JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Special.ATA.Acquittal.Appeal.No.D- 49 of 2004

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

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

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Muhammad Zahid, Umerdaraz and Usman were tried by the learned Judge Anti-Terrorism Court, Mirpurkhas in Special Case No.38 of 1999 for offence u/s 365-A, 34 PPC r/w Section 17(3) Offence against Property (Enforcement of Hudood) Ordinance, 1979. By judgment dated 22.02.2000, the respondents/accused were acquitted of the charge by extending them benefit of doubt. Hence the instant Criminal Acquittal Appeal is filed by the State.

2. Notices were issued to the respondents but despite issuance 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. argued that the trial court has acquitted the respondents / accused on the basis of minor contradictions and did not appreciate the evidence in accordance with the settled principles of law.

Learned A.P.G. further argued that there was ample evidence against respondents/accused to convict them with commission of offence.

5. We have perused the prosecution evidence and impugned judgment passed by the trial court dated 22.02.2000. The relevant portion whereof is reproduced hereunder:-

> ***"To further assertion truthness in the prosecution story it is worth noting that complainant in his evidence says that he was driving the motorcycle at speed of 70 miles/hours but not less than 30/40 miles/hour when other P.Ws says that the speed was low, at 30/40 or so.***
>
> ***The I.O SIP Muhammad Mushtaque in his cross-examination has stated that there were 01/02 shops at Lashkar Shah but were closed when ASI Taj Muhammad says that there were 20/25 shops and cabins at Lashkar Shah and other witnesses says that there were two shops and two houses and as against this the complainant says that there were 25 shops and 05/05 houses. This is also has created doubt in the prosecution story. This witnesshas contradicted him and stated that H/C Shabbir was the I/C and that ASI Mir Muhammad and ASI Ghulam Mustafa were not present at the P.S. but were with him.***
>
> ***This all shows that police had not left for the patrolling.***
>
> ***So far as recovery of the abductee, the Car and the pistols from the accused Umerdraz and Muhammad Zahid is concerned it may be pointed out that ASI Taj Muhammad in his evidence has stated that the Car (after recovery) was searched by P/C Soomar, when the I.O/S.H.O Muhammad Musthaq says that the Car was searched by him.***
>
> ***Although there are private masheers of recovery nbamely Jamshed and Sher Ali out of whom Jamshed has b een examined who had supported the masheers nama of recovery, but he is co-masheer and main masher Sher Ali has been given up. Learned D/C has pointed that Sher Ali has been given up, because in his 164 Cr.P.C statement he has stated that he had put his L.T.I on the masher nama at the P.S where the parcels were sealed by the S.H.O. This only statement of P.w Sher Ali which is very much available on the record as Ex.22/C has shattered the recovery apart from above piece of evidence of the ASI and the I.O. It is clear that to cover this defect the prosecution has given up P.W Sher Ali.***
>
> ***P.W Jamshed Ali in his cross-examination has stated that he had not seen any person putting signature on the pacels when as per note of the court in the evidence of Jamshed, signature of the S.H.O is seen on the parcels. This has also created doubt about the recovery.***
>
> ***S.H.O Dilbar Khan Mehar as per I.O/S.H.O Muhammad Mushtaque had recorded statements of***

P.Ws in 13-D.A.O cases, but he has not been examined by the prosecution. I, therefore, agree with the defence that case of the accused is prejudiced as right of cross-examination is not given to the accused so benefit of this is to go to the accused persons.

The important aspect of this case is that P.W Jamshed (Ex/16) in his cross-examination has stated that there are houses of Haries of Sohrab at some distance (from place of abduction) but none from these haries is either cited as witness by the prosecution nor is examined by the prosecution. It is correct that people avoid to give evidence in dacoity cases, but how a hari would avoid who sometimes are ready to give life for their landlords.

