

2001 P Cr. L J 1401

[Peshawar]

Before Nasirul Mulk and Ijaz-ul-Hassan, JJ

KHAWAJ MUHAMMAD ---Appellant

versus

THE STATE and another---Respondents

Criminal Appeal No.58 of 1999, decided on 8th March, 2001.

Control of Narcotic Substances Act (XXV of 1997)---

---S. 9(c)---Appreciation of evidence---Case property i.e., opium recovered from the accused was not produced in the Trial Court---Burden was on the prosecution to positively establish on the destruction, of the case property which was not discharged by the testimony of two prosecution witnesses--F.I.R. regarding the incident in which the case property was allegedly destroyed had not been placed on record---No evidence was led by the prosecution to show that the case property was destroyed in the fire---Since the recovery of the opium itself constituted the offence under the law, its non-production in the Court was fatal to the prosecution case---Report of the Chemical Examiner was not sufficient to establish the prosecution case--Accused had already spent more than three and a half years in prison---Accused was acquitted in circumstances.

Islam Gul v. State 1997 PCr.LJ 225 and Mst. Nargis v. State 1997 PCr.LJ 1093 ref.

Khalid-ur-Rehman Qureshi for Appellant.

Muhammad Ayub Khan, Asstt. A.; G. for Respondents.

Date of hearing: 8th March, 2001.

JUDGMENT

NASIRUL MULK, J.--- The appellant was convicted by .the Sessions Judge, Haripur on 24-9-1999 under section 9(c) of Control of Narcotic Substances, Act, 1997 (C.N.S.A.) for possession of 16 Kgs. of opium and sentenced to imprisonment for life and fine of Rs.50,000 in default of payment whereof to suffer further 5 years imprisonment. The benefit of section 382-B, Cr.P.C. was given to the appellant.

2. The case of the prosecution as disclosed in the F.I.R. is that on 16-9-1997 Muhammad Safdar Khan, S.H.O. Police Station Khalabat Township was checking the thoroughfare leading to the Afghan. Refugees Camp No.4 near Kawasaki Factory at about 7-30 p.m. He noticed a person carrying a bundle. He got suspicious and stopped the man. On checking the bag the S.H.O. found 8 packets, containing opium. Each packet weighed 2 Kgs. from each packet 4 grams of opium was separated and sent to the Chemical Examiner. The person carrying bundle disclosed his name as Khawaj Muhammad son of Ibrar Shah. He was arrested and a Murasila was sent to police station for registration of the case. Case under sections 3/4, Prohibition Order and section 9(c) (C.N.S.A.) was registered.

3. The S.H.O. Muhammad Safdar Khan also investigated the case. He sealed, 4 grams opium taken from each packet in separate parcels. The remaining opium was put in one parcel. He prepared the recovery memo. of the drugs as Exh.P.R. The S.H.O. prepared the site plan Exh.P.B. and recorded the statements of the P. Ws. The samples of the drugs were sent through application Exh.P.W.3/1 to the Forensic Science Laboratory, whose report is Exh.P.Z., which affirms the prosecution case. The Investigating Officer also submitted the challan before the trial Court.

4. The learned counsel appearing for the appellant, apart from making some submission on the merits, mainly stressed upon the non-production of the case property before the trial Court at the trial. He contended that admittedly the case property was not produced, despite specific questions put to the witnesses. The learned counsel submitted that the explanation put forth by the eye-witnesses of the destruction of the case property in the fire on the police station has not been proved.

5. The learned Assistant Advocate-General on the other hand contended that the Investigating Officer as well as the marginal witnesses had positively asserted that the case property has been destroyed in the fire and that this evidence is sufficient to show its destruction.

6. The prosecution produced three witnesses in support of its case. Hakim Dad (P.W.1) who recorded the F.I.R. on the receipt of the Murasila, Umar Khitab H.C. (P.W.2) the marginal witness to the recovery memo. Exh.P.R. and the Investigating Officer Muhammad Safdar Khan.

7. The main argument advanced before us was the non-production of the case property at the trial. P. W.2 in his cross-examination had admitted that the case property was not present in Court. He, however, explained ".....The same might have been burnt during arsoning of the P.S. K.T.S. alongwith Malkhana and quarters on 21-8-1998". He further, stated that an F.I.R. was registered regarding the arson. The Investigating Officer also confirmed this in cross-examination. He elaborated that an F.I.R. regarding the looting and destruction of the police station by the mob was duly registered. To a question in cross-examination, he, however, stated that he was unable to produce the F.I.R. regarding the incident or any documentary proof with regard to destruction of the case property of the present case. From the testimony of these two witnesses the destruction of the case: property has not been positively established, which was the burden of the prosecution. The F.I.R. regarding the incident in which the case property allegedly was destroyed has not been placed on record. Further, no other evidence was led to show that the case property was destroyed in the fire. The only question, therefore, remains as to whether the absence of case property will entitle the appellant to acquittal. Since in the present case the recovery itself constitutes the crime under the law, the non-production of the case property is fatal to the prosecution case. The report of the Chemical Examiner would not be sufficient to establish the prosecution case. Reference was made to Islam Gul v. State 1997 PCr.LJ 225 and Mst. Nargis v. State 1997 PCr.LJ 1093. It may be added that the appellant has already spent more than three and a half years in prison. The appellant is, therefore, entitled to acquittal. For this reason the appeal was allowed and the conviction and sentence of the appellant set aside by a short order, dated 8-3-2001.