

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

HON.MR.JUSTICE MUHAMMAD SIDDIQUE
HON.MR.JUSTICE MALIK GHULAM ALI

CRIMINAL APPEAL NO.173/I OF 1984

Muhammad Farooq	...	Appellant
Versus		
The State	...	Respondent
For the appellant	...	Sh.Muhammad Saleem. Advocate
For the State	...	Mr.Shamsuddin,Advocate
Date of F.I.R.	...	27.3.1984
Date of Judgment of the Trial Court	...	16.10.1984
/ Date of filing in this Court	...	1.11.1984
Date of hearing	...	7.1.1985
Date of decision	...	17-1-1985

JUDGMENT:

MUHAMMAD SIDDIQUE, J:- The Additional Sessions Judge, Rawalpindi vide impugned judgment dated 16.10.1984 found guilty Muhammad Farooq accused under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter referred to as the Order) and sentenced him to undergo R.I. for 2 years plus whipping numbering 5 stripes and a fine of

Rs.1000/- or in default of payment of fine further R.I. for 6 months. He was also given the benefit of the Provisions of Section 382-B Cr.P.C. The convict has challenged his conviction and sentences through the present appeal.

2. In support of its case the prosecution produced 5 witnesses. Ch.Abdul Rashid, Excise Inspector (P.W.1) has deposed that on 27.3.1984 he was present at the Excise Check Post G.T.Road Taxila alongwith subordinate Excise Officials including Muhammad Safdar Excise Head Constable, Muhammad Anwar and Tora Baz Khan Excise constables. At about 2.00 P.M. on the same day, Aftab Ahmad Police Inspector alongwith his police staff also reached there. This witness and his staff was checking the vehicles/coming from Peshawar side. At about 2.30 P.M. a Flying Coach from Peshawar side reached the check-post. He checked the passengers of this Flying Coach and Muhammad Farooq accused was travelling in the said Flying Coach. Due to suspicion, this witness asked the accused to get down the Flying Coach. On his search 250 grams of heroin (p-1) was recovered from the folds of ^{his} the trousers. It was wrapped in plastic envelope (p-2). About 12 grams of heroin was separated and was made in-to a sealed parcel for sending the same to the Chemical Examiner Punjab, Lahore for chemical analysis. The rest was also made into a separate sealed parcel. Vide recovery memo Ex.PA both p.1 and p.2 were taken into possession attested by this witness, Tora Baz Khan and Bashir Ahmad P.Ws. He prepared the complaint Ex.PB and handed over the same alongwith the accused and sealed parcel and recovery memo etc to Aftab Ahmad Inspector Police.

In cross-examination this witness has stated that it takes about two to three minutes usually to complete checking of a vehicle. Generally, they do not check all the passengers but check only those passengers about whom they have any suspicion. He has further deposed that he and other members of his party had not noted the number of the Flying Coach in question. He himself had asked the accused to get down the Flying Coach. He had not checked any of the other passengers because according to him checking was done only when they suspected some one. No ticket was recovered from the accused. On a Court question this witness stated that he had enquired from the accused about the ticket but he did not reply and he could not enquire about it from the driver as the driver was allowed to drive away just after the recovery of the heroin in order to avoid in-convenience to the passengers. Rs.160/- and other articles were also recovered from the accused. The cash was recovered from the pocket of the trousers. He denied the defence suggestion that the accused and two other persons were hauled up between 10.00 A.M. and 11.00 A.M. and they were arrested on suspicion. It is further denied by him that the accused was having with him a ticket on which the name of the passenger, date and time of departure of the Flying Coach was recorded. He denied the suggestion that he had destroyed the said ticket. It is further denied by him that the heroin was not recovered from the accused.

