For uploading

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE SH. NAJAM UL HASAN, CHIEF JUSTICE
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.141-Q OF 1998

STATE THROUGH DEPUTY ATTORNEY GENERAL FOR PAKISTAN.

APPELLANT

VERSUS

1. IBRAHIM SON OF MANDHA,
2. BISHAM SON OF FAQIR,

BOTH BHEEL BY CASTE, RESIDENT OF MOUZA CHOUNCA, TURBAT.

RESPONDENTS

COUNSEL FOR THE STATE/ APPELLANT	...	MR. YAHYA KHAN, DEPUTY PROSECUTOR-GENERAL BALUCHISTAN.
COUNSEL FOR THE ANF.	...	MR.SHAMS-UD-DIN ACHAKZAI, SPECIAL PROSECUTOR.
COUNSEL FOR RESPONDENTS NO.1 AND 2.	...	MR. NAJAM-UD-DIN-MENGAL. ADVOCATE.
FIR NO. DATE AND POLICE STATION	...	21 (R) 1993. 31.05.1993 PAKISTAN NARCOTICS CONTROL BOARD (PNCB), QUETTA.
DATE OF ORDER OF TRIAL COURT	...	21.09.1998
DATE OF PREFERENCE	...	11.11.1998
DATE OF HEARING	...	14.12.2017
DATE OF DECISION	...	14.12.2017
DATE OF JUDGMENT	...	19.12.2017

JUDGMENT:

Mehmood Maqbool Bajwa, J: Being dissatisfied with the order dated 21st of September, 1998 handed down by learned Sessions Judge, Khuzdar, acquitting the respondents while accepting the application under Section 265-K of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code), the State has preferred the present appeal for setting aside the conclusion arrived at in case FIR No.21 (R) of 1993 registered under Articles 3, 4 and 26 of The Prohibition (Enforcement of Hadd) Order IV of 1979, (Hereinafter called Order IV of 1979).

2. Crime report was lodged on 31st of May, 1993 on the complaint of Syed Ishtiaque Hassan, Senior Intelligence Officer (Customs & Excise), Karachi (P.W.1) with the accusation that on 18th of May 1993, spy information was communicated that at about 76 kilometers from Ormara Airport, huge quantity of *charas* has been dumped in the caves for the purpose of smuggling by the respondents and others. Since the place pointed out was not easily accessible, therefore, with the help of Pakistan Navy, a raiding party was constituted comprising the officials of Customs and Intelligence Department, Pakistan Navy and on 20th of May, 1993, the raiding party went to the pointed place on fokker airplane as well as helicopters of Pakistan Navy. It was noticed that armed people were on guard on the mountains who after seeing helicopters which were in landing position managed to escape from the said place.

As per allegation, search was made from 20th of May to 28th of May 1993 and after flag search 460 bags of *charas* weighing at 40,000 K.G. were recovered.

Out of recovered contraband material, 15 slabs weighing 15 K.G. were separated for the purpose of sample, sealed into parcels alongwith the remaining narcotics.

3. The respondents were formally charged under Articles 3, 4 and 26 of President Order No. IV of 1979 who did not plead guilty and claimed to be tried.

4. Syed Ishtiaque Hassan, complainant appeared as P.W.1.

5. The respondents made an application under Section 265-K of The Code claiming acquittal with the plea that there is no probability of their conviction which application after hearing the adversaries was allowed through order assailed.

6. Learned Law Officers making reference to the record contended that proper opportunities were not granted to the prosecution to prove its case against the respondents. Submitted that the order assailed is result of misreading and non-reading of the evidence recorded in the trial against the respondents as well as adduced earlier by the prosecution during the trial of co-accused.

Continuing the arguments, the learned Law Officers went on saying that while setting aside the order impugned, case be remanded for its

afresh decision while providing opportunity to the prosecution to produce evidence.

