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

Cr. Acquittal. Appeal.No.D- 53 of 2019.

Present.
Mr. Justice Naimatullah Phulpoto.
Justice Mrs. Kausar Sultana Hussain.

Date of hearing: 25.03.2021.

Date of judgment: 25.03.2021.

The State: Through Mr. Muhammad Ayoob Kasar, Advocate/Special Prosecutor ANF.

Respondent: Muhammad Hussain s/o Bhalu.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondent / accused Mohammad Hussain was tried by learned Special Judge CNS-I/Model Criminal Trial Court, Thatta in Special Case No. 31/2016 for offences u/s 9(c) Control of Narcotic Substance Act 1997. After full dressed trial, vide its judgment dated 22nd day of April, 2019 respondent / accused was acquitted of the charges. Hence, State / Anti Narcotic Force filed this appeal against acquittal.

2. Brief facts of the prosecution case as disclosed by S.H.O. Muhammad Naseer (P.W.2) are that on 20.06.2016 he was posted as S.H.O. Police Station Anti-Narcotic Force Hyderabad. On the same day, he received spy information that one person will supply huge quantity of the charas to the supplier adjacent to the petrol pump situated at village Kalan Kot, Karachi-Thatta Bye Pass, Taluka and District Thatta. After receipt of such information, S.H.O. formed a raiding party consisting of ASI Raza Ali Shah and his other subordinate staff and left the Police Station under the supervision of AD Ghulam Abbass vide Roznamcha Entry No.09 at 1600 hours in Government vehicle. Police party reached at

the pointed place at 1800, hours where they saw that one person was standing. He had a black shopper in his hand. Spy informer gave the description of the said person to the police. Thereafter, police surrounded the accused and apprehended him. The shopper which was in the hand of the accused was handed over to the above named SHO in presence of Mashirs ASI Raza Ali Shah and PC Kashan. Name of the accused was inquired, to which he disclosed his name as Muhammad Hussain son of Bhaloo by caste Mallah. Shopper was opened in presence of the Mashirs and it was checked. It contained 366 rods of charas. Charas was weighed, it became 400 kilograms. Mashirnama of arrest and recovery was prepared in presence of mashirs. Case property was sealed in cloth bag in presence of mashirs. From the personal search of the accused four notes of 100/- each were also secured from his pocket. Thereafter, the accused and the case property were brought to the police station where F.I.R. was registered under section 9(c) Control of Narcotic Substance Act 1997 on behalf of the State. After registration of the FIR, case property was sent to the Chemical Examiner for analysis and report. Positive report was received. On the conclusion of usual investigation, challan was submitted against the accused under section 9(c) Control of Narcotic Substance Act 1997. Learned Special Judge CNS-I / Model Criminal Trial Court framed the charge against the respondent under section 9(c) Control of Narcotic Substance Act 1997. Respondent / accused pleaded not guilty and claimed trial. Prosecution at the trial examined PW.1 PC Kashan Ahmed Malik at Ex.04, P.W.2 Inspector Muhammad Nasir Afandi, P.W.3 Imam Bux Jagirani at Ex.08, P.W.4 SIP Sajjad Hussain Pasha at Ex.09. Thereafter, prosecution side was closed. Statement of accused was recorded under section 342 Cr.P.C. accused claimed false implication in this case and denied the prosecution evidence. Respondent/accused examined himself under section 340(2) at Ex.12. He had also examined D.W.1 Rasheed Ahmed Gandro at Ex.13. Trial Court, after hearing learned counsel for the parties and assessment of the evidence vide it’s Judgment dated 22.4.2019 acquitted the accused. Hence, this acquittal appeal is filed.

3. Learned Special Prosecutor ANF has mainly contended that trial Court has failed to appreciate the evidence according to the settled principles of law. It is further argued that provision of section 103 Cr.P.C. has been excluded in cases registered under the provisions of Control of Narcotic Substance Act 1997. It is also submitted that evidence of the police officials is as good as of other private persons, which is also supported by the positive report of the Chemical Examiner. Lastly, it is

submitted that reasons assigned by the trial Court for recording acquittal were not cogent and prayed for allowing this appeal against acquittal.

