IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAFI MUHAMMADI

JAIL CRIMINAL APPEAL NO.22/I OF 1996

Khizar Hayat son of Salah Muhammad r/o Mohalla Dinianwala Sahiwal, Tehsil Shahpur District Sargodha.

... Appellant

Versus

The State ... Respondent

Counsel for the appellant ... Mr.M.D.Malik, Advocate

Counsel for the State ... Ch.Muhammad Ibrahim, Advocate

FIR No., Date & Police Station ... 105, 2-5-1994, Sahiwal, Sargodha;

Date of order of trial Court ... 9-1-1996

Date of institution ... 4-2-1996

Date of hearing ... 7-4-1996

Date of decision ... 7-4-1996

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JUDGMENT:

SHAFI MUHAMMADI,J. Appellant Khizar Hayat son of Salah Muhammad, caste Machi, has sent this appeal through Superintendent, District Jail, Shahpur against his conviction and sentence awarded to him by the learned Magistrate Section 30, Shahpur vide his judgment dated 9-1-1996 in a case arising out of an FIR No.105 dated 2-5-1994 lodged by complainant Muhammad Ashraf, ASI, registered under Article 3 of the Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter referred to as the Order) whereby the learned Magistrate had awarded him punishment to suffer R.I. for 2½ years, three stripes and a fine of Rs.500/- only. In case of failure of payment of fine the appellant had to undergo three months simple imprisonment with benefit under section 382-B Cr.P.C.

2. Brief facts of the prosecution case, as unfolded by the FIR and narrated by complainant Muhammad Ashraf ASI/I.O., are that on 2-5-1994 the complainant alongwith Muhammad Farooq 333 Constable, Muhammad Riaz 417 Constable and Muhammad Iqbal 1047 Constable were present at Kashmiri Gate, Sahiwal on patrol duty for checking when they received spy-information that one Khizar Hayat (the present appellant) was selling heroin. Muhammad Ashraf, the I.O. of this case, sent Muhammad Riaz, a Constable dressed in civilian clothes, as fake purchaser with a currency note of Rs.50/- marked with letter 'R' on it for purchase of heroin from accused Khizar Hayat. According to the I.O. the fake purchaser had given

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the note to appellant Khizar Hayat and had purchased heroin from him after payment of Rs.50/-. Soon after that the I.O. raided the said appellant. From his personal search, 11 grams of heroin was recovered out of which two grams of heroin was sent for Chemical Examiner. The recovered purchased heroin, the sample weighing two grams of heroin and the remaining 9 grams heroin (recorded by the ~~counsel~~ court inadvertantly as 10 grams in the evidence) was sealed in different packets. The recovered heroin and the sample were sent to the Chemical Examiner into two different packets. The report of the Chemical Examiner was found positive. After usual investigation the challan was submitted before the court on 12-5-1994.

3. Admittedly, the Chemical Examiner's report was not attached with the challan when the same was submitted in the court. In this regard I am of the view that unless the Chemical Examiner's report is attached with charge-sheet, the police must file only interim challan in accordance to the proviso to section 173 Cr.P.C. and not the final challan because the police officer cannot be presumed to be a chemical examiner to treat every recovered material to be certainly heroin. After receiving the Chemical Examiner's report the I.O. can submit the ~~[illegible] submit~~ the final challan provided the report is found to be positive or can move an application before the court to treat the interim challan as final challan. In the present case, the I.O., while submitting the charge-sheet, had treated it as interim challan on the ground that the Chemical Examiner's report

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had not been received by him but admittedly he neither submitted any application to treat the said challan to be a final challan nor he had submitted any supplementary challan in the shape of final challan. Although it is a technical ground yet it is hoped that the investigating officer would not keep these defects alive in the charge sheets in future.

4. The learned counsel for the appellant has assailed the judgment of the trial court on the following grounds :-

(i) The sample drawn from the alleged recovered heroin was sent to the chemical examiner after about 17 days i.e. on 19-5-1994 after its recovery on 2-5-1994. No explanation has been given by the I.O. regarding this delay during the proceedings or in the charge-sheet submitted by him. However he has explained this delay in the court today by saying that the police was busy on account of arrangements of Muharram and, therefore, the concerned official of the police-station could not send the samples to the chemical examiner in time. This explanation can be treated convincing but not appreciable particularly when the record of the case has been kept silent. This contention of the learned counsel would have gained force if the prosecution case had been assailed by the defence counsel on the ground of delay in the trial court. It is also important to point out that the chemical examiner had sent the report back to the I.O. on 16-6-1994 and it was submitted in the trial court on the same day. Hence the delay, in the circumstances, cannot be attributed to the investigating agency and is, therefore, condonable.

