

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.53/I of 1997.

1. Sher Muhammad s/o Zareef	.....	Appellants
2. Abdullah s/o Akram Khan		
	Versus	
The State	.....	Respondent
Counsel for the appellants	.....	Malik Rab Nawaz Noon Advocate
Counsel for the State	.....	Mr.Aziz-ur-Rahman Advocate
FIR No. date and police station	.....	51 dated 7-8-1996 P.S. Chanjal
 Date of the Judgment of the trial court	.....	9-5-1997
Date of Institution	.....	3-6-1997
Date of Hearing	.....	17-12-1997
Date of Decision	.....	21-1-1998

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered on 9-5-1997 by the Court of Sessions Judge, Batagram whereby they have been convicted under article 3 of the Prohibition (Enforcement of Hadd) Order 1979 and have been sentenced to suffer R.I. for eight years with whipping numbering seven stripes and also to pay fine of Rs:20,000/- each or in default to undergo further simple imprisonment for a period of two years each. Benefit of section 382-B Cr.P.C. has also been given.

2. Muhammad Younas (PW-5), S.H.O. police station Chanjal made a complaint (Ex.PA/1) at the said police station District Batagram on the basis of which an FIR was lodged per Ex.P.A. on 7-8-1996. The contents of the said F.I.R., briefly, are that the said S.H.O. was investigating some case under sections 302, 304/34 P.P.C. accompanied by police party and while returning from Batagram he found a red Datsun pick-up No.PRF 2466 coming from Thakot in a suspicious condition. He gave a signal to stop, but the driver did not do it. The vehicle was followed from Batlay upto Shingly Pain where the police succeeded in stopping it. The vehicle was brought to police station Chanjal, searched and 105 KGs of opium were recovered. After having completed

necessary investigation, both the appellants were challaned.

3. Both the appellants were charged under article 3 and 4 of the Prohibition (Enforcement of Hadd) Order 1979, hereinafter referred to as the said order, to which they did not plead guilty. Prosecution examined five witnesses. Gul Dad (PW-1) Moharrir proved registration of FIR (EX.PA). He was handed over the case property by Investigation Officer on 7-8-1996 and it was sent to the laboratory by him on 12-8-1996. Kafeel Ahmed (PW-2) constable has proved submitting the case property to the laboratory on 13-8-1996. Niaz Muhammad (PW-3) Head Constable has proved that he was one of raiding party and that the signal of the party was ignored and after chase the vehicle was overpowered at Shangli Pain. He has proved the recovery of the intoxicant from the vehicle. Zubair (PW-4) has proved that he was one of the police personnel in the raiding party and from the pickup No.2466 PRE the recovery of the narcotics was made. Muhammad Younus Khan (PW-5) S.H.O. and Investigation Officer of the case has proved the story of the prosecution and has also deposed that the vehicle was taken to the police station Chanjal alongwith the two appellants, and then the said vehicle was searched in the premises of police station Chanjal resulting into the recovery of 105 KGs of opium. He has also

proved that he drafted the Murasala Ex.PA/1 and sent to the Moharrir for registration of the case. In his statement under section 342 Cr.P.C. Sher Muhammad has replied to a question that he was only travelling as passenger from Besham to Batagram in the said vehicle. He has denied the recovery of the narcotics. Abdullah another appellant has stated in his statement under section 342 Cr.P.C. that neither he was the driver of the vehicle nor is he the owner of the said vehicle that is PRF 2466. He has denied the recovery of the narcotics and has stated that the PWs have deposed against him because they are police officials and are interested witnesses. Both the appellants have declined to be examined on oath and they have not produced any defence.

