NFR - Appeal against Acquitted dismissed

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Amjad Ali Sahito.

CRIMINAL ACQUITTAL APPEAL NO. 705 OF 2019

Appellant	Syed Masood Ali s/o. Syed Mehmood Ali through Mr. Arshad Jamal Siddiqui, Advocate
Respondents /State	1. Muhammad Azeem s/o. Muhammad Arib. 2. Aqeel Ahmed s/o Allah Baksh 3. Bilawal s/o. Aman. 4. Nadeem Ahmed s/o. Nabi Baksh. 5. Wazeer Ahmed s/o. Noora. 6. The State through Mr. Abrar Ali Kitchi, APG
Date of Hearing	02.12.2020
Date of Announcement	02.12.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant has assailed the impugned judgment dated 30.09.2019 passed by Learned Additional Sessions Judge-I, Karachi West (Model Criminal Trial Court) in Sessions Case No.2772 of 2013 whereby the respondents were acquitted under Section 265-H(1) Cr.P.C for the offenses u/s 302/34 PPC.

2. The brief facts of the prosecution case are that the FIR was registered on 16.08.2013 by complainant Fazal Rehman which stated that on 15.08.2013 his brother-in-law Syed Maqsood Ali informed him on the telephone that his nephew Shahzad aged about 22 years had sustained bullet injury and been shifted to Hospital. On receipt of such information,

he reached at Abbasi Shaheed Hospital where he found his nephew dead due to gunshot injury. The police also arrived and after completing legal formalities handed over to him the dead body of the deceased; then, he registered the instant FIR at P.S. Surjani Town, Karachi **against unknown accused involved in the incident for unknown motive.** During the course of investigation, I.O. inspected the place of incident wherefrom he secured one crime empty, blood stained earth, made photographs of the place, drew sketch of occurrence as well as recorded statements of witnesses under section 161 Cr.P.C. but he could not arrest any accused in this case.

3. After usual investigation I.O. of the case filed interim challan against the accused persons. Later on accused Nadeem Ahmed and Wazeer Ahmed on account of their alleged involvement in this case were produced before the trial court. Thereafter amended charge was framed against all 05 accused persons to which they pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 10 witnesses and exhibited various documents and other items. The statement of the accused were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them. None of the accused gave evidence on oath or called any DW in support of his defense case. After appreciating the evidence on record the trial court acquitted the accused persons (herein respondents). Hence, the appellant has filed this appeal against the acquittal of the respondents.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30.09.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the impugned judgment is a result of non-reading and misreading of evidence, failure to apply the relevant law and in particular ignored the fact that two eye witnesses had positively identified the accused persons as the persons who committed the crime and as such the appeal against acquittal should be allowed.

7. On the other hand, learned APG has supported the impugned judgment and has stated that it suffers from no legal infirmity and that the accused/respondents were rightly acquitted by being extended the benefit of the doubt by the trial court and as such the appeal should be dismissed.

8. We have heard the learned counsel for the parties, considered the evidence on record and have gone through the impugned judgment.

9. Through the impugned judgment the accused/respondents have mainly been acquitted on account of the findings at paragraphs 18, 19 and 20 which are set out as under for ease of reference;

> *"18. The whole edifice of prosecution case has been built upon on alleged confession of guilt by accused in custody of police, identification test held before Judicial Magistrate and other weakest circumstantial evidence. It is claimed that two accused namely* ***Aqeel*** *and* ***Bilawal*** *who were already arrested in crime No.472/2013, u/s. 353, 324 r/w 34 PPC during the course of interrogation confessed their involvement in this case and also named their uncle Muhammad Azeem as one of their accomplices in commission of the crime. They also became ready to point out the place of occurrence. On such confession of guilt, on 09.09.2013 I.O. arrested all the three accused Aqeel, Bilawal and Azeem (Exh. 8/C & 8/D).*
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> *19. Five days later to their arrest and obtaining police custody remand of accused, on 14.09.2013 I.O. made his first application (Exh.44) to concerned Judicial Magistrate and requested for holding identification test of accused by witness Muhammad Nabeel Gohar (PW-3). He was given time to produce the accused/suspects and witness on 17.09.2019, when he repeated his application (Exh.44) and then identification test was conducted before Judicial Magistrate. The unexplained delay of five days in applying for identification test, grant of police custody remand prior to identification parade and holding identification test after eighth day of arrest has lost its sanctity and worth to be used as reliable piece of evidence. Moreover, the identification test memos produced on record are self-explanatory and showing that the learned Judicial Magistrate did not fulfill the legal requirements for holding the identification test as provided under the law. Firstly, she conducted identification test on eighth day of arrest and after grant of police custody remand. Therefore, the contention raised by accused during identification test that witness has seen him at P.S. cannot be ignored. Secondly; the Judicial Magistrate again failed to mention complete description of dummies at the test of identification parade, with no mention of their addresses, occupation, and without any clue, whether they were fellow prisoners or outsiders having similarity in height, physique, feature, complexion, appearance and dress of the dummies and accused, which has rendered the whole exercise before Judicial Magistrate as futile.*

