

IN THE FEDERAL SHARIAT COURT
(APPELLATE/REVISIONAL JURISDICTION)

PRESENT:

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL REVISION NO.02-K OF 2022

KASHIF ALI, SON OF GHULAM QADIR, BY CASTE CHANNA, MUSLIM,
ADULT, RESIDENT OF SHAHBAZ COLONY, DADU.

PETITIONER

VERSUS

THE STATE

RESPONDENT

Counsel for the Petitioner	:	Mr. Sarmand Qurban Jiskani, Advocate
Counsel for the State	:	Mr. Zahoor Shah, Additional Prosecutor General, Sindh.
FIR No., Date and Police Station	:	157/2021, 21.09.2021, A-Section, District Dadu.
Date of Impugned Judgment	:	26.03.2022
Date of Institution of Appeal	:	26.04.2022
Date of Hearing	:	27.06.2022
Date of Decision	:	27.06.2022

J U D G M E N T

KHADIM HUSSAIN M. SHAIKH -J. By means of the captioned Criminal Revision, the petitioner named above has called in question judgment dated 26.03.2022, passed by the learned Additional Sessions Judge-I, Dadu, dismissing Crl. Appeal No.07 of 2022 re-Kashif Ali Vs. The State and maintaining the conviction and sentence of two years with fine of Rs.10,000/- awarded to the petitioner for offence punishable under Article 4 of The Prohibition (Enforcement of Hadd) Order, 1979 (“**The Hadd Order**”) vide judgment dated 28.01.2022, passed by the learned Civil Judge & Judicial Magistrate-I/MTMC Dadu in Cr. Case No.324 of 2021 re-The State vs. Kashif

Ali, arising out of Crime No.157 of 2021, registered at Police Station A-Section Dadu for offence under Articles 3 & 4 of The Hadd Order, extending the petitioner benefit of Section 382-B of The Code of Criminal Procedure, (Act V of 1898) ("**The Code**").

2. Briefly, the facts of the case are that on 21.09.2021 at 1730 hours, complainant ASI Muhammad Siddique of CIA Dadu, lodged his FIR being the subject crime at P.S A-Section Dadu, mainly stating therein that he alongwith his subordinate staff set-out from CIA Center, Dadu for the purpose of arresting pro-claimed absconding offenders and narcotics peddlers and when they reached near Benzair Hotel, Dadu at about 1530 hours, they on suspicion intercepted and stopped accused Kashif Ali Channa ("**the petitioner**"), who was coming behind them on his motorcycle, having two Iron Boxes, which allegedly contained two cartons of cardboard, each containing 24/24 total 48 Adhoyos (half size bottles) of wine, out of which one bottle was allegedly sealed separately for chemical analysis, while the remaining 47 bottles were allegedly sealed separately in two cartons, having also secured the motorcycle with two Iron Boxes. Such mashirnama of arrest and recovery was prepared in presence of mashirs HC Ghulam Muhammad and PC Manzoor Ahmed, both of CIA Dadu, who then allegedly brought the petitioner and the alleged recovered property at police station A-Section Dadu, where the subject FIR was lodged. After usual investigation, the petitioner was sent up with the challan to face his trial. Then following the legal formalities, a formal charge was framed against the petitioner at Ex.2 to which he pleaded not guilty and claimed his trial vide his plea Ex.2/A.

3. To prove its case, the prosecution examined PW.1 complainant ASI Muhammad Siddique at Ex.3, who produced entry No.8, memo of arrest & recovery and FIR at Exs.3/A, 3/B and 3/C respectively; PW.2 mashir HC

Ghulam Muhammad at Ex.4, who produced memo of inspection of place of incident at Ex.4/A; and, PW.3 Investigating Officer ASI Pyar Ali of P.S A-Section Dadu at Ex.5, who produced entries No.20, 42 and 45, photographs, sketch and chemical examiner's report at Exs.5/A to Ex.5/F respectively, whereafter the prosecution closed its side vide statement at Ex.6. Then the statement of the petitioner under Section 342 of The Code was recorded, wherein he denying the prosecution allegations and recovery of the alleged bottles of wine, professed his innocence. He, however, neither examined himself on oath nor did he examine any person as his defence witness.