4. We have carefully heard Mr. Muhammad Ayoob Kasar, Advocate/Special Prosecutor ANF, scanned the entire prosecution evidence and perused the impugned Judgment. Trial Court in it's judgment has rightly mentioned that application of 103 Cr.P.C. has been excluded in cases registered under CNS Act 1997. The rule to cite a witness from public is a rule of prudence and not a rule of procedure. It has come on record that respondent / accused had claimed enmity with the police officials, yet prosecution had failed to examine the private persons who were present around the place of the recovery. Learned trial Court had also rightly mentioned that story as narrated by the prosecution appeared to be un-natural and unbelievable and mashirnama has been prepared in the mechanical manner without application of the mind. It was a case of spy information, SHO had sufficient time to call independent persons of the locality to witness the recovery proceedings but Investigating Officer avoided without assigning the reasons. In this case, original roznamcha entries despite contention of the defence were not produced. Trial Court has rightly mentioned that photo copies had no evidentiary value. At-least secondary evidence should have been produced before the trial Court. Findings of the trial Court recorded in para-13, 14 and 15 of the judgment are reproduced as under:-

> *13. Although application of Section 103, Cr.P.C. has been excluded in case under CNS Act 1997, the rule to cite a witness from public is a rule of prudence and not a rule of procedure. Unless the prosecution is able to show that there was absolutely no chance of citing a witness from public, relying upon evidence of the police amounts to make them judge of their own cause. For any reference, please see KAMRAN alias GHULAM RASOOL alias Kaloo v. THE STATE (PLD 1997 Karachi 484). In the instant case, the evidence shows that a number of people was available around at the time of alleged recovery but none of them was cited to attest such recovery proceedings. The alleged recovery proceedings and evidence of the witnesses as also preparation of the documents particularly the memo for arrest and recovery all appear to have been mechanically done and no account of the natural events and their consequences taking place in such circumstances has been recorded. There is also anomaly as regards exact time of recovery and preparation of the memo for such recovery.*
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> *14. That complainant claims to have received spy information at Hyderabad and set out with his party acting upon such information with the spy informer also accompanying. According to him, the information was that the accused was going to supply a huge quantity of chars at the pointed place between 1700 to 1830 hours. It is not the case of prosecution that some informer was continuously observing movement of the accused and that he was in*

> *touch with the complainant as regards such movement. It is not only surprising but also not acceptable to a prudent mind that despite not being so a party setting out from Hyderabad, which is around 100 kilometers from Thatta with the sole informer also with them, reaching exactly the place of recovery and finding the accused with the contraband as if he was just waiting for the party to come and arrest him. The story, thus, set-up by the complainant and his party does not appeal to a prudent mind. Moreover, PW-1 Kashan Ahmed Malik who is one of the recovery mashirs did not state a single word about sealing of the contraband at the place of recovery and arrest in his examination in chief.*
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> *15. A copy of departure and arrival entry produced at Exh.4/A is not a certified copy within the meaning of Article 87 of Qanoon-e-Shahadat Order 1984. An entry in the station diary maintained at police station is a public document and if secondary evidence of contents of such document is required to be produced only certified copy thereof is acceptable in evidence as provided by Article 88 of Qanoon-e-Shahadat Order 1984. Thus the entry (Exh.4/A) cannot be accepted as secondary evidence of such contents. It was held in case of MUHAMMAD ACHAR MACHI v. THE STATE (2001P.Cr.L.J. 1762) that failure to produce the departure entry cuts the root of the prosecution case. It is also settled law that for giving benefit of doubt there may not be many circumstance and if there is a single circumstance creating doubt, benefit thereof should go to the accused not as a matter of grace or concession but as a matter of right. For any reference, please see TARIQ PERVEZ v. THE STATE (1995 SCMR 1345).”*

5. In our considered view, the judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculating 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:

> *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."

6. In the present case, there were deficiencies as pointed out by the trial Court in the impugned Judgment. We have come to the conclusion that prosecution failed to prove it's case, trial Court has rightly extended benefit of doubt to the accused and acquitted respondent / accused while relying upon the judgment of TARIQ PERVEZ v. THE STATE 1995 SCMR 1345.

7. For the above stated reasons, once again it is observed that judgment of the trial Court was neither arbitrary nor perverse Finding of acquittal recorded in favour of respondent / accused by the trial Court is 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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