

IN THE FEDERAL SHARIAT COURT  
( APPELLATE JURISDICTION )

PRESENT

HON.MR.JUSTICE ABDUL WAHEED SIDDIQUI

CRIMINAL APPEAL NO.187/I OF 1998

Khan Zaman s/o Saleh Khan caste Bhattani r/o Abizar Tehsil and District Tank	.....	Appellant
		Versus
The State	.....	Respondent
Counsel for the appellant	.....	Mr.Fazal-ur-Rehman Rana, Advocate
Counsel for the State	.....	Mr.Aziz-ur-Rehman, Advocate
FIR NO, Date and Police Station	.....	13 dated 11-01-1996 P.S. Saddar D.I.Khan
Date of decision of the trial court	.....	17-09-1998
Date of Institution	.....	07-12-1998
Date of hearing	.....	22-01-1999
Date of decision	.....	22-01-1999

occurrence. Mohammad Ayub (PW-3) ASI has proved recording of FIR Ex.PW.3/1 on receipt of murasila. Munir Ahmad Shah(PW-4) has proved that he worked as Inspector CIA, Dera Ismail Khan during the days of occurrence. He submitted complete challan.

In his statement under section 342 Cr.P.C. appellant has denied all the specific questions. To question No.9 as to why he has been charged, he has replied as under:-

"I am innocent and has been falsely charged. The CIA police has falsely implicated me and the whole case is fabricated and in abuse of their official position. The CIA is neither competent to register a case nor investigate and this whole exercise has been declared to be void of lawful authority by the Hon'ble Supreme Court in judgment as reported in PLD 1997 (SC) page-408. The CIA police has also violated the provisions of section 103 Cr.P.C. in not associating any independent person from the locality to witness the search. The shirt which I was wearing did not have any side pocket at all and probably for this reason it has not been taken into possession. Even the envelope which was alleged used as a wrapper has neither been produced before the court nor taken into possession. No contraband has been exhibited in Court. But for the unsupported allegations of the CIA the charges have not been substantiated by any independent means. Even the place of occurrence is not similarly described by the ASI CIA and the witness CIA staff official. While the ASI incharge described the police party having been concealing themselves in bushes and trees, the solitary witness MOhammad Nawaz described that the passage on which they were present is not even covered with bushes and trees. The fact that the site plan and the memos bear the FIR No. clearly shows that these were prepared after the registration of the case and at P.S. Infact the accused is working as an employee on boring of Rasheed. The CIA police party came there and as usual demanded some thing for themselves resulting in an exchange of hot words, I was taken to the P.S. by them where I was allowed to go minus the some-total of cash amount of Rs.800/- to which I was not agree and therefore, I was involved in the present case'!

He has declined to be examined on oath and has not produced any witness in his defence.

4. I have heard the counsel for the appellant and State. At the out set the learned counsel for appellant has contended that in the present case cognizance has been taken by the CIA staff and the investigation has also been carried by the said staff which has no jurisdiction in such like cases, and all the mashes of recovery are from the said staff which is in violation of the mandatory provisions of section 103 Cr.P.C. Reliance in this context has been placed on PLD 1997 SC 408. The rulings of the apex court in this regard are quoted as under:

"(f) Criminal Procedure Code (V of 1989)---  
Ss. 156(1) &4(p)-- Power to investigate cognizable offence--- Scope-- C.I.A. personnel have no power to investigate a cognizable offence--Contention that such personnel had been taking cognizance of cognizable offences for the last several decades, investigating the same, and submitting the challans in respect thereof, inasmuch as even a Special Court C.I.A. was established at Karachi for trial and that constituted according of recognition by the Courts to the C.I.A.'s power to take cognizance of cognizable offences to investigate, to submit challans to the Court concerned, was repelled--- Any alleged illegal practice cannot negate an express provision of a statute--- Supreme Court, on giving of undertaking by concerned Authorities, not to violate provision by functionaries will entail initiation of appropriate legal proceedings against the C.I.A. personnel to be found guilty of such violation.

