NFR : Appeal against Acquittal

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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.122 of 2020

Appellant;	Mst. Rukhsana Begum D/o Karim Bux through Mr. Shahnawaz, Advocate
Respondents No.1, 2, 3 & 4;	1. Abdul Waheed S/o Abdul Majeed 2. Mumtaz Ali Junejo S/o Ghaji Khan 3. Mst. Shazia Aziz Dahiri W/o Abdul Aziz Dahiri 4. Mst. Shahbana @ Hawa W/o Mumtaz Ali Junejo. Advocate
Respondent No.5;	The State through Mr. Ali Haider Saleem, Deputy Prosecutor General, Sindh
Date of Hearing;	14.12.2020
Date of Judgment;	14.12.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant has assailed the impugned judgment dated 10.01.2020 passed by learned 1st Additional Sessions Judge (Model Criminal Trial Court), Karachi-South in Sessions Case No.1229 of 2015; whereby the respondents were acquitted under Section 265-H(1) Cr.P.C. hence the appellant has preferred this appeal against their Acquittal.

2. The brief facts of the case as per FIR lodged by complainant Ghulam Mustafa S/o. Karim Bux through his statement recorded under section 154 Cr.P.C. on 13.12.2014 at about 2330 hours in mortuary of Civil Hospital, Karachi are that on 13.12.2014 his brother Abdul Aziz visited his house and went to hairdresser shop, then wife of Abdul Aziz informed him on phone that his brother was shot dead, therefore, he rushed to Tayyab Ali Alvi Road near Okhai Memon Jamat Khan, Kalri where he

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found public gathered, who informed that his brother was severely injured and he has been taken by ambulance to Civil Hospital where his other relatives also arrived.The body of his brother was lying, who was having bullet injuries. The complainant further stated that on enquiry, he came to know that two unknown persons, one wearing pants shirt, while the other wearing Shalwar Kameez came on one motorcycle and started firing upon his brother with intent to kill him due to which he was severely injured and succumbed to his injuries therefore, he alleged against two unknown culprits for committing murder of his brother for unknown reasons.

3. After usual investigation, all the accused were charge sheeted and then sent up for trial. A formal charge was framed against all accused persons to which the accused pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 09 witnesses and exhibited various documents and other items. The statements of the accused were recorded under Section 342 Cr.P.C in which they denied the allegations of the prosecution and have taken the plea that they are innocent and have falsely been implicated in this case by the complainant. They did not give evidence on oath or call any DW in support of their defense case.

5. After appreciating the evidence on record the trial court acquitted the accused persons (herein respondents) through the impugned judgment. Hence, the appellant has filed this appeal against acquittal.

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 DPG has fully 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.

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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 following findings;

> *"Perusal of the evidence brought at the trial by the prosecution shows that in order to prove the charge against the accused persons, the prosecution has relied upon ocular account of the incident furnished by PW Ali Nawaz and PW Muhammad Arif Aurangzaib and identification parade of accused Abdul Waheed through the above named eyewitnesses.*
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> ***So far the evidence of PW Ali Nawaz son of Sohab, is concerned, he has exonerated the accused*** *by deposing in his evidence that about one year back at about 2000/2020 hours, he heard firing noise and when the firing stopped, he found a motorcycle passing through from there with two persons on it and later on* ***he came to know*** *that in result of firing, Aziz sustained bullet injuries and he was shirted to hospital in Rikshaw. He further stated that the police visited the place of occurrence and recorded his statement. However,* ***he stated that his LTI was obtained on identification parade memo by the police and he was never produced before any Court of law for identification parade test, therefore, so called eyewitness namely Ali Nawaz son of Sohab was declared hostile by the prosecution.*** *He was put to test for his cross examination by learned DDPP for the State, but nothing favorable to the prosecution could be brought at the trial.* ***Hence, evidence of said PW Ali Nawaz is of no use for the prosecution.***
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> *So far evidence of other eyewitness PW Muhammad Arif Aurangzaib is concerned, he deposed in his evidence that on* ***13.12.2014, he was present at Memon Society, Okhai Memon Hall with reference to his bike work at about 2000 hours*** *and during that four persons seated on two motorbike came and started firing due to which one person fell down and got injured. Later on, all those four persons made their escape good from the scene on motorbike.* ***On the next day, he came back again for repairing his motorbike at the same place and came to know that person namely Abdul Aziz received bullet injuries due to firing*** *and being Muslim and due to fear of God,* ***he went to the Police Station on 16.12.2014*** *for* ***recording his statement and on 14.02.2015 he appeared before he learned Judicial Magistrate concerned for identification parade,*** *during which he identified accused Abdul Waheed as one of the culprits. He also identified accused Abdul Waheed present in Court to be same accused, who made firing at the place of incident.* ***Perusal of the evidence brought at trial shows that alleged incident took place on 13.12.2014 and the FIR was lodged against unknown accused persons. There is no mention of any eyewitness of the alleged incident in the FIR, but surprisingly on 16.12.20214 one witness namely Muhammad Arif Aurangzeb appears at Police Station and states that he had seen the incident and could identify the accused persons on seeing, therefore, on 14.02.2015 he identifies accused Abdul Waheed in identification parade. Another eyewitness namely Ali Nawax S/o. Sohab is said to have been produced before the learned Judicial Magistrate concerned on the same date i.e. on 14.02.2015 for identifying accused Abdul Waheed in identification parade and it is alleged that he also identified accused Abdul Waheed during identification parade, but PW Ali***

