IN THE HIGH COURT OF SINDH, AT KARACHI

Cr. Acq. Appeal No. 451 of 2019

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Appellant	:	Ghulam Ali Magsi, through, Shabbir Ahmed Kumbho, Advocate
Respondent No. 3	:	Ahsan, through Abdul Hafeez Sandhu, Advocate
The State	:	Through Ali Haider Saleem, DPG
Date of Hearing	:	13.04.21, 20.04.21 and 27.04.21

JUDGMENT

YOUSUF ALI SAYEED, J. - The Appellant, who is the complainant of FIR No.2/2014 registered at PS Bannu, District Thatta (the "**FIR**") under Sections 302, 324, 506/2, 147, 148 and 149 of the Pakistan Penal Code, 1860 (the "**PPC**"), has preferred the captioned Appeal under Section 417 (2A) Cr. P.C., impugning the Judgment entered by the Additional Sessions Judge-I/Model Criminal Trial Court, Thatta on 06.07.2019 in the ensuing Sessions Case, bearing No. 47 of 2014, resulting in the acquittal of the Respondent Nos. 2 and 3, namely Aaroo, son of Umer Magsi, and Ahsan, son of Dittal Khan Magsi – the former passing away during pendency of this Appeal and the same abating as against him accordingly.

2. As to the substance of the FIR, succinctly stated, the Complainant alleged that on 25.01.2014, at 1245 hours, the Respondents, along with one Jumman son of Umer Magsi (since deceased), had perpetrated a murderous attack on the Complainant and his relatives at Mawali Mori Stop, situated in Deh Shah Pur, Taluka Mirpur Bathoro, District Thatta, with firearm injuries being caused by the Respondents to Mian Bux Magsi and Nawaz Ali (alias Babu Magsi), resulting in their demise, and with deceased Jumman also said to have fallen victim to the friendly fire of his co-assailants.

3. The Respondents were then apparently arrested on 02.02.2014 on the basis of so-called spy information received as to their whereabouts, and upon conclusion of the usual investigation the police submitted the challan, with the charge then being framed against all accused by the trial Court on 06.08.2015, to which they pleaded not guilty and claimed trial.

4. In an endeavor to prove its case, the prosecution examined several witnesses, including the Appellant (PW-1), whose deposition was initially recorded and marked as Ex.03, with the FIR being produced as Ex. 2/A, and who was subsequently re-examined as PW-6 in pursuance of an Order made on an Application under Section 540, Cr.P.C, with that deposition being marked as Ex. 8; Syed Taj Muhammad (PW-2), Muhammad Jumman Magsi (PW-3) and Ameer Bux Magsi (PW-5), all three of whom are said to have been eye witnesses to the occurrence and whose depositions were recorded and marked as Ex. 4, 5 and 6 respectively; Haji Sher Muhammad (PW-5), who was the Mashir of all the Memos, whose deposition was recorded and marked as Ex.07; Dr. Rafique Ahmed Soomro (PW-7), who was the Deputy Medical Superintendent RHC Darro who performed the post-mortems on the deceased persons, and whose deposition was recorded and marked as Ex.10 and who *inter alia* produced the police letter for the post mortem and the relevant reports; SHO Gul Muhammad Katiyar (PW-8), who was the Investigating Officer of the case and whose deposition was recorded and marked as Ex. 11; and Jan Muhammad Magsi (PW-9) the Tapedar of the beat, whose deposition was recorded and marked as Ex. 12.

5. After, the DDPP appearing on behalf of the State closed the side of the prosecution, the Statements of the accused under S.342 Cr. P.C were recorded at Exh.14 and Exh.15, wherein they denied the allegations and professed their innocence, taking the plea that they had been falsely implicated in the case. As per the Statement of Aaroo Magsi, deceased Juman, who was his brother, had been injured by the Complainant party by causing lathi blows in a Khadi Bello near a protective bund in the vicinity of their village in Taluka Mirpur Bathoro. He then brought his brother to Mawali Mori for treatment and they were at the clinic of one Munawar Guggo, who refused to treat him and asked them to report the matter at the police station, but as they came out from the clinic, the Complainant party attacked them with a kalashnikov and repeaters and when they ran to take shelter, his brother Juman received firearm injuries at their hands. The accused did not examine themselves on oath, nor led evidence in their defence.

6. A perusal of the impugned Judgment reveals that the trial Court was cognizant of the fact that the case was one involving the death of three persons, one of whom was Juman, the real brother of one of the Respondents, namely Aaroo, who according to the prosecution had died as a consequence of injuries caused to him due to the friendly fire of none other than Aaroo himself. In this backdrop, the trial Court considered itself to be handicapped by the fact that the proceedings emanating from FIR No.6 of 2014 registered in relation to the incident at Police Station Bannu and a private complaint filed by complainant of that FIR, namely Ghulam Mustafa, son of Muhammad Umer, the real brother of Aaroo and deceased Juman, culminated without cognizance and without any order for trial. Be that as it may, from a cumulative assessment of the evidence, the learned trial Court determined that the prosecution had failed to prove the guilt of the accused, hence duly extended them the benefit of doubt, resulting in their acquittal.

7. Certain points as came to the fore were considered by the trial Court to be of particular significance, being specifically identified as such in the impugned Judgment, as follows:-

(a) The alleged incident took place on 25.01.2014 at 1245 p.m. whereas the FIR was registered with a delay of over two days, on 27.01.2014 at 03:00 PM, albeit that the police arrived immediately after the incident, collected bloodstained earth and empties and removed one of the dead bodies to hospital, where various legal formalities were otherwise completed and where the Appellant was also present.