4. On the conclusion of the trial and after hearing the parties' counsel, the learned trial Court vide judgment dated 28.01.2022 convicted and sentenced the petitioner, who then filed the aforesaid CrI. Appeal No. 07 of 2022 against the conviction judgment dated 28.01.2022, passed by the learned trial Court, which has been dismissed by the learned Additional Sessions Judge Dadu vide judgment dated 26.03.2022, as discussed in paragraph-I *supra*. Having felt aggrieved by both the aforesaid judgments passed by the learned trial Court as well as the learned Appellate Court, the petitioner has preferred this Criminal Revision Petition.

5. Mr. Sarmad Qurban Jiskani, learned Advocate for the petitioner has mainly contended that the petitioner is innocent and he has been falsely implicated in this case by the police; that there are material contradictions in the evidence led by the prosecution; that only one bottle out of 48 bottles shown to have been recovered, was sent to the chemical examiner and, that the prosecution has failed to prove its case against the petitioner beyond a reasonable doubt. The learned counsel prays for acquittal of the petitioner.

6. The learned Additional Prosecutor General, Sindh, supporting the impugned judgments of both the learned Courts below, has contended that no

enmity or animosity of the police officials, examined by the prosecution has been proved by the defence, therefore, per him, the contradictions and discrepancies in the prosecution case may be ignored; and, that the learned trial Court as well as Appellate Court have rightly passed the impugned conviction judgments against the petitioner. The learned Additional Prosecutor General prays for dismissal of the instant Criminal Revision Petition.

7. I have anxiously considered the arguments of the learned Counsel for the petitioner and the learned Addl. Prosecutor General for the State and have gone through the evidence brought on record with their assistance.

8. From a perusal of the record, it would be seen that recovery of 48 adhoyas (half size bottles) of wine was shown to have been made from the possession of the petitioner on 21.09.2021, but only one bottle out of 48 bottles was sent vide letter No.RC-199 dated 23.09.2021 to chemical analyzer through HC Ghulam Abbas B.No.3181, which was delivered in the chemical examiner's laboratory on 29.09.2021 i.e. after 07 days of its recovery and 04 days of its delivery to HC Ghulam Abbas, as is reflected from the chemical examiner's report produced at Ex.5/F, and whereas per PW.3 Investigating Officer ASI Pyar Ali he sent the case property to the laboratory for chemical examination on 29.09.2021, but no explanation for such an inordinate delay delivering the parcel for its analysis in the laboratory has been offered by the prosecution; according to PW.1 complainant ASI Muhammad Siddique, the case property was handed over by them to ASI Pyar Ali, who was author of the FIR and the Investigating Officer of the case as well, while per PW.2 mashir HC Ghulam Muhammad, the ASI (complainant Muhammad Siddique) handed over the case property to WHC Shah; the official (s) under whose custody the property was kept and the police official namely HC Ghulam

Abbas, who allegedly carried and delivered the parcel in the chemical examiner's laboratory, were neither examined by the prosecution nor were cited as witnesses; even receipt and/or entry of roznamcha, showing the deposit of the aforesaid alleged recovered property including parcel sealed separately for analysis, in malkhana, has not been produced in evidence; and as such the prosecution has failed to establish the safe custody of the property and safe custody and safe transmission of even one Adhoya (half size bottle), shown to have been sent for its analysis to the laboratory. And, hence no sanctity could be attached to the chemical examiner's report Ex.5/F, relating to one Adhoya (half size bottle); furthermore, one bottle allegedly sent to the chemical examiner's laboratory for its analysis, by no stretch of imagination could be the representative sample of the remaining 47 bottles, for that all the 48 bottles, shown recovered, and/or at least some substance from each bottle was required to be sealed separately and sent to the chemical analyzer so as to determine as to which substance all the 48 bottles contained; undoubtedly, opinion of chemical examiner, was not obtained to prove the nature and nomenclature etc of the substance contained in 47 bottles, and as such there is absolutely no evidence available on the record to suggest that the alleged remaining 47 bottles contained wine; even otherwise the production of entire material, shown to have been recovered from the petitioner, in Court was necessary, but that was also not done as neither the alleged recovered 47 bottles (not sent to analyzer), were produced in Court at the time of evidence nor even remaining substance of the bottle after consumption of 200 ml fluid during the process of analysis, shown to have been returned in the sealed parcel by the chemical analyzer to the Investigating Officer as revealed from chemical examiner's report Ex.5/F, was produced in Court nor the motorcycle and two Iron Boxes, in which the alleged 48 bottles were found kept, were

