

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr.Acquittal.Appeal.No.D- 35 of 2010

Present:-

Mr. Justice Naimatullah Phulpoto.

Mr. Justice Shamsuddin Abbasi.

Date of hearing: 09.04.2018.

Date of judgment: 09.04.2018.

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 Rasool Bux alias Asad s/o Muhammad Ibrahim by caste Kumbhar was tried by learned Sessions Judge / Special Judge for CNS, Jamshoro @ Kotri in Special Case No.07 of 2007 for offence u/s 9 (b) of CNS Act, 1997. On the conclusion of trial vide judgment dated 29.09.2009, 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 as disclosed in the FIR are that respondent/accused was found in possession of 500 grams opium

on 26.02.2007 at 1700 hours near National Highway, in front of Hadi (Bone) Mill stop. A sample of 10 grams opium was separated and sealed for chemical analysis, the remaining opium too was sealed. Such memo of arrest and recovery was prepared in presence of mashirs PCs Abdul Hameed and Sher Muhammad. Accused and property were brought at PS ANF Hyderabad where FIR was lodged by complainant Inspector Syed Muhammad Muatafa vide crime No.01/2007 u/s 9(b) of CNS Act, 1997.

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, Jamshoro @ Kotri u/s 9 (b) of CNS Act, 1997.

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

5. At the trial, prosecution produced two PWs i.e. the complainant and the mashir HC Sher Muhammad. Thereafter, prosecution side was closed.

6. Trial court after hearing the parties and assessment of the evidence available on record, acquitted the accused by judgment dated 29.09.2009, hence the instant appeal.

7. We have heard Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF and examined evidence available on record. Time and again notices were issued to the respondents but could not be served. Appeal pertained to 2010. We intend to decide it, on the basis of evidence available on record.

8. Learned Special Prosecutor ANF 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. He further contended that the judgment passed by the trial court is based on misreading and non-reading of the evidence. He further contended that the complainant and the mashir have fully supported the case of prosecution. Lastly, argued that judgment of the trial court was shocking and ridiculous hence the same may be set aside. In support of his contentions, learned Prosecutor ANF has placed reliance on the case of Muhammad Sarfraz v. The State and others (2017 SCMR 1874).

9. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 29.09.2009. The relevant portion whereof is reproduced hereunder:-

“I have considered the arguments of learned counsel for accused, learned SP (ANF) Hyderabad for the State and from the perusal of file it reveals that the Inspector Syed Muhammad Mustafa ANF Police Hyderabad is the complainant of this case and he is too the Investigating Officer, he investigated the matter and submitted challan in the court of law, therefore, in this regard, personal enmity of complainant with the accused cannot be ruled out and version of defence witnesses that the accused was arrested from Tando Muhammad Khan and no narcotic was recovered accused carrying weight. The other contradictions made the prosecution regarded place of information, where the complainant received spy information, non mentioning the denomination of currency notes as well as their numbers in the mashirnama and non mentioning the side of shalwar from which the alleged opium was recovered from accused in FIR and mashirnama have led me to form an opinion that prosecution has failed to establish its case against accused beyond reasonable doubt and benefit of doubt certainly goes in favour of the accused, therefore, I answer the above point as not proved / doubtful.

POINT NO.2.

In view of discussion on para-1, as I have already held that prosecution has failed to establish the case

against accused beyond reasonable doubt and ocular evidence is not proper and no convincing evidence has been brought, which could connect the accused in this case, therefore, this point is also decided in negative and accused Rasool Bux @ Asad is hereby acquitted under section 265-H(i) Cr.P.C. He is present on bail, his bail bond stands cancelled and surety discharged.”

10. In our considered view, prosecution had failed to prove its case against the accused/respondent for the reasons that the safe custody of the opium in the Malkhana of the police station has not been established at the trial. Surprisingly, PC Imtiaz Ali 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. Complainant in his evidence has not mentioned the time at which appellant was arrested and opium was recovered from him. We have scanned the evidence, neither the complainant nor the mashir have deposed that from which side of the fold of shalwar, opium was recovered from the accused. Evidence of the complainant and mashir was materially contradicted on the point that the complainant Inspector Syed Muhammad Mustafa has deposed that accused was arrested near Mazar of Baba Salahuddin and the private persons refused to act as mashir but on this point the mashir has replied that Inspector Syed Muhammad Mustafa did not ask private persons for acting as mashir in this case. 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. Moreover, learned Special Prosecutor ANF could not satisfy the court 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)*, 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.”

11. In another unreported 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, Honourable Supreme Court vide order dated 04.04.2018 observed as follows:-

“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."

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).

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 cardinal 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).

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 being without merit was dismissed by our short order dated 09.04.2018 and these are the reasons whereof.

JUDGE

JUDGE

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