

Appeal Against Acquittal

Double murder

NFR

268

**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-08 of 2013.

Muhammad Bux

Vs.

Abbas and others

Appellant : Muhammad Bux	Through Mr. Muhammad Sachal R. Awan, Advocate
Respondents No.1 to 3 : Abbas and others	Through Mr. Mumtaz Alam Laghari, Advocate
Respondent No.4 : The State	Mr. Shahzad Saleem Nahyoon, Deputy Prosecutor General
Date of hearing :	03.10.2018
Date of judgment :	03.10.2018

**JUDGMENT**

**MOHAMMAD KARIM KHAN AGHA, J.-** This criminal acquittal appeal has been filed by the appellant against the judgment dated 28.02.2013, passed by the learned Sessions Judge, Dadu in Sessions Case No.112 of 1994 (re- The State Vs. Abbas and others), arising out of Crime No.04/1994, registered at P.S Pat Ghulam Muhammad, under sections 302, 460, 324, 404 PPC, whereby the learned trial Court after full dressed trial acquitted the private respondents by giving them benefit of doubt.

2. Precisely, the facts of the prosecution case are that;

"Complainant is hari by profession. The brother of complainant namely Shah Muhammad and his sons Wazir Hussain, Hamal, Azam, Yar Muhammad and Dhani Bux reside in the house having separate rooms surrounded by one and same hedge. On last night, complainant and his nephew took meals, tethered their cattle and went for sleep. On 27.02.1994 at 0130 hours (night) complainant and his nephew awakened at barking of the dogs. They found three persons, out of them, one was armed with kalashnikov, when two were armed with guns. They saw accused very well on torch light and will identify on seeing, while taking away the bullocks by two accused, the complainant and his nephew raised hakals and tried to caught hold them for release of cattle. In the meantime, accused left the cattle and started firing upon complainant party with intention to cause their death. In result, the nephew of complainant namely Wazir Hussain, Hamal and Azam fell down receiving injuries. Accused while taking the licensed gun of the brother of the complainant



alongwith bag having cartridges and license ran away from the spot. Thereafter, complainant saw that Wazir Hussain and Hamal were lying dead whereas Azam was found injured. Due to odd hours in the night they remained with injured and dead bodies and came at PS and lodged the report at 07.30 a.m. on 27.02.1994.

3. After usual investigation, challan of the case was submitted before the concerned Court. At trial, learned trial Court framed charge against the accused named above as Ex.05, 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 07 witnesses. Then prosecution side was closed.

5. Thereafter, statements of the accused persons were recorded under section 342 Cr.P.C. wherein they have denied the prosecution allegations by claiming their innocence and false implication in this case. However, neither they examined themselves on oath nor led any defense evidence.

6. The trial court after hearing the learned counsel for the parties and assessing the evidence available on record, by the impugned judgment acquitted the accused / private respondents as stated in concluding para of the impugned judgment. Hence, this acquittal appeal has been filed by the appellant.

7. Learned Counsel for appellant contended that the judgment passed by the learned trial court is perverse and the reasons for acquitting the private respondents are artificial, vis-à-vis the evidence on record; that the grounds on which the trial court proceeded to acquit the private respondents are not supportable from the evidence on record. He submitted that the private respondents have been directly charged with the commission of the offence 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 findings 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. Lastly, he prayed that this criminal acquittal appeal may be allowed as prayed.

8. On the other hand learned counsel for private respondents No.1 to 3 as well as the learned Deputy Prosecutor General have 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.



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

10. 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.

11. It appears that the main issues which lead to the acquittal of the respondent was the untrustworthy prosecution evidence and the failure to safely identify the accused with the trial court finding as follows in this respect at Para's 30, 31 and 32:

"30. In cross examination, this witness admitted that at the time of firing, he was in the room, therefore, he may not be able to saw the accused. However, he also admitted in cross-examination that the name of accused are not mentioned in his statement recorded by police u/w 161 Cr.P.C. Furthermore, this witness himself produced the statement u/s 164 Cr.P.C. recorded before Magistrate after 36/37 days to this incident as Ex.11/A. This statement of witness also recorded on oath before Magistrate specifically disclosed the words of witness that after incident, they came to know that offence was committed by accused Abbas, Usman and Asghar. In this statement u/s 164 Cr.P.C. neither it was claimed that accused were identified on spot nor any role was attributed against them. It is thus proved that the witness did not tell the truth and made dishonest improvement to prove the case.

