

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-27 of 2013.

Athar Khan

Vs.

Abdul Majeed and others

Appellant : Athar Khan	Through Mr. Nisar Ahmed Durrani, Advocate
Private respondents No.1 and 2	Through Mr. Atif Ali Qazi, Advocate.
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing :	05.09.2018
Date of judgment :	05.09.2018

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal acquittal appeal has been filed by appellant Athar Khan against the judgment dated 30.07.2013, passed by the learned Ist. Additional Sessions Judge, Mirpurkhas in Sessions Case No.39 of 2008 (re-The State Vs. Abdul Majeed and others) under Crime No.259 of 2007, registered at P.S Town under sections 302, 147, 148, 149, 504, 337-H(ii) PPC, whereby the learned trial Court after full dressed trial acquitted the private respondents by giving them the benefit of the doubt.

2. Precisely, the brief facts of the prosecution case as disclosed in the FIR which was lodged at police station Town by complainant Athar Khan, are as under:

"Complainant Athar Khan on 10.12.2007 appeared at Police Station Town and lodged his FIR stating therein that "he and his son Raees alias Guddo are starter on bus. Today on 10.12.2007, boarded passengers on SRTC Bus No.3103 at Station Chowk. He remained there while his son Raees @ Guddo along with starter Taj Muhammad Rajput went to the Post Office Chowk to see the said Bus. A huge mob gathered at the post office chowk, he also reached there and saw that

Faiz Muhammad Pathan and Muhammad Rafique Pathan were exchanging hot words with Raees. Both the accused took out the pistol and so also his son Raees also took out pistol in his defence. Meanwhile three accomplices of the two accused namely Yakoob Balouch, Majeed Pathan and Faisal told the two accused that they should get a side and they will kill Raees @ Guddo. All three accused fired at Raees @ Guddo from their firearms. The fires were sustained by Raees @ Guddo Faiz Muhammad Pathan and Muhammad Rafique Pathan. All three persons fell down meanwhile Farman and others came there, thereafter, all three accused persons boarded in a car and went away by making aerial firing. Thereafter, they brought the injured Raees @ Guddo to the hospital but he succumbed injuries. Thereafter he left the above named witnesses at the dead body of Raees, came to lodge the FIR and lodge report that the above named accused persons committed rioting, the accused Yakoob, Majeed Pathan and Faisal on the dispute of Starter fired on his son Raees @ Guddo and kill him and due to their firing their two companions namely Faiz Muhammad Pathan and Muhammad Rafique Pathan also sustained injuries".

3. After usual investigation, challan of the case was submitted before the concerned Court. The learned trial Court framed charge against accused persons, to which they pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case against the accused persons examined as many as 07 witnesses and thereafter prosecution side was closed.

5. Thereafter, statements of accused persons were recorded under section 342 Cr.P.C. wherein they denied the prosecution allegations and professed their innocence.

6. The trial court after hearing the learned counsel for the parties and assessment of evidence, by impugned judgment acquitted the accused persons/respondents as stated in concluding paragraph of the impugned judgment. Hence, this acquittal appeal has been filed by the appellant.

7. Mr. Nisar Ahmed Durrani, learned Counsel for appellant 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 in the statements of witnesses 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 minor contradictions on non-vital points in the statements of prosecution witnesses and that the prosecution evidence has not been properly appreciated. Therefore, under the circumstances, he was of the view that this appeal may be allowed as prayed.

8. On the other hand, the learned counsel for the private respondents as well as the learned Additional Prosecutor General Sindh has supported the impugned judgment passed by learned trial court by arguing that the impugned judgment has been passed after due appreciation of evidence on record and that there is no legal infirmity in the same and the appeal was liable to be dismissed.

9. We have heard the learned Counsel for the parties and perused the evidence so brought on record alongwith impugned judgment with their able assistance.

10. The first issue to be considered is that of time bar. The learned counsel for the appellant has admitted that the appeal is time barred by 11 days and that he has not filed any application for condonation for delay. It is settled law that the defaulting party while applying for condonation of delay must explain and account for each day of delay because on expiry of period of limitation a valuable right is created in favour of another party. In this respect reliance is placed on **Messrs Tribal Friends Co. versus Province of Balochistan** (2002 SCMR 1903), **The State versus Syed Ali Baqar Naqvi and Others** (2014 SCMR 671) and **Mst. Sirajun-Munira versus Pakistan 1998** (SCMR 785). In this case not even an application for condonation for delay has been made and not a single day's delay has been explained and as such on this count alone the appeal deserves to be dismissed.

