IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAFI MUHAMMADI

JAIL CRIMINAL APPEAL NO.34/I OF 1996

Abid Hussain s/o Fida Hussain r/o Lucky Star, Saddar, Karachi South;

... 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	...	121/94, 20-7-1994, Mithadar, Karachi.
Date of order of trial Court	...	24-1-1996
Date of institution	...	27-2-1996
Date of hearing	...	8-5-1996
Date of decision	...	8-5-1996

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SHAFI MUHAMMADI,J.- This appeal has been filed by Abid Hussain son of Fida Hussain against his sentence and conviction vide a judgment dated 24-1-1996 passed by the learned IV-Additional Sessions Judge (South) Karachi in S.C.No.342/94 arising out of FIR No.121/94 lodged by SI Ch.Muhammad Ashraf, P.S. Mithadar, Karachi registered under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979. The appellant has been convicted and sentenced to R.I. for 4 years, 10 stripes and a fine of Rs.1000/- (in default thereof 3 months SI) alongwith benefit of section 382-B Cr.P.C.

2. Prosecution story unfolded by the FIR and narrated in the judgment is that Ch. Muhammad Ashraf, SHO of P.S. Mithadar was on patrolling duty on 20-7-1994 in the area in his Government mobile. At about 2115 hours he alongwith his police-party reached at Railway Fire Brigade Station, I.I. Chundrigar Road, Karachi and found the present appellant in suspicious conditions with black-colour thelli (bag) in his hand. He was intercepted and searched in presence of P.C. Sakhi Muhammad and Kamran Baig. It resulted in recovery of heroin allegedly weighing 70 grams. Other things recovered from the appellant are stated to be Rs.1795/- as admitted by P.C. Sakhi Muhammad and the I.O., Ch. Muhammad Ashraf, in their examination-in-chief. Contrary to this claim the appellant stated in his statements recorded u/s 342 and 340(2) Cr.P.C. that Rs.17895/- were snatched by the police from him. The seized heroin was sealed, mushirnama was prepared, accused was arrested and

then brought to the police station alongwith the seized material where FIR was registered, statement of witnesses was recorded and sealed parcels were sent to chemical analyser. Charge-sheet dated 29-7-1994 in this case against the accused was submitted after completion of usual investigation in the competent court.

3. At the commencement of the trial, accused pleaded not guilty and claimed trial. Only P.W.1 Shakhi Muhammad (recovery witness) and P.W.2 Ch.Muhammad Ashraf (I.O.) were examined while the second recovery witness namely Kamran was given up by the prosecutor for the reasons best known to the learned prosecutor or the police. The appellant examined himself on oath under section 340(2) Cr.P.C. in proof of his own defence. On the basis of that evidence the learned trial judge found the appellant guilty and sentenced him as mentioned above. Hence this appeal.

4. The appellant sent the appeal on 15-2-1996 to this Court through the office of Superintendent, District Jail, Malir, Karachi which was admitted on 3-3-1996. Mrs. Aqeela Mansoor has represented the appellant at State expenses while Mr.Muhammad Nawaz Abbasi is representing the State.

5. The learned counsel for the appellant has assailed the judgment on several grounds besides drawing attention of this Court to several glaring aspects of the case. It was contended by the learned counsel that both the witnesses of recovery and arrest are police officials and only one was examined by the prosecution.

It was thus contended that on the bases of principles laid down in the case of Badshah Khan and another Vs The State (1996 MLD 428) the present appellant is entitled to be acquitted by allowing this appeal.

6. It is admitted position that the referred judgment was pronounced by a single bench of the Federal Shariat Court and this is my unshaken view expressed in several judgments that the view expressed by a single bench of any court is only persuasive and not authoritative for another single bench of the same court. However, inspite of being persuasive in nature a judgment pronounced by a single Bench might not be ignored as a routine. I have fully gone through the said judgment and with all my praises and regards for Mr.Justice Nasir Aslam Zahid (as he then was) I could not share the conclusion reached by him in that case. Regarding section 103 Cr.P.C. there are un-countable judgments of the Superior Court with apparently conflicting views. The Hon'ble single bench has opined that section 103 Cr.P.C. is applicable in the case of search of a house as well as in all other cases but contrary views are also available in several judgments. Relience in this regard can be placed on Said Muhammad Vs. The State (PLD 1990 SC 1176). The learned Judge has expressed his view regarding necessity of examining two witnesses u/s 103 Cr.P.C. but contrary views are also available in several judgments. Reliance may be placed on the case of Mohammad Khan V. Dost Mohammad (PLD 1975 SC 607

