

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeal No.69 of 2012

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

The State: Through Mr. Habib Ahmed, Special Prosecutor, ANF

Respondent No.2: Through Mr. M. B. Shakeel, Advocate

Date of hearing: 26.10.2018

Date of announcement: 01.11.2018

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- The appellant filed this appeal against the impugned judgment dated 27.09.2010 passed by learned Special Court No.1 (Control of Narcotic Substances) Karachi in Special Case Nos.114/2008 whereby Respondents were acquitted from the charge and their bail bonds were also cancelled and sureties discharged.

2. The brief facts of the case according to the FIR are that raiding party of PS ANF-II headed by Sub-Inspector Asif Ali accompanied by PCs Asif Minhas, M. Amin, M. Rafique, Mir Ahmed and Driver Abdullah, left the police station on spy information on 29.08.2008 and reached the pin pointed place i.e Café Quetta Chinar Hotel, Sea View, Clifton, Karachi at 1930 hours and apprehended the two suspects namely Muhammad Anis s/o. Muhammad Iqbal and Ismail s/o Usman respective residents of Doraji Society, PECHS, Karachi, and Bhutta Village, Kemari, Karachi and secured from their respective possession, one motor bike bearing registration No.KBN-8270 with one jerry can from each of them containing, Acetic Anhydride; the officer secured 20 ml/grams as sample from both jerry cans separately for examination and report by the expert; the personal search of the accused persons was conducted and their respective articles were secured and they were arrested under the memo of arrest and recovery which was prepared by the officer before the official Mushirs namely, PC Asif Minhas and PC Rafique thereafter they came to police station where FIR No.78/2008 was registered against the culprits under Section 6/9-C of the

Control of Narcotic Substances Act, 1997 (CNSA). The samples were sent to the expert of Government of Sindh in the first instance and the matter was investigated, thereafter the charge sheet was submitted carrying no expert report at the relevant time.

3. The learned trial Court took cognizance of the matter and framed charge against the charge sheeted persons for their having committed offence covered by the aforesaid sections of law to which they pleaded not guilty and claimed for trial.

4. Learned trial court recorded evidence of attesting witnesses of memo namely PC M. Rafique as PW-1 at Ex.5 who produced memo of arrest and recovery as Ex.6/A. The prosecution also produced the seizing officer SI Asif Ali and the court recorded his statement who produced certain documents in support of the prosecution case as Ex.6/B to 6/J and thereafter the prosecution closed its side.

5. Statements of the accused were recorded under section 342, Cr.PC. Both accused claimed false implication in this case and denied the prosecution allegations. Neither the accused examined themselves on oath nor produced any defense witness to disprove the prosecutions allegations against them.

6. Learned Judge, Special Court-I, (Control of Narcotic Substances) Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment acquitted the respondents as stated above, hence this appeal has been filed against the respondents. By this judgment we intend to decide the same.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned advocate for appellant mainly contended that the prosecution should be allowed to produce a fresh chemical report and that the impugned judgment be set aside and the case remanded back to the trial court for this purpose as well as re hearing the case.

9. Mr. M.B. Shakeel, Advocate for Respondent No.1 argued that there was no infirmity in the impugned judgment, that the chemical report could not be relied upon and that there was no evidence that the chemical was ever kept in safe custody from the time of its recovery till it was sent on two separate occasions for chemical examination and as such the appeal against acquittal should be dismissed and the impugned judgment up held.
10. At this point it is relevant to mention that Respondent No.1 Muhammed Anees has expired and proceedings were abated against him and as such the appeal only relates to respondent Ismail.
11. We have heard the learned counsel for the parties, considered the evidence on record, the impugned judgment and the relevant law.
12. The relevant as well as operative part of the impugned judgment which led to the acquittal of the respondents reads as under:

