

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-

Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammad Karim Khan Agha.

Cr. Spl. ATA. Acquittal Appeal No.D-131 of 1999

The State.Vs.Muhammad Nawaz and others.

Date of hearing: 17.05.2017.
Date of judgment: 26.05.2017.

Syed Meeral Shah, D.P.G. for the appellant / State.
None present for the respondents / respondents.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Muhammad Nawaz, Mubarik, Muhammad, Wahid Bux, Usman, Majeed and Ali Bux were tried by learned Judge Anti-Terrorism Court, Mirpurkhas in Special Case No.05/1999 for offence u/s 365-A, 34 PPC. By judgment dated 23.07.1999 the respondents named above were acquitted of the charge. Hence this acquittal appeal.

2. Brief facts of the prosecution case are that (i) on 19.11.1998 at 2330 hours complainant Abdul Ghaffar s/o Akber Khan r/o Deh Setha Taluka Shahdadpur lodged report at P.S. Shahpur Chakar that on 17.11.98 at about 2000 hours accused Ali Bux Machi alongwith three unidentified persons duly armed with Kalashinkoves and Rifles kidnapped (1) Rahimuddin Pathan s/o Qamar Din Pathan (2) Iqbal (3) Hazoor Bux Brohi and (4) Saeed Ahmed Pathan on gun point from the Bricks Bhatta of complainant situated in Deh Sehta Taluka Shahdadpur. It is alleged that at Sim Nala they released (1) Iqbal (2) Hazoor Bux Brohi and (3) Saeed

Ahmed Pathan after delivering a chit of Ransom for the release of remaining abductee Rahimuddin s/o Qamar Din Pathan cousin of complainant. Through Chit accused demanded cash, Rado Watches, Turbans etc. as such case FIR No.38/98 u/s 365-A/34 PPC was registered against accused at P.S. Shahpur Chakar.

(ii) On 4.12.1998 at 1930 hours SIP / SHO Atta Muhammad Nizamani of PS Shahdadpur alongwith his subordinate staff went for conducting the investigation of case crime No.38/98 u/s 365-A/34 PPC of PS Shahpur Chakar and when reached at Link Road going towards village Gul Khan Umerani within the jurisdiction of P.S. Shahpur Chakar at about 1800 hours accused Muhammad Nawaz s/o Ali Bux by caste Talpur was sitting there armed with 7 MM Rifle, in suspicious condition. The accused while seeing the police party tried to run away but he was apprehended. One 7 MM Rifle alongwith 10 live bullets were secured from his possession without permit / license. Case crime No.40/98 u/s 13-(d) A.O was therefore registered against him at P.S. Shahpur Chakar.

(iii) SIP Malik Muhammad Hayat SHO PS Shahdadpur lodged report on behalf of the State at P.S. Shahdadpur that on 5.12.1998 at 0133 hours while he alongwith police party of P.S. Shahdapur was going for conducting the investigation of case crime No.38/98 u/s 365-A/34 PPC of P.S. Shahpur Chakar under the orders of SSP Sanghar for the recovery of abductee Faheemuddin Pathan on pointation of accused Muhammad Nawaz Talpur and when reached near Maldasi Shakh on Madlasi-Shahdpur road, encounter took place between dacoits and police party which lasted about 15 minutes, 3 dacoits namely (1) Mubarik s/o Muhammad Ismail Rajpur armed with SBBL gun & Muhammad s/o Soharai armed with TT Pistol were arrested. Dacoits namely (1) Ali Bux Machi and (2) Usman s/o Jamal Talpur however fled away in Banana garden, leaving behind the abductee Raheemuddin s/o Qamaruddin Pathan who was

recovered by the police. Such case crime No.214/98 u/s 353, 324, 34 PPC was registered against accused at P.S. Shahdadpur.

(iv) Since the arms and ammunition recovered by the police from the abovenamed accused were without as such the following cases were also registered against them at P.S. Shahdadpur u/s 13-(d) A.O. 1965.

(v) Crime No.215/98 U/s 13-(d) A.O. was registered against accused Mubrik S/o Ismail Rajpur for possessing one 12 Bore DBBL Gun with 15 live cartridges without license.

(vi) Crime No.216/98 U/s. 13-D A.O. was registered against dacoit Mohammad S/o Sohrab Brohi for carrying one TT Pistol of 30 Bore with 8 live bullets without license.

