

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

Criminal Acquittal Appeal No.D-52 of 2019

PRESENT:

**Mr. Justice Abdul Malik Gaddi
Mr. Justice Khadim Hussain Tunio**

Date of hearing: 12.02.2020.

Date of judgment: 12.02.2020.

Appellant: The State / A.N.F through Mr. Muhammad Ayoob Kassar, Special Prosecutor ANF.

Respondent: Subhan Ali S/o Muhib Ali, through Mr. Mian Taj Muhammad Keerio, Advocate

JUDGMENT

Khadim Hussain Tunio, J.- Through above captioned Criminal Acquittal Appeal, the State / ANF has impugned the judgment dated 05.03.2019 passed by the learned Sessions / Special Judge (CNS), Hyderabad, in Special Case No.02 of 2017 (Re: the State v. Subhan Ali) emanated from Crime No.D040404616, registered at P.S ANF Hyderabad, under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby respondent / accused was acquitted of the charges while extending him benefit of doubt.

2. It is alleged that on 27.12.2016 respondent / accused was apprehended by the A.N.F officials and from his possession they secured a shopper containing small / big pieces of charas, which was weighed and it became 2200 Grams. On personal search, cash amount of Rs.1500/- was secured from the appellant, for which F.I.R was registered against him.

3. After completing of the required formalities, formal charge was framed against the respondent / accused, wherein he denied prosecution allegations made against him by the prosecution and claimed to be tried.

4. The prosecution, in order to prove the charge against the respondent, examined only three witnesses, namely Inspector Nisar Ahmed, Mashir PC Yasir Ali and HC Ghulam Muhammad, who produced documents in their evidence.

5. Statement of accused was recorded under Section 342 Cr.P.C, in which he denied the allegations made against him by the prosecution. The accused neither examined himself on oath in terms of Section 340(2) Cr.P.C, nor examined any witness in his defence.

6. After hearing the learned for the respective parties, learned trial Court acquitted the respondent / accused by extending him benefit of doubt; hence, this acquittal appeal.

7. Learned Special Prosecutor A.N.F vehemently argued that the impugned judgment passed by the learned trial Court is not sustainable in the eyes of law as it suffers from illegalities and irregularities; that the learned trial Court while passing the impugned judgment has failed to appreciate the evidence adduced by the prosecution; that the charas so recovered from the respondent is proved by the prosecution witnesses through their evidence and that the prosecution witnesses have supported the case of the complainant and there is no contradiction in their evidence; however, the learned trial Court while committing misreading and non-reading of the evidence has passed the impugned judgment; that the learned trial Court has given undue weight to the minor discrepancies if any arose in the evidence of the prosecution witnesses; that learned trial Court has also not appreciated that the provision of Section 103 Cr.P.C for association of public persons is not applicable in the cases of recovery of narcotics by virtue of Section 25 of CNS Act, 1997. He, therefore, prays that the impugned judgment may be set aside and the respondent may be convicted in accordance with law. In support of his arguments, he has cited the cases of THE STATE through Director General, Anti-Narcotics Force v. ABDUL JABAR alias JABBARA (2017 SCMR 1213), MUHAMMAD SARFRAZ v. THE STATE and others (2017 SCMR 1874), ZAFAR v. THE

STATE (2008 SCMR 1254) and THE STATE / ANF v. MUHAMMAD ARSHAD (2017 SCMR 283).

8. Conversely, learned Counsel for the respondent has supported the impugned judgment.

9. We have heard learned Special Prosecutor ANF as well as learned Counsel for the respondent and examined the material available on the record.

10. The allegation against the accused by the police officials is that he was apprehended alongwith 2200 Grams of charas and besides that an amount of Rs.1500/- was also recovered from him. After having scanned the evidence of the prosecution witnesses, we have come to the conclusion that prosecution has miserably failed to establish its case beyond reasonable shadow of doubt. Perusal of impugned judgment, it also transpires that the learned trial Court has recorded the acquittal in favour of the respondent with significant and sound reasoning. It is noted that appellant has failed to associate any private person who is stated to have present at the time of commission of the alleged incident, despite the alleged incident took place at Breeze Fish Point at Giddu Chowk, Hyderabad, as per evidence of the prosecution witnesses. The learned trial Court after having examination and evaluation of the evidence has acquitted the respondent mainly on the grounds and reasons which reads as follows:-

“On perusal of the above evidence, it would appear that both the eye-witnesses i.e. complainant and mashir have supported each other’s version but on its’ closer analysis, it does not stand the judicial scrutiny. No doubt there was similarity in their version but they admittedly belonged to the ANF department and were used to often giving evidence in such cases. The admitted features of the case are that the recovery was claimed from the populated area and one of the busiest inter-sections of the city i.e. Giddu Chowk during broad hours of the day and that too in pursuance of advance information yet nobody from public was associated as mashir. Neither was anybody arranged on received the information, nor was any person picked from the way. Although it was said by the complainant as also mashir that the people available at the place of recovery were asked to act as mashirs but they declined. However, no detail of any such person was given nor was any action taken against them. Although in the cases of narcotics, association of public witnesses was not so essential but

