(15)

IN THE FEDERAL SHARIAT COURT.
(APPELLATE JURISDICTION).

Present
Mr. Justice Ch. Ejaz Yousaf

Jail Criminal Appeal No.47/Q/95.

Sultan son of Mangay caste Akazai	...	Appellant.
	Versus	
The State	...	Respondent.
Counsel for the appellant .		Mr. Irshad Ali Rashid Awan, Advocate
Counsel for the State	...	Mr.Sakhi Sultan Addl.Advocate General
No, date of FIR & Police Station	...	No.61 dated 17.7.93 P.S Nokundi
Date of the order of trial Court	...	28.2.1995
Date of institution	...	7.9.1995
Date of hearing	...	19.3.1997
Date of decision	...	24.4.1997

Judgement.

Ch. Ejaz Yousaf J. This appeal calls in question Judgement dated 28.2.1995 passed by learned Additional Sessions Judge Noshki at Quetta whereby the appellant has been convicted under Article 4 of the Prohibition(Enforcement of Hadd) Order 1979 and sentenced to 8 years rigorous imprisonment alongwith fine of Rs.10,000/- or in default thereof further RI for one year. The benefit of section 382-B Cr.P.C was however, extended to the appellant. This appeal is barred by 131 days. In view of the fact that this is a Jail appeal and appellant has been sentenced for eight years, I do not consider it proper to dismiss the appeal on the ground of limitation. I ,therefore, condone the delay and propose to decide the same on merits.

2. Facts in biref are that in the night between 16.7.1993 and 17.7.1993 a pick up bearing Registration No.QAB-5144 which was on its way from Dalbandin to Noshki was intercepted by the Lavies personnel. Two persons i.e. present appellant and one Haider were

found sitting in the rear cabin. On suspicion their personal search was carried out in result whereof one kilogram heroin was recovered from possession of the appellant which was tied with his belly. Consequently FIR bearing No.6/93 was registered on 17.7.1993 under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979. After completion of necessary investigation challan was submitted in the Court of Sessions Judge, Noshki for trial.

3. That charge was accordingly framed to which both the accused pleaded "not guilty" and claimed trial. It would be worhtwhile to mention here that in the mean time the Accused Haider was admitted to bail by this Court and taking advantage of the concession he subsequently dis-appeared. Consequently he was declared as proclaimed offender.

4. At the trial prosecution produced 5 witnesses. Syed Abdullah, Chemical Expert was examined as PW-1. He produced certificate Ex.P/1-A and confirmed that the recovered contraband material was " heroin". Mohammad Ashraf Dafadar Lavies Noshki was examined as PW-2. He produced recovery memo Ex.P/2-A and Ex.P/2-B. He affirmed on oath that the same bear his signatures. He also confirmed that article A/1 and heroin article A/2

were the same which were recovered in his presence. Habibullah was examined as PW-3. He is the person who was driving the pick up at the relevant time. He deposed that on the night intervening between 16.7.1993 and 17.7.1993, he was on his way from Dalbandin to Mashkhail. Two passengers including the present appellant requested him to take them to Mashkhail to which he agreed in consideration of a fare of Rs.100/- each. He further deposed that when they were on their way to Mashkhail in the pick up the vehicle was intercepted by Lavies personnel and was thoroughly searched, nothing was recovered from the vehicle. However, on personal search of the appellant one kilogram heroine was found tied with his belly which was weighed and sealed in his presence. He confirmed that the accused was the same from who's possession the heroin was recovered. Tehsildar Nokundi was examined as PW-4, he deposed that on 2.8.1993 both the accused namely Haider and Sultan were brought before him for the purpose of recording their confessions. He stated that after fulfilling all the necessary requirements of law he recorded the confessional statements. He produced appellants confessional statement as Ex.P/4-A

and certificate as Ex.P/4-B. Mr. Khuda-e-Nazar, Investigation Officer was examined as PW-5.