On the other hand, the learned Counsel representing the respondents maintained that it is a case of no evidence. Drawing our attention to the allegations contained in the crime report, it was submitted that names of the respondents were incorporated after due deliberation and that too without any cogent evidence.

Continuing the arguments, it was further submitted that Abdul Samad, Dad Muhammad, Ismail and Haji Asghar to whom similar role was ascribed were acquitted and the judgment/order was not assailed. Further argued that there is no evidence at all to connect the respondents in the commission of crime.

7. Conscious consideration has been given to the arguments advanced while perusing the record.

8. Prior to dealing with the respective contentions, keeping in view the case of prosecution, evidence adduced (P.W.1) and collected during the course of investigation, it is desirable to know the yardstick for recording acquittal under the provision of law, under which the order assailed was made.

9. Provisions of Section 265-K of The Code empowers the Court to acquit an accused at any stage of the case, if it considers that there is no probability of his conviction. The provision does not qualify the stage of exercise of powers in view of use of expression "At any stage". Only

condition imposed is to provide "right of hearing" to the prosecutor and then "Reasons are required to be recorded" to reach the conclusion.

10. The expressions "consider" and "no probability of conviction" used in the provisions under reference are important and significant which admittedly have not been defined in The Code.

The expression "consider" has been defined in Oxford Dictionary of English (Second Edition) as follow:

> "**consider** ▶ **verb** [with obj.] think carefully about (something), typically before making a decision: *each application is considered on its merits* | [as adj. **considered]** *I may not have time to give a considered reply to suggestions.*"

In Lexicon Webster Dictionary Volume-I, it means as under:

> "**con.sid.ered,** kon.sid'erd, a. Arrived at by careful thought and evaluation; as, his *considered* opinion; looked upon with respect."

The word "probability" has been defined in Oxford Dictionary of English (Second Edition) according to which the expression means:

> "**probability** ▶ **noun** (pl. **probabilities**) [mass noun] the quality or state of being probable; the extent to which something is likely to happen or be the case: *the rain will make the probability of a postponement even greater.*"

In the Lexicon Webster Dictionary (Volume-II), "the expression "probable cause" has been defined in a following manner:

> "**prob.a.ble cause,** *n. Law,* reasonable grounds for believing in the guilt of one charged with an offense."

In Black's Law Dictionary (Eight Edition) "probable cause" has been interpreted in a following way:

> "**probable cause. 1.** *Criminal law.* A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with

crime. • Under the Fourth Amendment, probable cause -which amounts to more than a bare suspicion but less than evidence that would justify a conviction — must be shown before an arrest warrant or search warrant may be issued —......."

11. Purpose and object behind incorporation of provision of Section 265-K of The Code is to prevent the rigorous trial when it is apparent that there is no probability of conviction of the accused.

Keeping in view the definition of both the expressions referred earlier, evidence available with the prosecution has to be examined, as it is, whether produced or yet to be recorded and while taking it as gospel truth, it has to be considered whether there is any probability of conviction of the respondents by proving the charge. In case query is answered in negative, then recording of further evidence would result in wastage of time and will not serve any useful purpose.

It is further to be noted that evidence in any form has to be "scanned" and "cursory examination" will not be sufficient to satisfy one of the yardstick, i.e., "consider". Conscious application of judicial mind is required for evaluation of incriminating material collected during the course of investigation in order to test the same on the touchstone of "probability".

Dealing with the scope and extent of powers of the Court under Section 265-K of The Code in "THE STATE through Advocate-General, Sindh High Court of Karachi v. Raja ABDUL REHMAN" (2005 SCMR 1544), the Apex Court held at page-1554 as follow:

"This Court in the case of Bashir Ahmad v. Zafar ul Islam PLD 2004 SC 298 and Muhammad Sharif v. The State and another PLD 1999 SC 1063 (supra) did not approve decision of criminal cases on an application under section 249-A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K, Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused under section 342, Cr.P.C., recording of statement of accused under section 340(2), Cr.P.C. if so desired by the accused persons and hearing the arguments of the counsel of the parties and that the provisions of section 249-A, section 265-K and section 561-A of the Cr.P.C should not normally be pressed into action for decision of fate of a criminal cases.

