that a) the statement of the witnesses for the prosecution do not contradict each other, b) the recovery evidence is available on record, c) that 130 bottles of liquor were recovered from the car in possession of the accused, d) that on the pointation of the accused the police succeeded in a haul of 215 KG of liquor in a drum and, e) the accused were apprehended at the place where police had put up a traffic blockade. There is no finding as to the nature of the liquid found in the bottles and the drum.

9. In my view the basic question to determine the guilt of accused, charged under articles ¾ of the Prohibition (Enforcement of Hadd) Order, 1979, is the proof that the seized article was covered by the mischief of an *intoxicant*. Article 3 of President's Order No.4 of 1979 reads as under:-

> *"3. **Prohibition of manufacture, etc, of intoxicants.*** [(1) Subject to the provisions of clause (2) whoever
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> (a) imports, exports, transports, manufactures or processes any intoxicant; or
> (b) bottles any intoxicant; or
> (c) sells or serves any intoxicant; or
> (d) allows any of the acts aforesaid upon premises owned by him or in his immediate possession;
>
> shall be punishable with imprisonment of either description for a term which may extend to five years and shall also be liable to fine].
>
> [(2) Whoever-
>
> (i) imports, exports, transports, manufactures, or traffics in, opium or coca leaf or opium or coca derivatives; or
> (ii) finances the import, export, transport, manufacture, or trafficking of, opium or coca leaf or opium or coca derivatives;
>
> shall be punishable with imprisonment for life or with imprisonment which is not less than two years and shall also be liable to fine].

Article 4 of President's Order No.4 of 1979 provides as follows:-

> *"**Owning or possessing intoxicant.*** Whoever owns, possesses or keeps in his custody any intoxicant shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine."

10. It is therefore clear that import, export, manufacture, processing, bottling, selling, or serving of any *intoxicant* is prohibited and according to clause (d) of article 3 any person even allowing any of the

aforementioned acts upon the premises owned by him or in his immediate possession or owning, possessing or keeping in his custody any *intoxicant* shall be liable to punishment under article 4. The emphasis is on the word *intoxicant.* It is therefore imperative that there should be a clear cut and unambiguous report that the seized article is in fact an *intoxicant* and not something else and thus covered by the definition of an *intoxicant*. According to the interpretation clause, as stipulated in article 2 of the President's Order No.4 of 1979, the word *intoxicant* and *intoxicating* liquor have been defined as under:

> "*Intoxicant*" means an article specified in the Schedule and includes *intoxicating* liquor and other article or any substance which the Provincial Government may, by notification in the official Gazette, declare to be an *intoxicant* for the purposes of this Order;
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> "*Intoxicating* liquor" includes toddy, spirits of wine, wine, beer and all liquids consisting of or containing alcohol normally used for purposes of *intoxication*, but does not include a solid *intoxicant* even if liquefied." (Emphasis added)

11. In order therefore, to sustain conviction, the prosecution is under a legal obligation to prove that the seized article was in fact an

intoxicant within the meaning of term so defined for the purposes of Order 4 of 1979. This is possible only after a signed analysis report in original has been placed on file. In this case PW.5 Khurshid Khan SHO alone, unaided by any analysis expert report makes us believe that he separated 5 ml liquor from each bottle and sent the same for analysis through Moharrar. There is an application Ex.PW.5/3 dated 12.11.2007 on the record, addressed to Chemical Examiner, wherein it is stated that 131 samples are being sent for chemical analysis as the suspected material is *intoxicating* liquor. But there is neither any report of the Chemical Examiner to establish that the suspected material was found to be *intoxicating* liquor nor is even the evidence of the Moharrar available on record as to when and where he received the crime samples and when and to whom he delivered the same samples in tact for chemical analysis. It is the bounden duty of the prosecution to prove beyond all reasonable doubt the basic ingredients of the offence with which the accused is being charged. It cannot be left to the raiding officer to seize an article, register a case, arrest the person accused of an offence, investigate the same and also assert, without proof obtained

from a Chemical Examiner, as contemplated by section 510 of the Code of Criminal Procedure, that the seized article was an *intoxicant*. It is the domain of the courts established by law to determine on the basis of unimpeachable evidence before it that the crime liquid was an intoxicant. This determination is not left to the discretion of a police officer.

