JUDGMENT SHEET

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

Cr.Acquittal.Appeal.No.D- 267 of 2010

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 28.03.2018.
Date of judgment: 28.03.2018.

Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh for the appellant / State.
None present for respondent.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent/accused Ali Nawaz s/o Ali Khan by caste Notkani was tried by learned Special Judge for CNS, Badin in Special Case No.68 of 2007 for the offence u/s 9 (c) of CNS Act, 1997. By judgment dated 14.01.2001, the respondent/accused was acquitted of the charge by extending him benefit of doubt. Hence the instant Criminal Acquittal Appeal filed by the State through Special Prosecutor General Sindh Karachi.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 08.05.2007 Excise Inspector Incharge Divisional Intelligence Branch Hyderabad received spy information that respondent was possessing the narcotics. On such information Incharge Divisional Intelligence Branch Hyderabad alongwith other Excise officials left Excise Police Station in the Government vehicle and proceeded to the village of

respondent Ali Nawaz situated in Taluka Tando Bago. Excise officials reached at the otaq of accused Ali Nawaz at 10-00 a.m where they saw the respondent/accused sitting on a cot. Excise Inspector inquired from him about the name to which he disclosed his name as Ali Nawaz s/o Ali Khan. Excise officials suspected him to be involved in narcotics and he was asked to dig out the earth where it was alleged that charas has been concealed by him. On the pointation of accused, Excise Constable Muhammad Shahidm dug out the earth and secured one plastic bag. It was opened and it contained 20 packets of charas. Excise Inspector weighed the 20 packets and total weight of charas was 20 kilograms. Excise Inspector took out 10 grams from each packet as sample total 200 grams for sending the same to the Chemical Examiner. Sample and the remaining charas were separately sealed. Accused was arrested. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, accused and the case property were brought at Excise police station where FIR bearing crime No.05/2017 under section 9 (c) of CNS Act, 1997 on behalf of the State was lodged against the accused on behalf of the State.

3. During investigation, sample was sent to the Chemical Examiner for analysis, positive report was received. On the conclusion of investigation, challan was submitted before the learned Special Judge for CNS Badin u/s 9 (c) of CNS Act, 1997.

4. Trial court framed charge against the accused u/s 9 (c) of CNS Act, 1997 to which accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined two PWs and prosecution side was closed.

6. Statement of accused was recorded u/s 342 Cr.P.C. in which he denied the prosecution allegations.

7. Trial court after hearing the parties and assessment of the evidence available on record, acquitted the accused by judgment dated 14.01.2001.

8. We have heard Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh and examined the entire evidence available on record. BW was issued against the respondent but the same returned unexecuted with the endorsement that respondent has shifted to some unknown place.

9. Learned D.P.G. appearing on behalf of the State argued that the trial court has acquitted the respondent / accused on minor contradictions and did not appreciate the evidence according to the settled principles of law. Lastly argued that judgment of the trial court was shocking and ridiculous.

10. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 14.01.2001. The relevant portion whereof is reproduced hereunder:-

> "As per prosecution case the Excise police party headed by Incharge Divisional Intelligence Branch Hyderabad Zaheer Hussain Shah alongwith PW-2 complainant Excise Inspector Shabir Ahmed and others left their office on 08.06.2007 for the alleged place of recovery. However, the time of their departure is neither mentioned in the FIR nor mashirnama. Both the prosecution witnesses PW Excise Dfedar Javed Ahmed and PW-1 complainant Shabir Ahmed have also not given the time of their departure in their evidence. The entry No.265 has been produced at Exh.9 which shows the time of departure is 6.10 am. The Exh.9 contains two leaves showing the departure and arrival entries of the Excise officials in Division Office. The entries shown in these two leaves of Exh.9 are not in sequence, e.g. Two entries are with the same number i.e. 264 dated

8.5.2007. The entry No.264 shows the time 6 a.m and there is overwriting in the time. While entry No. 265 shows the return of excise party to their office along with accused at 1.30 p.m. This shows that the entries No.264 and 265 whereby the Excise Police party claims to have left their office for the place of recovery and arrival after the recovery are after thought and manipulated.

The entry No.265 shows the arrival of the Excise police party after arrest and recovery of the charas from accused at Divisional Intelligence Office, Hyderabad at 1.30 p.m. whereas the FIR has been lodged at 6 p.m i.e. after delay of about 5 hours. The complainant in his cross examination has stated that the delay of 5 hours in lodging of the FIR has been explained in daily diary entry No.265 Exh.9. The said entry No.265 does not show the reasons of delay in lodging of the FIR. The delay of 5 hours after returning from the place of recovery, itself makes the whole prosecution case doubtful.

