

IN THE FEDERAL SHARIAT COURT
(APPELLATE/REVISIONAL JURISDICTION)

PRESENT:

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL REVISION NO.03-K OF 2022

FAHEEM SON OF JAMEEL AHMED, BY CASTE QAIMKHANI, RESIDENT
OF HATHUNGO, TALUKA KHIPRO, DISTRICT SANGHAR.

PETITIONER

VERSUS

THE STATE

RESPONDENT

Counsel for the Petitioner	:	Mr. Habibullah Chaniho, Advocate
Counsel for the State	:	Mr. Zahoor Shah, Additional Prosecutor General, Sindh.
FIR No., Date and Police Station	:	215/2021, 29.10.2021, Khipro, District Sanghar.
Date of Impugned Judgment	:	28.02.2022
Date of Institution	:	28.05.2022
Date of Hearing	:	31.10.2022
Date of Judgment	:	03.02.2023

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 28.02.2022, passed by the learned Additional Sessions Judge Khipro, dismissing Crl. Appeal No.01 of 2022 re-Faheem Vs. The State and maintaining the conviction, but altering the sentence of one year by reducing it into R I for six months 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") and in default in payment of fine, the

petitioner to suffer further imprisonment for one month, extending him 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 29.10.2021 a police party headed by ASI Muhammad Salah Pinjaro alongwith his subordinate staff left PP Hathungo of PS Khipro vide roznamcha entry No.06 at about 1430 hours for patrolling purpose in private vehicle. After patrolling though various places when they reached near Old Mori of Nara Canal at 1630 hours, they finding the petitioner in suspicious condition, having one blue Jerrycan, arrested him and on checking they found Jerrycan stuffed with 30 liters raw wine. After taking some liquid from the recovered material sealed it separately for chemical examination while the remaining liquid in Jerrycan was sealed separately, Then memo of arrest and recovery was prepared with the signatures of mashirs PC Ali Nawaz and PC Jaffar and then they brought apprehended accused Faheem and recovered property at police station Khipro, where after making entry No.22 at about 1730 hours, complainant ASI Muhammad Salah lodged the subject FIR. 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.02 to which he pleaded not guilty and claimed his trial vide his plea Ex.02/ A.

3. To prove its case, the prosecution examined PW.1 complainant ASI Muhammad Salah at Ex.03, who produced FIR bearing crime No.215 of 2021 at Ex.03/A, memo of arrest and recovery at Ex.3/B and entry Nos. 22, 34 and 38 on one page at Ex.03/C; PW.2 mashir PC Ali Nawaz at Ex.04, who produced memo of site inspection at Ex.04/A; and, PW.3 investigating officer ASI Tasweer Hussain Memon at Ex.05, who produced register No.19

Sr.No.131 at Ex.05/A, carbon copy of entry Nos. 24 & 20 on one page at Ex.05/B, letter addressed to Chemical Examiner at Ex.05/C and Chemical Examiner's Report bearing No.21242 at Ex.05/D, whereafter the prosecution closed its side vide statement at Ex.06. Then the statement of the petitioner under Section 342 of The Code was recorded at Ex.07, wherein he denying the prosecution allegations and recovery of the alleged 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 impugned judgment dated 13.01.2022 convicted and sentenced the petitioner, and whereas the appellate Court while maintaining the conviction awarded to the petitioner, dismissed the appeal, but altered the sentence of one year awarded to him by reducing it into six months with fine of Rs.10,000/- and in default whereof he was ordered to undergo one month more imprisonment, as discussed in paragraph-I *supra*, vide impugned judgment dated 28.02.2022, passed by the learned Additional Sessions Judge Khipro. Having felt aggrieved by both the judgments passed by the learned trial Court as well as the learned Appellate Court, the petitioner has preferred this Criminal Revision Petition.

5. The 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; 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, 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 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 there are various lacunas and infirmities in the prosecution case coupled with material and glaring contradictions, dishonest and deliberate improvements during the trial and admissions adverse to the prosecution case, which being significant could not be lost sight of e.g. per prosecution on 29.10.2021 vide entry No.06 at about 1430 hours PW.1 complainant ASI Muhammad Saleh, Incharge PP Hathungo alongwith his subordinate staff PC Ali Nawaz and PC Jaffar had left that PP in private vehicle for patrolling purpose and during patrolling the petitioner was allegedly apprehended and a Jerrycan allegedly containing raw wine was statedly recovered from the petitioner, but that very vital entry No.06, which could establish the prosecution version about complainant and his staff's being on patrolling, was not produced in evidence; even the descriptions, type of private vehicle etc, in which PW.1 complainant ASI Muhammad Saleh and his staff were patrolling, were neither mentioned in the mashirnama of arrest and recovery Ex.3/B nor even in the FIR Ex.3/A, however, to specific