4. I have heard the learned counsel for the appellants as well as the State. The counsel for the appellants has contended that the case is not free from doubt; that according to the Investigation Officer Muhammad Younas (PW-5) the vehicle was searched at police station Chanjal, but his own Murasala (Ex.PA/1) is indicating that the vehicle was searched at Shangli Pain where it was over powered after the chaise; that there are substantial and material contradictions among the PWs who are police officials, that no independent witnesses for recovery was procured; that the recovery memo Ex.PB is indicative of the

(57)

Cr.A.No.53/I/1997.

recovery of opium in the beginning but at the final end it has been mentioned that it was 105 KGs of charas in the following words:

« حمد پارسا کے ذمے میں 105 کلوگرام اور یہ جو ڈرائنگ نہیں ہے
نمبر 2466 پر فروقہ پولیس چورنگی ڈاکھن فورڈ مظون ڈرام انکا وہاں
PRF
- مکمل فورڈ ڈاکھن -

Zubair (PW-4), one of the recovery witnesses has admitted that he is matriculate and he can read and since he could read therefore this error of opium converted into charas is indicative that the entire story of prosecution has been fabricated in a hasty manner; that complainant and Investigation Officer of the case is the same person which is detrimental to the case; that the alleged offence was committed within the jurisdiction of police station Batagram but then the vehicle was taken away from that jurisdiction to the jurisdiction of police station Chanjal which is indicative of the malafides working at the level of police belonging to police station Chanjal; that the samples were delivered by PW-2 namely Kafeel Ahmed four days later and it is not transpiring as to why the recovered material was kept or who was custodian of the said material; that pick up was plying for passengers admittedly and Sher Muhammad was admittedly a passenger; that none of the appellants are proved to be owners of the vehicle; that it appears that no

Handwritten signature/initials

one has claimed the ownership of the vehicle from which the alleged contraband item was recovered; that the reliance has been placed on 1989 NLR (S.D) 11, 1995 NLR (S.D) 105, 1992 SCMR 1475 and two unreported cases of this court namely Cr.A. No.1/I/1993 (Mosam Khan Vs. The State) and Cr.A.No.142/I/1996 (Taga Khan etc Vs. The State). The counsel for State has stated in writing that there is nothing in the record to suggest that even the place named Shangli Pain was outside the jurisdiction of police station Chanjal; that vehicle used for carrying passengers in such areas/^{are}normally over loaded whereas the present vehicle was carrying only one passenger from Besham to Batagram in suspicious condition; that the so called contradictions are only minor discrepancies which could not set aside the story of prosecution.

5. At the outset I have come across a fact that in the Murasila (Ex.PA/1) and FIR (Ex.PA) a reference has been made to a red-coloured Datsun No.2466-PRF in which the recovered narcotics were being transported by the appellants/accused, but in column No.5 of the final challan the Datsun becomes Toyota. Another fact which has been noted by me is that in the memo of recovery (Ex.P.B), it has been stated in the middle that from the vehicle 105 KGs of opium were recovered. In the end of

Handwritten signature

the same Ex.PB it has been said that 105 KGs of charas were recovered. Zubair (PW-4) F.C. and one of the witnesses of recovery has replied to a suggestion in this respect as under:

"I am matriculate and can read. Fard Ex.PB is wrong as opium has been recovered and not the chars. The memo Ex.PB correctly bears my signature. I have seen Ex.PB it is the same recovery memo which was prepared in the P.S."

The learned counsel for State has vehemently argued that in the memo of recovery it is a clerical mistake to the extent that in the end opium has been stated to be charas. But the question arises as to how and under what circumstances a Datsun is becoming Toyota in the challan. Then neither there is any mention of the Registration Book, driving licence and other related documents concerning the vehicle nor there is any serious effort transpiring from the record to trace out the owner of the vehicle. The recovery was made from inside the secret second floor which was opened with implements. Under such circumstance, then, it was incumbent for Muhammad Younus Khan, S.H.O., and Investigation Officer, to trace out the owner of the vehicle. But what he did is coming up in his own deposition as PW-5 in the following words:

"The owner of the vehicle has so far not been

known. I have written to the Registration Officer Peshawar for letting us known about the name of the owner of the vehicle but the Registration Officer did not make any reply."

