

# IN THE HIGH COURT OF SINDH, KARACHI

Criminal Acquittal Appeal No.602 of 2019

PRESENT:

**Mr. Justice Mohammad Karim Khan Agha**

**Mr. Justice Amjad Ali Sahito**

Appellant: Fazal-e-Rabi S/o Ibrahim  
Through Mr. Mr. Mukesh K. Sharma,  
Advocate

Respondent No.1: The State  
Through Mr. Faheem Hussain, DPG

Respondent No.2: Nazir Zada @ Kaki S/o Shahzada  
None present.

Date of hearing: 21.12.2020

Date of Short order: 21.12.2020

## J U D G M E N T

**AMJAD ALI SAHITO, J.** Being aggrieved and dissatisfied with the judgment dated 28.08.2019 passed by the learned 1<sup>st</sup> Additional Sessions Judge/Model Criminal Trial Court (MCTC-I), Karachi Central in Sessions Case No.1312 of 2015 arising out of the FIR No.226/2015 registered under sections 302/34 PPC at PS Nazimabad, Karachi; whereby the Respondent No.2 was acquitted. The appellant/complainant files this acquittal appeal with a prayer to convict the respondent following the law.

**2.** Brief facts of the prosecution case, as per the statement of the complainant recorded under section 154 Cr.P.C., are that on 19.07.2015 he along with his nephew namely Fazal Khaliq S/o Fazal Karim by his car came opposite Diamond CNG, Nazimabad No.3, Karachi at about 03:00 AM to 03:30 AM meanwhile his nephew got off from the car and went towards Zohaib PCO situated near Diamond CNG and after that when he was just sitting in the vehicle, the firing was started. He saw that Gulab Khan S/o Shahzada and Nazeer Zada @ Kaki S/o Shahzada holding pistols in their hands and made firing. Due to this, his nephew Fazal Khaliq became injured and fell. He further deposed that he heard that they will kill everyone. Then, he rushed

towards PCO where Shakir S/o Gull Daraz, Ghulam Muhammad and Sanaullah were present. Then, he brought his nephew to Agha Khan Hospital through vehicle wherein the doctor declared him dead, as such, he lodged the instant FIR.

**3.** After lodging of the FIR, PI Abdul Rehman took over the investigation of the case. Initially, he submitted challan under section 512 Cr.P.C. and having completed all the formalities, both accused were declared proclaimed offenders and the case was initially kept on dormant file. Later, on 18.07.2017 accused Nazeer Zada was arrested and he has confessed his guilt with the commission of this crime alongwith his co-accused Gulab Khan.

**4.** A formal charge was framed against accused under section 265-D Cr.P.C. at Ex.6 wherein accused Nazeer Zada @ Kaki pleaded not guilty and claimed to be tried, such plea was recorded at Ex.6/A.

**5.** In order to prove its case, prosecution examined complainant PW-1 Fazal-e-Rabi at Ex.7, who produced his 154 Cr.P.C. statement at Ex.7/A, FIR at Ex.7/B, memo of site inspection at Ex.7/C. DDPP gave up PW-Sanaullah at Ex.8. ADPP gave up PW-Muhammad Khalid at Ex.9. PW-2 SIP Muhammad Riaz at Ex.10, who produced entry No.17 at Ex.10/A, memo of dead body inspection at Ex.10/B, inquest report at Ex.10/C, sketch of site at Ex.10/D, receipt to handing over dead body at Ex.10/E, entry No.12 at Ex.10/F. PW-3 PI Khursheed Ahmed at Ex.11, who produced entry No.2 at Ex.11/A and memo of recovery of seizure at Ex.11/B. PW-4 PC Muhammad Imran at Ex.12. DDPP gave up PW-Muhammad Mushtaq at Ex.13. PW-5 Dr. Muhammad Nadeemuddin at Ex.14, who produced police letter at Ex.14/A, death certificate at Ex.14/B and postmortem report at Ex.14/C. PW-6 Zahid Rehman at Ex.15. PW-Bashir Muhammad at Ex.16. DDPP gave up PW Fazal and Zahid at Ex.17. DDPP gave up PW-Asghar Khan at Ex.18. Statement of DSP Abdul Rehman was recorded as Court witness at Ex.19, who has submitted his report at Ex.19/A and jail warrant of PW-Abdul Majeed at Ex.19/B. PW-7 DSP Abdul Rehman at Ex.20, who has produced letter to Incharge FSL and Chemical at Ex.20/A and 20/B, letter

to CRO at Ex.20/C, FSL and CDR report at Ex.20/D and Ex.20/E, chemical examiner report at Ex.20/F, memo of site inspection at Ex.20/G and 20/H, CRO of accused at Ex.20/I and Ex.20/J-1 to 20/J-11. Photographs of accused Nazeer Zada at Ex.20/K. PW-8 Abdul Majeed at Ex.21 (who was wrongly mentioned as PW-1 in his deposition). ADPP gave up PW-PC Zubair and Abdul Karim at Ex.22 and Ex.23 respectively. Thereafter, the learned ADPP for the State closed the side of prosecution vide statement at Ex.24.

**6.** Statement of accused Nazeer Zada was recorded under section 342 Cr.P.C. at Ex.25; however, he did not produce any defense witness nor examined himself on oath.

