

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Acquittal Appeal No.443 of 2019

PRESENT:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Sahito

Appellant: Muhammad Rafiq S/o Muhammad Haroon
Through Mr. Abdul Nabi, Advocate

Respondent No.1: Fahad S/o Fayaz
None present.

Respondent No.2 The State
Through Mr. Ali Haider Saleem, DPG

Date of hearing: 14.12.2020

Date of Short order: 14.12.2020

J U D G M E N T

AMJAD ALI SAHITO, J. Being aggrieved and dissatisfied with the judgment dated 17.07.2019 passed by the learned 1st Additional Sessions Judge/Model Criminal Trial Court, Malir, Karachi in Sessions Case No.259/2016 arising out of the FIR No.91/2014 registered under sections 302/34 PPC at PS Sachal, Karachi; whereby the Respondent No.1 was acquitted. The appellant/complainant files this acquittal appeal with a prayer to convict the respondent following the law.

2. The facts of the prosecution case as narrated in the FIR are that on 16.02.2016 in between 1500 to 1615 hours at Flat No.B-18/17 situated in Jouhar Complex, University Road, Karachi the respondent along with his accomplice in furtherance of their common intention committed rape with Mst. Razia, sister of the complainant Muhammad Rafiq, as per chemical analysis report and also abetment of co-accused Mst. Saima Ashraf committed qatl-i-amd of Mst Razia by cutting her throat with a sharp-edged weapon, hence the instant FIR was registered.

3. After registration of the FIR and conducting a usual investigation of the case, the charge was framed against the

accused at Ex.4, which they pleaded not guilty and claimed to be tried to vide pleas recorded at Ex.4/A & Ex.4/B.

4. To prove its case, the prosecution examined PW-1 Complainant Muhammad Rafique at Ex.05, he produced a copy of the FIR at Ex.5/A and memo of the place of incident at Ex.5/B. PW-2 Muhammad Ashraf was examined at Ex.6, he produced inquest report at Ex.6/A, memo of arrest and recovery at Ex.6/B and memo of recovery of crime weapon at Ex.6/C. PW-3 WMLO Dr. Yasmeen Qamar was examined at Ex.7, she produced post mortem report at Ex.7/A and cause of death certificate at Ex.7/B. PW-4 I.O./SIP Muhammad Nawaz was examined at Ex.8, he produced roznamcha entry at Ex.8/A, the sketch of place of incident at Ex.8/B, 13 photographs at Ex.8/C-1 to Ex.8/C-13, entries at Ex.8/D, ML along with a letter of accused persons at Ex.8/E to Ex.8/H, roznamcha entries at Ex.8/I to Ex.8/L, memo of arrest at Ex.8/M, entry No.21 at Ex.8/N, PW-5 Muhammad Arif was examined at Ex.9, he produced memo of inspection of the dead body at Ex.10 and receipt of receiving of a dead body at Ex.11. The prosecution given-up PWs. PC-Riaz, Irfan, Ali Raza, Aslam and Muhammad Haneef vide statement at Ex.11/A. P.W-06 judicial Magistrate Sher Muhammad Kolachi was examined at Ex.12, he produced a confessional statement of accused Saima Ashraf at Ex. 13. P.W-07 SIP-Muhammad Akram Saho was examined at Ex.14, he produced entry No. 39 at Ex.15 Then after the prosecution has closed the side of evidence vide statement at Ex.16.

5. Statements of accused persons under section 342 Cr.P.C. were recorded at Ex.17 & Ex.18 in which they denied the prosecution allegations and further stated that they are innocent and pray for justice, they further say that they had no concern with the alleged offence. They neither examined themselves on oath under section 340(2) Cr.P.C. nor examined any witness in their defence and lastly prayed that they are innocent and may be acquitted.

6. Learned counsel for the appellant has mainly contended that the judgment passed by learned trial Court is perverse and the

reasons recorded by the learned trial Court are artificial and without appreciating the evidence; that the grounds on which learned trial Court proceeded to acquit the respondent No.1 is not supportable from the evidence on record; that the ocular evidence is supported by the medical evidence, but same was not considered by the learned trial Court, therefore, under these circumstances, the respondent is liable to be dealt with in accordance with the law. He lastly prayed for allowing the instant appeal.

7. Conversely, learned DPG has supported the impugned judgment passed by the learned trial Court.

8. We have heard learned counsel for the parties and have gone through the evidence as well as an impugned judgment with their able assistance. It is an admitted position that as per the case of the prosecution, the incident was not witnessed by anyone; therefore, the ocular account of the incident is missing from the case of the prosecution. The FIR was lodged by the complainant after two days of the incident against unknown accused persons and during the investigation, police have arrested near about 22 persons and finally, a further statement of the complainant was recorded in which he has stated that one arrested person namely Muhammad Hassan is not the real accused and he was released by the police under section 497(2) Cr. P.C. During the investigation, accused Ahmer and Fahad/present respondent was arrested and on their disclosure that on the instigation of Mst. Saima, they have killed deceased Mst. Razia and on their pointation police recovered the crime weapon. The prosecution examined complainant Muhammad Rafiq and according to him, in his 161 Cr.P.C. statement, he has disclosed the name of the accused to be Fahad and Mst. Saima on suspicion but he did not know accused Ahmer and says that he does not know about any involvement of accused Ahmer in the present case, as such, he was declared as a hostile witness. It is settled principle of law that suspicions cannot take place of proof as such only a suspicious account is available against accused Ahmer and Fahad/respondent but there is no other evidence against present