11. Even otherwise we are of the view that the appellant has not made out a case on merits. The operative part of the Judgment reads as under:

"16. According to the text of the F.I.R. it is the allegation against the present accused that when Faiz Pathan and Rafique Pathan were exchanging hot words with the son of complainant namely Raees. Both the accused took out Pistol and his son Raees also took out pistol,

meanwhile, three accomplices of the two accused namely Yaqoob Balouch, Majeed Pathan and Faisal told that you should get a side and they will kill Raees @ Guddo. It is further averred in the F.I.R. that all those three persons fired at Raees @ Guddo from their arms and the fires were sustained Raees @ Guddo, Faiz Pathan and Muhammad Rafique. Perusal of memo of place of incident shows that the police at the time of visiting the place of incident recovered 3 empties of 30 bore pistol and one empty of 12 bore cartridge. The post mortem report of the deceased Raees shows that he sustained only a single fire shot and on his body the medical officer found a fire arm wound of entrance and a fire arm wound of exit. The complainant was acquitted in the counter case on the basis of compromise it means the fire shot attributed to the Rafique Pathan and Faiz Muhammad Pathan were fired by the complainant. Now there remains a single fire shot which hit to deceased Raees @ Guddo which has not been specifically attributed to the present accused persons. Besides this, according to complainant the fire shots of the present accused and absconding accused hit to deceased Raees, Faiz Pathan and Rafique Pathan. According to complainant when his son Raees and Faiz Pathan and Rafique Pathan were arguing and the present accused persons along with absconding accused reached at the place of incident and asked Rafique Pathan and Faiz Pathan to step aside then admittedly the accused Rafique Pathan and Faiz Pathan would come towards the present accused persons then how the fire shot of present accused hit them, though, the fire shot on Rafique Pathan and Faiz Pathan attributed to the present complainant. It is an admitted fact that the deceased sustained only a single fire shot, as such, it cannot be said with certainty that the deceased sustained injury at the hands of the present accused persons. It has been held in the case law reported in 2012 YLR 426 that;

"In the F.I.R. nothing has been mentioned as to which of the accused had given blow/injuries to the victim. There are material contradictions in the ocular testimony as well as medical evidence, which makes the case of the prosecution doubtful."

17. In this case the prosecution has failed to establish the motive behind the incident. No doubt, the motive is one of the relevant piece of evidence which furnishes support to the prosecution case as to the involvement of accused in the offence but it is double-edged weapon. While motive can be sufficient reason for commission of offence by the accused, it can equally be a reason for false involvement of the accused in the crime. Whereas prosecution case rests solely on the testimony of the interested witnesses, it would not be safe in such cases to seek corroboration from the same witness regarding motive. The motive alleged against the appellant has not been furnished through independent evidence to corroborate the testimony of eye witnesses. Therefore, acceptance of motive, through same witnesses would not be safe for corroboration. Reliance is placed in 2003 P.Cr.L.J. 1847.

18. Moreover, nothing incriminating recovered from the possession of the accused persons. The case of the prosecution lacks the essential evidence. The case of the prosecution is full of doubts and ambiguities and in my opinion conviction cannot be based on presumptions. In number of cases it has been held by the apex courts

that ten guilty persons be acquitted rather than one innocent person be convicted.

19. What has been discussed above I am of the view that the prosecution case is not free from doubt. I, therefore, answer the point No.2, as doubtful.

12. 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. The relevant para is reproduced hereunder:-

"16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both the sides, it may be mentioned that both the learned counsel agreed that the criteria of interference in the judgment against acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Courts about the rules which should be followed in such cases; the dicta are:

