

Sp AT Acq. A 151/2015
 Nazeem A. Javed vs. Mst Labra Zanothu
 SINDH HIGH COURT

Composition of Bench.

Single/D.B.

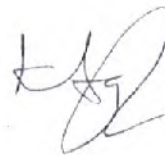
Mr. J. Mohammad Karim Khan Aghe
 Mr. J. Zulfizar Ali Sangi

Dates of hearing: 13-04-20

Decided on 13-28-4-20

(a) Judgment approved for reporting.

Yes
 No



CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

IN THE HIGH COURT OF SINDH AT KARACHI
(Appellant Jurisdiction under Anti-Terrorism Act, 1997)

Special Anti-Terrorism Acquittal Appeal No. / 2015

Noor Ahmed Javed

Son of Ch. Muhammad Shafi,
 Muslim, adult, resident of
 House No.B-73, Block-6,
 Gulshan-e-Iqbal, Karachi.....Appellant

PRESENTED

11-07-2015

[Signature]
 Dy. Registrar

3408

VERSUS

1. Mst. Laiba

Daughter of Anthony Burtles,
 Muslim, adult, resident of

Mehmoodabad No.1, Karachi.

2. The StateRespondent

FIR No.851/2008
 U/s 365-A/34 PPC
 R/w Section 7(a)(c) ATA 1997
 P.S.Shahrah-e-Faisal, Karachi.

ACQUITTAL APPEAL UNDER SECTION 25(4-A) OF THE
ANTI -TERRORISM ACT, 1997 (ACT XXVII OF 1997)

Being aggrieved and dissatisfied with the impugned Judgment dated 15-06-2015, passed by the learned Judge of Anti-Terrorism of Court No.IV Karachi, (Mr. Anand Ram D. Sairani) in Special Case No.A-133/2008, (The State Vs. Mst. Laiba), arising out of FIR No.851/2008 under Section 365-A/34 PPC read with Section 7, ATA 1997 of Police Station Shahrah-e-Faisal Karachi, whereby acquitting the respondent No.1, above named from the charge, by tendering pardon under Section 265-H(I) Criminal Procedure Code. The appellant above named, most respectfully prefers this appeal with

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Spl. Crl. Anti-Terrorism Acquittal Appeal No.151 of 2015.

Appellant: Noor Ahmed Jawed Khan son of Ch. Muhammad Shafi through Mushtaq Ahmed, Advocate.

Respondent No.1 & 2 Mst. Laiba daughter of Anthony Burtles and The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General.

Date of hearing: 13.04.2020

Date of Judgment: 29.04.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- The respondent was tried and acquitted vide judgment dated 15-06-2015 passed by learned Judge Anti- Terrorism Court No.IV for not giving completely truthful evidence at trial which would have violated one of her conditions for being granted a pardon under S.338 and 339 Cr.PC when she gave evidence against her co-accused in a case under S.365 A PPC. The appellant/complainant has filed this appeal against her acquittal which we propose to decide by this judgment.

2. The brief facts of the case are that the Respondent (Mst Laiba) was part of a gang which was involved in kidnapping for ransom along with other co-accused. After the charge was framed and the respondent had pleaded not guilty on 6.02.2009 in one case against the Respondent and her co-accused u/s 365 A PPC (special case 133/2008 The State V Salman Quershi and others pursuant to FIR No.851/2008 u/s 365A/34 PPC r/w 7 ATA 1997 lodged at PS Shahra-e-Faisal proceeding before Anti Terrorism Court II Karachi) **but before** any prosecution witness had given evidence the respondent made an application u/s 338 Cr.PC to be pardoned which was supported by SPP for the State and allowed vide order dated 26.03.09. The application was subject to the conditions (a) that she gave her statement u/s 164 Cr.PC before a magistrate and then (b) that she gave

evidence as PW 1 in the trial against her co-accused and (c) that most importantly she told the complete truth. This order was not challenged and reached finality in terms of the reasons why the respondent was allowed to become an approver in return for a conditional pardon.

