

Appeal against Acquittal - number of minor
NFR 177

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Mohammad Karim Khan Agha

Cr. Acq. Appeal No.D-229 of 2010.

Syed Ali Asghar Shah

Versus

Ismail

Cr. Acq. Appeal No.D-230 of 2010.

Syed Ali Asghar Shah

Versus.

Gul Muhammad @ Guloo

Appellant Syed Ali Asghar Shah in both Criminal Acquittal Appeals :	Through Mr. Abdul Rashid Mughal, Advocate
Respondent Gul Muhammad @ Guloo in Cr. Acq. Appeal No.D-230 of 2010 :	Through Mr. Shabeer Hussain Memon, Advocate
None present for respondent Ismail in Cr. Acq. Appeal No.D-229 of 2010	
On Court notice	Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	06.09.2018
Date of judgment	06.09.2018

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-Both the aforementioned criminal acquittal appeals have been filed by appellant Syed Ali Asghar Shah, assailing the judgments dated 28.05.2010. passed by the learned Ist. Additional Sessions Judge, Badin in Sessions Case No.147/2003 and Juvenile Sessions Case No.13/2006 (arising out of Crime No.69 of 2003 of Police Station Talhar, under sections 302, 364-A, 201 and 34 PPC),

whereby the learned trial Court after full dressed trial acquitted the private respondents Gul Muhammad alias Guloo and Ismail by giving them the benefit of the doubt.

2. Since at the time of commission of alleged offence respondent Gul Muhammad alias Guloo was minor, therefore, his case was separated to be tried by the learned trial Court and it was assigned separate number as Juvenile Sessions Case No.13 of 2006. However, as the F.I.R., facts of the case and the evidence so recorded by the prosecution, statements of both accused recorded under section 342 Cr.P.C. as well as judgments delivered by the learned trial Court in both cases are almost same, therefore, we propose to decide both the instant criminal acquittal appeals by this common judgment.

3. The brief facts of the case are that complainant Ali Asghar is zamindar and used to reside in the above address alongwith his family members. He has three daughters and one son Ismail Shah alias Saad aged about two and half year. On 15.11.2002, when the complainant after finishing his work returned to his house, his son Ismail alias Saad left the home for playing and the complainant later went to look for him but could not find him. The complainant also searched in the street but could not get his clue. Thereafter, the complainant called his brother Mushtaque Shah, Ali Nawaz and other neighbourer and disclosed the above facts to them for missing Ismail Shah alias Saad but they also could not find any clue. On the next day when the complainant alongwith the above witnesses started searching it was about 10-30 am found the dead body of Ismail Shah alias Saad Shah lying in the gutter, located behind the house of Abdul Karim Junejo. The complainant party took out the dead body from it and took out his house. About 1/13 days back the complainant came to know that Ismail alias Saad Shah was kidnapped by Ismail Lashari and Gul Mohammad Lashari from the street and killed him instantly, whereupon, the complainant party called accused Gul Mohammad alias Guloo Lashari at his otaq where Mushtaque, Ali Nawaz and Bilawal son of Peer Bux Leghari were available there. On their enquiry, the accused Gul Muhammad alias Guloo Lashari disclosed that he and Ismail Lashari jointly kidnapped Ismail alias Saad Shah and took him in the vacant old rooms situated near railway station Talhar, where deceased Ismail Shah raised cries whereupon they tried to keep him silent by putting their hands forcibly over his mouth on which he died. In the early morning dead body of Ismail Shah

was thrown in the street cesspit. Thereafter, the complainant lodged such FIR with police on 19.06.2003 at 1630 hours. Pursuant to the registration of the case, accused were arrested and after usual investigation challan was submitted in the Court of law. Accused Gul Muhammad alias Guloo was declared minor and his case was bifurcated from the case of main accused Ismail Lashari.

4. Formal charge against the accused on both cases were framed by trial Court at Ex.2, to which the accused / respondents vide their respective pleas pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined complainant Syed Ali Asghar Shah (Ex.4), P.Ws. Mushtaque Ahmed (Ex.5), Ali Nawaz (Ex.6), Chakar Khan (Ex.7), Bilawal (Ex.8), Ghulam Muhammad (Ex.9), Dr. Sharafuddin Baloch (Ex.11), Khushi Muhammad, the then Civil Judge and Judicial Magistrate Badin-I (Ex.12), ASI Muhammad Raza (Ex.13). Thereafter the learned ADPP closed the side of the prosecution vide Ex.14. Thereafter, the learned ADPP for the State filed an application under Article 164 of Qanun-e-Shahadat 1984 seeking permission to produce Video cassette as part of evidence, as accused / respondent have confessed guilt in the said video, the application was allowed vide order dated 22.04.2010. Then again the side of the prosecution was closed by the learned ADPP vide his statement Ex.16.

