ANF Appeal against Acquittal
NFR



# IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:
Mr. Justice Abdul Maalik Gaddi
Mr. Justice Mohammad Karim Khan Agha

Cr. Acq. Appeal No.D-435 of 2010.

The State/Anti Narcotics Force
through its Deputy Director (Law)

Vs.

Ali Asghar

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| Appellant : The State/Anti Narcotics Force | Through Mr. Muhammad Ayub Qasar, Special Prosecutor ANF |
| None for the private respondent. | |
| Date of hearing : | 06.09.2018 |
| Date of judgment : | 06.09.2018 |

## JUDGMENT

**MOHAMMAD KARIM KHAN AGHA, J.**- This criminal acquittal appeal has been filed by the State/Anti Narcotics Force against the judgment dated 29.07.2010, passed by the learned Special Judge CNS/IIIrd Additional Sessions Judge, Hyderabad in Sessions Case No.130 of 2008 (re-The State Vs. Ali Asghar), arising out of Crime No.09 of 2008, registered at P.S ANF Hyderabad, under sections 9(b) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the learned trial Court after full dressed trial acquitted the respondent by giving him the benefit of the doubt.

2. Precisely, the brief facts of the prosecution case as disclosed in the FIR which was lodged at police station ANF Hyderabad, by complainant Ghulam Murtaza, are as under:

> "On 09-09-2008 Inspector Ghulam Murtaza alongwith his subordinate staff took the arms and ammunition and proceeded in official vehicle while making entry No.10 at 1630 hours for crushing the activities of narcotics dealers as such reached at Hala Naka Hyderabad where received spy information at 1750 hours that a person namely Ali Asghar selling charas outside the hut as such complainant alongwith subordinate staff reached at pointed place and saw that one person

was holding black colour shopper bag in his hand and was standing any how the officials of ANF succeeded in apprehending the suspect and during spot interrogation the said person disclosed his name as Asghar and due to such facts the police/ANF searched the said shopper and it was containing pieces of charas small and big having weight of 500 grams as such the said charas was shield in white cloth for sending it to the chemical analyzer and so also recovered 12500 currency notes of different denomination and such kind of mashirnama of arrest and recovery was prepared in presence of subordinate staff and thereafter, brought the accused and recovered property at police station where FIR was registered against the accused U/s. 9 CNS Act, 1997."

3. After usual investigation, challan of the case was submitted before the concerned Court. The learned trial Court framed charge against the accused, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case against the accused examined 02 witnesses and thereafter prosecution side was closed.

5. Thereafter, statement of accused was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He also led defense evidence and examined himself as well as one D.W. Abdul Karim at Ex.8.

6. The trial court after hearing the learned counsel for the parties and assessment of evidence, by impugned judgment acquitted the accused /respondent as stated in concluding paragraph of the impugned judgment. Hence, this acquittal appeal has been filed by the appellant.

7. Perusal of record reveals that despite service of notice as well as execution of bailable warrant upon the respondent (order sheet dated 20.12.2016) he did not appear in this matter on a single date of hearing. Therefore on 30-08-2018 we requested the learned special prosecutor ANF to assist us in determining this matter which is over 8 years old and thus today we have heard the learned Special Prosecutor ANF/ appellant and perused the evidence so brought on record alongwith impugned judgment with his able assistance.

8. Mr. Muhammad Ayub Qasar, learned Special Prosecutor ANF/appellant contended that the judgment passed by the learned trial court

is perverse and the reasons are artificial, vis-à-vis the evidence on record; that the grounds on which the trial court proceeded to acquit the respondent are not supportable from the evidence on record. He further submitted that the respondent has been directly charged and that the discrepancies in the statements of witnesses are not so material on the basis of which respondent could be acquitted. He further contended that the learned trial court has based its finding of acquittal merely on the basis of minor contradictions on non-vital points in the statements of prosecution witnesses and that the prosecution evidence has not been properly appreciated. Therefore, under the circumstances, he was of the view that this appeal may be allowed as prayed. He has relied upon judgments reported as **Muhammad Sarfraz versus The State and Others** (2017 SCMR 1874), **Zafar V The State** (2008 SCMR 1254), **Ghulam Qadir V The State** (PLD 2006 SC 61) and **Roshan V The State** (2018 P.Cr.L.J. Note 26).

9. The relevant as well as operative portion of the impugned judgment reads as under:

> "12- It is admitted by both the prosecution witnesses at the time of recovery some people gathered there but they did not join the proceedings and refused. The witnesses are failed to disclose the names of those persons who gathered at the time of recovery. PW Ghulam Murtaz in cross examination admitted that he did not take any action against those persons and he does not know their names. It is admitted position in the cross examination of PW Ghulam Murtaza that at the time of recovery neither any purchaser/customer was there nor the accused was selling the charas. The recovered contraband charas was in pieces, but this PW is unable to disclose the number of the pieces of recovered contraband charas. The PW Abdul Razak replied that recovered contraband charas was weighed at spot with a digital scale which was available with him in his kit, but in cross examination he admitted that Roznamcha Entry No.20 at Ex.3/A does not speak that kit was with him and the entry also does not mention that electronic digital weighing machine was with him, PW Ghulam Murtaza deposed that recovered contraband charas was weighted at spot and the evidence so available in the record reveals that it was recovered when accused was apprehended near Madarsa Tajul Uloom, whereas PW Abdul Razak in chief examination deposed that the recovered contraband charas was weighed on spot whereas in cross examination he replied that case property was weighed with electronic machine lying in police mobile and mobile was parked at the distance of 5-feet from accused. He further replied that when case property was being weighed inside the mobile the accused was handcuffed out side the mobile and no one was seated inside the mobile when property was being weighed. The PW Abdul Razak in the first phase is not confient in his evidence and in another way he has not supported the version of PW

Ghulam Murtaza to the effect where actually case property was weighed, thus the evidence of PWs suffer from discrepancies.

