

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Acquittal Appeal No.313 of 2017

PRESENT:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Sahito

Appellant: Muhammad Nadeem S/o Muhammad Ashraf
Through Mr. Khalid Ahmed Khan, Advocate

Respondent No.1: The State
Through Mr. Abrar Ali Khichi, Addl. PG

Respondents No.2 to 4: (i) Muhammad Ali S/o Allah Waryo
(ii) Ahmed Ali S/o Allah Waryo
(iii) Majid @ Babo S/o Sikandar Khaskhali
Through Mr. Allah Warayo, Advocate

Date of hearing: 05.11.2020.

Date of Short order: 05.11.2020.

J U D G M E N T

AMJAD ALI SAHITO, J. Being aggrieved and dissatisfied with the judgment dated 23.06.2017 passed by the learned IInd Additional Sessions Judge, Malir, Karachi in Sessions Case No.609/2012 arising out of the FIR No.140/2012 registered under sections 302/34 PPC at PS Bin Qasim, Karachi; whereby Respondents No.2, 3 & 4 were acquitted from the charge.

2. The facts of the prosecution case as narrated in the statement of Muhammad Nadeem recorded under section 154 Cr.P.C. recorded on 10.07.2012 at 0010 hours are that about fifteen days back Muhammad Nadeem visited native village in Bahawal Nagar. On 08.07.2012 at night time his cousin Muhammad Rizwan informed him on telephone that his brother Muhammad Waseem expired due to bullet injury. On receipt of such information he came to Karachi and made inquiries from his relatives. It has further been alleged that they had an old enmity with Muhammad Ali Junejo, who many times extended threats to kill Muhammad Waseem. On 08.07.2012 his brother Muhammad Waseem, Police Constable having Belt Number 18060 after attending duty at security zone was returning home. When he

reached main gate marshaling yard Railway Colony at about 10.00 P.M. near market, accused Muhammad Ali, Ahmed Ali and their two unknown accomplices made straight firing from their weapons at Waseem, who sustained injuries. His cousins Muhammad Asif and Muhammad Rizwan shifted Waseem to hundred bed hospital where first aid was provided. Police officers of local police station also arrived there whom injured disclosed about the incident. During shifting to Jinnah Hospital the injured succumbed to injuries. The statement was incorporated in the book of FIR as FIR No.140/2012 of PS Bin Qasim.

3. After registration of the FIR and conducting usual investigation of the case, the I.O. submitted charge sheet against the accused in the Court of learned Judicial Magistrate-1, Malir wherein accused Muhammad Ali and Ahmed Ali were shown in custody. The R&Ps were sent up by the Judicial Magistrate to the Court of Hon'ble Sessions Judge, Malir. Police papers were supplied to the accused vide receipt at Ex. No.1 and thereafter the R&Ps were transferred to this Court for disposal according to law.

4. The formal charge was framed upon the accused Muhammad Ali and Ahmed Ali vide Ex. No.2 to which they pleaded not guilty vide Ex. No.2/A & 2/B respectively and claimed trial. On 04.05.2013 police arrested absconding accused Majid @ Babo and produced him before the Court of learned Judicial Magistrate on 05.05.2013 who remanded him to judicial custody and sent up the case papers for trial. Accordingly, amended charge was framed upon accused Muhammad Ali, Ahmed Ali and Majid @ Babo vide Ex. No.3, to which they pleaded not guilty vide Ex. No.3/A, 3/B and 3/C respectively and claimed trial.

5. In order to prove its case, the prosecution examined 11 witnesses. PW-1 Muhammad Nadeem (Complainant) was recorded vide Ex. No.4, who produced his statement recorded under section 154 Cr.P.C. FIR, mashirnama of arrest of accused Muhammad Ali & Ahmed Ali and mashirnama of inspection of place of incident at Ex. Nos.4/A, 4/B, 4/C & 4/D respectively. PW-2 Atif (mashir) was recorded vide Ex. No.5. He produced statement of deceased/dying

