IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Acquittal Appeal No.D-38 of 2020

PRESENT
Mr. Justice Naimatullah Phulpoto
Mrs. Justice Rashida Asad.

Date of Hearing:	*12.08.2020*
Date of Judgment:	*12.08.2020*
Appellant:	*The State / Anti-Narcotics Force, through Mr. Muhammad Ayoob Kassar, Special Prosecutor.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J.– Through this Criminal Acquittal Appeal, appellant / complainant has impugned the judgment dated 21.12.2019 passed by learned Sessions / Special Judge (CNS), Hyderabad in Special Case No.162 of 2017 for offence under Section 9(c) of Control of Narcotic Substances Act, 1997. On the conclusion of the trial vide judgment dated 21.12.2019, respondent / accused namely Muhammad Yousuf was acquitted.

2. Brief facts of the prosecution case, as reflected in the judgment of the trial Court, are that on 20.09.2017 ANF officials, Hyderabad received information that a known narcotic dealer Pado Chando would deliver narcotics through his henchman named Muhammad Yousif near Agha Taj Muhammad Academy in front of Kausar Masjid, Hussainabad. On such information, a party comprising Inspector Abdul Rasheed, ASI Qurban, PC Shakoor, PC Ahmed, PC Imtiaz and other ANF officials was informed who took

the informer and left at about 10:00 a.m. under the supervision of Assistant Director Muhammad Akram Niazi in the official vehicle vide entry No.6. It is said that when at about 10:15 a.m. they reached at the said place, on seeing one person with shopper, the informer pointed out for him to be the relevant person. He was thus apprehended and asked about his identity who affirmed his name as Muhammad Yousif son of Muhammad Siddiq, Ghunno, resident of village Haji Hashim Gbunno, Taluka Jati District Thatta. The people of public available there wre asked to act as mashirs but they declined, whereafter PC Shakoor and PC Imtiaz were nominated as mashirs and in their present, the shopper was snatched from the accused and on opening it, pieces of chars of different sizes were secured from it which were weighed and found to be in all 1050 grams. On his bodily search, his CNIC and cash of Rs.500/- were also secured from him. The charas was sealed on the spot and the accused was arrested under a mashirnama attested by the above named mashirs and then taken to ANF Police Station Hyderabad where the case was registered against him by Inspector Abdul Rasheed on behalf of State under Section 9(c) of CNS Act, 1997.

3. On the conclusion of the investigation, challan was submitted against the accused under the above referred section.

4. Learned Trial Court framed the charge against the accused. He pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant Inspector Abdul Rasheed, PW-2 Mashir Constable Abdul Shakoor,

PW-3 Constable Muhammad Ameen and PW-4 Sub-Inspector Sami Hayat and thereafter prosecution side was closed.

6. Statement of accused Muhammad Yousuf was recorded under Section 342 Cr.P.C, in which accused claimed false implication in this case and denied the prosecution's allegation.

7. Learned trial Court after hearing learned counsel for the parties and assessment of the evidence vide judgment dated 21.12.2019 acquitted the accused / respondent for the following reasons:-

> **"** *On perusal of the above evidence, it would appear that both the eye-witnesses i.e. complainant and mahsir 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 important and noteworthy aspects of the case are that the recovery was claimed from a populated area during broad hours of the day and that too in pursuance of information yet nobody from public was taken as mashir. Neither was such person arranged on receiving the information nor was picked from the way. Further, while it was claimed by the complainant and mashir that people available at the place of recovery were asked to act as mashirs who declined but details of such persons were given leaving aside any action against them. It may be observed that in the cases of narcotics, association of mashirs from public was not so essential as argued by the learned SPP but it has been held by the Superior Courts in several cases that if people from public were easily*

available, it would be expedient to associate them to add sanctity to the proceedings of recovery. Rliance can be made to the case of Nazeer Ahmed vs State (PLD 2009 Karachi 191). Further, the complainant and mashir have also not given the details of vehicles in which they went and although it was said that the charas was secured in shape of pieces but neither was their number given nor were they weighed separately. Furthermore, it was mentioned in the FIR and mashirnama and deposed by the complainant and mashir that the ANF party was led by Assistant Director Muhammad Akram Niazi but he was not examined before the Court who as a matter of propriety, being senior officer of the ANF party ought to have been examined before the Court. This also had its' effect upon the case of prosecution and for such reason, the case of prosecution was disbelieved by the Hon'ble High Court and the accused was acquitted despite huge recovery of 24 K.Gs of charas. Reliance in this context can be made to the case reported as Mir Muhammad vs. State (2008 MLD 1333). Here another striking factor was that the accused belonged to district Thatta and it was hard to believe that he would come all the way from Thatta with charas in a shopping Mr. Bilawal Ali Ghunio, State Counsel. unnoticed by anybody during his entire journey and make himself available at a conspicuous public place in Hyderabad in day-time. These factors if viewed together, create doubt in the case. There seems no cavil with the propositions laid down in the cases cited by the learned SPP but each case is to be decided on its' own merits. Thus without going into plea of false implication of the accused, it can safely be concluded that the prosecution has not been able to satisfactorily

prove the charge of recovery of charas from the accused."

8. The State / ANF being dissatisfied with acquittal of the accused has filed this appeal.

9. Learned Special Prosecutor appearing for ANF has mainly contended that impugned judgment of the trial Court is based on misreading and non-reading of evidence. It is also argued that trial Court has disbelieved strong evidence without assigning sound reasons, and prayed for converting the acquittal of the accused to the conviction.

10. It is settled law that ordinary scope of acquittal appeal is considerably narrow and limited and obvious approach for dealing with the appeal against the conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of accused is attached to the order of acquittal. In case of ***Zaheer Din v. The State*** **(1993 SCMR 1628),** following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:

> **"***However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases-law on, the question of setting aside an acquittal by this Court. They are as follows:--*
>
> *(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings*

of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for reappraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

(2) The acquittal will not carry the second presumption and will also thus lose the first one if on pints having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

(3) In either case the well-known principles of reappraisement of evidence will have to be kept in view while examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observations of some higher principle as noted above and for no other reason.

(4) The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional

cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous. **"**

11. In the recent judgment in the case of ***Zulfiqar Ali v. Imtiaz and others*** **(2019 SCMR 1315),** the Honourable Supreme Court has held as under:

"*2. According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB. There is a reference to M/s Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not open to any legitimate exception.* ***It is by now well-settled that***

> ***acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.*** *Criminal Appeal fails. Appeal dismissed.*"

12. In the present case, the learned trial Court has rightly come to the conclusion that the complainant and mashir had failed to give the details of the vehicle in which they had gone to the place of the alleged recovery. It is matter of the record that charas was secured in the shape of the pieces, but neither the number of such pieces has been given nor its weight has been shown. The prosecution had also failed to examine Assistant Director Muhammad Akram Niazi, head of the ANF party, without furnishing sufficient explanation. It was the case of recovery of the charas from thickly populated area during broad day light hours but admittedly nobody from the public was associated as mashir by the ANF officials so as to establish the alleged recovery of charas.

13. Learned Special Prosecutor appearing for the appellant / complainant / ANF has not been able to point out any serious flaw or infirmity in the impugned judgment. The view taken by the learned trial Court is a possible view, structured in evidence available on the record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted to an accused cannot be recalled merely on the possibility of a contra view. Unless, impugned

view is found on fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.

14. Keeping in view the above stated circumstances as well as law laid down by the Superior Court, this Criminal Acquittal Appeal is without merit and the same is dismissed in limine.

JUDGE

JUDGE

Shahid