produced in evidence; according to PW.2 mashir HC Ghulam Muhammad they took tea at cinema chowk, they consumed 15/20 minutes at cinema chowk and whereas per PW.1 complainant ASI Muhammad Siddique they took tea at Duabo Stop and consumed 15/20 minutes there; according to PW.1 complainant ASI Muhammad Siddique, they stood at cinema chowk for 10/15 minutes and they also took some break upto 30 minutes at ShahJahan Park, but PW.2 mashir HC Ghulam Muhammad did not state about taking such break at ShahJahan Park; PW.2 mashir HC Ghulam Muhammad stated that **“ASI prepared memo of recovery on the bonnet of vehicle”**, but PW.1 complainant ASI Muhammad Siddique stated that **“I wrote memo of arrest and recovery on clipboard”**; PW.3 Investigating Officer ASI Pyar Ali stated that **“on 22.09.2021 I kept entry No.42-700 hours left P.S alongwith mashirs and complainant for visit of place of incident; I went to inspect place of incident in CIA police mobile”**, but PW.1 complainant ASI Muhammad Siddique and PW.2 mashir HC Ghulam Muhammad did not state about their accompanying PW.3 Investigating Officer ASI Pyar Ali to inspect the place of incident on 22.09.2021; the departure entry No.42 produced by PW.3 I.O ASI Pyar Ali at Ex.5/B, also does not show if Investigating Officer ASI Pyar Ali went to the place of incident accompanying with complainant ASI Muhammad Siddique of CIA Center, Dadu and/or with mashirs HC Ghulam Muhammad and PC Manzoor Ahmed of CIA Center, Dadu in CIA police mobile or otherwise; rather the said entry shows that some subordinate staff accompanied PW.3 Investigating Officer ASI Pyar Ali to inspect the place of incident; that entry from its face is also vague in nature lacking in material particulars i.e. names of the subordinate staff, shown to have accompanied Investigating Officer ASI Pyar Ali to inspect the place of incident, that is also admitted by PW.3 Investigating Officer ASI Pyar Ali in his cross examination

by stating that **“it is correct to suggest that in entry No.42 CIA mobile is not mentioned nor names of mashirs are mentioned”**; the mashirnama of place of vardhat Ex.4/A does not make reference of departure entry No.42-700; per entry No.20 Ex.5/A (vernacular) arrested accused Kashif Ali (Petitioner), mashirnama, secured property, wine, motorcycle and cash reached at police station A-Section Dadu in his presence, but as to who had brought them at the police station is not mentioned in the said entry No.20 Ex.5/A, that in fact was the initial entry kept in daily diary by PW.3 ASI Pyar Ali Lashari at police station A-Section Dadu, which further reveals that an entry No.13 dated 21.09.2021, was shown to have been kept at 1630 hours in daily roznamcha register maintained in CIA Center, Dadu, and instead of incorporating contents thereof in book under Section 154 of The Code at police station A-Section Dadu, the subject FIR Ex.3/C was lodged, wherein even reference of that entry bearing No.13 kept at CIA Center, Dadu, was not made, which rather shows as if PW.1 complainant ASI Muhammad Siddique of CIA Center, Dadu alongwith arrested accused Kashif Ali, mashirs HC Ghulam Muhammad and PC Manzoor Ahmed and the case property straightaway appeared at police station A-Section Dadu from the place of incident and lodged the subject FIR and whereas in evidence PW.1 complainant ASI Muhammad Siddique has stated that **“we brought the accused alongwith case property at PS and kept entry No.13-1630 hours and handed over the accused, case property to ASI Pyar Ali after registration of FIR”**, even the aforesaid entry No.13 shown kept at CIA Center, Dadu despite being essential was not produced in evidence; entry No.20 Ex.5/A also does not reveal name of complainant ASI Muhammad Siddique and so also the names of mashirs HC Ghulam Muhammad and PC Manzoor Ahmed, which is admitted by PW.3 Investigating Officer ASI Pyar Ali in the manner that **“it is correct to**

