SUPREME COURT OF AZAD JAMMU AND KASHMIR

(APPELLATE JURISDICTION)

PRESENT:

Ch.Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Criminal appeal No.01 of 2016
(Filed on 08.01.2016)

Abdul Hafeez Khan son of Naseeb Khan, caste Pathan, r/o village, Tehsil and District Hattian Bala, presently central jail, Muzaffarabad.

….APPELLANT

VERSUS

State through Advocate-General Azad Jammu & Kashmir, having his office in High Court Building, Lower Chatter, Muzaffarabad.

….RESPONDENT

(On appeal from the judgment of the Shariat Court dated 22.12.2015 in criminal appeal No.60 and criminal reference No.61 of 2014)

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FOR THE APPELLANT: Kh.Attaullah Chak, Advocate.

FOR THE RESPONDENT: Raja Akhlaq Hussain Kiani, Addl. Advocate-General.

Date of hearing: 07.03.2017

***JUDGMENT*:**

***Raja Saeed Akram Khan, J.*—** This appeal has been directed against the judgment of the Shariat Court dated 22.12.2015, whereby the appeal filed by the appellant, herein, and the reference sent by the District Court of Criminal Jurisdiction, Hattian Bala, have been disposed off.

2. The facts necessary for disposal of this appeal are that a case in the offences under sections 3 and 4 of the Prohibition (Enforcement of Hadd) Act, 1985 (hereinafter to be referred as Act, 1985) and section 13 of the Arms Act, 1965, was registered against the convict-appellant on 17.02.2007, at police station Chinari. After completion of the required investigation, the *challan* was presented in Tehsil Court of Criminal Jurisdiction, Hattian Bala. The trial Court after

necessary proceedings, convicted the appellant sentenced him to 5 years' rigorous imprisonment along with a fine of Rs.10,000/- under section 3 of Act, 1985 and in case of nonpayment of fine the convict has to undergo further two months simple imprisonment. Under section 4 of Act, 1985 the sentence of two years' rigorous imprisonment along with a fine of Rs.5000/- was awarded to the convict-appellant and in case of nonpayment of fine he has to undergo a further sentence of 1 month simple imprisonment. The convict was also convicted under section 13 of the Arms Act, 1965 for a fine of Rs.5000/- and in case of nonpayment of fine a simple imprisonment for one month has to be faced by the convict. Feeling dissatisfied from the judgment of the trial Court, the appellant filed an appeal in the District Court of Criminal Jurisdiction, Hattian Bala. However, a difference of opinion arose

between two members of the first appellate Court. One member of the Court, i.e. District Qazi, modified the judgment of the trial Court and awarded two years, rigorous imprisonment under section 3 of Act, 1985 along with a fine of Rs.5000/- to the convict and under section 4 of Act, 1985 one year rigorous imprisonment along with fine of Rs.5000/-, was awarded and under section 13 of the Arms Act, 1965 an amount of Rs.5000/- was ordered to be paid as fine. The convict was also extended the benefit of section 382-B, Cr.P.C., whereas, the other member, i.e. Sessions Judge acquitted the convict of the charge in the offence under section 3 of Act, 1985, however, concurred with the sentence awarded by the District Qazi under sections 4 of Act, 1985 and 13 of Arms Act, 1965. Due to the difference of opinion among the members of the first appellate Court, a reference was

sent to the learned Shariat Court. The appellant also filed an appeal before the Shariat Court against conviction. The learned Shariat Court vide impugned judgment dated 22.12.2015, set aside the conviction recorded by the learned District Qazi under section 3 of Act, 1985 and upheld the conviction order passed by both the member of the first appellate Court to the extent of sections 4 of Act, 1985 and 13 of the Arms Act, 1965. Hence, this appeal.