Bashir Ahmed v. Fida Hussain and 3 others (2010 SCMR 495), **Noor Mali Khan v. Mir Shah Jehan and another** (2005 PCr.LJ 352), **Imtiaz Asad v. Zain-ul-Abidin and another** (2005 PCr.LJ 393), **Rashid Ahmed v. Muhammad Nawaz and others** (2006 SCMR 1152), **Barkat Ali v. Shaukat Ali and others** (2004 SCMR 249), **Mulazim Hussain v. The State and another** (2010 PCr.LJ 926), **Muhammad Tasweer v. Hafiz Zulkarnain and 02 others** (PLD 2009 SC 53), **Farhat Azeem v. Asmat Ullah and 6 others** (2008 SCMR 1285), **Rehmat Shah and 2 others v. Amir Gul and 3 others** (1995 SCMR 139), **The State v. Muhammad Sharif and 3 others** (1995 SCMR 635), **Ayaz Ahmed and another v. Dr. Nazir Ahmed and another** (2003 PCr.LJ 1935), **Muhammad Aslam v. Muhammad Zafar and 2 others** (PLD 1992 SC 1), **Allah Bakhsh and another v. Ghulam Rasool and 4 others** (1999 SCMR 223), **Najaf Saleem v. Lady Dr. Tasneem and others** (2004 YLR 407), **Agha Wazir Abbas and others v. The State and others** (2005 SCMR 1175), **Mukhtar Ahmed v. The State** (1994 SCMR 2311), **Rahimullah Jan v. Kashif and another** (PLD 2008 SC 298), **Khan v. Sajjad and 2 others** (2004 SCMR 215), **Shafique Ahmad v. Muhammad Ramzan and another**

(1995 SCMR 855), *The State v. Abdul Ghaffar* (1996 SCMR 678) and *Mst. Saira Bibi v. Muhammad Asif and others* (2009 SCMR 946).

From the ratio of all the above pronouncements and those cited by the learned counsel for the parties, it can be deduced that the scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent is doubled. **The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous (Emphasis supplied). The Court of appeal should not interfere simply for the reason that on the re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities. It is averred in *The State v. Muhammad Sharif* (1995 SCMR 635) and *Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others* (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals.** (bold added)

13. In this case we find that the appellant who was charged with the murder of two others at the scene in another separate F.I.R. which concerned the respondents version of events; namely that the appellants side were the aggressor the appellant during his trial entered into a compromise agreement with the legal heirs of the two men who he had through the compromise agreement admitted murdering and thus we do not find his evidence to be either trustworthy or confidence inspiring; that only three recoveries of empties was made at the scene yet **at least** two of those empties must have belonged to the appellant who has admitted shooting two other men at the scene and thus if all 3 accused fired as alleged by the appellant this would not have been possible as only one empty would have belonged to that side; that the deceased only received one bullet wound and there is no evidence as to which of the 3 accused fired the fatal shot if at all it came from their side

as it appears that there was a shoot out between two different sides; that the alleged eye witness PW's are related to or work for the appellant and thus are interested witness who cannot in our view, based on the particular facts and circumstances of this case, be safely relied upon to corroborate the appellant's version of events; that no weapon was recovered from the respondents; that there appears to be no motive for the respondents to kill Raees as per the F.I.R. Raees had exchanged hot words with **other men** (and not the respondents) who had drawn their pistols on him which had led to him also drawing his pistol on them and that it is a well settled principle of law that the accused is entitled to the benefit of doubt and that in an appeal against acquittal there is a double presumption of innocence and that in this case there are many doubts in the prosecution case as alluded to above which the respondent is entitled to the benefit of. When we asked the learned counsel for the appellant to specifically point out any legal infirmity in the impugned judgment he was unable to do so.

14. Thus, we find that the private appellant within the narrow scope of an appeal against acquittal as provided by law has not been able to make out his case. As such the impugned judgment is upheld and the appeal against acquittal is dismissed. These are the reasons for our short order announced in open court today which reads as under:

"Parties advocates have been heard. They have concluded their arguments. For the reasons to be recorded later on, this criminal acquittal appeal is dismissed being time bared as well as on merits."

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ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Acq. Appeal No.D-27 of 2013

DATE

ORDER WITH SIGNATURE OF JUDGE(S)

1. For order on office objection.
2. For Katcha Peshi.

05-09-20018

Mr. Nisar Ahmed Durrani, advocate for the appellant.
Qazi Atif, advocate for the respondents No.1 & 2.
Syed Meeral Shah, A.P.G.

Parties advocates' have been heard. They have concluded their arguments. For the reasons to be recorded later on, this criminal acquittal appeal is dismissed being time barred as well as on merits.

Khebro/PA