

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.175/I/1998.

1. Muhammad Ibrahim Appellants
s/o Haji Muhammad Afzal
r/o Kirani Road, Quetta
2. Nazar Muhammad @
Syed Muhammad s/o
Muhammad Farooq, r/o
Pashtoonabad, Quetta

Versus

The State Respondent

LINKEDWITH

Criminal Appeal No.188/I/1998

Abdul Rashid s/o Appellant
Mir Wali, Caste
Gujar, r/o Raisani
Raod, Quetta

Versus

The State Respondent

Counsel for the Syed Iftikhar Hussain
appellants Gilani and Muhammad Munir
Peracha, Advocates

Counsel for the Qari Abdul Rashid,
State Advocate

FIR No. Date and 42/97 dated 17-9-1997
Police Station P.S Crime Branch, Quetta

Date of the judgment 10-11-1998
of trial Court

Date of Institution 26-11-1998

Date of hearing 3-2-1999

Date of decision 3-2-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered by the Court of Additional Sessions Judge-II, Quetta on 10-11-1998 whereby each one of them is convicted under Article 4 of the Prohibition (Enforcement of Hadd) Order 1979, hereafter to be referred to as the said Order, and is sentenced to R.I for 10 years, fine of Rs:20,000/- in default of payment of which the defaulter shall have to undergo S.I for six months more. Benefit of Section 382-B Cr.P.C is extended to each of the appellants.

2. On the basis of spy information, Inspector of Police Ghulam Dastagir (PW-3), accompanied by other personnel raided Dairy Abdul Rasheed, at Sabzal Road, Quetta at 5 P.M on 17-9-1997 and found one Car No.QAG/5042 Toyota Corolla 1974 inside the Dairy. In the car there were sitting three present appellants. The car was searched in the presence of AC/SDM and from its dicky one white coloured plastic bag was recovered. From the said bag 20 KGs of wet opium were recovered

Appellants were challaned and charged under Articles 3 and 4 of the said Order to which they did not plead guilty.

3. To prove its case, prosecution examined 4 witnesses.

Rahim Khan (PW-1) has deposed that on 17-9-1997 he was working in Crime Branch, and was one of those officials who had raided the Dheri of Abdul Rashid on the basis of spy information. He is one of the mushires of the memo of recovery which is Ex.P/1. He has also produced the white bag of plastic as Article P/1 and seals as Article P/2 and the recovered opium as Article P/3. The sample of seals as Article P/4. The registration book of the recovered car as Article P/5. Car No.QAG-5042 colour gray Model 1974 Toyota Corolla as Article P/6. Syed Abdul Jabbar (PW-2), Chemical Expert has deposed that on 29-9-1997 SHO, P.S crime Branch sent him one parcel which was sealed. He opened the seals and weighed the material in it which came to be 20 KGs. After chemical analysis it proved to be raw opium. He has proved his report of Chemical Expert as Ex.P/2. Ghulam Dastagir (PW-3), complainant, has deposed in confirmity with his complaint Ex.P/3-A. He has further deposed that the car was checked in the presence of Mr.Zulfiqar Durrani, SDM. He has proved the memo of recovery of opium as well as the car alongwith registeration book which memo is Ex.P/1. Din Muhammad (PW-4), S.I of police has deposed that on the date of occurrenc^{was} he/working as SIP of P.S Crime Branch. On the basis of spy information he became one of those personnel of police who

raided the place of occurrence. The investigation has been handed over to him and he recorded the statements of the witnesses and arrested the appellants. He sent _____ the opium for chemical analysis and received report thereof. After completion of the investigation he handed over challan alongwith other record of the police to Muhammad Hanif, Inspector of police who sent the challan to the competent court. He has submitted the challan in the court with the signature of SHO Muhammad Hanif Murree as Ex.P/4-B.

