

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain.**CRIMINAL ACQUITTAL APPEAL NO.410 OF 2019**

Appellant	Qasim S/o Abdul Ghaffar Magsi through Mr. Muhammad Ramzan, Advocate
Respondents No.1, 2, 3 & 4	1. Qadir Bux @ Qadir S/o Mir Muhammad @ Miro Mallah 2. Mst. Rukhsana W/o Abdul Ghafafar 3. Ali Nawaz S/o Mehar Jatt 4. Juman S/o Mehar Jatt Through Mr. Muhammad Daud Narejo, Advocate
Respondent No.5	The State through Mr. Ali Haider Saleem, Deputy Prosecutor General, Sindh
Date of Hearing	26.11.2020
Date of Order	26.11.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant has assailed the impugned judgment dated 15.06.2019 passed by learned Additional Sessions Judge-I/Model Criminal Trial Court, Thatta in Sessions Case No.213 of 2015; whereby the respondents were acquitted under Section 265-II(1) Cr.P.C.

2. The brief facts of the prosecution case as narrated in the FIR are that on 21.02.2015, complainant Qasim S/o Abdul Ghaffar alongwith his brothers Muhammad Salim Magsi, Muhammad Hashim Magsi and his father Abdul Ghaffar aged about 50 years came to Bhudo Talpur City for purchasing articles and after purchasing the articles, they were going back to their village when at about 08:00 pm (night time) they reached at Kachia (Band) Pinyari Barrage in the Kacha Patri where they saw through

the torch light that three unknown persons were standing there out of whom two persons were having hatchet in their hands and one person having T.T. Pistol in his hand. When they reached near them, the person holding hatchet caused hatchet blows to his father Abdul Ghaffar with intention to kill him upon upper portion of the left ear below the temporal region and another unknown person by hatchet gave a straight blow on same place on temporal region, where he fell down and third unknown person made straight fire from his T.T. pistol which hit at the back head of his father, who became unconscious and later on expired. The culprits ran away towards side land and in the meantime, all accused persons ran away towards Dargah Jaffar Shah thereafter they came towards the dead body and gave the information about the incident to Abdul Jabbar through phone, who gave information to police of Bhudo Talpur and thereafter police came and took necessary action. Hence, the instant FIR.

3. After usual investigation, all the accused were charge sheeted and then sent up for trial after being supplied copies under receipt. On 21.09.2015, 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.

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 three 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 counsel for the respondents as well as learned DPG has supported the impugned judgment and have 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 to 20 in the impugned judgment which are set out as under for ease of reference;

"The law was set in motion by information to police about the incident by PW Abdul Jabbar whereafter SIP Umaid Ali proceeded to the place of incident in his company to carry out legal formalities including removal of the dead body, collection of blood stained earth and an empty bullet casing from the place of incident. It is however, pertinent to mention that neither he nor P.W. Abdul Jabbar speak a single word of availability of the complainant or PWs Saleem and Muhammad Hashim at the place of incident. In the memo for inspection of dead body and inquest report, PW Abdul Jabbar and his real brother Tarique Aziz are cited as witnesses. Similarly in the medico legal certificate their names are mentioned as identifiers of the dead body. The incident took place on 21.02.2015, but the FIR was lodged on 26.02.2015. Although none of the accused is named in the FIR to enable them to claim benefit of such delay but it raises a serious question as to what prevented the complainant from getting a case registered when he claims to be present with the deceased at the time it took place. As has been mentioned above neither any of the witnesses who immediately proceeded to the place of incident nor does any document prepared by the I.O. shows presence of either the complainant or any of the witnesses there. Thus, serious doubt crept in when the complainant lodged FIR after five days of the incident claiming that he and his brother PWs Muhammad Hashim and Muhammad Saleem were with the deceased when he was attacked and killed.

