

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr.Acquittal.Appeal.No.D- 03 of 2017

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 17.04.2018.
Date of judgment: 17.04.2018.

Mr. Muhammad Ayoub Kassar, Special Prosecutor ANF.
None present for the respondent.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent / accused Abdul Sattar @ Babu alongwith co-accused Muhammad Ismail (since died) was tried by learned IIIrd Additional Sessions Judge/Special Judge, under Control of Narcotics Substance Act, Hyderabad in Special Case No.41 of 2010 for offences u/s 9 (c) of CNS Act, 1997. After full-dressed trial, vide judgment dated 26th October, 2016, the respondent/accused was acquitted of the charge hence this appeal against acquittal is filed.

2. Brief facts of the prosecution case as disclosed in the FIR are that SHO of Police Station ANF, Hyderabad under the supervision of Assistant Director ANF Taimoor Khan Masood left the ANF police station for patrolling vide entry No.10 at 0530 hours. During patrolling when the ANF police reached at Pathan Colony Chowk, they received spy information at 0620 hours that Muhammad Ismail and Abdul Sattar were available in front of the City Gate hotel having huge quantity of narcotics. On such information ANF police reached there at 0630 hours

and saw two persons having shoppers in their hands. The informer pointed out those persons. Thereafter, ANF police apprehended them and due to non-availability of the private mashirs, PCs Abdul Hameed and Abdul Sattar were made as mashirs. The names of the accused were enquired to which they disclosed their names as Muhammad Ismail and Abdul Sattar. It is further alleged that Sub Inspector secured narcotic bags from their possession. From the shopper carried by accused Muhammad Ismail, ANF officials found several pieces of charas which were weighed and became 1500 grams. From his personal search one CNIC, driving license, mobile and cash of Rs.550/- were recovered. From another accused namely Abdul Sattar alias Babu, the shopper was secured it contained pieces of charas which became 1300 grams and f 200 grams opium. On the personal search of accused Abdul Sattar cash of Rs.750/- was also recovered. Thereafter, accused and the case property were brought at police station where FIR bearing crime No.05/2010 was lodged on behalf of the State on 10.05.2016 u/s 9 (c) of CNS Act, 1997 at P.S. ANF Hyderabad.

3. During investigation, charas and opium were sent to the chemical examiner and the positive report was received. On the conclusion of investigation, challan was submitted against the above named accused under the above referred section and one accused Ghulam Sarwar was shown as absconder. Thereafter, he joined the trial and moved an application before trial court u/s 265-K Cr.P.C. and he was acquitted vide order dated 08.04.2014.

4. Trial court framed charge against accused Muhammad Ismail and Abdul Sattar, to which both the accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined complainant Nisar Ahmed, Sub Inspector ANF at Ex.07, who produced the mashirnama of arrest and recovery, roznamcha entries, FIR and positive report of chemical examiner at Ex.7/A to 7/G and mashir HC Abdul Sattar was examined at Ex.08. Thereafter, prosecution side was closed.

6. Statement of respondent/accused was recorded u/s 342 Cr.P.C. Accused Abdul Sattar raised plea that he alongwith his deceased brother Muhammad Ismail was arrested on 10.05.2010 from Kunri and such news were published in several newspapers. Accused however, denied the allegation of recovery from him and he did not lead any evidence in his defence nor examined himself on Oath in disproof of the prosecution allegation.

7. Trial court after hearing the learned counsel for the parties and assessment of the evidence vide judgment dated 26.10.2016 acquitted the accused/respondent of the charge. Hence, this appeal.

8. Mr. Muhammad Ayoub Kassar, Special Prosecutor ANF mainly contended that ANF officials had no enmity whatsoever to foist charges upon the accused. He has argued that evidence of ANF officials was corroborated by positive report of chemical examiner. He further submitted that trial court ignored the huge prosecution evidence and acquitted the accused on the basis of speculation. In support of his contentions, reliance has been placed on the cases reported as The State/ANF v. Muhammad Arshad (2017 SCMR 283), Zafar v. The State (2008 SCMR 1254), Muhammad Khan v. The State (2008 SCMR 1616), Ghulam Qadir v. The State (PLD 2006 Supreme Court 61) and Nazar Muhammad v. The State (P.Cr.L.J 1399).

