IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Cr. Acquittal. Appeal.No.D- 167 of 2007.

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Muhammad Karim Khan Agha.

Date of hearing: 24.05.2017.

Date of judgment: 24.05.2017.

The State: Through Syed Meeral Shah, Addl.P.G. for the State.

Respondent: (1) Ali Muhammad s/o Allah Dino.
(2) Mohammad Rafique s/o Allahdino. (called absent).

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents Ali Mohammad and Mohammad Rafique were tried by Special Judge CNS Sanghar, in Special Case No. 40/1996 for offences u/s 9(c) Control of Narcotic Substance Act 1997. Trial court after full dressed trial by judgment dated 29th day of May, 2007 acquitted the respondents / accused. State through Advocate General Sindh filed the instant criminal acquittal appeal No.D-167/2007 against the judgment dated 29.05.2007 passed by the trial court.

2. Brief facts of the prosecution case as reflected from the FIR are that on 19.12.1996, Inspector Mohammad Hassan, S.H.O.

of Police Station Tando Adam along with his subordinate staff namely SIP Nazar Mohammad, ASI Mohammad Aslam, ASI Akhtar Shah, ASI Vijey Kumar, PCs Mir Mohammad, Mohammad Ashraf, Ghulam Mustafa, Manthar, Soomar Khan, Talib Hussain and driver P.C. Taj Mohammad left Police Station for patrolling at 06.15 a.m. vide roznamcha entry No.42 in official vehicle. During patrolling at various places when they reached near Berani Chowk, they received spy information that the charas in huge quantity was lying in the house of accused Ali Mohammad and Mohammad Rafique situated in village Niaz Hussain Mari, on Berani road. On such information, the police party reached at the house of above named accused, it was 07-30 a.m. where they found both accused present in house. On their personal search nothing was recovered, then the search of house and its surrounding was conducted in presence of accused, in presence of mashirs 18 small and big bags of charas were recovered from a ditch situated on the Northern side of the house. Then, the scale was brought through ASI Vijey Kumar and the charas was weighed it became ten maunds. From the recovered charas 5 kilograms were separately sealed as a sample for Chemical Examination and remaining charas was sealed separately. Such mashirnama was prepared in presence of mashirs SIP Nazar Mohammad and ASI Akhtar Shah. Thereafter, the accused and the case property were brought to the police station where F.I.R. was registered vide crime No.30 of 1996 under section 9(c) Control of Narcotic Substance Act 1997. Charge was framed against the accused under section 9(c) Control of Narcotic Substance Act 1997. Accused pleaded not guilty. Prosecution examined PWs and side was closed. Statement of accused was recorded under section 342 Cr.P.C. accused claimed false implication in this case. Trial court

after hearing learned counsel for the parties acquitted accused. Hence, this acquittal appeal is filed.

3. We have carefully heard learned Counsel for the parties, scanned the entire prosecution evidence and perused the impugned Judgment.

4. Syed Meeral Shah appearing on behalf of the State argued that the prosecution had produced sufficient evidence against the respondents/accused to connect them in the commission of offence but the trial court did not appreciate the evidence according to settled principle of law. Learned A.P.G. referred to the evidence of complainant and other prosecution witnesses in support of appeal.

5. After hearing the learned Addl. P.G, we have carefully perused the judgment dated 29.05.2007 passed by the trial court. The relevant paragraph is reproduced as under:-

> "I have carefully examined the evidence of prosecution witnesses which is very much contradictory, there is no independent corroboration. The prosecution is relied on the evidence of only two police officials, whose evidence is also not corroborative to each others. The major contradictions which I found are that, the place of recovery as per F.I.R. and mashirnama is shown from excavated ditch situated on the eastern side of the house of accused and eighteen bags were recovered, whereas the mashir Akhtar Hussain in his cross examination replied that it was courtyard infront of the rooms of the house of accused, wherefrom charas was recovered by digging the earth, the complainant in his cross examination has also denied the recovery of charas from already excavated ditch, by such piece of evidence, both the witnesses are not corroborative