14. In the aforecited cases, the principle laid down by this Court while dealing with the powers of the Courts under section 561-A, Cr.P.C. in quashing criminal proceedings pending before the trial Court is that when the law provides a detailed inquiry into offences for which an accused has been sent up for trial then ordinarily and normally the procedure prescribed by law for deciding the fate of a criminal case should be followed unless some extraordinary circumstances are shown to exist to abandon the regular course and follow the exceptional routes. Such exceptionable routes can also be one envisaged by section 249-A, Cr.P.C.........."

(underlining is ours)

The Apex Court in the same Report (atpage-1557) created line of distinction between "Acquittal on merits" and "Acquittal under Section 265-K of The Code" and highlighted yardstick for interference in appellate or revisional jurisdiction which reads as under:

"18. It will not be out of place to mention that in appeal or revisional proceedings, the order of acquittal of the accused section 249-A or section 265-K of the Cr.P.C. would not have the same sanctity as orders of acquittal on merits. Consequently, the principles which are to be observed and applied in setting aside concurrent findings of acquittal or the principle relating to the presumption of double innocence when an accused is acquitted after a fullfledged inquiry and trial to acquittals under section 249-A, Cr.P.C. would not be applicable........."

12. Keeping in view the dictum referred to, there can be no two opinions that in normal course, full-fledged trial has to be conducted providing fair opportunities to the prosecution to prove evidence. However, departure can be made from the settled practice when "Extraordinary circumstances" are shown.

The extraordinary circumstances means and includes inability of prosecution to collect incriminating evidence during the course of investigation, sufficient to record conviction. Question of production of evidence will arise only if it is collected during the course of investigation.

Due to use of words "At any stage" though powers can be exercised even prior to recording evidence and before framing of charge but the condition is careful analysis and evaluation of evidence collected in order to determine reasonable grounds regarding commission of offence by a particular person.

We may advantageously make reference to the provision of Section 265-D of The Code, suggesting material for the purpose of framing charge. The word "opinion" has been used in the provision under reference instead of expression "consider" contained in Section 265-K of The Code. Similarly words "ground for proceeding" has been employed in earlier-mentioned provision instead of "No probability of conviction".

Though test mentioned in Section 265-K of The Code is harder and stringent but the material for consideration would be the same as suggested in Section 265-D of The Code, if evidence has not been recorded.

13. On our query, the learned law officer admitted that the only evidence against the respondents is statements of complainant (P.W.1), Iqbal Raza Naqvi, Riaz Leghari, Hashmat Ullah, Khurram Aslam and Masroor Ahmad Burni (whose statements were recorded under Section 161 of The Code), besides recovery memo (Ex.P.1-A) through which *charas* was secured from the dumping points.

14. Keeping in view the definition of expressions "consider" "No probability of conviction" and Rule of law enunciated in the case of "Raja ABDUL REHMAN" (supra), we have to examine the statement of complainant who appeared as P.W.1 and other evidence collected during the course of investigation (as it was not recorded). If on scanning the evidence, we arrive at a conclusion that prejudice has been caused to the case of prosecution and the yardstick mentioned in Section 265-K of The Code is not satisfied, then there will be no option but to set aside the order assailed and remand the case.

15. Contents of the F.I.R. as well as Reports under Section 173 of The Code, submitted from time to time, reveals that more than eight persons were nominated. Contents of the F.I.R also suggest the names of respondents alongwith others being the accused. As per allegations when the fokker airplane and helicopters of Pakistan Navy were in a landing position, the armed persons at guard at the dumping sites managed to escape to the nearby mountains. It also finds specifically mentioned that despite hectic efforts, none of the armed persons could be arrested.

