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IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

Present:

Hon.Mr.Justice Abdul Waheed Siddiqui

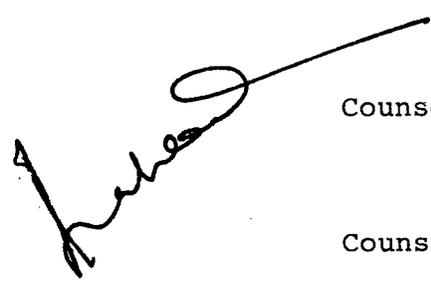
Criminal Appeal No.125/I of 1998

Farooq Azam s/o Manawar Khan,  
caste Pathan r/o village, Mannan,  
P.S.Havelian Teh.& Distt. Abbottabad. Appellant

Versus

the State

Respondent



Counsel for the appellant -- Mr.Khan Afsar Khan  
Advocate

Counsel for the state .. Mr.Aziz-ur-Rehman  
Advocate.

No.FIR.Date.P.S. No.205 dt.14-2-96  
P.S Havelian.

Date of decision of  
trial Court 18-8-1998

Date of institution 04-09- 1998

Date of hearing 21- 12- 1998

Date of decision 4-05-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J.:- Appellant has assailed a judgment delivered by the court of Sessions Judge, Abbotabad on 18-8-1998 whereby he has been convicted under Article 4 of the Prohibition (Enforcement of Had) Order, 1979, hereafter to be referred to as the said Order, and has been sentenced to R.I for 10 years. He has also been fined for Rs.10,000/- In case of default he shall suffer further S.I for one year. Benefit of section 382-B Cr.P.C has been extended.

2. Ayaz Khan (PW-5), SI/SHO P.S Hawelian was on a patrol duty on 14-2-1996 at 14.45 hours and was accompanied by other personnel of police and was in search of narcotic peddlers. At Takla Shekhan he received information that heroin is being brought to Hawelian. Ayaz Khan then went to Mannan stop, Gora Baz Gran Road, where he came across a young person with a black shopping bag in his hand. On suspicion he was stopped and searched. On search of shopping bag a packet having plastic and cloth cover containing one KG of heroin was recovered. One gram was separated and sealed in a parcel for Chemical analysis and the remaining heroin was sealed in a separate parcel. A complaint Ex.PA/1 was prepared and sent to the police station where an FIR was registered on the same date at 15.15 hours. Appellant was arrested, challaned and charged under article 3/4 of the said order to which he did not plead guilty.

3. To prove its case prosecution examined five witnesses.

Hamid Ali(PW-1) MHC, has proved receipt of parcel No.1 containing one gram heroin and parcel No.2 containing 999 grams from Ayaz Khan (PW-5) on 14-2-1996 for keeping in Malkhana which he entered in Register No.19 at Sr.No.401. He produced original register in the court, photo state copy of which is Ex.PW/1. He sent the sample to the Chemical Examiner through F.C Muhammad Younis (PW-2) vide receipt No.70/21 dated 26-2-1996 which is Ex. PW 1/2. Muhammad Younis (PW-2) FC has corroborated evidence of PW-1. He has proved that he handed over the parcel to the F.S.L Peshawar on the same day. Muntazue Hussain Shah (PW-3),ASI has proved his being a member of the patrolling party led by SHO/ complainant . He has proved contents of the complaint Ex.PA/1. He is a mashir of memo of recovery Ex. 3/1 which has been proved by him. Khalid Khan (PW-4) has proved receipt of complaint Ex.PA/1 and registration of FIR Ex.PA by him. Ayaz Khan (PW-5), complainant, has proved the contents of complaint Ex.PA/1. He recorded statements of witnesses under section 161 Cr.P.C and vide application Ex.PW 5/1 he sent the sample to the Chemical Examiner. Report Ex.5/2 is positive. Finally he submitted complete challan in the court.

In his statement under section 342 Cr.P.C, appellant denied all the specific questions. To question No.1. he has replied:

"No. It is absolutely incorrect and false allegation. F.C Iqbal belonging to village Takkia Sheikhan was on inimical terms with me and at his behest on altercation with Ayaz Khan I was falsely implicated in the instant cooked up case."