3. Bashir Ahmad Head Constable (P.W.2) Police Station Taxila has stated that on 27.3.1984 in his presence, a Flying Coach coming from the side of Peshawar was stopped at Check Post Taxila by Abdul Rashid Excise Inspector. Some other police

and Excise Officials were also present there at that time. Abdul Rashid Inspector brought down the accused from the said Flying Coach. The accused was searched by Abdul Rashid Inspector and as a result 250 grams of heroin was recovered from the folds of the trousers which the accused was putting on at that time. 12 grams of heroin was made into a sealed parcel and the rest was also sealed in a parcel. The said heroin was wrapped in a plastic envelope (p-2). The envelope and the heroin were taken into possession vide recovery memo Ex.PA which was signed by this witness. It was also signed by Tora Baz Khan Excise Constable. In cross-examination this witness was duly confronted with his police statement recorded under section 161 Cr.P.C. This witness did not know the number of the Flying Coach and he did not know any other officials present there had or had not noted down the number. In cross-examination this witness has further stated that the copy of inspection note Ex.DA was not in his hand. However, it was signed by him and at the end. In fact he had certified that it was a correct copy of the inspection note. This document was in the hand of Ahmad Hassan Police Constable who was posted at police station Taxila. It is further admitted by him that the report under section 173 Cr.P.C was in his hand and the copies of the statements of Tora Baz Khan, Bashir Ahmad H.C Ex.DB and Ex.DC respectively which were supplied to the accused, were prepared by him. Copies of statements of Malik Muhammad Amir M.H.C and Muhammad Aslam F.C, which were supplied to the accused and which had been shown to him, were in his hand. But they were signed by Aftab Ahmad. It is also deposed by him that on 27.3.1984 he had come to Rawalpindi in the morning.

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He further denied the suggestion that he had returned from Rawalpindi at 4.15 P.M. and at that time Muhammad Ismail F.C was with him or that he had recorded his arrival at the police station in that manner. It is also admitted by him that he had been appearing before the trial court with record of the case at the time bail petitions on behalf of the accused were heard. He denied the defence suggestion that he was not present at check post Taxila on 27.3.1984 or that he had not witnessed the recovery or that bogus proceedings were initiated against the accused. He, however, has admitted that he had written the 'ziminis' at the direction and at the dictation of Aftab Ahmad Inspector Police. It is denied by him that the ziminis were prepared at the police station without the direction and dictation of the S.H.O.

4. M.H.C Muhammad Amir (P.W.3) on receipt of complaint Ex.PB, prepared the formal F.I.R Ex.PB/1. Aftab Ahmad Inspector Police had given him two sealed parcels on 27.3.1984 which he had kept intact in the Mallkhana. On 28.3.1984 he handed over the said sealed parcel to Muhammad Aslam F.C for onward transmission to the office of the chemical examiner, Lahore.

5. F.C.Muhammad Aslam (P.W.4) on 28.3.1984 was given a sealed parcel by MHC Muhammad Amir and he delivered the same in tact in the office of the Excise Department at Rawalpindi. After getting a docket from Excise Office he had sent the said sealed parcel by registered post on the same day. In cross-examination he has denied the defence suggestion that he had not visited the Excise Office on the morning on 28.3.1984 and on that day he had

gone to the Court of Special Judge Rawalpindi for producing record in case F.I.R No.53/83 Police Station Taxila.

6. Aftab Ahmad Inspector/SHO (P.W.5) is the investigating officer in this case. He claims to be present at the Check Post Taxila alongwith his subordinate staff on 27.3.1984 at about 2.30 P.M. He has deposed that the excise officials had stopped a Flying Coach coming from Peshawar side. Abdul Rashid Excise Inspector and an excise constable went in the Flying Coach and the accused was brought down from inside the Flying Coach. The accused was searched by the Excise Inspector and as a result 250 grams of heroin (p-1) wrapped in a plastic envelope (p.2) was recovered from the dab(ڈب) of the accused's trousers. About 10/12 grams of heroin was made into a sealed parcel and the rest was also made into a sealed parcel. Recovery memo Ex.PA was prepared by Abdul Rashid Excise Inspector. The said Excise Inspector handed over to this witness, the complaint, the recovery memo, memo of Jama-Talashi and the accused. The case property i.e. the sealed parcels were also handed over to him. This witness arrested the accused and started the investigation of the case. He prepared the rough site plan Ex.PC. He handed over the sealed parcels to Muhammad Amir MHC in tact. After completion of the investigation he challaned the accused. In cross-examination this witness has stated that the police station was 3 or 4 miles from the Check Post. He has admitted that he did not know the number of the Flying Coach. He had asked the accused to produce the ticket but he could not produce the same. He has deposed that he was allowed to dictate to his subordinate during the investigation. According to him

