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

Cr. Acquittal. Appeal.No.D- 112 of 2007

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Muhammad Karim Khan Agha.

Date of hearing: 24.05.2017.

Date of judgment: 24.05.2017.

The State: Through Syed Meeral Shah, Addl.P.G. for the State.

Respondent: Jamal Khan called absent.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent Jamal Khan was tried by the Special Judge Control of Narcotic Substances, Hyderabad in Special Case No. 51/2004 for offences u/s 9(c) Control of Narcotic Substance Act 1997. Trial court by judgment dated 2nd December 2006, acquitted the respondent / accused by exercising powers under section 265-K Cr.P.C. State through Advocate General Sindh filed the instant criminal acquittal appeal No.D-112/2007 against the judgment dated 02.12.2006 passed by the trial court.

2. Brief facts of the prosecution case as reflected from the FIR are that respondent/accused Jamal Khan on 3.4.2004 was

found in possession of 30 Kilogram of charas while he was standing near protective Band in Unit No.4 Latifabad Hyderabad, he was arrested in presence of mashirs as such Sub Inspector/S.H.O. Mohammad Salman lodged F.I.R. bearing No.47 of 2004 at Police Station Hussainabad under Section 9(c) Control of Narcotic Substance Act 1997 on behalf of State. After usual investigation challan was submitted against the accused u/s 9(c) Control of Narcotic Substance Act 1997.

3. Trial Court examined P.W.1 SIP/SHO Mohammad Salman and P.W.2 SIP Qazi Aamir Ali Investigation Officer at Ex.9 & 10. Thereafter, trial court after hearing learned counsel for the parties acquitted respondent / accused Jamal Khan under section 265-K Cr.P.C. Hence, this appeal is filed by the State.

4. Syed Meeral Shah appearing on behalf of the State argued that trial court without recording the entire prosecution evidence acquitted accused in a hasty manner under section 265-K Cr.P.C. He has submitted contradictions highlighted by the trial court were minor in nature. Lastly, he submitted that there is merit in the appeal and acquittal recorded by the trial court is not sustainable under the law.

5. After hearing the learned Additional P.G. for the State, we have perused the order dated 2nd December 2006, passed by the trial court under section 265-K Cr.P.C. The relevant paragraph is reproduced as under:-

> "I have carefully considered the above arguments in the light of the record.

The case of prosecution, in brief is that on 03.04.2004, above accused was found in possession of 30 Kilograms of charas when he was found standing near Protective Bund, Unit No.4, Latifabad along with his companion, by the complainant in presence of the mashirs ASI Syed Waqqar Ali and ASI Rao Shahid. The narcotic consisted 30 strips of charas and out of that, a sample taking places from each of them, was separated and sent to the Chemical Examiner whose report was in positive, therefore, he was challaned.

Today, during the evidence, the complainant deposed that the narcotic, which was in a blue polythene bag in the hand of the accused was sealed on the spot in a white cloth and he as well as the mashirs signed the same. He produced the same as Article 09-A(i). He also deposed that one piece from each of the strips was taken out and total quantity of these 30 pieces was 10 grams, which was sent to the Chemical Examiner in one sample mixing all of them. He also deposed that the big parcel was also sealed on the spot in the white cloth, which was signed by him and the two witnesses. That incriminating charas as well as sample were handed over to the Investigating Officer SIP Qazi Aamir Ali, who was examined vide Ex.10, but he deposed that when he received the said big parcel of the narcotic, it was not sealed in the white cloth, but it was a blue polythene bag and the same was not bearing the signatures of any of the witnesses, which is a major contradictions in the statements of the two witnesses. The evidence of the Investigation Officer was more credible than the complainant because it cannot be believed that the entire narcotic about 30 Kilograms would be sealed on the place of incident in such a large bag stitched at the place of incident as deposed by the complainant. It is also to be appreciated that the sample, which was sent to the Chemical Examiner was a mixture of 30 pieces and each piece taken from each strip was not separately sealed and sent to the Chemical Examiner for its examination and report, therefore, it cannot be said that each of the s trips was the narcotic. Moreover, the quantity of sample was only 10 grams out of 30 strips and it is not believable that such a small quantity from

each of 30 strips would so accurate. Besides this, it is not comprehend-able that as to why such a small piece was taken from each strip and why the entire narcotic was not sent to the Chemical Examiner, although could be sent easily. Moreover, the wrapper of the sample, which was bearing the signatures of the complainant and mashirs and received in the Laboratory at Karachi was not sent back to the police or to the Court to confirm through the witnesses that the said sample was same, which was examined by the Chemical Examiner. These discrepancies in the statement of the two witnesses are fatal to the prosecution and goes to the roots of the case, therefore, it is not possible that the case even the other witnesses are examined can be ended in conviction of the accused, hence invoking the powers U/S 265-K Cr.P.C. the accused is entitled to be acquitted. Order accordingly. He is in custody, he may be released forthwith in this case."

6. In our considered view, trial court rightly acquitted the respondent / accused under section 265-K Cr.P.C for the reasons that there were discrepancies in the statements of two prosecution witnesses examined by the trial court and such discrepancies were fatal to prosecution case. It appeared that there was no probability of conviction of accused. Trial Court was empowered to acquit the accused u/s 265-K Cr.P.C. at any stage. Trial court has rightly mentioned that safe custody of the charas and its safe transit to the Chemical Examiner has not been established at trial. In the case of **IKRAMULLAH & OTHERS v. THE SATE** reported in 2015 SCMR 1002, Honourable Supreme Court has held that prosecution has to establish safe custody of the narcotics at Malkhana and its safe transit to the Chemical Examiner. The judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous 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 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 of the same 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).**

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."

7. For the above stated reasons, there is no merit in the appeal against acquittal. Finding of acquittal recorded in favour of respondents / accused by the trial Court are based upon sound reasons which require no interference. As such, the appeal against acquittal is without merits and the same is dismissed.

JUDGE

JUDGE

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