PRESENT

MR.JUSTICE SARDAR MUHAMMAD DOGAR

Criminal Appeal No.247/L of 2002

Nazar Hussain s/o Sikandar Khan r/o Qadirpur Raan, Distt. Multan	....	Appellant
	Versus	
The State	....	Respondent
Counsel for appellant	....	Syed Almas Haider Kazmi, Advocate
Counsel for State	....	Mr.Muhammad Akbar Tarrar, Assistant Advocate General with Mr.Asghar Ali Hashmi, Advocate
FIR.No.Date & Police Station	....	121/92, 14-10-1992 Budhla Sant, District Multan
Date of judgment of trial court	....	25-7-2002
Date of Institution	....	23-8-2002
Date of hearing	....	14-11-2002
Date of Judgment	....	14-11-2002

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JUDGMENT

SARDAR MUHAMMAD DOGAR,J.- This appeal is directed against judgment dated 25-7-2002, by Additional Sessions Judge, Multan, whreby learned trial judge, convicted the appellant under Article 4 of Prohibition (Enforcement of Hadd) Order and sentenced him to undergo R.I. for five years, plus to pay a fine of Rs.30,000/- in default whereof to undergo S.I. for six months.

He was further convicted U/S.166-PPC and sentenced to undergo R.I. for six months, plus to pay a fine of Rs.5000/- in default whereof to undergo S.I. for one month.

Vide the same judgment he was also convicted U/S.193-PPC and sentenced to undergo R.I. for one year, plus to pay a fine of Rs.5000/- in default whereof to undergo S.I. for one month.

Sentences of imprisonments on all counts have been ordered to run concurrently.

Tariq Saeed, tried alongwith him, was sentenced to undergo S.I. for three months, plus to pay a fine of Rs.2000/- in default whereof to undergo S.I. for fifteen days, for conviction U/A.4 of the said Order.

Tariq Saeed had challenged his conviction and sentence vide Criminal Appeal No.284/L of 2002. The same was withdrawn

on 24-9-2002, on coming up for hearing for the first time. Presumably it was done for the reason that he had undergone the sentence, the matter qua him thus stands closed.

2. Occurrence allegedly in this case had taken place on 14-10-1992, at about 9.30.a.m, at Bus Stop Chah Dallay Wala, in the area of Village Kothay Wala, at a distance of four miles from police station, Bhudhla Sant.

FIR.No.121/92, was registered at the police station, by Iqbal Hussain, MHC(not examined at the trial) on 14-10-1992 at 10.00.a.m, on receipt of complaint drafted by Nazar Hussain, ASI (appellant in this case) on the same day at the spot at 9.30.a.m.

According to FIR, Nazar Hussain, ASI (appellant herein) was standing at Pul Dandian Wali, near Budhla, on patrol duty alongwith Saif Ullah,H.C, Muhammad Nawaz, Javed ASghar, Riaz - Hussain, Sajjad Hussain and Zahoor Ahmad, constables. One Malik-Muhammad Aslam was also accompanying them. A soruce informed the ASI that a person was selling heroin near the Bus Stop Chah-Dallay Wala Road, leading to Budhla Road. On receipt of this information, he went to the spot alongwith his companions and caught the said person. On interrogation, he gave his name as Tariq Saeed son of Israr-ul-Haq, Caste Gujjar, resident of Budhla

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(tried alongwith appellant herein). On search, he was found holding a bag in his hand. On opening the same, a packet containing heroin was found. On being weighed the heroin was found to be one kilogram. On further search nothing else was recovered from him. ASI removed one gram of heroin from the total recovered heroin, in the presence of the witnesses, sealed the same in separate parcel. The remaining heroin was sealed in another parcel. He took both the parcels into possession vide memo prepared by him (memo prepared at the spot was not produced at the trial nor it was exhibited. However, certified copy of the same had been placed on record, which also was not exhibited). After completion of proceedings, including recording of statements of the P.Ws and preparation of the site plan, ASI returned to the police station and deposited the parcels there.

3. On completion of necessary investigation, challan was submitted to court vide report under section 173 Cr.P.C, drafted by SHO of the police station on 16-10-1992, against Tariq Saeed for trial under Articles 3/4 of Prohibition (Enforcement of Hadd) Order, for having been found in possession of one kilogram heroin.