some of the case diaries were dictated by him to Bashir Ahmad H.C who was also present at the time of recovery. He did not remember whether the statement of Bashir Ahmad H.C. was recorded by him or it was dictated to him. Statement under section 161 Cr.P.C and report under section 173 Cr.P.C were written by Bashir Ahmad H.C on his dictation. He denied the defence suggestion that no recovery was effected from the accused and he was not present at the spot.

7. Muhammad Farooq accused in his statement recorded under section 342 Cr.P.C denied the prosecution allegations. He stated that on 27.3.1984 he was hauled up alongwith two other persons at the check post at about 10.30 A.M. He was also searched in the Flying Coach. When asked why this case was made against him, the accused stated as under:-

"I was travelling in a Flying Coach from Peshawar to Rawalpindi on 27.3.1984. At about 10.30 A.M. our Flying Coach was stopped at Excise Check-Post Taxila. I and two other un-known travellers were made to get down from the Coach. I and the said two persons were searched. The two un-known persons were allowed to go whereas I was detained at the police station. The other two un-known persons were also taken to the police station but they were allowed to go later."

8. The accused produced two witnesses in his defence. He himself appeared as D.W.1 and stated on oath that he migrated to Pakistan as Afghan refugee about a year ago. He was Afghan-National. He had to leave Afghanistan as the Russian-Forces have occupied Kabul. As a result

of bombing by Russian-Air-Force, his father, his brother and his wife were killed. According to him he used to get ration from refugee camp at Peshawar. His sister, who was in West Germany, was also supporting him financially. He was residing at Islamabad. His mother, his sister and his son were also living with him. He was waiting for a Visa as he was to leave for West Germany to join his sister there. On 27.3.1984 he left Peshawar at about 9.00 A.M. in a Flying Coach. He purchased a ticket from there before boarding the Flying Coach. His name, seat number, date and time of departure was written on his ticket. At about 10.30 A.M. the Flying Coach was stopped at Texila Excise Check Post. There were no police officials present at the said post at that time. Two or three Excise Officials started checking the Flying Coach. They found a plastic envelope, wrapped in a news-paper, lying under a seat. The said envelope was recovered from a seat ahead of him. The excise officials ordered them all to get down from the Flying Coach and it was searched again by the Excise Officials. He and two other persons were hauled up. He and the other two persons were detained at the police station for one night. The other two persons were allowed to go on the next morning whereas he was challaned. It is alleged by him that the police searched him and deprived him of his ticket, his money and his other belongings. He was detained at the police station for two nights. He was also beaten up by a Hawaldar. According to him he had submitted a number of applications to police authorities from Jail protesting against his false involvement in this case. He further stated that he could not keep the heroin in his Pant or any where on his person even on that day in Court although he was wearing the same clothes i.e. a shirt and a pant. In cross-examination it is denied

by him that on 27.3.1984 at 2.30 P.M. he was checked and searched when he was travelling in a Flying Coach from Peshawar. It is further denied by him that 250 grams of heroin (p.1) was recovered on his personal search and that the heroin was wrapped in a plastic envelope Ex.P.2. He also denied the suggestion that he himself had destroyed the ticket.

9. Laaj Hussain Shah (D.W.2) is the police constable who at the relevant time was attached with the police station Taxila. He brought the daily diary pertaining to police station Taxila dated 27.3.1984 and 28.3.1984. Ex.DD was the photostat of the entries in the daily diary reports No.7 to 19 and Ex.DE was the photostat of the reports in the daily diary from 26 to 31. The original was seen and returned. The accused tendered in evidence report of the chemical examiner Ex.DF and copy of newspaper Nawai-Waqat dated 23.5.1984 and closed his defence.

10. The trial court vide impugned judgment convicted and sentenced the accused as mentioned above.

11. We have heard at length the counsel for the parties and have also perused the entire material available on the record.

