

**IN THE HIGH COURT OF SINDH CIRCUIT COURT,
HYDERABAD**

Criminal Acquittal Appeal No.D-07 of 2023

Present:

**Mr. Justice Shamsuddin Abbasi
Mr. Justice Amjad Ali Sahito**

Appellant : The State
Through Mr. Shawak Rathore,
Deputy Prosecutor General, Sindh.

Respondents : NEMO.

Date of hearing : 16.01.2024

Date of decision : __.__.2024

J U D G M E N T

AMJAD ALI SAHITO, J; Being aggrieved and dissatisfied with the judgment dated 24.09.2022 passed by learned Model Criminal Trial Court-II / Additional Sessions Judge-IV, Hyderabad in Sessions Case No.02 of 2016 under FIR No.133 of 2015 U/s 302, 34 P.P.C at PS B-Section Latifabad, whereby all four Respondents/accused were acquitted under Section 265-H(i) Cr.P.C.

2. The relevant facts of the case are that complainant Muhammad Ahsan and his brother Irfan deals in business of construction and real estate. It was 21st August 2015, when complainant's brother Rizwan along-with his family members visited him and they were busy in chit-chatting, at about 0220 hours, Rizwan received call of Irfan on his cell phone who had informed him that quarrel has taken place with co-accused Rasheed in morning so he is being followed while going to home and there is apprehension that he would be caused harm, hence Rizwan should come to his house. The complainant and Rizwan arrived at Irfan's residence at 02:55 hours and proceeded to the vicinity of Areesha Arcade, where they found Irfan's vehicle parked, meanwhile co-accused Rasheed and two unknown persons in Santro Car while accused Kamran along-with one

unknown person boarded on motorcycle available stopped complainant party under the fear of causing bullet shots if reach near and within their sight, Rasheed and Kamran got alighted Irfan and his servant Aijaz Muhammad caused them direct fire shots on the flat dispute then Rasheed and two unknown escaped towards Siddique Plaza while Kamran along-with unknown accused escaped towards Al-Mustafa town. After their departure, complainant went over Irfan and found him and Aijaz were bleeding after having sustained wounds of bullet shots on head and other parts they were shifted to Hospital but succumbed to their injuries. Hence, the instant FIR was lodged.

3. After completion of a usual investigation and proceedings under sections 87 & 88 Cr.P.C, a formal charge under Sections 302, 34 P.P.C was framed against respondents / accused vide Exh.6, to which all of them pleaded not guilty and claimed to be tried as per their pleas as Exh.6/A, 6/D respectively.

4. In order to prove its case, the prosecution examined PW-01 Complainant/Muhammad Ahsan as Exh.7; PW-02 eyewitness / mashir Muhammad Rizwan; PW-3 Muhammad Irfan mashir of recovery of pistol; PW-4 Sr. MLO Dr. Baldev as well as PW-5 being well conversant of deceased Dr. Imtiaz Ahmed Siddiqui; PW-6 retired ASI Ghulam Hussain; PW-7 retired SIP Arif Mughal and PW-8 I.O SIP Nek Muhammad Khoso who produced various documents in evidence whereafter prosecution's side was closed vide Exh.17.

5. The statement of the Respondents/accused under Section 342 Cr.P.C, were recorded at Exh.18 to 21 respectively in which they denied the allegation leveled against them. However, they did not examine themselves on oath under Section 340(2) Cr.P.C. nor produce any witness in their defence.

6. The learned trial Court on evaluation of the evidence and after hearing the parties, acquitted the Respondents/accused vide judgment dated 24.09.2022, which the State through Prosecutor/appellant impugned before this Court by preferring instant Criminal Acquittal Appeal.

7. Learned Deputy Prosecutor General/appellant has mainly contended that the impugned 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 evidence produced by the prosecution was not considered by the learned trial Court, therefore, under these circumstances, the respondents are liable to be dealt with in accordance with the law. He lastly prayed for allowing the instant acquittal appeal.

8. We have heard the learned Deputy Prosecutor General, Sindh and have gone through the evidence, material as well as impugned judgment with his able assistance. 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).

