IN THE HIGH COURT OF SINDH, AT SUKKUR.

PRESENT:-
Mr. Justice Naimatullah Phulpoto; and
Mr. Justice Abdul Mobeen Lakho.

Cr. Acq. Appeal No. D - 28 of 2002.

Appellant	Anti-Narcotics Force, Karachi, through Mr. Mohsin Ali, Special Prosecutor ANF.
Respondent	Farhad Khan s/o. Mir Akbar Khan.
Date of hearing	05.09.2019.
Date of detailed reasons	31.10.2019.

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JUDGMENT

Abdul Mobeen Lakho, J: The Respondent was tried by learned Special Judge CNS, Sukkur in Special Case No. 35 of 1999, arising out of FIR No. 09 of 1999 u/s 9 (c) of Control of Narcotics Substances Act, 1997 registered at P.S ANF, Sukkur. After regular trial, vide judgment dated 21.10.2002 respondent was acquitted of the charge by trial Court.

2. The facts giving rise to this appeal, briefly stated, are on 26.04.1999 SIP Sher Ali Shah Sherazi lodged a report with P.S. ANF Sukkur, stating therein that he alongwith Pak Army Hawaldar Muhammad Aslam, Constables Tahir Mehmood, Muhammad Yasin, Khuda Bux and ANF Constables Abdul Rasheed, Gul Khan, Mukhtiar Ali, Imtiaz Ali, Driver Amir Ali and Gul Khan duly armed with official weapons under the command of Captain Raja Qamar Siddique Incharge ANF Station in official vehicle and while patrolling when they reached at Bus stand they received spy information that a person is transporting Narcotics from Khairpur at Pir-Jo-Goth wagon Stand. The complainant alongwith his staff immediately reached at

the pointed place and on the pointation of spy apprehended Farhad Khan son of Mir Akbar Pathan. During search the complainant recovered a cloth bag containing four foil packed packets in blue plastic alongwith seven foil packed packets in red plastics containing Charas. Each packet was weighed separately which contained one kilogram of Charas (total 11 kilograms). Ten grams from each packet were sealed separately for chemical analysis and examination, the remaining were sealed separately. The complainant also recovered Rs.200/= cash alongwith photocopy of CNIC bearing No.439-63-263960 and service book of Pak Army. He then arrested the accused and seized the recovered charas at spot under a mashirnama prepared in presence of PC Abdul Rasheed and PC Gul Khan due to non-availability of public persons. They then brought the accused and case property at P.S ANF, Sukkur, where FIR No.09 of 1999 under Section 6/9(c) of Control of Narcotic Substances Act, 1997 was registered against accused on behalf of the State under above referred Section.

3. Pursuant to the registration of FIR, the investigation was followed and challan was submitted before the Court of competent jurisdiction.

4. Trial Court framed charge against respondent who pleaded not guilty and claimed trial.

5. At the trial, the prosecution has examined as many two (02) witnesses namely, SIP Sher Ali Shah Sherazi (complainant) at Ex.7 and Constable Abdul Rasheed at Ex.15 and then closed its side.

6. Statement of accused was recorded under Section 342, Cr.P.C. at Ex.17, wherein he denied the prosecution case and pleaded his innocence. He also examined himself on oath under Section 340(2),

Cr.P.C. at Ex.18 and examined Imdad Hussain at Ex,19 and Amin Malik @ Gul Khan at Ex.20 as his defence witnesses.

7. The learned trial Court, after hearing the parties respective counsel and assessing the evidence on record acquitted the respondent for the following reasons:

> According to complainant SIP Sher Shah Sherazi, he proceeded with the party for patrolling vide Roznamcha entry No.7; though the witness has produced Roznamcha entry No.7 but he has not mentioned the entry No.7 in the FIR as well as in the mashirnama of arrest and recovery of the Charas from the possession of the accused. The entry of the Roznamcha is to be mentioned in the FIR as well as in the mashirnama which would have supported the prosecution case to prove that the Anti Narcotic Force party had left their Station on the day of incident for detecting the incident. Perusal of entry No.7 produced in the evidence, transpires that true copy of the same is produced and there are over writing on the dates from 27.01.1999 to 26.04.1999 and no such explanation is furnished by the complainant SIP Sher Ali Sherazi as well as PC Abdul Rasheed that why this entry was not mentioned in the FIR as well as in the mashirnama of arrest and recovery of Narcotics. Even PW-1 SI Sher Ali Shah Sherazi has not stated, in his evidence, that he proceeded vide Roznamcha entry No.7 to detect the Narcotic Cases on the day of incident.
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> The next point for consideration is that, as per prosecution case accused was dropped from the Wagon at Pir-Jo-Goth Wagon Stand but neither any public person is taken from the Wagon Stand nor from the place of information viz. Central Bus Stand to act as mashir and witness the recovery of Narcotics from the possession of the present accused. The ground raised by the Special Public Prosecutor that since public witnesses are not co-operating with the police as well as Anti-Narcotic Force officials to become a witness against Narcotic drug dealers, due to apprehension requires consideration but no public person is contacted or even approached to act as mashir to witness the recovery and on his refusal for acting, is to be mentioned with the details in the FIR as well as in the mashirnama that public persons namely so & so was approached to act as mashir but he refused. Nothing is mentioned in the FIR as well as in the mashirnama that complainant party approached public person but they refused to act as mashir and in absence of such explanation the evidence could not be relied upon that the public persons refused to act as mashir. In the present case even Wagon driver or conductor from which accused dropped is not examined or approached and there are contradictory versions about the departure of the Wagon. SIP Sher Ali Shah Sherazi has stated in cross examination that the Wagon immediately went away when accused came out from it on the road while PW-2 PC Abdul Rasheed has stated in cross examination that Wagon had stopped outside the stand and