But the police record before me does not carry even a copy of such writing. To establish the commission of an offence, it is essential to establish mens rea and knowledge about the existence of an incriminating material , or a fact. Here both are absent. So far as appellant Sher Muhammad is concerned, he has stated in his statement under section 342 Cr.P.C. that he was travelling as a passenger in the said pick-up. Now it was for the prosecution to establish that he was not a passenger. On the contrary, Muhammad Younas Khan (PW-5), Investigation Officer, has admitted as under:

"We though had prior information of the contra-band in the vehicle, however we did not picket at that time. Sher Muhammad accused is the resident of Deer. It is correct that the Pickups are used in this areas for carrying passengers. Sher Muhammad was accompanying the other it is therefore he has been arrested."

It simply means that without having proved beyond reasonable doubt the guilt of appellant Sher Muhammad, he was raped in the case. So far as the case of appellant Abdullah is

(55)

Cr.A.No.53/I/1997.

- 9 -

concerned, his co-appellant Sher Muhammad is not denying him to be a driver of the pick-up at the relevant time. To certain questions regarding recovery of the contraband items he is replying as under:

"I am innocent and falsely charged in the case. I was not in the knowledge that there are contraband in the vehicle nor I am the owner of the vehicle, nor I have concern with the contraband. I was travelling as passenger from Besham to Batagram in the said vehicle."

In other words, there is admission of the recovery but denial of the mens rea or knowledge. At the level of appellant Abdullah there is total denial, even that of driving the vehicle in question. But this weakness in the defence of appellant Abdullah cannot be used by the prosecution in its favour unless it stands on its own footings. The difficulty is that the prosecution has left so many aspects unresolved that doubts stand generated in its own story as is being discussed here under.

6. Murasila (Ex.PA/1) and FIR (Ex.PA) indicate that the vehicle was chased and over-powered at Shangli Pain. It was then brought to police station Chanjai, was searched and during search the floor of the said vehicle Datsun was found

doubled. About this murasila (Ex.PA/1), Gul Dad (PW-1)

is deposing:

"During the days of occurrence I was posted as Muharrir in present police station . On the day of occurrence I was in P.S. On the receipt of Murasala brought by constable Zubair on 7.8.96 at 1900 hour I have registered the case vide FIR No:51 dated 7.8.96."

In substantial conflict with this deposition, Muhammad Younas Khan (PW-5), S.H.O., is deposing:

"As the Murasala was drafted in the premises fo the P.S. therefore, I myself handed over the same Murasala to the Muharrir of P.S. for the registration of the case."

Who is correct then ? Whether Gul Dad (PW-1) Moharrir, deposing that constable Zubair brought the murasila (Ex.PA/1) or Muhammad Younas Khan (PW-5), S.H.O. and Investigation Officer who is deposing that he himself drafted murasila at police station and handed over the murasila to the moharrir at the same police station ? Zubair constable (PW-4) could have resolved this material conflict, but he is silent on this aspect. However his following piece of deposition is indicative that the incriminating material was kept secret in a manner that even the driver appellat Abdullah might not have known about the existence of such a meterial in the vehicle he was

driving unless his knowledge was proved by the prosecution beyond reasonable doubts in the circumstances of the case.

"SHO himself unscrewed the nut bullet of the vehicle. SHO was having the necessary articles for unsecuring."

7. It is also surprising to note that PW-5 is contradicting himself in the same breath in the following words:

"The recovery was made in the premises of P.S however I did not make FIR as the recovery was not made inside the police station building. I have personally weighted the contra bond recovered by me."

8. The learned counsel for appellants has also agitated another weakness in the story of prosecution creating doubts and that is about the delivery of samples of alleged recovered opium in the office of chemical examiner on 15-8-1996. Gul Dad

(PW-1) Moharrir is deposing:

"The I.O. handed over the case property to me which I have kept and then on 12.8.96 the case property was sent to the Labartory by me through constable Kafeel Ahmad as per directions of the SHO. No one interfeare with the parcel during my possession."

