

IN THE HIGH COURT OF SINDH, KARACHI*Present:**Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana.***CRIMINAL ACQUITTAL APPEAL NO. 30 OF 2014**

Appellant	The State through Dr. Shahnawaz Memon, Advocate
Respondent	1. Haji Nabi Bux s/o Raham Dil 2. Abdullah s/o Asad Ullah Malizai Through Nemo
Date of Hearing	24.11.2020
Date of Announcement	24.11.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant has assailed the impugned judgment dated 28.08.2013 passed by Learned Special Judge, Court-II, CNS, Karachi in Special Case No.524 of 2011 whereby the respondents were acquitted under Section 265-H(1) Cr.P.C.

2. The brief facts of the prosecution case as per the FIR are that on 07.08.2011 high ups of Directorate Intelligence-FBR, Karachi received spy information that foreign origin Poppy Seeds would come from Quetta in three trucks. On such information raiding party was constituted headed by Intelligence Officer Muhammad Nadeem consisting Superintendent Riffat; SIO Mumtaz Shah; SIO Qasim Ali Alvi; Investigation Officer Atif; Investigation Officer Zia Moin who left office at 04:00 hours on 07.08.2011 and reached at Kathore More, near Madina hotel, Super Highway, Karachi and held Naka bandi there and at about 0445 hours on the said date saw the said trucks coming from Quetta Baluchistan which they signaled to stop. In all there were three trucks. It is a fact that only drivers were found who on inquiry disclosed their names as (i) Samiullah (ii) Hikmatullah and (iii) Asmatullah. The raiding party checked the said trucks/vehicles and found poppy seeds loaded on all the trucks.

On inquiry about the documents of the loaded poppy seeds they produced Bilties/consignment receipts bearing No.18 to 20 dated 05.08.2011, which were issued by M/s. Sitra Usman Goods Forwarding Agency, Quetta. As per Bilties/Consignment Receipts 390 bags of poppy seeds were loaded on each truck. A cursory Mashirnama was prepared on the spot in presence of witnesses Muhammad Akbar and one private mashir namely Imran Qureshi and SIO Mumtax Shah. Thereafter the drivers of the trucks alongwith trucks and loaded poppy seeds were brought at the office and all the three trucks were thoroughly searched and 390 bags were found on each of the said trucks and three samples from three bags of each truck were taken out of total 09 samples had been drawn each weighing 200-250 grams and prepared second Mashirnama of recovery and samples in absence of accused persons and in presence of driver Akbar of customs intelligence and private witness Imran Qureshi. On 10.08.2011 the said poppy seeds in three samples were sent to HEJ Laboratories University of Karachi, which was received on 12.08.2011 and FIR being Crime No.1564/2011 under Section 6/9-C CNS Act, 1997 was lodged. Custom Authorities released the said three drivers.

3. After usual investigation I.O. of the case has filed interim challan against the absconding accused persons. Later on accused Haji Nabi Bux and Abdullah surrendered themselves voluntarily and got pre-arrest bail which was subsequently confirmed. An amended charge was framed to which the accused pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 03 witnesses and exhibited various documents and other items. The statements of accused was recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them. They did not examine themselves on oath or call any DW's in support of their defense case. After appreciating the evidence on record the trial court acquitted the accused persons (herein respondents). Hence, the appellant has filed this appeal against acquittal.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated

28.08.2013 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. The appellant in this appeal against acquittal has mainly contended that the trial court has acquitted the Respondents without appreciating the evidence in accordance with the settled principles of law, that there has been a misreading and non reading of evidence and has stressed that such a large quantity could not have been foisted on the Respondents and as such the impugned judgment should be set aside by this court.

7. We have heard the appellant, examined the entire evidence available on record and the impugned judgment with the able assistance of the appellant and considered the relevant law.

8. It appears that the trial court through the impugned judgment has mainly acquitted the Respondents for the following reasons as set out in the impugned judgment below;

"In the above facts and circumstances I am of the considered view that the accused persons have been wrongly challaned under section 9-C of the CNS Act, 1997 instead of Section 9(b) of the CNS Act, 1997 without actual quantity of so called poppy seeds on record as such offence at the most could have fall under section 9-B CNS Act, 1997 in view of the case law reported in PLD 2009 Lahore 362.

25. Above all, it is to be noted that on 07.08.2011 PW-1 Intelligence Officer Complainant's Muhammad Nadeem of Directorate General of Intelligence and Investigation-FBR, Karachi and others conducted raid at Kathore More near Madina Restaurant, Super Highway, Karachi. The said officials had acquired spy information about the narcotics much before the raid and had enough time to pass on the said information to the concerned Police Station, however, they themselves conducted the raid and made the alleged recoveries and whereas report was lodged at Office of the Directorate General of Intelligence and Investigation-FBR having office situated at Block-6, PECHS Karachi. The recovered articles were kept by the customs authorities in its possession for a considerable period without offering any explanation. Thus, it creates doubt in the prosecution case and in the light of such circumstances it is to be seen whether a sample from so called recovered articles was sent for chemical examiner on considerable delay? In the FIR as well as in the recovery memo it has been mentioned that poppy seeds were recovered in 1170 bags but in the recovery memo there was no mention that recovered items

were got mixture of pulverized poppy seeds and then sent to chemical analysis. On the other hand the contents of the report of chemical analysis after careful perusal, indicate that samples taken from the recovered articles was in "pulverize poppy straw (*Papaver somniferum*) and poppy seeds" from therefore admittedly these were not the 'illicit articles' which were recovered. Thus no recovery of poppy straw can be attributed (Reliance is placed on 2011 SCMR 1954).

