

IN THE FEDERAL SHARIAT COURT  
( Appellate jurisdiction )

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Present:

MR. JUSTICE MUHAMMAD SHAFI MUHAMMADI.

JAIL CRIMINAL APPEAL NO.79/I OF 1996.

Taskeen son of Bashir Ahmad,  
resident of Ward No.2, Jampur.

.....Appellant.

Versus

The State.

.....Respondent.

For the appellant:

Khan Mushtaq Ahmad Khan,  
Advocate.

For the State:

Ch. Muhammad Ibrahim, Advocate.

No. & Date of FIR/PS:

No.212 dated 30-5-1995,  
P.S. Jampur.

Date of judgment of  
trial court

3-4-1996

Date of institution of appeal:

12-5-1996

Date of hearing:

1-7-1996

Date of decision:

1-7-1996

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JUDGMENT:

SHAFI MUHAMMADI, J.- Appellant Taskeen son of

Bashir Ahmad was convicted by the learned Sessions Judge, Jampur vide his judgment dated 3-4-1996 under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter referred to as the Prohibition Order) and sentenced to suffer three years R.I. whipping five stripes and fine of Rs.1000/- (in lieu thereof one month SI) with benefit of section 382-B Cr.P.C.

2. The prosecution story as revealed by the record is that complainant Khalil Ahmad, SI was present in Ward No.2, Jampur in connection with investigation of a case alongwith other police officials. During investigation, Taskeen (the present appellant) made a disclosure that he was having heroin in his house for sale. Thereafter he led the police <sup>party</sup> to his house for recovery of the said heroin. The police is stated to have recovered the heroin weighing 50 grams lying under a mat wrapped in polythene paper in a room on the upper storey of the house. One gram of heroin was separated for sending the same to the Chemical Examiner while remaining heroin was put in another parcel. A murasila was sent to the police station which was incorporated into F.I.R. bearing No.212/95 dated 30-5-1995 registered at Police Station, Jampur. The prosecution examined five witnesses with the following summary of their deposition:-

- (i) Dost Muhammad, H.C.(PW.1). He recorded F.I.R. after receiving the murasila.
- (ii) Tariq Jamil, Constable (PW.2). He is the marginal witness in respect of the recovery of the seized material.

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- (iii) Ashiq Hussain, HC(PW.3). He received the parcel containing heroin and forwarded the same to the office of the Chemical Examiner through Liaqat Ali, Constable.
- (iv) Malik Khalil Ahmad, Inspector/SHO(PW.4). He is complainant and I.O. of the case.
- (v) Liaqat Ali, Constable(PW.5). He took the parcel to the Chemical Examiner after getting the same from Ashiq Hussain (PW.3).

Sajid Maqsood, Constable, was given up by the prosecution.

3. It is thus clear that all the witnesses examined by the prosecution were police officials, hence, the learned counsel for the appellant assailed the judgment of the trial court on the basis of violation of section 103 Cr.P.C. as well as on the basis of Article 22 of the Prohibition Order. The learned counsel for the State has taken a stand that disclosure was made by the appellant during investigation and, therefore, it was not possible in the circumstances of the case to get search warrant during mid-night from a Magistrate to search the house of the appellant. Similarly violation of section 103 Cr.P.C. also falls in the clutches of the same circumstances because it was not possible to get two witnesses of the locality during mid-night.

4. No doubt compliance of Article 22 of the Prohibition Order and section 103 Cr.P.C. is subject to the circumstances of each and every case and no strict rule can be made applicable in similar manners. But in the present case, the contradiction in the statement of the investigating officer PW.4 and the statement of PW.2 (marginal witness) is of great importance. The investigating officer of this case namely Malik Khalil Ahmad stated during cross examination



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that "none among the mohallah people including chowkidar

was present at the spot" while PW.2 Tariq Jamil states that

"it was about mid-night before 12, no other mohallah-dar was

present. Volunteered chowkidar was however present". This contradiction

in my view is more than sufficient to make recovery doubtful particularly

when the accused was already in ~~the~~ custody of the police and before

going to the house, the place of incident, the police had a chance to

arrange private witnesses to comply with the provisions of section

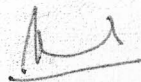
103 Cr.P.C. In the circumstances of the case, I am of the view that

the judgment (PLJ-1975-Cr.Cases-Lahore-102) regarding treating

the police witnesses as good as public witnesses unless enmity is

proved is not applicable to this case.

5. The upshot of the above discussion is that this appeal is accepted, the conviction and sentences passed against the appellant are set aside. He is acquitted of the charge levelled against him. He is ordered to be released forthwith if not required in any other cognizable offence.

  
( Shafi Muhammadi )  
Judge

Approved for reporting.

Islamabad, the 1st of July, 1996.  
M. Khalil.

  
( Shafi Muhammadi )  
Judge