

**Wali Muhammad Vs. Emperor**

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**Court :** Allahabad

**Decided On :** Sep-17-1923

**Reported in :** 83Ind.Cas.904

**Judge :** Sulaiman, J.

**Appellant :** Wali Muhammad

**Respondent :** Emperor

**Judgement :**

**Sulaiman, J.**

1. This is a criminal revision from an appellate order, convicting the accused under Section 60 (a) of the Excise Act for being in possession of cocaine.

2. The prosecution case was that the accused was caught red handed by a Constable while he was buying beetles and three packets of cocaine were recovered from him. A number of witnesses were produced to prove that three packets were recovered from the accused by the Constable. That evidence was believed by the learned Magistrate. It now appears that some packets, alleged to have been those which were recovered from the accused, were sent on to the Chemical Examiner who sent a report to the effect that they contained cocaine. This report however was never formally tendered in evidence at the trial, nor does it appear from the record of the Trial Magistrate's Court, that this report was used

as evidence in the proceedings. No copy of it was ever placed on the record of this case. In the judgment the learned Magistrate did not even refer to it, but based his finding that the packets contained cocaine, on the ground that the accused himself admits that he had cocaine in his possession. A reference to the statement of the accused, recorded in the vernacular under Section 364 of the Code of Criminal Procedure, shows that the Magistrate's remark is not accurate. In answer to the question put to him as to whether the three packets of cocaine were recovered from him, he replied that three packets were recovered from him, but he went on to say that they were handed to him by a man named Babu and that the accused did not know what these packets actually contained. His statement should not therefore, have been used as an admission that he had cocaine in his possession. Unfortunately, the prosecution did not take care to see that the report was formally tendered in evidence, nor did the Magistrate take the trouble to have it brought on the record. In the absence of that report it is impossible to say that the powder in the packets was necessarily cocaine. There is apparently no other evidence to show that any one tasted it or that any one was satisfied that these packets contained nothing but cocaine.

3. The accused, however, was convicted, and an appeal was preferred to the Court below. Arguments were heard on the 29th of June 1923 when it was pressed on his behalf that there was no evidence on the record to show that the packets did ' contain cocaine. On the 2nd of July the learned Additional Sessions Judge ordered the Government Pleader to produce the report of the Chemical Examiner. A report was sent for, which was on the record of another proceeding to which the accused was no party. After a perusal of this report, and apparently without any further argument, and without any formal order admitting this additional evidence, the learned Additional Sessions Judge dismissed the appeal holding that the report on the file of the other record conclusively established that the packets contained cocaine.

4. I am of opinion that this additional evidence ought not to have been perused in appeal unless the provisions of Section 428 of the Code of Criminal Procedure were complied with. No reasons were recorded, and no formal order admitting it was passed. It was treated as if it were a piece of evidence already on the record.

Under Section 510 of the Code of Criminal Procedure any document purporting to be a report under the hand of a Chemical Examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry, trial or other proceeding. This, however, does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such, so that the accused may have a chance of questioning the identity of the packets. I am satisfied that this was not done in the present case. In failure of the report having been formally brought on the record, there is really no satisfactory evidence to show that the powder contained in these packets was cocaine.

5. The case must, therefore, fall to the ground. I set aside the order convicting the accused and acquit him of the charge. He is already on bail. The bail-bond will be cancelled.

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