Acquitted Appeal - Sally Rafiq

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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.26 of 2020

Appellant	Muhammad Hanif S/o. Muhammad Yaqoob through Mr. Muhammad Hanif Qureshi, Advocate.
Respondents	Mr. Ali Haider Saleem, DPG.
Date of Hearing	17.12.2020
Date of Order	17.12.2020

JUDGEMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant has assailed the impugned judgment dated 25.11.2019 passed by the Model Criminal Trial Court (Additional Sessions Judge-I Karachi East) in Sessions Case No.21 of 2018; whereby the respondent was acquitted under Section 265-H(i) Cr.P.C.

2. The brief facts of the case as narrated by the complainant Muhammad Hanif son of Muhammad Haqoob are that on 01.04.2017 he was coming back from the house of his brother Muhammad Ayub along with his son Asad Hanif (deceased) after attending party. When he reached near the house, the deceased told him that he would come to house after getting easy load in his mobile phone. The complainant went to bed and woke up at 0600 hours and found that the deceased was not at home. The complainant rang on his mobile phone but no one received his call. He became worried, therefore, he started searching his son at various places and in the end proceeded to PS Shah Faisal colony at about 1100 hours. The duty officer asked him to come in the evening if his son did not return. At about 1700 hours he received a phone call from police officer Imran of PS Al-Falah who called him at PS AL-Falah. When he reached there the said police official made inquiries about details of his son Asad and further disclosed that he was shot by accused Safdar Abbas Zaidi

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when the deceased attempted to rob the accused and his dead body was lying at Chipa Cold Storage from where he received the same. Thereafter, he returned to house.Police did not lodge his FIR, thereafter, he approached Session Judge Karachi East under section 22-A Cr.P.C. who passed order in his favour and issued direction to SHO PS Al-Falah for registration of FIR but police refused to lodge FIR. Thereafter, the accused challenged the order of the Sessions Judge before High Court. The High Court dismissed the petition and directed the police to record his statement under section 154 Cr.P.C. and then police recorded his statement which led to the lodging the FIR.

3. During investigation the I.O. found that the deceased had robbed one person namely Syed Ajmal and robbed articles had been recovered from the deceased. Syed Ajmal who lived in the next street of the house of the complainant identified the deceased at Chipa Cold Storage. He had lodged one FIR No.79/2017 under section 392 at PS Al-Falah. He also identified the robbed articles recovered from the accused. Moreover, the accused soon after he shot the deceased lodged FIR No.80/2017 under section 393 PPC at PS Al-Falah in which he narrated the fact that he shot the deceased who attempted to rob him with pistol. The deceased fired at the accused but the accused escaped unhurt then the accused shot at the deceased from his licensed pistol in self defence as a result of which the deceased became injured. The accused called for the police and an Ambulance. The deceased was shifted to the hospital where he died. The accused registered FIR of the said incident against the deceased. The present case was investigated twice but each time the I.O. recommended the case for disposal under "C' class. The Magistrate did not approve the finding of the I.O. and took cognizance in pursuance thereof case was challaned. The leaned Magistrate concerned after taking cognizance sent up the same to the District & Sessions Judge Karachi East as the case was exclusively triable by the court of Sessions, there from the above noted case was received to the Additional District & Sessions Judge Karachi East.

4. After usual investigation, the formal charge was framed against accused to which he pleaded not guilty and claimed trial of the case.

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5. The prosecution in order to prove its case examined 10 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations of the prosecution and stated that he had shot the deceased in self defense. He also gave evidence under oath to the same effect and called one DW in support of his defense case.

6. After appreciating the evidence on record the trial court acquitted the accused (herein respondent) vide the impugned judgment and hence, the appellant has filed this appeal against acquittal.

7. 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, that there were contradictions in the evidence of the PW's; that that the case of the respondent was completely made up and in particular the failure to recover the broken glass of the car window from the scene where the deceased allegedly fired at the respondent showed that this was a concocted story and since the respondent had failed to prove that this was a case of self defense the onus of which lay on him since he had admitted the murder of the deceased the appeal against acquittal should be allowed and the respondent convicted of the charge.

8. 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/respondent was rightly acquitted as he had been able to prove based on the evidence that he had acted in self defense and as such the appeal should be dismissed.