31. As regards the identification of accused on torch, it is the case of prosecution in F.I.R. that accused were seen on torch light and will be identified on seeing who committed the offence. It has been observed earlier on the basis of evidence that accused are already known to complainant party, therefore, if the persons identified on torch, their names would have been disclosed at the time of lodging F.I.R. However, identification of accused on torch light has always been considered as weak type evidence. In the condition in which offense was committed the identification of accused in night hours in torch light is not sufficient, piece of evidence as pronounced by the Superior Court in the case of Ali Nawaz and another reported in 1988 P.Cr.L.J 1736, it was observed by Honourable High Court of Sindh that identification in torch light not a sufficient and reliable evidence for conviction unless it was corroborated by some other independent evidence. It was further held that where accused claimed to have been identified in dark night in torch light, possibility of mistaken identity could not be ruled out. Furthermore, the source of identification viz. torch through which accused were identified has neither been secured nor produced in Court. I.O of the case SHO Abdul Rehman has stated in his evidence that it is not mentioned in F.I.R. that who was holding torch and also this fact not disclosed by eye witnesses. He further stated that neither he secured the torch on



which accused allegedly identified nor they produced the same during his investigation. In the case law reported in NLR 1997 Criminal 618, it was held by Honourable Supreme Court of Pakistan that evidence of identification would be unreliable when torch on the basis of which accused were identified was not produced before police.

32. As far as the identification parade of accused is concerned, it is the case of prosecution that accused Abbas and Usman were arrested and produced before Mukhtiarkar Johi for the purpose of identification test where P.Ws Dhani Bux and Yar Muhammad identified the accused to be same culprits. Neither Magistrate who conducted the identification parade was examined nor any memo of identification test is available on record and no any witness of identification parade has been examined. In absence of any evidence, no any conclusion can be drawn with regard to the value of identification test. Even the witness who allegedly identified to accused, in his evidence has neither deposed with regard the identification parade nor deposed that he picked to accused persons before Magistrate in test. Hence, the identification parade stands not provided. In the case of Tharo reported in PLD 2000 Karachi 1297, conviction and sentence was set aside by Honourable High Court of Sindh in similar circumstances."

12. It also transpires from the evidence that there was a 6 hour delay in lodging the F.I.R. which remained unexplained in this case; that the complainant who would have been the best witness did not give evidence and the names let alone description or features of the alleged accused are not given in the FIR; that eye witness PW Dani Bux stated that he knew the accused at the time of the incident yet there names are not recorded in the F.I.R. or in his S.161 statement which does not appeal to reason; that the torch was not recovered from which light the accused allegedly saw the incident; that no weapon was recovered from the accused; that the person who allegedly carried out the ID parade was not examined; that the statements of the PW's suffer from massive improvements and in our view cannot be safely relied upon especially as there appears to be little, if any, corroborative evidence; that the evidence of the eyewitnesses who are all related in our view appears to be untrustworthy as in effect found in the impugned order; that this was a night time incident yet the torch was not recovered through which light the accused were allegedly identified and in our view since there was no evidence of any ID parade the identification of the accused cannot be safely relied upon.

13. Keeping in view the extremely narrow scope of appeals against acquittal as a matter of law as mentioned above, the fact that the respondents are entitled to the benefit of the doubt and the double presumption of innocence having again reviewed the evidence against the respondents for what has been discussed above we consider that the respondents are entitled to the benefit of the doubt and that the impugned judgment is based upon valid and sound reasons and has rightly acquitted them on this basis and as such the appeal against their acquittal is dismissed.

14. These are the reasons for our short order which was announced to day in open court and 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 being without merit is dismissed alongwith listed application."