In this case 164 Cr.P.C statements are also recorded, but from the evidence of the recording Magistrate Mr. Ghulam Akber Leghari (Ex/22), it appears that he himself had not recoded the statements but only has put his signature thereon under which he even has not bothered to write dates of recording of the 164 Cr.P.C statements excepting statement of P.W Sher Ali so also P.W Sohrab. About 164 Cr.P.C statements, the complainant has stated in his evidence that the S.H.O had informed him on the day of incident that 164 Cr.P.C statements of the P.Ws would be recorded on 06.12.1999, when the S.H.O in his evidence has stated that he had informed about the same on 03.12.1999. This all shows that present case is arranged affair of the police who has registered false F.I.R. against accused Umerdraz and Zahid in view of defence plea, which the defence has not bound to prove unless the prosecution has proved his case beyond slightest reasonable doubt on this capital charge.

As per the prosecution since accused Umerdraz and Zahid were caught red handed so their identification parade is not necessary. However, identification parade of accused Usman was necessary as his only glimpses were seen by the abductee so also P.Ws Jamshed and complainant Akhtar, therefore, in absence of identification parade accused Usman cannot be implicated in this case, as there is no material available against him. The prosecution through ASI Taj Muhammad and S.H.O Muhammad Mushtaque has wanted to bring on record that he is implicated on the basis of extra judicial confession of co-accused Zahid and Aslam to be the third culprit of this case, but the defence has raised objection that this piece of evidence is inadmissible. The objection is to be decided at this stage. I am, therefore, in agreement with learned D/C that statement of co-accused since are not their confessional statement before the Magistrate, therefore, the same being before the police are inadmissible and are to be discarded. Mere involvement of accused Usman alleged by the prosecution in other many cases, even if they are be true then too they will not make him accused of this case and liable for present offence. The defence has not put question to the I.O that the weapons are not in working condition so mere objection about not sending the weapons to

the Ballistic Expert is of not avail. The recovery even otherwise is not proved.

It has been pointed by the defence that accused kept was without remand for 48 hours, this point is not disputed by the prosecution but the I.O has given explanation in his evidence that P.O of this Court was on leave and he had contacted the A.T.A Court Hyderabad on telephone through Mr. Shamim Reader of this Court, but ATA Court declined to grant remand on the ground that notification of leave of P.O of this Court is not received by them. He had also stated that he had gone to Judicial Magistrate Mirpurkhas, the Civil Judge and FCM, Mirpurkhas so also the Mukhtiarkar for the remand but remand was not granted. He has however, admitted in his cross-examination that he does not know that u/s 19(4) of Anti Terrorism Act he can obtain temporary remand from nearest Magistrate. I am of the opinion that there is no malafide on the part of the S.H.O to keep the accused without remand. But, provisions of law must be strictly followed in the future.

In view of all above, I am clear in my mind that the prosecution has miserably failed to prove all the above four points beyond slightest reasonable doubt, so also point of recovery of weapons beyond reasonable doubt and case law of the prosecution in view of all above will be of no help to the prosecution which will have to give way to case law relied upon by learned D/C subject to above discussion and with variations etc.

For the above reasons my findings on point No.1 is "NOT PROVED" and my findings on points No.02 & 3 so also No.04 is "IN NEGATIVE".

<u>POINT NO.05-1</u>

In view of my findings on points No.01to 04, all the three accused are acquitted.

The accused Umerdraz, Zahid & Usman are produced in custody, they are ordered to be released by the jail authorities forth with if not required in any other case.

Copy of this judgment be sent to all the D.Ms of Mirpurkhas Division to see that law about remand is strictly complied with without fail in future."

6. We have come to the conclusion that trial court has assigned sound reasons while acquitting the accused persons. Learned A.P.G. could not satisfy the court on the point that the trial court has committed any illegality while passing impugned judgment whereby trial court has acquitted the accused persons by extending them benefit of doubt. There are major contradictions in prosecution evidence which have created doubt in the case of prosecution. Moreover impugned judgment was neither perverse nor speculative. The trial court has assigned the

sound reasons in the judgment which need not be interfered by this Court.

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

JUDGE

Tufail