The prosecution case is that 20 pieces of contraband charas weighing one kilogram in each piece, total weighing 20 kilograms were recovered from the possession of accused. The sample of ten grams each was taken from each piece total weighing 20 grams. The bulk of 20 pieces of charas were exhibited in the court at articles A/1 to 20. The complainant in his cross examination has admitted that no sample was taken out from the articles A/1, 3, 4, 5, 6, 7, 8, 9, 10 and 20 of white colour packets and A/1 and 8 of red colour packets. This clearly shows that the sample was not taken out from all the 20 pieces as alleged. Thus the sample as sent to the chemical examiner was not from the 20 packets already recovered from the accused and was of another charas. In other words whether alleged recovery from accused was charas or something else.

The public mashir have not been made in this case although the information about the possession of the alleged charas was with the complainant and there was ample opportunity with complainant to have made recovery in presence of public mashirs. The police witnesses with such contradictory and defective evidence cannot be relied upon for the purpose of recording conviction in this case.

Furthermore, the accused has been seriously prejudiced as the complainant and the investigation officer is the same person although according to the prosecution story other members of the excise staff including incharge Divisional Intelligence Branch Hyderabad and other Excise Inspectors were available at the time of raid. The whole case seems to be false, fabricated, at least doubtful under the circumstances.

In view of the above discussion, I am of the considered view that the prosecution case against the accused is highly doubtful. The benefit of doubt must go to the accused as a matter of right. I therefore, given benefit of doubt to accused and acquit him under section 265-H(i) Cr.P.C. He is in custody. He be released forthwith if not require in any other case."

11. In our considered view prosecution had failed to prove its case against the accused for the reasons that according to the case of prosecution, charas was recovered from the otaq of accused. The Excise officials failed to observe the legal formalities while conducting the search of otaq of accused. According to the evidence, charas was recovered from otaq of accused on 08.05.2007 on spy information. Excise officials failed to associate any independent person of the locality to witness the recovery proceedings. There was nothing on the record to show that charas was recovered from the exclusive possession of the accused. Trial court has rightly observed that there was manipulation in roznamcha entries for which no plausible explanation has been furnished by the prosecution. Learned D.P.G. could not satisfy the court about the safe custody of narcotics at Malkhana so also the safe transit. Learned D.P.G. could not explain the discrepancies in prosecution evidence so also safe custody of charas at Malkhana. He also frankly stated that there were infirmities in the prosecution case. In this regard, reference can be made to the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), the relevant portion 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 to 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."**

12. Appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. As held in the case of Ghous Bux v. Saleem and 3 others (2017 P.Cr.L.J 836):-

> **"It is also settled position of law that the appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. Additional P.G has rightly relied upon the case of Muhammad Usman and 2 others v. The State 1992 SCMR 489, the principles of considering the acquittal appeal have been laid down by honourable Supreme Court as follows:**
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> > **It is true that the High Court was considering an acquittal appeal and, therefore, the principles which require consideration to decide such appeal were to be kept in mind. In this regard several authorities have been referred in the impugned judgment to explain the principles for deciding an acquittal appeal. In the impugned judgment reference has been made to Niaz v. The State PLD 1960 SC (Pak.) 387, which was reconsidered and explained in Nazir and others v. The State PLD 1962 SC 269. Reference was also made to Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 and Khan and 6 others v. The Crown 1971 SCMR 264. The learned counsel has referred to a recent judgment of this Court in Yar Mohammad and 3 others v. The State in Criminal Appeal No.9-K of 1989, decided on 2nd July, 1991, in which besides referring to the cases of Niaz and Nazir reference has been made to Shoe Swarup v. King-Emperor AIR 1934 Privy Council 227 (1), Ahmed v. The Crown PLD 1951 Federal Court 107, Abdul Majid v. Superintendent of Legal Affairs, Government of Pakistan PLD 1964 SC 426, Ghulam Mohammad v. Mohammad Sharif and another PLD 1969 SC 398, Faizullah Khan v. The State 1972 SCMR 672, Khalid Sahgal v. The State PLD 1962 SC 495, Gul Nawaz v. The State 1968 SCMR 1182, Qazi Rehman Gul v. The State 1970 SCMR 755, Abdul Rasheed v. The State 1971 SCMR 521, Billu alias Inayatullah v. The State PLD 1979 SC 956. The principles of considering the acquittal appeal have been stated in Ghulam Sikandar's case which are as follows:-**

"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:-

(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting, the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for the reappraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

(2) The acquittal will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

(3) In either case the well-known principles of reappraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and, for no other reason.

(4) The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding

> **sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."**
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> **13. In another case of State/Government of Sindh through Advocate General Sindh, Karachi v. Sobharo (1993 SCMR 585), it is held as follows.**
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> **"14. We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view that while evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed."**

13. Judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. 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 cordinal 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 case of The State and others v. Abdul Khaliq and others (PLD 2011 Supreme Court 554). The relevant para 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."

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

JUDGE

JUDGE

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