

**IN THE HIGH COURT OF SINDH AT KARACHI**

*PRESENT:*

***Mr. Justice Aftab Ahmed Gorar***  
***Mr. Justice Amjad Ali Sahito***

Criminal Acquittal Appeal No. 303 of 2012

Appellant : The State/Anti-Narcotic Force  
Through Ms. Abida Parveen Channer  
Special Prosecutor for ANF.

Respondent : Illahi Bux @ Bhutto  
Through Mr. Abdul Jabbar Korai, Advocate

Date of hearing : 13.02.2019

Date of decision : \_\_.02.2019

**J U D G M E N T**

**Amjad Ali Sahito, J.**— Being aggrieved and dissatisfied with the judgment dated 28.04.2012 passed by the learned Judge, Special Court, CNS-I, Karachi, in Special Case No.823/2011 arising out of the FIR No.45/2011 for the offence under Section 6/9(c) of Control of Narcotic Substances Act, 1997 registered at PS ANF Clifton, Karachi, whereby the respondent/accused was acquitted from the charge.

2. Brief facts of the prosecution case are that on 02.11.2011 SI/SHO Muzamil Ahmed was present at ANF Police Station Clifton Karachi where he received information from superior officers that notorious narcotic dealers Illahi Bux alias Bhutto son of Muhammad Hayat and Qadir S/o Gohram along with their other companions are selling narcotic at their Narcotic ADA at Sharafi Goth adjacent to Korangi Baloch Football Ground, Malir Karachi where narcotic in huge quantity is lying. If immediate action is taken he could be caught hold. On instructions of the high-ups of ANF a raiding party

was constituted headed by SI/SHO Muzamil Ahmed, PC Zafar Iqbal, PC Majid Baloch, PC Mazharuddin, PC Muhammad Rizwan, PC Ismail, PC Abdul Hafeez, PC Safdar Abbas, PC Manzoor Rind, PC Umar Raza, Driver Khalid, HC Driver Talib along with other ANF staff under supervision of Deputy Director Maqbool Ahmed armed with official weapons on official vehicles along with special spy left PS vide roznamcha entry No.8 at 1615 hours and reached pointed place at 1700 hours. A man came out from the house he was holding a blue colour plastic shopping bag. The special spy identified the person as Bhutto the accused. The accused got confused seeing the ANF party and tried to escape away. He was caught hold of by ANF party. The people present at the spot were asked to testify as witnesses but begin afraid of narcotic dealers they excused themselves. Therefore, PC Zafar Iqbal and PC Majid Baloch from ANF staff were made witnesses. The arrested person was asked his name he disclosed his identity as Ellahi Bux alias Bhutto S/o Muhammad Hayat and address as Sharafi Goth, adjacent to Korangi Baloch Football Ground, Malir, Karachi. On search of the shopping bag, he was holding in his right hand, 15 foil pack packets of blue colour marked "Old Holborn" were recovered. Recovered packets were opened and charras was found from it. On investigation, he disclosed that he was running a narcotic ada with his companion Abdul Qadir and that Abdul Qadir was present in the ada. ANF party entered the pointed cattle pan alongwith arrested person but Abdul Qadir managed to escape from the place. Ellahi Bux pointed at secret hiding place which was entered into

and 52 Kattas blue colour tie with Nylon rope recovered on checking the same from 43 Kattas 60/60 Kupies total 2,580 in a number containing Desi Wine recovered while from 2 Kattas Vat No.22/22 in number total 44 bottles of Wine were recovered. Further from 2 Kattas Vat No.1, one Katta 30/30 total 60 number half point Wine bottle recovered whereas from 2 Kattas London Lyin Barrandi from 1 Katta 21 in number and from other Katta 20 number total number point Wing Bottles recovered from 2 Kattas London Dry Lying Barrandi form 1 Katta 40/40 in number total 80 in number half point bottles were recovered. In total from 8, Kattas total 225 in number bottles were recovered while from 1 Katta 5 fold pack packet blue in colour bearing mark Old Holborn 24 Rods of different size in red and white plastic cover containing charras carton. 5 packet in number were wrapped in yellow solution Tape charras in the shape of kidney, 5 in number packet wrapped in yellow solution tape from there opium from one blue plastic shopping Katta small pieces were recovered and on personal search Pakistani Rs.2240/- Irani Riyal 11000/-, one wristwatch and one mobile phone were recovered and sealed. The accused was accordingly arrested and proceedings carried out according to law. The FIR was registered U/S 6,9-C, 14&15 of CNS Act 1997.

