JUDGMENT SHEET

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

Cr.Acquittal.Appeal.No.D- 159 of 2007

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammad Karim Khan Aga.

Date of hearing: 25.05.2017.
Date of judgment: 25.05.2017.

Syed Meeral Shah,Addl:P.G. for the appellant / State.
None present for respondents.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent/accused Khan Sahib was tried by learned Special Judge for CNS, Hyderabad in Special Case No.34 of 2002 for offence u/s 9 (c) of CNS Act, 1997. By judgment dated 23.04.2007, the respondent/accused was acquitted of the charge by extending him benefit of doubt. Hence, the instant Criminal Acquittal Appeal is filed by the State.

2. According to the prosecution case, Excise officials had received spy information in their Office Crime Branch, Hyderabad. As such they reached at Railway Station in Ittehad Cargo Service and found the accused having 8 wooden show-cases and they were waiting for vehicle. The Excise officials searched the sow-cases and found that there were concealed draws having 10 packets of charas in each one. There were in all 80 packets of charas in each one weighing, each one was one kilogram. Two samples of 10 grams each were secured and separately sealed for the purpose of examination by the Chemical

Examiner whereas the remaining 79980 grams of narcotics were sealed separately in 2 polythenc bags. Cash of Rs.230/- were also secured form his shirt so also a Railway builty bearing No.57806 in favour of Hyderabad Parcel Office along with his National Identity Card. Such Memo was prepared by Inspector Arsalan Kujeeb in presence of ECs Azeemullah and Ahtesham-ulHaque. The accused and the incriminating substance along with the show-cases were brought at the Excise Police Station where Excise Inspector lodged such FIR against accused. He then recorded the statements of the witnesses u/s 161 Cr.P.C. The samples were sent to the Chemical Examiner for analysis and report. Positive report was received. After usual investigation, the accused was challaned u/s 9 (c) of CNS Act, 1997.

3. Trial court framed charge against the accused. Accused pleaded not guilty and claimed to be tried. The prosecution examined 2 witnesses i.e. the complainant Arsalan Mujeeb, Ex.8 and Ec Azeem-ullah, Ex.9. The complainant produced all the above referred documents including copy of the Builty hearing No.57806 vide Ex.8-B and the mashirnama, Ex8-C, FIR Ex.8-D and the Chemical Examiner report Ex.8-E. the wooden showcases form where the incriminating substances was secured were produced as Article 8-C (iv). The remaining substance as Article 8-C (I), his NIC as Article 8-C (II) and cash of Rs. 250/- as Article 8-C (iii) are also produced.

4. Statement of accused was recorded u/s 342 Cr.P.C. as well as under sub-Section (2) of Section 340 Cr.P.C in both the statements, he has specifically denied the evidence against him and claimed to be innocent., a victim of high handedness of Excise officials on the ground that he had dispute with the Nazim of UC Shahi Bala, District Peshawar with whose connivance, the Excise officials have involved him in this case. However, no witness in defence was examined by him.

5. Trial court after hearing the learned counsel for the parties and assessment of the evidence acquitted the accused by judgment dated 23.04.2007 mainly for the following reasons:-

> ***"POINT NO.1.***
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> ***On the oboe point, both the official witnesses named above were examined, who have deposed according to the facts of the cases as mentioned in the beginning of this judgment and there were no material contradictions as far as the case of the prosecution is concerned, but their evidence is not sufficient to decide this point in favour of the prosecution because of inherent defects in it's case. First is the fact that as per prosecution's case, the accused had taken the delivery of these 8 show-cases, Article 8-C (iv) in which the narcotics were kept in secret draws from the Goods Office namely Itttchad Cargo Service, Metla Associates, but surprisingly, no witness from that office was examined in order to prove the guilty of the said office, Ex.8-C and this fact was admitted by the complainant Excise Inspector ArsalanMujeeb during his cross-examination to the following effect:-***
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> > ***"it is correct that the statement of any official of Metla Associates Cargo Service was not recorded by me."***
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> ***The evidence of the official, who had delivered these show-causes to the accused was important piece of evidence and if the same was not secured by the Investigation Officer, he should have given some plausible reason for that, but he failed to do so.***
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> ***The second defect in this regard is that even if the witness was not examined odn the point of the delivery of the show cases to the accused at least some receipt which must had been delivered by the accused to that Charge Service must have been secured and should have been produced in the Court in order to authenticate that the accused had taken the delivery of these show-cases, but that was also not done by the complainant and that too without any reason.***
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> ***The third and the most important discrepancy is, as pointed out by the learned counsel for the accused, that the complainant had secured 2 samples of 10 grams each from the total 80 packets and he did not even separately mark those 2 packets, the Chemical Examiner had verified such fact vide report Exh.8-E. No explanation was forwarded by the complainant that why sample from each of the 80 packets was not taken.***
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> ***It is not out of place to mention here that the place of the recovery i.e. periphery of the Railway Station was thickly populated area and the complainant should have made an attempt to associate some private witnesses, but in this regard no such fact was deposed by these witnesses.***

The contention of the accused that he had been falsely implicated in this case on account of certain enmity, cannot be ignored out-rightly because he has given such statement on oath and keeping in view the evidence produced by the prosecution and the credibility of these witnesses which reminds me a case being Spl.Case No.73/2004 Re-State Vs. Abdul Malik, Crime No.05/2004 of Excise Crime Branch, Hyderabad U/S 9 (c) of CNS Act, 1997, which has been recently disposed of on 3.2.2007 in which both of these witnesses had specifically deposed in my presence that the accused in that case was falsely involved, for keeping in possession of 3 kilograms of heroin, by them as some of the official of the Excise Department had brought him, but they had prepared a false case against him. This conduct of the witnesses in one case demands that when the accused has deposed on oath that he was involved falsely at the instance of Nazim of his area, that their evidence must be corroborated through independent witness in order to consider the request of the prosecution for conviction of an accused.

It is well settled principal of administration of Criminal Justice that the prosecution is required to prove the commission of offence against an accused beyond all reasonable doubts and no compromise is possible on this basic principle merely on the ground that huge quantity of narcotic is involved. In these circumstances, this point is decided in negative.

POINT NO.2

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."

6. We have heard Syed Meeral Shah, Additional Prosecutor General Sindh and examined the entire evidence available on record.

7. Learned A.P.G. appearing on behalf of the State argued that a huge quantity of 80kg of charas was recovered from secret draws of the accused but the trial court disbelieved the evidence of the prosecution without assigning any reason. He has further argued that the trial court failed to appreciate the evidence according to the settled principle of law. It is further contended that the evidence of the Excise officials witnesses is as good as that of the private persons and in this case there was no malafide or enmity against the respondent/accused.

Lastly, it is contended that the impugned judgment was a result of misreading and non-reading of the evidence.

8. Respondent/accused despite notice did not appear.

9. We have perused the prosecution evidence with the assistance of learned Additional Prosecutor General and impugned judgment passed by the trial court. In Para 11 to 17 trial court has appreciated the evidence properly and by assigning sound reasons recorded acquittal in favour of the accused/respondent. Trial court in the judgment has mentioned that there were material contradictions in the evidence of the prosecution witnesses. It has been also observed that the prosecution failed to prove the safe custody of the narcotic as such the judgment of the trial court is based upon the sound reasons. On the point of safe custody the Honourable Supreme Court in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), has held as under:-*

> ***"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."***

10. Even otherwise scope of appeal against acquittal is very narrow and limited as held by the Honourable Supreme Court in the case of The State v. Abdul Khaliq and others (PLD 2011 Supreme Court 554). Moreover, 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 above referred judgment. 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:**
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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).**
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> **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."

11. For the above stated circumstances, the findings recorded by the trial court are neither perverse, arbitrary nor speculative. As such, 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 at all. As such, the appeal against acquittal is without merit and the same is dismissed.

JUDGE

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