

HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeal No.29 of 2018

PRESENT:

Mr. Justice Aftab Ahmed Gorar

Mr. Justice Amjad Ali Sahito

Appellant : Mst. Kausar Parveen D/o Nawab Deen
Through Mr. Aaqib Rajpar, Advocate.

Respondent No.3 : The State
Through Mr. Abrar Ali Khichi,
Addl. Prosecutor General Sindh.

Date of hearing : 16.01.2019

Date of decision : 16.01.2019

J U D G M E N T

AMJAD ALI SAHITO, J .- Respondent, namely, Muhammad Arif S/o Qadir Buksh Bhatti was tried and acquitted through the impugned judgment dated 09.12.2017, by the learned IInd Additional District & Sessions Judge, Karachi West, in Sessions Case No.493 of 2012, arising out of Crime No.208/2013, for offence punishable under Sections 302/34 PPC, registered at Police Station, Surjani Town, Karachi West, being aggrieved the appellant being mother of the deceased filed instant appeal.

2. As per prosecution case, on 05.05.2012 at about 1415 hours inside a house situated in katchiabadi Hassan Brohi Goth, Surjani Town, Karachi accused had committed Qatl-e-Amd of Asghar the son of complainant Muhammad Akbar by strangulation of his neck. The FIR has been lodged on the basis of the statement under section 154, Cr.P.C. of the complainant.

3. After a usual investigation, challan was submitted under Section 173 Cr.PC against the accused under above-referred sections.

4. The learned Trial Court framed the Charge against the respondent/accused at Ex.3 to which he pleaded not guilty and claimed to be tried.

5. At trial, the prosecution examined the following witnesses:-

- (i) PW-1 Muhammad Akbar at Ex.4;
- (ii) PW-2 Mst. Kausar Parveen at Ex.5;
- (iii) PW-3 Yousuf at Ex.7;
- (iv) PW-4 Dr. Zafar Shah Khan at Ex.8;
- (v) PW-5 Malik Ahmed Khan at Ex.9;
- (vi) PW-6 SI/SHO Muhammad Jamal at Ex.10;

6. Statement of the respondent/accused Muhammad Arif was recorded under Section 342 Cr.PC at Exh.12, in which he denied the prosecution allegations and further stated that he is innocent. Respondent/accused was recorded his statement on oath under section 340(2), Cr.P.C. at Exh.13, stating therein that Mst. Kausar Parveen is his wife, who is characterless and she always quarreled with him, many times he beat her, she also demanded to pronounce the talaq towards her, during this the incident happened, the son Asghar died, she has no option left him for putting false allegation regarding the death of minor and she also blamed allegation upon him that she and doctor both implicated him in the above crime. She also trapped to ex-husband Muhammad Akbar for a statement against him, thereafter, she reconciles the dispute and resides with him but he refused to do so and witnesses Muhammad Yousuf got relation with Kausar

Parveen he supported her. Respondent/accused has neither produced any document nor produced any witness in his defence.

7. The learned Trial Court after hearing the parties counsel and appraisal of the evidence acquitted the respondent as stated above, which has been impugned by the mother of the deceased through instant acquittal appeal.

8. Mr. Aaquib Rajpar, learned counsel for the appellant, mainly contended that the judgment passed by the learned trial Court is perverse and the reasons recorded by the learned trial Court are artificial and without appreciating the evidence; that the grounds on which learned trial Court proceeded to acquit the respondent is not supportable from the evidence on record; that the incident has taken place in the house of respondent No.1, hence he is bound to disclose that how the deceased Asghar died; that the ocular evidence is being supported by the medical evidence, but the same was not considered by the learned trial Court, therefore, under these circumstances, the respondent No.1 is liable to deal in accordance with law. He lastly prayed for allowing the instant appeal.

9. Conversely, learned Addl. Prosecutor General Sindh has supported the impugned judgment passed by the learned trial Court.

10. We have heard the learned counsel for the appellant as well as learned Addl. Prosecutor General Sindh and have gone through the evidence with their assistance as well as the impugned judgment.