4. On certain facts coming to the notice of Senior -

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Police Officers, the case was taken up for re-investigation. During that investigation, which was conducted by a SHO, an Inspector CIA and ASP Cantt, it came to light that actually 20 grams of heroin had been recovered from Tariq Saeed during the raid conducted by Nazar Hussain, ASI (appellant herein) and he (Nazar Hussain) had planted 980 grams of heroin from his own possession and had shown that one kilogram heroin had been recovered from Tariq Saeed(probably due to some malafides or to show commission of offence of enhanced nature). Another report under section 173 Cr.P.C. was drafted on 23-12-1992, by the SHO qua quantity of heroin recovered from Tariq Saeed. It is written therein that during investigation conducted by Muhammad Ayub Qureshi, ASP, it was found that only 20 grams of heroin had been recovered from Tariq Saeed and so he was liable to be tried for that only. The said report was attached with the challan already submitted against Tariq Saeed.

5. During the same investigation, Investigating Officers had come to the conclusion that Nazar Hussain, ASI (appellant herein) who had arrested Tariq Saeed on 14-10-1992, during a raid, had wrongly shown that one kilogram of heroin was recovered from Tariq Saeed. The Investigating Officers had come to the conclusion, that actually 20 grams of heroin was

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recovered from Tariq Saeed while 980 grams of heroin was planted by Nazar Hussain, ASI, from his own possession. He was arrested and challan was submitted against him to the court, vide report under section 173 Cr.P.C, drafted by Muhammad Bakhsh, S.I, on 21-7-1993.

5. Both the challans i.e. one against Tariq Saeed and the other against Nazar Hussain, ASI, were entrusted for trial to the court of Syed Hamid Hussain, Additional Sessions Judge, Multan.

Though, specific order by the Additional Sessions Judge, is not available on record but it is obvious that he had proceeded to try both the accused jointly. (may be for reason that both the challans had arisen from the same FIR).

Additional Sessions Judge, vide order dated 7-9-1999 charged Tariq Saeed under Articles 3/4 of Prohibition (Enforcemen of Hadd) Order, 1979 for having been found in possession of 20 grams of heroin.

Vide the same order on the same day, Nazar Hussain, ASI (appellant herein) was charged for having committed offence under Article 4 of Prohibition(Enforcement of Hadd) Order, on having been in possession of 980 grams of heroin. He was also charged of having committed offence under section 166-PPC.

Charge under section 193-PPC was also framed against him.

On both having pleaded not guilty, Additional - Sessions Judge, proceeded with the joint trial of both the accused. The impugned judgment was passed after recording statements of 4 P.Ws and statements of both the accused under-section 342 Cr.P.C.

7. During hearing of this appeal, a question cropped up, whether joint trial of the appellant herein and Tariq Saeed was just and in accordance with law and whether the accused had been prejudiced due to being tried jointly?

8. Mr.Muhammad Akbar Tarrar, Assistant Advocate General was called to assist the Court in this case.

Mr.Muhammad Akbar Tarrar, Assistant Advocate General submitted that Superior Courts have time and again held the view that if it appears that the accused was prejudiced by the manner, due to having been tried jointly with others or due to having been tried on charges contradictory to each other, the judgment of conviction is not maintainable.

9. Learned Assistant Advocate General cited PLD-1952-Lahore, page 185 (Noor Din Versus The State), PLD-1959-Dacca, page 711 (Almas Ali Khan Versus The State), PLD-1960 (W.P)-

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Karachi, page 287 (Ali Nawaz Versus The State).

In the case reported in PLD-1952-Lahore, paged 185, learned Judge came to the conclusion that error committed in joint trial of two groups was not curable since the appellant had been prejudiced, the judgment was set aside and the case was remanded for retrial.

In the judgment reported at page 711, PLD-1959-Dacca, even though the learned Judge had not accepted the argument that the trial of the accused had been prejudiced due to the reasons pointed out but it was observed that, it is now well settled that where the adoption of such a procedure is likely to have caused prejudice to the accused, it should not be approved.

In the case reported at page 287, PLD-1960(S.P)-Karachi (Ali Nawaz Versus The State), learned Judge had come to the conclusion that trial had been vitiated due to mis-joinder of charges. Judgment was set aside and case was remanded for re-trial.

It was observed,"that provisions under sections 233-239 Cr.P.C. are designed to protect the interest of the accused who may be bewildered with the complexity of charges levelled against him or his co-accused, which he may not be

able to defend properly"

10. The facts of the case reported at page 133- P.Cr.L.J. 1970, were briefly as under:-

> A person had died due to the negligent driving of two drivers, driving different vehicles. After investigation, police had submitted challan against both of them under section 304-A, PPC. They were charged and tried together. The appeal filed by them was dismissed by the Sessions Judge.Both had filed revision petitions before the High Court.
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> The argument advanced by the learned counsel appearing for the convicts that convicts had been prejudiced due to being tried jointly, was accepted by the High Court, impugned judgment was set aside and retrial separately, on separate charges, was ordered.