To another question, he has replied:

"I know nothing about deposit of any material as alleged by the prosecution and I also do not know about the sending of any alleged material to the Chemical analysis, however, Chemical Examiner reports reveals that the alleged material was sent to Chemical Examiner with the delay of 14 days and this inordinate delay has not been explained by the prosecution. Moreover, the said constable has also not stated in deposition that the sample was not tampered with.

To a question as to why PWs have deposed against him, he has replied:

"No independent witness has deposed against me. Only police Officials who are interested and inimical to me have falsely deposed against me at the behest of one FC Iqbal resident of Takkia Sheikhan due to enmity with me, and Ayaz Khan SHO has falsely invented a fabricated false story against me at the behest of Muhammad Iqbal FC."

Appellant has examined himself on oath as DW-1. His examination-in-chief is reproduced as below:

"I am educated upto three classes. On the day of my arrest I was taken to police station at 600/700 a.m from my house alongwith my mother and three brothers. Nothing

was recovered from our house during the search and he was taken to police station without reason. The actual reason of our arrest was that I and two other persons had gurreled 2/3 times with Iqbal FC of PS Havelian who is resident of Thakka sheikhan which is at a distance of 4/5 kilometer from my village. The other two persons who had quarrelled with Iqbal FC was Sajjad and Taj. Said Iqbal FC used to object on persons boarded on the roof of the bus while passing through his village and due to this reason he used to quarrel with us. Respectables of the village including Nawaz requested police that his mother should not be taken to the police station but his request was turned down. My mother was let free on the same day at evening time, while, my brother Javed, Sikandar Azam and Sohrab Azam were let free after one day at evening. I am innocent and nothing was recovered from me. False case was made against me on account of above mentioned reasons.

Muhammad Nawaz Khan has been examined <sup>as</sup> DW-2. He has deposed that he is a neighbour of the appellant and that the police raided the house of the appellant at 600/700 A.M on the date of arrest and took alongwith them the appellant, his three brothers and mother. The mother was released on the same day in the evening. Three brothers were let free next day or the day following the next day. According to this witness he was standing outside the house of the appellant at the time of raid that nothing was recovered from appellant at the time of raid. Javed Khan (DW-3) has deposed that the appellant is his real brother. He has corroborated DW-1 and DW-2 and has further stated that at the time of their arrest people of the locality had protested but the police had paid deaf ear. He has further stated that as his mother, he himself and other brothers were released later so also

appellant was being released by S.H.O. He was not released as he abused the S.H.O.

4. I have heard the counsel for appellant and state. At the outset the counsel for appellant has contended that the sample parcel of one gram of heroin was prepared on 14-2-1996, but the same was received by the Chemical Examiner on 26-2-1996. Consequently this delay is fatal to the prosecution. This contention is repelled as misconceived because of the fact that the chain of the custody and intactness of the parcel containing sample is not broken. PW-1 has produced original register of receipt and despatch of the sample which was seen and returned by the trial court and the photo copies of the same were brought on the record as Ex. PW/1/1 and Ex. PW 1/2. During cross this witness has deposed;

"I had not opened the parcels, therefore, I cannot say what the parcel were containing. We sent the same parcel to the Chemical examiner on 26.2.96."

PW-2 is FC No.703 who has corroborated PW/1 and has proved that nobody had interferred with the parcel during the period it remained with him. During cross he has deposed;

*Advee*

"I had taken 6/7 parcels to the laboratory of different type and I handed over the same at about 11/12 hours. All the parcels were taken into a bag and that bag was not sealed. It is incorrect to suggest that parcel in question was not packed into sealed parcel."

Report of Chemical Examiner Ex.P-5/2 corroborates PW-2 to the extent that FC No.703 has brought the parcel and the seals on the

parcel were found intact. Consequently the tampering with the parcel containing sample for Chemical examiner is not proved.

5. It has been contended that as per complaint Ex.PA/1, the recovered heroin was sent to the police station through FC Muhammad Iqbal. Ayaz Khan PW-5, complainant -cum-I.O was made certain suggestions to which he has replied:

"I do not know whether FC Iqbal is a resident of Thakia Sheikhhan or not. It is incorrect to suggest that Iqbal F.C had enmity with the accused and at his instance false case against the accused was fabricated."

Since the plea of defence is that of enmity of appellant with FC Muhammad Iqbal, therefore a doubt is created in the case. In this context reliance has been placed on , inter alia, NLR 1998 SD 155 .The relevant portion of the said judgment of Single bench of Abbottabad circuit of the High Court of Peshawar in/ para No.17 which reads:

Baside this in this case the allegation of the appellant that the investigating Officer P.W.4 was on inimical terms with him and his family and had a motive for falsely implicating him in this case is fully established from the cross-examination of the I.O(PW-4). The same is reproduced as under;

"It is correct that prior to this occurrence on 12.12.1992 I had registered a case against the brother of accused namely Arab Zaman vide F.I.R NO.221 which is Ex.D.5. Similarly I had recorded F.I.R. and registered a case against another brother of accused namely Maqsood vide No.18, dated 10.12.1992 which is Ex. D.6. On 10.12.1992 I had also registered a case vide F.I.R No. 219 of P.S. Khanpur against Arab Zaman the real brother of accused which is

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Ex. D.7 It is correct that the said Arbab Zaman and Maqsood against whom I registered the case, are real brothers of the accused. It is correct that on 20.4.1996 the real brother of accused Khalid namely Maqsood was murdered by the police in his house in the limits of P.S Khanpur. It is correct that a private complaint has been filed by the brother of deceased namely sardar against me and S.H.O. namely Mehmood Hussain, which is pending before the learned Sessions Judge, Haripur. It is incorrect to suggest that in all the cases registered by me against the brothers of accused Khalid they have been acquitted being false cases and the present case is also a chain of the said false cases. It is further incorrect to suggest that nothing was recovered from the accused and I planted the the said recovery just to counter the acquittal orders of his brothers."

The cited case is totally distinguishable from the facts of the present case. In the cited case, enmity of the appellant/accused with the I.O of the case was fully established. In the present case, there is simple denial of I.O <sup>to</sup> a suggestion <sup>that</sup> the FC Muhammad Iqbal had some enmity with the appellant. This enmity has not been proved although allegations have been made. During cross, the appellant has deposed as DW-1 as under :

"My driver brother plies vehicle /truck and he was in Karachi at the time of my arrest. So many other persons also quarrelled with Iqbal FC due to overloading of bus on roof, as his house was visible from the roof of bus. No quarrel with Iqbal FC was ever reported to police. Taj and Sajjad who had also quarrelled with Iqbal were not arrested by police because the matter was compromised by the elders of the village and they went from the village. My compromise had also taken place but we again quarrelled

because we were sitting on the roof of the bus and Iqbal FC etc stoned at us.

He has also admitted as under:

My mother alongwith my brother used to visit the jail. When we met in the jail we used to talk about the present case as it was concocted by the police at the instance of Muhammad Iqbal FC. at me as we could do nothing being Zamindar and illiterate persons against police official Muhammad Iqbal. My brother did not submit any application to any forum or the concerned M.P.A about the present situation because they were illiterate and zamindar. I am facing trial before this Hon'ble Court for the last two years but I did not move any application regarding my innocence nor I moved any application regarding the conduct of the police station. "

Muhammad Nawaz (DW-2) has admitted to a court question as under:

" I know that accused was arrested by police a few times before this occurrence of arrest. I donot know why he was arrested by police. The accused has not other job and he /works zamindara. Lateron I came to know that the accused and his family was arrested because they had some unlawful thing and it was suspected by the police. Our M.P.A is Khurshid Azam who had come to our village for cowassing but he did not come to our village after-wards. Nobody from our village complained to M.P.A that the police had wrongly arrested the accused and his family members. I personally do not know about any enmity in between police and accused, however, accused had told me that he has quarreled with Iqbal F.C. of PS Havelian. I do not know the details of quarrel. Accused told me this fact after the occurrence and his arrest.

In view of this position, it stands clarified that the plea of enmity with F.C Muhammad Iqbal is an after-thought and is treated as such.

proved the guilt of the appellant beyond reasonable doubt. Consequently

(Abdul Waheed Siddui)

Judge

Announced in open court

on 14-5-1999

Fit for Reporting

(Abdul Waheed Siddiqui)

Judge

Latif Baloch