NFR - PB Appeal against Conviction + Appeal against Acquittal

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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

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

Crl. Accountability Appeal No.25 of 2002.

Appellant:	Zulfiqar Ali (now deceased) through his son namely Mr.Murtaza Zulfiqar.
Respondents/State:	NAB through Mr. R.D. Kalhoro, Special Prosecutor NAB.

Crl. Acctt. Acquittal Appeal No.08 of 2002.

Appellant:	The State through Chairman NAB through Mr. R.D. Kalhoro, Special Prosecutor NAB.
Respondents/State:	Ghulam Hyder Memon, Kazi Khalilur Rehman, Shah Muhammad Balouch, Agha Muneeruddin and Zulfiqar Ali through Nemo.
Dates of hearing:	**25.08.2020.**
Date of judgment:	**31.08.2020.**

JUDGMENT

Mohammad Karim Khan Agha, J.- The appellant namely Zulfiqar Ali has filed Criminal Accountability Appeal No.25 of 2002 against his conviction in the Judgment dated 24.12.2001 in Reference No.41/2001 on account of entering into a plea bargain, whereas the NAB has filed Criminal Accountability Acquittal Appeal No.08 of 2002 against the acquittal of respondents Ghulam Hyder Memon, Kazi Khalilur Rehman, Shah Muhammad Balouch and Agha Muneeruddin, vide judgment dated 24.12.2001 passed by learned Admn. Judge Accountability Courts Sindh, Karachi in Reference No.41/2001.

2. The brief facts of the prosecution case as disclosed in the F.I.R. lodged by Inspector I.D. Mangi of Anticorruption Establishment are that a discreet enquiry was conducted in respect of regularization/allotment of amenity plots of KDA. On 23.1.1997 it was found by him that challans for payment were issued in faovur of M/s. Zulfiqar Ali, Riaz Mohammad and Mansoor Mehmood for regularization/allotment of plots No.ST-18, St-18/1 and St-18/2 measuring 4840 square yards each in scheme No.36 Gulistan-e-Johar Karachi. Each challan was

issued for an amount of Rs.24,20,000/- in a fraudulent manner with the connivance of KDA officials and in collusion of above named private persons. The result was that the KDA has sustained a loss of millions of rupees and wrongful gain to the officials of KDA and private persons. Further, the plots were converted/bifurcated in violation of KDA Rules and existing policy. The name of the KDA officials and part played by them has also been disclosed in the FIR. It is alleged that Member Finance Ghulam Hyder Memon and Accounts Office KDA and Shah Mohammad Balouch had revalidated the Challans, Assistant Director Land Department KDA, Agha Muneeruddin had issued regularization letters and Executive Engineer KDA Kazi Khalilur Rehman had issued site plans and letters for possession of the plots.

3. After lodging the FIR, the Inspector I.D. Mangi started investigation. On 23.1.1997 he had arrested the accused Ghulam Hyder Memon and Kazi Khalilur Rehman. On 30.1.1997 he had arrested accused Riaz Mohammad. He then recorded the statements of Naeen Afzal, Abdul Wahab, Abdul Majeed, Abdul Jabbar, Ghulam Mohammad, Rasheed Akeel, Basheer Ahmed, Najeeb Ahmed, Shakeel Ahmed, Shah Mansoor Allam, Murad Ali Junejo, Ahmed Hussain and Abdul Nasir Khan. He had written several letters to the officers of KDA for producing the files of the plots in question but the files were not produced. He also sent a letter to the Manager Allied Bank of Pakistan for producing the challans for the payments in respect of plots in question and the bank manager had sent the required challans. After completing the investigation, he had submitted the charge sheet before the Anticorruption Court Karachi by adding the name of Pir Mazahar-ul-Haque, the then Minister for Housing and Town Planning, Government of Sindh from where the case has been transferred as mentioned above.

4. On 18.8.1998 a charge was framed by the Court of Special Judge Anti corruption Karachi to which all the accused pleaded not guilty. After receipt of the case by the trial court and on examination of the record it was found that the charge was not properly framed as the alleged facts were not adequately mentioned in it there fore, the necessity had arisen for framing fresh charge.

5. This case was then transferred to the accountability court by the Chairman NAB whilst exercising his powers under S.16 (A) NAO.

6. On 4.12.2001 a charge for offences punishable under section 10 and serial No.2 of the schedule appended with the NAB Ordinance and sections 409 and 109 PPC was framed against the accused but the accused pleaded not guilty.