3. The learned trial Court framed charge against the respondent/accused, to which he pleaded not guilty and claimed to be tried.

4. At the trial, in order to establish the accusation against the respondent/accused, the prosecution examined PW-1 Constable ANF Muhammad Majid at Exh.4, who produced memo of arrest at Exh.4/A. The prosecution also examined PW-2 Complainant SI Muhammad Muzamil at Exh.5, who produced the FIR along with the expert report and correspondence etc. at Exh.5/A to 5/E respectively.

5. The respondent/accused was cross-examined by the learned Special Public Prosecutor for ANF. Thereafter, the learned SPP closed the prosecution side of the prosecution vide statement at Exh.6.

6. Statement of the accused/respondent was recorded in terms of Section 342 Cr.PC at Exh.7, in which he denied the prosecution allegations and further stated that he is innocent and lastly prayed for justice. However, neither the respondent/accused examined himself on oath in terms of Section 340(2) Cr.PC to disprove the prosecution allegations nor led any evidence in his defence.

7. The learned trial Court after hearing the parties counsel and on assessment of the evidence acquitted the respondent/accused, as stated above, vide judgment dated 28.04.2012, which is impugned by the appellant/ANF before this Court by way of filing the instant Criminal Acquittal Appeal.

8. Learned Special Prosecutor for ANF/appellant mainly contended that the learned trial Court has seriously erred in summing up the case and has failed to appreciate the prosecution evidence and, therefore, the impugned judgment is unlawful and liable to be set aside; that Section 25 of the CNS Act has excluded Section 103 Cr.P.C. and it's not requisite of law and as per judgment of the Apex

Court the official witnesses are as good as public witnesses; that the learned trial Court has wrongly observed that the inmates have not been arrested in the instant matter as it has never come in evidence that the other persons were residing in the house and moreover, the accused himself stated to the police that charras/Opium lying in the house belonged to him and the charras/opium was secured on the pointation of the accused, as such, the accused was solely responsible for the recovery of the narcotics from the house; that learned trial Court invalidly drawn its attention towards ownership of the house from which narcotics were recovered which is not a requisite of law in such cases, the accused pointed out the ANF party inside that huge narcotics is lying inside the house from which the narcotic was secured which means that the accused had access to the house which was in its physical possession and, therefore, it was irrelevant whether the accused was owner, tenant or having any vested interest in the house, this ground for acquittal is frivolous, untenable and unreasonable; that the learned trial Court has misread the testimony of the prosecution and the impugned judgment suffers from misreading and non-reading of the evidence of the prosecution recorded in this matter, hence the impugned order is untenable, illegal and not maintainable and, therefore, is liable to be set aside; He lastly contended that the prosecution has succeeded to prove its case against the respondent/accused; thus according to him, under the above-mentioned facts and circumstances, the impugned judgment passed by the learned trial Court is liable to be set aside.

9. On the other hand, learned counsel for the respondent/accused while supporting the impugned judgment has argued that the

prosecution has failed to prove its case against the respondent/accused; that all the witnesses are ANF officials and no independent person has been cited as mashir of arrest and recovery, which is a clear violation of section 103 CR.PC and ANF officials failed to comply the section 21 of CNS Act, 1997, and there are so many contradictions in the evidence of prosecution witnesses. He thus lastly prayed for dismissal of the instant appeal.

10. We have heard learned Special Prosecutor for ANF/appellant, learned counsel for the respondent/accused and have minutely gone through the record with their able assistance.