3. Pursuant to the aforesaid order the respondent made her statement under S.164 Cr.PC in accordance with law and also gave evidence as PW 1 at trial where she was cross examined by the accused. Thus, having complied with the conditions of her pardon she requested her pardon to be finalized and approved by the court. The State however was of the view that the respondent had not told the complete truth at trial and as such had breached one of the conditions of her pardon which should not be granted and once again she should join the ranks of the accused. The trial court vide order dated 16.07.2009 came to the conclusion that whether or not the respondent had complied with the conditions of her pardon and could be pardoned would be decided after final arguments. This order was challenged before this court which vide order dated 27.10.2009 after considering S.338, 339 and 339 A Cr.PC set aside the order of the trial court dated 16.07.2009 and directed the trial court to decide the issue of the respondent's pardon strictly in accordance with S.339 and 339 A Cr.PC.

4. After following the above sections the respondent was charged and the prosecution called 7 PW's to prove its case that the respondent had not told the complete truth in her evidence before the trial court and as such her pardon should not be allowed as she had not fulfilled the conditions which were attached to her pardon. The accused/respondent gave her statement under S.342 Cr.PC in which she stuck to her stance that she had told the truth as per her statement before the trial court and as such was entitled to her pardon.

5. After hearing both sides and after assessing the evidence on record the learned trial judge came to the conclusion that there was no reason to deny the accused/respondent her pardon and thus acquitted her in effect of not fulfilling the conditionality's attached to her pardon by failing to give evidence of the complete truth.

6. The appellant/complainant being dissatisfied with the impugned judgment has filed this appeal against the acquittal of the accused/respondent.

7. Learned counsel for the appellant contended that the respondent had not told the complete truth before the trial court and as such the appeal against acquittal should be allowed. When however he was confronted by this court he was unable to point out any evidence to show that the respondent had not told the complete truth before the main trial as per the evidence produced by the prosecution in her trial for in effect not telling the complete truth in the main trial under S.365 A PPC against her co-accused. In support of his contentions he placed reliance on **Ashiq Hussain Shah V Ashiq Ali Shah and another** (1982 SCMR 1110), **Ghulam Husain Soomro V The State** (PLD 2007 SC 71), **Muhammad Siddique V The State** (2020 SCMR 342), **Niaz Ali Rajper V The State** (2020 P Cr. L J 96), **Muhammad Rasool V The State** (2015 P Cr. L J 391), **Sajan and another V The State** (2015 P Cr. L J 953), **Muhammad Riaz V Bilqiaz Khan** (2012 SCMR 721), **Ahmed Hussain alias AMI V The State** (PLD 2008 SC 110), **Sh. Muhammad Amjad V The State** (PLD 2003 SC 704) and **Anwar Shamim and another V The State** (2010 SCMR 1791).

8. Learned APG for the State fully supported the acquittal appeal and submitted that it should be allowed as the respondent had lied before the trial court at the main trial and had not given truthful evidence and as such her pardon should be cancelled as she had not complied with the conditionality's which were a pre condition of her being pardoned and as such she should be made to stand trial.

9. Despite notice to the respondent No.1 (Ms Laiba) she did not put in an appearance either herself or through counsel. Since however her acquittal appeal was central and crucially interlinked to other appeals which were pending before us concerning the kidnapping for ransom cases in which she gave evidence as a PW (approver) which lead to the conviction of some of her co-accused who had been languishing in jail for some time we were of the view that it would not serve the interests of justice to keep her acquittal appeal pending as this would further delay the hearing of the other appeals in the kidnapping for ransom cases in

which she gave evidence. This was because if her appeal against acquittal was allowed then her evidence against those convicted could not be used against them and she would need to be arrested and face trial for kidnapping for ransom or if the acquittal appeal was dismissed then we could hear the other appeals against the conviction of her co-accused whilst considering the evidence which she gave against them at trial. The interests of justice in our view therefore required that the acquittal appeal needed to be decided without further delay and in any event learned APC could assist us vis a vis her case as officer of the court which he very fairly and ably did.

