JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Cr.Spl.ATA.Acquittal.Appeal.No.D- 118 of 2002

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammad Karim Khan Aga.

Date of hearing: 17.05.2017.
Date of judgment: 29.05.2017.

Syed Meeral Shah, D.P.G. for appellant / State.
None present for the respondents.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Muhammad Hashim and Roshan Ali were tried by the learned Special Judge, Anti-Terrorism, Mirpurkhas for offence u/s 365-A PPC. By judgment dated 20.05.1999 respondents / accused were acquitted of the charge. Hence this Criminal Acquittal Appeal has been filed by the State.

2. Brief facts of the prosecution case as disclosed in the FIR are that complainant Syed Nadeem Shah lodged the FIR at PS Samaro, alleging therein that he is area Manager of Ciyanide Pakistan Limited and his brother Faheem Shah is Assistant Director Port Qasim, Karachi and his other brother Babar Shah who is American Citizen and his cousin Sohail Shah has recently retired and that he is residing at Karachi. As per FIR on 04.12.1998 his two brothers and cousin boarded car of Sohail Shah No. AY 573/KYC, came to home at Mirpurkhas at 10-00 p.m and stayed

with him. As per FIR their counsin Rashid was residing at Samaro and they had to go to him on his invitation and such program was made. As the per FIR Sohail Shah and others had worked in National Identity Card Office Umerkot and thereafter they were to reach Samaro at 04-00 p.m. who told him that he (complainant) should proceed to Samaro. As per FIR on that day they stayed at his house at Mirpurkhas. On 05.12.1998 Sohail Shah, Babar Shah and Faheem Shah reached Mirpurkhas at 10-00 a.m in car of Sohail Shah and the complainant left for Samaro in his car at 12-00 noon time and reached house of Rashid Shah at Samaro via Kot Ghulam Muhammad. As per the FIR till 4-00 p.m Sohail Shah and others did not reach Samaro and the complainant and others kept waited for them till 7-00 p.m and that by that time also they did not reach there. As per the FIR the complainant then enquired from Haider Shah of Umerkot on telephone who informed him that they had not reached there at his place. As per the FIR the complainant then enquired from his house at Mirpurkhas on telephone and his inmates of the house disclosed that they were not there. As per FIR the complainant then alongwith Junaid Shah looked for Sohail Shah and others in the surroundings and enquired about them and then reached Mirpurkhas and looked for them in Mirpurkhas but they could not be found out Sohail Shah and others. As per FIR the complainant then assured that some unknown persons had abducted Sohail Shah and others while going from Mirpurkhas to Umerkot and then they reached back at Samaro at 4-00 a.m. and on 6.12.1998 in the morning time car of Sohail Shah was standing on Chhandan Mori situated at the northern side of Khani at Mithrao Wah. As per the FIR receiving such information complainant and Junaid Shah, Rashid Shah and others went to Chhandan Mori of Mthrao Wah where Khyber car of Sohail Shah bearing No. AAY 573/KYC was standing. As per FIR they searched for foot prints but no foot print was found out. As per FIR documents of

National Identity Card of son of Sohail Shah were found in the jungle situated on the western side of Sim-Nala. As per the FIR they then consulted with Nobho Shah and then the complainant appeared at police station and lodged present FIR to the above effect. The FIR is registered as Crime No.64 of 1998 u/s 17/3 Hudood Ordinance and section 365-A PPC.

3. Facts of FIR/Crime No.69/1998 are that complainant SIP Muhammad Rahim Rajar of PS Samaro lodged the FIR at the PS Khipro District Sanghar and stated that he was the SHO PS Samaro where crime No.64/1998 u/s 365-A and 17/3 Hudood Ordinance is registered in which abductee Faheem Shah, Babar Shah and Sohail Shah are shown as abductees. As per FIR, spy information was received during investigation of that case. According to which that offence is committed by Karo Chanio, Roshan Khoso, Iqbal Abro and Ali Barani group of dacoits and that the abductees were kept in village Karo Chanio by him. As per the FIR as such information received, SSP Umerkot was informed about, who consulted with the superior officers and got the teams of police of Umerkot, Mirpurkhas and Sanghar District constituted including the complainant himself and the other staff members of the different districts reached there and they proceeded to the pointed place and reached at 09-45 a.m near otak of Karo Chanio. As per FIR seeing the police party car bearing No.ABJ 582/Karachi Margala was boarded by Karo Chanio and Roshan Khoso started to run away with speed and that dacoit Iqbal Abro and Ali from the southern side started firing at them. As per FIR police taking position started firing in their defence and that in the meanwhile the car was stuck-up in the mud and occupants of the car Roshan Khoso taking position started firing from his Kilanshankov. As per FIR the police also fired at him. It is stated that as a result of that dacoit Karo Chanio was killed and other dacoit Roshan Khoso was arrested who disclosed his name to be the same. As per FIR

