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

Criminal Acquittal Appeal No. D-209 of 2007

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.
Respondents:	None present for the respondent.
Date of hearing:	14.02.2018
Date of Decision:	14.02.2018

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 its Deputy Director (Law), ANF against the judgment of the learned Special Judge under Control of Narcotic Substances Act, Hyderabad in Special Case No.14/2005 relating to Crime No.02/2005 registered at P.S ANF Hyderabad under section 9(c) of CNS Act, 1997, whereby the learned trial court after full dressed trial acquitted the respondent by giving them benefit of doubt.

2. Precisely, the fact of the prosecution case are that on 04.02.2005 at 1215 p.m when Inspector Mir Badshah S.H.O P.S ANF Hyderabad was on patrolling duty within the jurisdiction of the police station in the official vehicle alongwith his subordinate staff and when reached at Pathan Colony, old Bus Stand near PSO Petrol Pump, he saw the accused in suspicious condition having a bag in his hand. The accused tried to flee away seeing the officials of the ANF, but he was apprehended and from his possession 4.60 kilograms of charas lying in his hand bag was recovered in presence of mashirs ASI Muhammad Fareed Abbasi and PC Abdul Hameed. The samples were sent to the Chemical Examiner whose report was found positive. Hence this appeal.

3. The trial court framed charge against accused/respondent under section 9(c) Control of Narcotics Substances Act, 1997 on 21.11.2005 at Ex.3 to which accused pleaded not guilty and claimed to be tried vide his plea at Ex.4.

4. At the trial the prosecution examined the 2-witensses i.e the complainant Mir Badshah, Ex.7, who produced all the documents as well as the report of the chemical examiner at Ex.7/A to 7/E. During his cross, he produced the challan sheet as Ex.7-F and ASI Muhammad Fareed Abbasi at Ex.8. These witnesses wee cross examined by the counsel for accused. Thereafter, learned Special Prosecutor for ANF closed its side vide statement at Ex.9 dated 27.04.2007.

5. Statement of accused / respondent was recorded u/s 342, Cr.P.C at Ex.10 in which he denied the allegations as leveled by the prosecution and stated that he is innocent and has been falsely involved in the case by complainant on 02.02.2005 at 10:00 p.m from Market Area in a Rickshaw when he was going to his relative's home. He also examined himself on oath under section 340(2), Cr.P.C at Ex.11. Respondent /accused did not examine any witness 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 19.10.2007. Thereafter, time and again B.Ws and N.B.Ws were issued to the respondent / accused through concerned S.H.O of P.S A.N.F but the same are returned as unexecuted, as such, 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 contended that the judgment passed by the learned trial court is perverse and the reasons are artificial, vis-à-vis the evidence on record; that the grounds on which the trial court proceeded to acquit the respondents are not supportable from the evidence on record. He further submitted that the respondents have been directly charged and that the discrepancies / lacunas in the record are not so material on the basis of which respondents could be acquitted. He further contended that the learned trial court has based its finding of acquittal merely on the basis of surmises and conjectures and the learned trial Judge has not properly appreciated the grounds of the appellant. He further submitted that the evidence of police officials is as good as of any other person and as such, provisions of section 103, Cr.P.C are not applicable in the instant case, therefore, under the circumstances he was of the view that this appeal may be allowed as prayed. In support of his contention learned Special Prosecutor for ANF has relied upon the case law

reported as 2017 SCMR 1213 (State through Director General, Anti-Narcotics Force versus Abdul Jabar alias Jubbara), 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. We have heard the learned Special Prosecutor for ANF and after going through the record come to the conclusion that the prosecution has failed to establish its case against the respondents for the reasons that it has been brought in evidence that the incident took place on 04.02.2015 at about 12.15 p.m and the accused was arrested from Pathan Colony, old Bus Stand near PSO Petrol Pump. It has also been brought in evidence of complainant Mir Badshah that the place of incident was surrounded by shops and people were available. For the sake of convenience it would be proper to reproduce the relevant portion of the cross examination admitting this fact by the said witness, which is reproduced as under:-