To a suggestion he is replying.

"I do not remember the exact time of entrustment of the case property to Kafeel constable."

Kafeel Ahmed (PW-2) is deposing:

"I received the parcels at evening time on 12.8.96, it was about 4.00 or 4.30 PM. It is correct that P.S. Chanjal is situated on KKH road. It is also correct that KKh road is a busy road and normaly vehicle play on it round the clock. After receiving the parcels I have been waiting for the vehicle but could not get the same and I kept the parcels with me in the P.S. The next day i.e. 13. I left for Peshawar at 9.00 AM. I stayed at Mansehra on 13.8.1996. I remained in my house. The parcels were with me and I stayed in my home where I had kept the parcels. I have gone to Mansehra in a veagon. I left for Peshawar from Mansehra at 12.00 noon on 14.8.96 in a veagon and reached Peshawar at about 4.00/4.30 PM. I stayed in Hujra hotel in Peshawar, the parcels were with me in the Hotel. I have not gone to any P.S. during my journey from Batagram to Peshawar. I have handed over the parcels on 15.8.96 at 9.00 AM and came back from Peshawar on the same date."



The denial about the memory of the time of handing over the samples by PW-1 and affirmation of PW-2 that the time was 4 or 4.30 P.M., then the narration about various stays at Mansehra, Hujra hotel at Peshawar and final delivery on 15-8-96 is indicative that the samples were lying at various places from 12-8-1996 upto 15-8-1996 and this creates doubts

(59)

Cr.A.No.53/I/1997.

- 13 -

about the safe custody in the circumstances of the case.

6. It has also been contended that Muhammad Younas Khan (PW-5) has combined in himself quadruple positions of complainant, Investigation Officer, S.H.O. and a witness of recovery and since it is so, he was obliged to give a reasonable explanation in respect of his wilful omission to call respectable persons of the locality to attend and witness search and recovery. This is not only a violation of the mandatory provisions of section 103 Cr.P.C. which exposes the recovery to distast and unreliability, but it is also amounts to mockery of law. Reliance has been placed on, inter alia, NLR 1995 Cr.105, NLR 1989 SD 11, and unreported case of a Division Bench of this court entitled Taga Khan etc Vs. The State in Cr.A.No. 57/Q/1996 and Cr.R.No.38/I of 1996. All these cases are relevant in view of the following pieces of evidence on the record.

To certain suggestions by appellant Abdullah, Muhammad Younas Khan (PW-5) is replying:

"The vehicle was over powered by me in Shungli Pain at about 3.50 PM. It is correct that village Shungli Pain is big village comprising of population of one thousand or more. I reached the P.S. Chanjal alongwith accused

- 14 -

and vehicle at about 4.00 PM. The moment we reached P.S. Chanjal the first thing we did the search of the vehicle. It might have taken 2 to 3 minutes searching the vehicle."

Niaz Muhammad (PW-3) Muharrir is deposing:

"It is correct that Peshawar Bazar does fall within the way. It is correct that there remains rush in Bazar. It is also correct that Kot Galla Chair lift also does fall in the way. It is also correct that the same Chair left is also in KKh road. It is incorrect that there remains people present round the clock. The witness volunteered that occasionally people remained present at Chair left. I can not tell whether three Chair lifts of village Hotel does fall in the way or not. I remained in P.S. Chanjal for a period of 18 months. I have visited Hotel village for many times. There remains people present on Chair lefts of Hotel village. Then Batlay Bazar comes in the way and there remains rush in Bazar. It is correct that there is a Paka built house of one Shah Zada adjacent to P.S. The houses of Ayub Mian are at a distance of one furlang from P.S. It is correct that P.S. Chanjal is situated at KKH road, and it is a busy road. Normally vehicles are checked near P.S. Chanjal, however there is no special Barrer for this purpose. Shah Murad road also leads adjacent to the P.S. Chanjal. The vehicle was stopped in front of the Police Station. There is no shop near the P.S. The floor