accused/respondent to connect him in the instant crime. In support of his contention, the prosecution examined Muhammad Ashraf (PW-2), he deposed that accused Mst. Saima disclosed that she sent her nephew Fahad to the deceased just for issuing threats but he has committed the murder of his mother. After the arrest of Mst. Saima, she was produced before the learned Magistrate for the recording of her confessional statement under section 164 Cr.P.C. and she has implicated both the accused persons. From the perusal of Article 43 of Qanoon-e-Shahadat, 1984 which provides that when more persons than one are being tried jointly for the same offence and confession made by one of such persons is proved, such confession shall be proved against the person making it and, the Court may take into consideration such confession as circumstantial evidence against such other person. In the present case, the complainant party has compromised with accused Mst. Saima and she has been acquitted from the charge and in view of Article 43, evidence of an accomplice cannot be accepted for convicting an accused unless it is corroborated by other reliably cogent evidence. Further, the confessional statement alone cannot be the sole basis of conviction. The prosecution failed to bring on record any such circumstantial evidence to prove that accused/respondent Fahad is involved in this case as we have already stated above that as per complainant, he was not sure whether accused Ahmer has involved in this case, therefore, the only circumstantial evidence available in this case is recovery of knife on the pointation of accused Fahad and Ahmer, which was recovered in the presence of PW-2 Muhammad Ashraf and as per his evidence, on 28.02.2016 at about 06:00 PM I.O. recovered crime weapon i.e. knife from Block # 16, Jouhar Complex on the pointation of accused; whereas the I.O. of the case deposed that during course of investigation, accused persons Ahmer and Fahad were ready to produce the weapon used in the commission of offence and on their pointation, reached at pointed place and accused persons got off from the police mobile and led the police party to the stairs of Block-17, Johar Complex and took out churri from the garbage lying under the stairs and produced the same before him and

disclosed that it was used by them in the commission of murder. It is important to note here that Muhammad Ashraf (PW-2) disclosed that knife recovered from Block #16, Johar Complex; whereas I.O. disclosed that the crime weapon viz. knife was recovered from the stairs of Block-17, Johar Complex, which is far from the Block # 16, hence recovery of crime weapon on the pointation of accused creates doubt and cannot be the foundation for conviction.

9. Furthermore, *churri/knife* was not sent to the forensic experts to ascertain whether the fingerprints of accused are available on the handle of the knife to show that they are involved in the commission of the offence. No circumstantial evidence has also been brought on record to connect the accused/respondent with the commission of an offence.

10. Based on the confessional statement of co-accused alone, the conviction cannot be recorded, in the instant case, corroborated evidence is lacking. It is not sufficient to rely only on the recovery of the knife to convict the respondent especially as no further evidence has been brought on record to connect the respondent with the commission of the alleged offence.

11. We are fully satisfied with appraisal of evidence done by the learned trial Court and we are of the view that while evaluating the evidence, the difference is to be maintained in an appeal from conviction and acquittal appeal and in the latter case, interference is to be made only when there is a gross misreading of evidence resulting in miscarriage of justice. Mere disregard of technicalities in a criminal trial without resulting injustice is not enough for interference in the judgment of acquittal gives rise to a strong presumption of innocence rather double presumption of innocence is attached to such an order. While examining the facts in the order/Judgment of acquittal, substantial weight should be given to the findings of the lower Courts, whereby accused were exonerated from the commission of the crime as held by the Apex Court in the case of *MUHAMMAD IJAZ AHMAD v. FAHIM AFZAL* (1998 SCMR 1281) and *JEHANGIR v. AMINULLAH AND OTHERS* (2010 SCMR 491). It is also a settled principle of law as held in a

plethora of case law that acquittal would be unquestionable when it could not be said that acquittal was either perverse or that acquittal judgment was improper or incorrect as it is settled that whenever there is doubt about the guilt of accused, its benefit must go to him and Court would never come to the rescue of the prosecution to fill-up the lacuna appearing in evidence of prosecution case as it would be against established principles of the dispensation of criminal justice. Learned counsel for the appellant failed to disclose any misreading and non-reading of evidence. In the case of **Muhammad Zafar and another v. Rustam and others (2017 SCMR 1639)**, the Hon'ble Supreme Court of Pakistan has held that:-

“We have examined the record and the reasons recorded by the learned appellate court for acquittal of respondent No.2 and for not interfering with the acquittal of respondents No.3 to 5 are borne out from the record. No misreading of evidence could be pointed out by the learned counsel for the complainant /appellant and learned Additional Prosecutor General for the State, which would have resulted into grave miscarriage of justice. The learned courts below have given valid and convincing reasons for the acquittal of respondents Nos. 2 to 5 which reasons have not been found by us to be arbitrary, capricious of fanciful warranting interference by this Court. Even otherwise this Court is always slow in interfering in the acquittal of accused because it is well-settled law that in criminal trial every person is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. As a sequel of the above discussion, this appeal is without any merit and the same is hereby dismissed”

12. Suffice it to say that there is hardly any improbability or infirmity in the impugned judgment of acquittal recorded by the learned trial Court, which is based on sound and cogent reasons that do not warrant any interference by this Court. The appellant has miserably failed to establish extraordinary reasons and circumstances, whereby the acquittal judgment recorded by the trial Court may be interfered with by this court.

13. This is a Criminal Acquittal Appeal and we cannot lose sight of the doctrine of double innocence, which is attached to such proceedings. Consequently, the instant Criminal Acquittal Appeal was **dismissed** vide short order dated 14.12.2020.

14. These are the reasons of our short order dated 14.12.2020.

JUDGE

JUDGE