

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

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PRESENT

HON. MR. JUSTICE MUHAMMAD SIDDIQUE

CRIMINAL APPEAL NO. 119/I OF 1984

Jalada	...	Appellant
Versus		
The State	...	Respondent
For the Appellant	...	Sh. Zia-ud-Din, Advocate
For the State	...	Mr. S. M. Naeem, Advocate
Date of filing	...	
Date of hearing and decision	...	3.10.1984

JUDGMENT

MUHAMMAD SIDDIQUE, J:- This is an appeal under Article 27 of the Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter referred to as the Order) against the impugned judgment of the Additional Deputy Commissioner(G) Magistrate, 30 Section, Attock dated 26.7.1984 whereby Jalada accused was convicted and sentenced as under:-

Under Article 3 of the Order to undergo = R.I. for two years and to pay a fine of Rs.2000/- or in default of payment of fine further S.I. for 6 months and also to suffer 10 stripes.

Under Article 4 of the Order to undergo = R.I. for one year and to pay a fine of Rs.1000/- or in default of payment of fine further S.I. for three months.

Both the substantive sentences of imprisonment were ordered to run consecutively. The convict was

also given benefit of the provisions of Section 382-B Cr.P.C. The case property was confiscated to the state according to the rules.

2. In support of its case the prosecution produced 6 witnesses. Abid Hussain (P.W.1) and Fateh Muhammad (P.W.2) are tea venders of Mehrpura, Attock City. Their version is that on the day of occurrence they were travelling from Peshawar to Attock City in the last compartment of the Thal Passenger Train. Jalada accused was already known to them. Abid Hussain (P.W.1) has deposed that the accused Jalada boarded that compartment at Pabbi Railway Station. The accused was carrying a basket which contained gundaries (cut pieces of sugar-cane). The accused went to the laterine in that compartment of the train. He came out of the laterine after some time and again sat near the witnesses. When the train reached railway station Attock City the witnesses met S.H.O. Noor Khan (P.W) who asked about Jalada accused but he could not be traced out any where from the platform. The witness told the police officer that the accused boarded the train at railway station Pabbi and he went inside the laterine of that particular compartment. Thereafter the said police officer went inside the laterine and beneath the water-tank, he opened a plank and recovered opium weighing 4 k.g. from there. The said opium was concealed in the ceiling. A sample parcel of 50 grams was prepared out of the said opium. This witness has also attested the recovery memo. Ex.PA. In cross-examination this witness has admitted that besides the accused other passengers had also gone inside the laterine but he could see the accused only going to the laterine. The accused had taken the basket to the laterine. It was a large basket. It

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is further admitted by this witness that the accused used to take down the basket containing gundaries whenever the train stopped at any railway station. The passengers used to board and alight from the compartment during the journey from Peshawar to Attock. The witness did not see accused at Attock Railway Station. The recovery memo was made in the absence of the accused. The police had not taken into possession the ticket by which this witness was travelling. It is also admitted by this witness that he had appeared as a P.W in three cases. He denied the defence suggestion that he had not gone to Peshawar and did not witness the occurrence and was deposing falsely at the instance of the police. He further denied the suggestion that he was a stock-witness of the police.

3. Fete Muhammad (P.W.2) as indicated above, made a similar statement. He was also travelling in the same compartment from Peshawar and was coming back to Attock City. He corroborated the version of Abid Hussain (P.W.1). He has also attested the recovery memo Ex.PA. In cross-examination this witness has deposed that the opium was recovered from the side of the water-tank and not from beneath the water tank. He has further stated that the people have been using laterine of that compartment from Peshawar to Attock. However neither he nor Abid Hussain used ~~to~~ laterine from Peshawar to Attock. According to the witnesses the basket of the accused was of 3 feet diameter and the accused had taken it in the laterine in quite straight manner and had not tilted it. According to this witness the accused disappeared from Pabbi. He denied the defence suggestion that he was deposing falsely at the instance of the local police.

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4. S.I. Noor Khan (P.W.3) is the investigating officer in this case. He has more or less given the same version as already contained in the F.I.R. According to him on 27.10.1982 he received secret information that Jalada accused who used to sell gundaries in the railway train compartment was carrying opium by concealing in the body of the train No.192. He was therefore present at the platform before the arrival of that train. The train reached railway station Attock City at 12.15 P.M. He alongwith his companions started search for the accused. In the meantime Abid Hussain and Fateh Muhammad P.Ws met him and informed him that Jalada accused boarded the last compartment of the train at railway station, Pabbi and that he was carrying a basket and he went to the laterine of the said compartment of the train where he remained for some time. Accordingly the said laterine of the last compartment was searched and from the roof of the water-tank, opium weighing 4 k.g. in 8 packets was recovered. Out of that opium 50 grams of opium was separated for sample and sealed in a parcel and sent for chemical analysis. The said opium was taken into possession vide recovery memo Ex.PA. This police officer prepared the complaint Ex.PB and sent the same to the police station for registration of the case. After completion of the investigation he submitted the final challan in the court of the Magistrate. In cross-examination this witness has admitted that it is not possible to keep any thing between the water tank and the card wood of the ceiling and the opium was not recovered from the under bottom of the water-tank. He denied the defence suggestion that the opium was not concealed in the laterine by the accused. H.C Muhammad Khan(P.W.4)