(ii) The next point which has been urged by the learned counsel for the appellant is about the witnesses who were examined in the court. Out of several witnesses shown in the charge

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sheet, Muhammad Farooq was given up by the prosecution while Muhammad Riaz, who served as fake purchaser, and Muhammad Iqbal, who served as recovery witness, were examined by the prosecution in support of its case. The reason for dropping PW Muhammad Farooq has not been brought on record. According to the Evidence Act (repealed) no particular number of witnesses was required in any case for proof of any fact as had been embodied in Section 134 of the said repealed Act. The said section was replaced by Article 17 of the Qanun-e-Shahadat Order, 1984. Article 17(2)(b) of the Qanun-e-Shahadat Order appears to be applicable in this case which reads as follows:-

> "In all other matters, the court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant." (underlining is my own)

Hence I am of the view that the number of witnesses as required under Article 17 depends upon the circumstances of each case. The number of witnesses as required under section 103 Cr.P.C. is not less than two. If Article 17(2)(b) of the Qanun-e-Shahadat Order is read with section 103 Cr.P.C. then the number of witnesses might not be less than two to keep the prosecution case free from all doubts particularly when the investigating officer shows mostly two witnesses in recovery memo. Although I have no doubt in my mind that the police witnesses are competent witnesses yet that also depends upon the circumstances of each case. For example if a police party is chasing dacoits then it cannot be expected that they should have independent witnesses from the public in the memo of arrest of those dacoits. Similarly if the police searches any place situated in a forest then it would not be possible to comply with Section 103 Cr.P.C. In such cases the police witnesses or the number of witnesses may not be

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strictly in accordance to section 103 Cr.P.C. or to procure public witnesses to witness the personal search or the search of a place.

The learned counsel for the State has urged that section 103 Cr.P.C. would be attracted only in the cases when any search of a place is done. What he meant was that the place of incident in the present case was not attracted for application of section 103 Cr.P.C. He has relied upon a case reported as Nasir Khan-Vs-The State (PLJ 1990 FSC 104) which supports his contention. Notwithstanding the fact as to whether the place of incident, which is stated to be a grave yard, can be treated a place attracted by section 103 Cr.P.C. or not, the circumstances of the case were not of such nature where the I.O. of the case could be presumed to be unable to procure public witnesses or he had no other alternative but to depend upon the police witnesses. I am of the view that unless the circumstances are fully explained in the record of the case for not procuring public witnesses the I.Os are expected to arrange public witnesses to establish personal recovery or search of any place.

It is pertinent to point out that in the present case the I.O. had stated that they reached the place of incident in a vehicle owned by a private person who was his friend. If the I.O. had sources to have private vehicle to raid any place then he could also procure public witnesses. Unfortunately the I.O. has not brought on record to explain the possession of Hilux vehicle which was claimed by him to be owned by his friend. I need not to comment upon as to how he was using the said vehicle particularly in the light of general and common allegations against the police that private vehicles are taken away by force by the police. In these circumstances I consider it necessary to direct that the I.O.s must keep every thing crystal clear in their investigations regarding the use of such vehicles by producing evidence to save the police department from being defamed by common people

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otherwise such things can some times be treated fatal to the prosecution case.

5. Learned counsel for the State has drawn my attention to the statement of the appellant recorded under section 342 Cr.P.C. The appellant has denied the story of the prosecution but has admitted the possession of heroin. The relevant question and the answer to that question are reproduced as under :-

"سوال :- کیا یہ درست ہے کہ مورخہ 02/5/94 بوقت 11.50 بجے دن
یا اس کے قریب بجلی رقبہ لکھی وال روڈ قبرستان ساہیوال
ہیروئن 11 گرام P1 اور ایک نوٹ پچاس روپے
والا نشان R-PII آپ سے برآمد ہوئے ؟

جواب :- غلط ہے + ہیروئن میں پیتا تھا۔ صرف آدھ گرام برآمد
ہوئی۔ باقی کارروائی فرضی ڈالی گئی۔"

It is, therefore, evident that the appellant had admitted recovery of heroin but weighing only half gram for which the maximum punishment is either upto two years or with whipping not exceeding 30 stripes and fine. Thus evidence on record brings into light two versions about the recovery of heroin. According to the prosecution case the recovery of heroin appears to be 12 grams and according to the statement of accused/appellant the recovery of heroin was half gram. Neither the appellant examined himself on oath to prove his stand nor the prosecution examined public witnesses to establish the actual weight of the recovered heroin. In these circumstances version of the appellant/accused can be accepted particularly when

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there are circumstances which do not provide any strength to the prosecution case with reference to the absence of public witnesses.

6. The learned trial Court has convicted and sentenced the appellant under Article 3 of the Order but the circumstances clearly show that the offence committed by the appellant was attracted by Article 4 and not by Article 3 of the said Order.

7. By taking into consideration all the facts as discussed above, the appeal is dismissed but with the following modifications in the impugned judgment :-

(i) Conviction and sentence of the appellant is altered from Article 3 to Article 4 of the Order;

(ii) The sentence of imprisonment is reduced from $2\frac{1}{2}$ years to one year R.I.;

(iii) The sentence of lashes is dropped on account of the word "or" used in the said Article;

(iv) The sentence of fine is up-held as pronounced by the learned trial court;

(v) The appellant would be entitled to have benefits u/s 382-B Cr.P.C., too.

Orders accordingly.

(Shafi Muhammadi)
Judge

Approved for reporting.

(Shafi Muhammadi)
Judge

Islamabad, the
7th April, 1996.
Latif Baloch/*