Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Acq. Appeal No. D – 54 of 2000

Present: ***Mr. Naimatullah Phulpoto, J***
Mr. Rasheed Ahmed Soomro,J

Date of hearing : **22.08.2019**.

Mr. Bakhshan Khan Mahar, Advocate for the appellant / complainant.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

NAIMATULLAH PHULPOTO, J.–Through this Acquittal Appeal, appellant / complainant Abdul Razaque son of Haji Abdul Raheem has impugned the judgment dated 25.11.2000 passed by learned IInd Additional Sessions Judge, Khairpur in Session Case No. 59 of 1997 for offences under Sections 302, 324, 34, PPC. On the conclusion of the trial vide judgment dated 25.11.2000, respondents / accused No.1 to 4 namely Abdul Kareem @ Ganoo, Abdul Waheed, Nadeem and Raheem were acquitted.

2. Brief facts of the prosecution case, as reflected in the judgment of the trial Court, are that on 05.01.1997 at about 8.30 a.m complainant Abdul Razaque Kandhir lodged FIR at Police Post Piryaloi of P.S Baberloi, stating therein that his brother Alidino purchased three jirebs of land in deh Piryaloi from Qaim Sial, on which Shamsuddin annoyed with him and he used to issue threats to him. That on 5.1.1997 when the complainant, his brother Alidino alias Ali, Rehmatullah and Muhammad Soomer were cleaning the garden of mangoes and dates palm trees, when at about 7.30 a.m accused Abdul Kareem alias Ghanoo armed with DBBL gun, Abdul Waheed son of Shamsuddin armed with SBBL gun, Nadeem son of Shamsuddin and Raheem son of Kareem Bakhsh both armed with guns

came there, they challenged the complainant party and asked them that why they have purchased the land inspite of their objection, saying so accused Abdul Kareem alias Ghanoo fired from his gun but the complainant and P.Ws saved themselves by taking the protection of mango trees, while, Alidino tried to run away towards road accused Abdul Kareem alias Ghanoo fired a second shot at Alidino which hit him on his forehead, and he fell down on the road, whereas accused Nadeem, Raheem and Abdul Waheed made straight fires at the P.Ws with intention to kill them, but they did not receive the injuries. According to complainant, they raised cries, thereafter accused made their escape good. Complainant thereafter went to Police Post Piryaloi and reported the matter, where his complaint was incorporated in daily diary and later on the same was sent to Police station Baberloi, where the complaint was incorporated in Section 154 Cr.P.C book. FIR was recorded on 05.01.1997 at 8.30 a.m vide crime No. 04/1997 at Police Station Baberloi under sections 302, 324, 34 PPC.

3. On the conclusion of the investigation, challan was submitted against the accused under the above referred sections.

4. Trial Court framed the charge against all the accused. They pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined eight (09) PWs and prosecution side was closed.

6. Statements of accused Abdul Kareem, Abdul Waheed, Nadeem and Abdul Raheem were recorded under Section 342, Cr. P.C in which accused claimed false implication in this case and denied the prosecution’s allegation.

7. Learned trial Court after hearing learned counsel for the parties and assessment of the evidence vide judgment dated 25.11.2000 acquitted the accused for the following reasons:

> " *In view of the above discussion and the demeanor of the witnesses in the witness box and the manner in which answer the question put to them by the defense counsel, I had advantage that they were not speaking the truth and also given the evidence not confidence inspiring, all the eye witnesses and mashirs are admittedly related with complainant, seems to be chance witnesses and have not satisfactory accounted their presence at the spot of occurrence, but even gave major contradictory versions about the time of incident, their coming to wardat and leaving their village is also disputed, even their tutored evidence is not in line with medical evidence, but it is in conflict with the medical testimony not supported by motive recovery and chemical ballistic opinion report such facts has rendered the prosecution case highly doubtful, and the well settled principles of law is that any thing goes in favour of accused must be taken into consideration and benefit of the same be extended to accused not as matter of grace but as a matter of right. In this respect reliance can be placed on P.Cr.L.J 2000 Karachi Page 390, SCMR 1995Page 635, SCMR 1998 Page 279, P.Cr.L.J 2000 Page 1125. "*

8. Complainant being dissatisfied with the acquittal of the accused has filed this appeal.

9. Learned advocate for the appellant / complainant mainly contended that impugned judgment of the trial Court is based on misreading and non-reading of evidence. It is also argued that trial Court has disbelieved strong evidence without assigning sound reasons, and prayed for converting the acquittal to the conviction.

10. Mr. Aftab Ahmed Shar, Additional Prosecutor General argued that trial Court has properly appreciated the evidence and acquittal of the accused / respondents is neither perverse nor based upon misreading of evidence. He has supported the judgment of the trial Court. Mr. Shar A.P.G pointed out that Mr. Sher Muhammad Shar, advocate for respondents is lying ill.

11. It is settled law that ordinary scope of acquittal appeal is considerably narrow and limited and obvious approach for dealing with the appeal against the conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of accused is attached to the order of acquittal. In case of *Zaheer Din v. The State* (**1993 SCMR 1628**), following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:

> **"***However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases-law on, the question of setting aside an acquittal by this Court. They are as follows:--*
>
> *(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 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 pints 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 while 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 observations 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. **"**

12. In the recent judgment in the case of *Zulfiqar Ali v. Imtiaz and others*(**2019 SCMR 1315**), Hon'ble Supreme Court has held as under:

"*2. According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB. There is a reference to M/s Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not*

> *open to any legitimate exception.* ***It is by now well-settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.*** *Criminal Appeal fails. Appeal dismissed.***"**

13. In the present case incident took place on 05.01.1997 at 7.30 a.m. According to case of prosecution deceased was accompanied by the complainant and incident was witnessed by complainant Abdul Razak and three eye witnesses namely: Muhammad Soomer, Rehmatullah and Muhammad Sulleman. It is quite surprising that the brother of the complainant was murdered by the accused persons but complainant and three eye witnesses remained silent which is against the human conduct. The conduct of the complainant / brother of deceased is to be judged at the touch stone of Article 129 of the Qanun-e-Shahadat Order, 1984, which is reproduced below:-

> ***"129. Court may presume existence of certain facts.-*** *The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

Mr. Bakhshan Khan Mahar Advocate for appellant / complainant could not satisfy us about the human conduct of the complainant as to why he remained silent. Most vital point in the case attracting the Court's attention is the fact of the FIR which was delayed for two days, no reason plausible has been explained by the prosecution for such delay. Moreover, both parties were belonging to the village, no effort whatsoever was made by the eye-witnesses to rescue the brother. We

have also observed that ocular evidence was contradictory to the medical evidence. According to the prosecution witnesses fire was made upon the deceased from the distance of 40 paces but according to Medical Officer injury had charring and blackening, this clearly shows that presence of the eye-witnesses was highly doubtful.

14. Learned counsel for the appellant / complainant has not been able to point out any serious flaw or infirmity in the impugned judgment. View taken by the learned trial Court is a possible view, structured in evidence available on record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, impugned view is found on fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.

15. This Criminal Acquittal Appeal is without merit and the same is **dismissed**. These are the **reasons** of our **short** order announced on 22nd **August 2019**.

J U D G E

J U D G E

Irfan/PA