dacoit Iqbal Abro, Ali Barnani taking benefit of suger cane crop succeeded in escaping from there. As per the FIR one Kilashinkov bearing No.1953 D/C 4318 and one magazine were recovered from Karo Chanio and one kilashinkov No.56-14111921 and two magazines and 10 rounds were recovered from Roshan Khoso. As per the FIR one gun No.B-4997 double barrel, four cartridges and two hand grenades lying in the car so also they were taken into custody of police. Thereafter the complainant registered the FIR as Crime No. 69/98 U/s 353, 324 and 34 PPC read with section 3 & 4 Explosive Substance Act.

4. Facts of the FIR/Crime No.70 of 1998 are that complainant SIP Muhammad Rahim S.H.O Samaro police station lodged the FIR at Police Station Khipro (District Sanghar) and stated in the same that he was posted S.H.O Police Station Samaro, District Umerkot, and that on that day they during investigation of Crime No. 64 of 1998 U/s 17(3) Hudood Ordinance, and section 365-A of PPC, of Police Station Samaro, alongwith Bomb Squad had reached out-side Otak of dacoit Karo Chanio under roznamcha entry No.22 dated 12.12.1998 at 7-00 a.m where encounter with dacoits Karo Chanio, Roshan Khoso, Iqbal Abro and Ali Barnani had taken place in which Karo Chanio had been killed and dacoit Roshan Khoso was arrested alongwith Kilashinkov detail of which is given in the FIR of Cr. No.69 of 1998 U/s 324, 353 and 34 PPC and 3,4 Explosive Substnace Act and that one KK and that one Double barren gun, details of which are given in the FIR, two hand grenades were recovered and that the accused could not produce their licneses therefore since he had committed offence u/s 13-D Arm Ordinance therefore such FIR was lodged against him on behalf the State.

5. During investigation, place of wardat was visited by the Investigation Officer, statements of the PWs were recorded. Accused

Muhammad Hashim and Roshan Ali were arrested and on the conclusion of investigation challan was submitted against the respondents / accused.

6. Charge was framed against accused in all the three FIRs / Crimes, to which they pleaded not guilty and claimed to be tried.

7. In order to prove its case, the prosecution examined as many as 09 witnesses, thereafter the prosecution side was closed.

8. The statements of accused were recorded u/s 342 Cr.P.C. in which both the accused denied the prosecution allegations and claimed their innocence. Both the accused did not examine themselves on Oath nor they led any evidence in defence.

9. After hearing the learned counsel for the parties and examination of evidence trial court acquitted the accused of the charge. Against such acquittal the learned D.P.G. has filed the captioned Criminal Acquittal Appeal.

10. We have perused the evidence and judgment of trial court dated 20.05.1999 with the assistance of D.P.G. for the State.

11. We have come to the conclusion that no overt act has been attributed to accused persons. Mere presence of the accused did not constitute an offence as alleged by the prosecution. Trial court has assigned sound reasons while acquitting the accused persons. For the sake of convenience the relevant portion of the judgment is reproduced hereunder:-

> ***"In both these crimes it may first be pointed out that as per cross examination of Inspector Zakir Hussain (Ex.9) 80/100 police personnel constituted parties of police and was available on the place of vardat and that persons of the car started firing at police parties and that they also fired in their defence. Again ASI Nandlal (Ex.11) has stated that immediately on their arrival encounter took place and that Iqbal Abro, Ali Barani***

fired from the side of sugar cane and that Karo Chandio was killed in a result of police firing and Roshan Khoso was arrested and that Iqbal Abro and Ali Barani taking benefit sugar cane crop escaped from there. In this connection ASI Muhammad Sharif (Exh.12) in his examination in chief has deposed that as soon as they reached near the village and otaq of Karo Chandio, two persons seeing the police mobile boarded in car and started to run away with speed but car was stuckup in the mud and in the meanwhile Iqbal Abro and Ali Barani fired straight on the police from southern side and persons of the car alighted and also started firing upon the police and also police fired in defence. He in his cross examination has stated that 100/200 rounds were fired while Pw Nandlal in his cross examination has stated that 100/150 rounds were fired. Pw Nand Lal has admitted that no empties were recovered from the place of wardat. Pw Muhammad Sharif in his cross examination has also stated that not a single empty recovered from the place of wardat. As against these witnesses Pw ASI Wali Muhammad Rajar (Exh.13) has in his cross examination stated that 200/300 rounds were fired, therefore it is surprising that even if such incident has taken place then why empties were not recovered from the place of wardat as circumstantial corroboration evidence, therefore this has created doubt in the prosecution story. It is also again important to note that the evidence of ASI Wali Muhammad Rajhar who was also police party and had gone to raid village of Karo Chanio. In his cross examination admitted that no any police vehicle was hit and no any police personnel was hit by the firing, which again is not believable had the present incident taken place.