(vii) Crime No.217/98 U/s 13-D A.O. was registered against dacoit Wahid Bux S/o Nek Muhammad Brohi for possessing one 12 Bore SBBL Gun with 12 live cartridges without license.

3. After usual investigation challan was submitted U/s 365-A, 34 PPC before learned Judge, A.T. Court Hyderabad on 19.12.1998, whereas the remaining cases were challaned before the Court of Judicial Magistrate Shahdadpur concerned under Arms Act.

4. Charge was framed against accused at Ex.14 to which the accused pleaded not guilty and claimed to be tried.

5. In order to substantiate its' case, the prosecution examined in all 13 witnesses.

6. The statements of accused were recorded u/s 342 Cr.P.C. in which they have denied the prosecution allegations leveled against them to be false and claimed their innocence. Accused neither examined themselves on Oath nor they led any evidence in their defence.

7. After hearing the learned counsel for the parties and examination of evidence trial court acquitted the respondent of the charge. Against such acquittal the State has filed the captioned Criminal Acquittal Appeal.
8. We have perused the evidence and judgment of trial court dated 23.07.1999 with the assistance of D.P.G. for the appellant / State.
9. We have come to the conclusion that trial court has assigned sound reasons while acquitting the respondents/accused. The relevant portion of the impugned judgment is hereby reproduced as under:-

***“In the evidence the abductee Rahimuddin in his cross-examination has stated that he had not seen the police recovering any weapon from the accused, when he has denied that the police has shown false encounter, but how it is to be believed that encounter took place when the abductee in his evidence has said that when his eyes were opened he had seen four accused in the custody of police, when as per the mashirnama of arrest only three accused namely Wahid Bux, Mubarak and Muhammad were arrested at that time and as per mostly all the police witnesses of the encounter, the accused Muhammad Nawaz was sitting in the mobile at the time of encounter and that other two accused had absconded away. Abductee Rahimuddin in his cross-examination to Mr. Mukhtiar Ahmed Khanzada Advocate, has admitted that in 164 Cr.P.C. statement it is stated that the accused present at that time were neither seen by him nor he known their names and that he had only seen them in the police custody and also says in the cross that he did not know Muhammad Nawaz. His other evidence discussed in respect of his 164 Cr.P.C. statement as above is also material. Abductee has also in his cross-examination has stated that he had also not seen the police doing any karvai (At the time of encounter). This also shows that either abductee was not present or encounter had not taken place. If the abductee was not present then too prosecution case will fail and if encounter had not taken place then too the prosecution case will fail. Again accused Ali Bux and Usman as per the F.I.R. of Cr. No.214/1998 are said to be present at the time of encounter but absconded away, even if so still they are not shown as absconder. In the challan of case Cr. No.214/98. This also shows that false encounter has been shown to fulfill the requirement of the papers. So far as the encounter is concerned, it is important to note that P.W. Anwar Ali (Ex/32) who happens to be H/C of P.S. Shahdadpur in his cross-examination has stated that they had parked the mobiles on the Mori at a distance of 04/05 feet from the Banana crop and P.W. SIP Atta Muhammad (Ex/33) in his cross-examination says that the mobiles were parked at a distance of 100/150 feet from the Banana.*”**

In connection of Cr. No.214/98, it is also important to note that SHO Malik Muhammad Hayat (Ex/36) in his cross-examination has stated that there were three search lights and one was with each SHO i.e. SHO Shahpur Chakar, SHO Shahdadpur and SHO Lundo. When H/C Anwar Ali (Ex/32) says that there were two search lights and that he does not know who was having search lights and that SHO Lundo was having torch of three cells with him. It is also important to note that SHO Atta Muhammad (Ex/31) in his examination in-chief has deposed that they alighted from the mobile and flashed search lights and encircled the Banana crop and as soon as they encircled the Banana crop, the accused opened fire on them. When P.W. H/C Anwar Ali (Ex/32) in his examination in-chief at the first says that the Banana crop was encircled by them which was pointed out by the accused (Muhammad Nawaz) and then started searching Banana crop but firing was started when in the cross examination he says that he does not know if Banana crop was encircled.

Again most of the P.Ws. of encounter have stated in their evidence that at the time of surrender by the accused they were having weapons in their hands, when SHO Shahdadpur Malik Muhammad Hayat (Ex/36) who is I.O of this Crime No.214/1998 says in his cross examination that accused were not having weapons in their hands.

