

IN THE FEDERAL SHARIAT COURT.
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.246/I OF 2003.

Muhammad Bashir son of
Muhammad Zaman, resident
Of Village Katree,
Police Station, Muzafarabad
District Muzafarabad --- Appellant.
Azad Kashmir.

Versus.

The State	---	Respondent.
Counsel for the Appellant	--- ---	Mr.M.Saliheen Mugal Advocate.
Counsel for the State	--- ---	Mr.M. Sharif Janjua, Advocate.
Case F.I.R. No.date & Police Station.	--- ---	No.765,dated 9.10.1990, P.S. Haripur.
Date of Judgment of Trial Court.	---	22-09-2003.
Date of Institution	---	21-10-2003.
Date of Hearing	---	23-01-2004.
Date of decision	---	23-01-2004.

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J : - The judgment dated 22.9.2003 passed by Babar Ali Khan, Additional Sessions Judge-II, Haripur in case F.I.R No.765 dated 9.10.1990 under articles 3 / 4 of the Prohibition (Enforcement of Hadd) Order 1979, (hereinafter referred to as the Order), has been impugned through this appeal. The appellant has been convicted under article 3 of the Order and sentenced to undergo five years R.I with a fine of Rs.10,000/-, or in default of payment of fine to suffer further six months S.I. He was also convicted under article 4 of the Order and sentenced to suffer seven years R.I and to pay a fine of Rs.10,000/-, in default thereof to further suffer six months S.I. Both the sentences were ordered to run concurrently with the benefit of section 382-B, Cr.P.C.

2. Three persons, i.e. Muhammad Bashir son of Gul Hassan, Muhammad Bashir son of Muhammad Zaman and Sher Bahadar son of Faqir were sent up to face trial. Sher Bahadar was acquitted whereas Muhammad Bashir son of Gul

Hassan absconded from the court after the charge had been framed. Muhammad Bashir son of Muhammad Zaman was convicted and he has filed the present appeal.

3. According to the prosecution, secret information was received that some narcotics and contraband goods were being carried and transported through truck No.3085/GLTA. Accordingly police picket was arranged on 9.10.1990 at 2.30 p.m. Truck No.3085/GLTA was intercepted and searched which was being driven by Muhammad Bashir son of Gul Hassan (absconder) and the present appellant Muhammad Bashir was sitting on the front seat and acting as conductor. On search from the secret pockets, which had been prepared for concealing contraband goods, 31 bags of opium, 16 slabs of charas and two packets of heroin were recovered. On weighing they turned out to be 103 kilograms and 400 grams to be opium, 17 kilograms and 600 grams charas and heroin two kilograms. The police party was joined by the Custom Officials and the aforesaid intoxicants were secured by the police and Custom Authorities.

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4. On completion of the investigation, both Muhammad Bashir, driver and Muhammad Bashir son of Muhammad Zaman (appellant), the conductor alongwith Sher Bahadar to whom the truck belonged, all the three were sent up to face trial. Charge was framed under article 3 and under article 4 of the Order. The appellant and his co-accused pleaded not guilty and claimed trial.

5. The prosecution examined seven witnesses who had intercepted the truck and recovered the aforesaid contraband goods. Apart from the aforesaid witnesses the prosecution relied upon the confessional statement made by Muhammad Bashir son of Gul Hassan (absconding co-accused), before Magistrate Ist-class, Haripur on 13.10.1990. The maker of confession confessed that the truck in question belonged to Sher Bahadar and the secret pockets were specially prepared under the floor of the truck. They were filled with the intoxicants, which were meant to be carried and transported to various destinations.

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6. The learned trial Judge relying on the testimony and also taking into consideration the confessional statement, found the appellant guilty under articles 3 and 4 of the Order, and awarded sentences as detailed supra.

7. The learned counsel on behalf of the appellant argued in detail that the prosecution evidence was deficient to warrant the conviction of the appellant. According to him the maker of the confession, i.e. Muhammad Bashir son of Gul Hassan since absconded and the Magistrate, who were not examined, could not be relied upon by the learned trial Judge. He mainly stressed that it has not been proved by the prosecution that the appellant was acting as a conductor. No evidence or proof in this behalf was collected by the prosecution. The appellant who was sitting merely by the side of Muhammad Bashir son of Gul Hassan driver just, by itself cannot be treated as sufficient evidence to record his conviction.

8. The learned counsel for the State has controverted this submission by referring to the memorandum of appeal



filed by the appellant himself wherein he admitted that the appellant was acting as a conductor/cleaner of the truck.

Further the appellant when taken into custody did not come up with the plea that he was not conductor and was accompanying the driver as an innocent passenger. The absconding accused Muhammad Bashir son of Gul Hassan has unambiguously stated in his confessional statement that the appellant was present in the truck as its conductor, the appellant, therefore, cannot be absolved of his responsibility of transporting the narcotics.

9. It is argued next that unless it is proved that possession of an accused person of the contraband article was a conscious possession it cannot be accepted only for the reason that the appellant was found traveling in the truck.

10. The arguments has a fallacy, truck is not a normal vehicle meant for carrying passengers. Had he being traveling in some bus (public vehicle) then the argument could have some weight. Anything recovered from the truck wherein the appellant was working as cleaner would be his responsibility to

explain as to how the illegal substance was being transported.

11. The learned counsel for the appellant has argued with emphasis that the case property was not produced, therefore, the appellant can be convicted only for the quantity of the contraband obtained as samples. No doubt the production of the case property is ordinarily considered necessary but in the present case the occurrence took place on 9.10.1990, whereas the conviction has been recorded in the year 2003, i.e. after about 13 years. Even at the time of trial quite a long time lapsed in between the recovery and the statements of the PWs. These contraband articles cannot be retained for an indefinite period. It must have been destroyed, however, non-production of the Order to destroy the substance in this behalf would amount to a serious lapse on the part of the Investigating Officer. This lapse however cannot falsify or nullify the whole prosecution case.

12. The learned counsel for the appellant after addressing arguments on the factual plain came up with his legal pleas. According to the learned counsel articles 3 and 4

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of the Order are quite distinct. The ingredients of both the articles are different. In case the contraband articles are carried or transported then article 3 of the Order is attracted, and in case someone possesses or keeps it in his custody then article 4 of the Order is attracted. The learned trial Judge has erred in law in convicting the appellant under both the articles 3 and 4 of the Order.

13. The contention has a force and cannot be repelled.

The learned counsel in support of his contention has placed reliance on various judgments, 1991 S.C.M.R page 895, 1993 S.C.M.R page 1608 and P.L.J 1996 F.S.C page- 281. It has been held by their lordships that conviction cannot be recorded under both the articles, i.e. either under article 3 or 4 of the Order. At the same time the learned counsel for the State also concedes to this proposition.

14. In view of the above discussion, the appellant's conviction under article 3 of the Order is maintained while his conviction under article 4 is set-aside.



15. Consequently the appellant stands convicted under article 3 of the Order and sentenced to suffer five years R.I with a fine of Rs.10,000/-, or in default of payment of fine to further undergo six months S.I, with the benefit of section 382-B, Criminal Procedure Code.

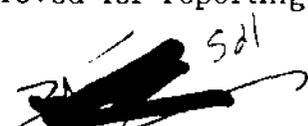
16. The appeal is partially accepted.


ZAFAR PASHA CHAUDHRY
Judge

Islamabad the
January 23, 2004.

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Approved for reporting.


JUDGE.