with the contents of F.I.R. and the mashirnama, because F.I.R. and the mashirnama give impression that the ditch was already excavated from which the alleged narcotics were recovered. Mashir in his examination-in-chief stated that recovery was made from the eastern side adjacent to the gate of the house of accused, the F.I.R. and the mashirnama reveals common house of both the accused, but in his deposition complainant disclosed separate houses of both accused adjacent to each others. The complainant has replied that the recovered property was sealed by the ASI Vijey Kumar under his supervision whereas mashir Akhtar Hussain has replied that he along with SHO and other police officials joined in the process of sealing the case property. Another contradiction found is that the complainant in his deposition stated that accused led the police party adjacent to their house at place of recovery, whereas mashir has not stated so, he has deposed that search of their houses was conducted and the adjacent area was searched and eighteen bags of charas concealed under the earth were recovered. The mashir while cross examination has not replied the question of defence counsel with confidence, he has shown his ignorance on so many questions, such as “I do not know: “I do not remember”. Like, he does not know as to how the spy information was received by the SHO, he does not know whether the SHO had taken any efforts to pick up private mashir from Berani chowk up to village Niaz Hussain Mari, he is unable to give exact time for which they stopped at Berani chowk, he does not know whether ASI Vijey Kumar had gone for bringing weights and measurements on foot or on vehicle, he does not know how many seals were affixed on each bag of the case property, he is unable to give exact number of the weight which were used in weighing the case property, he does not know whether the charas taken out as sample was from all the bags, he does not know as to who had written the F.I.R. At one place he (mashir) stated that charas was recovered from eastern side of the house of accused, at

other place he stated that charas was recovered from the courtyard of the house of accused, at other place in his cross examination he has denied the suggestion that nothing was recovered inside the house of accused. It is not mentioned in the F.I.R. or mashirnama that charas was recovered from the courtyard, in front of the rooms, but he (mashir) in his cross examination has replied that it is mentioned in the mashirnama. Such unconfident attitude of the witness makes the case of prosecution highly doubtful. In view of the above discussion, the evidence of both the witnesses is found much contradictory to each other as well as to the F.I.R. and mashirnama which is not reliable and cannot be treated as truthful. Apart from this witness Vijey Kumar whose role was that he was all along with complainant party, during the recovery proceedings, but he has not been examined by the prosecution to corroborate the version of complainant. There are so many other discrepancies noticed i.e. there is 15 days delay in sending of the sample of recovered charas to the Chemical Examiner for report, for which there is no explanation that with whose possession the recovered material was kept for such a long time, therefore, possibility of the substitution of the recovered intoxicant could not be ruled out. The chemical report reveals that 50 grams charas was consumed in analysis, remaining case property duly sealed were to be collected from that office within 15 days, but same remaining charas has not been produced before the Court, even no explanation is placed on record. Both the P.Ws have admitted that they have not made efforts to associate private witnesses to act as mashirs, therefore there is also violation of section 103 Cr.P.C, despite admittedly the place of information and the place of alleged recovery was surrounded with population. This is the dishonesty in the investigation which rendered entire case of prosecution as doubtful. The other defect found is that attested copy of entry no.42 from daily diary of the police station has been produced at Ex.7-A, but there is overwriting in the column of date at three places, which

also creates doubt. These material discrepancies and contradictions found in the statements of prosecution witnesses creates reasonable doubt, the benefit of doubt is to be extended to the accused. For the purpose of doubt a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding truth of charge would make whole case doubtful. It is duty of prosecution to prove the charge against the accused beyond any shadow of doubt. On the other hand it is case of defence that the accused has been implicated falsely at the instance of one Baagh Ali who has enmity with accused, who has attacked upon the brother of accused and such F.I.R. was registered with the accused has produced at Ex.D-1. as per version of accused the alleged charas was recovered from the possession of drug paddlers of Tando Adam namely Arman Shah, Ali Mohammad Shah and Noora Jan Shah who let off by the police after taking bribe and the recovered charas was foisted upon present accused. In presence of above contradictions in the evidence of prosecution witnesses and defects in prosecution case, the plea raised by the accused is considerable. In view of the above circumstances I believe that the case of prosecution is highly doubtful, where a single circumstance creates reasonable doubt in a prudent mind about the guilty of accused then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right, therefore, the available testimony is doubtful and not trustworthy, which I do not appreciate, hence this point is answered as doubtful.