5. After completion of the prosecution evidence accused was examined under section 342 Cr.P.C wherein he denied prosecution version and stated that he was innocent and nothing was recovered from him. His statement under sub section (2) of section 340 Cr.P.C was also recorded wherein too, he denied all the allegations levelled by the prosecution and pleaded his innocence. He also produced DW-1 Qadir Bakhsh son of Noor Mohammad in his defence who deposed that after appellant's arrest he was contacted by his mother on who's request he visited Tehsildar who in turn sent him to Habibullah (probably PW-3) and Habibullah told him that in case he (Habibullah) is paid some money, he would get release the appellant. After hearing arguments of the parties the trial court convicted the accused/appellant in the manner described here-in-above.

6. I have heard learned counsel for the pauper appellant Mr. Arshad Ali Rashid Awan, Advocate as well as Mr. Sakhi Sultan, learned Additional Advocate General Balochistan. The learned counsel for the

appellant, inter alia raised the following

contentions:-

1. That the search was defective. The I.O. was not competent to investigate into the offence in view of section 155 (2) Cr.P.C particularly with reference to section 2(J) of the Prohibition Order.

2. That it was alleged by the prosection that the contraband material was found tied with the belly of the appellant yet the piece of cloth which was allegedly used for the purpose was not produced at the tiral.

3. That the contraband material was implanted against the appellant as he refused to bribe the Police.

7. The learned Additional Advocate General on the other hand controverted these contentions and additionally it has been submitted :-

i) That the appellant has not disputed recovery of heroin nor he has disputed search carried out by the Police. Appellant's case before the trial Court was that the contraband material was not recovered from him but was recovered from one of the seats of the pick up.

ii) That the recovery was proved to the hilt by the prosecution through independent witnesses

(21)

including Driver of the pick up in which the appellant was travelling at the relevant time.

iii) That huge quantity of heroin weighing one k.g, was recovered from possession of the accused, therefore, possibility of implantation was out of question.

iv) That the appeal is barred by 131 days . No explanation with regard to the delay has been made in the application submitted for the purpose.

v) Lavies personnel have neither any motive to falsly implicate the accused nor any enmity has been alleged against them.
He as such prayed that the appeal may be dismissed.

8. I have given my anxious consideration to the respective contentions of the learned counsel for the parties and have also perused the record with their help. First contention raised by learned counsel for the appellant is that the Police in view of section 155 (2) Cr.P.C was not competent to carry out search of the vehicle as well as person of the appellant without order of the Magistrate, in view of the fact that the offence allegedly committed by him was non-cognizable. He also made a reference to section

2(J) of the Prohibition(Enforcement of Hadd) Order 1979 (here-in-after referred to as the Prohibition Order or the Order) and said that since "vehicle" has been included in the definition of a "place" appearing in section 2(J) of the Prohibition Order, therefore, it does not fall within the definition of a public place as provided by section 2(1) of the Prohibition Order, hence the offence was not cognizable in view of section 16(1)(b) of the Order. In order to supplement his arguments he placed reliance upon a Division Bench Judgement of this Court delivered in the case of Mohammad Yameen Versus The State 1987 P.Cr.L.J 2239 wherein it was held that the offence having been committed in a vehicle was not cognizable under section 16(1)(b) of the Prohibition Order thus defect in the investigation had vitiated the trial. Before dilating upon the above objection I feel it necessary to reproduce here-in-below, relevant portions of the law:-

1) Section 155(2) Cr.P.C reads as follow :-
When information is given to an officer-in-charge of a police station of the commission within the limits ofsuch station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and arefer the informant to the (Judicial Magistrate).

2) Whereas section 2(J) is as under :-

"place" includes a house, shed, enclosure, building shop, tent, vehicle, vessel and aircraft.

3) Section 16(1)(b) of the Prohibition Order provides:-
The following offences shall be cognizable, namely;

a) an offence punishable under Article 3; and

b) an offence punishable under Article 8 or Article 11, if committed at a public place.

