IN THE HIGH COURT OF SINDH, AT KARACHI

Cr. Acq. Appeal No. 506 of 2020

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

Appellant	:	Muhammad Ilyas, through Syed Samiullah Shah, Advocate
Respondent No.1	:	Nemo
Respondent No. 2	:	The State, through Muhammad Saleem Burriro, APG
Date of Hearing	:	20.04.2021

JUDGMENT

YOUSUF ALI SAYEED, J. - The Appellant, who is the complainant of Crime No. 71 of 2020 registered on 23.01.2020 at Police Station Quaidabad, Karachi, under Sections 302, 109, 34, PPC (the "**FIR**"), has preferred the captioned Appeal under Section 417 (2A) Cr. P.C., impugning the Judgment entered by the learned 1st Additional District & Sessions Judge, Malir, Karachi, South, on 19.09.2020 in the ensuing Sessions Case, bearing No. 435 of 2020, resulting in the acquittal of the Respondent No. 1, Umar Hayat, and the case against the absconding accused, namely Basheer and Abdul Haq, being kept dormant.

2. Succinctly stated, the information disclosed by the Appellant through the FIR was that on 22.01.2020, he was informed by the police that a man and a woman had been the victims of an armed attack in the vicinity of Younis Mills and an identity card had been recovered from the person of the male victim bearing the name Abdul Rehman, which corresponded with that of his real brother. As such, the Appellant rushed to the hospital, where he met one Gul

Nawaz, who apprised him that he and several others, including the deceased persons, had been passengers in a Qingchi Rickshaw and had been fired upon by unknown persons astride a motorcycle when they reached the bridge near Younis Mills at around 1350 hours, with four bullets striking Abdul Rehman, who died on the spot, and one bullet hitting the female cousin of Gul Nawaz, namely Zahida, who also succumbed to the injury. The Appellant attributed the attack as being carried out by his cousin, Abdul Haq and other accused, ascribing the motive as enmity based on Abdul Haq's suspicion that his brother, Fazlur Rehman, had been killed by the Appellant and Abdul Rehman in the year 2014.

3. After the usual investigation and favoring the arrest of the Respondent No.1 the police submitted the challan, 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 *inter alia* the Appellant (PW-1), whose deposition was recorded and marked as Ex.4, the rickshaw driver, namely Muhammad Waseem (PW-2), whose deposition was recorded and marked as Ex.11, Gul Nawaz (PW-3), whose deposition was recorded and marked as Ex.12, Police Constable Faisal Nawaz (PW-5), who had apparently recovered two empty bullet casings from the crime scene and whose deposition was recorded and marked as Ex.16, ASI Noor Dad (PW-10), who made the arrest of the Respondent No.1 and whose deposition was recorded and marked as Ex.33, and P.I. Aamir Alam (PW-11), the Investigating Officer of the case, whose deposition was recorded and marked as Ex.36.

5. After, the DDPP for the State closed the side of the prosecution, the Statement of the accused under S.342 Cr. P.C was recorded as Ex.56, wherein he denied the allegations leveled against him and professed his innocence.

6. From a cumulative assessment of the evidence, the learned trial Court determined that the prosecution had failed to prove the guilt of the Respondent No.1, hence duly extended him the benefit of doubt, resulting in his acquittal. A perusal of the impugned Judgment reflects that the learned trial Court noted *inter alia* that:

(a) No effort had been made during the course of the investigation to hold a test identification parade through the two eye witnesses to the incident, namely Muhammad Waseem (PW-2) or Gul Nawaz (PW-3), and during course of their evidence in Court, the said witnesses also could not identify the Respondent No.1 as being the person who had fired on the rickshaw, as such there was no direct evidence against the accused in the matter. Indeed, the depositions of both those witnesses reflect that they had stated that they had not seen the faces of the persons who had engaged in the firing and could not identify the Respondent No.1 as being one of the assailants.

(b) The Appellant appeared conflicted during his deposition as to the motive attributed by him to the accused persons in the FIR as he did not make any mention thereof in his examination in chief and while under cross-examination also initially denied that there had been a previous dispute as to management of a Masjid but then conceded that FIR No.183 of 2018 had been registered at the behest of one of the accused against him and his deceased brother.

(c) The recovery of a pistol from the possession of the Respondent No.1 which was then matched to the empties said to have been recovered from the place of incident was also ridden with doubt as there was no mention of the identifying marks on the pistol in the recovery memo and a co-mashir to the recovery memo, namely HC Muhammad Aamir, had been given up as a witness. Furthermore, the empty bullet casings said to have been recovered from the crime scene on 22.02.2020 were only sent to the FSL after the arrest of the accused on 24.01.2020, when he was found to be in possession of a 30 bore pistol with 2 live rounds,

hence the recovery and positive FSL report were found to be inconsequential in light of the principle laid down by the Honourable Supreme Court in the case reported as Muhammad Ashras alias Acchu v. The State 2019 SCMR 652.

(d) The arrest of the Respondent No.1 has been shown to have taken place at 0630 hours on 24.01.2020 from near the graveyard, Rehri Road, whereas the Respondent No.1 had refuted the same and stated that he had in fact been arrested a day prior from his house, which was near the aforesaid graveyard and in close proximity to the place of incident, with the trial Court observing that it was strange that the Respondent No.1 would be so readily available at that location after commission of the offence, alongwith the incriminating pistol.

(e) The so called CDR data allegedly placing the Respondent No.1 near the scene of incident on the fateful day could not be relied upon as its genuineness has not been proved in as much as the CDR report did not bear the signature of any representative of the concerned cellular company nor had any such representative being examined in Court for establishing its authenticity and or genuineness.

7. When called upon to demonstrate the misreading or non-reading of evidence or other infirmity afflicting the impugned judgment, 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. Indeed, it is well settled principle of law that an appeal against acquittal is distinct from an appeal against conviction, as the presumption of double innocence is attracted in the former case and an acquittal can only be interfered with when it is found to be capricious, arbitrary and perverse.

10. We are fortified in this regard by the judgment of the Honourable Supreme Court in the case reported as the State v. Abdul Khaliq PLD 2011 Supreme Court 554, where after examining a host of case law on the subject, it was held as follows:-

> "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 reappraisal 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."

11. In the matter at hand the learned trial Judge has advanced valid and cogent reasons in acquitting the Respondents and no palpable legal justification has been brought to the fore for that finding to be disturbed.

12. As such, the Appeal is found to be devoid of merit and stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: