IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi

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Criminal Acquittal Appeal No.D-236 of 2020

Zafar Iqbal son of Abdul Rasheed. … Appellant

Versus

Mst. Aaisha & 2 others. … Respondents

Mr. Amir Nawaz, Advocate for the Appellant.
Mr. Ali Haider Saleem, Additional Prosecutor General.

Date of hearing 12.01.2023

Date of detailed reasons **23.01.2023**

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JUDGMENT

Shamsuddin Abbasi, J:- Zafar Iqbal son of Abdul Rasheed, appellant (complainant), has challenged the validity of the judgment dated 18.02.2020, penned down by the Additional Sessions Judge-I (Model Criminal Trial Court), Karachi (South), in Sessions Case No.346 of 2016, arising out of FIR No.06 of 2016 registered at Police Station Defence, for offences punishable under Sections 302, 109 and 34, PPC, through which Respondents 1 and 2 (Mst. Aaisha and Muhammad Aamir) were acquitted of the charge under Section 265-H(1), Cr.P.C. extending them the benefit of doubt.

2. FIR in this case has been lodged on 05.01.2016 at 6:00 pm whereas the incident is shown to have taken place on 02.01.2016 at 10:30 am. Complainant Dr. Zafar Iqbal son of Abdul Rasheed has stated that on the fateful day he was present in his house. It was about 10:45 pm he received a phone call from his brother Ghulam Mustafa informing that their brother Muhammad Irfan has sustained bullet injury and brought at Jinnah Hospital. He immediately rushed to Jinnah Hospital and saw dead body of Muhammad Irfan lying in mortuary. His nephew Muhammad Usman was also present at hospital, who informed him (complainant) that Oman Mehmood, neighbor of his step mother Mst. Aaisha, with his companions has committed murder of

his father at corner of a vacant plot, situated opposite of their workshop at Plot No.24/C, 4th Sunset Lane, Phase-II (Extension), DHA, Karachi. The complainant also came to know that his "Bhabhi" Mst. Aaisha wanted to marry with one Muhammad Yousuf son of Saeedullah Khan, therefore, Oman Mehmood with the help of his companions has committed murder of his brother Muhammad Irfan by firing at the instigation of Mst. Aaisha with support of Yousuf. The complainant then went to P.S. Defence and lodged FIR on behalf of the State.

3. The duty officer ASI Tajuddin of P.S. Defence registered a case vide FIR No.06 of 2016 for offence punishable under Sections 302, 109 and 34, PPC and handed over the same to SIO for investigation purposes.

4. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under the above referred Sections, whereby Respondents No.1 and 2 and co-accused Muhammad Yousuf were was sent up to face the trial. During trial accused Muhammad Yousuf was acquitted of the charge in terms of compromise under Section 345(6), Cr.P.C.

5. A charge in respect of offence punishable under Sections 302, 109 and 34, PPC was framed, to which respondents pleaded not guilty and opted to be tried.

6. At trial, the prosecution has examined as many as fourteen (14) witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

7. Complainant Zafar Iqbal appeared as witness No.1 Ex.5, Muhammad Usman (eye-witness) as witness No.2 Ex.6, SIP Muhammad Nawaz as witness No.3 Ex.7, Khursheed Gul as witness No.4 Ex.9, PC Muhammad Kamran as witness No.5 Ex.10, PC Muhammad Fayyaz as witness No.6 Ex.12, ASIP Qadir Bux as witness No.7 Ex.14, Altaf Hussain (Surveyor) as witness No.8 Ex.15, Dr. Ejaz Ahmed as witness No.9 Ex.21, Inspector Muhammad Yousuf as witness No.10 Ex.23, Mst. Aasia as witness No.11 Ex.24, Muhammad Zahid as witness No.12 Ex.25, Aneesur Rehman (Judicial Magistrate) as witness No.13 Ex.27 and SIP Rao Akhtar

Ali (investigating officer) as witness No.14 (Ex.28). All of them were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.30.

8. Respondents 1 and 2 were examined under Section 342, Cr.P.C. at Ex.31 and Ex.32, wherein they have denied the allegations imputed upon them by the prosecution, professed innocence and stated their false implication in this case. They opted not to make a statement on Oath under Section 340(2), Cr.P.C. Mst. Aaisha, however, examined Hassan Zahoor in her defence at Ex.35.