Nawaz has categorically denied his appearance and participation in any identification parade and stated that his LTI on memo of identification parade was obtained by police at Police Station. So far presence of PW Muhammad Arif Aurangzeb at place of incident is doubtful for the reasons that he is not the resident of locality of place of incident, secondly he stated that he stopped or went to place of incident for repair of his motorcycle, but he did not mention the disorder of his motorcycle and it is surprising to note that after the alleged incident he left place of incident without getting his motorcycle repaired. It is also surprising to note that as per memo of site inspection produced as Ex. 10/B and sketch of place of incident produced as Ex. 14/B, there is no mention of existence of any motorcycle repairing shop or stall (Thiea) at place of incident, nor any accused, nor deceased, nor any eyewitness is shown in the sketch of place of incident, therefore, the evidence of PW Muhammad Arif Aurangzeb is not corroborated by any other evidence with regard to existence of any motorcycle repair shop of stall at place of incident. Therefore, when the existence of any motorcycle shop or stall at place of incident is not proved, the presence of PW Muhammad Arif Aurangzeb at place of incident for repair of motorcycle at the time of occurrence is very doubtful Moreover, the said witness namely Muhammad Arif Aurangzeb, if saw the alleged incident, for the sake of arguments, did not go to police officials who arrived at place of incident to inform that he saw the incident and could identify the culprits, rather he went away from the scene and after three days he went to Police Station and got his statement recorded under section 161 Cr.P.C. without furnishing any explanation as to why remained silent for three days and this action also casts doubt on his veracity and his presence at place of incident at the time of occurrence Furthermore the investigating officer has not recorded the statement of motorcycle mechanic, to whom PW Muhammad Arif Aurangzeb brought his motorcycle for repair and if such motorcycle mechanic was present at place, he also would have seen the alleged incident, but the investigating officer neither recorded his statement under section 161 Cr.P.C nor cited him as witness in this case, which makes the presence of PW Muhammad Arif Aurangzeb at place of incident at the time of occurrence more doubtful. Evidence of PW Muhammad Arif Aurangzaib is not corroborated by any other witness, hence his sole evidence, which otherwise has become doubtful, cannot be relied upon to base conviction against the accused persons for a heinous offence of murder.

It is alleged by the prosecution that the accused persons namely Mumtaz Ali Junejo, Mst. Shazia Aziz Dahri and Mst. Shabana alias Hawa abetted the alleged murder of the deceased but no iota of evidence has been produced by the prosecution to prove such abetment.

So far evidence of remaining private witnesses is concerned, it is not sufficient to base conviction against the accused persons, as PW Mst. Zareena daughter of Muhammad Khan Dahri, PW Muhammad Ibrahim Shah son of Moosa Shah have exonerated the accused persons in their evidence, by stating therein that the accused persons were not involved in murder of the deceased.

So far evidence of PS Mst. Rukhsana is concerned, her evidence is also not confidence inspiring, as she narrated the alleged fact communicated to her by complainant Ghulam Mustafa but the complainant has not been examined by the prosecution in this case,

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its case against the accused beyond a reasonable doubt and that the trial court rightly acquitted the accused by extending them the benefit of the doubt.

11. Furthermore, 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 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 that the accused shall be presumed to be innocent until proved guilty. **In other words, the presumption of innocence is doubled** as held by the Supreme Court 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.....
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> **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**

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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 requires no interference at all. As such, the appeal against acquittal was dismissed vide short order dated 14.12.2020.

14. These are the reasons for our short order dated 14.12.2020 which reads as under;

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"We have heard the learned counsel for the appellant as well as learned DPG For the reasons to be recorded later, this appeal against acquittal is hereby dismissed "

15 The appeal stands disposed of in the above terms