(b) The only explanation offered for the delay in registration of the FIR was that the complainant party was preoccupied in the burial of the deceased and it was also stated generally that the Appellant faced some security issues, but in view of the Appellant claiming to have been present at the scene of incident and at the hospital, the plea of preoccupation was not tenable and the other ground of insecurity was also not convincing, as there was nothing on record to show that such an issue had ever been raised. As such, the delay in registration of the FIR was considered by the trial Court to have been purposeful and with a view to report the incident in a manner suiting the complainant party, thus the element of exaggeration, malice and due deliberation could not be ruled out.

(c) At least three people other than the deceased, namely Singhar Magsi, Khamiso Magsi and Saleem Shah, were shown to have received injuries in the incident as per the deposition of the Appellant, but were neither cited as witnesses nor examined in terms of S. 161, Cr.P.C, and there was nothing on record to show that they were even taken to hospital or treated, with such omission on the part of the prosecution raising serious doubt as to the veracity of the incident, as reported, and the withholding of their evidence giving rise to a presumption in terms of Articles 129(g) of the Qanun-e-Shahadat Order, 1984 that, if they had been produced, their testimony would have been unfavourable to the prosecution.

(d) The Appellant had sought to overstate matters while deposing as to the issues said to have given rise to the incident, in as much as he narrated two events in a manner that wrongly depicted him as being personally and physically present at the occasion. For example, the Appellant deposed that deceased Juman complained to his brother, accused Aaroo, that boys from the complainant party fought with him, which, according to the prosecution, infuriated the accused, who then attacked the complainant party and caused death of Nawaz Ali alias Baboo and Mian Bux, with Juman also falling victim to the firing that ensued. However, the narrative begs the question that when Juman himself had died and Aaroo was an accused in the case, who then informed the Appellant about the complaint allegedly made by Juman to Aaroo? The Appellant failed to disclose the source of his knowledge of the supposed altercation when cross-examined in that regard.

(e) The Appellant deposed that five persons (1) Aaroo, (2) Jumman, (3) Ahsan, and two unknown persons arrived at the place of incident on two motorcycles and attacked the complainant party but both eyewitnesses, PW-2 Syed Taj Muhammad and PW-3 Jumman Magsi, deposed that only three persons (1) Aaroo, (2) Jumman and (3) Ahsan came to the spot on one motorcycle and perpetrated an attack.

(f) The Appellant deposed that accused Aaroo fired at him with his Kalashanikov, with the bullet missing him while passing through his clothes so as to leave a hole and burn the rear of his kamiz, then went on to hit Jumman, but the kamiz was not handed over to the police, which made the version doubtful. Furthermore, it was strange that the Appellant remained safe while his close relatives received serious injuries in front of him, and he did not try to save them and also did not record his statement or even become a Mashir as to the recovery of empties and bloodstained earth when the police arrived at the spot.

(g) When only the accused were shown to have been armed as per the prosecution evidence, with the complainant party being depicted as hapless victims, it beggared belief that the accused would have fled the scene while leaving Jumman behind in an injured condition.

(h) The Kalashnikov shown to have been recovered at the indication of accused Aaroo was not functional, therefore no test was performed and there was no report to demonstrate that the empties found at the place of incident were in fact fired from that weapon.

(i) Deceased Jumman, who died at the scene of the incident, was said to have been armed with a lathi (stick) and to have struck a blow to the Appellant, but the lathi was not recovered from the place of incident, which also creates serious doubt as to the prosecution case.

8. When called upon to demonstrate the misreading or non-reading of evidence or other infirmity afflicting the impugned Judgment, learned counsel for the Appellant was found wanting and could not point out any such error or omission or otherwise controvert the observations of the trial Court, but merely fell back on the plea that the accused Respondents had not denied their presence and that of the complainant party during the incident, hence the question of their presence and presence of PWs was not disputed, which served to support the case of the prosecution. The learned DPG sought somewhat lackadaisically to support the Appellant, but could not advance any cogent argument to address the lacunas in the prosecution's case.

9. Conversely, learned counsel for the accused Respondents supported the impugned Judgment and, while professing their innocence, submitted that the case of the prosecution was marred by gaps and inconsistencies, as noted by the trial Court, as such the prosecution had failed to satisfactorily discharge the burden of proof.

10. Indeed, it is well settled principle of law that an appeal against acquittal is distinct from an appeal against conviction, as the presumption of double innocence is attracted in the former case and an acquittal can only be interfered with when it is found to be capricious, arbitrary and perverse.

11. We are fortified in this regard by the judgment of the Honourable Supreme Court in the case reported as the State v. Abdul Khaliq PLD 2011 Supreme Court 554, where after examining a host of case law on the subject, it was held as follows:-

> "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 reappraisal 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."

12. In the matter at hand the learned trial Court has advanced valid and cogent reasons while acquitting the Respondents, foremost amongst which to our minds is the omission of the three persons said to have been injured as a consequence of the attack allegedly perpetrated by the Respondents. Astonishingly, those persons were not cited as witnesses albeit that they ought by any reckoning to have been produced as the star witnesses if one were to accept the version of events projected by the prosecution. Ergo, as rightly observed by the trial Court, that lacuna cannot be overlooked and does indeed attract the presumption envisaged in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984. If any authority is required in that regard, one need look no further than the judgments of learned Division Benches of this Court and of the Lahore High Court in the cases reported as the State/Anti-Narcotics Force through Deputy Director v. Muhammad Siddiq 2010 YLR 2617 and The State v. Naziran Bibi 2016 YLR 1362 respectively. In view of the foregoing, no interference is warranted and the Appeal being devoid of merit, stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: