JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Acquittal.Appeal.No.D- 113 of 2010

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 28.03.2018.
Date of judgment: 28.03.2018.

Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh for the appellant / State.
None present for respondent.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Khan Muhammad and Muhammad Ashraf were tried by learned Additional Sessions Judge, Kotri in Sessions Case No.36 of 2003 for the offence u/s 302, 114, 504, 34 PPC. By judgment dated 20.10.2009, the respondents/accused were acquitted of the charge by extending them benefit of doubt. Hence, instant Criminal Acquittal Appeal was filed by the State through Special Prosecutor General Sindh Karachi.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 11.05.2013 at 2130 hours complainant Jalaluddin lodged FIR alleging therein that he owned some property. At the time of incident, he was present at his lands alongwith his nephew Zahid Hussain. At 1845 hours, one hari Muhammad Yousif came running to the complainant from the garden side and informed him that two unknown persons were

taking bath in water course alongwith Muhammad Ashraf Punjabi and Khan Muhammad. It is alleged that the complainant had restrained them from taking bath in the water course as the houses of the complainant are situated infront of water course. It is alleged that Muhammad Ashraf become annoyed over it and declared that the complainant party would not be spared. It is further alleged that accused Khan Muhammad fired from his pistol at Zahid Hussain who sustained the firearm injury and fell down. Thereafter, contractor Muhammad Ashraf, Khan Muhammad and two unknown persons abused to the complainant party. Zahid Hussain was shifted to the hospital for his treatment where he succumbed to the injuries. FIR of the incident was lodged by Jalaluddin against the accused for offences u/s 302, 114, 504, 34 PPC.

3. After usual investigation, challan was submitted against the respondents/accused Khan Muhammad and Muhammad Ashraf.

4. Trial court framed charge against the respondents/accused under the above referred sections, to which they pleaded not guilty and claimed to be tried. At the trial, prosecution examined in as much as 10 PWs who produced the relevant documents/reports thereafter the prosecution side was closed.

5. Statements of accused were recorded u/s 342 Cr.P.C. in which accused claimed false implication in this case and denied the prosecution allegations.

6. Trial court formulated two points for determination and replied the point No.1 with regard to the involvement of accused as doubtful and acquitted the accused by judgment dated 20.10.2009.

7. State filed appeal on 19.04.2010. Notices were issued to the respondents which returned unserved. BWs were also issued but returned executed with the endorsement that the respondents have shifted to Punjab and their whereabouts are not known.

8. We have heard Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh and scanned the entire evidence available on record. Trial court has recorded acquittal in favour of the respondents/accused mainly for the following reasons:-

> ***"PW Abdul Qadir Ex.28, deposed that complainant is his brother, he does not know if Muhammad Yousif is or was Kamdar of complainant. This piece of evidence of P.W is also created doubt because how he was not in knowledge that Muhammad Yousif was Kamdar of complainant, as this fact was in knowledge of every person of land. He further deposed that co-mashir Hashim is father of P.W Yousif. The blood spot was only one and spread over about 6/7 inches in diameter. The empty shell and live bullet were lying near the blood stained earth. While P.W Mazhar Meddi Ex.30, deposed that he had visited the place of incident on 12.05.2003 and prepared mashirnama. He had collected two empty bullets and blood stained earth/mud from the place of incident. This fact is not corroborated by weapon examination report Ex.34, which shows that one 30 bore crime empty no marked as "C" was fired from the 30 bore pistol, without number, then how the another empty bullet was lying at the place of incident. The blood stained clothes of deceased Zahid Hussain were sent through letter dated 06.10.2003, which was received by Chemical Examiner on 08.03.2004 much more five months. The pistol was sent for Chemical Examination on 22.09.2003, while incident took place on 11.05.2003. Such piece of evidence was not credible and was of no assistance to the prosecution against the accused in circumstances. In this respect I relied on 2002 SCMR 1986 (C).***
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> ***There are so many contradictions of witnesses making improvements and changing version as and when suited. Improvements once found deliberate and dishonest, cast serious doubt on veracity of witnesses. In this respect I relied on 1973 P.Cr.L.J 802 (Lahore).***
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> ***PW Amjad Hussain Ex.34 was directed to record statements of complainant and witnesses and handed over the statements alongwith case diaries to Additional D.P.O. He did not give any conclusion after recording statements of complainant and witnesses.***

The accused persons in their defence filed statement Ex.37-A stated that allegation that he and co-accused Khan Muhammad were swimming in the water course is false, as the water course was quite shallow and it cannot be come upto the knees of a person as such no bath can be taken much less swimming in it. There arose dispute between brothers Anwar and complainant for not sharing the lease money as he was leaseholder of mango garden. After getting him arrested in this false case, the fruit of the leased garden was appropriated by complainant party and paid amount of Rs.5,00,000/- was usurped by the complainant.

