JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Acquittal.Appeal.No.D- 123 of 1995
Cr.Acquittal.Appeal.No. 95 of 1996

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammad Karim Khan Aga.

Date of hearing: 24.05.2017.
Date of judgment: 24.05.2017.

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Ahmed, Mehboob, Nusrat Ali and Muhammad Younis were tried by learned Additional Sessions Judge, Shahdadpur in Sessions Case No.203 of 1998 for offence u/s 302, 307, 34 PPC Crime No.112 of 1988 registered at Police Station Shahdadpur. By judgment dated 31.07.1995, the respondents/accused named above were acquitted of the charge by extending them benefit of doubt. Hence, instant Criminal Acquittal Appeal is filed by the State.

2. Notices were issued to the respondents but despite issuance of notices, none appeared.

3. We have heard Syed Meeral Shah, Additional Prosecutor General Sindh and examined the entire evidence available on record.

4. Learned A.P.G. appearing on behalf of the State argued that the trial court has wrongly acquitted the respondents / accused on the basis

of minor contradictions and did not appreciate the evidence in accordance with the settled principles of law. Lastly it is contended that there was ample evidence on record to connect the accused with the commission of offence.

5. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 31.07.1995. The relevant portion whereof is reproduced hereunder:-

> ***"From the evidence of P.W. Ali Nawaz, Ghulam Mustafa and Sardar it is clear that they have materially contradicted each other on the point of meeting and reaching at the place of vardat which create high doubt and they are chance witnesses and P.Ws Ghulam Mustafa and Sardar Ahmed are closely related to deceased and resident of about 13/14 miles away from the place of vardat so their evidence cannot be believed in view of above authorities, therefore, I decide that the ocular testimony has not proved the offence committed by accused persons.***
> ***(iii) <u>MEDICAL EVIDENCE</u>.***
>
> ***The evidence on the point of injuries sustained by deceased Ghulam Mustafa is peculiar in this case. According to FIR, inquest report and testimony of eye-witnesses furnished at the trial, the deceased sustained injuries with fire arm at the hands of three accused namely Ahmed, Mehboob and Nusrat Ali alias Nasrullah and injuries with dagger caused by accused Younis. The medical officer had issued post mortem report and according to him the injury No.1 and 2 were caused by a fire arm and all the other injuries No.3 to 13 were caused by sharp cutting weapon. According to eye-witnesses all the 3 accused fired at the deceased with pistols which shows that there would have been 3 fire arm injuries on the person of deceased Ghulam Mustafa, but according to P.W Dr. Iqbal Hussain injury No.1 & 2 were caused by fire arm and all other injuries No.3 to 13 were caused with sharp cutting weapon which shows that ocular evidence does not tally with medical evidence and there is conflict in between ocular testimony and medical evidence. In cross-examination P.W. Dr. Iqbal Hussain has admitted that injury No.2 is exist wound of injury No.1 which is entry would and both these injuries are caused by same fire. The learned counsel for the complainant Mr. Vijey Kumar has relied upon an authority reported in***

1994 P.Cr.L.J 1730 (Lahore) in which it has been observed as under:-

> ***"Medical evidence, authenticity of---General tendency on the part of the Courts exists to consider medical evidence, especially about the location of the injuries noticed at the time of medical examination or autopsy, as a gospel truth, while with the passage of time and 0creeping in of many malpractices in the working of various departments, to which the Health Department is no exception, impression about the authenticity of medical evidence will have to be revised--."***

On the other hand the learned counsel for the accused has relied upon an authority reported in 1988 P.Cr.L.J 2062, which is on the point that the medical evidence found falsifying the prosecution version has not satisfactory credible to sustain the conviction.

From the evidence of P.W. Iqbal Hussain it is clear that there were only 2 fire arm injuries on the person of deceased which appears to have been caused by one and same fire which is falsifying the ocular testimony, therefore, the case of prosecution has become doubtful as there is conflict between medical evidence and ocular evidence.

(iv) <u>RECOVERIES</u>.