In this case it is case of the prosecution that the police had gone to the place of wardat on spy information therefore as per the settled law it was incumbent upon the police to have taken private mashir with him but the investigation office of this case namely ASI Muhammad Sharif (Exh.12) in his cross examination has stated that there were 100/150 persons residing in village Karo Chanio and from this village Ali Khan Rajar is at call distance from the place of wardat, village of Sarhandi is situated at southern side of place of wardat at the distance of one kilometer and otaq of Taj Kaimkhani is by the side of Rajar village. He has stated that they had asked private persons to accompany them at Khipro and Karo Chanio but they had refused. He has admitted that he has neither given them notice nor have mentioned about their refusal in the case diary. In his cross examination he has stated that they had searched the village of Karo Chanio and also all its inhabitants on 20.5.1999 but has admitted that no such mashirnama is prepared. Therefore, the prosecution story in view of above also has become doubtful and recovery of weapon from the accused for want of independent private mahsir has also become doubtful. It may further be noted that in the FIR bearing No.70/1998 under section 13(d) Arms Ordinance, there is no mentioned about the recovery of the weapons in

presence of the mashirs and there is nothing to show that police had taken efforts to have private mashir but none was willing and came forward. Therefore in view of PLD 1997 SC page-408 also the recovery has become doubtful.

It is also worthwhile nothing that as per the prosecution story accused Karo Chanio and Roshan with view to run away in the Car drive the Car with speed but the car was stuckup in the mud but as per mashirnama of place of wardat Exh.11 no wheel marks of the car are shown to be available. This also has created doubt in the prosecution story.

Important of them all is the fact that investigating officer ASI Muhammad Sharif in his cross examination has admitted that Klashankov recovered from accused but was not sealed at the spot and that from the police station the Klashankovs were sent to malkhana. As per note of this court at the bottom of the chief examination of this witness, the properties were due sealed and unsealed in the court. This witness has however voluntarily in his cross examination has stated that the property was sealed after his transferred. But he has not disclosed the source as to how he has come to know that the property was sealed after his transfer. This has also created doubt about the recovery of these weapons from the accused person.

Most important of all above is evidence of Dr. Abdul Rehman (Exh.6), who has as against prosecution story and its evidence in which Inspector Zakir Hussain (Exh.9) in his cross examination stated that the police party had fired at the accused from distance of one block which is equivalent to 16-0 acres and when SIP Muhammad Manthar Exh.10 in his cross examination has stated that some were fired from four chowkri and some were fired from eight chowkri. When SIP Muhammad Sharif Exh.12 has in his cross examination stated that the accused were fired upon from distance of about two blocks which come to 32-0 acres. As against evidence of these PWs the medical office in his evidence so also in post mortem report has stated that injury No.1 was caused from range more than 15 feet and injury No.3 was caused from closed range and that both injury No.1 and 3 are entry wounds. The defence in the cross examination has put question to the witness that accused Karo Chanio was already killed and therefore in order to do away with that killing present incident has been manipulated and that he was fired upon from distance of about 100 feet but the prosecution witnesses has denied that, but defence plea has very much got the force in view of the evidence of Doctor. Therefore on this account also the prosecution story of crime No.69/98 and 70/98 has become doubtful. The prosecution therefore also has failed to prove charges leveled on the basis of crime No.69/98 and 70/98 beyond reasonable doubt. My findings on points No.2,3 and 4 therefore are also in 'NEGATIVE'.

POINT NO.5.

> ***In view of my findings on points No.1 to 4, accused Hashim and Roshan are acquitted.***
> ***Accused Hashim and Roshan are produced in custody who are ordered to be released forthwith by jail authorities if not required in any other case."***

12. In our considered view, judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honourable 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:***
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> ***Bashir Ahmad 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 2 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), 2004 SCMR 249, 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 until proved guilty; in other words, the presumption of innocence 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."

13. For the above stated reasons there is no merit in the appeal against acquittal. Acquittal recorded by trial Court in favour of respondents / accused is based upon the sound reasons, which require no interference at all. As such, the appeal against acquittal is without merits and the same is dismissed.

JUDGE

JUDGE

Tufail