16. Though names of respondents finds mentioned in the crime-Report but source of information regarding names and other particulars of the respondents and role attributed to them is significant. Relevant portion of the F.I.R. is reproduced for ready-reference:

> *"As per source report lodged with the Regional Office of this Directorate General, Intelligence and Investigation (Customs and Taxation) Karachi, the accused persons named in the F.I.R. alongwith*

other particular offenders were involved in smuggling of charas in huge quantity.............."

(Emphasis supplied)

It is to be noted that except disclosure of name and other particulars of respondents with role explained suggesting past conduct and that too on the basis of spy report, nothing has been attributed to them. In the middle part of the Report, though it finds mentioned that armed persons were at guard on dumping points but un-deniably names of respondents does not figure there. Contents of the F.I.R. further reveal that armed persons managed to escape after hearing the noise of helicopters.

Accusation contained in the F.I.R. while treating them as bundle of truth by itself would not be sufficient even to stamp the respondents as an accused in the occurrence under report.

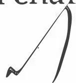
17. Record of the learned Trial Court reveals that statement of complainant (P.W.1) was recorded during course of trial against the present respondents, though in earlier round of trial against co-accused, all the witnesses (6 in number), were examined. Perusal of interim order dated 22nd of August 1998 made by learned trial court reveals that the learned counsel representing the respondents made request to the trial court to decide the application made by the respondents claiming acquittal even considering the evidence produced by the prosecution earlier, which request was allowed without any objection from the prosecution side.

18. Prayer was made to remand the case in view of non-provisions of proper opportunities to the prosecution to produce the remaining witnesses.

Serious thought was given by us to the prayer but we are not inclined to allow the request keeping in view the fact and circumstances of the case and the material collected during the course of investigation.

19. It is a matter of record that occurrence took place on 20th of May 1993. Report under Section 173 of the Code against the present respondents was submitted in the year 1996. Order impugned by way of present appeal was made on 21st of September, 1998 and appeal was preferred in the same year. After expiry of 19 years, it is not in the interest of the justice to remand the case for trial at the stage, from where it was decided, particularly keeping in view the material collected against the respondents during the course of investigation.

20. As referred earlier, neither the complainant nor any other witness whose name finds mentioned in the schedule of witnesses knows the respondents either by name or by face. Contents of the F.I.R. as well as Report under Section 173 of The Code clearly reveals that the respondents were named in the F.I.R. on source report (information furnished by spy). Undeniably name and particulars of the spy is not known, which prosecution even otherwise is not supposed to disclose. Implication of the respondents in view of the information furnished by secret sources, by itself would not be sufficient to connect the respondents in an offence under which they have been charged or any other offence.



21. We have gone through statement of Syed Ishtiaque Hassan, complainant (P.W.1) recorded during the course of trial against the present respondents, who in his direct statement maintained that it was Mukhbir who intimated the names of accused i.e., Basham, Abdul Hakeem, Saleh Muhammad, Dad Muhammad, Haji Asghar and others, total 8 in numbers. Statement of the complainant referred above, even if taken as gospel truth, would not be sufficient to connect Basham (respondent No. 2) in the commission of crime. It is to be noted that the complainant (P.W.1) did not name respondent No. 1, while disclosing the names of accused referred above. It is worth-mentioning that the complainant in his deposition while disclosing names of respondent No.2 and others also stated that Mukhbir also disclosed that they want to smuggle the Narcotics. Nothing is available in his deposition that contraband material seized from the spot is owned by respondents. His direct statement as well as contents of F.I.R. are also nowhere suggestive that contraband material was recovered from the custody or possession of both the respondents. It is also not the case of prosecution that both the respondents got domain over it.

It is further to be noted that the complainant in his direct statement maintained that at the time of receipt of secret information, he was not in a position to identify the respondents. In the next breath, he maintained that he got information regarding the names of respondents when they joined the investigation.

