

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

Criminal Acquittal Appeal No. D-30 of 2013

Present:-

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Arshad Hussain Khan

Appellant: The State / Anti Narcotics Force through
Mr. Muhammad Ayoob Kassar, Special Prosecutor, ANF.

Respondent: Faiz Muhammad Khoso.
None present for the respondent.

Date of hearing: 15.02.2018

Date of Decision: 15.02.2018

J U D G M E N T

ABDUL MAALIK GADDI, J:- This criminal acquittal appeal has been filed by the State / Anti Narcotics Force through A.D Law, against the judgment dated 30.03.2013 of the learned Special Judge under Control of Narcotic Substances Act, Hyderabad in Special Case No.136/2008 relating to Crime No.10/2008 registered at P.S ANF Hyderabad under section 9(b) of CNS Act, 1997, whereby the learned trial court after full dressed trial acquitted the respondent by giving him benefit of doubt.

2. Precisely, the facts of the prosecution case are that on 16.09.2008 at 1200 hours, the accused was found in possession of 750 grams of charas at General Bus Stand Badin Stop, Hyderabad by complainant Inspector / S.H.O Ghulam Mustafa of PS ANF, Hyderabad and he in presence of witnesses namely HC Rahim Bux and PC Muhammad Tanveer prepared the mashirnama of arrest and recovery. After completing the investigation, the accused was sent up to the Court of law.

3. The charge against the accused was framed at Ex.3, to which accused pleaded not guilty and claimed to be tried vide his plea at Ex.3/A.

4. At the trial, the prosecution examined PW-1/mashir Constable Muhammad Tanveer Aslam at Ex.4, who produced mashirnama of arrest and recovery at Ex.4/A & PW-2 complainant Assistant Director Ghulam Murtaza at

Ex.5, who produced entry of departure and arrival back at PS at Ex.5/A, F.I.R. at Ex.5/B, letter for chemical analysis as Ex.5/C, report of Chemical Examiner at Ex.5/D, letter to S.H.O Digree at Ex.5/E and criminal record of accused at Ex.5/F. Thereafter, the prosecution closed its side vide statement at Ex.6.

5. The statement of the accused was recorded at Ex.7, wherein he has denied the allegation of the prosecution and has claimed his innocence. However, he neither examined himself on oath under section 340(2), Cr.P.C nor led evidence in his defence.

6. The trial court after hearing the learned counsel for the parties and assessment of evidence, by impugned judgment, acquitted the respondent as stated above. Hence, this appeal has been filed by the appellant.

7. It appears from the record that this Criminal Acquittal Appeal was filed on 26.09.2013. Thereafter, time and again notices were issued to the respondent / accused but all the time it has been reported that the respondent has shifted to some unknown place. Under the circumstances, learned Special Prosecutor for ANF was directed to assist the court on merits of this appeal, therefore, he has been heard at length.

8. Mr. Muhammad Ayoob Kassar, learned Special Prosecutor, ANF has supported the case of the prosecution by arguing that both the prosecution witnesses have implicated the accused in the commission of the offence and their evidence is trust worthy and faith inspiring. Besides that, he was of the view that no major contradiction in the evidence of the prosecution witnesses has been pointed out by the defence advocate and Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities. He further argued that the trial court while acquitting the respondent has ignored the evidence of the prosecution witnesses and acquitted the respondent on flimsy ground, therefore, he has prayed that this appeal may be allowed. In support of his arguments learned Special Prosecutor for ANF has relied upon the case law reported as 2017 SCMR 1874 (Muhammad Sarfraz versus The State and others), PLD 2006 Supreme Court 61 (Ghulam Qadir versus The State) and 2008 SCMR 1254 (Zafar versus The State).

9. It is settled principle of law that burden to prove the case is always lay on the prosecution to prove the allegation and prosecution has to succeed on the strength of its own case and not on the weakness of the defense.