11. The main contentions of the learned counsel for the appellant are that the place of occurrence is a house of

accused/respondent No.1, hence he has committed the murder and now it is his duty to shift the burden that in what manner the incident had taken place. The liability of the prosecution to prove the charge beyond a shadow of a doubt by bringing on record the direct, natural and confidence inspiring evidence against the accused. Reference may well be made to the case of **Abdul Majeed vs. State (2011 SCMR 941)** wherein the principle to deal with such like the situation was not only dealt but the *criteria* for liabilities of each was chalked out as: -

7. *The basic principle of criminal law is that it is the burden of the prosecution to prove its case against the accused beyond reasonable doubt. **This burden remains throughout and does not shift to the accused, who is only burdened to prove a defence plea, if he takes one. The strangulation to death of the appellant's wife in his house may be a circumstance to be taken into account along with the other prosecution evidence. However, this by itself would not be sufficient to establish the appellant's guilt in the absence of any other evidence of the prosecution connecting him to the crime.** The prosecution has also not been able to establish that the appellant was present in the house at the time his wife was murdered. This, perhaps, distinguishes this case from that of Afzal Hussain Shah v State (ibid) where the accused admittedly was present in the house when his wife was killed."*

12. We are fully satisfied with appraisal of the evidence adduced by the learned trial Court and we are of the view that while evaluating the evidence, the difference is to be maintained in the appeal from conviction and acquittal appeal and in the later case, interference is to be made only when there is gross misreading of the evidence resulting in miscarriage of justice.

13. As per prosecution case, the star witnesses of the case are; PW-1 complainant Muhammad Akbar, PW-2 Kausar Parveen mother of the deceased and PW-3 Yousuf. It is pertinent to mention here that this is a case of an unseen/un-witness incident

which was taken place on 5.5.2012. PW-1 complainant Muhammad Akbar lodged the FIR that the accused Muhammad Arif had committed murder of his son Asghar Ali by strangulation of his neck, but it is admitted fact that he is not an eyewitness of the incident. In cross-examination, he admitted that **“It is correct to suggest that accused Muhammad Arif informed to Muhammad Yousuf that my deceased son is lying at Jail Chowrangi in an unconscious condition. It is correct to suggest that I did not produce Muhammad Yousuf before the police as an eyewitness. It is correct to suggest that I have not stated in my statement under section 161 Cr.P.C. that Muhammad Yousuf is an eyewitness of the incident”**.

14. In order to support the version of the complainant, the prosecution has examined PW-2 Kausar Parveen mother of the deceased. In examination-in-chief, she deposed that on 4.5.2012 she was in Dubai, on the same day she has received a call of the respondent No.1 that Muhammad Asghar is in ill condition and she directed him to take away her son to the hospital for a medical checkup, but Muhammad Arif did not listen to her. She made numerous calls to the respondent No.1 Muhammad Arif, but he did not respond. She further deposed that she had directed Muhammad Arif to get the money from one Sultan resident of Bhutto Colony, but accused Muhammad Arif switched off the mobile phone and subsequently accused informed him that now her son Asghar is dead. In cross-examination, she admitted **“It is correct to suggest that I did not inform to my other children after hearing about the sickness of my deceased son. It is correct to suggest that I did not inform to Muhammad Yousuf about the sickness of my deceased son. It is correct to suggest that I did not**

inform to my ex-husband and other children about the sickness of deceased son deliberately. It is correct to suggest that I came to know that when Muhammad Arif was coming back after taking money from Bhutto Colony, Muhammad Yousuf also called the ambulance”.

15. In support of the version of the prosecution witnesses, PW-3 Yousuf was examined by the prosecution, who is, in examination-in-chief, deposed that on 4.5.2012 he did not find Asghar, hence he has contacted through the mobile phone, the deceased Asghar informed him that he is present in his house, at about 3 am midnight respondent No.1 Arif stepfather of the deceased made a call on a cell phone and informed him that Asghar has been expired. On such information, PW-3 Yousuf reached the place of incident and saw that the accused Arif called an ambulance to shift the dead body to Abbasi Shaheed Hospital. Accused Arif was also gone to the hospital in an ambulance. The police came at the hospital and arrested the accused in the presence of Yousuf. In his cross-examination, he admitted that **“it is correct to suggest that I reached at Jail Chowrangi before the arrival of Arif over there. It is correct to suggest that I reached at Jail Chowrangi from Tariq Road. He further admitted that it is correct to suggest that I have not seen the accused Arif while committing murder of deceased Asghar Ali”**.