"12. I have heard the learned counsel for the accused persons, SPP for ANF and perused the record as well, **there is no expert report regarding the samples of the memo admittedly.** It is submitted that the samples dispatched to the expert in the first instance to the expert of the lab, Government of Sindh are said to have stood consumed with no result; the expert wanted dispatch of the entire property for the purpose in question to him; the same was sent to him with permission of the court, while, he showed his inability to give any positive report there against, too, for want of necessary lab equipment or devices etc. containers of the samples i.e. two bottles of glass, remained uncollected from the experts by the I.O. and unproduced in court as well. **There appears no sufficient material to substantiate even the facts that there were samples contained in the bottles of glass; and these were bottles used for samples except the correspondence and words of the seizing officer which are insufficient for the purpose where the empty bottles in question, too are left unproduced in court;** the expert letter is unable to substantiate if the stuff of the samples stood consumed in test/analysis if any, experienced on his part. The expert report produced in court, can hardly be used against the accused persons for the reasons that same does not belong to the investigation stage(s) but an unwarranted exercise of the court and in the strict legal sense, such material is not useable against the accused persons as a valid piece of evidence. **The record pertaining to the said reports does not stand established for want of evidence of the officials concerned therewith, out of whom, none is either made witness or so produced in court.** The seizing officer of the case though produced the said correspondence and relevant record including expert report as Ex. I and J at the instance SPP but disowned

the same as record of his investigation, which was the basis of the charge sheet submitted on his part in the instant case. Besides, the expert reports dated 23.01.2009 and 24.01.2009, being of the date receiving the date of dispatch and receipt of the samples pertaining thereto, are cloudy and unreliable rather seem to be bogus or false in nature. Even otherwise, the same pertains to the samples not of memo in question but of the aforesaid unwarranted exercise of the court, and hence, worthless. The chemical detected as crime stuff, being available in open market as legitimately usable product specially in making pesticides, textile printing and paints and dying clothes etc. cannot exclusively be considered or regarding as "narcotics" or objectionable or controllable item or substance covered by the restrictive and punitive provision of the CNS Act, 1997. It is however, admitted by the I.O. that the marketing of the said chemicals in its present form is subject to license as provided by the law, in that behalf. He disclosed no such law but admitted that the control of Narcotics Substances Act, 1997 does not deal with such licensing at all. **The SPP does not dispute the conflicting position of the said reports, to the aforementioned material extent, and its benefit, which goes to the accused as a consequences thereof, as a matter of law and justice. He also concedes the view that such contradictory state creates confusion and makes the proceedings thereof, doubtful on the one hand, and the case as a whole on the other.** In these circumstances, no reliance can be placed either on the evidence, case or expert reports. Therefore, the prosecution in the instant case being groundless with knowledge to the prosecution, becomes malicious. The under discussion point stands answered as 'not proved' accordingly."

13. It is settled law that judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honorable Supreme Court in the case of **The State v. Abdul Khaliq and others** (PLD 2011 Supreme Court 554). Moreover, the scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of the innocence is significantly added to the cardinal rule of criminal jurisprudence as the accused shall be presumed to be innocent until proved guilty. In other words, the presumption of innocence is doubled as held by the Honourable Supreme Court of Pakistan in the above referred judgment.

14. We have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt for the

following reasons; that the prosecution itself conceded at trial as mentioned in the above extract of the impugned judgment that there were doubts in the prosecution case concerning the chemical report; that there was a 4 month delay in sending the chemical report for examination and even then no positive report was placed on record; that there is no evidence that the chemical during this period was ever kept in safe custody; that neither the Malkhana in charge was examined nor was HC Muhammed Rasheed and AD Nadeem Islam who took the chemical for examination, at different times, examined as to the safe custody of the narcotic.

15. In **Muhammad Sarfraz V The State** (2017 SCMR 1874) it was indicated that when there was no negative evidence of non safe custody the conviction could be upheld. However in the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was decided by a three member bench the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. In the case in hand there appears to be no evidence of such safe custody on record. **Even otherwise there is no reliable positive chemical report in favour of the prosecution**

16. The significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case** (Supra), the relevant portion of which is reproduced hereunder:-

"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but **safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution.** It is not disputed that the investigating officer appearing before the learned trial court had failed to even mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner

without the same being tampered with or replaced
while in transit." (bold added)

17. Under these circumstances **and for the other reasons mentioned above**, especially keeping in view the narrow scope for an appeal against acquittal to succeed, we are of the considered view that the prosecution failed to prove its case against the appellant beyond a reasonable doubt and there is no legal infirmity in the impugned judgment which is upheld and as such this appeal against acquittal is dismissed.

18. The appeal is disposed of in the above terms.

MAK/PS