

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT

MR. JUSTICE FAZAL ILAHI KHAN CHIEF JUSTICE

CRIMINAL APPEAL NO.88/I OF 2002

Muhammad Amin son of Musharaf Gul,  
resident of Maina Banda, Gaddar,  
District Mardan. ... Appellant.

VERSUS

The State ... Respondent.

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Counsel for the ... Mr. Amjad Ali,  
Appellant ... Advocate

Counsel for the ... Malik Ahmad Jan,  
State. ... Deputy Advocate-General  
N.W.F.P.

Case FIR No, date ... No.321, 27.8.1997,  
and Police Station ... P.S, Choorā,  
District Mardan.

Date of Order of ... 10.4.2002  
trial Court.

Date of Institution ... 17.4.2002.

Date of hearing ... 31.10.2002.

Date of decision ... 31.10.2002.

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JUDGMENT

FAZAL ILAHI KHAN, CHIEF JUSTICE:- Muhammad Amin

son of Musharaf Gul, resident of Maina Banda Gadar, Mardan (presently undergoing imprisonment in District Jail, Mardan) has through this criminal appeal, challenged the judgment of the Senior Civil Judge/Magistrate Ist Class, Mardan, dated 10.4.2002, whereby he was convicted under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 (herein after referred to as the said Order) and sentenced him to undergo 3 years (two years S.I and one year R.I) with a fine of Rs.5,000/-; in default of payment of fine to further suffer two months simple imprisonment with the benefit of section 382-B, Criminal Procedure Code, extended to him.

2. The facts of the case briefly stated are that on receipt of murasila of Fazli Malik, ASI (PW.1) registered the case against the accused, vide F.I.R No.321, dated 27.8.1997. The murasila was sent by Jan Bahadar, SHO, Police Station Choorra through the driver. Jan Bahadar, SHO (PW.4) reported that he had received secret information about the presence of Roohul Amin son of Musharaf a Proclaimed Offender, in case FIR No.132, dated 9.3.1995 under section

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364-A, Pakistan Penal Code of Police Station, Nowshera Kalan, in case FIR No.474 dated 4.12.1992, under Article 3/4 P.O and in case FIR No.52, dated 11.2.1995 under section 223/224

Pakistan Penal Code, Police Station Attock and in case FIR No.510, dated 6.6.1994 under Article 3/4 of the Prohibition Order of Police Station Attock Khurd, in the house of the accused/appellant, he therefore, alongwith police personnel, namely Zahid Khan, Shah Hassan Khan, Shoukat Khan and Munir Khan, ASIs, and the Foot constables raided the house but the proclaimed offender was not present in the house. However, Muhammad Amin his brother was present in the house. During the house search from the residential room of Muhammad Amin, he recovered charas and opium in packets kept in an Almirah on the southern wall of the kotha. The recovered narcotics were weighed. The charas weighing 3 kilograms while the opium came out to be 1000 grams. Three packets of 4 grams each were separated from the charas and it was sealed into a parcel while the remaining was separately sealed. Similarly 4 grams was separated from the opium and sealed into a parcel and the remaining was sealed into separate parcel. The accused present in the kotha was arrested. The recovery memo is Ex.PC and the site plan is Ex.PB.

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He drafted the murasila and sent it to the police station for registration of the case, and took up the investigation.

After completion of the investigation complete challan was put in Court against the accused. The accused denied the recovery from his possession and further denied the charge brought against him.

3. The prosecution in support of its case examined three witnesses in all. All the three witnesses are from police force. The accused was examined under section 342 Criminal Procedure Code. The accused was put the incriminating prosecution evidence in his examination under section 342 Criminal Procedure Code, which he denied. He did not make his statement on oath in rebuttal of the prosecution case and led no evidence in his defence.

The learned trial Judge relying on the prosecution evidence convicted and sentenced the accused to the term stated above.

4. The learned counsel for the appellant and the learned Deputy Advocate-General appearing for the State have been heard and record of the case has been perused.

5. It was contended by the learned counsel for the appellant that the accused is innocent and falsely

implicated in the case; that there is no evidence to connect the accused with the commission of the offence; that the recovery memo is tampered with and there is over writing and manipulation which have not been explained; that there is no evidence that the place from where the alleged recovery was made, was the residential kotha of the appellant; that the learned trial Court has based its judgment on surmises and conjectures; that the entire exercise by the Investigation Officer is illegal and bias; that the prosecution failed to produce the recovered narcotics in Court at the trial; that there was no evidence to prove that the same was destroyed by order of any competent Court/Authority, hence the prosecution case is highly doubtful. It was further contended that the SPO arranged the raid on the house on proper information, which was not true, yet he failed to associate any person from the locality or from the public with the raid, which is violation of section 103 Criminal Procedure Code, hence the entire proceedings stood vitiate; that prosecution story is concocted and manipulated one.

It was further contended that the learned trial Court

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has convicted the accused by taking into consideration the extrinsic matter, which was NEVER THE PART OF THE

prosecution evidence. In support of his contention the learned counsel relied upon 1999 S.C.M.R 1367 (State..Vs.. Muhammad Amin)PLJ 1996 Cr.C (Peshawar) 1599 (Ishtiaq Ahmad.. (F.S.C) Vs..The State), 1995 P.S.C (Criminal) 246/(Nawab Ali..Vs.. (F.S.C) The State),1996 P.Cr.L.J 1446/(Muhammad Ibrahim..Vs..The State), and several other judgments of the Superior Courts.