after dropping the passengers went inside the wagon Stand as such it could not be said that the driver of the Wagon was not available to be made a witness in the case. Even otherwise, the registration number of the Wagon from which accused is stated, has dropped is not mentioned in the FIR as well as in the mashirnama. No doubt the FIR is not an exhaustive piece of evidence and it should contain all details and accused was apprehended at Pir-Jo-Goth Wagon Stand while dropping from the Wagon with the Charas than it was incumbent upon the complainant party to give the registration number of such Wagon as well as the name of its driver, but the prosecution has failed to give the registration number of the Wagon as well as name of the driver.

The next point urged by the defence is that the Chemical Examiner's report is a belated one and is not reliable one. According to prosecution case, incident took place on 26.04.1999 whereas report of Chemical Examiner produced at Ex.12 tranpsires that the property is received by the Chemico bacteriological Laboratory M.A. Jinnah Road, Karachi on 5.5.1999 vide letter No. 09/99/ANF/PS/Sukkur dated 26.1.1999 by the hand of PC Gul Khan as such it appears that the case property viz. samples are received in the laboratory after 10 days and there is no explanation from the prosecution side that whether the property was kept in safe custody from 26.04.1999 till 5.5.1999 and what where the reasons that the property could not reach before the Laboratory immediately after its dispatch and where was the property for the last such 10 days as such the report of the Chemical Examiner issued, could not be relied upon. The learned trial Court supported its findings on the following judgments:

> It is held in the case of Javed Akhtar reported in PLD 1997 Cr.C Lahore 1310 (DB) that case property was not kept in safe custody i.e. Malkhana. Case property (samples of chars) was kept for about seven days and was not transmitted promptly to Chemical Examiner Delay in dispatch was not explained. Result and report of chemical Examiner would become unreliable on account of unexplained delay in sending the material to "Expert"-Appellant was unrepresented by a counsel-Held:Prosecution has not been successful to prove its case against appellant beyond any reasonable doubt-Appellant acquitted.
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> It is held in the case reported in 2000 MLD 1045, the case of Khan Zaman Vs. the State, that Despite the recovery having been effected in a thickly populated area, police party admittedly did not call any shopkeeper or any other private person to witness the same and clearly violated the mandatory provisions of S, 103 Cr.P.C making the recovery of contraband heroin from the accused illegal which could not be made the basis of conviction-Prosecution had also failed to send the sample of the recovered heroin to the Chemical Examiner immediately and without any loss of time

> but so after seven days of the alleged recovery. Accused, in circumstances, was entitled to acquittal not as a matter of grace but as a matter of right and he was acquitted accordingly.
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> It is also held in the case of Hamza reported in PLD 2000 Cr.C (Karachi) 921 (DB) that petitioner's entitlement to benefit of bout-Evidence of prosecution witnesses was contradictory and discrepant one-Delay in sending property to Chemical examiner would cast doubt on factum of recovery-Weight of recovered Narcotic was not proved-Reasonable doubt was thus, available to accused/appellant was acquitted on the basis of doubt.

Appraisal of the evidence is that both the witnesses examined by the prosecution are Anti Narcotic Force Official witnesses and no public person is approached from the place of information as well as the place of arrest of accused and recovery of Narcotic Chars to act as witness and mashir in the case. Even the Registration number of the Wagon from which accused dropped with the Narcotic and the name of its driver is not mentioned in the FIR as well as in the mashirnama nor they are disclosed before the Court at the time of recording of evidence of both the witnesses. The case property viz. samples are received to the laboratory after about 10 days of the dispatch from the ANF Station and there is no explanation that the property, for the said 10 days either was kept in safe custody or what were the reasons that the property could not be dispatched with the laboratory within time.