> *"It is correct that at the place of incident there were a number of persons present there at the time when we reached there. It is correct that there are a number of shops which were open at that time. I did not record the statement of any such person. I did not issue any notice to appear before me to record his statement."*

10. From perusal of evidence of said witness it is crystal clear that at the time of arrest of the appellant the people were available but despite of this fact complainant did not bother to associate any independent person from the place of incident to witness the arrest and recovery proceedings. It is settled principle that judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police officials alone. We are conscious of the fact that provisions of section 103, Cr.P.C are not attracted to the cases of personal search of accused relating to the narcotics. In such cases, however, where alleged recovery was made from the place where the people were available there as happened in this case, omission to secure the independent mashirs, cannot be brushed aside lightly by this court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on the part of the police during course of recovery, curbs false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery from respondent, complainant did not associate any private person to act as recovery witness and only relied upon his subordinates and furthermore he himself registered the FIR and investigated the case. In our view, investigation officer of police or such other force, under section 25 of Control of Narcotic Substance Act, 1997 was not authorized to exclude the independent witness. It

does not do away with the principle of producing the best available evidence. No doubt that no specific bar exists under the law against complainant who is also the investigation officer of the case, but being the complainant it cannot be expected that an investigation officer he will collect any material which goes against the prosecution or gives any benefit to the accused. Evidence of such officer therefore, is a weak piece of evidence and for sustaining a conviction it would require independent corroboration which is lacking in this case. We are supported with the case of Nazir Ahmed v. The State, reported in PLD 2009 Karachi 191 & Muhammad Khalid v. The State, reported in 1998 SD 155. Hence as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out. We have also noted the number of contradictions in the evidence of the prosecution witnesses with the able assistance of learned Special Prosecutor for ANF and when confronted these contradictions to the learned Special Prosecutor for ANF, he could not reply satisfactorily.

11. We have also gone through the evidence alongwith impugned judgment with the able assistance of Special Prosecutor for ANF and find number of infirmities and lacunas in between the statements of prosecution which are material and fatal to the prosecution case and these lacunas have been highlighted by the learned trial court in its judgment of acquittal. For the sake of convenience it would be proper to reproduce the relevant portion of the impugned judgment, which reads as under;-

> *"Notwithstanding this, the material lacuna in the case of the prosecution is that no evidence was brought on the point that the 20 samples which were said to have been separated from the incriminating substance allegedly recovered from the hand bag of the accused, were sent to the Chemical Examiner and the report Ex.7-C is in respect thereof. The best evidence in this regard could be the wrappers in which these samples were wrapped and sealed which were said to have been signed by the complainant and the two witnesses before sending to the chemical examiner, therefore, after examination of these samples by the Chemical examiner, the same must have been sent back to the SHO concerned who was bound to produce the same before this court and to depose that these were the same wrappers which were signed by him and the mashirs. In that case only the court could held that the same contents which were separated from the incriminating substance recovered from the bag of the accused were examined by the Chemical Examiner. No explanation for that default has been submitted by the prosecution therefore, this court is unable to decide that the incriminating substance recovered from the bag of the accused was narcotic/charas. Mere fact that the report Ex.7-E shows that 20 samples were sent to the chemical examiner bearing No.1/1 to 5/4 does not ipsofacto proves this, until and unless the wrappers in which the contents were found brought before the court, therefore, the evidence produced by the prosecution is not sufficient to hold that the accused was found in possession of the narcotic."*

12. From the perusal of documents on record as well as the impugned judgment, it appears that the impugned judgment of the trial court is based upon sound reasons. 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 have acquired double presumption of innocence, this 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."*

13. 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 No.209 of 2007 is without merits and the same is dismissed.

JUDGE

JUDGE

A.H.