

PRESENT

26/4/95

By Registrar (U)

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IN THE HIGH COURT OF SINDH AT KARACHI.

Crl. Acquittal Appeal No. 193 /95.

State,
through Advocate General Sindh
and Public Prosecutor APPELLANT.

Vs.

Shahbaz Khan s/o,
Anwar Khan @ Sardar Khan,
Adult, Muslim by caste Pathan,
R/O Sikandarabad, D-79, Osimabail Hyderabad.
Ketri. House No: RESPONDENT / ACCUSED

F/A

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

Cr. Acquittal Appeal No.D- 193 of 1995

PRESENT

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

Date of Hearing: 12.10.2021
Date of Judgment: 12.10.2021

Appellant: The State through Mr. Muhammad
Ayooob Kassar, Special Prosecutor
ANF.

Respondent: Called absent.

J U D G M E N T

Rashida Asad, J.—Appellant/State has filed this appeal against acquittal of respondent Shahbaz Khan S/o Anwar Khan alias Sardar Khan, who was tried by Judicial Magistrate, Kotri in Criminal Case No.81 of 1994 for offence under Articles 3/4 of Prohibition (Enforcement of Hadd) Order, 1979.

2. Brief facts of the prosecution case are that on 27.02.1993, upon receiving spy information Field Investigation Officer of Narcotic Control Board, Hyderabad, alongwith his sub-ordinate staff left police station and reached at the house of Anwar Khan alias Sardar Khan, to arrest him under the suspicion that he had a huge quantity of Narcotic substance, in his house for transporting to Karachi. When police party reached at the house of aforesaid accused Anwar Khan, he was not found at home, but a boy (respondent herein) who came out of the house and told ANF officials that he was son of Anwar Khan, on which the said boy/present respondent was arrested and abovementioned criminal case was registered against him. It is further stated that ANF officials secured 200 Nylon bags containing 4000 kilograms Charas from the house.

3. On conclusion of the investigation, challan was submitted against the respondent under Articles 3/4 of Prohibition

(Enforcement of Hadd) Order, 1979. Whereas co-accused/father of the respondent namely Anwar Khan was shown as absconder by the trial Court. Thereafter, trial Court framed the charge against respondent/accused. He pleaded not guilty to the charge and claimed to be tried.

4. At the trial, the prosecution to prove its case, examined as many as 03 witnesses and produced number of documents. Respondent/accused Shahbaz Khan in his statement under section 342 Cr.P.C, claimed his false implication in this case and denied the prosecution's allegations.

5. Learned trial Court after hearing learned counsel for the parties and assessment of the evidence available on record vide judgment dated 08.01.1995 acquitted the accused/respondent mainly for the following reasons:-

"I am of the view that prosecution has not proved the case against present accused Shahbaz Khan without reasonable doubts on the following reasons:-

1. All the three PWs have stated that they received SPY information regarding accused Anwar Khan alias Sardar Khan (Now absconding) that he was dealing in Charas but they caught the boy (present accused) who opened the door of the house from where recovery was effected. According to prosecution the main accused Anwar Khan alias Sardar Khan made his escape good by climbing over the wall of the raided house. The I/O further stated that accused Shahbaz Khan disclosed before him that the recovered Charas belonged to his father Anwar Khan who escaped by climbing over the wall. But I/O failed to get the statement of accused recorded before any Magistrate. And the Confession before police Officer is inadmissible under article 38 of Qanun-e-Shahadat. Except the above evidence there is no other evidence against him (accused Shahbaz) that recovered Charas was recovered from his exclusive possession or any other evidence that accused Shahbaz Khan kept the Charas for selling the same.

The I/O in his deposition (Ex.No:6) has stated that Charas was recovered from the house of accused Anwar Khan but he has not

clarified whether in whose exclusive possession the Charas was lying?. Hence the prosecution has miserably failed to ascertain the exclusive possession of the alleged recovered property viz Charas because the burden of proof lies upon prosecution. There is no evidence on record that the property was recovered from the exclusive possession of accused Shahbaz Khan. Logically all family members can not be held responsible for the act of one individual.


2. The both mashirs in their depositions (Ex.No:7) and Ex.No:8 have also not deposed upon the point of exclusive possession of Charas by present accused Shahbaz Khan.
3. The provisions of Section 103 Cr.P.C. have not been observed by the I/O which is, mandatory, as the place searched was a dwelling house. No respectable persons of the locality were taken as mashirs which make the prosecution case doubtful.
4. The complainant Khaliduddin who is also I/O stated in his examination in Chief (Ex.No:6) that he received SPY information at Railway Crossing Kotri while in his Cross Examination, he replied that he had received SPY information on telephone at his office. This is quite material contradiction which cannot be over looked and makes the prosecution story doubtful.

Under the circumstances, I giving the benefit of doubt, acquit present accused Shahbaz Khan in this case u/s 245(ii) Cr.P.C.”

6. The State being dissatisfied with acquittal of the respondent/accused has filed this acquittal appeal in the year 1995.

7. Today, respondent is called absent. This appeal against acquittal pertains to the year 1995, we, therefore, intend to decide the same on the basis of material available on record and after hearing Special Prosecutor ANF.

8. Upon putting specific query about the case of absconding accused, the learned Special Prosecutor ANF replied that absconding/main accused Anwar Khan alias Sardar Khan was subsequently arrested and was acquitted by the trial Court vide judgment dated 10th July, 2006. Learned Special Prosecutor ANF



has also admitted that acquittal in favour of said Anwar Khan has not been challenged by the State.

9. Learned Special Prosecutor ANF has mainly contended that the reasons assigned by the trial Court while acquitting the accused/respondent Shahbaz Khan are not cogent; that huge quantity of Charas was recovered from his home; that impugned judgment of the trial Court is based on misreading and non-reading of evidence. Lastly it is submitted that trial Court has failed to appreciate the evidence according to the settled principles of law, and prayed for converting the acquittal of the respondent/accused to the conviction.

10. After hearing the submissions made by the learned Special Prosecutor ANF and by going through the record as well as reasoning assigned by the learned trial Court, we are unable to find any merit in the appeal against acquittal for the reasons that impugned judgment is neither perverse nor speculative in the eyes of law and it deserves only dismissal.

11. It is admitted fact that a young boy, the son of main accused was arrested from home due to alleged escape of main accused/father of respondent, which act of police is highly doubtful. Admittedly, the main accused (absconder) was later arrested and vide judgment/order dated 10th July, 2006, acquitted from the charges. State did not challenge such acquittal.

12. 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 reappraisal 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 points 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 reappraisal 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."

13. Learned Special Prosecutor appearing for the appellant/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 ^{Honble Supreme} the Superior Court, this Criminal Acquittal Appeal is without merit and the same is dismissed accordingly.

Sd/ MRS. RASHIDA ASAD,
JUDGE. 13.10.2021.

Sd/ NAIMATULLAH PHULPOTO,
JUDGE. 13.10.2021.