9. We have heard the learned Special Prosecutor ANF and perused the entire record minutely.

10. In order to appreciate the contentions of the learned Special Prosecutor ANF, the operative part of the impugned judgment of acquittal is reproduced hereunder:-

“12. The perusal of evidence of both the PWs would reveal that no doubt they have supported the version of prosecution as given in the mashirnama and in FIR but the complainant Nisar Ahmed while examined before this court also given another episode of the case by stating that during interrogation, the above named accused persons disclosed that other narcotics was also available in their village Memon Kunri and on such information complainant along with other staff left police station vide entry No. 06, went to village of accused and conducted search on the pointation of accused but no property was found. Thereafter, they returned to police station, however, the evidence of HC Abdul Hameed would reveal that he has not stated a single word in this respect. In the cross examination complainant has admitted that the entire staff, who were along with him at the time of recovery left alongwith him and on pointation of accused went to Kunri. He also admitted that he did not prepare the mashirnama of places, which were pointed out by the accused at Kunri nor he made information to local police or joined any officer from Kunri Police Station. In this respect a case law has been relied upon by learned defense counsel viz Ameen Ali & Others Versus the State, reported in 2011 SCMR 323 in which it was observed that “recovery was made from jurisdiction of an other police station but investigation officer did not go that Police Station or made any entry so as to show his presence at relevant time within jurisdiction of that police station or took some help from that police station, such act of investigating officer created doubt about genuineness of recovery.” I am of the view, that this was not necessary for the ANF police but in the circumstances when other witness has not deposed a single word about entire this episode, no reliance can be placed upon sole evidence of complainant in absence of any other evidence.

13. It is worth to mention here that in the cases of narcotics recovery the report of chemical examiner plays a pivotal role as without authenticity of chemical report no conviction can be based in the case of Narcotics Substances. For the sake of convenience, I would like to refer the letter written by Assistant Director Taimoor Khan Masood, for sending the

property to chemical examiner (Ex.7/F) and the report of chemical examiner (Ex.7/G). The letter mentions in the subject as under:-

Subject:- Case FIR No. 05/2010 Dated 10.05.201 U/S 6/9 (C) CNSA-1997 Recovery of 2.800 Kgs Charas & 200 grams Opium Accused Muhammad Ismail S/O Abdul Hakeem Caste Memon R/O Village Memon Kunri, District Umerkot. 2. Abdul Sattar S/O Abdul Hakeem R/O Village Memon Kunri, District Umerkot.

14. The details of property in the letter are mentioned as under:-

<u>NAME OF ACCUSED</u>	<u>RECOVERY</u>	<u>WEIGHT OF THE SAMPLE FROM RECOVERED NARCOTICS</u>
1. Muhammad Ismail s/o Abdul Hakeem r/o Village Memon Kunri District Umerkot Caste: Memon	2.800 Kgs Charas & 200 Gr Opium	Three sealed parcel containing 1500 grams Charas, 1300 Grams Charas and 200 Opium
2. <u>Abdul Sattar s/o Abdul Hakeem</u>		

15. The perusal of letter would reveal that in the subject the underlining (made by myself) is in hand writing of some person which carried no initial, thereafter, at the details of property name of Abdul Sattar at Serial No. 02 has also been added with the hand writing in the column of recovery nothing is mentioned and it too does not bear initial or signature of Taimoor Khan, with whose signature the property was sent for chemical examiner. I have also perused chemical report at Ex. 7/G, it also reveals that name of Abdul Sattar has been added at serial No. 02 with the black ink and in front of addition of this name an initial is made with the blue ink but this initial is not of Dr. Fazal Ellahi Memon, the Director Laboratories with whose signature the chemical report has been prepared.

16. The complainant in the cross examination has admitted this position stating that :-

“It is a fact that in Ex. 7/F and Ex. 7/G viz: the letter for sending property for chemical examination and in chemical examiner’s report the name of accused Abdul Sattar has been added later on with a handwriting. The letter for sending property for chemical examination, sent with the signature of Taimoor Khan Masood, Assistant Director ANF of PS: ANF Hyderabad. It is a fact that the name of accused Abdul Sattar added with handwriting does not bear initial or signature of

any person including that of signature or initial of Taimoor Khan. The chemical report has been issued by Dr. Fazal Ellahi the Chemical Examiner and that bears his signature with blue ink. The chemical report bears another signature in blue ink with stamp of I/C Excise-I Section. It is fact that at Chemical Examiner's report where the name of accused Abdul Sattar has been added with handwriting there is initial of I/C Excise-I Section with blue ink."