suggest that the name of mashirs and complainant is also not mentioned in entry No.20"; furthermore, memo of site inspection Ex.4/A and arrival entry No.45, shown to have been kept at police station A-Section, Dadu by PW.3 Investigating Officer ASI Pyar Ali on 22.09.2021 at 0745 hours after inspection of the site made at 0755 hours, also do not reveal preparation of sketch and snapping photograph produced at Ex.5/D and Ex.5/C, that is also admitted by PW.3 I.O. ASI Pyar Ali in his evidence by stating that **"it is correct to suggest that I have not mentioned sketch and photograph in the memo of inspection and entry No.45"**; the evidence of all the three PWs reveals that the certain case property was shown present in Court, but as to what was the case property produced in the Court at the time of examination of the PWs was neither specifically disclosed nor was it shown to have been de-sealed; the evidence does not reveal that the alleged 47 bottles (not sent to chemical analyzer) and the remaining substance, shown in the chemical examiner's report to have been returned to the Investigating Officer, were produced at the time of recording evidence of the prosecution witnesses.

9. Moreover, ASI Muhammad Siddique has admitted in his cross examination that the place of incident is very busy place of Dadu City, that is also even evident from the photograph Ex.5/C, sketch Ex.5/D and mashirnama of place of vardhat Ex.4/A, which reveal that several shops are located on the western side of the place of incident, but no independent person from the locality was associated with the alleged recovery proceedings and/or during the course of inspection of the place of incident by I.O. PW.3 ASI Pyar Ali nor any effort was shown to have been made for doing so as was admitted by PW.1 complainant ASI Muhammad Siddique by stating that **"I did not try to associate any citizen to act as mashir at the place of arrest and recovery"** so also by PW.3 I.O ASI Pyar Ali, stating that **"it is correct to**

suggest that I have not associated any private mashir during the investigation", that is violative of mandatory provisions of Section 103 of The Code, for the official making searches, recovery and arrest, are required to associate private persons, more particularly, in case in which the availability of private persons cannot be disputed, for the transparency in the recovery proceedings and to eliminate the chance of fabrication; it is also strange enough that HC Ghulam Muhammad and PC Manzoor Ahmed (not examined), who both are the police officials of CIA Center, Dadu and subordinate to the PW.1 ASI Muhammad Siddique, acted as mashirs of all purposes, but no official from police station A-Section Dadu was asked to act as mashir of inspection of place of incident. In case of **THE STATE VS. BASHIR AND OTHERS (PLD 1997 SC 408)**, the Hon'ble Supreme Court of Pakistan has held that:

"It has been repeatedly held that the requirements of Section 103 Cr.P.C., namely, that two members of the public of the locality should be mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two mashirs from the public."

10. Manifestly, the witnesses, examined by the prosecution despite being skillful and expert witnesses of police department with vast service career, are inconsistent on almost every material aspect of the case and their statements regarding the mode and manner in which the recovery was shown to have been made, being contradictory to each other, are self-destructive as discussed *supra*.

