1996 P Cr. L J 179

[Federal Shariat Court]

Before Nasir Aslam Zahid, J

Mst. SHAHIDA PARVEEN---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.86/L of 1995, decided on 29th August, 1995.

Criminal Procedure Code (V of 1898)---

----S. 103---Prohibition (Enforcement of Hadd) Order (4 of 1979), Art.4-- Appraisal of evidence---Police despite having had advance information did not try to arrange for two respectable witnesses from public to associate them in the recovery proceedings, thus violated the mandatory provisions of S.103, Cr.P.C.---Police also knowing that they were required to search a woman (accused) did not take a lady constable with them for her search which fact had made the prosecution version doubtful---Accused was acquitted in circumstances.

Aftab Ahmad Bajwa for Appellant.

Muhammad Anwar Dholan for the State.

Date of hearing: 29th August, 1995.

JUDGMENT

This appeal has been filed by Mst. Shahida Perveen wife of Gulzar Ahmad against the judgment, dated 6-2-1995 passed by Magistrate, Section 30, Cr.P.C., Lahore apparently, under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, and sentenced to R.I. for three years, and a fine of Rs.10,000 and in default of payment to suffer R.I. for five months more. Charge had been framed under Article 3 as well as 4 of the Prohibition Order, 1979, but in the impugned judgment it is not mentioned whether appellant has been convicted under both these Articles or under Article 3 or under Article 4, but from the final paragraph of the impugned' judgment it follows that, conviction is under Article 4 for possession of 350 grams of heroin. I have heard the arguments of Mr. Aftab Ahmad Bajwa, learned counsel for the appellant, and Mr. Muhammad Anwar Dholan, learned counsel for the State. With the assistance of the learned counsel, I have gone through the record.

2. According to the F.I.R., on 23-8-1993, one accused Gulzar Ahmad in custody in another case gave information during interrogation that he had purchased heroin from

the appellant and that on that day at 4-30 p.m. time had been fixed for another purchase and if raid was conducted the appellant could be apprehended. According to the complainant, P.W.1, S.I. Umer Hayat with a raiding party and also taking with him the said accused Gulzar Ahmad went to the graveyard in Khokhar Town, Lahore, where at 4-45 p.m. the appellant came there and on her right shoulder there was a cloth bag. The appellant was apprehended and on search of the appellant 350 grams of heroin was recovered from the plastic envelope containing in the said cloth bag, out of which two grams were separated for chemical report. The appellant was arrested and after completion of the investigation by the complainant himself, who became the Investigating Officer, the appellant was challaned. During investigation, five witnesses were produced by the prosecution. P.W.1 S.I. Umer Hayat, who was the head of the raiding party, the complainant as well as the Investigating Officer; P.W.4 Constable Amir Ali and P.W.5 S.I. Khuram Abbas gave evidence regarding the recovery. In her statement under section 342, Cr.P.C., she denied the prosecution case and alleged false implication.

3. In support of the present appeal, Mr. Aftab Ahmad Bajwa, learned counsel for the appellant has submitted that the police had advance information, but despite that no effort was made to associate witnesses from the public for being associated in the recovery proceedings. It was argued that section 52 of Cr.P.C. provides that whenever it is necessary to cause a woman to be searched; the search shall be made by another woman, with strict regard to decency. According to learned counsel, this provision was violated. It was then submitted that person, who gave information about sale of heroin by the appellant, namely, accused Gulzar Ahmad, was not produced as a witness. Learned counsel also referred to several contradictions in the evidence of the prosecution witnesses.

Mr. Muhammad Anwar Dholan, learned counsel for the State, argued that the prosecution had established its case through the police witnesses and no enmity was shown between the police and the appellant and as such the submission that appellant was falsely implicated is without any foundation.

4. In this case, there is violation of the mandatory provisions of section 103 read with section 165(4), Cr.P.C. The police had advance information through accused Gulzar Ahmad, but despite that no effort was made to arrange for two respectable witnesses from the public to be associated in the recovery proceedings.

Submission of learned counsel based on section 52, Cr.P.C. is also not without force. If the police had advance information and a personal search of a woman had to be conducted, a lady constable should have been taken in the police party which was not done. The police officials including complainant/Investigating Officer P.W.1 S.I. Umer Hayat is presumed to know the law, and law as contained in section 52, Cr.P.C. is that whenever it is necessary to cause a woman to be searched, the search shall be made by any woman with strict regard of decency. It was not a case where search had to be made on the spur of the moment. The police knew that they will be required to search the appellant, a woman. Being conversant with the law contained in section 52, Cr.P.C., there should have been made arrangement for taking a lady constable with them for search. The fact that the police had advance information that they were required to

search a woman, but did not make any arrangement for taking a lady constable with them throws a doubt as to the prosecution story of appellant having been involved by an accused in custody that he had purchased heroin from the appellant.

5. As a result, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge. The appellant is on bail from this Court, her bail bonds are discharged.

N.H.Q./1007/FSC Appeal allowed.

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