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. We have gone through the case law cited by the appellant however we find it to be of little, if any, assistance to him based on the particular facts and circumstances of this case. This is because nearly all the cited case law concerns kidnap for ransom cases whereas the case in hand concerns whether the conditionality's of a pardon have been truthfully complied with. Whether or not the accused/respondent should have been made an approver in these kidnapping cases is beyond the scope of these appeals and in any event the decision on that issue has reached finality as discussed above.

12. At the outset we are of the view that it would be helpful to set out the sections which are at issue namely S.338, 339 and 339 (A) Cr.PC which for ease of reference are set out below:

338. *Power to grant or tender pardon.* At any time before the judgment is passed, the High Court or the Court of Sessions trying the case may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the

[officer-in-charge of the prosecution in the district] to tender, a pardon on the same condition to such person;

Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or, as the case may be, of the heirs of the victim]]

339. *Commitment of person to whom pardon has been tendered.*

(1) **Where a pardon has been tendered under section 337 or section 338, [the Public Prosecutor certifies that in his opinion] any person who has accepted such tender has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made [such person may be] tried for the offence in respect of which the pardon was so tendered, or for any other offences of which he appears to have been guilty in connection with the same matter:**

[Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; **in which case it shall be for the prosecution to prove that such conditions have not been complied with].**

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him [at such trial].

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

[339-A]. *Procedure in trial of person under section 339.* (1) The Court trying under section 339 a person who has accepted a tender of pardon shall, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) **If the accused does so plead, the Court shall record the plea and proceed with the trial, and shall before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.** (bold added)

13. Following the order of this court as mentioned above to follow strictly the procedure under S.339 and 339 (A) Cr.PC the prosecutor certified that in his opinion the respondent had not complied with the

condition on which the tender of pardon was made. Namely, that she had not told the whole truth and had concealed the truth.

14. This lead to a full dressed trial of the accused/respondent **whereby it was for the prosecution to prove** that such conditions were not complied with beyond a reasonable doubt.

15. We have reviewed the charge and find that it is not in line with the accused/respondent having violated her conditions of pardon however based on the earlier proceedings and orders of the court and the defence taken by the accused respondent in her S.342 Cr.PC statement we are of the view that this is of no consequence as the accused/respondent knew full well what she was accused of and what charges she was defending herself against. Likewise the prosecution was aware of the same as was the judge so in our view any defect in the charge is inconsequential especially as it in no way prejudiced the accused /respondent in her defence.

16. We note that no prosecution witness has been able to show that the respondent/accused did not tell the complete truth in her evidence. Neither her S.164 statement nor her evidence before the trial court was exhibited so in our view it was almost impossible for the prosecution to prove that there was any deviation between the two and that the accused/respondent was not telling the complete truth. Even otherwise although not a part of her trial record we have read her S.164 Cr.PC statement and it is similar to the evidence which she gave under oath at trial and thus it appears that she stuck to the truth. The evidence of the abductee PW 4 Khurram Javed who did give evidence at her trial is also in consonance with her evidence and does not suggest that she has not told the complete truth.

17. The trial court found as under whilst acquitting the accused/respondent at typed P.10 of the impugned judgment which is set out below;

"On the order hand the star witnesses PWs named above seem to have narrated almost the same story and supported the version of PW Mst. Laiba (the respondent in this appeal against acquittal) as the abductee in his whole statement narrates that one male and one female came to him and asked to show a house to purchase and then

abducted him and kept him somewhere, in the whole story as stated by the victim the two accused persons i.e. one male and one female are roaming around the case and no any third and fourth persons has been named in it, even the two persons i.e. male and female are not named in his statement before the trial Court however, since lady accused came forward and made an application u/s 338 CrPC for tendering pardon which was considered and following the procedure of her statement u/s 164 CrPC was recorded wherein she named her to be female accused and brought the name of accused Imran Ahsan @ Sunny as main accused as her companion in the offence, on bringing such fact on record which otherwise was hidden to some extent as only the male member who has been assigned role of accompanied lady accused whose name was not disclosed specifically in the statement of abductee at first time come on surface after statement of accused/PW Laiba recorded u/s 164 CrPC. The main witness i.e. victim has also narrated about one male accused in his statement whose name admittedly brought on record by accused/PW Laiba.

