JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Acquittal.Appeal.No.D- 23 of 2002

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

Date of hearing: 24.04.2018.
Date of judgment: 24.04.2018.

Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF for appellant.

Mr. Ghulamullah Chang, Advocate for respondent.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent/accused Naeem alias Sawan by caste Nizamani was tried by learned Sessions Judge / Special Judge for CNS, Sanghar in Special Case No.235 of 1999 for offence u/s 6, 9, 12, 13 of CNS Act, 1997. On the conclusion of trial vide judgment dated 11.01.2002, the respondent/accused was acquitted of the charge. Hence, instant Criminal Acquittal Appeal is filed by the State through Special Prosecutor ANF, Hyderabad.

2. Brief facts of the prosecution case are that on 05.09.1997, complainant S.I Naeemuddin of ANF, Hyderabad with Incharge Khalidudin- S.I Ghulam Abbas- ASI Amjad Ali- Police Constables Manzoor Ali- Abdul Ghafoor- Raheem Bux- Muneer Ahmed- Sher

Muhammad and driver PC Ghulam Mustafa vide entry No. 08 of ANF police station Hyderabad, left police station at 3.00 p.m, for detecting narcotics. It is alleged that at Jhol, they received spy information that near Jhol Water Mir Mohalla, accused Naeem alias Sawan was selling charas. ANF officials proceeded there and apprehended him and 3400 grams charas was recovered in presence of mashirs. Ten grams were separated from the pieces and separately sealed for examination of the Chemical Examiner. Remaining charas was separately sealed. Accused and case property were brought to ANF police station Hyderabad, where FIR vide crime No.5 of 1997, under sections 6, 9 12 & 13 of CNS Act was lodged on behalf of State.

3. After usual investigation, ANF police challaned the accused for trial under section 6, 9, 12 and 13 of CNS Act, in the court of CNS /Special Court at Hyderabad who returned the challan on the point of jurisdiction, on 27.11.1999, the accused was challaned before Special Judge CNS, Sanghar.

4. Trial court framed charge against the accused at Ex.2 to which accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution produced two PWs i.e. the complainant namely SI Naeemuddin and mashir SI Ghulam Abbas. Thereafter, prosecution side was closed.

6. Trial court after hearing the learned counsel for parties and assessment of the evidence, acquitted the accused by judgment dated 11.01.2002, hence, the instant appeal.

7. We have heard Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF, Mr. Ghulamullah Chang, counsel for the respondent and examined the entire evidence available on record.

8. Learned Special Prosecutor ANF argued that the trial court has acquitted the respondent / accused on speculations and did not appreciate the evidence according to the settled principles of law. He further contended that the judgment passed by the trial court is based upon misreading and non-reading of the evidence. He further contended that the complainant and the mashir had fully supported the case of prosecution and their evidence was corroborated by positive report of Chemical Examiner. Lastly, argued that judgment of the trial court was shocking and ridiculous. In support of his contentions, learned Prosecutor ANF has placed reliance upon the case of Mst. Waziran Detho v. The State (2001 P.Cr.L.J 1963).

9. On the other hand, learned counsel for the respondent contended that the respondent has rightly been acquitted by the trial court as there were material contradictions in the evidence of the prosecution witnesses. He further contended that there was no evidence with regard to the safe custody of charas at the police station as well as safe transit to the chemical examiner. Lastly, argued that this is appeal against acquittal and principles for appreciation of evidence in the appeal against acquittal and appeal against conviction are entirely different. He prayed for dismissal of appeal.

10. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 11.01.2002. The relevant portion whereof is reproduced hereunder:-

"As the guidance is provided that while assessing the prosecution evidence, side by side, the defence evidence is also to be taken into consideration. I have therefore, taken into consideration and to me, it has appeared that there is a balanced evidence on both sides. Under these circumstances who has to prove the case. It is the prosecution, who has to prove the case against the accused beyond any reasonable doubt. To me, it has appeared that there are still flaws in the prosecution evidence and that they have not discharged the duties to prove the charge.