16. It is pertinent to mention here that all the above three prosecution witnesses are not the eyewitnesses of the incident, hence it is a case of unseen incident, therefore, it was the duty of the Investigating Officer to collect the evidence, which starts from the dead body of the deceased Asghar end at the neck of the accused and if any chain is broken/missing then benefit of doubt will go in favour of the accused . In this case, PW Kausar Parveen

admitted that on 4.5.2012 she received a call from Muhammad Arif, who told her from Pakistan that his son Asghar is in ill condition and she repeatedly called him for providing medical facilities to Asghar. PW-3 Yousuf also disclosed that he has received a telephone call from the appellant that deceased Asghar has died, but the Investigating Officer failed to collect mobile data of the respondent No.1 Muhammad Arif as well as PW Kausar Parveen and PW-3 Yousuf to believe that respondent No.1 has actually contacted Mst. Kausar Parveen PW-2. The complainant failed to disclose the motive against the respondent No.1 for committing murder of deceased Asghar. Now the burden can be shifted upon the respondent No1 to explain the circumstances in which deceased Asghar had died in an unnatural death in his house. In such a situation, we are taking the guideline from the case of **Nazir Ahmed vs. The State (2018 SCMR 787)**, wherein the Hon'ble Supreme Court of Pakistan has held that:

"..... We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above-mentioned cases of Saeed Ahmed v The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant n a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him."

17. The rule of benefit of the doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. The conviction must be based on unimpeachable evidence and certainty of guilt and doubt arising in the prosecution case must be resolved in favour of the accused. The said rule is based on the maxim *“It is better than ten guilty persons be acquitted rather than one innocent be convicted”* which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the *“mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent”*.

18. Needless to mention here that the prosecution primarily is bound to establish guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence for conviction of the respondents/accused and from the evidence if it comes to the conclusion that the charges so imputed against the respondents/accused have not been proved beyond reasonable doubt, then the respondents/accused become entitle to their acquittal. In the case of **Muhammad Zafar and another v. Rustam and others (2017 SCMR 1639)**, the Hon’ble Supreme Court of Pakistan has held that:-

“We have examined the record and the reasons recorded by the learned appellate court for acquittal of respondent No.2 and for not interfering with the acquittal of respondents Nos.3 to 5 are borne out from the record. No misreading of evidence could be pointed out by the learned counsel for the complainant/appellant and learned Additional Prosecutor General for the State, which would have resulted into grave miscarriage of justice. The learned courts below have given valid and convincing reasons for the acquittal of respondents Nos.2 to 5 which reasons have not been found by us to be arbitrary, capricious or fanciful warranting

interference by this Court. Even otherwise this Court is always slow in interfering in the acquittal of accused because it is well-settled law that in criminal trial every person is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. As a sequel of the above discussion, this appeal is without any merit and the same is hereby dismissed.”

19. The criteria of interference in judgment against the acquittal are not the same as against the cases involving a conviction. The scope of interference in appeal against acquittal is narrow and limited for the reasons that 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. It is settled principle of law that the Courts are very slow in interfering with such acquittal judgment unless it is shown to be perverse, passed in violation of law, suffering from errors of grave misreading or non-reading of evidence. Such judgments should not lightly interfere and the heavy burden lies on the prosecution to rebut the presumption of innocence, which the accused has earned and attained on account of acquittal. In a number of dictums laid down by the Hon'ble Supreme Court of Pakistan, it has categorically been laid down that such judgment should not be interjected unless the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous.

20. In view of the above, we are satisfied with the appreciation of evidence evaluated by the learned IInd Addl. Sessions Judge, Karachi West, while passing the impugned judgment dated 09.12.2017, which is based on sound reasons having been assigned by the learned trial Court while recording the acquittal of

the accused, hence it does not call for any interference by this Court. Consequently, the instant appeal merits no consideration and is dismissed accordingly.

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