17. The manipulation as mentioned above in the letter for sending the property to chemical examiner and in the chemical report in the light of admissions of investigating officer and in absence of non-examination of Assistant Director Taimoor Khan and HC Talib Hussain, who transmitted the property from Police Station to chemical laboratory would clarify the position and left no home for the prosecution that in the above documents, the name of present accused Abdul Sattar was added afterwards for the reasons best known to them. Had the author of letter AD Taimoor Khan and HC Talib Hussain been examined, the prosecution as well the defense would have in better position to bring on the record the explanation in respect of addition of name of accused Abdul Sattar in these documents. In the case of Munawar Ali Jatoi V/S the State, reported in 2012 MLD 1738 (Sindh), it was observed by DB of Honourable High Court of Sindh that police officials who had taken samples to chemical examiner, was not examined by the prosecution. Safe custody of sample before being sent for analysis was not established. It was further observed in this judgment that where there was the slightest apprehension regarding the truth of the prosecution case, its benefit to be extended to the accused.

18. Now coming towards the defense plea of the accused, it is worth to mention here that during cross examination learned defense counsel has put suggestion to the complainant that the accused were arrested from their native place viz village Memon Kunri, Taluka Kunri, District Umerkot being affiliated politically with Jam Memon, the Ex-Nazim of Kunri, who was political rival of Nawab Yousuf Talpur, the sitting MNA and his son Nawab Taimoor Talpur, the sitting MPA and at their instance accused were falsely involved in this case. In the written statement filed by accused at Ex. 10/F, same defense has been taken by accused stating that actually he, his deceased brother, co-accused Muhammad Ismail, Noor Muhammad Chandio, Hayat, Ghulam Hyder and others were arrested on 10.05.2010 by the complainant from Kunri, District Umerkot without any recovery of narcotics at the instance of Nawab Muhammad Yousuf Talpur Ex-MNA of PPP and his son Nawab Taimoor Khan Talpur, who had

political rival with Jam Memon Ex-Nazim Kunri as the accused were party men of Jam Memon. I have also gone through the newspaper cuttings produced by the accused along with his statement, which are published in Daily Ibrat in its issue dated 11th May, Daily Mehran 11th May, Daily Sobh 12th May, Daily Islam 12th May, Daily Kawish 13th May, 2010. All these newspapers would reveal that the accused Abdul Sattar @ Babu and others were arrested from Memon Kunri, while one Sarwar Memon had fled away. I am agree with the submission made by learned counsel that the news items have not been rebutted by the prosecution, to explain that as to why in so many newspapers the news were published in respect of arrest of accused from Kunri, instead of from Hyderabad as alleged by the prosecution. This factor also creates a reasonable doubt in the entire case of prosecution. In the case of Abdul Ghani and others Versus the State reported in (SBLR 2007 (Sindh) 295), the Honourable High Court of Sindh observed that “press reports have not been contradicted by the concerned authorities. Therefore, the same can be relied upon for holding that the plea of defense is kept in juxtaposition to the prosecution case. It is to be seen, if the prosecution has been successful in building a chain, whereby to connect the accused with the illegal organization.

19. The several infirmities as discussed above in the prosecution case would demand that there must be evidence from independent source, which could support and corroborate the evidence of police officials in this case. Admittedly, the complainant himself has acted as complainant and investigating officer and he did not hand over papers to any other officer for conducting investigation. Though, according to prosecution case, the supervising officer was Assistant Director Taimoor Khan at the time of recovery of alleged narcotics from the accused. Even the mashirnama of arrest and recovery does not bear the signature of Assistant Director Taimoor Khan, in whose presence alleged narcotics was recovered from the accused. In the case of Khuda Bux v/s the state (2010 YLR 2276 (Karachi)) the fact of function of complainant in the dual capacity as complainant and investigating officer, in a case of narcotics was taken serious note and the accused was acquitted on the basis of such practice in addition to other grounds also.