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20. The identification memos brought as Exh.9/B & 9/C are showing that witness Nabeel had identified the accused Aqeel s/o Allah Bux and Bilawal s/o Muhammad Aman separately and assigned role to ***each accused*** *that* ***"he is the same culprit who had killed the deceased Shahzad on 15.08.2013"****. It is a proved fact from oral and documentary medical evidence that deceased had received only one bullet shot; and from this identification test in which both suspects have been assigned same role of killing to deceased, it has become impossible to determine, who out of two (accused) is the actual culprit, who made fire and killed the deceased.*

21. Another interesting aspect of this case is, that despite all these proceedings of identification test before Judicial Magistrate, ***on 29.04.2014 father of the deceased Syed Masood Ali (PW-1) recorded his disposition and stated that I.O/ASI Tariq Khalid has arrested the wrong accused Aqeel, Bilawal and Azeem after leaving the actual culprits involved in the incident. All these three persons are innocent and they have been falsely involved by the I.O. of this case. This witness Syed Masood Ali not only exonerated these accused but he also registered his separate FIR No.99/2014 at P.S. Liaqatabad against Nabeel Gohar and Owais Muhammad (witnesses in this case) for committing murder of his son Shahzad, which FIR was subsequently investigated and disposed of as "C" class."*** *(bold added)*

10. After our re assessment of the evidence on record we have found that the FIR was lodged against unknown persons and despite their allegedly being two eye witnesses to the incident, who identified the accused persons, in our view these eye witnesses were not reliable as they contradicted themselves in material part and their evidence does not tie in with the medical evidence whereby the deceased received only one fire arm injury as opposed to two; that the statements of the eye witnesses recorded under S.161 Cr.PC were not taken timely which again adds to their unreliability; that the eye witnesses did not know the accused before the incident and gave no hulia of the same in their S.161 statements; that they only got a fleeting glance of the accused; that the identification parade was carried out after a delay of 8 days whilst the accused were kept in police custody and eye witness PW 3 Nabeel even in his own evidence states that he saw both the accused in police custody **before** the identification parade as claimed by the respondents, that the identification

parade was not conducted in accordance with the law and even PW1 Syed Masood Ali who was the father of the deceased had given evidence that the accused had been falsely implicated in order to save the skins of the real culprits which evidence must be given weight as obviously the father of the deceased would want the real accused to stand trial and would not want to see a case of substitution which would defeat the ends of justice and even PW 1 was not declared hostile by the prosecution as such we do not find the evidence of the eye witnesses in terms of correctly identifying the accused can be safely relied upon. Even otherwise, the confession before the police has no evidentiary value in the eyes of the law, that the accused pointing out the place of occurrence was irrelevant as the police already knew the place of the occurrence, and as such we find that the respondents were rightly acquitted by the trial court by extending to them the benefit of the doubt when the evidence is considered in its totality.

11. **Even otherwise** it is settled law that judgment of acquittal should not be interjected unless 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.....*

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 and italics added)*

12. Having gone through the evidence and the impugned judgment we **find** that there has been no misreading or non reading of the evidence and that such evidence has been appreciated by the learned trial court in its proper perspective, that the impugned judgment is based on sound reasons and there is no question of the findings in the impugned judgment being perverse, arbitrary, foolish, artificial, speculative and ridiculous for the reasons mentioned earlier by us.

13. As such for the above reasons we find there is no merit in the instant appeal against acquittal. The Acquittal recorded by trial court in favour of the accused/respondents is based upon sound reasons, which

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requires no interference at all. As such, the appeal against acquittal is dismissed.

14. These are the reasons for our short order of even date dismissing the appeal against acquittal which are set out below for ease of reference;

> *"Learned counsel for the appellant and learned Addl. PG have made their submissions. For the reasons to be recorded later, this appeal against the acquittal is dismissed"*

15. The appeal stands disposed of in the above terms.

MAK/PS