Learned Judge of the High Court had placed reliance on PLD-1964-SC, page 120 wherein, Hon'ble Judges of the Supreme-Court had observed as follows:-

> "Even though sections 235 and 239 of the Criminal-Procedure Code give a discretion to the Court to try certain persons and/or offences jointly, yet there are certain considerations which are more fundamental than merely the convenience of the proceeding or trial which must be kept in view when deciding as to whether the discretion should in a given case be exercised or not. In a criminal trial, as we have already observed, it is a fundamental

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principle that the trial of the accused persons should be conducted with the utmost fairness and anything which is likely to cause any serious embarrassment to him in the conduct of his defence should be avoided".

Learned Judge, before setting aside the impugned jdugment, had observed as under:-

"When we apply the aforesaid rule of law laid down by their Lordships, we find that the petitioners have been prejudiced in this defence. If they had been tried separately, it would have been opened to either of the petitioners to have the other examined as a witness and, if necessary, to cross-examine him in order to establish as to who it was, who was responsible for death of Mst.Salehoon. The valuable right of the petitioners has been taken away by their joint trial".

11. Learned counsel for the appellant had cited,AIR-1955-Allahabad, page 620, AIR-1927, page 520, PLD-1996 and MLD-1996, page 1639, in support of the proposition that if prejudice was caused to the accused by way of joint trial, the judgment should be set aside as the same is not curable under the provisions of section 537 Cr.P.C.

In the case reported at page 1639-MLD-1996, two policemen had been tried jointly on having received illegal gratification. One of them was acquitted by the trial court,

while the other had been convicted.

Learned Judge of the High Court, while hearing appeal, had set aside the impugned judgment, holding that trial of the appellant jointly with the acquitted accused had prejudiced his case. The case was remanded for retrial. It is noted in the judgment as under:-

> "Admittedly, each of the accused's act was his own independent act of receiving bribe as alleged by the prosecution and it was not the case of prosecution that there was any preconcert between the accused persons, even the charge framed against the appellants does not reflect the accused persons acted jointly. In case Muhammad Abdul Rauf Vs. The State,PLD-1958-SC, page 131, where identical facts were present, it was held that the joint trial of the appellants was vitiated being illegal and no question as to whether prejudice was caused or not be considered as the joint trial had resulted from adopting a mode of trial prohibited by the code and it could not be cured even under section 537, Cr.P.C".

12. As noted above, firstly challan was submitted to court against Tariq Saeed on the allegation of having been found in possession of one kilogram of heroin vide report under section 173 Cr.P.C, dated 16-10-1992. After re-investigation of the whole matter another report under section 173 Cr.P.C, was drawn by the SHO on 23-12-1992, wherein it was prayed that

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as during investigation conducted by Muhammad Ayub Qureshi, ASP Cantt, only 20 grams of heroin had been recovered from Tariq Saeed, so he should be tried for that.

13. Nazar Hussain, who had been arrested as a result of the investigation done by the Senior Police Officers on having come to the conclusion that he had wrongly shown that one kilogram of heroin was recovered from Tariq Saeed and that actually he had planted 980 grams of heroin upon Tariq Saeed from his own possession in addition to the 20 grams of heroin recovered from him. Challan was submitted against him to the court vide report under section 173 Cr.P.C, prepared by Muhammad Bakhsh,SI on 21-7-1993. Thus it is clear that separate challans had been submitted to court against Tariq Saeed and Nazar Hussain, ASI. They were not only tried together but had been charged together vide same order of the evidence of the prosecution was recorded during same trial.

14. It is clear that offence had been committed by both independently. There was no pre-concern/planning. In fact there could not have been one, according to the circumstances noted above. Their joint trial had obviously caused prejudice to the appellant. The judgment reported at page 136-P.Cr.L.J.1970, fully covers the case of the appellant. Judgement reported at

page 1639-MLD-1996, also covers the case of the appellant. The other judgments also lend support to the proposition as it had been held that if the accused is found to have been prejudiced due to joint trial or on the basis of joint charges, the judgment cannot be maintained due to the trial being illegal.

For the reasons, noted above, the impugned judgment is set aside and the case is remanded for re-trial, in accordance with law.

The appellant was on bail at the time of passing the impugned judgment and he was arrested in consequence of having been convicted. I feel, it will be just and fair if he is released on bail. He shall be released on bail, subject to furnishing fresh bail bonds in the same sum and same number of sureties.

Sardar Muhammad

Justice
(Sardar Muhammad Dogar)

Lahore the 14th
November, 2002.

APPROVED FOR REPORTING

UMAR DRAZ/