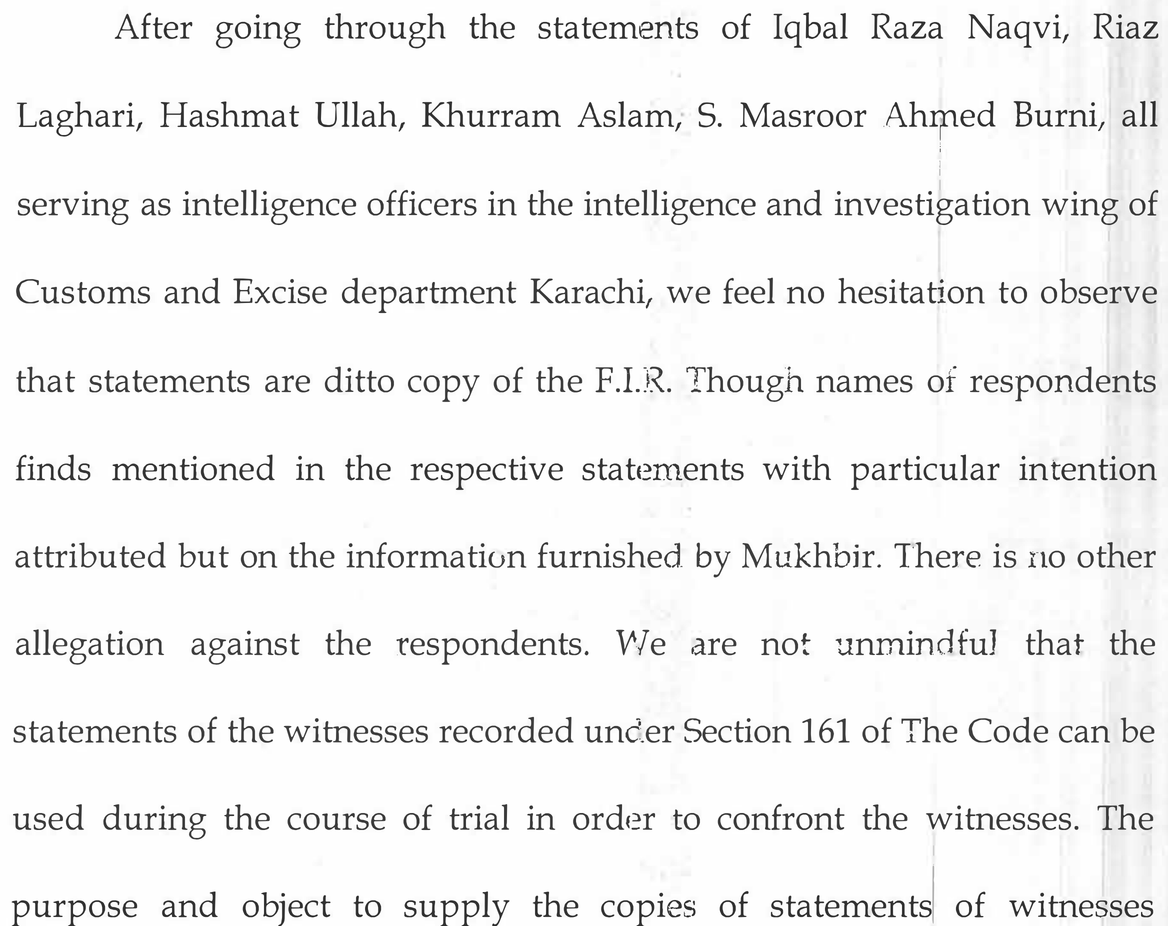
One can well imagine the evidentiary value of the statement of the complainant, portion of which has been referred above.

22. No doubt as referred earlier, statements of rest of the witnesses were not recorded and premium was granted to the counsel for respondents by learned Trial Court in view of omission on the part of prosecution to raise objection for adoption of said mode.

