

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH

MR. JUSTICE SHAUKAT ALI RAKHSHANI

Criminal Appeal No.10-P of 2019

The State through Advocate-General,
Khyber Pakhtunkhwa, Peshawar.

.....Appellant

Versus

1. Muhammad Shabran alias Shada S/o Muhamad Shafique,
2. Shail Imtiaz S/o Imtiaz Ali, Cast Gujjar
Both R/o Mohra Ghazni, Tehsil & District Haripur.

.....Respondents

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| Counsel for the Advocate State/Appellant | --- | Malik Akhtar Hussain Awan, Assistant Advocate-General, Khyber Pakhtunkhwa. |
| Case FIR No, date & Police Station. | --- | No.61 dated 25.01.2016, P.S. Khanpur, District Haripur. |
| Date of impugned Judgment | --- | 09.02.2019. |
| Date of institution | --- | 26.06.2019. |
| Date of hearing | --- | 27.11.2019. |
| Date of decision | --- | 27.11.2019. |

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JUDGMENT

SYED MUHAMMAD FAROOQ SHAH, J:- Captioned Appeal under section 417 Cr.P.C. against the impugned judgment dated 09.02.2019, passed by the learned Senior Civil Judge (Admin)/JM-I, Haripur, has been directed by the State through Advocate General, Khyber Pakhtunkhwa, Peshawar with a prayer that the accused/respondents tried and acquitted for an offence punishable under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, in F.I.R. number 61, dated 25.01.2016, registered at Police Station Khanpur, District Haripur may be convicted on the grounds averred in the memo of appeal.

2. Succinct story of the prosecution is that on 25.01.2016 police party headed by Bashir Ahmad S.H.O. received spy information regarding possessing and selling of liquor. On such information, he proceeded at the pointed place and found two persons having shopping bags. On seeing the police party, they turned back in shops and closed the shutter of shop. The S.H.O. alongwith police party overpowered them and recovered six blue

shopping bags and black can containing 12/12 each total 72 bottles country made liquor and one can 20 liters of country made liquor. The incident was incorporated in the F.I.R. and after conducting usual investigation, the culprits/respondents were charge sheeted. Trial commenced after framing of charge on 12.01.2017 to which the accused did not plead guilty. After recording the evidence of prosecution witnesses and statement of accused under section 342 Cr.P.C., vide impugned judgment acquittal was recorded.

3. During preliminary hearing Malik Akhtar Hussain Awan, Assistant Advocate-General representing the State/appellant contended that despite convincing evidence inspiring confidence adduced by the prosecution, the trial Court by acquitting the accused, caused grave miscarriage of justice by extending benefit of minor discrepancies in favour of the accused/respondents. Learned State Counsel submitted that third charged accused namely Khursheed alias Bahool had been acquitted under section 249-A Cr.P.C. by the learned trial Court and the State did not prefer any appeal against his acquittal.

4. We have scanned the evidence with the able assistance rendered by the learned State Counsel representing the state. It is an admitted fact that the contraband liquor was allegedly recovered from a shop but neither the owner of the shop nor inhabitants of the locality had been associated to witness the recovery. It is also an admitted fact that samples taken from the recovered bottles and can of liquor were sent to the laboratory on 01.02.2016 i.e. after delay of almost seven days of alleged recovery. The delay of seven days in sending of samples has not been explained and justified; moreso, there is nothing on record that the recovered case property was kept in safe custody since the day of registration of F.I.R. i.e. 25.01.2016, till it was sent to the laboratory on 01.02.2016. Under the law, un-explained delays in sending the narcotics to the laboratory and unsafe custody of narcotics besides transmission of samples to the office of chemical examiner through un-examined witness are fatal to the prosecution case. It is also an admitted fact that despite advance information of alleged crime and the place of occurrence, situated in a thickly populated area, compliance of mandatory requirement of section 103 Cr.P.C. has not been followed by the raiding party, more

particularly, the recovery was effected during day time and the police party was continuously busy in preparation of recovery of narcotics proceedings etc. for sufficient time.

5. Prosecution case hinges on the evidence of police officials. The legal proposition of the case much emphasized by the learned State counsel for the Appellant/State is that the rules of justice enunciated by section 103 of the Code are so embedded in criminal jurisprudence of Pakistan that the said provision of law is not applicable in the circumstances of the case. It need not to be iterated that universally accepted principle in criminal cases is that two *mashirs* are always cited for recovery made from places and reliance is to be placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the *mashirs* becomes relevant depending on the facts of the case. In order to ensure proper investigation and clear proof preference should be given to the witnesses of the locality, particularly witnesses who are respectable. Where witnesses are not of the locality, the Court should cautiously examine their statement. Reference in this regard is made to the cases of Abdul Rashid v. State (PLD 1975 Kar. 92); Ballia and others v. State (1985 SCMR 854); Nasrullah and another v. State (1977 PCr.LJ 132); Rahmat v. State (PLD 1976 Lah. 1444); Muhammad Shafi and others v. State (PLD 1967 SC 167); Muhammad Khan v. Dost Muhammad (PLD 1975 SC 607); Afzal v. State (1983 SCMR 1); Niaz Muhammad alias Jaja and another v. State (PLD 1983 SC (AJ&K) 211); Malik Aman v. State (1986 SCMR 17); Sultan and others v. State (1987 SCMR 1177); Khair Gul v. State (1989 SCMR 491) and The State v. Abba Ali Shah (PLD 1988 Kar. 409).

6. It is not out of context to mention that the scope of interference in appeal against acquittal is narrowest and limited because after acquittal, the accused shall be presumed to be innocent. It is settled principle of law that extraordinary remedy of an appeal against an acquittal is quite different from an appeal preferred against the findings of conviction and sentence. The appellate jurisdiction under Section 417 Cr.P.C. can be exercised by this Court if gross injustice has been done in the administration of criminal justice, more particularly, wherein, findings given by trial Court are perverse, illegal and based on misreading of

evidence, leading to miscarriage of justice or where reasons advanced by trial Court are wholly artificial. Accused earns double presumption of innocence with the acquittal; First, initially that till found guilty he has to be considered innocent; and second, that after his acquittal by the trial Court further confirmed the presumption of innocence. It shall be advantageous to reiterate that the appellate Court by exercising its powers under section 417 Cr.P.C, could interfere only if the order of acquittal is based on misreading, non-appraisal of evidence or/was speculative, artificial, arbitrary etc.

7. On analysis of the testimonies of prosecution witnesses and the record, the learned trial Court's view appears to be reasonable, sound, natural, logical and in consonant with the evidence, which in our view is neither perverse, artificial, shocking, ridiculous, flimsy or suffering from distortion or misreading of evidence. Resultantly, the impugned judgment passed and pronounced by the learned trial Court on dated 09.02.2019, acquitting the respondents is maintained. Accordingly, the captioned appeal having no merits for consideration is dismissed in *limine*. The Criminal Miscellaneous Application number 14-P of 2019 is disposed of having become infructuous.

JUSTICE SHAUKAT ALI RAKHSHANI
JUDGE

JUSTICE SYED MUHAMMAD FAROOQ SHAH
JUDGE

Peshawar the
27th November of 2019
M.Ajmal/**.