

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Acq. Appeal No. D- 47 of 2019

Present:

Mr. Justice Khadim Hussain Tunio
& Mr. Justice Yousuf Ali Sayeed.

Appellant : Abdul Razzaque Brehmani through
Mian Taj Muhammad Keerio,
Advocate

Respondent 1 to 3 : Nemo

Respondent No. 4 : The State, through Sana Memon,
APG

Date of Hearing : 18.02.2021

JUDGMENT

YOUSUF ALI SAYEED, J. - The Appellant, who is the complainant of Crime No. 10 of 2012 registered on 21.05.2012 at Police Station Wahi Pandhi, District Dadu, under Sections 302, 324, 147, 148 and 149 PPC (the "**FIR**"), has preferred the captioned Appeal under Section 417 (2A) Cr. P.C., impugning the Judgment dated 31.05.2019 passed by the learned Additional Sessions Judge-I/Model Criminal Trial Court Dadu in the ensuing Sessions Case, bearing No. 260 of 2012, resulting in the acquittal of the Respondents Nos. 1 to 3.

2. Succinctly stated, the substance of the case against the Respondents in terms of the FIR was that on 20.05.2012, they were involved in an act of armed affray between communal factions towards which the Appellant and his relatives were drawn, thus came to be caught in the cross fire, with one his cousins, namely Bashir Ahmed, suffering a gunshot wound to the neck and succumbing to his injuries at Taluka Hospital Johi.

3. After the usual investigation the police submitted the final challan before the competent Court and the case was sent-up to the Sessions Court for disposal in accordance with law, where the accused entered pleas of not guilty in response to the charge and claimed trial.
4. The prosecution examined several witnesses at trial, including the Appellant, PW-4, whose deposition was recorded and marked as Ex.11, as well as Dr. Haji Khan Mangi, P.W-1, whose deposition was recorded and marked as Ex.8, Tapedar Irfan Ahmed Soomro, P.W-2, whose deposition was recorded and marked as Ex.9, Dr. Niaz Ahmed Kalhoro, P.W-3, whose deposition was recorded and marked as Ex.10, eye witness Ahmed Ali, P.W-5, whose deposition was recorded and marked as Ex.12, eye witness Abdul Jabbar, P.W-6, whose deposition was recorded and marked as Ex.13, mashir Ali Akbar, P.W-7, whose deposition was recorded and marked as Ex.14, Investigation Officer ASI Qurban Ali Khoso (retired), P.W-8, whose deposition was recorded and marked as Ex. 15, and SIP Bashir Ahmed Mallah, P.W-9, whose deposition was recorded and marked as Ex.16. Thereafter, the ADPP for the State closed the side of prosecution, whereafter the Statements of the accused under S.342 Cr. P.C were recorded at Ex.18 to Ex.20, wherein they denied the allegations leveled against them and professed their innocence.
5. A perusal of the impugned Judgment reflects that the learned trial Court found that the Appellant had deposed in deviation from the FIR in as much as he had stated that he and his companions had gone to Wahi town on the date of the incident, and were confronted by the accused when reached BHU Hospital on their return, with the accused being armed with repeaters and issuing murderous threats.

6. It was stated that on the instigation of accused Mureed Birehmani and Niaz, the accused Manzoor and Nazar fired upon and injured Bashir, with the Appellant and others falling to the ground to save themselves, with the accused then leaving the scene and the Appellant, whereupon the Appellant and his companions rushed Bashir towards Taluka Hospital Johi, but in vain as he succumbed to his injuries *en route*, after which the Appellant apparently informed the police.

7. It was also observed that P.W-5, Ahmed Ali, P.W-6 Abdul Jabbar, both being shown as eye witnesses of the incident, had given contradictory and inconsistent versions, with the former deposing that on the given day he, his brother Abdul Razzaque, Abdul Jabbar and cousin Bashir Birehmani went to Wahi Pandhi and when they reached near BHU Hospital on their return, armed persons belonging to the Rustamani community fired upon and injured Bashir, while two fires also hit passersby, whereas the latter stated that of the accused, Manzoor, Nazar, Makhno, Ali Gohar and Mureed made hakals at them, whereas Manzoor and Nazar directed gunfire at Bashir, hitting him on the neck and shoulder respectively. Then they removed the injured Bashir towards Police Station, obtained a letter for medical treatment and on the way to hospital Bashir succumbed to the injuries.