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on receipt of the complaint Ex.PB registered the formal F.I.R. Ex.PB/I. He also received two sealed parcels from the investigating officer and first kept the same in the Malkhana and then handed over the same to F.C. Abdul Aziz (P.W.5) for taking the same to the officer of the Chemical Examiner, Lahore and the said F.C. Abdul Aziz delivered the same intact there. A.S.I. Hakim Khan (P.W.6) arrested the accused Jalada on 29.9.1983.

5. Jalada accused in his statement recorded under section 342 Cr.P.C. denied the prosecution allegations. When asked if he wanted to say anything else, the accused stated as under:-

"میں بے گناہ ہوں ، میں ریلوے اسٹیشن اٹک پر کبھی کبھی ڈرائی فروٹ فروخت کرتا تھا ، میں نے آئی نور خان مجھ سے مفت فروٹ لیا کرتا تھا - جس پر میں نے احتجاج کیا ، وقوعہ ہڈا سے ایک ہفتہ قبل اس نے مجھے مجبور کیا کہ میں ایک جھوٹے مقدمہ میں گواہ بن جاؤں - میرے انکار پر اس نے مجھے دھمکی دی کہ وہ مجھے مجھ اس کا سبق سکھائے گا - چنانچہ اپنے انتقام کے لئے اس جھوٹے مقدمہ میں غلط طور پر ملوث کر دیا - میں بروز وقوعہ نہ تو اٹک میں تھا اور نہ ہی اس ٹرین میں ، میں نے اس دن سفر کیا تھا - گواہان سررشتہ اٹک ریلوے اسٹیشن پر ملازم ہے - اور پولیس کے زیر اثر میرے خلاف جھوٹی گواہی دی ہے -

The accused, however, produced no evidence in defence.

6. The challan of the accused was put up before the Additional Deputy Commissioner(G)/Magistrate Section 30. As indicated above the accused was neither apprehended at the spot at the time of the

recovery of the opium from the laterine nor, according to the prosecution, he was available after the occurrence. The investigating officer on 16.5.1983 submitted an application to the Court of Magistrate, for the issuance of non-bailable warrants of arrest of the accused. This prayer was granted and the required warrants were issued against the accused but even then he could not be arrested. Subsequently on 7.6.1983 the trial court examined constable Noor Muhammad who stated that he was interested with the warrants of arrest of the accused but he could not execute the said warrants because the accused was not traceable and his correct whereabouts were not known. Accordingly on the basis of the said statement of F.C.Noor Muhammad, proclamation under section 87/88 Cr.P.C was published requiring the accused to appear in the court at specified time. Even as a result of this proclamation, the accused did not appear before the court at the specified time. The statement of F.C.Noor Muhammad was recorded on 18.6.1983 in which he deposed that he had affixed a copy of the proclamation at the conspicuous part of the house of the accused in village Khudarzai. The accused, however, did not appear before the trial court and as stated above, he was arrested by A.S.I. Hakim Khan (P.W.6), on 29.9.1983.

7. The trial court vide impugned judgment dated 26.7.1984 convicted and sentenced Jalada accused as mentioned above.

8. I have heard at length the counsel for the appellant who has also taken me through the entire material available on the record.

9. In order to appreciate the exact nature of the allegations, it is necessary to examine the charge

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against the accused. The trial Magistrate on 19.11.1983 framed the following charge against Jalada accused:-

میں سید مظفر حسین زیدی مجسٹریٹ درجہ اول اٹک آپ جلال خان میں حسب ذیل الزام عائد کرتا ہوں یہ کہ مورخہ 27/10/82ء کی اطلاع پر ریلوے اسٹیشن اٹک پر ایک عدد ٹوکری گنڈیریاں کے نیچے افیون ناچائز 4000/گرام برآمد ہوئی ٹوکری آپ کی ملکیت بتائی گئی گواہان نے آپ کو اس ناچائز کاروبار میں ملوث پایا اس طرح آپ نے اس جرم کا ارتکاب کیا جسکی سزا پاکستان کی دفعہ 3/4 حد منشیات میں ہے اور جو ہماری سماعت کے قابل ہے ، 19/11/83 دستخط