26. It is pertinent to mention here that section 29 of CNS Act, 1997 case a duty upon the Court to presume in a trial under the Act that the accused has committed the offence under the Act unless contrary is proved. However, firstly, the prosecution has to establish the fact that the narcotic drugs were secured from the possession of the accused. Though it was duty of the prosecution to prove the recovery of narcotics from the physical custody of accused persons, then the burden of proving that they were not knowingly in possession of the articles is upon him. In the instant case, primarily the onus was upon the prosecution to prove that whatsoever was recovered, were narcotic drugs and the same were recovered from the possession of the accused persons.

27. Admittedly both the present accused persons were not arrested from the spot nor any narcotic drug were recovered from their physical possession or on their pointation even otherwise the name of the accused Abdullah was not mentioned in FIR nor in the final report under Section 173 Cr.P.C.

28. Learned counsel for the accused has relied upon golden principle of law that even a single circumstance which creates doubt as to the guilt of the accused to the offence he is charged with entitles him to the acquittal not a matter of concession but as a matter of right and similarly a simple reason can be a source of discrediting the entire evidence of a witness. The case law report as 1995 SCMR 1345, 1997 SCMR 25 and 2008 SCMR 1221. The relevant head notes of the same are as under:-

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 29. The contradictions of the magnitude highlighted above are not of nature as can be ignored in a case involving punishing upto 14 years. It has been held by our superior courts that burden of proving the case beyond reasonable doubts rests on the prosecution and its duty does not change or vary even when no defence plea is taken by the accused or the same if taken is not proved or is found to be palpably false. It is also held in 1992 SCMR1134 (Wazir Muhammad V. The State) that duty of the prosecution is to prove its case

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against accused to the hilt, no such duty is cast upon accused who has only create doubt in case of prosecution.

30. It is an admitted position that out of 1170 bags of poppy seeds recovered from three trucks only 09 bags were sent to the extend of 200-250 grams and the remaining so called Opium in the shape of poppy seeds were not sent for chemical analysis twice even all the three prosecution witnesses have been examined against the accused persons though three drivers namely (1) Samiullah (ii) Hikmatullah and (iii) Asmatullah of the said trucks were arrested and subsequently they were released by the customs authorities without any cogent reason whatsoever and the instant crime was defectively some malafide motive by the customs authorities and in this regard appropriate action shall be taken by the high ups of Directorate General of Intelligence and Investigation-FBR, Karachi against the Complainant's Intelligence Officer Muhammad Nadeem and I/O Senior Intelligence Officer Zia Moin after issuing firstly show cause notice as to why they were released three driver as stated above at initial stage and under what authority and what law and in furtherance conclusion with each other by the said customs officers as well." (bold added)

9. When learned counsel for the appellant was asked by this court to point out any infirmities and illegalities in the above findings he was unable to do so.

10. After our reappraisal of the evidence on record it clearly shows that there was no safe custody of the narcotics which were not sent for a long time for chemical analysis and as such the chance of tampering cannot be ruled out; that it has remained unexplained why the narcotics had to go for retesting; that samples were not sent for testing from each recovered bag; that the type of narcotic recovered is contradictory i.e was it poppy seeds or poppy seeds mixed with poppy straw; that the narcotics were not recovered from the respondents on the spot but were recovered from 3 truck drivers who were not even sent up for trial; the apparent linkage between the narcotics and the respondents is that one of the respondents (Nabi Bux) came forward to claim it which story does not appeal to reason, logic or common sense as such respondent would have known that he would face a trial for a very serious offense when there was no evidence to link him to the crime. It remains unclear from the evidence as to how the other respondent (Abdullah) was connected to the crime and

even the learned trial court has pointed out in the impugned judgment that the investigation was carried out malafide and directed action to be taken against the IO. Thus, we find the prosecutions case riddled with doubt and find that the trial court rightly acquitted the respondents based on the benefit of doubt.

11 **Even otherwise** it is settled law that judgment of acquittal should not be interjected unless findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honorable 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 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 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

Bashir Ahmed v. Fida Hussain and 3 others (2010 SCMR 495), Noor Mah 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 02 others (PLD 2009 SC 53), Farhat Azeem v. Asmat Ullah and 6 others (2008 SCMR 1285), Rehmat

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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 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." (bold and italics added)

12. Having gone through the evidence and the impugned judgment **we find** that there has been no misreading or non reading of the evidence and that such evidence has been appreciated by the learned trial court in its proper perspective, that the impugned judgment is based on sound reasons and there is no question of the findings in the impugned judgment being perverse, arbitrary, foolish, artificial, speculative and ridiculous for the reasons mentioned earlier by us. Learned counsel for the appellant as we have already mentioned above has not been able to point out a single legal infirmity in the impugned judgment based on the evidence recorded before the trial court which accords fully with the reasoning given in the impugned judgment.

13. As such for the above reasons we find there is no merit in the instant appeal against acquittal. The Acquittal recorded by trial court in favour of the Respondents is based upon sound reasons, which require no interference at all. As such, the appeal against acquittal is dismissed.

14. These are the reasons for our short order of even date which is reproduced as under for ease of reference;

"We have heard submissions of learned counsel for the Appellant in this appeal against acquittal. For reasons to be recorded later on, this appeal against acquittal is dismissed." /