11. The careful analysis of the material brought on record reflects that on spy information ANF officials recovered 35.500 KGs of charras of different shapes, 5 KGs Opium and alcohol/wine bottles total 2659/ from the possession/cattle pan/house of the accused, on personal search Pakistani Rs.2240/- Iran Rial 11000/-, one wristwatch and one mobile phone were recovered and sealed, the aforesaid properties were separated from each other and sent for chemical examination, hence the respondent/accused is found possession for huge quantity of narcotic substance having prior knowledge of it in the cattle pan/house. It cannot be believed that such a huge quantity of charras was kept in the secret cavity made in of the cattle pan without prior knowledge, which undeniably remained in possession and control of the respondent/accused, rather respondent/accused was responsible for lying with him such a huge narcotic substance in his house/cattle pan.

12. In order to prove its case, the prosecution examined PW-1 Muhammad Majid, who is mashir of the memo of recovery and seizure of narcotics etc. In his evidence, he deposed that on 02.11.2011 at 1700 on the pointation of informer arrested accused/respondent in front of his house holding a shopping bag in his hand. They secured the said bag from his possession and on search, the officer secured 15 packets of charras in the shape of rods. He further deposed that accused Illahi Bux disclosed that his crime associate Abdul Qadir has been present inside the house with narcotics. The raiding party entered into the house but he managed to escape. The accused led them to the cattle pan on one side of the house, on his pontation recovered a huge quantity of narcotics stated above from the cattle-pen. The recovery was effected from a secret cavity built in the RCC constructed bucket alongwith the boundary wall, apparently useable from its open portion for keeping food for feeding the animals. In cross-examination, he admitted that there is no shop and hotel around the said house.

13. The prosecution has examined the complainant PW-2 SI Muhammad Muzamil, who lodged the FIR No.45/2011 and investigated the case. He recorded the statements of PWs, also dispatched the charas and Opium to the office of the chemical examiner, the liquor found in the matter together with such stuff was subjected to sampling and such samples were also sent to the office of the chemical examiner. He has supported the contention of the memo of recovery as well as FIR and admits that a huge quantity of narcotics was recovered from the accused/respondent in his presence. In the cross-examination, he admitted that for raiding the

house or for searching dwelling premises, a search warrant is required by the officer.

14. It is evident from the evidence of the prosecution witnesses that they have received information from superior that narcotic dealers Ellahi Bux and Qadir are selling narcotic at their ADA Sharafi Goth, if immediate action be taken huge narcotic can be recovered in such situation it was impossible for the complainant to obtain search warrant at the cost of disappearance of the accused and narcotics, as such in the peculiar circumstances of the case, non-compliance of provision of section 21 of the CNS Act, 1997 could not make the conviction bad in the eyes of law. The reliance in this context is placed upon the case of **Fida Jan V. The state** reported as **2001 SCMR 36** the Hon'ble Supreme Court of Pakistan has held as under:-

*“The implication of section 20 of the Act. It appears that the lawgivers have coached this section of law in such manner that it does not place a mandatory obligation upon the Investigating Agency to obtain search warrants from the Special Judge before conducting a raid. However, we may mention here that all parts of a statute are required to be enforced in letter and spirit and no plea can be entertained that a particular part of a statute is redundant. But from the language employed in a statute it can be gathered whether it is mandatory or directory in its nature. We have noticed that in section 20 of the Act word “may” has been used with reference to obtaining search warrants by the agency who intended to effect search of a house, place, premises or conveyance etc. It is also known principle of interpretation of statute that word “may” sometimes can be used as “shall”. But perusal of section 20 of the Act suggests that law has not prescribed consequences of conducted search without obtaining the warrants from Special Court. Thus, we are of the opinion that it is directory in nature.”*

15. In narcotics case, the applicability of section 103 Cr.PC has been excluded and none inclusion of any private witness is not a



serious defect to vitiate the trial/conviction, it would be appropriate to refer section 25 of the Control of Narcotics Substance Act 1997, which reads as under:

**“25. Mode of making searches and arrest.**--- *The provisions of the Code of Criminal Procedure, 1898, except those of section 103 Cr.PC shall mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of section 20, 21, 22 and 23 to all warrants issued and arrest searches made under these sections”.*

16. So far the evidence of ANF officials is concerned, they are competent and their evidence cannot be discarded, only for the reason that they are ANF officials. They have furnished straightforward and confidence inspiring evidence, there is nothing on the record to show that they have deposed against the respondent/accused maliciously or out of any animus and it cannot be believed that the ANF officials would plant such a huge quantity of narcotic viz.40.500 K.Gs narcotic against the respondent/accused at his own sources. It is a settled principle of law that the prosecution witnesses belong to ANF officials by itself cannot be considered as a valid reason to discard their statements. The reference in this context is made to the case of **Zaffar vs. the State (2008 SCMR-1254)**, the Hon’ble Supreme Court of Pakistan has held that:

*“Police employees are the competent witnesses like any other witnesses and their testimonies cannot be discarded merely on the ground that they are police officials”.*

17. The case in hand, respondent/accused has failed to bring on record any material to show any animosity or ill-will with the complainant and the prosecution witnesses, thus in the absence thereof, the competence of prosecution witnesses being ANF officials

was rightly believed. Furthermore the learned trial court has given a reason for the acquittal that the ANF official failed to prepare the first memo of recovery of charas, it is suffice to say that the learned trial Court has not considered the evidence of the prosecution witnesses, who deposed in there evidence that after the arrest of accused secured 15 packets of charas in shape of rods, the accused disclosed that his companion is present inside the house as such the raiding party entered in to the house but narcotic dealer Qadir ran-away. It is to be said that it is continuity of offence and when entire recovery was effected then the complainant prepared the memo of recovery, it is not a sound reasons for the acquittal of the accused/respondent. Moreover, a procedural formality cannot be insisted at the cost of completion of an offence and if an accused is otherwise found connected, then mere procedural omission and even allegation of improper conduct of investigation would not help the accused. The reference in this context is made to the case of the **State/ANF vs. Muhammad Arshad (2017 SCMR-283)**, wherein the **Hon'ble Supreme Court of Pakistan** has held that:

*“We may mention here that even where no proper investigation is conducted, but where the material that comes before the Court is sufficient to connect the accused with the commission of crime, the accused can still be convicted, notwithstanding minor omissions that have no bearing on the outcome of the case”.*

18. Even otherwise, mere status of one as **official** would not alone prejudice the competence of such witnesses until and unless he is proved to be **interested**, who has a motive, to falsely implicate an accused or has the previous enmity with the person involved. The

reliance in this context is made to the case of **Farooq v. The State (2008 SCMR-970)**.

19. The recovered charas was sent to the office of the chemical examiner on 03.11.2011 by the investigating officer, which was received on the same day with three sealed nylon bag and two cloth bags each with two seals, the seals were found perfect. It is pertinent to mention here that Chemical Examiner's passative report regarding charras/Opium is sufficient to prove that the substance recovered from the respondent/accused can be used to cause intoxication and the prosecution has discharged its initial onus while proving that substance was recovered from the secret cavity of ada of the shop in possession and control of the respondent/accused, for which the respondent/accused has failed to discharge his burden in terms of Section 29 of Control of Narcotics Substance Act 1997. Though the investigation officer and other prosecution witnesses are ANF officials, they have no enmity or rancor against the respondent/accused to plant such a huge quantity of narcotics substance against him. The defense has not produced any evidence to establish animosity qua the prosecution witnesses

20. We have carefully scrutinized evidence brought on the record. It appears that the learned trial Court has failed to appreciate the evidence on record in accordance with the settled principles of law. This is a clear case of misreading and non-reading of the evidence on the record as the impugned judgment, on the very face of it, suffers from lacunae. The learned trial Court has not assigned any reasons for recording acquittal in the case. Even the impugned judgment does

not fulfill the requirements of section 367(2), Cr.P.C. The statement of the accused has been recorded in a mechanical manner. We have several reasons to come to the conclusion that the trial Court has not applied its mind while passing the impugned judgment. Since it has already been held that the prosecution evidence has not been appreciated properly and sound reasons have not been assigned for recording acquittal in the case as such the matter requires a reappraisal of evidence. Therefore, the impugned judgment of acquittal is not sustainable in law and the same is hereby set aside. Appeal is partly allowed. The case is remanded to the trial Court for afresh from the stage of recording statement of the accused under Section 342, Cr.P.C. within (01) month and after hearing the parties, decide the matter in accordance with law. The respondent is present on bail. He is directed to appear before the trial Court on 11.03.2019. Office is directed to transmit the R&P to the learned trial Court.

**JUDGE**

**JUDGE.**