Point No.2.

In view of the above discussion I believe that the prosecution has failed to establish charge against the accused beyond the shadow of reasonable doubt, whereas the available testimony is insufficient and in-adequate to convict the accused, therefore, benefit of doubt is extended to the accused, they are hereby acquitted under section 265(H)(i) Cr.P.C. Both accused are present on bail, their bail bonds stand cancelled and sureties discharged.”

6. In our considered view, trial court on the basis of material contradictions in the prosecution evidence and other defects rightly acquitted the accused. It is the matter of the record that there was delay of 15 days in sending charas to the Chemical Examiner for analysis for which no plausible explanation has been furnished. There was also no evidence that during the period of 15 days charas was kept in safe custody at Malkhana. Police constable who had taken charas to the Chemical Examiner was also not examined. In the case of **IKRAMULLAH & OTHERS v. THE SATE** reported in 2015 SCMR 1002, Honourable Supreme Court has held that prosecution has to establish safe custody of the narcotics at Malkhana and its safe transit to the Chemical Examiner. The judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculating and ridiculous as held by the Honourable 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. The relevant para of the same is reproduced hereunder:-

> **"16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both the sides, it may be mentioned that both the**

learned counsel agreed that the criteria of interference in the judgment against ' acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Courts about the rules which should be followed in such cases; the dicta are:

> **Bashir Ahmad v. Fida Hussain and 3 others (2010 SCMR 495), Noor Mali Khan v. Mir Shah Jehan and another (2005 PCr.LJ 352), Imtiaz Asad v. Zain-ul-Abidin and another (2005 PCr.LJ 393), Rashid Ahmed v. Muhammad Nawaz and others (2006 SCMR 1152), Barkat Ali v. Shaukat Ali and others (2004 SCMR 249), Mulazim Hussain v. The State and another (2010 PCr.LJ 926), Muhammad Tasweer v. Hafiz Zulkarnain and 2 others (PLD 2009 SC 53), Farhat Azeem v. Asmat ullah and 6 others (2008 SCMR 1285), Rehmat Shah and 2 others v. Amir Gul and 3 others (1995 SCMR 139), The State v. Muhammad Sharif and 3 others (1995 SCMR 635), Ayaz Ahmed and another v. Dr. Nazir Ahmed and another (2003 PCr.LJ 1935), Muhammad Aslam v. Muhammad Zafar and 2 others (PLD 1992 SC 1), Allah Bakhsh and another v. Ghulam Rasool and 4 others (1999 SCMR 223), Najaf Saleem v. Lady Dr. Tasneem and others (2004 YLR 407), Agha Wazir Abbas and others v. The State and others (2005 SCMR 1175), Mukhtar Ahmed v. The State (1994 SCMR 2311), Rahimullah Jan v. Kashif and another (PLD 2008 SC 298), 2004 SCMR 249, Khan v. Sajjad and 2 others (2004 SCMR 215), Shafique Ahmad v. Muhammad Ramzan and another (1995 SCMR 855), The State v. Abdul Ghaffar (1996 SCMR 678) and Mst. Saira Bibi v. Muhammad Asif and others (2009 SCMR 946).**

From the ratio of all the above pronouncements and those cited by the learned counsel for the parties, it can be deduced that the scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous (Emphasis supplied). The Court of appeal should not interfere simply for the reason that on the re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual

conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities. It is averred in The State v. Muhammad Sharif (1995 SCMR 635) and Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals."

7. For the above stated reasons, there is no merit in the appeal against acquittal. Finding of acquittal recorded in favour of respondents / accused by the trial Court are based upon sound reasons which require no interference. As such, the appeal against acquittal is without merits and the same is dismissed.

JUDGE

JUDGE

A.