12. The first contention raised by Sh.Muhammad Saleem the learned counsel for the appellant is that protection of Section 103 Cr.P.C should have been given to the accused in this case. In other words the question raised is whether the said section 103 Cr.P.C is applicable to recovery of an objectionable article under the Prohibition (Enforcement of Hadd) Order, 1979. The word 'place' has been defined under Section 4(q) of the Code of Criminal Procedure as under:-

"Place". "place" includes also a house, building, tent and vessel."

The Punjab Excise Act, 1914 also defined this word as under:-

" place" includes a building, shop, tent, enclosure, booth, vehicle, vessel, boat and raft"

The word 'place' is also defined by the Order under Article 2(j) in the following words:-

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

A perusal of the above shows that the definition of word 'place' was not exhaustive in the Code, or the Punjab Excise Act, 1914 but the Prohibition (Enforcement of Hadd) Order, 1979, has further widened its scope by including in it, shed, enclosure, shop, vehicle and air-craft. In the instant case, we are concerned with the vehicle because Flying Coach undoubtedly is a vehicle and, therefore, would be covered by the definition of 'place'. It can, therefore, logically be inferred that the Flying Coach in which the appellant was travelling and was searched by Excise Staff, would be 'place' as defined under Article 2(j) of the Order. Section 103 Cr.P.C deals with the search of the place and expression the 'place' has been clearly used in that section. It can, therefore, reasonably be held that while carrying out the search of Flying Coach, the Excise Inspector Abdul Rashid was required to comply with the provisions of Section 103 Cr.P.C and consequently the recovery memo should have been attested either by some of the passengers of that Flying Coach including its Driver and Cleaner or the inhabitants of the locality where the search was carried out. In the instant case admittedly the recovery memo Ex.PA has not been attested by any person from the public i.e. either of the occupants of the Flying Coach or the residents of the locality but it has been attested by the excise and police officials only. The result is that in the instant case the provisions of section 103 Cr.P.C have not been fully complied with

and this has created an element of doubt in the prosecution case.

13. Another argument advanced by the learned defence counsel is that in the instant case the report of the chemical examiner Ex.DF should not be attached any importance as the same is not in accordance with the official instructions contained in the Punjab Medical Manual. Reference in this behalf has been made to paragraph 587 of the Manual which is reproduced below:-

Para-587."(1) The report of the Chemical Examiner of the results of his examination, which is admissible as evidence under section 510 of the Code of Criminal Procedure, should be in the form given in Appendix XXXIX. To it should be attached the original letter of invoice mentioned in paragraph 585.

(2) The above report will be despatched to the transmitting officer (a duplicate being retained in the Chemical Examiner's office) and should be placed with the file of the case."

Report of the chemical examiner, according to this paragraph, should be in the form given in Appendix XXXIX which is also reproduced below for ready reference:-

" APPENDIX XXXIX.

(See Chapter X, paragraph 587.)

REPORT OF THE CHEMICAL EXAMINER FOR THE PUNJAB.
(Admissible as evidence under section 510 of the Code of Criminal Procedure.)

In the case of

I hereby certify that I received by a packet from the _____ of _____ alleged to have been despatched by him on the referred to in his office _____ No _____ dated and received by me on the _____ of _____

2. The packet consisted of a _____ was sealed with a seal bearing the impression on the invoice hereunto attached, and reached me with _____ seals

The contents of the packet were as follows:-

3. The above seals were opened in my presence and the contents of the package were duly examined by me, remaining under my immediate custody until the examination was completed.

The poisons which I was led to examine for were---

The result was as follows:-

No.

Lahore:
Chemical Examiner's Office, }
The 19 . }

Chemical Examiner.