In Cr. No.214/98 apart from arrested accused two accused namely Ali Bux and Usman are said to have been absconded away, but their foot prints as admitted by SHO Shahdadpur are not tracked on the first or any subsequent day and also that they did not chase absconding accused. As per the SHO they had even not gone to the villages of these accused, when he could get their addressed from the SHO Shahpur Chakar. Some of the PWs of the encounter say that abductee was lying in the Nali of water, when some P.Ws. have stated in different and that he was lying in the katcha land. These all has rendered the prosecution story of FIR/Cr. No.214/98, as unbelievable.

Again, no separate mashirnama of place of wardat is prepared in respect of place of encounter and recovery of abductee.

161 Cr.P.C. statement of P.Ws. in order to confirm the recovery of the abductee at the time of encounter from the accused are not recorded in special case No.5/99. This shows that encounter actually had not taken place. Had story been true then the police must have taken all the necessary efforts and precautions to prove the prosecution case, but no required steps are taken to show and prove that the both incidents actually and really had taken place in the manner as stated. It is case of the prosecution that accused Muhammad Nawaz after arrest in Crime No.40/98 confessed guilt of Crime No.38/98, but still his confessional statement is not get recorded. Explanations from concerned SHOs for such defects therefore, are needed to be called and delinquent punished. In the circumstances, therefore, admission of accused Muhammad Nawaz claimed by the prosecution being admission before the

police during the custody is, therefore, not admissible in evidence u/s 38 and 39 of Qanoon-e-Shahadat and is not to be proved against him. So if these pieces of evidence is excluded then prosecution story of Cr. No. 214/1998 itself became without substance. The story appears to have been manipulated to show kargardi of the police.

In view of all the recovery of the weapons from the accused Wahid Bux, Mohammad, and Mubarak is, therefore, has become doubtful and story of Cr.No.40/98, therefore, also appears to have been manipulated, by the police and, therefore, is rendered unbelievable. Moreover, the SHO of Cr.No.214/98 has admitted in evidence that the weapons lying in the Court did not bears the signatures of the mashers. The signatures are usually to be taken as a token of guarantee that he same weapons recovered from the accused in presence of masheers. Therefore, the recovery of the weapons in presence of masheers is also became doubtful. So far as arrest of accused Muhammad Nawaz is concerned, masheer of arrest H/C Ali Sher (Ex/30) has in his evidence stated that the SHO had not measured height of the accused when in the masheernama of arrest Ex/30-A height is very much mentioned. This also has given doubt about the arrest of the accused Mohammad Nawaz as stated. In the FIR/Cr.No.38/98 four dacoits are mentioned when in the evidence five dacoits are mentioned but police has implicated as many as 08 accused in this case for which no explanation has been given. This has also created doubt about the involvement of the accused persons in this case.

In this case some newspapers have been produced in defence during the statement of the accused Mohammad Nawaz, but the same are not been considered for the reason that there is no authenticity of the news published in the same. Moreover, it is the prosecution to first prove it's case beyond reasonable doubt and only then the defence has to dis-prove the prosecution case, through their evidence and material brought on the record. But in view of all above I am clear in my mind that prosecution has failed to prove it's case about all the Cr. No.38/98, 40/98, 214 to 217 of 1998 beyond reasonable doubt, therefore, weakness of the defence if any, will not itself prove the prosecution case. My findings on points no.1 to 07 are, therefore, in negative.

POINT NO.8:-

In view of my findings on points No.1 to 07 above, all the accused persons are acquitted. Accused Muhammad Nawaz, Mubarak, Muhammad, Wahid Bux and Usman are produced in custody, when the accused Ali Bux Machi and Majeed Brohi are absconders.

Accused Muhammad Nawaz, Mubarak, Muhammad, Wahid Bux and Usman are in custody, who are ordered to be released forthwith if not required in any other case."

10. In the present case, abductee Rahimuddin has deposed before the trial Court that there were five accused persons but their faces were

muffled and he had identified only accused Ali Bux, who has expired during the pendency of the proceedings and proceedings have been abated against him vide order dated 12.12.2013. There was no reliable evidence against remaining respondents to connect them in the commission of alleged offence. Trial Court rightly recorded acquittal in their favour.

11. In our considered view, judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honourable 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 Ahmad 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 2 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), 2004 SCMR 249, *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 until proved guilty; in other words, the presumption of innocence 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.”

12. For the above stated reasons there is no merit in the appeal against acquittal. Acquittal recorded by trial Court in favour of respondents / accused is based upon the sound reasons, which require no interference at all. As such, the appeal against acquittal is without merits and the same is dismissed.

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