In his statement under Section 342 Cr.P.C appellant Abdul Rashid has replied to question No.1 that his car can not enter into the Dairy in which it has been alleged that the car was standing. To other question he has replied in negative. To question No.6 as to what he had to say further, he has replied that the story of police is wrong. The car from which it is alleged that the opium was recovered can not enter into Dairy because of the fact that the ^{entrance} /of street is very narrow and the entrance gate is 5 feet and 8 inches. He has declined to be examined on oath.

In his statement under Section 342 Cr.P.C appellant Muhammad Ibrahim has replied to question No.1 that neither he has any relationship with the car nor with the Dairy

(the place of occurrence). To all other specific questions he has replied in negation. He has examined himself on oath and has deposed as under:-

" محمد ابراہیم ولد حاجی محمد افضل قوم محمد شہی عمر ۲۲ سال پیشہ پراپرٹی ڈیلر/ زمینداری سکنتہ کلی جیو سریاب کوئٹہ -

حلفیہ بیان: ملزم عبدالرشید کو جانتا ہوں - میری مستونگ میں زمینداری ہے میں نے عبدالرشید کو بھوسہ دیا تھا۔ میں اپنی آئیف ایکس گاڑی میں عبدالرشید سے بھوسے کی رقم لینے جا رہا تھا - میں جیسے گلی کے کونے پر پہنچا اور گاڑی کھڑی کی تو پولیس والے وہاں کھڑے تھے۔ پولیس والے نے مجھ سے پوچھا کہ کہاں جا رہے ہو - تو میں نے بتلایا کہ میں عبدالرشید ڈیری اپنے بھوسے کی رقم لینے جا رہا ہوں - انہوں نے مجھ سے پوچھا کہ ڈیری سے آپ کا تعلق ہے میں نے کہا کہ میرا کوئی تعلق نہ ہے - اس وقت میرے ساتھ بشیر احمد

ولد محمد شریف بھی گاڑی تھا - پولیس والے مجھے میری گاڑی سمیت تھانے

لے گئے - دوسرے روز صبح مجھے مجسٹریٹ کے سامنے پیش کیا اور چھ دن

کے بعد مجھے جوڈیشل کر کے جیل بھجوا یا - مجھے جیل میں معلوم ہوا کہ

مجھے منشیات کے کیس میں بند کیا گیا ہے - میرا اس منشیات سے کوئی

تعلق نہ ہے - میں عدالت سے چاہتا ہوں کہ میں بے گناہ ہوں "

بس میرا اس قدر بیان ہے۔

In his statement under Section 342 Cr.P.C appellant Nazar Muhammad has denied all the specific questions. He has examined himself on oath and has deposed as under:-

" میرا اصل نام سید محمد ہے - میرا ایک مقدمہ ۲۲۰/۲۱۱ ت پ عدالت ایڈھاک سیشن جج میں زیرسماعت ہے - میں ٹیکسی اٹھے میں گرفتار ہوا - میں سیڑی روڈ نہ گیا ہوں اور نہ ہی ملزمان سے میرا تعلق ہے اور ملزمان کو نہیں جانتا ہوں - مجھ سے افیوں برآمد نہیں ہوئی ہے - میں اپنے نام کے بابت مقدمہ حکم عدالت محررہ ۲/۶/۹۸ سیشن جج ایڈھاک بطور ایگزیبٹ ڈی/۱ پیش کرتا ہوں - پولیس والے مجھے جیل گیٹ پر بتایا کہ تمہارا نام نذر محمد ہے - میں بے گناہ ہوں "

Bashir Ahmad (DW-1) has deposed that he knows Muhammad Ibrahim since 10/15 years. On 17-9-1997 Muhammad Ibrahim told him that they have to go to the Dairy of Abdul Rashid for taking some amount. Then they went in one AFX vehicle to the said Dairy. Since they were turning vehicle from Sabzal Raod towards the said Dairy, the police made them to

stop and asked them as to where they were going. Muhammad Ibrahim replied that they were going to the Dairy of Abdul Rashid for taking some amount. Then the police made them witness to come out of the vehicle and took Muhammad Ibrahim alongwith the vehicle towards the P.S. Muhammad Ibrahim is a land Lord and also indulges into/business of property. He has not found Muhammad Ibrahim/in any case. Fida Muhammad (DW-2) has deposed that appellant Syed Muhammad is his brother and in this context he has produced a photostate copy of N.I.C as Ex.D/2.