3. Kh. Attaullah Chak, Advocate, the learned counsel for the convict-appellant argued that the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He added that the learned Shariat Court while passing the impugned judgment failed to appreciate the evidence brought on record in a legal manner. He contended that under section 103, Cr.P.C.,

at the time of search of a house, two independent witnesses of the locality are required to be associated but in the present case the provisions of the said section have not been complied with in letter and spirit. He submitted that the Courts below failed to take into consideration that the provisions of section 103, Cr.P.C., are mandatory in nature and the search made in violation of the statutory provision has no value in the eye of law. He added that all the witnesses in the case are the police officials, thus, for recording conviction the testimony of these witnesses cannot be relied upon safely. He contended that all the proceedings are fictitious and have been conducted by the police just to show its efficiency. He added that the appellant had never been convicted by any Court of law as no case ever was registered against him. He submitted that according to the record the raid

was conducted on 17.02.2007 at 5:15, am, whereas, the search warrant was obtained by the police from the Magistrate on 16.02.2007, during the working hours and no explanation is brought on the record regarding the delay of 18 hours in conducting the raid. He contended that the learned Shariat Court also failed to take into consideration the statement of the star-witness of the case, i.e. Magistrate, in whose presence the raid was conducted. He added that the said witness clearly deposed that neither the recovery memos were prepared in his presence nor any article was sealed at the spot. In this way, serious doubts have been created in the prosecution story and it is settled law that every possible doubt must go in favour of the accused.

4. On the other hand, Raja Akhlaq Hussain Kiani, the learned Additional Advocate-General, strongly opposed the

arguments advanced by the learned counsel for the convict-appellant. He contended that the learned Shariat Court while taking the lenient view has already awarded the lesser punishment to the convict. The convict is involved in a heinous offence; therefore, he does not deserve for any further leniency. He added that there is no mala-fide or ill-will of the police officials against the convict-appellant to falsely implicate him in the commission of offence. He added that a huge quantity of narcotics, i.e. 20 bottle liquor (alcohol) and 50 gram *charas* was recovered from the convict and such an heavy quantity of narcotics cannot be planted by the police. He contended that the police officials are also ax good witnesses as the others. During the course of arguments, when a query was made to the learned Additional Advocate-General that why the next morning time was chosen

for raid after procuring the search warrant in the working hours in the preceding day, he was unable to satisfy the Court. He added that there was an apprehension that the convict may be escaped from the scene. He also added that the provisions of section 103, Cr.P.C. are not applicable in the case in hand as the raid was conducted in presence of the Magistrate.

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The allegation leveled against the convict-appellant is that 20 bottle liquor; 50 gram *charas* and a pistol were recovered from the dwelling house of the convict during the raid/search conducted by the police in the supervision of a Magistrate. The learned counsel for the convict-appellant has forcefully argued that while conducting the search, the

provisions of section 103, Cr.P.C., which are mandatory in nature, have not been complied with. To appreciate this argument, we have examined the relevant provision of law, i.e. section 103, Cr.P.C. It will be useful to reproduce here the same which reads as under:-

> "103. *Search to be made in presence of witnesses*.—(1) Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.
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> (2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be

prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) *Occupant of place searched may attend.* The occupant of the place searched, or some person in his behalf, shall, in every instance, by permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or

> neglects to attend and witness a search under this section, when called upon to do so by any order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Pakistan Penal Code."

The statutory provision referred to hereinabove postulates that while conducting the search of a place, it is enjoined upon the officer in whose supervision the search is conducted, to call upon two or more respectable inhabitants of the area in which the place to be searched is situate, to attend and witness the search. The main object of this provision is to ensure that recovery of things/articles is affected honestly and fairly so as to exclude the possibility of false implication and fabrication. The question before us is; whether the provisions of section 103, Cr.P.C., are mandatory in nature in case of search of a