In view of the above it is crystal clear that accused Laiba has made true statement of account and has brought on record name of one accused i.e. Imran Ahsan @ Sunny whose role has also been stated victim/abductee without name, since in this case there are 03 male accused if accused/PW Laiba did not name the accused specifically who has accompanied with her in the whole story, it would have been difficult to identify that one male person as the prosecution case at evidence during trial involves four accused persons that too without name and role hence I am of the view that accused/PW Laiba has made true/full statement of account and has complied with conditions of pardon as laid down u/w 338 CrPC, therefore, she is made approver of the case and grant her pardon u/s 338 CrPC.(bold added)

POINT NO.3.

Since accused Laiba was made approver in the points No.1 & 2 and she has been tendered pardon as she has complied with provision laid down u/s. 338 Cr.PC therefore she is acquitted u/s 265-H(i) Cr.PC."

18. It is by now well settled that judgment of acquittal could not be interfered with unless certain unimpeachable material is brought on record warranting interference by this Court into the judgment of acquittal passed by the trial Court. The Superior Courts have also time and again laid down the principle that the consideration for deciding a Criminal Appeal against acquittal are quite difference from that of a Criminal Appeal against conviction as in the former case presumption of double innocence of the accused is available in the case. It is a settled

principle of law that the superior Courts act slowly in interfering with an order of acquittal, unless grounds for acquittal are perverse, wholly illogical or unreasonable. The fact that there can be a contrary view on re-appraisal of the evidence by the court hearing acquittal appeal simpliciter would not be sufficient to interfere with acquittal order.

19. In the case of **Muhammed Ashgar V State** (PLD 1994 SC 301) it was held by the Supreme court that *double presumption of innocence exists in favour of any acquitted accused, one that every accused shall be presumed to be innocent unless proved to be guilty and other that a competent Court of law has adjudged him not guilty.* It was further held that *interference in the order of acquittal can only be made if the order of court below is manifestly wrong or perverse or is based on the view of the evidence which no judicial officer would take, or the court has misread the evidence or ignored important evidence or when non-interference will result in miscarriage of justice. Mere fact that the appellate or revisional court forms a different opinion than that arrived at by trial court will not justify setting aside the order of acquittal and that due weight has to be given to the conclusions of the Trial Court.*

20. In the case of **Mirza Noor Hussain vs. Farooq Zaman and 2 others** (1993 SCMR 305) the Supreme Court held as under:

".....the judgment of the trial Court is supported by sound reasons and this Court cannot substitute its own findings in place thereof unless.....that the findings.....are 'artificial', 'shocking', 'ridiculous', 'based on misreading of evidence' and 'leading to miscarriage of justice'."

21. In the case of **Yar Muhammad and 3 others Vs. The State** (1992 SCMR 96) the Supreme Court observed as under:

"Unless the judgment of the trial Court is perverse, completely illegal and on perusal of evidence no other decision can be given except that the accused is guilty, there has been complete misreading of evidence leading to miscarriage of justice, the High Court will not exercise jurisdiction under section 417, Cr. P.C. In exercising this jurisdiction the High Court is always slow unless it feels that gross injustice has been done in the administration of criminal justice."

22. Thus, based on our reassessment of evidence coupled with the very narrow scope as a matter of law with interfering in appeals against acquittal on our reassessment of the evidence on record we do **NOT** find that the prosecution was able to prove that the respondent failed to comply with the conditionality's attached to her pardon and the trial court as mentioned above has given sound reasons for reaching such a conclusion which we fully agree with and do not require our interference and as such this appeal against acquittal is dismissed.

23. The appeal against acquittal is disposed of in the above terms.

MAK/PS