4. I have heard the learned counsel for appellants and State. At the outset, the counsel for the appellants have contended that order sheet of 8-12-1997 concerns the orders of the inspection of site which reads as under:

ڈی - ای حاضر نہ ہے - ملزمان زیر حراست حاضر - کونسل ملزمان حاضر

عدالت نے مثل مقدمہ کا بغور مطالعہ کیا درخواست کا مطالعہ کیا عدالت بغرض انصاف درخواست ملزمان بغرض معائنہ مقدمہ یہ ثبوت منظور کرتے ہوئے مسٹر نعیم اختر ایڈووکیٹ کو برخرج ملزمان عدالت کے Behalf بر لوکل کمشنر برائے معائنہ مقدمہ

یہ ثبوت مقرر کرتے ہوئے حکم دیا جاتا ہے کہ کل سہ ماہیہ جاری ہے وہ جائے وقوعہ کا

معائنہ بموجودگی کونسل ملزمان عبدالرشید و نائب کورٹ کریج - اپنی رپورٹ میں Main gate/door

ڈیری کی لمبائی چوڑائی تفصیلاً رپورٹ میں درج کرے - مزید یہ

کہ اپنی رپورٹ میں یہ بھی واضح کرے کہ یہ دروازہ یا گیٹ کتنا پرانا ہے ، ضرورت

ہو تو اس پاس کیے نزدیکی رہائشی کا بیان بھی قلمبند کرے - مزید یہ کہ آیا ڈیری

کے اندر کوئی گاڑی آسانی سے آ جاسکتی ہے کی بابت بھی رپورٹ دے - خرچ

لوکل کمشنر =/۱۰۰۰ روپے داخل ہو - یہ پرچہ داخلی رپورٹ لوکل کمشنر

مثل التواء ہوکر بتقرر ۹۷ - ۱۲ - ۱۲ پیش ہو -

On the basis of these orders, the commissioner submitted

in the trial court his report on 12-12-1997, The relevant

paras of which read as under:

" The dheri of Abdul Rashid is situated in a street of 13½ ft width on Sabzal Road. The Dheri is a katcha construction which is an old construction. Rough sketch is drawn for convenience of this Honourable court. The entrance gate "A" of the Dheri is an old ousted gate of 5'8" width opening inside the dheri. After opening gate A, at point B there is a round ditch (probably of an old abandoned well) on one side while on the other side there is a Nalli C entering in the dheri from outside street..... The Toyota Corolla car Model 1974 was asked to be driven by Driver/Mechanic Fazal inside the dheri from rear (reverse) as well as from front but the car could not enter the dheri through gate 'A' either through reverse or front and all possible effort was made and each angle was tried. There is no other way to enter the dheri except gate 'A'. There were no signs of any new construction or erection of any fitting or structure!"

The orders for appointment of commissioner dated 18-12-1997 were

challenged by state through application dated 18-12-1997. It was heard

and decided through an interlocutory order dated 26-3-1998. Relevant

portion of the said order reads:-

"I have heard the arguments of both the parties. According to D.A. there is no provisions in the Cr.P.C for appointment

of local commissioner, there is only one section for the inspection of any place, that is section 539-B which empowers only the Court itself to inspect the place. On the other hand, the counsels for the accused contended that at the time of appointment of local Commissioner no objection was made and objections are after thought, because the report of Local Commissioner is against the State. Perusal of section 539-B shows that only the court is empowered to inspect the place and there is no provision in Cr.P.C for appointment of a Commissioner for the purpose of inspection of any place. Moreover, the inspection was made after three months of the occurrence and it is doubtful whether the things were in the same condition as were on the date of occurrence or not? The perusal of record also shows that the car in which the opium was allegedly found is of 1973 Model while the local commissioner wrote 1974 Model car for entering in the premises, although witnesses have said that the car is of 1974 Model but copy of registration book proves that the same is of 1973 Model. Moreover at the time of inspection no one was present on behalf of State except a Naib Court. In fact I.O should have been asked to be present at the spot at the time of inspection. There is nothing on record to show that the place inspected by the local commissioner was the same place as alleged by prosecution. No one has pointed out the said place on behalf of State. All these things have made the report doubtful and the same can not be believed. In the light of above the same is rejected because there is no provision for appointment of local commissioner and the same is also doubtful for the reasons stated above. The application is, therefore, accepted."

This order dated 26-3-1998 was assailed by accused Abdul Rasheed in this court through Cr.Rev.Petition No

4/Q/98 which was disposed off on 5-8-1998 in terms of setting aside of orders of the trial court dated 8-12-1997 and 26-3-1998 with consent of the parties and the case was remanded to the trial court for reconsideration of petitioner's application for inspection of the site by the court in accordance with law. The relevant law which came under consideration of this court is section 539-B Cr.P.C. which reads as under:-

" Local Inspection: (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record and memorandum of any relevant facts observed at such inspection.
(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost!"

The grievance of the learned counsel for appellants is that the directions of this court given to the trial court as mentioned above were never followed and this way the appellants have been prejudiced for having been condemned unheard and, in fact, the golden principle of *aude alteram partem* has not been applied. The counsel have referred to the facts that no site plan was prepared and it is admitted by Deen Muhammad, Investigation Officer (PW-4) in the following words:-

" میں نے موقع کا نقشہ مرتب نہیں کیا "

He has further admitted as under:

" گاڑی ہم گلی میں لے گئے - ڈیری مذکورہ کے اردگرد مکانات ہیں ریڈ سے قبل کسی پرائیوٹ شخص کو گواہ بننے کے لیے نہ لے گیا - دوران تفتیش میں نے ڈیری کے گیٹ کی پیمائش نہیں کی - اور نہ ہی گاڑی کی چوڑائی کی پیمائش کی تھی - از خود کہا - کہ ملام دستگیر نے گیٹ اور گاڑی کی پیمائش کی تھی - مجھے یاد نہ ہے - کہ گیٹ اور گاڑی کی چوڑائی کتنی تھی - میں نے ملام دستگیر کا بیان بابت گیٹ اور گاڑی کی چوڑائی اخذ نہیں کیا - اور نہ ہی اس کا اندراج کسی ضمن میں کیا - یہ مہلظ ہے کہ گیٹ اور گاڑی کی پیمائش نہ کی - "

In view of ^{the} defence plea that the car from which

incriminating narcotics were recovered could not enter the place of occurrence i.e. the Dairy of Abdul Rasheed, it was incumbent for the prosecution as well as for the trial court to have proved otherwise, specially when such directions were issued by this court.

Therefore the only conclusion which can be drawn is that the appellants have been prejudiced for having been condemned unheard on this point. The counsel for State has conceded on this point and has admitted that disobedience of the orders of this court has indeed prejudiced the appellant.

5. It has also been contended that prosecution has violated the mandates created by the provisions of section 103 Cr.P.C. specially when the raid was conducted at a place on the basis of prior spy information and it has been admitted by Deen Muhammad (PW-4), I.O., that there are houses around the place of occurrence which is a dairy and none from the private persons was asked to become a witness. No reasons for not joining at least two respectable inhabitants of the locality have been shown.

Here then I am bound by the following rulings of the superior courts:

NLR 1998 Cr. 241:

(a) Criminal Procedure Code (V of 1989)---

S. 103. Police should associate some person from public to witness recovery of unlicensed arm. In case of negligence of Police to get assistance and presence of some person from public, no. weight can be granted to statements of Police Officers who appear as P.Ws, in such matters of recovery.

(b) Ibid---

S. 103. Association of members of public to witness is required under letter of Supreme Court No.J.P.32/R(S)/88-SCJ, dated 20.8.1990 and letter of Lahore High Court No.17712-Genl/1-G, dated 20.12.1990 addressed to I.G, Police and others.

(c) Ibid--

S. 103.Failure by Police to associate witnesses of public in the case wherein secret information was received by Police before recovery of illicit arms, would warrant conclusion that alleged raid/recovery was planned well in advance due to secret information received by Police.

(d) Ibid--

S. 103. Recovery would be viewed with caution in absence of any explanation as to why witnesses of public had not been associated in recovery proceedings.

(e) Arms Ordinance (XX of 1965)--

S. 13. Contradictions pointed out and projected in evidence of recovery witnesses who were Police Officials would go to root of prosecution and would be sufficient to set aside conviction/sentence recorded by Special Judge, Suppression of Terrorist Activities."

PLD 1997 SC 408

"--- S. 103-- Recovery-- Requirement of S.103, Cr.P.C. namely that two members of the public of the locality should be Mashirs to 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--- if, however, the statement of the Police Officer indicated that no efforts were made by him to secure two Mashirs from public, the recoveries would be doubtful."

In view of this position, it is held that the violation of the mandates of section 103 Cr.P.C without assigning any reason or rhyme and in the persence of prior spy information vis-a-vis raid conducted on a place has eroded the basis of the veracity of the witnesses of recovery who are neither independent nor respectable inhabitants of the locality.

6. It has also been contended that the procedure and

technicalities should not stand in the way of justice. In this respect reliance has been placed on the following rulings of the superior courts:

1997 SCMR 1692

"(c) Interpretation of statutes--
-- Procedural law --- All procedural laws are subservient to the cause of justice and therefore, such laws neither limit nor control the power of the Court to pass an order or decree which is necessary to do full justice in the facts and circumstances of the case-- Interpretation of procedural law, in a manner, it tends to obstruct the course of justice has to be avoided as far as possible ."

PLD 1977 SC 273

"Doing complete justice" is indeed a very comprehensive term and in my humble opinion means doing real and substantial justice without being fettered by legal formalism, so that the paramount interests of justice are not allowed to be sacrificed at the alter of mere technicalities. It is to safeguard these interests that the Constitution has conferred vast discretionary powers on the Supreme Court which is on the apex of the judicial hierarchy and the Court of last resort. This view finds support from the following observation made by Hamoodur Rehman, C.J. in Noora's case (1):-
"Now that we are no longer merely exercising a prerogative jurisdiction but are exercising powers conferred by the Constitution, there appears to me no valid reason for this Court to be inhibited by the limitations which the Judicial Committee of the Privy Council had imposed upon itself. I cannot, therefore, persuade myself to agree that we should go back again to the rule in Dillet's case and

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narrow down the scope and content of our own constitutional jurisdiction. We should have the fullest power to do full justice without fettering ourselves with any self imposed restrictions which are no longer necessary in the context of the changed circumstances in which we now function."

In view of the above-mentioned rulings, inter alia, it has been vehemently argued by the counsel for appellants that the lapses and omissions of defence cannot help the prosecution and since the principles of criminal jurisprudence have been ignored therefore evidence on record cannot inspire confidence.

7. In view of the above-mentioned discussion, I find that the prosecution has failed to prove the case beyond reasonable doubt. Extending the benefit of doubt, I had already set aside the impugned judgment, accepted the appeal and had directed for the release of appellants namely Abdul Rashid s/o Mir Wali, Muhammad Ibrahim s/o Haji Muhammad and Nazar Muhammad @ Syed Muhammad s/o Muhammad Farooq through my short order dated 3-2-1999. These are the reasons for the said order.

Approved for reporting

(Abdul Waheed Siddiqui
Judge

Islamabad, the
3rd February, 1999.
Zain/*