

P L D 1996 Supreme Court 574

Present: Ajmal Mian, Saiduzzaman Siddiqui, and Mukhtar Ahmad Junejo, J

MUSHTAQ AHMAD --- Appellant

versus

THE STATE --- Respondent

Criminal Appeals Nos.75 and 76 of 1995, decided on 9th April, 1996.

(On appeal from the judgments both dated 12-12-1993 of Lahore High Court, Lahore, passed in Criminal Appeals Nos. 1281 of 1991 and 1307 of 1991 respectively).

(a) West Pakistan Arms Ordinance (XX of 1965)--

S. 13 --- Criminal Procedure Code (V of 1898), S.103 --- Constitution of 2akistan (1973), Art.185(3) --- Leave to appeal was granted to consider, whether in the circumstances of the case, particularly the fact that no public witness was associated with the alleged recoveries from the accused, it was in the interest of safe administration of justice to convict the accused.

(b) Criminal Procedure Code (V of 1898)-

---- S. 103 --- Search --- Recovery --- Principles enumerated.

Following are the principles with regard to search;---

(i) That section 103, Cr.P.C. relates to a search of a place situate in a locality and not to a search of a person;

(ii) That the requirement of section 103, Cr.P.C. that the officer or the other person who is about to make search of a place under Chapter VII of the Cr.P.C. to call upon two or more respectable inhabitants of the locality in which the place to be searched is situated, to attend and witness search, though is procedural but is of mandatory in nature, It is designed and intended to guard against any possible chicanery and concoction;

(iii) That if, in spite of the best efforts on the part of the officer or the other person who made the search, two or more respectable inhabitants had no attended and witnessed the search and if there was nothing on record to case doubt about the bona fides of the officer or the other person, the above search would not be vitiated and the testimony of the officer concerned could be relied upon;

(iv) That there is a marked distinction between a case in which compliance of section 103, Cr.P.C. is made and a case in which no efforts to comply with the same are made and the police personnel are made Mashirs to the recovery. In the former case, failure to produce two respectable inhabitants as witnesses in the Court for a justifiable reason free from any doubt would justify the acceptance of his or their testimony, whereas in the latter case, the search would lose its credibility particularly when the testimony of such Mashirs is challenged by the defence in the cross-examination;

(v) That likewise there is a marked distinction between a case in which the offence charged with is the recovery of the article itself like recovery of an unlicensed Klashnikov and a case in which the article recovered e.g. a crime weapon is to be used as a corroborative piece of evidence. In the former case if the witnesses to the recovery were police personnel, though it was possible to have two Mashirs from the locality where recovery was made, the testimony in the absence of other reliable pieces of evidence would not war "Viction, whereas in the latter ease, if other pieces of evidence on record are free from doubt, the testimony of the police personnel, if otherwise free from any legal infirmity, may be accepted;

(vi) That there is also a marked distinction between a case in which a police officer is an eye-witness to the commission of an offence like a murder on a road where he is on duty and a

case in which he is an Investigating Officer and as such becomes a Mashir to the recovery of a crime weapon. In the former case, his testimony is as good as of any other witness from the public, but in the latter case, in the absence of any justifiable reason not to make two or more respectable inhabitants of the locality as witnesses to the recovery, implicit reliance cannot be placed on the recovery if the same is challenged by the defence in the cross-examination;

(vii) That the question, whether testimony of a police official as a Mashir to the recovery of an offending article is to be accepted or not besides testing on the touchstone of the above legal principles, depends on the facts of each case, the Court will have to discern inter alia, as to whether such witness bore any animus against the accused involved or was he not over-zealous Investigating Officer/witness.

Muhammad Khan v, Dost Muhammad and 17 others PLD 1975 SC 607; Rehan v. The State 1976 SCMR 72; Mumtazuddin v. The State PLD 1978 SC 114; Muhammad and others v. The State PLD 1981 SC 635; Safdar Abbas and 2 others v. 'the State PLD 1987 SC 467; Tasleem Khan v. The State PLD 1990 SC 1088; Zardad v. The State 1991 SCMR 458; Mirza Shah v. The State 1992 SCMR 1475; Arshad Zubair v. The State 1993 SCMR 2059; Zakir Khan and others v, The State 1995 SCMR 1793; Muhammad Azam, v. The State PLD 1996 SC 67; Bashir Ahmad and others v. The State PLD 1988 SC 86 and Said Muhammad v. The State PLD 1990 SC 1176 ref.

(c) West Pakistan Arms Ordinance (XX of 1965)

--- S. 13 --- Criminal Procedure Code (V of 1898), S.103 --- Search --- Recovery-- Prosecution witness who had headed the raiding party had admitted that people from the locality had gathered at the place of recovery at the time of raid --- Non compliance with the requirement of S. 103, Cr. P.C. namely to call two or more respectable inhabitants of the locality where the search was to be made as witness to the recovery, was not warranted and justified in circumstances-- Alleged recoveries having constituted the offences which were the subject-matter of the terries, Trial Court and the High Court should have appraised and scrutinized the evidence of the police personnel with care and caution and should also have taken into consideration the factum that there was no justifiable reason not -to comply with the requirement of S.103, Cr.P.C.---Where both the Courts have failed to do the needful their judgments were not sustainable in law and convictions and sentences were set aside by the Supreme Court.

Muhammad Khan v. Dost Muhammad and 17 others PLD 1975 9C 607; Rehan v. The State 1976 SCMR 72; Mumtazuddin v. The State PLD 1978 SC 114; Muhammad and others v. The State PLD 1981 SC 635; Safdar Abbas and 2 others v. The State PLD 1987 SC 467; Tasleem Khan v. The State PLD 1990 SC 1088; Zardad v, The State 1991 SCMR 458; Mirza Shah v. The State 1992 SCMR 1475; Arshad Zubair v. The State 1993 SCMR 2059; Zakir Khan and others v. The State 1995 SCMR 1793; Muhammad Azarn v, The State PLD 1996 SC 67; Bashir Ahmad and others v. The State PLD 1988 SC 86 and Said Muhammad v. The State PLD 1990 SC 1176 ref. MehmoodAhmed Khan, Advocate Supreme Court and S. Abul Aasim Jafri, Advocate-on-Record (absent) for Appellant.

Sh. Muhammad Naeem, Advocate Supreme Court for the State.

Date of hearing: 9th April, 1996.