house or not. It may be observed here that the provisions of section 103, Cr.P.C., are not mandatory in the case where the recovery is affected on the pointation of accused, however, in respect of search of a dwelling house or other inhabited place, the provisions of section 103, Cr.P.C. are mandatory in nature. In the present case, the search of a dwelling house was made but no respectable from the locality was called upon at the place of search as has been envisaged in the referred statutory provision. In such state of affairs, the provisions of section 103, Cr.P.C. have not been complied with, therefore, it can be said that the prosecution failed to prove the recovery of narcotics, etc. from the possession of the convict-appellant. The apex Court of Pakistan while dealing with the proposition in a case

reported as *Muhammad Mansha v. The State* [NLR 1995 SD 626], held as under:-

> "5. The plan reading of this section would show that before making a search of a place, the Police Officer is obliged to call upon at least two respectable inhabitants of the locality to attend and witness the search, but unfortunately, in the instant case the two respectable inhabitants were not associated during the search of the house. The Investigating Officer could issue an order in writing calling upon the two respectable inhabitants of the locality to attend and witness the search but he has not done so. No doubt, he had joined Amanullah Shah PW-2 from the public to witness the recovery but that will not fulfill the mandatory requirement of section 103, Cr.P.C and this legal infirmity per se may vitiate the search proceedings."

In another case reported as *Rehmat Ali v. The State* [1994 P.Cr.LJ 475], it has been held that:-

> "The requirement of law is that recovery of incriminating articles should be made in presence of two or more respectable inhabitants of the locality, and the same would be defeated if the recoveries are made by the police officials themselves and no witness is associated in the process of recovery."

Similarly, in a case reported as *Kamil Zaman v. The State* [1999 P.Cr.LJ 1546], it has been held that:-

> "The object of associating public witnesses with the recovery process is to abviate possibility of false implication. The recovery would become unreliable if no public witness is associated, more particularly when they were available and no effort whatsoever

> was made to manage their presence. The provisions of section 103, Cr.P.C. are mandatory in nature and if it is not possibly to fulfill the conditions of the said section, the Investigating Officer must account for such non-compliance. If reasons for non-compliance of section 103, Cr.P.C. are not furnished by the prosecution, such recovery cannot be relied upon."

6. It also appears from the record that the police obtained the search warrant on 16.02.2007, during the working hours, but raid was conducted on 17.02.2007, at 5:15, a.m. after more than 18 hours and regarding this delay no satisfactory explanation has come on the record. The learned counsel for the convict also argued that the alleged recovered articles were not sealed in presence of the Magistrate; moreover, fictitious recovery memos were prepared at police

station. In this regard, he referred to the statement of the Magistrate. To appreciate this argument, we have examined the statement of Sardar Tariq Khan, Assistant Commissioner/ Magistrate, who was present at the time of raid/search. He deposed in his statement that the recovery memo was not prepared in his presence rather immediately after completion of search; he had gone to his residence. The relevant portion of his statement reads as under:-

"مذکور کو گرفتار کر کے واپس آگے پولیس چوکی ہٹیاں بالا چلی گئی جب کہ راقم اپنی رہائش پر چلا گیا۔۔۔۔۔۔۔۔۔۔۔۔۔۔۔۔ یہ درست ھیکہ مظہر نے فرد ضبطی مرتب نہ کی تھی یہ بھی درست ہے کہ فرد ضبطی مظہر کے سامنے بھی مرتب نہ ہوئی تھی۔"

After going through the statement of the Magistrate, we agree with the stance taken by the learned counsel for the convict-appellant that the recovery memos were prepared at police station in absence of the Magistrate, moreover, the recovered articles were not

sealed at the spot. In such situation, it can be said that the recovery is doubtful and it is well established principle of law that every possible doubt must go in favour of the accused.

7. As we have reached the conclusion that the search has been conducted in violation of the mandatory provisions of section 103, Cr.P.C. and the recovery of the narcotics etc., is also doubtful, therefore, there is no need to discuss the other aspects of the case.

In view of the above while accepting this appeal the impugned judgment of the Shariat Court is set aside and the convict-appellant is acquitted of the charge.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**
__.03.2017

Date of announcement: 15.03.2017