In the instant case, the letter of invoice or forwarding letter of the Excise Department alongwith the report of the Chemical Examiner is reproduced below:-

M:29	سیل = C.R.
بہ نجام	وزن 12 گرام ہیروئن
محمد فاروق والد حاجی محمد شیرین	ایک عدد پلندہ سرمہر شدہ
قوم بارک زئی افغانستان	نمونہ ہیروئن
حال مقیم راول ڈیم اسلام آباد کلب روڈ	محمد اسلم
مقدمہ نمبر 57/84	بدست محمد اسلم / 821
مورخہ - 27/3/84	ڈاکٹ نمبر 357
بجرم - 3/4	دستخط و مہر اسسٹنٹ ایکسائز نیڈ
آرٹیکل - 1979ء	ٹیکشن افسر راولپنڈی
تھانہ ٹیکسلا	28/3/84
ضلع راولپنڈی	ڈاکٹ نمبر 357
مورخہ 28/3/84	

بخدمت جناب کیمکل ایگزامینر پنجاب لاہور برائے تجزیہ کیمیائی ارسال خدمت ہے۔

دستخط و مہر اسسٹنٹ ایکسائز نیڈ
ٹیکشن افسر راولپنڈی ،
28/3/84

No.2465/EX, dated, 4.4.1984
The above packet contain Heroin.

Sd/-
Chemical Examiner,
Government of the Punjab,
Lahore.13....

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A mere perusal of the above shows that the report of the chemical examiner is not in conformity with Appendix XXXIX of the Punjab Medical Manual referred to above.. In order to verify whether the said Appendix XXXIX contained in the Punjab Medical Manual is applicable to the instant case or not, we summoned Dr.Muhammad Akram Sheikh the chemical examiner Punjab, Lahore to explain this position. He has informed us that in excise cases different forms are used which are contained in the Punjab Excise Manual. He refers to paragraph 4.19 of the Punjab Excise Manual Volume-III which requires that sample should be sent for analysis and opinion of the chemical examiner to Government of Punjab, Lahore whose report is admissible in evidence under section 510 Cr.P.C and such sample should be sent by the Collector direct and not through the Civil Surgeon. It further provides that all such articles should be packed and sealed in the presence of the Excise Inspector himself who should sign a certificate in Form M.29 in triplicate. The said paragraph 4.19 is reproduced below:-

"Paragraph 4.19. Samples of liquor, hemp drugs, opium and other dangerous drugs in regard to which doubt arises, should be sent for analysis and opinion to the Chemical Examiner to Government, Punjab, Lahore whose report is admissible in evidence under section 510 of the Criminal Procedure Code. Samples should be sent by Collectors direct and not through the Civil Surgeon. All articles for analysis shall be packed and sealed in the presence of the excise inspector himself, who shall sign a certificate in the form M.29, in triplicate, one copy being despatched with the articles, one with the covering letter and one retained as an office copy. The Chemical Examiner will return one of the copies sent to him and endorse upon it his report. If the inspector is on casual leave or on tour for several days, the

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certificate should be signed by the excise officer or failing him by the treasury officer.

PROSECUTIONS, REWARDS AND DISPOSAL OF THINGS CONFISCATED.

Special care must be taken to see that each article in the package, particularly bottles, is wrapped up separately, and the following instructions shall be carefully observed:-

- (1) (a) All bottles should be properly corked.
- (b) All articles of a solid nature should be placed in suitable containers.
- (2) These exhibits should then be properly sealed.
- (3) The sealed articles are then placed in wooden boxes using cotton, wool or bhusa as packing material. Old office records and papers are quite unsuitable; in addition to which any letters enclosed with the exhibits are apt to be lost or mislaid.
- (4) The wooden box should then be covered with cloth, and carefully sewn into a neat parcel. This box is again sealed.

Explanation:- Unless this is desired by the court, samples of spirit, which are considerably stronger than 20 U.P. should not be sent to the Chemical Examiner, since it may safely be assumed, from the test made by the excise staff, that they are so much above the strength of licit spirit as to be illicit beyond any possibility of doubt. Similarly, if a working still has been seized, there is no need to send samples of spirit seized to the Chemical Examiner, since there can be no reasonable doubt that this spirit is illicit whether it is above or below the strength of licit spirit. In the case of Lahan, the presumption raised by section 76 of the Punjab Excise Act is that the finding of the Lahan is prima facie a proof of an offence under the Excise Act and it is for

the defence to prove that the substance is something other than lahan. The presumption raised by section 76 of the Act is always a very important link in the chain of evidence against an accused person in an excise case, and if there is any danger of its being overlooked the attention of the court should always be invited to it. Sections 32, 10 and 5 of the Dangerous Drugs Act, the Opium Act, and the Punjab Opium Smoking Act, respectively, should also be brought to the notice of the courts in cases falling under these Acts."