declaration at Ex. No.5/A. PW-3 Muhammad Rizwan (mashir) was examined vide Ex. No.6, who produced mashirnama of inspection of dead body and inquest report at Ex. Nos. 6/A & 7 respectively. PW-4 Muhammad Asif (mashir) was recorded vide Ex. No.8. PW-5 SIP Muhammad Baqar was recorded vide Ex. No.9, who produced daily diary entry at Ex. No.9/A. PW-6 Dr. Dileep Khatri (MLO) was recorded vide Ex. No.10, who produced medical certificate, letter of police, postmortem report and death certificate vide Ex. No.10/A, 10/B, 10/C & 10/D respectively. PW-7 Muhammad Kashif and PW-8 SIP Sharafat Ali were recorded vide Ex.11 & 12 respectively. SIP Sharafat produced receipt and daily diary vide Ex. No.12/A & 12/B correspondingly. ASIP Ismail Ahmed Malik (mashir) was examined vide Ex. No.13, who produced mashirnama of place of incident and recovery of crime weapon at Ex. No.13/A. PW-10 Inspector Ghulam Mujtaba was recorded vide Ex. No.14, who produced daily diary entry No.10 dated 09.07.2012 entry number 36 dated 11.07.2012, sketch of place of incident, daily diary entry No.46 dated 11.07.2012 and report of chemical examiner vide Ex. Nos.14/A, 14/B, 14/C, 14/D & 14/E respectively. PW-11 Inspector Rana Muhammad Munir (I.O. of the case) was recorded vide Ex. No.15, who produced daily diary entry No.15, 18, 20 & 34 dated 20.07.2012 and report of FSL at Ex. Nos.15/A, 15/B, 15/C, 15/D & 15/E respectively vide statement at Ex. No.16. Thereafter, learned ADPP for the State closed the side of prosecution.

6. Statements of accused Muhammad Ali, Ahmed Ali and Majid @ Babo under section 342 Cr.P.C. were recorded vide Ex. Nos. 17, 18 & 19 respectively, to which they denied the case of prosecution and stated that they have been falsely involved in this case; however, they neither examined themselves on oath under section 340(2) Cr.P.C. nor produced any evidence in defense.

7. Learned counsel for the appellant has mainly contended that the judgment passed by 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 respondents is not

supportable from the evidence on record; that the deceased had apprehensions of his murder in the hands of respondents; that the ocular evidence is supported by the medical evidence, but same was not considered by the learned trial Court, therefore, under these circumstances, respondents are liable to be dealt with in accordance with law. He lastly prayed for allowing the instant appeal.

8. Conversely, learned counsel for respondents as well as learned Addl. P.G. has supported the impugned judgment passed by the learned trial Court.

9. We have heard learned counsel for the parties and have gone through the evidence as well as impugned judgment with their able assistance. It is an admitted position that as per case of prosecution that incident was not witnessed by anyone, therefore, the ocular account of the incident is missing from the case of prosecution. The entire case against the accused Muhammad Ali thus hinges upon the dying declaration of the deceased and recovery of weapon on pointation of accused Muhammad Ali. According to the evidence, PWs Muhammad Asif, Rizwan and Atif, on acquiring knowledge of the incident reached at place of incident and took the deceased who was injured at that time and still alive, to the hospital. Till then despite being in senses the deceased has not made any declaration or statement regarding the persons who made firing on him. As per prosecution case, it is only on the arrival of Police, the deceased who was alive at that time removed oxygen mask and stated that accused Muhammad Ali fired at him and then fainted. It is matter of record that the Police has obtained LTI of deceased on the statement when he was unconscious. The stance taken by the prosecution is not believable in view of the fact that relater being unconscious was unable to inscribe signatures/thumb impression on the statement. The weird situation coupled with the fact that statement/dying declaration was recorded in absence of doctor, attendant or any other person in hospital, has diminished the relevance of dying declaration. Moreover, if the dying declaration was actually made by the deceased on the very night of incident

before the police then what was the reason for not incorporating the same as FIR during the next two days. Another factor which augments the doubt viz-a-viz recording of dying declaration is that the doctor under whose medical care the deceased was when alive, has not been examined by the prosecution to testify that the dying declaration was actually recorded by the Police and the deceased at that time was in conscious state of mind. Hence, in such peculiar circumstances no reliance could be placed on the dying declaration.

