JUDGMENT SHEET

# IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Acquittal.Appeal.No.D- 135 of 2007

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

Date of hearing: 03.04.2018.
Date of judgment: 03.04.2018.

Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF for appellant.
None present for respondent.

## J U D G M E N T

***NAIMATULLAH PHULPOTO, J***: Respondent/accused Muhammad Siddique s/o Haji Ismail by caste Soomro was tried by learned Special Judge for CNS, Hyderabad in Special Case No.36 of 2006 for offence u/s 9 (c) of CNS Act, 1997. By judgment dated 13.01.2007, the respondent/accused was acquitted of the charge by extending him benefit of doubt. Hence, instant Criminal Acquittal Appeal is filed by the State through Special Prosecutor ANF, Hyderabad.

2. Brief facts of the prosecution case as disclosed in the FIR are that respondent/accused was found in possession of 02 kilograms of charas on 27.04.2006 at 1615 hours near main gate of Lady Differen Hospital, Station Road, Hyderabad. A sample of 10 grams of charas was separated and sealed separately from the remaining narcotic and that too was sealed. Such memo of arrest and

recovery was prepared in presence of mashirs PCs Abdul Hameed and Rahim Bux. Accused and property were brought at PS where such FIR was lodged by complainant SI Naeemuddin 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, Hyderabad 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 produced two PWs, their examination-in-chief was reserved, for want of case property / wrappers. Prosecution could not produce said PWs before trial Court for cross-examination.

6. Trial court after hearing the parties and assessment of the evidence available on record, acquitted the accused by judgment dated 13.01.2007.

7. We have heard Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF and examined evidence whatsoever available on record. BWs were issued to the respondents but could not be executed by ANF. Appeal pertained to 2007. We intend to decide it on the basis of material / evidence on record.

8. Learned Special Prosecutor ANF appearing on behalf of the State argued that the trial court has acquitted the respondent / accused on technicalities 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.

9. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 13.01.2007. The relevant portion whereof is reproduced hereunder:-

> ***"I have heard the learned counsel for the accused and the learned SPP for the State.***
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> ***It is contended on behalf of the accused that the prosecution has failed to prove the case beyond reasonable doubt, therefore, he is entitled to be acquitted whereas the learned SPP for the State opposed the above arguments and contended that the case has been proved against the accused, therefore, he is to be convicted according to law.***
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> ***The point for determination are as under:-***
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> ***(i) Whether the accused was found in possession of two kilograms of charas?***
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> ***(ii) What offence, if any, the accused have committed?***
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> ***On careful consideration of the arguments of the learned counsel and the perusal of the record, I have reached to the conclusion that the prosecution has failed to prove it's case beyond reasonable doubt against the accused, therefore, he is entitled to be acquitted for the following reasons:-***
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> ***<u>POINT NO.01</u>***
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> ***On the above point, although, the witnesses produced by the prosecution, who are ANF officials have deposed according to the facts of the case as mentioned above, but after the examination-in-chief, the complainant SI Naeemuddin did not appear for his cross-examination, therefore, his Examination-in-Chief cannot be considered as evidence under Qanun-e-Shahadat Order 1984 and on that account the only evidence is of PC Abdul Hameed, but he has very frankly deposed that after recovery of the two kilograms of narcotic from the shopper, which was in the hand of the accused, 10 grams from each slab was separated and sealed separately, but such mashirnama was prepared at the Police Station. This statement, if examined, keeping in view the contents of the report of the Chemical Examiner, the entire case of the prosecution becomes doubtful because the mashirnama Ex.7-A shows that the substance which was secured from the possession of the accused were***

***in the shape of four strips each weighing 500 grams out of them 10 grams from each of the four strips were taken and sealed separately. It was not mentioned in the mashirnama that these samples were separately signed but the Chemical Examiner's report shows that these four samples were signed by not only the complainant SI Naeemuddin, but by PC Abdul Hameed and PC Rahim Bux, however, these wrappers were not produced before the Court, therefore, the same were not certified by these witnesses to be the same, which was signed by them, therefore, it cannot be said that these were the same samples which were separated at the place of the incident and there is no reason as to why these wrappers were not taken from the Chemical Examiner's Office or why the same were not sent by the Chemical Examiner himself alongwith his report. In view of these, it can be presumed, as provided in illustration (g) of Article 129 of Qanun-e-Shahadat order, 1984 that the sample examined by the Chemical Examiner was not the same which was separated from the substance secured from the accused because had it been so, the wrappers must have been produced before the Court to authenticate by these witnesses and for that reason the complainant has avoided to appear before this court for his cross examination.***

***In view of the above facts and circumstances, it is clear that the case of the prosecution is not free from doubt, and therefore, the point is decided in negative.***

***<u>POINT NO.02</u>***

***In view of the findings on Point No.1, I hold that the prosecution has failed to prove the offence against the accused, hence he is acquitted U/S 265-H(i) Cr.P.C. He is in custody, he should be released forthwith in this case."***

10. In our considered view, prosecution had failed to prove its case against the accused for the reasons that despite number of opportunities, the prosecution failed to produce the wrappers before the trial court in which sample was sent to the chemical examiner. We have also found that the examination-in-chief of complainant SIP Naeemudin was recorded before the trial court but he never appeared for cross examination before the trial court. Evidence of a witness means examination-in-chief, cross examination and re-examination if any. The above infirmity goes to the root of the case and the trial court had rightly

acquitted the respondent/accused. Furthermore, learned Special Prosecutor ANF could not satisfy the court about the safe custody of narcotics at Malkhana so also the safe transit. In above circumstances, positive report of chemical examination would not improve prosecution case. He frankly stated that there were infirmities in the prosecution case.

11. 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."**

12. 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."**

13. 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

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