According to the said paragraph 4.19 the Excise Inspector is required to fill up Form M.29 in triplicate indicating the statement showing the details of suspected articles forwarded in excise cases to the chemical examiner for analysis. There are 6 columns in Form M.29. Ist column is formal and gives serial number while column 2 gives the details of the excise cases in which the articles were recovered. Column No.3 gives the description of the articles, Column No.4 shows the weight while column No.5 gives the description of the seals used on the articles. The last column No.6 deals with remarks. Underneath these columns, the Excise Inspector has to certify that the articles are in tact and in good condition and have been carefully packed in his presence, each bottle or other articles being wrapped up separately. The foot note given in Form M.29 is rather significant which shows that the Excise Inspector should personally sign the certificate in triplicate. One copy being kept as an office copy, one copy enclosed in the package and one sent with the accompanying letter by post to the chemical examiner, Punjab to be returned completed by him. The Chemical Examiner is required to give his opinion on the reverse of Form M.29 which is also printed in the Manual underneath Form M.29. Form M.29 and the reverse of it which is to be used by the chemical examiner are reproduced below for ready reference:-

FORM M.29
IN TRIPLICATE.

Statement showing details of suspected articles forwarded in Excise cases to the Chemical Examiner for Analysis.

Serial No.	Details of the excise cases in which the articles were recovered.	Description of articles	Weight.	Description of seals used on the articles.	REMARKS.
1	2	3	4	5	6

CERTIFIED that the articles are intact and in good condition and have been carefully packed in my presence, each bottle or other article being wrapped up separately.

Excise Inspector

DEPUTY COMMISSIONER'S OFFICE

NO. DATED 19 .

FORWARDED To the Chemical Examiner to Government, Punjab, for favour of analysis.

DISTRICT _____

Dated _____

for Deputy Commissioner.

Note:- The Excise Inspector should personally sign the certificate in triplicate. One copy being kept as an office copy, one copy enclosed in the package, and one sent with the accompanying letter by post to the Chemical Examiner, Punjab, to be returned completed by him.

CHEMICAL LABORATORY

LAHORE DATED 19 .

REPORT on the analysis of the sample of _____

forwarded by _____

referred to in his _____

No. _____

Dated _____

Opinion _____

Chemical Examiner to
the Government of Punjab".

Admittedly, neither Excise Inspector nor Chemical Examiner has used the printed Form M.29. It is verbally explained by Dr. Muhammad Akram Sheikh, the Chemical Examiner, Government of Punjab, Lahore that the printed forms may not be available in the local office of the Excise Office, Rawalpindi and that is why that instead of printed Form M.29 the Excise Inspector prepared his own specimen which is similar to said Form M.29 and the Chemical Examiner gave his opinion on the reverse of the same. The forwarding letter or the letter of invoice sent by Excise Inspector alongwith the report of the Chemical Examiner has already been reproduced above. We have minutely compared this document with Form M.29 and find that technically speaking it is not a verbatim copy of the said Form M.29. Although, most of the columns of this form have been complied with yet an important aspect of this form namely undertaking by the Excise Inspector and foot note which are integral part of the form have not been included in the said document by the Excise Inspector. As regards the report of the Chemical Examiner on the reverse of this document Ex.PD, the