it has been held by the superior Courts in several cases that if people from public were available, it would be better to associate them to add sanctity to the proceedings of recovery. In the cases of Abdul Waqar and Abdul Qadir (supra) cited by the learned advocate for the accused, non-association of witnesses from public was taken exception to. The complainant and mashir had also not given the details of the vehicle(s) in which they went and the name(s) of driver(s) who drove the said vehicle(s) and despite claim of the prosecution that the charas was secured in shape of pieces but neither was their exact number given nor were the said pieces weighed separately. Furthermore, it mentioned in the FIR and mashirnama and also said by the complainant and mashir that the ANF party was led by Assistant Director Ghulam Abbas but he was not examined before the Court. As a matter of propriety, he being the senior officer of the party ought to have been produced and examined before the Court. These factors though individually were minor in nature but if viewed together, they would create doubt and eclipse the whole case. Over and above this, the admitted fact was that the accused hailed from another district i.e. Sanghar and it was hard to believe that he would come all the way from Sanghar with charas in a shopping bag unnoticed by anybody during his entire travel from there and would be available at the alleged place in Hyderabad with charas. Further, it was stated by the complainant that after arrest of the accused, they went to his native place in taluka Khipro but nothing was recovered from there nor was the previous record showing his involvement in such cases was produced. The stance of the accused was that he was rounded up by ANF officials from his house in taluka Khipro and roped in this case at the behest of his opponents with whom he had got matrimonial dispute. Though he neither produced any material nor examined any person in support of such plea but the regardless of it, it was bounden duty of the prosecution to establish its' case independently on its' strength and no pick holes in the weakness of the plea of defense. Thus on the assessment of evidence of the prosecution in juxtaposition with the plea of the accused, I feel no hesitation in holding that the prosecution has not satisfactorily discharged its' burden of proving charge against the accused."

11. We have perused and examined the above reasoning of the learned trial Court and are of the view that no illegality and irregularity appears to have been committed by the learned trial Court which may warrant interference by this Court. Even, learned Special Prosecutor A.N.F during course of arguments has failed to satisfy us as to what illegality and irregularity has been committed by the learned trial Court while recording impugned judgment. The acquittal of the respondent is as per law and his acquittal cannot be interfered by this Court until and unless some cogent, reliable and trustworthy evidence is furnished by the prosecution but unfortunately the prosecution could not come with. When an accused is acquitted from the charge by a Court of competent

jurisdiction, then it is well established principle of law that double presumption of innocence will remain attached with the judgment of acquittal, therefore, such judgment cannot be interfered with unless it is proved that same is arbitrary, shocking capricious, fanciful and against the settled principles of criminal administration of justice. In this respect, reliance may respectfully be placed on the cases of *Yar Muhammad and 3 others v. The State* (1992 SCMR 96, *State/Government of Sindh through Advocate General, Sindh Karachi v. Sobharo* (1993 SCMR 585), *The State & others v. Abdul Khaliq & others* (PLD 2011 SC 554), *Muhammad Zafar and another v. Rustam Ali and others* (2017 SCMR 1639), *Zulfiqar Ali v. Imtiaz and others* (2019 SCMR 1315).

12. So far as, the cases cited at bar by the learned Special Prosecutor ANF are concerned, the same are not applicable with the facts and circumstances of the present case as in case of STATE / ANF (supra) the accused was convicted by the trial Court, in appeal acquitted by the High Court and Honourable Supreme Court set aside the acquittal and restored the judgment of the trial Court. In the said case, accused was arrested from Airport and was then immediately taken to nearby hospital where x-ray of his stomach was taken which depicted foreign bodies. The x-ray as well as receipt of the hospital had been produced in evidence. After the x-ray, the accused was taken to another hospital where the Doctor administered the requisite medicines so that whatever was in accused stomach was flushed out and recovered capsules after excretion were immediately presented to the concerned Doctor and then were sealed and sent to chemical examiner. Upon chemical examination, it was confirmed that the capsules contained 550 grams of heroin powder. In the case of STATE through Director General, Anti-Narcotics Force v. ABDUL JABAR alias JABBARA (supra), the accused was acquitted by the trial Court and the STATE preferred appeal before the Lahore High Court against the acquittal of accused, which was dismissed and the honourable Supreme Court allowed the appeal by setting aside the judgment passed by the Lahore High Court and the matter was remanded to the said court to decide criminal appeal afresh on merits. In the said case, the allegation against the accused was

tried on the allegations of having acquired and being in possession of assets derived from narcotic substances, etc. In the cases reported as 2017 SCMR 1874 and 2008 SCMR 1254 (supra) the accused were convicted by the trial Courts and their appeals were dismissed by the High Court. However, in appeal the honourable Supreme Court upheld the conviction and sentence recorded by the two Courts below.

13. Even otherwise, the approach for dealing with the appeal against conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of the accused is attached to the order of acquittal. The scope of appeal against acquittal is considerably narrow and limited and criterion laid down for appeal against acquittal, is entirely different than the criterion of hearing of appeal against conviction. The different parameters are applied for interference in an appeal against the acquittal and appeal against the conviction. On the examination of the judgment of acquittal as whole, credence should be accorded to the findings of the subordinate Court whereby the accused had been exonerated from the charge of commission of the crime. Obviously, the approach for dealing with the appeal against conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of the accused is attached to the order of acquittal.

14. It is also settled principle of law that whenever there creates some reasonable doubts about the guilt of an accused, the benefit of which is to be extended to the accused as a matter of right but not as a matter of grace or concession as held by the Hon'ble Supreme Court in numerous cases, such as, MUHAMMAD MANSHA v. THE STATE (2018 SCMR 772), wherein it has been stipulated as under:-

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of

grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v, The State 2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749)."

15. The sequel of the above discussion is that the prosecution has miserably failed to substantiate the charge against the respondent; hence; we by our short order dated 12.02.2020 announced in open Court today, dismissed this acquittal appeal and these are the reasons thereof.

JUDGE

JUDGE

Shahid