at several 621). On account of conflicting judgments I am always inclined to embrace the observations made in the case of Mirza Shah v. State reported in 1992 SCMR 1475 wherein the Hon'ble Supreme Court has observed that the court will not insist on strict compliance with the provisions of section 103 Cr.P.C. but will examine other evidence produced by prosecution. Similarly, in para 8 of the referred judgment i.e. Badshah Khan v. The State (1996 MLD 428) the Hon'ble Judge has given the greatest importance to a discrepancy regarding the weight of seized heroin. I have no doubt in my mind that such kind of discrepancies can be the best foundation for acquittal of an accused in several cases by the trial court or at appellate stage but unfortunately the case in hand was not properly conducted because there was no advocate to represent the appellant in trial court and he himself, not being an advocate, could not be expected to be aware of legal technicalities. For instance, regarding this discrepancy, not a single question was put by the appellant during cross-examination from any of the prosecution witnesses. Hence allegation regarding recovery of heroin remained unshattered. It has been observed by this Court in several cases that a general question is usually asked from the prosecution witnesses by the defence counsel or by the accused himself, in case if he has not engaged any advocate, by saying "I suggest that you are deposing falsely against the accused." Such kind of suggestion would not serve the purpose of defence in each and every case. Same is

the position in this case where no specific question was asked from the PWs regarding recovery of heroin.

7. It was stated by the investigating officer in his statement that he had recovered few plastic thellies containing heroin powder weighing about 70 grams but the report sent by Chemico Bacteriological Laboratory shows the weight of heroin with plastic thellies as 69.000 grams and net weight of powder as 68.400 grams. In the present age when even pure poison to commit suicide is not available in the market to poverty-striken souls, it is an admitted position that pure heroin is also not expected to be available. The report of the laboratory, besides the weight, shows several other details too. Such as :

(a) Physical app: Light brown colour fine powder with bitter taste;

(b) Solubility: Soluble in chloroform, alcohol and ether;

(c) Colour test: Four tests named in this column show the result positive.

(d) T.I.C.Test: Identical with Heroin (Diacetyl Morphine).

Tests mentioned at (c) and (d) above show only presence of heroin but not the actual weight of heroin in the total seized material. It can be said with certainty that if any mixture contains a small quantity of heroin, the results of the tests, as quoted above, would not be different from the tests carried in the case of 100% pure heroin. In this advanced age the percentage of each component of the seized material can be easily ascertained for the purpose

of punishment particularly in the cases of heroin where punishment depends upon the actual weight of heroin and not the total weight of seized material.

Another important aspect of this report is that the alleged seized material was sent to the laboratory on 12-12-1994 i.e. after about five months. The reasons for sending seized material so late to the laboratory were not reflected or explained by any of the prosecution witnesses particularly by the I.O of this case. This unexplained delay could put the I.O in very hot-water if the appellant had asked only few questions from the I.O or if he had engaged some good advocates to shatter the statement of the prosecution witnesses or if the so called human-rights-organizations spread over in every corner of this country, particularly in Karachi city, had been sincere enough to help such unfortunate persons. If the case of the appellant had not been mishandled by the appellant himself or if the defence had kept it in view the difference between doubtful weight of the seized material and the doubtful recovery of the seized material at the time of cross-examining the I.O., the said police official could not get himself out of hot-water and this case would have been a case of acquittal. Inspite of these feelings I am unable to acquit the accused on account of untouched facts of recovery of heroin although the weight of heroin was dented by the laboratory report.