In order to appreciate the contentions of the learned counsel, it may be pointed out that the entire prosecution case is based on the statement of the police witnesses. Fazli Malik, (PW.1) on receipt of the murasila registered the case against the accused. Shoukat Khan, ASI (PW.2) stated to have accompanied the police party on 27.3.1997 headed by the S.H.O when the house of Roohul Amin, proclaimed offender involved in various cases, was raided, however the proclaimed offender was not present in the house. During the house search of the proclaimed offender from the residential room of the accused/appellant, the SHO recovered under beneath cupboard of an almirah three kilograms charas and one kilogram opium wrapped in packets. That in his presence samples were taken and sealed into different parcels. He further

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stated that the rest of the case property was destroyed but only 50 grams of chras and 50 grams of opium were kept. Jan Bahadar (PW.3) (wrongly shown as PW.4) headed the raiding party and made the alleged recoveries. The main ground for carrying out the raid was the fact that brother of the accused/appellant was involved in several cases registered against him. He deposed that he recovered 3 kilograms of charas and one kilogram of opium under the cupboard from residential kotha of the accused/appellant and further stated having arrested the accused from the same kotha. He admitted that the correctness of the murasila sent to the Police Station for registration of the case. He also stated to have separated 4 grams of opium and 4 grams of charas as samples, sealed in different parcels and sent to the F.S.L for its opinion. The report of F.S.L is Ex.PD, which is in the positive.

Jan Bahadar, PW is the complainant as well as the Investigation Officer in this case. No doubt a police officer who is the complainant in a case is not debarred from being ~~xxx~~ ~~xxxxx~~ to act as an Investigation Officer yet for just and fair trial of an accused the complainant shall abstain from investigation of a case in which he is a complainant and shall entrust the case to any

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other police Officer. In the instant case, as argued by the learned counsel for the appellant that the police Officer complainant, inspite of numerous judgments of Superior Courts in which it has been held that compliance of the provision of section 103 Criminal Procedure Code in carrying out the raid, did not bother to associate person from the locality in the raid and in the investigation of the case. It is not understandable that though the raid was conducted for the arrest of a proclaimed offender who was not found present in the house how he resorted to search the house and what led him to the recovery of narcotics. There is no evidence on the point from the prosecution side that the house in question is jointly occupied by the accused/appellant and his brother, the proclaimed offender. There is also no evidence whatsoever that the kotha where from the recovery was made, was in the sole occupation of the accused when arrest of the accused/appellant from the kotha is denied by the accused and such arrest from inside the kotha is not supported by any independent evidence. In 1999 S.C.M.R-1367 (State..Vs..Muhammad Amin) the provision of section 103 Criminal Procedure Code come for consideration and in that context their Lordship of the Supreme Court

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of Pakistan held that search in presence of public witness is not required under section 103 Criminal Procedure Code if the recovery is not made in pursuance of search of a house, but is made elsewhere, for instance on the Highway, road sides or the public place like Railway Stations, Bus Stands or Airports, otherwise two independent witnesses are generally required to witness the recovery.

6. It may also be pointed out that the alleged recovery was made on 27.8.1997 but the samples were received in the Office of the Chemical Examiner on 10.9.1997 but prosecution failed to show to whom these samples were entrusted for safe custody and with whom these remained during the said period to ensure its safe custody. In Nawab Ali..Vs..The State, (1995 F.S.C (criminal)246, (F.S.C) the charas and opium were recovered on 20.3.1991 but the samples were received by the Chemical Examiner on 20.4.1991 and the delay was not explained and safe custody of parcels during the period were not proved through evidence and further more when the contraband was not produced in Court, on the allegation that the same had been destroyed but no certificate in respect of it was produced, hence it was held that it was an illegality and serious irregularities. Considering such infirmities XXXXX

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the accused was acquitted of the charge. Reliance was made on Rule 22.16 of the Police Rule 1934 framed under the Police Act, 1861 that the case property seized by the police officer is to be made into a parcel, the parcel shall be secured with sealing bags fairly and marked with label and till such trial the parcel shall be in safe custody pending disposal as provided under the law. The prosecution failed to discharge the above legal formalities which are mandatory in nature. Reference can also be made to the prosecution evidence put to the accused in his statement under section 342 Criminal Procedure Code, which is full of illegalities and infirmities as it is against the prosecution evidence brought on record as far as the case against the accused is concerned.

The accused has been asked that charas was recovered from the almira though in the evidence it is alleged that it was under the cupboard. Similarly the accused was put a question that the recovery was made from his house though the evidence led is that the recovery was made from the residential room of the accused in the house. The accused was also asked to explain the recovery of narcotics made by the CIA Police allegedly from the house on 10.7.1997 and also recovery of a klashnikov

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with five rounds of various types though there is no such evidence brought on record that he was ever convicted for such offences. The accused categorically denied such allegation. He was also unnecessarily questioned about the involvement of his brother in so many cases which he denied and has stated that his brother was acquitted in so many cases by the Courts. He was illegally questioned about his statement made before the police although it was not part and parcel of the judicial record. The conviction was recorded on such extrinsic matters.

7. From what has been stated above, it is evident that the raid was made in violation of the provision of section 103 Criminal Procedure Code as no person from the public was associated with the raid, which vitiate the entire proceedings. More so the narcotics allegedly recovered was not produced at trial and no evidence was led to prove that the same has been destroyed by the orders of any competent Court/authority. There is also no evidence that the room from which the recovery was effected, was in the exclusive occupation and possession of the accused/appellant.

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8. Such being the case, the prosecution case is highly doubtful, the benefit of which is extended to the accused/appellant. Accordingly the appeal is accepted and the judgment of the learned trial Court is set-aside, and the accused/appellant Muhammad Amin son of Musharaf, is acquitted of the charge. He shall be released forthwith from jail, if he is not required in any other case.

*Fazal Ilahi*  
( FAZAL ILAHI KHAN )  
Chief Justice

Peshawar the  
October 31st 2002

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