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

10. Through the impugned judgment the accused/respondent has mainly been acquitted on account of the following findings at para 19;

> *"After perusal of record and hearing the learned counsel for both sides, I am of the view that there exists no motive behind commission of premeditated murder of the deceased by the accused. Admittedly, the accused and the deceased were not known to each other. The accused was present outside the house along with his children in his car. This*

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fact is supported by ocular and circumstantial evidence. According to the accused the deceased attempted to rob him and when he saw the accused was picking his gun he shot at him but the accused by exercising right of self-defence fired at him, which hit on the frontal part of the head of the deceased and he fell down and became critically injured. Window of the car of the accused was found broken to pieces, which proves that it was broken due to firing of the deceased. To substantiate this fact, the accused in his defence produced video, which was prepared by media persons soon after the incident, in which this fact was clearly seen that side wind screen of car of accused was broken and dead body was lying near the car of the accused. The deceased was having pistol for his safety, which was unlicensed one. Presence of the deceased near the house of accused proves that he did not come for any noble cause but for some sinister motive since he was having pistol and he fired at the car of the accused attempting to rob him. From personal search of the deceased robbed articles of Syed Ajmal were recovered, which was identified by him. Syed Ajmal was mugged just prior to the incident in the same society and such FIR was lodged. Similarly, conduct of the accused shows that he fired after the deceased launched attack. The accused was under imminent apprehension of death. His prompt act by firing at the deceased not only saved his life but precious lives of his children. The accused immediately informed police on 15. The accused did not have much time to have recourse to public authorities for his rescue. The accused registered FIR of the incident with promptitude. The accused only made one fire at the deceased which shows that he did not cause more harm than necessary. The accused exercised utmost restraint in exercising right of self-defence. The circumstantial evidence proves that the accused was under imminent threat of death. If he did not fire at the deceased, he would have been killed. Conduct of the accused prior to the incident, at the time of incident and soon after the incident did not show any malafide on his part. Oral evidence of the accused is supported by other prosecution witnesses as also circumstantial evidence of strong character, which only proves that the accused shot at the deceased in self-defence as there was no other motive for shooting the deceased. According to s. 96 of PPC nothing is an offence, which is done in exercise of right of private defence. According to s. 97 PPC right of private defence extends to body and property, subject to restrictions as contained under s. 99 PPC. According to s. 100 PPC the right of private defence of body extends to causing death when such an assault as

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may reasonably cause apprehension that death will otherwise be the consequences of such assault. Case of the accused does not fall within limitations as prescribed under s. 99 PPC. The accused has not committed any offence. Therefore, point No.2 is answered as not proved".

11. As a matter of law as the respondent had claimed the special defense of self defense the onus shifted on to him to prove that defense. After our re assessment of the evidence we find that the respondent was able to prove through cogent and reliable evidence that he acted in self defense in order to save his life for the following reasons;

(a) that the respondent admitted that after the deceased attempted to rob him at gun point he fired at and killed the deceased however instead of fleeing the scene he called the police and an ambulance in order to try to save the life of the deceased which in our view is not the action of a cold bloodied murderer.

(b) that having been fired upon already the deceased was justified in returning fire in order to save his own life and that of his children

(c) that he filed the FIR with promptitude and therefore had no time to cook up a false story. That even the police had recommended the case for closure in "c" class as the IO believed this to be a case of self defense.

(d) that he had no enmity with the deceased and had no motive to shoot and kill the deceased.

(e) that it does not appeal to reason, logic or common sense that he would commit the murder in cold blood whilst his young children were in the car and may have been endangered.

(f) that he only fired one shot which was proportionate to the attack on him. If he wanted to kill the deceased in cold blood then he would have most likely fired more than one time and certainly would not have called for an ambulance.

(g) that he stuck to his story through out the case during his S.342 Cr.PC statement and evidence under Oath and even called one

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DW in support of his defense case who corroborated him. Hardly any PW's were cross examined as hardly any of them gave any incriminating evidence against the respondent.

(h) that DW 1 Namza Ameenduddin who is unrelated to the respondent and is not a chance witness corroborates the respondents account of the incident and in particular states that broken glass of the car was lying on the ground along with dead body and the respondent was also present with his children in his car. The broken glass from the car window is further corroborated by a video clipping made by media persons.

(i) that PW 4 Asghar Ali who was the second IO of the case gave evidence that PW 5 Syed Amjal Sohail identified the deceased who had robbed him earlier in the evening when he was shown his dead body in the morgue. PW 5 was Syed Amjal Sohail himself who gave evidence that he was robbed on the same night by persons on motor cycle at gun point and he had registered an FIR in respect of the incident. In his evidence he specifically identifies the deceased as the person who had robbed him when he was shown his dead body. His stolen articles were also recovered from the deceased. This evidence to a large extent corroborates the respondent's evidence that the deceased was a robber and when the deceased attempted to rob him at gun point and fired at him he had no option but to resort to a return of fire in self defense in order to save his life and protect the lives of his children.

(j) that two pistol empties were recovered at the scene by PW 6 Ali Haider which ties in with the respondent's account of the events regarding the firing. Namely that only two pistol shots were fired at the scene and he also secured an unlicensed fire arm from the deceased whereas the respondent's firearm was licensed.

(k) that any contradictions that there may be in the evidence of the PW's are of not such a materiality as to offset the acquittal and

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the failure of the prosecution to prove its case beyond a reasonable doubt.

12 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)

13. 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.

14. 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/respondent is based upon sound reasons, which requires no interference at all. As such, the appeal against acquittal was dismissed vide short order dated 17.12.2020.

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15. These are the reasons for our short order dated 17.12.2020 which reads as under;

> "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."

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

Arif