8. In these circumstances, relying upon my observations in the case of Mst.Rose Nyokabi Wacira Versus The State (1996 PLD 497) regarding section 103 Cr.P.C. and weight of heroin, this appeal merits dismissal because there is difference between

the doubtful weight of the recovered heroin and doubtful recovery of heroin. The weight of seized heroin, in this case, has become doubtful but recovery of heroin was not dented. It may be possible that weight of the heroin was reduced on account of sublimation of some component of the seized material as is usually observed in the case of Canphor. It is also possible that the seized material had no such component. But this doubtful weight could be explained by examining the chemical examiner. In all such cases if discrepancies are not explained by the prosecution then weight of recovered heroin would remain doubtful.

9. In the light of this discussion the weight of seized material has become totally doubtful. But so far as the recovery of heroin is concerned, the said aspect of the case was not dealt by the accused properly otherwise the result of this appeal could be different.

10. On the strength of this discussion I dismiss this appeal with the following modifications in the sentences:

(a) Sentence of 4 years R.I. is reduced to two years;

(b) Sentence of 10 stripes is dropped;

(c) Sentence of fine of Rs.1000/- is maintained but in default of payment of fine he shall further undergo one month S.I. more instead of 3 months;

(d) The appellant shall also be entitled to benefit of section 382-B Cr.P.C.

11. Before parting with the judgment I consider it necessary to discuss certain other important glaring aspects too which were

point out by the learned counsel for the appellant for my serious consideration. These are the legal aspects which can be summarised as under :

(a) If mere denial of any charge and mishandling of a case by the accused himself or by his advocate on account of legal technicalities or by dealing the case carelessly cannot become a ground for acquittal of an accused in respect of any charge then on the same principle officials of the police department cannot be excused in respect of any material fact which goes against them provided the same was not shattered by the learned counsel for the State or remained untouched for the reasons best known to the prosecutor.

In the present case PW-2/I.O Ch.Mohammad Ashraf as well PW-1 Sakhi Mohammad have stated in their examination-in-chief that an amount of Rs.1795/- was recovered from the appellant but this fact was neither mentioned in the FIR nor in the charge-sheet. Column 5 of the charge-sheet contains mention of recovery of 70 grams of heroin only without anyother details which are the requirements of column 5 of the charge-sheet. Although recovery of Rs.1795/- was mentioned in the memo of recovery/arrest yet no mention of this important aspect in the charge-sheet, which was prepared several days after the preparation of recovery/ arrest memo cannot be treated meaningless. No mention of recovery of amount in concerned column of the charge-sheet cannot, rather must not, be ignored by any sensible court nevertheless the amount was Rs.1795/- as stated by the pws or Rs.17895/- as claimed by the appellant. Notwithstanding the allegation of demand of bribe by the police as levelled by the appellant it might be useful to reproduce certain questions and the answers to those questions:

Question No.3 and its Answer in the statement of the appellant recorded u/s 342 Cr.P.C. reads as under :

Q.3: It has come in evidence that from your said thellie packets containing heroin powder wrapped in plastic thellie weighing 70 grams, one pair shalwar kameez suit recovered. From your pocket Rs.1795/- cash also recovered, what have you to say?

Ans. It is not correct. I was holding one thelli in which only one pair Qameez shalwar was kept and Rs.17895/- cash was in my side pocket.

The fact of cash of Rs.17895/- was also repeated in the answer to question No.7 of the said statement. The matter did not end here. The appellant examined himself on oath u/s 340(2) Cr.P.C. The most important portion of that statement, which was not shattered or denied even in the shape of suggestion reads as under:-

"I was taken to P.S. Mithadar where 3 other persons were present. When I objected upon my arrest they started beating me and tortured. SHO was present in a room and was taking meal. The amount of Rs.17895/- was given by Rangers to Police but the police also demanded some more money and on my refusal to arrange the same I have been falsely implicated in this case."

Cross to Miss. Zainab Umeran ADD for the State

"I do the work of shuttering and used to earn Rs.300/- in a day. It is not correct that I was arrested in suspicious condition and heroin was recovered from me. It is also incorrect that I have concocted this story to save my skin."