Under subsection (1) of section 156, Cr.P.C. the power to investigate a cognizable offence under the above provision has been conferred on any officer incharge of the Police Station having jurisdiction over the local area within the limits of such Police Station.

Only an Officer incharge of the police station having jurisdiction over the local area within the limits of a police station can investigate a cognizable offence or any other person covered by the definition of the officer incharge of a police station given in clause (p) of section 4, Cr.P.C. which, in the absence of officer incharge of a police station, includes officer incharge present at the station house who is next to the officer incharge of the police station and is above the rank of the constable or when the Provincial Government so directs, any other police officer so present. The above provision does not include C.I.A. personnel, therefore, they have no power to investigate a cognizable offence."

"(i) Criminal Procedure Code (V of 1898)---

---S. 103-- Recovery---- Testimony of police personnel  
---Admissibility---Conditions.

A Police Officer produced as a witness for the prosecution can be relied upon like other prosecution witnesses but as he is an investigating officer or attached with the investigation staff, the Courts as a matter of prudence and safe administration of justice, scrutinize the evidence of such witnesses with care and caution. Where circumstances permit, the evidence may be accepted to prove arrest or recovery but in order to make it credible and authentic the prosecution must explain the circumstances for non-compliance with the provisions of section 103. Section 103 read with section 164, Cr.P.C lays down the mode for recovery and search but, as in certain circumstances a deviation may be made, it would be proper to explain the police officer is concerned, the general principle is that if there is no animus or mala fides, the investigation has been straight and honest and no substantial defect or infirmity has been pointed out in the evidence or brought through cross-examination, the evidence of such a witness, though a policeman, may be accepted. However, in cases of recovery, this principle is accepted subject to furnishing an explanation by the prosecution for non-compliance with section 103.

Being a policeman or a Investigating Officer, is no bar to the acceptance of his testimony. His evidence should be accepted like other prosecution witnesses and if it fulfils all such conditions which are necessary for accepting

and believing a witness, it cannot be discarded.

But where such witness proves recovery, normal limitations and restrictions have to be observed.

Where search is made by the police officer without resorting to the provisions of section 103, Cr.P.C., the policeman or the investigating officer would not be a competent witness. No doubt their evidence can be assessed as an ordinary witness, but where it relates to search and seizure, it will have to be considered whether provisions of section 103, Cr.P.C. have been observed."

The learned counsel for State has outrightly conceded that since the entire proceedings have been carried by C.I.A staff, the same are void in the eyes of law for being coram non iudice.

5. The counsel for appellant has also made a reference to glaring material discrepancies among the PWs, to unexplained delay in sending the samples, to non-production of the case property in the trial court and to the broken chain of the samples. All these facts are apparent from the record which are creating doubt in the case. Reliance has been placed on 1995 MLD 1114 so far as the non production of the recovered narcotic is concerned. The ruling reads as under:-

"Prohibition (Enforcement of Hadd) Order(4 of 1979)--

--Art.4---Appreciation of evidence --- Out of 850 grams of heroin allegedly recovered from the accused two grams of heroin was sent to Chemical Examiner whose report was positive-- Rest of the 848 grams of heroin had been destroyed before the trial and was not produced in Court to establish the total quantity--Conviction of accused was, therefore, altered from being in possession of 850 grams of heroin to 2 grams of heroin and his sentence of seven year' R.I. was reduced to imprisonment already undergone by him in circumstances alongwith remission of sentence of stripes."

6. In view of the above-mentioned discussion, I do not find the prosecution to have proved the guilt of the appellant beyond reasonable doubt apart from the proceedings being vitiated ab-initio. Consequently I had set aside the impugned judgment, accepted the appeal and acquitted the appellant Khan Zaman s/o Saleh Khan through my short order. These are the reasons for the said order.

( Abdul Waheed Siddiqui )  
Judge

Approved for Reporting

Judge

Islamabad, the  
22nd January, 1999.  
Abdul Majeed/\*