The contention of Special Public Prosecutor that a huge quantity of Chars is recovered from the possession of the accused and such discrepancies would not be fatal to the prosecution case and the minor contradictions in the evidence of the Defence witnesses would not be fatal to the prosecution is considered. No doubt 11 KGs of Chars are shown recovered from the possession of the accused but in view of the Judgments of the Honourable Superior Courts, Prosecution has to produce strong and independent evidence without any discrepancies to prove the charge against the accused. It is the duty of the prosecution to prove the case against the accused and not the accused to disprove the case. Any discrepancy in the evidence of the defence are not to be considered but prosecution has to prove the charge against the accused beyond any reasonable doubt. The discrepancies in the prosecution case mentioned above, on appraisal of the evidence, makes the case of prosecution as doubtful and it is settled principle that multiple circumstances are not necessarily required to crate doubt in the prosecution case. If a single circumstances, creates doubt in the prosecution case, benefit of the same is to bee3xtended in favour of the accused.

8. ANF has filed this appeal against acquittal.

9. The learned Special Prosecutor, ANF argued that it is a case of huge recovery of charas; that the witnesses in their depositions have supported the case of the prosecution and implicated the respondent with the commission of offence without major contradictions or discrepancies, some minor contradictions, if any, are of no significance and same may be ignored in view of the facts and circumstances of the case; that the police witnesses are as good as that of any other person and their testimony cannot be discarded merely for the reason that they belong to police department; that no enmity or ill-will has been brought on record against police to substantiate false implication of the respondent; that the prosecution has successfully discharged its burden of proof and shifted the onus on respondent to justify his innocence, who has failed to bring on record any iota of evidence to prove his innocence. Finally, he prayed that the appeal may be allowed and the respondent may be dealt with in accordance with law.

10. The process despite issuance of notices was never served on the respondents. We decided to hear the appeal while observing that respondent deliberately avoided the service process of the Court.

11. We have carefully perused the evidence recorded by the trial Court. The learned trial Court has rightly observed that the prosecution case was doubtful for the reason that roznamcha entry bearing No.7 was neither mentioned in the FIR nor in the mashirnama of arrested and recovery of charas from the accused. True copy of Entry No.7 when produced in evidence show that there was over writing in the dates from 27.01.1999 to 26.04.1999 and no explanation of the over writing is furnished by the prosecution. Learned trial Judge very rightly observed that when the accused was

dropped from the wagon and was apprehended on information no person from the bus stand was made to act as mashir and witness the recovery of Narcotics from the possession of the accused.

12. The special prosecutor stated that public witness do not cooperate with police or ANF officials, the duty of the officer Incharge was to note down the names of the persons so approached/ asked and this fact should be mentioned in the FIR that so and so person was approached but he refused to act as mashir. In the absence of such fact in the FIR it could not be believed that the officer approached any public person to become a mashir. In this case even the wagon driver or the bus conductor were not approached and / or examined. In fact there is contradiction in the statement of the PWs about the departure of wagon. SIP Sher Ali Shah Sherazi has stated in cross examination that the Wagon immediately went away when accused came out from it on the road while PW-2 PC Abdul Rasheed has stated in cross examination that Wagon had stopped outside the stand and after dropping the passengers went inside the wagon Stand.

13. The observation is also made with regard to the mention of the registration number of the wagon from which the accused was dropped has not been mentioned in the FIR or in the mashirnama. The prosecution failed in its duty to prove the name of the wagon driver and also failed to provide the registration number of the wagon. The learned trial Judge also observed that the chemical examination report cannot be relied upon as the incident took place on the 26.04.1999 and the chemical examination report as Ex-12 produced transpires that the chemico bacteriological laboratory received the property on 05.05.1999, it appears that the case property received in the laboratory after 10 days without any

explanation with regard to its safe custody from 26.04.1999 to 05.05.1999 no reason was furnished as to why the property could not reach the laboratory after the dispatch making the report of the chemical examination unreliable. Trial Court rightly pointed out infirmities in the case of prosecution. Judgment passed by the trial Court was neither arbitrary nor capricious. When an accused person is acquitted of the charge by a Court of competent jurisdiction, double presumption of innocence is attached to its order with which this Court is always slow to interfere. Reliance is placed on the case of *The State and other v. Abdul Khaliq and others* **(PLD 2011 Supreme Court 554**), in which following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:

> "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:
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> > 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".

14. In the recent judgment in the case of *Zulfiqar Ali v. Imtiaz and others* **(2019 SCMR 1315)**, Hon'ble Supreme Court has held as under:

> "2. According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB. There is a reference to M/s. Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled. Criminal Appeal fails. Appeal dismissed."

15. There were several circumstances in the case, which created doubt in the case of prosecution. Trial Court has rightly disbelieved the prosecution evidence. Scope of acquittal appeal is considerably narrow and presumption of double innocence is attached to the order of acquittal.

16. This Cr.Acq. Appeal is without merit and the same is **dismissed**. There are the reasons of our **short order** announced on **05.09.2019**.

JUDGE

JUDGE

Jamil Ahmed/P.A.