Handwritten signature

Mill and the rice machine of Khasta Baz Mian is situated at a distance of ten yards from P.S. and there is a Mosque adjacent to the floor Mill. It is incorrect to suggest that people from the locality come for offering prayer. Witness volunteered that only Police official performed prayer in the said Mosque as the village Abadi is a quite sufficient distance from the Mosque. None form the public was called by the I.O. at the time of search of the vehicle, as the people normally do not associate with the investigation of the case."

All these pieces of evidence do suggest that independent persons were available at various positions but they were not joined as witnesses of recovery. When coupled with the following piece of evidence of PW-5, the doubts created are doubled:

"Witness volunteered that there was information of smuggling about the said vehicle. I had not mentioned the factum of information in my muralasa as I did not deem it necessary."

In these circumstances, I also find myself bound by a ruling of the apex court cited as 1997 SCMR 1494 which reads:

"After hearing the learned counsel for both the parties and perusal of record it may be pointed out that in the instant case the Investigating Officer having prior information ought to have associated disinterested person

while laying the picket Nakabandi and then at the time of personal search of the appellant. No doubt in absence of any mala fide or motive for false charge reliance can be placed on the statements of the official witnesses but when recovery of the substance by itself is the main offence the statement of such officials (police witnesses) need to be properly appraised and minutely scrutinised and the benefit of doubt, if any, arising from the reading of their statement shall be extended to the accused."

Another ruling of the Supreme Court of Pakistan cited as 1992 SCMR 1475 at placentium B, C and D are relevant and bind me to declare that having previous knowledge about smuggling in the vehicle, as admitted by Investigation Officer, first of all he should not have concealed it in his murasila (Ex.PA/1) and FIR (EX.PA) and then he should have arranged for two respectable inhabitants of the locality where the police station Chanjal was situated. In the circumstances of the present case, the deposition of PW-5 (i.e. complainant plus three more in one) is not at all transpiring confidence.

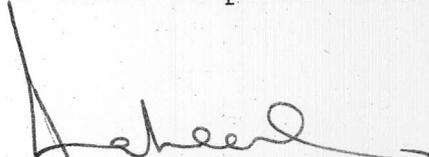
10. The contention that alleged offence had taken place within the jurisdiction of Police Station Batagram, but FIR was lodged out of jurisdiction at police station Chanjal appears to be misconceived. In this regard the learned counsel for State has submitted written argument which is sufficient

to clarify this contention and is quoted verbatim:

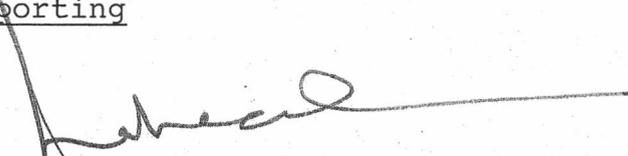
"The vehicle containing contraband was signalled to stop near a place named "Batlay" which lies well within the ambit of police station Chanjal and that there is nothing on record to suggest that even the place named "Shungli Pain" where the vehicle was intercepted and over powered after chasing it is outside the jurisdiction of police station Chanjal."

11. Since the case is not free from doubt, therefore extending such benefit , the impugned judgment is set aside and the appellants are acquitted from the charge. They may be released if not wanted in any other case.

12. Since none has claimed the ownership of vehicle, it shall remain confiscated to State. The case property shall be kept intact till the expiry of the period of Petition for leave to appeal in the Supreme Court of Pakistan and/^{if} it is preferred then it shall remain intact till final disposal of the petition/ appeal.


(Abdul Waheed Siddiqui)
Judge

Approved for reporting


Announced in the open court
today the 21th January, 1998.
Zain/*