It is thus evident that statement of the appellant recorded on oath regarding the actual amount of Rs.17895/- and taken by

the police as alleged by him against the police could not be shattered. From all the facts as detailed in the above lines I have no hesitation to hold that if statements of police-officials on oath, inspite of discrepancies and mishandling by the appellant himself cannot be a ground of acquittal for an accused then unshattered statement of the appellant on the point of Rs.17895/- and mishandling of the prosecution case on the said point by the State counsel can be a base of conviction for the I.O. and the only recovery witness because the second witness of recovery was not examined by the prosecution. In this regard the statement of the appellant u/s 340(2) Cr.P.C., on oath and cross-examination by the State counsel on the said statement need no comments regarding legal position of this aspect related to the actual amount of Rs.17895/-

12. Most sorrowful aspect of this case is that not only the appellant mishandled his own case but the learned counsel for the State also left no stone unturned to expose the police-officials by mishandling the case improperly due to most defective cross-examination done by the State counsel.

In these circumstances I am forced to pass the following orders to pave a high-way to reduce excesses of the police on the path of justice and to put the dangerous devil of corruption at least chained, because it would not die, even if hanged, on account of its being institutionalised in the Third-World countries including Pakistan, by those ever-green influential sponsors who never remain

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out of power in these countries:

(i) Before releasing the appellant, the Superintendent District Malir Karachi shall produce the appellant before the District and Sessions Judge Malir who is required to record his statement of this appellant himself in the light of his statement recorded u/s 340(2) Cr.P.C. instead of sending the case to any subordinate court.

(ii) The learned District and Sessions Judge would issue notice to the said police officials through SSP of the area and will take all possible steps to start proceedings against them or send the case to the concerned court having jurisdiction to proceed against those police official.

(iii) The appellant shall be entitled to start civil proceedings in the court against the police officials for recovery of his amount.

(iv) There is apprehension that the concerned police officials may harrass the appellant directly or through their friend on account of these orders. It is, therefore, ordered that the learned District and Sessions Judge Malir would be informed by the D.I.G. Police Karachi through his S.Ps about every new case registered against the appellant in any police station of Karachi, within 24 hours and the learned District and Sessions Judge inturn will inform this Court about all such cases so that this court could examine those cases to see that the accused has not been implicated falsely in these cases. The close relatives of the appellant may also inform this Court about any such case if the police tries to hide any such case for this court

(v) It has been observed by the court in several cases that violation of section 103 Cr.P.C. has alarmingly increased after the superior courts have observed

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that police witnesses are as good as other witnesses in the light of circumstances of each case. This certificate of credibility given by the court is usually misused by the police. Hence it is ordered that this judgment be circulated through I.G., Police of every province to the incharge of every Police Station in their province through their S.Ps. All these violations would be strictly dealt in future by the Federal Shariat Court if no reasons were shown by the I.Os in respect of non-compliance of the requirements of section 103 Cr.P.C. or if the I.Os failed to satisfy the Federal Shariat Court on this aspect. The Judgements of the Superior Courts have to be followed by every subordinate court but the Federal Shariat Court has its own specific jurisdiction. If the I.Os went on misusing their powers on account of certain observations made in the judgments of the Superior Courts, they may not be taken to task by those Courts but such conduct must not be expected from the Federal Shariat Court because no judgment of any Superior Court is binding upon this Court except the observations of the Shariat Appellate Bench. The appeal in hand has specifically radiated the need of strict compliance of section 103 Cr.P.C., in the light of allegations levelled against the police officials for snatching thousand of rupees. If the I.O of this case had arranged public witness in this case then position of the allegations could be different. In Islam where the statement of a son in favour of father or statement of wife in favour of her husband or statement of servant or slave in favour of his master cannot be accepted then, on the same principle, the statement of sub-ordinate police officials regarding serious allegation cannot be accepted easily in favour of their senior or incharge of police-station and such an act of the police officials,

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as levelled by the accused in this case, attracts section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, at least in the eyes of this Court. The Superintendent District Jail Malir, Karachi, is also required to send the report of compliance of this order alongwith the details of remaining cases pending against the accused in different courts within 7 days after the receipt of this judgment so that the conduct of the concerned police-official be judged in the light of those cases.

(Shafi Muhammadi)
Judge

Islamabad, the
8th May, 1996
Iqbal

Approved for reporting.

(Shafi Muhammadi)
Judge