10. Keeping all the attending circumstances, the evidence borne over the record and the contradictions arriving, the burden to prove the possession of charas U/S 6 of CNS Act, 1997 leading to contravention U/S 9 of CNS Act, 1997 has not been fully discharged by the prosecution to prove beyond any shadow of reasonable doubt as to the commission of offence. The prosecution evidence is not confidence inspiring.

11. We have in our consideration the evidence of constable Tanveer Aslam, who in his cross-examination has clearly stated that no sample was separated and the charas was weighed alongwith punni/wrappers and that the quantity of wrapped charas is not mentioned in the mashirnama so also denomination of currency notes was not mentioned in the mashirnama. From perusal of mashirnama, it appears that the recovery has been made from inside Bandi from different pockets, different size charas wrapped in white punni. What has been specifically stated there being total weight was 750 grams charas.

12. The perusal of statement of IO is in our consideration, who received such information through spy that Faiz Muhammad was selling charas at Badin stop, who took informer with him and in 10 minutes time recovered charas on his pointation from the accused. This PW has also stated in cross-examination that he has not separated sample and has sent all of the property to Chemical Examiner. He has also not counted the puries of charas wrapped in plastic thelli and further stated in cross examination that the puries of charas are in same condition as he has recovered. We have also perused the evidence of I.O / complainant who has stated that he has weighed the charas on electronic scale and stated that electronic weighing machine was in his car with the kit, however, he has stated that this has not been mentioned in the mashirnama.

13. We have also gone through the chemical examiner's report which speaks of 750 grams of charas as mentioned in mashirnama. However, the test performed is stated to be 800 grams and 3 grams of contents were consumed from each piece in analysis. Upon perusal of mashirnama, chemical report and the statement of mashir & I.O is that the charas wrapped in plastic puries were on being asked in cross-examination, they have stated that it is the same in the plastic puries so the punni puries of containing charas being the same having not been counted have passed through chemical examination. This aspect creates doubt on the recovery of charas. Be that the charas may be chemically tested as positive, however, the wrappers of punni lacks veracity in its recovery having not been counted and the gross weight as shown in chemical report to be 800 grams

which may be with the chemical mixture of the Chemical Examiner, however during the opening of the property, the wrappers were found in same condition as were stated to be recovered, therefore, no safe reliance can be placed on such a recovery. In such perspective, false implication of accused as alleged gives room for benefit of doubt upon which no conviction can be based on such contradictory and unsupported evidence.

14. During the course of arguments, we have specifically asked the question from learned Special Prosecutor for ANF to point out / show any piece of evidence, which is not supportable from the record, no satisfactory answer was available with him. From the perusal of record it reveals that the trial court has rightly acquitted the respondent / accused through impugned judgment, which is neither perverse nor arbitrary. So far as the appeal against the acquittal is concerned after acquittal, respondent / accused has acquired double presumption of innocence, this Court would interfere only if the judgment / order was arbitrary, capricious or against the record. But in this case, there were number of infirmities and impugned judgment of acquittal in our considered view did not suffer from any misreading and non-reading of documents on record. As regard to the consideration warranting the interference in appeal against acquittal and an appeal against conviction principle has been laid down by the Hon'ble Supreme Court in various judgments. In case of *State/Government of Sindh through Advocate General Sindh, Karachi versus Sobharo* reported as *1993 SCMR 585*, Hon'ble Supreme Court has laid down the principle that in the case of appeal against acquittal while evaluating the evidence distinction is to be made in appeal against conviction and appeal against acquittal. Interference in the latter case is to be made when there is only gross misreading of evidence, resulting in miscarriage of justice. Relevant portion is reproduced as under:-

“14. We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view that evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal appeal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed.”

15. For what has been discussed above, we are of the considered view that the impugned judgment is based upon valid and sound reasons and is entirely in consonance with the law laid down by the Honourable Supreme Court of

Pakistan. Neither, there is misreading, nor non-reading of documents on record or misconstruction of facts and law. Resultantly this Criminal Acquittal Appeal is without merits and the same is dismissed. These are the reasons of our short order announced in open court today i.e 15.02.2018.

JUDGE

JUDGE

A.H.