11 So far the chemical examiner's report Ex.5/F is concerned, the same relating to one Adhoyo (half size bottle of alleged wine) out of 48 bottles, is

manifestly unworthy of trust and reliance, for safe custody, safe transmission and handing over the sealed parcel, containing that one Adhoyo (half size bottle of wine), was not proved on record. A perusal of the statement of the petitioner recorded under Section 342 of The Code depicts that the incriminating material i.e. report of chemical examiner Ex.5/F was not put to the petitioner to extract his explanation thereon during his examination under Section 342 of The Code and in view of the well settled law the incriminating material and the circumstances from which inferences adverse to the accused sought to be drawn should be put to the accused when he questioned under Section 342 of The Code, else the same cannot be considered as a piece of evidence against the accused. Reliance in this context is placed on the case of **DIN MUHAMMAD VERSUS THE CROWN (1969 SCMR 777)**. It was held in case of **MUHAMMAD MUMTAZ VERSUS THE STATE (NLR 1997 SD 599)** that **non-putting of report of chemical examiner, when accused was examined under Section 342 of The Code would be violative of mandatory provisions of law.**

12. As far as the contention of learned APG that there is no enmity or animosity of police with the petitioner to falsely implicate him in this case, therefore, the discrepancies and inconsistencies in the prosecution case may be ignored is concerned, I am unable to subscribe myself to such a misconceived and untenable contention of learned APG for the reason that mere fact that the police witnesses have no enmity to falsely implicate the petitioner, by itself, is not a strong circumstance to hold that whatever has been alleged by the prosecution witnesses should be implicitly relied upon without asking for supporting evidence.

13. In view of what has been stated above, it is crystal clear that the prosecution case is full of doubts and the prosecution has failed to prove its

case against the petitioner beyond a reasonable doubt. It needs no reiteration that a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, benefit thereof is to be extended to the accused not as a matter of grace or concession, but as matter of right. Reliance in this context is placed on the cases of **GHULAM QADIR AND 2 OTHERS V. THE STATE (2008 SCMR 1221)**, **MUHAMMAD MANSHA and MUHAMMAD AKRAM V. THE STATE (2009 SCMR 230)**.

14. Patently, the aforesaid material and glaring contradictions, infirmities, omissions and admissions adverse to the prosecution case and dishonest and deliberate improvements in the statements of the prosecution witnesses during the trial, which did go to the root of the case, rendering it doubtful, were not at all attended to by the learned trial Court while passing the impugned judgment dated 28.01.2022, convicting and sentencing the petitioner; likewise, the learned Appellate Court, which is the Court of re-appraisal of evidence, without considering the aforesaid aspects of the case and appreciating the evidence in its true perspective, has dismissed the appeal filed by the petitioner against the impugned conviction judgment dated 28.01.2022 and maintained the conviction and sentence awarded to him by the learned trial Court. In such view of the matter, both the impugned judgments passed by the learned trial Court as well as learned Appellate Court; suffer from mis-reading and non-reading of the evidence, which could not sustain. Accordingly, the captioned Criminal Revision Petition was allowed and conviction and sentence awarded to the petitioner vide impugned judgment dated 28.01.2022, passed by the learned trial Court and the impugned judgment dated 26.03.2022, passed by the learned Appellate Court, maintaining the conviction and sentence of the petitioner, were set-aside and the petitioner was acquitted of the charge, extending him benefit of doubt, by

short order announced by me on 27.06.2022, which reads as under and these are the reasons for the same:-

“Heard the learned counsel for the applicant and the learned Additional Prosecutor General Sindh, for the State. For the reasons to be recorded later on, this Criminal Revision is allowed, and the conviction and sentence awarded to applicant Kashif Ali S/o Ghulam Qadir Channa in CrI. Case No.324 of 2021, for offence under Article 4 Prohibition (Enforcement of Hadd) Order, 1979, emanating from Crime No.157/2021 of P.S. A-Section, Dadu vide impugned judgment dated 28.01.2022, passed by the learned Trial Court *i.e.* Civil Judge & Judicial Magistrate-I/MTMC, Dadu, and maintained vide impugned judgment dated 26.03.2022, passed by the learned Additional Sessions Judge-I, Dadu, are set aside and the applicant is acquitted of the charge. The Applicant is present on bail, this bail bond is cancelled and his surety is discharged.”

**(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE**

Islamabad
19.12.2022
Khurram