**7.** 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.

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

**9.** We have heard learned counsel for the parties and have gone through the evidence as well as the impugned judgment with their able assistance. It is settled law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. Reliance in this regard is placed on the cases of *TARIQ PERVEZ v. THE STATE* (1995 SCMR 1345), *MUHAMMAD SAEED v. THE STATE* (2008 P.Cr.L.J. 1752), *GHULAM MURTAZA v. THE STATE* (2010 P.Cr.L.J. 461), *MOHAMMAD MANSHA v. THE STATE* (2018 SCMR 772).

**10.** In the instant matter, while acquitting the Respondent No.2, learned trial Court has concluded as under:

**CONCLUSION**

*“The prosecution has not been able to prove the case against accused beyond shadow of reasonable doubt. It is concluded that:*

- a. There is no recovery from accused.*
- b. The recovery of empties from place of incident is doubtful.*
- c. The independent eye witnesses had not been examined by prosecution.*
- d. The witnesses are interested and inimical.*
- e. The timings mentioned by PWs does not corroborate produced by prosecution.*
- f. The PWs does not support the presence of each other at the time and place of incident.*
- g. The visit of police officials at the site and recovery is doubtful.*
- h. Motive of offence is not established.*
- i. Material witnesses have not corroborated on material points e.g; place of incident, recovery of empties, time of recovery, time of preparation of inquest report, time of post mortem etc.*
- j. Sealing of recovered empties and preparation of its memo.”*

In this case, there are multiple circumstances which create reasonable doubts on the part of the prosecution, which was discussed by the learned trial Court while acquitting the Respondent No.2.

**11.** We have also carefully perused the record of the case with the able assistance of learned counsel for the appellant as well as learned DPG and have no hesitation to observe that the impugned judgment is speaking one and elaborated the reasons which do not suffer any illegality, gross irregularity and infirmity. Further, from the perusal of record, it reveals that while lodging the FIR, the complainant has disclosed that the incident was witnessed by eyewitnesses Shakir, Ghulam Muhammad and Sanaullah; however, the prosecution has given up eye witness Sanaullah at Ex-8; whereas PW-Shakir and Ghulam Muhammad were untraceable. The prosecution has given up PW-Fazal Rahim and Zahid at Ex.17. As per PW-Bashir Muhammad, he was available along with PW-Fazal Rahim on the date of the incident near the

place of incident, therefore, evidence of Fazal Rahim is important to corroborate with Bashir Muhammad. PW-Khalid was also given up at Ex.9. PW-Sanaullah has appeared before the trial Court but the prosecution has given up him at Ex.8. The eyewitnesses have not been produced by the prosecution, who were also independent witnesses. In view of Article 129(g) of Qanoon-e-Shahadat Order, 1984, the adverse inference can be drawn that if PWs were examined before the trial Court they would have not supported the case of the prosecution.

**12.** The present incident took place on 19.07.2015 but the FIR was lodged on 21.07.2015 at 1430 hours. PW-1/complainant Fazal-e-Rabi was examined at Ex.7, who has produced his statement recorded under section 154 Cr.P.C. at Ex.7/A and FIR at Ex.7/B wherein he has **admitted that after due consultation** he has lodged the FIR against Ghulab Khan and Nazeer Zada. Further, in cross-examination, he has **admitted** that he did not visit the police station on 19.07.2015 for lodging the FIR. SIP Muhammad Riaz PW-2 admitted in his cross-examination **“That complainant has stated in his 154 Cr.P.C. that after having been consulted with each other, he came at the police station for lodging of FIR.”** He further admitted that **“Complainant has not explained delay for loading the FIR in his 154 Cr.P.C.”** According to PI Khursheed Ahmed PW-3, on the day of the incident, he was on patrol when he reached near Diamond CNG he saw the rush of people. On enquiry, he came to know about the firing upon Fazal Khaliq. He visited the place of incident and secured 09 empties of 9 MM, bloodstained earth and when the property was de-sealed in the Court, only 08 empties of 9MM were found. He has further admitted that when he visited place of incident, PCO was open but nobody was available there, all persons, present/gathered at the time of recovery, have unanimously disclosed that unknown persons have fired upon the deceased. PC-Muhammad Imran PW-4, mashir of the case, admitted that he has signed cloth parcel seal at the police station. SIP Abdul Rehman was confronted with 161 Cr.P.C. of PWs Sanaullah Ghulam Rehman Shakir and Ghulam Muhammad, he admitted that in their 161 Cr.P.C. statement there is no mention

of the availability of complainant and other PWs Abdul Majeed and Bashir. PW-Abdul Rehman admitted that the name of three witnesses Shakirullah, Ghulam Muhammad and Sanaullah are mentioned by the complainant in 154 Cr.P.C. and FIR; however, names of Abdul Majeed, Zahid Rehman and Bashir Muhammad are not mentioned in the FIR as eyewitnesses. The motive set up in the present case was that the accused are drug smugglers and the deceased was Hafiz-e-Quran, who used to resist and complained against the accused party. On this ground, the deceased was murdered. Such a plea was not taken by the complainant at the time of lodging the FIR.

**13.** The criterion of interference in the judgment against acquittal is not the same as against the cases involving a conviction. The scope of interference in an appeal against acquittal is narrow and limited for the reasons that 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 until proved guilty. In other words, the presumption of innocence is doubled.

**14.** 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 or 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”***

**15.** 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.

**16.** 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 21.12.2020.

**17.** These are the reasons of our short order dated 21.12.2020.

**JUDGE**

**JUDGE**