Though such practice cannot be endorsed but for the reasons recorded in para-19 of the judgment, we have considered the evidence collected during the course of investigation in order to determine whether yardstick contained in Section 265-K of The Code stands satisfied or not and any prejudice has been caused to the case of prosecution.

23. We have gone through the statements of the witnesses recorded under Section 161 of The Code and recovery memo (Ex.P.1-A) produced by the complaint, which is part of the judicial record.

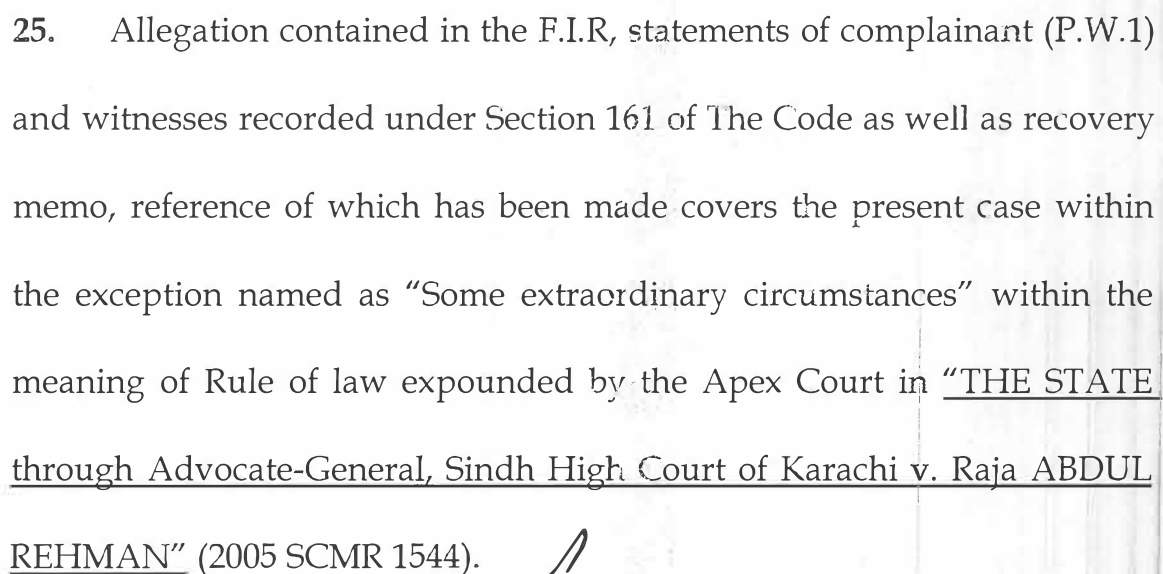
After going through the statements of Iqbal Raza Naqvi, Riaz Laghari, Hashmat Ullah, Khurram Aslam, S. Masroor Ahmed Burni, all serving as intelligence officers in the intelligence and investigation wing of Customs and Excise department Karachi, we feel no hesitation to observe that statements are ditto copy of the F.I.R. Though names of respondents finds mentioned in the respective statements with particular intention attributed but on the information furnished by Mukhbir. There is no other allegation against the respondents. We are not unmindful that the statements of the witnesses recorded under Section 161 of The Code can be used during the course of trial in order to confront the witnesses. The purpose and object to supply the copies of statements of witnesses



recorded under Section 161 of The Code as envisaged by Section 265-C of The Code is to inform the accused facing the trial regarding the case of prosecution suggesting precise accusation and evidence collected during the course of investigation.

24. Keeping in view the statements of the witnesses referred above, even if their evidence was recorded during the trial against present respondents, it would not have improved the case of prosecution.

Accusations contained in the statements of witnesses by no stretch of imagination are suggestive of first hand information. Implication of the respondents is result of hearsay evidence. None was arrested at the spot. No incriminating material as per statements was recovered from the respondents. Recovery memo (Ex.P.1-A) also does not suggest that contraband material was recovered either from the custody or possession of the respondents or on their pointation. It is also not the case of prosecution that respondents got domain over it.



25. Allegation contained in the F.I.R, statements of complainant (P.W.1) and witnesses recorded under Section 161 of The Code as well as recovery memo, reference of which has been made covers the present case within the exception named as "Some extraordinary circumstances" within the meaning of Rule of law expounded by the Apex Court in "THE STATE through Advocate-General, Sindh High Court of Karachi v. Raja ABDUL REHMAN" (2005 SCMR 1544).

26. We are conscious that after raid, huge quantity of *charas* was recovered from the mountains through recovery Memos (Ex.P.1/A) as deposed by complainant (P.W.1) but admittedly the said Narcotics was not recovered from the possession of the respondents, either actual or constructive. In order to establish the charge under Article 4 of President Order IV of 1979, there was legal compulsion to suggest the possession of respondents but perusal of the recovery memo clearly reveals that it was secured from the mountains. Since nothing is available on record even to suggest possession of respondents, therefore, what to speak of recording conviction under Article 4 of President Order IV of 1979, even charge could not have been framed keeping in view the yardstick contained in Section 265-D of The Code.

27. Statement of the complainant (P.W.1) and other witnesses referred to in preceding paragraphs that *charas* was stored for the purpose of smuggling and the respondents intended to transport it out of country by no stretch of imagination can fulfill the requirements of Article 3 of President Order No.IV of 1979 as evidence referred to does not suggest any nexus of respondents with Narcotics.

Even otherwise, conviction cannot be recorded simultaneously under Articles 3 and 4 of Order 4 of 1979

28. Similarly the provisions of Section 26 of the same order would not attract keeping in view the evidence collected during the course of investigation and statement of complainant as discussed.

29. Mere fact that huge quantity of contraband material was recovered by itself would not be sufficient to prove the guilt of respondents because in order to establish their culpability, prosecution was bound to establish that Narcotics was recovered from the possession or custody of the respondents.

30. Examination of the recovery memo (Ex.P-A) clearly suggests that it was not recovered from the custody or possession of the respondents. There is not even a single word to suggest constructive possession of the respondents.

31. Perusal of the impugned order reveals that application under Section 265-K of The Code was also made by the co-accused, i.e., Muhammad Ismail and Haji Asghar, against whom, similar type of evidence was collected during the course of investigation, which application was allowed through order dated 13th of January, 1998. On query, the learned law officer admitted that the said order was not assailed by the State. It is further to be noted that through judgment dated 26th of September, 1994, Dad Muhammad and Abdul Samad were acquitted by the learned Trial Court after trial, which was also not subject to challenge as frankly admitted by the learned law officer.

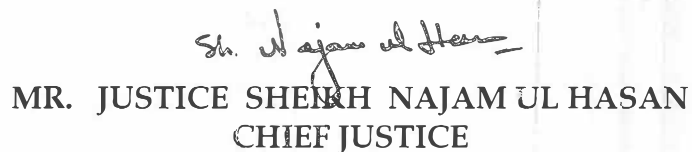
32. Pursuant to discussion, statement of complainant (P.W.1) and other evidence collected during the course of investigation, when kept under consideration, cannot give even an impression of culpability of respondents and as such there is no probability of conviction of

respondents in the offences under which they were charged. Remand of the case as such will be an exercise in futility. Even after recording of evidence of un-examined witnesses, prosecution cannot place its case on better footing as the witnesses cannot go beyond their statements recorded under Section 161 of The Code.

33. Viewed from whichever angle, we feel no hesitation to endorse the conclusion drawn by learned Trial Court through order assailed resulting in dismissal of appeal.

34. On 14th of December, 2017, after hearing arguments, we dismissed the appeal through short order. Above-mentioned are the reasons to dismiss the appeal.

MR. JUSTICE MEHMOOD MAQBOOL BAJWA



MR. JUSTICE SHEIKH NAJAM UL HASAN
CHIEF JUSTICE

Dated 19th of December, 2017
at Islamabad.
Mubashir/