19. The complainant and PWs Muhammad Hashim and Saleem are real sons of the deceased. Surprisingly, none of them received any kind of injury whatsoever in the incident. The only explanation they offer is that they did not retaliate out of fear and ran to save themselves. The number of alleged assailants was three and only one of them was armed with a pistol. The deceased had only one firearm injury and the only empty found at the place of incident suggests that, only a shot fired by the culprits and it was not a case of indiscriminate firing so as to compelled the complainant and his brothers PWs Saleem and Hashim run for shelter. The response of the complainant and the alleged eye witnesses is not in accordance with the natural course of events how real sons would respond when their father is attacked. None of them claims that their clothes got blood stains even after the culprits left and they came to see the dead body. The

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evidence shows that the complainant and his brothers PWs Saleem Hashim have been residing at Shah Latif Town near Bhains Colony within the limits of District Malir, Karachi and they had no occasion to accompany their deceased father who after divorcing his first wife, mother of the complainant and PWs Hashim and Muhammad Saleem, had been residing at Budho Talpur with Mst. Rukhsana and her children. Even on the deposition sheets of complainant and PWs Muhammad Saleem and Hashim, their address mentioned is that of Bhains Colony Curve, Shah Latif Town, Malir, Karachi. In view of the position as discussed above, it appears that the complaint and the witnesses concocted a cock and bull story of their presence at the time of incident.

20. One of the allegations according to the case of prosecution is that accused Ali Nawaz wanted to marry accused Mst. Rukhsana and both of them considering the deceased a hurdle caused his death. There is no evidence whatsoever to establish any conspiracy between the two. There is no evidence either to show that they had any kind of illicit or even any moral and acceptable relationship between them. Thus the motive as far as accused Mst. Rukhsana and Ali Nawaz are concerned could not be established. The prosecution could not justify joining of accused Juman as to why he would join hands with accused Mst. Rukhsana and Qadir Bux. Both accused are real brothers of inter se and the prosecution has miserably failed to show any motive for their involvement in the commission of crime. Admittedly Mst. Rukhsana is step mother of the complainant and both PWs Muhammad Hashim and Saleem also carry on business. It therefore does not appeal to a prudent mind that if the complainant and the alleged eye witnesses in fact witnessed the incident why they were unable to identify and pinpoint the culprits involved in the incident. There are a number of contradictions, anomalies and weakness in the case of prosecution as far as different stages of investigation, preparation of mashirnamas and recovery of crime weapons are concerned. After more than two months of the incident, accused Qadir Bux was seen all of sudden by the complainant and one of the PWs and identified as one of the culprits involved. As far as his arrest is concerned, there is a major contradiction therein. Recovery mashir Shabir Ahmed Disclosed that the police informed him and the complainant that accused Qadir Bux was available and he requested them to join him to proceed and arrest him, whereas the complainant claims that it was he who informed the police about his availability. This also shows that the arrest, recovery and other phases of investigation were manipulated to entangle the accused. Therefore the material available raises serious doubts about the truth of prosecution story and none else but the accused are entitled to benefit of doubt. In Tharo (supra), conviction and sentence was set aside observing that right of incident was dark and identification of assailants was made in the light of torch, but torch was neither produced before Police nor was it secured by police from eye-witness who allegedly was carrying same at the time of incident. In Majeed alias Majeedi and others (supra), the accused was acquitted on the ground that the accused had not been

any, reliance can be placed on it. In the S161 statements of the eye witnesses they also give no hulia of the accused and as such the identification of the accused is in doubt especially as already noted it was a nighttime incident and in our view the identification of the accused cannot be safely relied upon to lead to the conviction of the accused. We have also gone through the evidence which shows that there are numerous contradictions by the PW's; that no motive has been established by the prosecution for the respondents to murder the deceased and in our view the story of the prosecution is simply not believable in that it does not appeal to logic, reason or common sense that two sons would run away when their father was shot and killed in front of them by one targeted bullet and allow the accused to escape from the scene without attempting to even chase them

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

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

14. The appeal stands disposed of in the above terms