Turning to the appeal against conviction of Zulfiqar Ali (now deceased)

7. The appellant (now deceased) through his son contended that his father had been convicted in the aforesaid reference on the basis of a plea bargain which should be set aside as the plea bargain was not made voluntarily and thus his deemed conviction should be set aside especially as the other co-accused had been acquitted in the same reference and as such he was also innocent.

8. On the other hand special prosecutor NAB contended that the plea bargain had been made voluntarily by the appellant and since it had been approved by the Chairman NAB and the accountability court in accordance with law the same plea bargain should remain in the field and the appeal dismissed.

9. We have heard the appellant's son (who did not want to be represented by legal counsel) as well as special prosecutor NAB, gone through the record and considered the relevant law.

10. We have seen the application for plea bargain made by the appellant which was approved by the Chairman NAB and its approval by the court. Pursuant to this plea bargain the appellant admitted his guilt and paid the monies which he was required to and thereby fully accepted his plea bargain which lead to his deemed conviction. In our view the plea bargain has been made in accordance with law and according to his son after taking legal advice and the fact that the appellant paid the amount which he agreed to in his plea bargain also points to its legality. There is no evidence to suggest that the plea bargain was not made voluntarily. It is also irrelevant that the other co-accused were acquitted on merits as the appellants plea bargain was accepted before the impugned judgment was handed own. Additionally any one of the acquitted accused could also have opted for a plea bargain rather than stand trial but instead decided not to do so and thereby accepted the risk that they may be convicted after the trial and sentenced to imprisonment. The fact that the other co-accused who did not enter into plea bargain who were later acquitted is therefore irrelevant. The appellant made a conscious decision to enter into a plea bargain with the NAB and not run the risk of being convicted and sentenced to imprisonment at trial. It appears that the appellant only challenged the legality of

his plea bargain once the other co-accused had been acquitted and thus this appeal appears to be a belated attempt by him to get out of the plea bargain which he freely entered into once he found that the other co-accused had been acquitted. Had the other co-accused been convicted and imprisoned we doubt whether the appellant would have challenged his plea bargain.

11. As such we find that since there is no illegality in the plea bargain which the appellant's father entered into the appeal has no merit and is hereby dismissed. If any monies arising out of the plea bargain are not already with the NAB and held by some other entity or party, for example the trial court or the Nazir of this court the same shall immediately be sent to the Chairman NAB.

Turning to the appeal against acquittal of the Respondents Ghulam Hyder Memon, Kazi Khalilur Rehman, Shah Muhammad Balouch and Agha Muneeruddin.

12. It is well settled by now that the parameters for an appeal against acquittal to succeed are much narrower than in the case of an appeal against conviction. It is settled law that judgment of acquittal should **not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous** as held by the Honorable Supreme Court in the case of **The State v. Abdul Khaliq and others** (PLD 2011 Supreme Court 554). Moreover, 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 cardinal 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 above referred judgment. 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 Ahmed 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 02 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), 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 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. *" (bold added)*

13. Whilst acquitting the respondents the accountability court found as under at typed page 12 of the impugned judgment;

> *"After considering the material available on the record I am also of the considered view that the revalidation of challans or issuance of the letter of possession and regularization are not in violation of any rules, as the prosecution to show that the said actions were against those rules, has quoted no rules. Under illustration (e) of Article 129 of the Qanun-e-Shahadat Order, the court can presume that all official acts are regularly performed unless contrary is proved. As such in the present case, also all the actions of the official functionaries are, deemed to be in accordance with rules and law unless the same are contrary proved. However, no evidence whatsoever has been led by the prosecution to show that the revalidation was illegal or it should have been made at the prevailing market rates as such the prosecution has failed to prove the case."*

14. When confronted by the court to point out any illegalities in the impugned judgment despite his best efforts special prosecutor NAB was unable to do so. We have considered the record including the evidence recorded at trial and have not been able to find any glaring illegality in the impugned judgment which would warrant its interference. Thus, keeping in view the extremely narrow scope of appeals against acquittal as mentioned above and the fact that the respondents are entitled to the double presumption of innocence since we have found no glaring illegality in the impugned judgment we find that the respondents are entitled to the benefit of the doubt and that the impugned judgment has rightly acquitted the respondents and as such the appeal against the respondents **(Ghulam Hyder Memon, Kazi Khalilur Rehman, Shah Muhammad Balouch and Agha Muneeruddin)** acquittal is dismissed.

15. The above appeal against conviction and appeals against acquittal are disposed of in the above terms.