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IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE FAZAL ILAHI KHAN, CHIEF JUSTICE
MR.JUSTICE DR. FIDA MUHAMMAD KHAN, JUDGE

CRIMINAL APPEAL NO.46/P OF 2001

State through
Advocate General N.W.F.P,
Peshawar ... Appellant

VERSUS

Hazratullah son of
Izzatullah, R/O Toredeh
Chamorkon Tehsil and
Chitral ... Respondent

Counsel for the ... Malik Ahmad Jan
Appellant Deputy Advocate General

Counsel for the ... Mr.Pir Bakhsh Mehtab,
Respondent Advocate

F.I.R.No., date and ... No.168, 16.9.1997
Police Station ... P.S, Chitral.

Date of the Order of ... 13.06.2001
the Trial Court

Date of Institution ... 11.08.2001

Date of Hearing ... 30.05.2002

Date of Decision ... 30.05.2002

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JUDGMENT

FAZAL ILAHI KHAN, CHIEF JUSTICE :- State through Advocate

General NWFP has appealed against the Judgment and Order dated 13.6.2001 passed by the learned Senior Civil Judge/Judicial Magistrate, Illaqa Qazi Chitral, whereby the accused/respondent namely Hazratullah son of Izzatullah, the accused/respondent, was acquitted of the charge under article 3 / 4 of Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter referred to above as the Prohibition Order).

2. The facts briefly stated are that on 16.9.1997 on secret information that truck bearing No.2435/SW driven by Hazratullah son of Izzatullah, the accused/respondent, is parked near the Officers Colony Chitral in a suspicious condition, Sanaullah SHO Police Station Chitral accompanied by Attaullah ASI and the police party rushed to the spot and found ten cartons of tincture containing 494 bottle in all which were taken into possession vide recovery memo Ex.PW1/2. From each carton 9 m.l tincture was separated and sealed for chemical analysis. He drafted the murasila Ex.PW1/1 and sent it through Gulfaraz F.C to Police Station for registration of the case. The accused was arrested and the case was registered against him vide FIR No.168 dated 16.9.1997 under article 3 / 4 of the Prohibition Order. On completion of the investigation the case was put in Court against the accused. Formal charge against the accused was framed to which the accused pleaded not guilty and claimed trial.

3. The prosecution in support of its case examined Sanaullah, SHO (PW.1), who reiterated the contents of the murasila Ex.PW1/1. He also took into possession truck alongwith its registration book and the billet, and the receipts, which are Ex.PW1/6 to Ex.PW1/8. He recorded the statements of the PWs under section 161 Criminal Procedure Code and submitted complete challan against the accused. Attaullah Khan, ASI (PW.2) stated that in his presence the recovery was effected and the SHO took into possession the truck alongwith its registration book and billet receipts. Hussain Wali, Muharrir (PW.3) registered the case vide FIR Ex.PW3/1 against the accused on the receipt of the murasila Ex.PW1/1. Abdur Rehman, (PW.4) is a shopkeeper in the vicinity who stated that when the truck arrived near his shop, the police arrived and took the same to the Police Station and recovered tincture from inside the truck. Muhammad Hasham constable (PW.5) is witness to the recovery memo whereby the truck and the billet in the name of Sajid Medicos, were taken into possession.

4. The accused was examined under section 342 Criminal Procedure Code. He admitted the recovery of the cartons from his truck but he stated that he did not know its contents. He being a truck driver by profession as usually was handed over the cartons at goods forwarding agency Batkhela for Chitral alongwith other items and when he reached Chitral he tried his best to reach for the Sajid Medicos in

whose name the billets (بلیٹی) were made when the police arrived and arrested him.

He made the same statement on oath under section 340 (2) Criminal Procedure Code and produced Haji Sarfaraz Khan and Fahr-e-Alam in his defence. Both the DWs are Chemist and Druggist and have deposed that the accused had come to them and had inquired about Sajid Medicos and they have been told him that there is no such Chemist & Druggist Shop in Chitral named Sajid Medicos.

5. The learned trial judge acquitted the accused for the reason that the accused when arrested possessed of billets (بلیٹی) and receipts, these are Ex.PW1/1 to Ex.PW1/8 placed on file which fully support the plea of the accused that the cartons as such were handed over to him at Amandara/Batkhela for delivery to Sajid Medicos at Chitral. The learned trial judge further held that Abdur Rehman PW did not support the prosecution case.

6. After hearing the learned counsel for the parties and perusal of the record, we are inclined to accept this appeal for the reason that the recovery of the cartons from the truck in question and its contents had not been denied by the accused, therefore, even if Abdur Rehman had made confessional statement regarding the place where the recovery was made from the truck is immaterial and has wrongly been considered as a ground for acquittal of the accused.

As far as failure of the prosecution to trace the real culprit, who had booked the cartons at Batkhela or at Lahore and also to trace the addressee, no doubt is very serious and objectionable and point towards the incompetency or otherwise of the investigation agency, the learned Deputy Advocate General rightly pointed out that law is that whoever is found in possession of contraband is guilty of the offence under article 3 or 4 of the Prohibition Order as the case may be and the person who is found in possession, in order to shift the burden from him, has to lead the prosecution agency to the goods forwarding agency wherefrom he had picked up the carton and further to trace the source wherefrom initially the goods were booked and the billity prepared. The person who runs the goods forwarding agency is bound to verify the identity of the person who had initially booked the goods through the forwarding agency so that responsibility could be fixed in the even contraband goods/articles are forwarded through the good forwarding agency.

7. For the reason stated above this appeal is accepted, the judgment and ^{is} order/~~set-aside~~ and the case is remanded to the trial Court with the direction that he shall direct the prosecution agency to trace out the real culprit, i.e. the addressee/
f-v) proprietor of Sajid Medicos as well as the person who had initially brought the goods to the forwarding agency at Lahore or at Amandara (Batkhela). In absence of making such investigation it will be impossible to convict a person found in possession of

such like cartons containing contraband goods on mere statement of a driver carrying such goods that the same were handed over to him by the goods forwarding agency and plead innocence. It is improbable that the addressee could not have been traced if proper investigation was made. A copy of this judgment shall also be sent to the Superintendent of Police Chitral for taking necessary action in this regard.

Fazal Ilahi
(FAZAL ILAHI KHAN)
Chief Justice.

Dr. Fida Muhammad Khan
(DR.FIDA MUHAMMAD KHAN)
Judge

Peshawar the
May 30, 2002
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Approved for publication
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