A mere perusal of the above charge is sufficient to belie the prosecution case as subsequently put in court through the witnesses. According to the charge the allegation against the accused was that at railway station Attock, opium weighing 4000 grams was recovered from under-neath the gundaries (cut pieces of sugar-cane) lying in the basket which allegedly belonged to him. The prosecution has produced no witness to substantiate this charge and no recovery memo of the opium from underneath the gundaries lying in the basket, was prepared. In the instant case, no witness has deposed that either opium was recovered from underneath the gundaries lying in the basket or the said basket belonged to the accused. Even the said basket was not taken into possession by the investigating officer. In fact, neither the accused nor the said basket was available at Attock City platform where the opium was allegedly taken into possession. Thus in the charge framed against the accused there is no mention of

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any opium from the laterine of the last compartment of the train (Thal Passenger Train). According to the recovery memo. Ex.PA the opium was recovered from the top of the water-tank of the laterine of the last boggy (compartment) of the said train. The investigating officer and recovery witnesses have also supported this version. The result is that no charge regarding this recovery of opium from the laterine was framed against the accused and the charge actually framed against the accused is not supported by any evidence. This shows gross-negligence both on the part of the prosecution and the court as nobody noted this obvious error which goes to the route of the case and the convictions and sentences awarded to the appellant are liable to be set aside on this short ground alone.

10. Even on merits the convictions of the appellant under Article 3/4 of the Order are not maintainable. Article 3 of the Order provides punishment inter-alia for 'import', 'export', 'export', 'transport', 'manufacture' or 'process' of any intoxicant' etc. I have minutely examined the entire material available on the record but find not an iota of evidence to support the allegations under Article 3 of the Order. The prosecution has produced no witness to substantiate the allegations under this Article. In other words there is total absence of any evidence-oral or documentary, to support the conviction of the appellant under the said Article. His conviction under the said Article is, therefore, liable to be quashed.

11. As regards the conviction under Article 4 of the Order, the words used are whoever 'owns' 'possesses' or 'keeps' in his custody any intoxicant'.



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Factually according to the prosecution the admitted position is that the investigating officer recovered 8 packets of opium from the laterine of the last compartment (boggi) of Thal Passenger Train and at that time the appellant was not even present either in the compartment or at the platform. According to Abid Hussain and Fateh Muhammad P.Ws, the accused boarded the Thal Passenger Train on the day of occurrence at Pabbi railway station alongwith a basket containing gundaries. There is even no mention of any opium either in the said basket underneath the gundaries or otherwise in possession of the accused. He used to get down alongwith his basket and gundaries at every station whenever the train stopped at any railway station. It is an admitted position that the accused did not get down at railway station, Attock City but earlier he had got down with his basket and gundaries at some other railway station but it is not known at which railway station he actually got down. If he had been present in the train or at the platform at Attock City, he would have been apprehended at the spot by the police. The result is that at the time of the alleged recovery of opium from the laterine of the last boggi of Thal Passenger Train, Jalada accused was neither present in the said boggi nor at the platform of Attock City. It is further an admitted fact that during this journey other passengers have been boarding and alighting from the said compartment and they have been using the same laterine by going in and coming out from the said laterine. Thus it was not the accused alone who used the said laterine at the relevant time. Similarly there is no evidence to show that the said laterine was checked before the start of the train ~~train~~ from Peshawar or before the accused boarded that train at Pabbi Railway Station to ensure

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that opium in question was not placed in it earlier. In other words there is no positive evidence to show at what time and place and by whom the said opium was placed in the laterine. No witness has stated that the accused was carrying any opium underneath, the gundaries placed in his basket which he allegedly carried into the said laterine, or otherwise he kept the said opium with him before entering the laterine. Similarly, no one saw the accused placing the said opium in the laterine. It is no body's case that the accused had the exclusive possession or control of the laterine in any manner - either having the key of that laterine with him or otherwise control over it. It is admitted even by Abid Hussain and Fateh Muhammad P.Ws that there were other passengers sitting in the same compartment who have been using the same laterine during the journey from Peshawar to Attock City. Thus factually admitted position is that the laterine was accessible to all passengers travelling in that particular compartment and, therefore, it would be a public place as defined in Article 2(1) of the Order and not in exclusive possession or control of a particular passenger and consequently no particular passenger like the applicant can be held responsible for recovery of any intoxicant unless the prosecution produces further evidence <sup>to connect him directly</sup> with the said recovery. In this back ground it can reasonably be held that the appellant did not own, possess, or keep in his custody the opium allegedly recovered from the laterine of the last compartment of Thal Passenger Train. The possibility that some other person might have placed the said opium in the laterine cannot be excluded. Thus the ingredients of Article 4 have not been established satisfactorily against the appellant. It is not disputed that the onus was on the prosecution to establish the guilt of the accused beyond any reasonable doubt. In the peculiar circumstances