12. Chapter XLI of the Code of Criminal Procedure deals with special rules of evidence. Section 510 deals with the report of Chemical Examiner, Serologist etc. It reads as under:-

> "[510. Report of Chemical Examiner, Serologist etc. Any document purporting to be a report, under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government [or of the Chief Chemist of Pakistan Security Printing Corporation, Limited] or any Serologist, finger print export or fir-arm expert appointed by Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code.
>
> Provide that the Court may [if it considers necessary in the interest of justice] summon and examine the person by whom such report has been made.]"

The purpose of this section is to make provision for accepting in evidence in a court of law such analytical reports prepared by scientific experts who have been appointed by Government, concerning those matters which are submitted to them for analysis and report during the course of proceedings under the Code of Criminal Procedure. It is not left to the parties to procure reports from private sources. Government being neutral has the authority to appoint experts to help assist the courts in the administration of criminal justice. These experts are paid from public exchequer and have no pecuniary interest with any one party or group of litigants. The law speaks in terms of accepting the report in original and even a photo copy is not covered by this section.

13. The requirements of section 510, as pointed out in the case of Sultan and others Vs. The Stated reported as 1987 SCMR 1177 are as follows:-

> "(i) original report shall be put in evidence; (ii) report must be formally tendered; (iii) report must be 'under the hand' of the expert; (iv) if the report alone is to be considered sufficient, it should contain all the information which the officer himself would have been

able to furnish if he had been examined as a witness; when the report is meager and cryptic and incomplete, it is open to the court to summon and examine the expert."

14. It is therefore clear that section 510 of the Code of Criminal Procedure is an exception to the general rule and makes admissible the report of an expert of the category mentioned in the section without his appearing in person to depose as regards the contents of the report but that does not mean that the production of original report should be dispensed with or that such a report should not be tendered in evidence at all or that the report need not be issued under the signatures of the Expert visualized by the said section.

15. There is yet another feature that calls for interference in the impugned judgment. The conviction in this case has been recorded under article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 and the appellant has been awarded a sentence of three years whereas the maximum sentence which can be awarded to an accused under Article 4 is two years with fine which sentence cannot be maintained under law. Still another aspect of the impugned judgment is the conviction of appellants simultaneously under Article 3 and 4 of the Prohibition

(Enforcement of Hadd) Order 1979 in the same transaction. This is what should not have been done for the simple reason that recovery of the crime property in this case was allegedly made while the same was being transported from one place to another in vehicle. Article 3 of the Prohibition (Enforcement of Hadd) Order, 1979 contemplates transportation of any intoxicant as well. At best this case was covered by Article 3 of the Prohibition (Enforcement of Hadd) Order, 1979 because under clause (a) the words transport/processing of any intoxicant, and sale of intoxicant as visualized by clause C and allowing any such act upon premises owned by him or in his immediate possession, are covered by the terms of clause (d) of sub article (1) of article 3 of the Prohibition Order for which a maximum term of five years sentence is prescribed. In this case transportation included sale and possession for which it was not necessary to invoke an additional provision. I am fortified in this view by the case of Umar Said and two others Vs. The State reported as PLD 1994 SC 255 wherein, while referring to the case of Muhammad Ayub Vs. The State 1992 -SCMR

108-111, it was held that it is not proper to convict a person under both Articles 3 and 4 because importing, exporting, transporting or manufacturing or bottling or selling or serving any intoxicant includes his possession also.

16. In view of what has been stated above and particularly in the absence of any direct evidence in the shape of a positive report by Chemical Examiner that the crime liquid seized by police, was covered by the mischief of intoxicated liquid, no conviction can be maintained. It is settled principle of law that in criminal trial conviction can be based only if substantive and direct evidence has been brought on the file. Mere conjecture of the police officer that the seized property is covered by the mischief of provision law is not sufficient to return a verdict of guilt. If the seized liquid was in fact an *intoxicant* and its proof by way of production of the report of Chemical Examiner has been with-held intentionally or otherwise the blame lies with the prosecution. A copy of this judgment should be sent to the Inspector General Police of Frontier Province to depute some senior officer to

look into the matter and fix responsibility as to why the report if received was not produced at trial level.

17. The Conviction and sentence recorded by learned Judicial Magistrate-VI, Peshawar vide judgment dated 11.6.2008 in Hudood Case No.145/3 is hereby set aside and the accused are directed to be set at liberty forthwith unless required in any other case.

JUSTICE SYED AFZAL HAIDER

Islamabad the 20th January, 2009
Mujeeb-ur-Rehman/*

Fit for reporting.