10. Further, the complainant is not an eyewitness of the incident but he was informed by one Muhammad Rizwan. Prosecution also examined Muhammad Rizwan. According to him, on 08.07.2012 he and his cousins Muhammad Asif and Muhammad Atif were present in the house at about 1015 PM when deceased Muhammad Waseem informed that he is injured and lying at gate of market. The injured was shifted to the hospital. PW-Muhammad Abid went to Steel Town Police Station and informed about the incident. Thereafter, some police officials came there and went to hospital. PW-Muhammad Rizwan was busy in purchasing medicines for the injured and later on he came to know that the injured gave statement before the police in presence of the witnesses. Whereas, PW Muhammad Asif deposed that we took the injured in a Shahzore and reached at 100 Bed Hospital on motorcycle. After went to police station and some police officials came there later on he came to know that the injured gave a statement before the police in his presence and in presence of co-mashirs. It is intercept that when the statement was recorded in presence of PWs how they can say that later on they came to know that the injured gave statement before the police. According to PWs., after giving statement, the injured became unconscious and thereafter they proceeded towards Jinnah Hospital. PW-Muhammad Rizwan in cross-examination admitted that "I do not remember the name of the duty doctor present at the time when we reached that hospital." It means that the doctor was present but she has not signed or counter signed the dying declaration to believe that it was recorded in senses. It is also an admitted position that present incident was un-witnessed

and the entire case is based upon the ocular evidence. A person can be convicted on ocular evidence which requires strong circumstantial evidence to connect the chain from the neck of the accused and its dead body of the deceased. In the present case, so many links are missing and in presence of weak type of evidence, no conviction can be made.

11. The criterion of interference in the judgment against acquittal is not the same as against the cases involving a conviction. The scope of interference in an 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.

12. We have also carefully perused the record of the case with the able assistance of learned counsel for the Appellant and have no hesitation to observe that impugned judgment is speaking one and elaborate which does not suffer from any illegality, gross irregularity, infirmity, hence, it does not require any interference by this Court. It is settled law that if a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. Reliance in this regard is placed on the cases of *TARIQ PERVEZ v. THE STATE* (1995 SCMR 1345), *MUHAMMAD SAEED v. THE STATE* (2008 P.Cr.L.J. 1752), *GHULAM MURTAZA v. THE STATE* (2010 P.Cr.L.J. 461), *MOHAMMAD MANSHA v. THE STATE* (2018 SCMR 772).

13. It is not out of context to make here necessary clarification that an appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from the appeal against the acquittal because the presumption of double innocence is attached in the later case. Order of acquittal can only be interfered with, if it is found on its face to be capricious, perverse, and arbitrary in nature or based on a misreading, non-appraisal of evidence or is artificial,

arbitrary and lead to a gross miscarriage of justice. Mere disregard of technicalities in a criminal trial without resulting injustice is not enough for interference in the judgment of acquittal gives rise to a strong presumption of innocence rather double presumption of innocence is attached to such an order. While examining the facts in the order/Judgment of acquittal, substantial weight should be given to the findings of the lower Courts, whereby accused were exonerated from the commission of crime as held by the Apex Court in the case of *MUHAMMAD IJAZ AHMAD v. FAHIM AFZAL* (1998 SCMR 1281) and *JEHANGIR v. AMINULLAH AND OTHERS* (2010 SCMR 491). It is also a settled principle of law as held in a plethora of case law that acquittal would be unquestionable when it could not be said that acquittal was either perverse or that acquittal judgment was improper or incorrect as it is settled that whenever there is doubt about guilt of accused, its benefit must go to him and Court would never come to the rescue of prosecution to fill-up the lacuna appearing in evidence of prosecution case as it would be against established principles of dispensation of criminal justice.

14. Suffice it to say that there is hardly any improbability or infirmity in the impugned judgment of acquittal recorded by the learned Appellate Court, which is based on sound and cogent reasons that do not warrant any interference by this Court. The appellant has miserably failed to establish extraordinary reasons and circumstances, whereby the acquittal judgment recorded by the trial Court may be interfered with by this court.

15. This is a Criminal Acquittal Appeal and we cannot lose sight of the doctrine of double innocence, which is attached to such proceedings. Consequently, the instant Criminal Acquittal Appeal is **dismissed**.

16. These are the reasons of our short order dated 05.11.2020.

JUDGE

JUDGE