A bare perusal of the above provisions of law would reveal that the learned counsel for the appellant has perhaps raised this objection under a mis-conception. No doubt it is provided in section 155 sub section 2 Cr.P.C that no Police Officer shall investigate a non-cognizable offence without order of the Magistrate of First or Second Class yet the fact remains that the offence of transportation of heroin by no stretch of immagination could be termed as a non-cognizable offence being culpable under Article 4 of the Prohibition(Enforcement of Hadd) Order 1979 and having been committed in a vehicle which was being used as a public carrier at the relevant time. I am not convinced by these arguments of the learned counsel for the appellant that since the heroin was recovered from the person of the appellant while travelling in a vehicle which is not a "public place" within the definition of section 2(1) of the Prohibition Order,therefore, the Police was not competent to carry out search of the

(24)

vehicle as well as person of the appellant without a proper warrant. A bare perusal of section 2(1) would reveal that after the word "park, garden" the use of words "or other place to which public has free excess" includes in itself all such vehicles which are either being used as public carriers or the public has a free excess thereto. Since the vehicle in question at the relevant time was being used as a public carrier, therefore the presumption would be that, it was included in the definition of a public place as defined in section 2(1) of the Prohibition Order. Therefore, I am inclined to hold that the Police was competent to carry out search, seizure and subsequent proceedings in relation thereto without obtaining a warrant.

Even otherwise the case of Mohammad Yameen Versus the State is distinguishable from the case in hand due to this simple reason that in that very case appellant was found drunk in a private car which of course falls within the definition of a "place" as the public has no excess to it, therefore, the observations made in Mohammad Yameen's case have no relevance to the present one. This objection as such is without any substance.

So far as the second contention of the learned counsel for the appellant is concerned it would be pertinent to mention here that the recovery of contraband material from possession of the appellant was proved through reliable evidence including the statement of PW-3 who is Driver of the vehicle. The accused has also confessed his guilt in his statement recorded under section 164 Cr.P.C which was proved to be true and voluntary at the tiral, therefore, the non-production of the piece of cloth with the help of which contraband material was allegedly tied on the stomach of the accused was immaterial. Even otherwise if produced the cloth would have rendered additional corboration to the prosecution case, therefore, non production of the piece of cloth by the prosecution is of no help to the defence. The objection being purely technical in nature, cannot affect merits of the case in view of the observations of the Hon'able Supreme Court of Pakistan duly made in the case of Munawar Hussain alias Bobi and two others vs. The state reported in 1993 SCMR page 785 wherein it has been unequivocally laid down that in narcotics cases approach of the Court should be dynamic and technicalities

(26)

should be over looked in the larger interest of the country and the public at large and that the Court while deciding the case should consider the entire material as a whole and if it is convinced that the case is proved then, notwithstanding any procedural defect in the proceedings conviction should be recorded. Relevant portion of the Judgement reads as under :-

> "We may observe that the Court cannot expect in cases of smuggling of narcotics, the evidence of the nature, which is generally available in an ordinary criminal case, as the persons who indulge in the above nefarious activities are more organized, affluent and influential and, therefore, generally, they damage to cause dents in the prosecution evidence. In such like case, which are not only damaging the image of Pakistani nation in the comity of nations, but are making our young generation addicts to narcotic, the Court's approach should be dynamic and they should overlook technicalities in the larger interest of the country and the public-at-large. The Court is to consider the entire material on record as a whole and if it is convinced that the case is proved, conviction should be recorded."

As discussed above the recovery of contraband material was proved through independent and reliable evidence. Confessional statement of the appellant though retracted was duly proved at the trial and was found to be voluntary by the trial Court . Besides, implantation of such a huge quantity of heroin

i.e. one kg which is worth lacs of rupees was not possible. Further, neither any motive for false implication was either alleged by the defence nor proved at the trial nor any enmity to any of the PWs was ever attributed, therefore, view taken by the learned trial Court appears to be well founded and the technicalities if any are to be ignored.

The up -shot of above discussion is that the appellant has failed to point out any legal infirmity in the Impugned Judgement so as to call for interference by this Court, appeal as such has no substance in it which is dismissed accordingly.

Approved for
reporting

JUDGE

(CH. EJAZ YOUSAF)
JUDGE

Announced at Quetta
dated the 24th April, 1997.
Abdul Rahman

JUDGE