During the course of arguments, Special Prosecutor cited the case law reported in SCMR 2001 page 1474, 2001 P.Cr.L.J 1963, 2000 P.Cr.L.J 755, 1998 P.Cr.L.J 2086, while the defence placed reliance on the case law reported in 1995 SCMR 1345, PLD 1997 S.C 408, 1999 P.Cr.L.J 1546, 1990 P.Cr.L.J 331, 1996 P.Cr.L.J 181, 1998 P.Cr.L.J 1462, 2001 PLJ 640 & 642, 2001 PLJ 724 and unreported decision of Honourable High Court of Sindh Circuit Bench Larkana passed in the case of Rahim Bux. For and against the law has been produced by the prosecution and the defence, but it is an established principle that the authorities are relevant to the particular cases and we are also guided that each case is to be decided in the light of its own facts and circumstances. In case, when there is a balanced evidence and when it is weighed, the prosecution case is found suffering from certain requirements and lacuna, and thereby the accused is to be allowed benefit of doubt. So far the doubt is concerned it is not necessary that there should be so many circumstances to create the doubt, but if a single doubt is found in the case, the accused is to be allowed benefit of such doubt.

The non-production of the entry of roznamcha in the evidence, in the case reported in 2001 P.Cr.L.J 1963 is held as merely technicality, but it was the recovery in the same town at Jacobabad, while in this case, police party moved from District Hyderabad and came at District Sanghar and they have to prove that they had actually come to Jhol District Sanghar and the production of the entry was material and not technicality.

In the case reported in PLD 1997 S.C 408, it has been held that section 103 Cr.P.C was not limited up to the search of place, but it was also open for the search of a person. Similar view was also taken by honourable Federal Shariat Court in the case reported in 2000 P.Cr.L.J 374 and it was also view taken in the decision reported in 1999 P.Cr.L.J 1546.

There is a difference of weight of the sample of charas allegedly secured at vardat and sent by hand to the expert, it was found in excess. The circumstances thereby creates doubt for which the accused is to be benefited. In the case law reported in 1995 SCMR 1345 and case law reported in 1996 P.Cr.L.J 181, it has been held that it is not necessary that there should be so many circumstances to create doubt for which the accused is to be allowed benefit, but if a single doubt is created in the mind of the prudent man, the accused is to be allowed the benefit of doubt not as a matter of grace but as a matter of right.

For the foregoing reasons to me, it has appeared that prosecution has not proved the case against the accused free from doubt that on 5.9.1997 at 5-00 PM from Jhol Water near Mir Mohlla, 3400 grams of charas and cash of Rs. 400/- were recovered from the possession of the present accused.

<u>Point No. 2:-</u>

The result of the above discussion on point No.1 is that no offence committed by the accused is proved by the prosecution free from doubt and thereby accused Naeem is allowed the benefit of doubt and is acquitted. He is produced in custody and is ordered to be released forthwith, if he is no more required in any other case."

11. In the present case, we agree with the trial court that the prosecution failed to establish its case against the appellant for the reasons that 10 grams charas were taken from each sample for sending to the chemical examiner through PC Raheem Bux but the report of the chemical examiner Ex.5/B reveals that Chemical Examiner received 04 parcels. Net weight of parcel No.1 was 11.750 grams, parcel No.2 12.070 grams, parcel No.3 12.400 grams and parcel No.4 was 12.500 grams. It was surprising as to how and why net weight of charas exceeded from 10 grams in the parcels without wrappers when the same were opened by the chemical examiner. As such tampering with the case property at Police Station in the circumstances could not be ruled out. We have noticed that charas was not examined by Chemical

Examiner according to protocol. Moreover, there was no evidence with regard to the safe custody of charas in the Malkhana of police station. Surprisingly, PC Raheem Bux who had taken sample to the chemical examiner was not examined by the prosecution which clearly shows that best evidence was withheld. Its' benefit, rightly has been extended by trial court to the accused / respondent. We have scanned the evidence and found material contradictions in the evidence of complainant and mashir on material particulars of the case. We have also noticed that ANF officials had left the police station ANF vide roznamcha entry No.8 but the said entry despite the contention of the learned defence counsel was not produced before the trial court. Non-production of roznamcha entry would be also fatal to the case of prosecution. Trial court rightly came to the conclusion that the evidence of police officials lacked independent corroboration, particularly, in the circumstances when the accused claimed false implication in this case. Learned Special Prosecutor ANF could not satisfy us about the safe custody of narcotics at Malkhana so also the safe transit. In this regard, reference can be made to the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

12. Honourable Supreme Court in the case of Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, endorsed the view of Ikramullah case vide order dated 04.04.2018 by observing as under:-

> ***"According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of***

> ***the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."***

13. 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).

14. 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).

15. 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 being without merit was dismissed by our short order dated 24.04.2018 and these are the reasons whereof.

JUDGE

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