9. In the instant matter, while acquitting the respondents the learned trial Court has given cogent reasons in Paragraphs 14 to 17 which are reproduced as under:-

“14. It is necessary to record here the material contradictions as FIR shows that accused Rasheed and Kamran threatened complainant/PW then got both the deceased down from the Car and killed by opening straight firing, meaning thereby no specific role is ascribed to unknown culprits, but complainant in his 164 Cr.PC statement recorded after about 50 days of the incident, stated that as soon as deceased alighted from the car, accused Rasheed and Kamran Majeed made straight fires upon them (though in his 164 Cr.PC statement, he disclosed the names of unknown persons without disclosing the source but again did not assign any role to unknown culprits) whereas in his evidence recorded before this Court, he deposed that both the deceased were already present in Car parking when PWs arrived at the spot, Kamran and Rasheed

threatened them and all the armed accused went to parking area and issued fire upon deceased' which shows that he belied his own version of FIR as stated by him. PW-2 Muhammad Rizwan being one of the eyewitness of alleged incident deposed contradictory to that of evidence of complainant by deposing that he witnessed all the incident and scene and according to him as soon as they reached at the spot accused Rasheed raised commotion directing other not to spare them alive then all five together went to parking. First deceased Aijaz tried to refrain the accused but during talks all the accused opened fires upon his head and other part of body and then they issued fires upon his brother deceased Irfan, who was sitting inside the Car. In his cross examination, he belied his own version stating that at the time of incident, on threats of accused, they kept their faces towards bungalow and turned faces on the cries of his brother and his version is in conflict with medical evidence in respect of injuries sustained by deceased Aijaz. The said PW is also mashir in memos of place of incident, clothes of deceased persons, inspection of dead bodies and inspection of place of incident but he made all the above proceedings highly doubtful categorically stating in his cross examination that he did not remember which memo produced by him was prepared at Hospital and which at Police Station and police obtained his signatures at Hospital on less papers and at Police Station on more papers and he is unaware about the contents of memos produced by him as he signed the same at the directions of complainant without reading the same. Complainant deposed that after five minutes of occurrence, he reported the incident to police through mobile phone and this aspect was further supported by I.O./SHO Nek Muhammad Khoso, who also produced relevant entry No.33 in this respect, which reflects that complainant informed the SHO through mobile phone about the incident at 0415 hours i.e. after about one hour and 20 minutes of the incident and at that time dead body were being shifted to Hospital. As per prosecution story, after informing the police about the incident at 0415 hours, first both the dead bodies were brought at Bhitai Hospital and then dead body of Irfan was brought at Civil Hospital Hyderabad. On the contrary postmortem reports available on record show that dead body of Irfan was brought at Civil Hospital by ASI Ghulam Hussain at 0345 hours, while dead body of other deceased Aijaz Muhammad was brought at Bhitai Hospital by ASI Ghulam Muhammad and received by MLO at 0430 hours, which creates doubt regarding time of alleged incident. Complainant though in the FIR stated that they brought both dead bodies of both the deceased at Hospital but in his evidence before the Court, he contradicted his own version stating that he and PW had shifted the dead body of his brother to Civil

Hospital and some locality people shifted dead body of Aijaz Ahmed to Bhitai Hospital. He further deposed in his cross that after arrival at Civil Hospital, he remained there upto 0800 hours and on the contrary, he has been shown as one of the identifier of dead body of deceased Aijaz Muhammad at Bhitai Hospital. As per complainant incident took place at the end of parking, whereas PW Muhammad Rizwan deposed in cross that "it is incorrect to suggest that incident took place at the end of the length of parking of Areesha Plaza". Voluntarily says; incident took place adjacent to main gate of parking, whereas PW-8 I.O SIP Nek Muhammad Khoso deposed that the car of deceased was parked at the mid of parking. Per prosecution story and also deposed by I.O, the place of incident was visited on pointation of complainant and empties were recovered on same date at 0830 hours about 12 hours prior to registration of FIR but this piece of evidence was not supported by complainant and PW/mashir as none of them has deposed a single word regarding the recovery of empties from the spot. They even did not support the version of prosecution regarding inspection of spot and preparation of such memo by I.O. Complainant has denied the suggestion of inspection of place of incident before registration of FIR, who categorically deposed that memo was not prepared in his presence, while according to mashir signature on such memo was obtained at Hospital. It is deposed by complainant that accused persons on the point of weapons stopped them about 30 feet away from the main gate of Areesha Heights but eyewitness introduced new version by deposing that accused persons threatened them by showing weapon to remain there by keeping their face towards bungalow and they also issued fire in the air and then they turned their faces towards bungalow. It is deposed by complainant that the distance between his house and place of incident would be about 03 kilometers, which could be covered within 15/20 minutes but these aspects were contradicted by PW Muhammad Rizwan, who deposed that the distance between the house of complainant and place of incident would be about 1.5 kilometers and they consumed 7/8 minutes in reaching at the spot. Complainant admitted that Chowkidar remains available at the main gate of Areesha Heights and on this assertion, eyewitness deposed that Chowkidar remains available at Areesha Plaza till 0000 hours but on the day of incident, he went away after 0000 hours, whereas I.O deposed strangely that at the time of incident, no private Chowkidaar was deputed at the entrance of Areesha Arcade. Eyewitness Muhammad Rizwan deposed that incident took place adjacent to main gate of parking and accused stopped Santro Car about 100 feet away from main gate and stopped motorcycle in front of main gate of Areesha Plaza, whereas complainant deposed that