Co-accused Khan Muhammad in his statement has stated that he was Chowkidar on the garden. When he came on his duty at 09-00 P.M. he was told by the haris that murder of nephew of complainant was committed with a view to contact his Zamindar contractor he went to his house but he was not available, therefore, he returned to his house but during night the Police arrested him, nothing was recovered from him. The defence witnesses Muhammad Rafique has stated that Ashraf came to his shop and informed that Zahid had received injuries and they should go the hospital to know about it. When they both reached in Taluka hospital Kotri, where they contacted Jalal Abbasi, who is uncle of Zahid. After some talks with him, Jalal Abbasi told them that he was going to police station and they should also follow him and that presence of Ashraf at Police station was necessary in order to make enquiries from him about names of haris etc. Thereafter, he and Ashraf went to Police station where police locked up Ashraf. D.W. Fakhuruddin has stated that Ashraf came to his shop meanwhile D.W. Younis also came there. A person came there and informed Ashraf that there had happened a fight with Abbasi's and he was called to come to hospital then Ashraf left his shop. Next day he came to know that Ashraf was locked by police.

The complainant had taken plea motive of dispute over swimming in Water Course but this plea was not established by prosecution witnesses during their evidence. When the version put forth by the prosecution can equally will be interpreted as that of the accused and when both the probabilities appear reasonable, the version given by the accused is to be preferred. In this respect I relied on 2006 SCMR 1234. As for giving benefit of doubt to an accused it is not necessary that there should many circumstances creating doubts. If a simple circumstance creates doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. I also relied on 1995 SCMR 1345.

<u>Point No.2</u>

> ***In the above circumstances, I hereby acquit the both accused giving benefit of doubt to them. Accused Khan Muhammad is produced from Central Prison, Hyderabad. Issue writ of release, if not required in any other case. Co-accused Muhammad Ashraf is present on bail, his bail stand cancelled and sureties discharged."***

9. Learned D.P.G. appearing on behalf of the State argued that the finding of the trial court on point No.1 was entirely against the evidence as well as law and thus the same is liable to be set aside. It is further argued that the trial court ignored the ocular evidence corroborated by the medical evidence. It is further contended that there were minor contradictions in the evidence of prosecution witnesses. It is submitted that trial court did not assign reasons to disbelieve prosecution evidence. Lastly, submitted that the impugned judgment is liable to be set aside.

10. We have carefully perused the prosecution evidence and impugned judgment passed by the trial court dated 20.10.2009. We have come to the conclusion that the trial court rightly acquitted the accused for the reasons that there were material contradictions in the evidence of prosecution witnesses with regard to the material particulars of the case. Trial court has also assigned sound reasons for disbelieving the report of the ballistic expert. Motive as set up by the prosecution was also not established at the trial. There were several circumstances in the case which had created reasonable doubt in the prosecution case. Therefore, doubt was extended rightly in favour of the accused.

11. Moreover, appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. As held in the case of Ghous Bux v. Saleem and 3 others (2017 P.Cr.L.J 836):-

> **"It is also settled position of law that the appreciation**

of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. Additional P.G has rightly relied upon the case of Muhammad Usman and 2 others v. The State 1992 SCMR 489, the principles of considering the acquittal appeal have been laid down by honourable Supreme Court as follows:

> **It is true that the High Court was considering an acquittal appeal and, therefore, the principles which require consideration to decide such appeal were to be kept in mind. In this regard several authorities have been referred in the impugned judgment to explain the principles for deciding an acquittal appeal. In the impugned judgment reference has been made to Niaz v. The State PLD 1960 SC (Pak.) 387, which was reconsidered and explained in Nazir and others v. The State PLD 1962 SC 269. Reference was also made to Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 and Khan and 6 others v. The Crown 1971 SCMR 264. The learned counsel has referred to a recent judgment of this Court in Yar Mohammad and 3 others v. The State in Criminal Appeal No.9-K of 1989, decided on 2nd July, 1991, in which besides referring to the cases of Niaz and Nazir reference has been made to Shoe Swarup v. King-Emperor AIR 1934 Privy Council 227 (1), Ahmed v. The Crown PLD 1951 Federal Court 107, Abdul Majid v. Superintendent of Legal Affairs, Government of Pakistan PLD 1964 SC 426, Ghulam Mohammad v. Mohammad Sharif and another PLD 1969 SC 398, Faizullah Khan v. The State 1972 SCMR 672, Khalid Sahgal v. The State PLD 1962 SC 495, Gul Nawaz v. The State 1968 SCMR 1182, Qazi Rehman Gul v. The State 1970 SCMR 755, Abdul Rasheed v. The State 1971 SCMR 521, Billu alias Inayatullah v. The State PLD 1979 SC 956. The principles of considering the acquittal appeal have been stated in Ghulam Sikandar's case which are as follows:-**
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> **"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:-**
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> **(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting, the accused. This approach is slightly different than that in an appeal against conviction when**

leave is granted only for the reappraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

(2) The acquittal will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

(3) In either case the well-known principles of reappraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and, for no other reason.

(4) The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

13. In another case of State/Government of Sindh through Advocate General Sindh, Karachi v. Sobharo (1993 SCMR 585), it is held as follows.

"14. We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view that while evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar

Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed."

12. Judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. 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 cordinal 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 case of The State and others v. Abdul Khaliq and others (PLD 2011 Supreme Court 554). 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:

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 sound reasons, which require no interference. As such, the appeal against acquittal is without merits and the same is dismissed.

JUDGE

JUDGE

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