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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAFI MUHAMMADI

JAIL CRIMINAL APPEAL NO.33/I OF 1996

Ghulam Hussain @ Kaka s/o Abdul Ghani, r/o. Gali No.1 near Office
Jamaat Islami, Niazi Chowk, Darayabad Bughdadi, Karachi;

... Appellant

Versus

The State ... Respondent

Counsel for the appellant ... Mrs.Aqeela Mansoor, Advocate

Counsel for the State ... Mr.Muhammad Nawaz Abbasi,
Advocate

FIR No., date &
Police Station ... 222/94, 31-8-1994,
Bughdadi, Karachi South,

Date of order of trial Court ... 11-1-1996

Date of Institution ... 27-2-1996

Date of hearing ... 8-5-1996

Date of decision ... 8-5-1996

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JUDGMENT:

SHAFI MUHAMMADI, J.- Appellant Ghulam Hussain @

Kaka has preferred this appeal against the conviction and sentence

awarded by the learned Ist Additional Sessions Judge, Karachi

South in a case which is ~~the~~ out come of FIR No.222 of 1994, P.S.,

Bughdadi, Karachi, registered under Articles 3/4 of the Prohibition

(Enforcement of Hadd) Order, 1979, (hereinafter referred to as

the Order) on 31st August, 1994 at 2030 hours ^{lodged} by one SI Muhammad

Safdar of Police Station Bughdadi Karachi. The appellant was convicted

under Article 4 of the Order to suffer R.I., for three years and

to pay a fine of Rs.5,000/- (in lieu thereof four months R.I.) and

punishment of whipping ten stripes alongwith benefit of section

382-B Cr.P.C.

2. The facts of the case unfolded by the FIR and stated

in para-2 of the impugned judgment are that on 31-8-1994 SI Muhammad

Safdar of Police Station Baghdadi alongwith his subordinate staff

was on patrolling during which at Gali No.6, Daryabad, they apprehended

the present appellant and from his possession 28 grams of heroin

powder was secured. The accused, with recovered material, was

brought to Police Station where the said SIP Muhammad Safdar lodged

the above mentioned FIR. After usual investigation the challan

was submitted before the learned trial Court, Charge was framed

against the appellant to which he had pleaded not guilty and claimed

trial. After recording the evidence ^{of} only two witnesses namely

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HC Allahdino (P.W.1/mushir) and SIP Muhammad Safdar (I.O. of the case) the learned trial Judge convicted and sentenced the appellant as mentioned above. The accused was not represented in the court by any Advocate hence he could not be defended properly.

3. Learned counsel for the appellant Mrs. Aqeela Mansoor has inter alia assailed the judgment of the trial Court mainly on the report sent by the laboratory. She contended that as per statements of P.W.1 namely Allahdino (HC Hawaldar) ^{and} Investigating Officer namely Muhammad Safdar, the weight of puries containing heroin was about 28 grams. This statement is falsified if checked in the light of Chemico Bacteriological Laboratory report. On page-2 of the said report it is mentioned that the net weight was 46.310 grams including papers and the weight of heroin was 26.710 grams. The Investigating Officer ^{and/or other} witness has not stated any where about the total weight of contents of the seized material plus weight of the papers and had shown the weight of heroin to be 28 grams while the weight shown by the laboratory is 26.710 grams. No mention of total weight of the heroin plus the weight of papers and difference of weight of heroin ^{as observed in the record has} laid down the ^{foundation} of doubts.

4. Although the learned counsel for the State has stated that it is a minor discrepancy and, therefore, it can be ignored but in all such cases where there are only police witnesses and the claim of police is dented by ^{an accused on} any of such points and particularly when the accused provides full opportunity to the prosecution to

prove their case against him by not engaging any advocate to defend himself properly. Thus such discrepancies cannot be ignored.

In such circumstances these discrepancies may be treated more than sufficient to give some benefit of doubt to the accused.

5. The learned counsel for the appellant, in support of her contention, has relied upon a case reported as Badshah Khan and another Vs The State (1996 MLD 428) pronounced by Mr. Justice Nasir Aslam Zahid (as he then was in the Federal Shariat Court). I have discussed the said case in an unreported judgment in Jail Criminal Appeal No.34/I/1996 (Abid Hussain Vs The State) with my dissenting views by observing therein that there is important difference between the doubtful weight of seized material and the doubtful recovery of seized material. For the purpose of punishment of an accused under Article 4 of the Order the weight of seized material plays the most important role. If the weight of seized material is less than 10 grams of the intoxicant then punishment cannot be more than two years imprisonment besides whipping and fine. And if the weight of seized material exceeds 10 grams then punishment can extend to life imprisonment, besides whipping and fine. On account of this legal position any doubt about the weight of recovered heroin can become a base to give benefit to an accused with reference to punishment. But if the recovery of heroin from an accused is itself doubtful then result shall be acquittal of the accused. In the present case in hand it is the weight of the heroin

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recovered from the accused which is doubtful and not the recovery of heroin itself. Hence benefit goes to the appellant with reference to punishment only because his case falls out of the clutches of second proviso to Article 4 of the Order. Such benefit cannot be extended to the extent of acquittal because recovery of heroin does not appear to be doubtful.

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6. In the light of this discussion, it can be presumed that the actual weight of the heroin may not be the same as shown by the prosecution and it may be even less than 10 grams. In these circumstances this appeal is dismissed but the sentence is reduced from three years R.I. to two years R.I. The sentence of fine of Rs.5,000/- is reduced to Rs.1,000/- on account of the poor economic condition of the appellant and due to which a counsel was engaged to argue this appeal on behalf of the appellant on State expenses. In case of default of payment of fine the appellant shall undergo S.I. for one month only instead of R.I. for four months. The sentence of whipping is dropped. The appellant shall also be entitled to benefit of section 382-B Cr.P.C. The appeal stands disposed of with these modifications.

7. Before parting with this judgment I consider it necessary to point out that the poor accused persons need advocate to represent them at the trial stage more than at the appellate stage. Hence it is suggested for consideration of the Government to introduce such provision in the statute which could promote justice by providing

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legal assistance to those poor people who cannot afford to engage

an advocate *in the trial court.*

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(Shafi Muhammadi)
Judge

Approved for reporting.



(Shafi Muhammadi)
Judge

Islamabad, the
8th May, 1996.
Iqbal