20. No doubt association of private witnesses in the cases of narcotics has not been compulsory as application of section 103 Cr.P.C was over ruled by Section 25 of Narcotics Substance Act. However, in so many reported case laws of the Honourable High Court and Supreme Court, it was

observed that when the private persons were available at the time of recovery their non-association was taken into consideration as favourable to the accused and not to the prosecution. Following cases in this respect may be referred to;-

- i). Abdul Qadir V/S the State 2015 P.Cr.L.J 235 (Sindh)**
- ii). Ghulam Akbar V/S the State, 2014 YLR 1236 (Sindh)**
- iii). Munawar Ali Jatoy V/S the State, 2012 MLD 1763 (Sindh)**
- iv). Muhammad Aslam V/S the state 2011, SCMR 820**

21. In case of Tarriq Pervez V/S the State (1995 SCMR 1345), it has been laid down by Honourable Apex Supreme Court that for giving benefit of doubt to an accused, it is not necessary that there should many circumstances creating doubt, if a single circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right.

22. In the case of Taj Wali and six other V/S the State, (PLD 2005 Karachi 128), a divisional bench of Honourable High Court of Sindh, while dealing with matter of Narcotics observed that heavy responsibility lay upon prosecution to produce a solid piece of evidence, which could eliminate all possibilities of false involvement of accused and evidence should be free from all doubts. It was further observed that court in such types of cases should scrutinize evidence very minutely and if a single doubt appeared in evidence, advantage of such doubt should be liberally given to the accused because it was very easy to involve an innocent person in such cases, as all witnesses were invariably police witnesses and subordinate to complainant, who was also an investigating officer. It was also observed in this case that complainant should not be made judge of his own cause. His version should be investigated by another officer and a check could be placed on manipulation of evidence by complainant against innocent person, which was very essential in present daytime. Finally it was observed that activities of police officials, who were themselves becoming complainant, witnesses and investigating officer, should be checked and investigation of the cases should be entrusted to officer superior to the complainant, which act would ensure fair play between parties.

23. In the present case, as discussed above there are several circumstances creating reasonable doubts in the prosecution case, which have led me to draw an irresistible

inference that the case is not free from doubts, as such, the point under discussion is replied as “Not Proved”.

24. The upshot of above discussion has been that the prosecution has failed to prove charge against accused Abdul Sattar @ Babu S/o Abdul Hakeem beyond shadow of doubt, hence he is acquitted of his charge U/S 265-H(1) Cr.P.C. He is present on bail, his bail bond stand cancelled and surety discharged.”

11. After hearing the Special Prosecutor ANF, endorse the view of acquittal taken by learned trial Judge, although we would like to indicate the strongest reason for confirming acquittal of respondent. It appears that there was no evidence with regard to the safe custody of the narcotic at Malkhana of the police station and its safe transmission to the chemical examiner. It is also the matter of record that charas was taken by HC Talib Hussain to chemical examiner for analysis but he has not been examined by the trial court which shows that safe transmission is not established. We have also examined the report of the chemical examiner Ex.7/G. Chemical Examiner's report advanced in evidence was deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of recovered substance. The Honourable Supreme Court of Pakistan in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, has emphasized upon the safe custody of charas and safe transmission and the preparation of report according to the protocol. The relevant portion 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.”

12. In another unreported case of Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, Honourable Supreme Court vide order dated 04.04.2018 observed as follows:-

“According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient

report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt.”

13. Moreover, appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. As held in the case of Ghaus Bux v. Saleem and 3 others (2017 P.Cr.L.J 836).

14. Judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. 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 case of The State and others v. Abdul Khaliq and others (PLD 2011 Supreme Court 554).

15. For the above stated reasons, we have come to the conclusion that the judgment of trial court appears to have been passed according to the settled principles of law and does not appear to be ridiculous, perverse or speculative. Accordingly, no case for interference is made out. Acquittal recorded by trial Court in favour of respondent/accused is based upon sound reasons. As such, the appeal against acquittal being without merit is hereby dismissed.

JUDGE

JUDGE

Tufail