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of the case the prosecution has failed to establish that the opium recovered from the laterine was owned, possessed or kept in custody of the appellant. The prosecution has failed to connect the said opium with the appellant either at the time of its recovery or earlier from where and in what manner it was taken by the accused. The word 'possess' used in Article 4 means actual physical possession and not mere constructive possession. Moreover possession should be exclusive of the accused. By no stretch of imagination the laterine of the last compartment (boggi) of Thal Passenger Train could be said in possession of or in control of or in custody of the appellant-what to speak of the exclusive possession or control etc. The laterine was clearly a public place and, therefore, was accessible to any passenger travelling in that particular compartment of train. Thus even if the recovery of opium from the said laterine is accepted, the prosecution has miserably failed to show that the said laterine was in exclusive possession or control etc of the appellant. If as admitted by P.Ws Abid Hussain and Fateh Muhammad other passengers during the said journey from Peshawar to Attock, have been using the said laterine, the possibility that any of the said passenger might have placed the opium there cannot be excluded. In any case the mere recovery of opium from the said laterine is not sufficient to hold the accused guilty under Article 3 or 4 of the Order without further evidence to connect him with the said opium that he purchased or brought it from particular person or place and concealed it in the said laterine with that purpose. As mentioned above apart from Abid Hussain and Fateh Muhammad P.Ws the prosecution has produced no other evidence to connect the appellant

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with the said opium. Surprisingly the prosecution has not been able to explain as to from where and in what manner the accused brought such quantity of opium in the train. Further it is not explained how the appellant after placing the opium in the laterine himself disappeared and got down from the train leaving the opium there. It is no body's case that he got information about the presence of the police at the railway station Attock and, therefore, to avoid his apprehension he got down at some earlier railway station. Moreover as an ordinary prudent man he should have taken the opium with him if he himself had put it there and if he had got down at some earlier station to avoid his arrest by the police. The result is that the prosecution case is full of doubts and so many links are missing in the prosecution case which were essential to establish the guilt of the appellant.

12. Apart from above the prosecution case suffers from another informity on merits. According to the investigating officer the opium was recovered from roof of the water tank of the laterine in question. Same is the position in the recovery memo Ex.PA. However the witnesses of the said recovery Abid Hussain (P.W.1) and Fateh Muhammad (P.W.2) have given different description. Abid Hussain (P.W.1) has deposed that the investigating officer recovered opium from beneath the water-tank. On the other hand, according to Fateh Muhammad (P.W.2) the opium was recovered from the side of the water-tank and not from beneath the water-tank. All the three witnesses connected with the recovery of the said opium differ as to the exact place from where it was recovered-whether from top or the roof of watertank or beneath or from the side of the said water-tank. This discrepancy also creates serious

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element of doubt in the prosecution case. Moreover it is not clear how those 8 packets of opium weighing 4000 grams could be placed either beneath or by the side of the water-tank of the latrine.

13. The prosecution has also used the abscondence of the accused as corroboration against him. However, the position of the prosecution is weak on this score also. It is an admitted fact that accused Jalada is resident of Khudar Zai Police Station, Pabbi, District Peshawar N.W.F.P. Thus the residence of the accused was admittedly outside the local limits of the jurisdiction of the trial court. Now we have to see the mode of executing warrants of arrest against such an accused. Chapter VI of the Cr.P.C deals with summons and warrants of arrest. Sections 83 and 84 of the code are relevant for this purpose and the same are reproduced below:-

"S. 83 (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police 1\* \* \* within the local limits of whose jurisdiction it is to be executed.

(2) The Magistrate or District Superintendent 2\* \* to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction."

"S. 84 (1) When a warrant directed to a police officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement

either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it."

It is an admitted fact that the provisions of the above two sections which were applicable to the accused were not invoked by the trial court. The result is that even the alleged abscondence cannot be used against the accused in this case.

14. From the facts and circumstances of the case, it is abundantly clear that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. The case of the prosecution is full of doubts. It is well settled principle of Islamic Jurisprudence that benefit of doubt must go to the accused. Accordingly while giving the benefit of doubt, this appeal is accepted and the

convictions and sentences awarded to Jalada Khan appellant by the trial court are set aside. He is acquitted of the charge. He shall be released forthwith if not required in any other case.

JUDGE-III

Islamabad the 3rd  
October, 1984  
\*M. Akram, J.W.

*Approved for reporting.*