questions PW.1 complainant ASI Muhammad Saleh stated that **“our private vehicle is Coure Car of silver colour. This car belongs with my friend (sic). It is correct to suggest that description of private vehicle is not mentioned in the memo of arrest and recovery. I myself drive the vehicle”**, as to who was the person giving car to the complainant and as to why and against which consideration that private car was given to him for the purpose of patrolling, was not disclosed by the prosecution; according to prosecution PW.3 ASI Tasweer Hussain Memon alongwith his subordinate staff departed to inspect the place of incident in a private vehicle and after inspection he alongwith his subordinate staff arrived at police station as is evident from the departure entry No.34 and arrival entry No.38 produced at Ex.3/C, which both entries are vague in nature lacking in material particulars relating to that private vehicle and names of the subordinate staff etc, who allegedly accompanied PW.3 Investigating Officer ASI Tasweer Hussain Memon for inspecting the place of incident and their return to the PS; the departure entry No.34 also does not reveal if mashirs PC Ali Nawaz and PC Jaffar were with PW.3 Investigating Officer ASI Tasweer Hussain Memon while leaving police station to inspect the place of incident, but in evidence PW.3 Investigating Officer ASI Tasweer Hussain Memon did not utter even a single word about his subordinate staff’s accompanying him to the place of incident and instead he stated that **“I left PS alongwith PC Ali Nawaz and PC Jaffar in private vehicle bike”**, while PW.2 mashir PC Ali Nawaz stated that **“we visited the site inspection at private bike and such bike was ride (sic) by ASI Tasweer Hussain Memon and I was sitting between ASI and PC Jaffar (not examined)”**, which even otherwise, was apparently an attempt of the prosecution witnesses to improve its case during the trial; moreover, PW.1 complainant ASI Muhammad Saleh, PW.2 mashir PC Ali Nawaz and PW.3

Investigating Officer ASI Tasweer Hussain Memon have admitted by deposing that **“it is correct to suggest that the incident place is busy area”**, PW.2 mashir PC Ali Nawaz has stated that **“beside the incident place there is also a buffalo farm”**, but it is strange enough that the existence of that buffalo farm is no where mentioned either in the mashirnama of recovery and arrest or even in the FIR nor was it disclosed by PW.1 complainant ASI Muhammad Saleh and/or PW.3 Investigating Officer ASI Tasweer Hussain Memon, who allegedly inspected the place of incident in presence of PW.2 mashir PC Ali Nawaz and co-mashir PC Jaffar (not examined). Per PW.3 Investigating Officer ASI Tasweer Hussain Memon the custody of the accused was kept in lockup and recovered case property Sr.No.131 was handed over to WHC Ameer Bux; per him, on 01.11.2021 he sent property to the office of laboratory for chemical examination through PC Ghulam Rasool, but the official namely WHC Ameer Bux, to whom the custody of the property namely alleged wine was given and who could give the evidence as to when and where he kept the Jerrycan containing the remaining alleged wine and sample of alleged wine intact till its delivery to PC Ghulam Rasool for chemical analysis and the official namely PC Ghulam Rasool, who allegedly carried and delivered the parcel in the chemical examiner’s laboratory, and who could depose about its safe transmission and intact delivery in the office of chemical examiner, were not examined by the prosecution as witnesses, and thus the prosecution has not established the safe custody of the alleged wine and safe transmission of sample of wine, shown to have been sent for its analysis to the laboratory. In such view of the matter, no sanctity could be attached to the chemical examiner’s report Ex.5/D, relating to that parcel; the depositions of all the three PWs revealed that some case property was shown present in the 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 alleged recovered Jerrycan, containing wine (not sent to chemical analyzer), was produced in Court at the time of evidence; furthermore, admittedly the place of incident was busy place, 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 Tasweer Hussain Memon nor any effort was shown to have been made for doing so, which 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 PW.2 PC Ali Nawaz and PC Jaffar (not examined), who both are the police officials of PP Hathungo and subordinate to the PW.1 complainant Muhammad Saleh, acted as mashirs of recovery proceedings as well as mashirs of site inspection, but no official from police station Khipro was asked to act as mashir of the place of incident, which could show some independency of the evidence. 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."

9. 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.

10 So far the chemical examiner's report Ex.5/D is concerned, the same is patently unworthy of trust and reliance, for, the safe custody, safe transmission and handing over the sealed parcel, containing the sample of alleged wine, was not proved on record; further 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/D 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.**

11. It is reiterated 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, therefore, the request of learned APG for ignoring the aforesaid material discrepancies, contradictions and admissions adverse to the prosecution case rendering it

doubtful, on the plea that the police authorities are not inimical to the petitioner, being misconceived and untenable cannot be acceded to.

12. In view of what has been stated above, it is crystal clear that 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)**. 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 13.01.2022, 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 28.02.2022 and maintained the conviction with altered sentence awarded to the petitioner as discussed in paragraph-I *supra*. Under these circumstances, both the impugned judgments passed by the learned trial Court as well as learned Appellate Court; suffering from mis-reading and non-reading of the evidence, cannot sustain. Accordingly, the captioned Criminal Revision Petition is allowed and conviction and sentence awarded to the petitioner vide

impugned judgments, are set-aside and the petitioner is acquitted of the charge, extending him benefit of doubt. The petitioner is on bail, his bail bond is cancelled and his surety is discharged.

(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE

Karachi
03.02.2023
Khurram