P.W. Altaf Hussain who is admittedly resident of Khanewal has been examikned as mashir of arrest of accused Ahmed and recovery of one country made pistol, 6 live cartridges, one empty cartridge and clothes from him and the accused was alleged to be arrested from Nago Shah graveyard and the recoveries were also made in presence of mashir Altaf Hussain and one Niaz Muhammad who is said to be resident of Lundo, but the provisions of section 103 Cr.P.C. has not been complied with by the investigating officer Fazul Rehman as according to provision of section 103 Cr.P.C. the persons of the locality are to be called and they can attest the recovery. It is also admitted by P.W Altaf Hussain that he is related to complainant and deceased and the complainant has provided this mashir to police therefore he is chance witness as well as interested person. Similarly, P.W Muhammad Shabir has been examined as mashir of the recovery of pistols, cartridges and clothes from accused Mehboob and Nasrullah. Admittedly this mashir Muhammad Shabir is resident of village Ali Sher, Taluka Tando Allahyar. He has also

admitted that he is brother of deceased Ghulam Mustafa therefore, he is also an interested person. Moreover the crime weapons and cartridges were not sent to the Ballistic Expert for report therefore recoveries from accused Ahmed, Mehboob and Nasrullah have not been proved through independent evidence. Moreover according to I.O Fazul Rehman, Muhammad Faiz was co-mashir of recoveries of accused Mehboob and Nusrat, while according to Muhammad Shabir, Hanif was co-mashir hence P.W Muhammad Shabir and I.O Fazul Rehman have contradicted each other on the point of co-mashir which also gives doubt about the recoveries. As already stated above that the crime weapons and cartridges allegedly recovered from the accused persons were not referred to the Ballistic expert for report, therefore, in absence of any report from expert these recoveries cannot be said a corroborative piece of evidence against the accused. It is an admitted fact that no recover is made from accused Muhammad Younis as he was challaned in his absentia and subsequently he surrendered himself before this court therefore there is no evidence of recovery of dagger from accused Younis.

In view of my above discussion I am of the opinion that the prosecution has not been able to prove the alleged recoveries of crime weapons from accused Ahmed, Mehboob and Nusrat alias Nasrullah.

(v) <u>Abscondence of accused Younis</u>.

Accused Muhammad Younis absconded away and subsequently he surrendered himself in this court but it has been held by our superior Courts that the abscondence is no corroborative piece of evidence except the offence is independently proved. As I have discussed above that the prosecution case has become doubtful therefore the abscondence of accused Younis is also not helpful to the prosecution.

(vi) <u>Judicial confession of accused Ahmed</u>.

There is also judicial confession of accused Ahmed, but according to P.W Muhammad Jial who had recorded the Judicial confession has admitted that no legal formalities as provided section 164(3) Cr.P.C. have been observed by him before recording the confession of accused. The accused has retracted the confession therefore in my opinion and in view of authority reported in P.L.J. 1989 Cr. C. Karachi 564(DB) the confession is not voluntary nor it has been recorded in accordance with law, therefore it cannot be used as piece of evidence against accused Ahmed.

In view of my above discussion, I am of the opinion that the prosecution case has become doubtful and I give benefit of doubt to accused

and acquit them U/S 265-H(1) Cr.P.C. Accused Ahmed, Mehboob, Nusrat alias Nasrullah are present on bail. Their bail bonds stand cancelled and sureties discharged. Accused Muhammad Younis is in custody, if he is not required in any other case he may be released forthwith."

6. We have perused the evidence with the assistance of Additional Prosecutor General. It transpired that the prosecution evidence was materially contradicted with each other on material particulars of the case and PWs were chance witnesses and closely related to the deceased. Moreover medical evidence was contradicted with the ocular evidence. Recovery of incriminating articles was not believed by trial Court. Confession of the accused was also not true and voluntarily. Trial court rightly disbelieved it. Scope of the acquittal is most narrow and limited because in an acquittal the presumption of innocence is significantly added to the cordinal rule of the criminal jurisprudence that an accused shall be presumed innocence until proved guilty. This court is very slow in interfering with such acquittal judgment. It is not shown that the judgment has been passed in cross violation with the law, suffered from errors of grave misreading and non-reading of the evidence.

7. It is settled law that 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 cordinal 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."

8. 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 sound reasons, which require no interference at all. As such, the appeal against acquittal is without merit and the same is dismissed.

JUDGE

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