13. It is admitted position in the evidence that some people gathered at place of recovery and accused deposed he was arrested nearby his hut. The accused in his statement U/s 342 Cr.PC at Ex.6 has denied the recovery of 500-grams of charas from his possession, however he has claimed an amount of Rs.12500/- he wished himself to examine on oath as well as desired to lead evidence.

14. Accused Ali Asghar is examined U/s 342 Cr.P.C. wherein he deposed that the resides Malka Nagar in back of Salateen Hotel and works on juice shop as laborer. He deposed that about one year ago he came at house after discharging his duty, the police arrested him from his house and no contraband was recovered from his possession. He deposed that police snatched mobile phone and cash amount from his house and this incident was witnessed by the Muhallah people namely Abdul Karim Baloch and Mir Sahib Khan, he deposed that police took him in a car and blind folded his eyes, thereafter he was booked in this case. He did not identify the case property present in court and deposed that it has been foisted upon him. He specifically deposed that some peoples used to sell the charas in front of his house so he deterred them, hence they with the collusion of Abdul Razak, PC of ANF have booked him in false case.

15. DW- Abdul Karim at Ex.8 deposed that he knows accused Ali Asghar who is neighbourer and he knows the family member of Ali Asghar, they are Hanif, Hameed and his sister and brother. The house of accused is situated 10-houses from his house and he has shop in the muhallah. He deposed that about 15-months ago a car came and stood nearby the house of accused, one person was in uniform and 2-persons who were in casual dress, they all entered into the house of accused and he heard voices. He deposed that those all person were dragging the accused and they put him in the car. About 8-other muhallah people gathered there but they were deterred to intervene. He further deposed mother of accused told that persons have broken the boxes and have taken away cash Rs,15000/- and mobile phone. He specifically deposed that no contraband substance was recovered from the accused when he was taken away. He further deposed that accused is neither involved in selling the contraband and nor indulge to take so. He deposed that one day prior to this case accused deterred one person from selling the charas, hence on next day this incident was happened.

16. The plea of accused that one day prior to this incident, he deter one person from selling the charas in front of his house and is fully supported by the DW Abdul Karim. The PWs admitted that at the time of arrest the present accused was not selling the charas and there was no customer. It is admitted that accused was arrested near by his hut which plea is proved by the accused and DW that he was arrested from inside his house.

17. No doubt the police officials are good witnesses, but their evidence requires utmost care and caution by the prudent mind

while examining their witnesses, in presence of public witness who are not cited as witnesses in this case their evidence can not be safely relied upon. DW Abdul Karim who has a shop adjacent to the house of accused can be safely relied upon, his presence at the place of recovery is natural, therefore, prosecution is miserable failed to bring the home the guilt of accused persons.

10. It is settled law that judgment of acquittal should not be interjected until 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.

11. We have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt for the following reasons; that the police party arrested the appellant from a thickly populated area but the police did not associate any independent person of the locality to witness the recovery proceedings. There was also nothing on record that the complainant had attempted to call any private person to act as mashir. This aspect, although not fatal to the prosecutions case, was important because the appellant had raised the defense that he had been falsely implicated in this case due to enmity with PC Abdul Razzak who was a PW in the case and as such independent corroboration of the police version of events was important to ensure that it could be safely relied upon; that the complainant was also the IO in the case which though not unlawful creates a further measure of suspicion when the appellant has claimed false implication by one of the police party; that there appear to be some material contradictions in the evidence of the PW's as noted in the impugned judgment especially with regard to the weighing of the narcotic; that such a minor recovery of 500grms charas does not appear to indicate that the appellant was a supplier of narcotics and it cannot be ruled out based on the particular facts and circumstances of the case (especially considering his enmity with PC Abdul Razzak who was one of the police party) that this small amount was foisted upon the appellant as he claims; that an independent DW namely Abdul Karim has fully supported and corroborated the evidence of the

appellant; that the charas was recovered on 09.09.2008 and sample was sent to the chemical examiner on 11.09.2008 by PC Shezade Bhutto after 2 days.

12. Most significantly, we find that there is very little evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to the chemical examiner; that the Incharge of the Malkhana where the narcotic was kept for 2 days before being sent to the chemical examiner has not been examined and that PC Shezade who delivered the chemical to the chemical examiner has not been examined as to its safe custody. Learned Special Prosecutor ANF in respect of proof of safe custody of the narcotic not being fatal to the prosecution case has referred to the case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** which indicated that when there was no negative evidence of non safe custody the conviction could be upheld. **Muhammad Sarfraz's case** (Supra) however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.

13. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellants and was sent for chemical analysis may not have been kept in safe custody and may have been tampered with we find that even a positive chemical report is of no assistance to the prosecution; the significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case** (Supra), the relevant portion of which 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."** (bold added)

14. Under these circumstances **and for the other reasons mentioned above**, especially keeping in view the narrow scope for an appeal against acquittal to succeed, we are of the considered view that the prosecution failed to prove its case against the appellant beyond a reasonable doubt and there is no legal infirmity in the impugned judgment which is upheld and as such this appeal against acquittal is dismissed. These are the reasons for our short order which was announced in open court today which reads as under:

> "Learned counsel for the appellant has been heard. He has concluded his arguments. For the reasons to be recorded later on, this criminal acquittal appeal is dismissed alongwith pending application."