8. As such, from a cumulative assessment of the evidence the learned trial Court determined that the prosecution had failed to prove the participation of the Respondents in the crime, hence duly extending them the benefit of doubt, resulting in their acquittal. Paragraphs 28 and 29 of the impugned judgment are of particular significance, reading as follows:-

28. In their evidence before the Court, the eye witnesses of prosecution, complainant Abdul Razzaque, P.W Ahmed Ali and P.W Abdul Jabbar, have given contradictory versions on material points and made some dishonest improvements. The FIR is silent about allegation of abetment nor prosecution witnesses in their statements U/S.161 Cr.P.C, had stated about the abetment by any of the accused, but the complainant in his evidence has stated about the abetment by accused Mureed and Niaz, thus has deviated from his version of FIR and his evidence was not supported by the eye witnesses Ahmed Ali and Abdul Jabbar who are silent on that score. As per FIR, two factions of Rustamani community were firing upon each other and complainant party reached there, which is very surprising, as no one is so dare to put himself in danger by entering in the area of firing. However, complainant in his evidence has given the contradictory version than FIR and stated that when they reached at BHU Hospital, the accused persons armed with weapons came there. The complainant has nowhere stated in his evidence about the injuries sustained by the passersby. The eye witness Ahmed Ali, has given different version and according to him, when they reached at BHU Hospital, they saw that persons belongs to Rustamani community armed with ammunitions fired from their respective weapons upon his cousin Bashir. According to him, fire was also hit to passersby, by caste Jiskani and Rustamani, but casts of the injured were not mentioned in the FIR, on the contrary, as per medical evidence two persons by caste Jiskani and Leghari were injured. Complainant has nowhere stated in his evidence, regarding firing by present accused persons upon them in order to commit their qatl-i-amd. Likewise, P.W-5 Ahmed Ali has also not attributed any overt act to accused and has not taken the names of present accused in his statement.

29. Above all, the two injured namely Muhammad Jumman Rustamani and Sadam Hussain Leghari, were nowhere cited as witnesses in this case, nor examined before the court, to confirm the factum of firing by present accused persons and injuries actually caused to them from the hands of accused Niaz @ Makhan, Mureed and Ali Gohar, thus, the more important link in the prosecution story is therefore, missing. Under the circumstances, the evidence of prosecution is pregnant with material contradictions, variations, dishonest improvements and infirmities, which makes the case of prosecution and veracity of the witnesses, highly doubtful which further reflects that the incident might not had been taken place the way it was narrated and prosecution witnesses are not confirmed about the role played by present accused persons and have given different versions, thus, considering contradictory statements of eye witnesses, the presence of present accused persons on the spot becomes highly doubtful, as overt act specifically attributed to absconder accused Manzoor and Nazar and in absence of authentic piece of evidence of corroboration, accused Niaz @ Makhan, Mureed and Ali Gohar cannot be held vicariously liable for the act of absconder accused persons.

9. When called upon to demonstrate the misreading or non-reading of evidence or other infirmity afflicting the impugned judgment, particularly paragraphs 28 and 29 thereof, as reproduced herein above, learned counsel for the Appellant was found wanting and could not point out any such error or omission, but merely sought to repeatedly emphasize that as there was no allegation of enmity between the Appellant and Respondents, ergo there was no cause for false implication in the matter.

10. Needless to say, it is axiomatic that the presumption of innocence applies doubly upon acquittal, and that such a finding is not to be disturbed unless there is some discernible perversity in the determination of the trial Court that can be said to have caused a miscarriage of justice. If any authority is required in that regard, one need turn no further than the judgment of the Honourable Supreme Court in the case reported as Muhammad Zafar and another v. Rustam and others 2017 SCMR 1639, where it was 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 Nos.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.”

11. In the absence of any such factor in the matter at hand, the instant Appeal is manifestly devoid of substance, and it is for that reason that we had made a short order in open court on 18.2.2021, whereby the same was dismissed *in limine*.

JUDGE

JUDGE

karar_hussain/PS*