9. Upon completion of the trial, the learned trial Court acquitted Respondents 1 and 2 as detailed in para-1 (supra), which necessitated the filing of instant acquittal appeal.

10. It is contended on behalf of the appellant (complainant) that there was sufficient convincing ocular, medical and circumstantial evidence without any animosity adduced by the prosecution against the respondents which had not been considered by the learned trial Court while acquitting them with the charge of murder. The complainant and witnesses while appearing before the learned trial Court remained consistent on each and every material point. They were subjected to lengthy cross-examination but nothing adverse to the prosecution story was extracted from their mouth. The role of the respondents is borne out from the call detail record as well as recovery of crime weapon, matched with the empty secured from the place of incident. The learned trial Court did not appreciate the evidence in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in acquitting the respondents. The learned counsel while summing up his submissions has emphasized that the impugned judgment is the result of misreading and non-reading of evidence and without application of a judicial mind, hence the same is bad in law and facts and the order of acquittal, based on such findings, is not sustainable in law and liable to be set-aside and the respondents deserve to be convicted and prayed accordingly.

11. The learned Additional Prosecutor General has supported the submissions raised by the learned counsel for appellant (complainant) and submitted that it is a case of capital punishment and the witnesses in their respective statements have supported the case of the prosecution and involved the respondents (accused) with the commission of offence, therefore, they are liable to be convicted in accordance with law.

12. Heard and record perused minutely.

13. Incident alleged to have taken place on 02.01.2016 at 10:30 pm whereas the FIR has been lodged on 05.01.2016 at 6:00 pm i.e. after about three days of occurrence. It is noteworthy that on receipt of information, the complainant immediately rushed to Jinnah Hospital where his nephew Muhammad Usman was already present, who disclosed the whole incident to him (complainant). The record also reflects that police arrived at hospital on the same day and after obtaining permission from MLO completed legal proceedings under Section 174, Cr.P.C. and despite their availability, neither complainant nor Muhammad Usman, come forward to record a statement under Section 154, Cr.P.C. The question arises why the complainant party kept mum and did not report the matter to police till 05.01.2016, without furnishing any plausible explanation, which give rise to a presumption that FIR has been lodged after due deliberations and consultations. The Hon'ble apex Court, in absence of any plausible explanation, has always considered the delay in lodgment of FIR to be fatal and castes a suspicion on the prosecution story, extending the benefit of doubt to the accused. It is a well-settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Reliance in this behalf may be made to the case of *Zeeshan @ Shani v The State* {2012 SCMR 428}.

14. The entire case of the prosecution rests on the testimony of sole eye-witness Muhammad Usman (PW.2), who is son of deceased and nephew of complainant, hence he seems to be related and interested witness. There is no denial of the fact that incident is shown to have taken

place in a commercial area where availability of private persons cannot be ruled out of consideration, but no independent person has been associated in this case. The investigating officer SIP Rao Akhtar Ali in his cross-examination has admitted that no person of the locality has been joined as witness of the incident or site inspection. The entire record is silent as to any effort was made to persuade any person from the locality or for that matter the public was asked to act as witness. This position itself is sufficient to discard the evidence of the related and interested witness because his evidence is of second degree and unsafe to rely upon without having independent corroboration. More so it is an undisputed fact that the statement under Section 161, Cr.P.C. of said witness was recorded on 05.01.2016 after three days of the incident. No plausible explanation and valid reason has been furnished to that extent. The delay of even one or two days without explanation in recording the statements of witnesses has been held fatal for the prosecution and not worthy of reliance by the august Supreme Court of Pakistan in the case of *Muhammad Asif v. The State* reported as 2017 SCMR 486 as under:-

> *"There is a long line of authorities/ precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witness would be fatal and testimony of such witnesses cannot be safely relied upon."*

15. A close scrutiny of the evidence of (Zafar Iqbal) complainant and Muhammad Usman (eye-witness) reveals that they have contradicted each other on crucial points. According to complainant when he reached at hospital, Muhammad Usman disclosed that while he was standing near the stairs, Oman Mehmood alongwith his companions came at the scene and the person having thin body, accompanied by Oman Mehmood, fired at his father whom he can identify by face. On the other hand, Muhammad Usman while appearing before the learned trial Court has deposed that out of two boys one fired at his father whom he can identify by name and the other one by face, meaning thereby that Oman Mehmood fired at Zafar Iqbal and committed his murder. The complainant in his FIR as well as in his deposition has stated that Muhammad Usman disclosed that Oman Mehmood alongwith his companions committed murder of deceased. He has not disclosed how many persons were with Oman Mehmood. On the other

hand, Muhammad Usman while appearing before the learned trial Court has deposed that there were only two boys, out of them one fired at his father, whom he can identify by name. It is, thus, apparent that no role of firing is attributed to Muhammad Aamir and his presence at the scene of offence is doubtful.

