IN THE HIGH COURT OF SINDH, AT KARACHI

Cr. Acq. Appeal No. D-386 of 2018

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Appellant	:	Muhammad Iqbal Khan through Muhammad Khalid, Advocate
Respondent No.1	:	Nemo
Respondent No. 2	:	The State, through Ali Haider Saleem, APG
Date of Hearing	:	26.03.2021

JUDGMENT

YOUSUF ALI SAYEED, J. - The Appellant, who is the complainant of Crime No. 224 of 2012 registered on 29.04.2012 at Police Station Boat Basin, Karachi, under Sections 302, 34, PPC (the "**FIR**"), has preferred the captioned Appeal under Section 417 (2A) Cr. P.C., impugning the Judgment dated 04.06.2018 passed by the learned IIIrd Additional Sessions Judge, Karachi, South, in the ensuing Sessions Case, bearing No. 1856 of 2014, resulting in the acquittal of the Respondent No. 1, Bashir Ahmed, and the case against the absconding accused, namely Saeed, being kept dormant.

2. Succinctly stated, the information disclosed by the Complainant through the FIR was that he, along with his son, namely Asif Khan, and another companion, namely Uzair, were intercepted in their motor vehicle outside Meezan Bank on Shahrah-e-Ghalib at about 11:15 PM on 28.04.2012 by two young boys astride a motorcycle, of whom the pillion rider, was armed with a pistol. It is said that Asif, who was apparently driving, attempted to maneuver the vehicle so as to escape the scene, but the pillion rider took multiple shots at them, with Asif being struck by one of the bullets on the right side near his ribs, later succumbing as a result of the injury at Ziauddin

Hospital, where he had been rushed for necessary medical attention.

3. After the usual investigation the police submitted the challan before the competent Court with the matter initially being consigned under "A Class", however, on the basis of so-called 'spy information' said to subsequently have been received as to the complicity of the aforementioned accused, the Respondent No.1, who was apparently already in custody in relation to another case, was then apparently pointed out by the Complainant as being the driver of the motorcycle during the course of a Test Identification Parade held before the XIIth Civil Judge and Judicial Magistrate, Karachi, South, on 28.03.2014, with the case thereafter being sent-up to the Sessions Court for disposal in accordance with law, where the accused entered a plea of not guilty in response to the charge and claimed trial.

4. The prosecution examined several witnesses at trial, including the Appellant (PW-1), whose deposition was recorded and marked as Ex.5, Muhammad Uzair (PW-2), whose deposition was recorded and marked as Ex.6, the Medico Legal Officer, Dr. Afzal Ahmed (PW-4), whose deposition was recorded and marked as Ex.8, as well as Aziz-Ur-Rehman (PW-8), the learned Judicial Magistrate who conducted the Test Identification Parade, whose deposition was recorded and marked as Ex.15. After, the ADPP for the State closed the side of the prosecution, the Statement of the accused under S.342 Cr. P.C was recorded as Ex.18, wherein he denied the allegations leveled against them and professed his innocence.

5. A perusal of the impugned Judgment reflects that the learned trial Court *inter alia* found that:

(a) No incriminating articles had been recovered from the possession of the Respondent No.1 so as to connect him to the commission of the offence and even the motorcycle allegedly being ridden by him at the time of the incident was not recovered and produced.

(b) The medical evidence introduced by the Prosecution did not support the ocular account given by the witnesses, namely the Complainant and Uzair, in as

much as the entry and exit wounds reflected in the Report of the Medical Examiner were inconsistent with the account given by them as to the angle/direction of fire and the manner of injury sustained by the deceased.

(c) That the case of the Prosecution hinged upon the Test Identification Parade said to have been conducted on 28.03.2014, which was two years after the fatal incident, which had occurred on 28.04.2012 at a late hour (i.e. 11:15 PM), under cover of darkness, with the only apparent source of light being the headlights of the motor vehicle, as even the sketch of the scene prepared by the Mukhtiarkar did not show any other light source. Ergo, proper identification of the assailants under such conditions in obviously stressful circumstances would have been difficult. Furthermore, there were certain inconsistencies in the deposition of the Complainant as to the composition of the Test Identification Parade and placement of the Appellant, and the exercise carried out even otherwise did not correspond to the requisites of a proper line-up in as much as the dummies used did not have the same features, height or physique as the Appellant, who was the only participant produced with a muffled face whereas others were produced without their faces being muffled. Under such circumstances, it was held that the test identification parade could not be relied upon.

(d) It was also observed that the PW-02, Uzair, admitted that his Statement 161 Cr. P.C was dated 23.05.2014, meaning that it was recorded after a lapse of two years of the incident, without any reason being assigned. Furthermore, he had also admitted during cross-examination that he was never called upon to attend the test identification parade for purpose of identifying the accused.

6. As such, from a cumulative assessment of the evidence, including the aforementioned factors, the learned trial Court determined that the prosecution had failed to prove the participation of the Respondent No.1 in the crime, hence duly extending him the benefit of doubt, resulting in his acquittal.

7. When called upon to demonstrate the misreading or non-reading of evidence or other infirmity afflicting the impugned judgment, particularly the points noted herein above, learned

counsel for the Appellant was found wanting and could not point out any such error or omission.

8. The learned APG also did not support the Appellant, instead, defended the Impugned Judgment as being correct and unexceptionable.

9. 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."

10. In the absence of any such factor in the matter at hand, it is apparent that the instant Appeal is devoid of merit, and is accordingly dismissed.

JUDGE

CHIEF JUSTICE