6. Statements of the accused / respondents were recorded under section 342 Cr.P.C. at Ex.17 in both cases, in which they have denied the allegations of prosecution while claiming their innocence. In their said statements they stated that they were involved in this case due to enmity with one Alam Jamali who has been cited as co-mashir in this case as they were residing in his rented house and oftenly restrained him not to come in their house in their absence and not to bother their women folks, due to which enmity said Alam Jamali implicated them in this case. They did not examine themselves on oath.

7. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence acquitted the private respondents Gul Muhammad alias Guloo and Ismail, as stated above.

8. The facts of this case as well as evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court

therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Abdul Rashid Mughal, learned counsel for the appellant has contended that although there is no direct eye witness evidence against the respondents the circumstantial evidence was sufficient to prove their guilt. In particular he pointed to the confession of the respondent Gul Muhammed who had also implicated respondent Ismail in the abduction and murder of the young boy and the fact that Gul Muhammed had taken them to the spot where the murdered boy had been dumped which he would not have known if he was not the murderer and as such the impugned judgments should be set aside and the appeal against acquittals allowed.

10. Mr. Shabeer Hussain Memon, learned counsel for respondent Gul Muhammad alias Guloo while supporting the judgments passed by the learned trial Court, has contended that that the impugned judgments have been passed after due appreciation of evidence on record. According to him, false implication of the private respondents in the instant case with due deliberation and consultation on this ground alone cannot be ruled out. He further argued that in this case there is no direct evidence available on record connecting the said private respondents to the crime and neither was there any circumstantial evidence and as such the appeals should be dismissed.

11. Learned A.P.G. appearing for the State also supported the impugned judgments.

12. We have heard the learned Counsel for the parties and perused the evidence so brought on record alongwith impugned judgments with the able assistance of the parties.

13. It is settled law that judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honorable Supreme Court in the case of **The State v. Abdul Khaliq and others** (PLD 2011 Supreme Court 554). Moreover, the scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of the innocence is significantly added to the cardinal rule of criminal jurisprudence as the accused shall be presumed to be innocent until proved guilty. In other words, the presumption of innocence is doubled as

held by the Honourable Supreme Court of Pakistan in the above referred judgment.

14. In this case there is admittedly no eye witness evidence as to who abducted the child, killed the child or dumped the dead body of the child; that there was an unexplained delay of over 7 months in lodging the F.I.R.; admittedly in cases of abduction there is usually some delay in lodging the F.I.R. as usually the parents and the people of the locality consume some time in searching for the child themselves which is quite understandable however in our view a delay in such cases cannot stretch to 7 months; that the sole piece of evidence against the respondent Gul Muhammed is that 7 months after the incident he made an extra judicial confession that he and Ismail had kidnapped and murdered the boy however such evidence is not to be relied upon without corroboration and in this case there is no reliable corroboration. Reference in this respect can be made to the cases of **Tayyab Hussain Shah V The State** (2000 SCMR 683), **Ali Muhammad V Bashir Ahmed and others** (2003 SCMR 868) and **Muhammad Kamran and another V The State** (2003 SCMR 1070); that even otherwise the respondent Gul Mohammed seems to have made the extra judicial confession under duress as his hands are tied behind his back in the video of his alleged confession which was not handed over to the IO and for these reasons as well the extra judicial confession which was later retracted cannot be safely relied upon; that the respondents had no motive to commit the murder; that apparently there was enmity between respondent Gul Mohammed and one of the co-mashirs; that the person (Mr.Abdul Karim Junejo) whose house the body was found behind and who witnessed its recovery was not made a PW, that the plastic in which the body was near was not sent for chemical analysis; no relevant recovery has been made from the accused; that it is settled law that the confessional statement of one co-accused Gul Mohammed cannot be used against another co-accused i.e the respondent Ismail (which in any event was retracted and has no value in the eyes of the law); admittedly this is a case of circumstantial evidence where there can be no break in the chain of evidence leading to the only inference that the respondents committed the crime; that in this case there is hardly any evidence let alone a chain of evidence against the respondents; the only other material connecting the respondent Gul Mohammed to the crime is the fact that he led them to the body however this evidence is not sufficient to convict either him or the

other respondent Ismail; that the accused is entitled to the benefit of doubt and the double presumption of the innocence in acquittal appeals and in our view as discussed above there is much doubt in the prosecution case.

15. Thus, for what has been discussed above, in particular the narrow scope of an acquittal appeal, the benefit of the doubt in favour of the respondents, the double presumption of innocence in acquittal appeals the lack of direct evidence and insufficient circumstantial evidence against the respondents we find no legal infirmity in the impugned judgments and the same are upheld and both the acquittal appeals are hereby dismissed.