16. As far as establishing the identity of Muhammad Aamir (appellant) is concerned, suffice to observe that he was unknown to the complainant party and the FIR was lodged against unknown persons and one nominated accused namely, Oman Mehmood. Muhammad Aamir is shown to be arrested on 11.01.2016 and produced before the learned Magistrate for conducting his identification parade on 14.01.2016 after three days of his arrest and twelve days of the incident. The general principle regarding conducting identification parade has been laid down in the case of *Mian Sohail Ahmed v The State* (2019 SCMR 956), wherein the Hon'ble Apex Court has emphasized that care and caution must be taken by the Courts in ensuring that an unknown accused is correctly identified. For an identification parade to be properly held, it is essential that it must be conducted soon after the arrest of accused and that accused is not shown to the witnesses before the identification parade. The incident alleged to have taken place at an open place and if it is believed that PW.2 Muhammad Usman would have seen the accused properly he would have been able to describe the Hulya of the assailants in his Section 161, Cr.P.C. statement, but he failed to do so. He, however, admitted in his cross-examination that he was at a distance of 14 paces away from the place of incident where street lights were on and he had seen the accused firing at his father with pistol, but did not ascribe any role to the appellant. The purpose of identification test is not simply to adjudge the memory of a witness but is aimed at aiding the courts in administering the justice. The concept of punishment is directly linked with the role of a perpetrator in the commission of crime. Needless to mention the quantum of punishment is always dependent upon the act performed by an accused in the crime. In this backdrop, the simple identification of an accused has no legal significance and instead an accused is to be identified in reference to the role played by him towards the commission of offence. The Hon'ble Supreme Court has consistently held that an identification test, without attribution of role to an

accused is of no evidentiary value. Reference may well be made to the case *Mehmood Ahmed and 3 others v. The State* (1995 SCMR 127), wherein it has been observed as under:-

> *"It is quite clear from the entire evidence relating to identification parade that the accused named were not identified by their role in the crime. They were merely picked up and the role attributed to them was not stated by the witness. In such circumstances the settled law is that identification could not be relied upon and was of no evidentiary value".*

Likewise in the case of *Muhammad Fayyaz v. The State* (2012 SCMR 522), the Hon'ble Supreme Court of Pakistan rendered the identification test of no legal significance, in which the accused was not identified in reference to the role played by him in the commission of crime. The observation of the apex Court is as under:--

> *"After his arrest the appellant was put to a test identification parade and although he had been correctly picked up by the eye-witnesses yet indisputably such identification had been made without any reference to the role allegedly played by the appellant during the incident in issue. The law is by now settled that evidentiary value of such an identification in a test identification is next to nothing".*

We are, thus, of the view that identification parade was not conducted in the light of guidelines laid down in the case of *Kanwar Anwaar Ali* (PLD 2019 SC 488), hence is not helpful to the prosecution to maintain conviction of Muhammad Aamir.

17. As to the positive report issued by the office of Forensic Division about the crime empty secured from the place of occurrence and the crime weapon allegedly recovered from the possession of Muhammad Aamir is concerned, suffice to observe that he is shown to be arrested on 11.01.2016 alongwith 09 mm pistol i.e. after nine days of the incident. It is also noteworthy that the weapon allegedly recovered from the possession of Muhammad Aamir has been sent to the office of Forensic Division for its matching with the crime empty allegedly secured from the place of occurrence on 12.01.2016 i.e. after one day of its recovery. Neither the name of police official, who

had taken the case property to the office of Forensic Division, has been mentioned nor examined by the prosecution at trial in order to prove safe transit of the case property to the expert. In view of this background of the matter, two interpretations are possible, one that the alleged empties and pistol have not been tampered and the other that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive FSL report qua the crime empty and weapon being delayed without furnishing any plausible explanation, would not advance the prosecution case. The prosecution has also failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence and the alleged recovery of crime weapon, on the face of it, seems to be doubtful. Reliance may well be made to the case of *Ikramullah & others v The State* (2015 SCMR 1002).

18. The prosecution has based its case against Muhammad Aamir on the confession allegedly made by him before police, but he has not confessed his guilt before the competent Court of law, therefore, the alleged admissions before police have no evidentiary value in view of Article 38 of the Qanun-e-Shahadat Order, 1984. A confession before police is inadmissible in evidence. Such conditional admissibility of a confession before police is contingent upon availability of some other evidence connecting the accused with the offence charged with, but in the present case, as discussed herein above, all the other pieces of evidence relied upon by the prosecution against him have utterly failed to connect him with the alleged offence. In this view of the matter the case in hand is not a fit case wherein the Court could even consider the confession before police attributed to the accused.

19. Reverting to the case of Mst. Aaisha (appellant), the prosecution has produced Call Data Record (CDR), but failed to produce any witness from the cellular company in whose presence such record was seized. Even otherwise the record is not on the letter head of cellular company nor signed by any authority. CDR is a data, which includes information like, how many calls a person has made, to which number, time and duration of calls and from which tower the person received network while

making the particular call. It is secondary evidence which can be taken into consideration provided the same is accurate and exclusion of any possibility of tampering or manipulation. We have perused the record and found nothing on record to show that the SIM relied by the prosecution was registered in the name of the accused. The CDR data is not even attested, endorsed, stamped and signed by the responsible official of the concerned Cellular Company nor the official, who had prepared/taken out the same from the Computer, has been associated or produced before the Court to testify that it was issued by him. There is no explanation as to how the investigating officer obtained the CDR data from the concerned Cellular Company. In view of this background of the matter, such type of secondary evidence cannot be relied upon.

20. We are convinced that the learned trial Court has appreciated the evidence and scrutinized the material available on record in complete adherence to the principles settled by the Hon'ble apex Courts in various pronouncements and has reached a just conclusion while acquitting the appellants from the charge extending them the benefit of doubt. It is settled principle of law that extraordinary remedy of an appeal against an acquittal is quite different from an appeal preferred against the findings of conviction and sentence. Obviously, the appellate jurisdiction under Section 417, Cr.P.C. can be exercised by this Court if gross injustice has been done in the administration of criminal justice more particularly when findings given by trial Court are perverse, illegal and based on misreading of evidence, leading to miscarriage of justice or where reasons advanced by trial Court are wholly artificial. Scope of appeal against acquittal of accused is considerably limited, because presumption of double innocence of the accused is attached to the order of acquittal more particularly when the accused is acquitted from a case after a protracted trial. This is in line with the dictum law laid down by the Apex Court in the case of *Iftikhar Hussain and others v. The State* reported as 2004 SCMR 1185, wherein it has been held as under:-

> *"It is well-settled law of criminal administration of justice that when an accused is acquitted of the charge, he enjoys double presumption of innocence in his favour and Courts seized with acquittal appeal under section 417, Cr.P.C. are obliged to be*

> *very careful in dislodging such presumption. Undoubtedly, two views are always possible while appreciating the evidence available on record, therefore, for such reason and in order to avoid the multiplicity of litigation, it is always insisted that the Court should follow the recognized principles for interference in the acquittal judgment as held in the case of Ghulam Sikandar and another v. Mumraiz Khan and others (PLD 1985 SC 11) that the appellate Court seized with the acquittal appeal under section 417, Cr.P.C. is competent to interfere in the order challenged before it provided it has been established that the trial Court has disregarded the material evidence or misread such evidence or received such evidence illegally."*

In another case of *Haji Amanullah v. Munir Ahmad and others* reported as

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2010 SCMR 222, the Hon'ble Supreme Court of Pakistan has been pleased to observe as under:-

> *"It is well-settled by now that in an appeal, the Court would not interfere with acquittal merely because reappraisal of the evidence, it comes to the conclusion different from that of the Court acquitting the accused provided both conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."*

21. For what has been discussed above, we are of the considered view that the learned counsel for the appellant/complainant has failed to point out any illegality or material irregularity committed by the learned trial Court while acquitting the respondents from the charge through impugned judgment dated 18.02.2020, which is well-reasoned, cogent, confidence inspiring and based on fair evaluation of evidence available on record. Acquittal judgment is neither artificial nor ridiculous.

22. By means of our short order dated 12.01.2023 we had dismissed this Criminal Acquittal Appeal and these are the reasons thereof.

JUDGE

JUDGE

NAK/PA