report is too brief. It gives only the number, date and opinion. It is hardly in two lines. Admittedly, this opinion is not in conformity with the specimen given in the Excise Manual alongwith Form M.29 reproduced above. The Chemical Examiner has personally explained the reason for the omission of some columns in this document by saying that it was given on the reverse of that document Exh.PD and, therefore, there was no possibility of any mistake or doubt that the said opinion related to some other case or otherwise opinion was not genuine. We are inclined to accept the explanation offered by the learned Chemical Examiner that due to shortage of printed forms the sample was not sent alongwith the printed Form M.29 and, therefore, his report is also not on the reverse of the printed form. However, we find that the report lacks material informations required under the Manual. Even the learned State counsel admits that the report of the Chemical Examiner is rather too brief and is not in strict conformity with the specimen given in the Excise Manual. It is not disputed that paragraph 4.19 and Form M.29 form part of statutory rules and instructions issued by a competent authority and, therefore, binding upon officer concerned. It is well settled principle that when under the law or the statutory rules, a certain officer or authority is required to do a certain thing in a certain manner, it must be strictly done in that manner otherwise it will create serious doubts in the prosecution case. In the instant case, the report of the Chemical Examiner and the letter of invoice or forwarding letter by the Excise Inspector are not strictly in accordance with the requirement of the Form prescribed by the Excise Manual and, therefore, it has created some doubt in the prosecution case.

14. The learned defence counsel still argues that Appendix XXXIX contained in the Punjab Medical Manual contains more safe-guards for just and proper administration of justice and, therefore, the Excise Inspector

and the Chemical Examiner should have used that Appendix XXXIX and in its absence the report should be completely ignored. We do not agree. The Excise Department has got its own manual containing the relevant laws, rules and instructions framed by competent authority. In the presence of specific instructions contained in the Punjab Excise Manual, the Excise Inspector is required to follow his own laws, rules and instructions issued by his department rather than the general instructions of the medical department. It can, therefore, be held that the Excise Inspector did not commit any illegality or even irregularity by not following paragraph 587 and Appendix XXXIX of the Punjab Medical Manual. He has rightly followed paragraph 4.19 and Form M.29 contained in his own Excise Manual which covers the instant case.

15. Another objection raised by the learned defence counsel against the report of the Chemical Examiner is that it does not show that it contained more than the required percentage of heroin i.e. 0.2 percent. Reliance in this behalf is placed upon the definition of opium derivative given in Section 2(f) of the Dangerous Drugs Act, 1930 which definition has been made applicable under the schedule of the Order. Opium derivative inter-alia means:-

- " (i) (ii).....
- (iii).....(iv).....
- (v) all preparations, official and non-official containing more than 0.2 per cent of morphine, or containing any diacetylmorphine;"

According to him, it was obligatory on the part of the prosecution to show that the alleged heroin recovered from the appellant contained more than 0.2 per cent of heroin. We have given our anxious consideration to the said clause but are unable to agree with the defence counsel. This percentage relates to morphine only. We are told that diacetylmorphine and diamorphine are also the names of heroin. Morphine is different from heroin.

A perusal of clause (v) of Section 2(f) shows that the words "containing more than 0.2 per cent" relate to morphine only and does not cover diacetylmorphine. The word "or" separates these two items from each other. Further we find that the use of the word "any" before diacetylmorphine in this clause is significant to show that no particular percentage is required so far diacetylmorphine or heroin is concerned. The intention of the legislature by using the word "any" is clear. Heroin or diacetylmorphine whatever its percentage is prohibited. In other words, there is complete prohibition of heroin and diacetylmorphine irrespective of any percentage. The words "0.2 per cent" are applicable only to morphine while no particular percentage is prescribed for heroin or diacetylmorphine. The language used in this sub-clause has made the intention of the legislature crystal clear. We, therefore, feel no hesitation to repel this contention.

15. For the foregoing reasons, we find that the prosecution has not been able to establish the guilt of Muhammad Farooq appellant beyond reasonable doubt. It is well settled principle of Islamic Jurisprudence that benefit of doubt must go to the accused. In the instant case, the appellant Muhammad Farooq can legitimately claim the benefit of that doubt. Accordingly, while giving the benefit of doubt to Muhammad Farooq appellant, we accept this appeal, set aside his conviction and sentences and acquit him of the charge. He shall be released forthwith, if not required in any other case.

Judge-III.

Judge-IV.

Announced on 17.1.1985
at Lahore.
M. Akram, J.W.

Approved for reporting