accused persons stopped their vehicle outside parking of Areesha Heights and entered in the said parking by foot. It is admitted by complainant that at the entrance of parking of Areesha Heights, main gate is installed and he did not notice that who opened the gate of parking at the time of entrance of his brother but on these points, eyewitness deposed that incident took place adjacent to main gate of parking, yet necessary to record the contradictory version of I.O, who deposed that at the time of incident, no main gate was installed at the entrance of parking of Areesha Arcade.

15. *So far statements U/S. 164 & 161 Cr.PC of complainant and eyewitness Muhammad Rizwan are concerned, the same have no evidentiary value as the alleged incident took place on 22.08.2015, whereas said statements were recorded on 13.10.2015 with delay of about one month and 20 days while statement of PW Rizwan U/S. 161 Cr.PC was recorded on 05.10.2015 with delay of about 44 days and in this regard, complainant and eyewitness strangely admitted that their statements U/S. 164 Cr.PC were recorded after delay of about 50 or 45/60 days of the incident. Reliance can be placed on a case law reported as 2014 P.Cr L J 1480 Federation Shariat Court wherein it has been laid down that;-*

Effect---in the present case, occurrence took place on 30th August, 2001, whereas the statement of witness under S. 161, Cr.P.C. was recorded on 7th September, 2001 and under S. 164, Cr.P.C. on the 8th September, 2001---No explanation had been offered to justify the delay in recording his statement---delayed recording of statements made the case doubtful.

16. *It is matter of record that there is unnatural conduct of accused party in the present case as accused persons spotted the complainant and eyewitness namely Muhammad Rizwan being brothers of one of the deceased at the spot, they left said brothers alive and on the other hand committed murder of servant of their brother/ deceased Muhammad Irfan and such behavior on the part of the accused persons ran counter to natural human conduct and the behavior explained the provisions of Article 129 of the Qanun-e-Shahadat, 1984 and such fact was also held in a case law reported at 2017 SCMR 596 (Supreme Court of Pakistan).*

17. *It is worth to mention here that complainant alleged motive behind the murder in the FIR as dispute over flat, yet he as well as eyewitness Muhammad Rizwan has not deposed a single word in their respective testimony regarding motive behind the murders, therefore, prosecution has failed to prove*

motive behind the murder of deceased persons in the present case.”

10. We have also carefully perused the record with the able assistance of the learned Deputy Prosecutor General. We have no hesitation to observe that the impugned judgment is speaking one and elaborated the reasons which do not suffer any illegality, gross irregularity and infirmity; however, from the perusal of the record, it reveals that initially the complainant had not disclosed the names of unknown accused in the FIR however their names surfaced on record later on but the record suggest that no source of light mentioned in memo of place of incident.

11. It is also settled law that prosecution has to prove case on its own and the burden of proof is on the prosecution firstly to discharge the same by bring cogent evidence regarding culpability of accused in the present case which it has failed and contrary to this, no evidence has been led to prove that respondents/accused actually participated in the commission of alleged offence. Further, witness Rizwan in his cross examination admitted that ***“It is fact that no identification parade of accused Salman, Shahzail and Zafar was ever held before learned Magistrate...It is fact that I have not mentioned the source, time and place of identification about the unknown persons and their names in my 164 Cr.P.C statement. It is fact that Police Station B-Section is situated about 1.5 kilometers away from place of incident*** whereas witness Ghulam Hussain replied that ***“I was informed about the incident at about 0400 hours through mobile phone.*** It seems that delay is caused in informing the matter to police as the time of alleged incident is 02:55 hours whereas police station is distanced only 1.5 kilometers away from place of incident for which no justifiable explanation is available.

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 proven guilty. In other words, the presumption of innocence is doubled.

12. Learned counsel for the appellant/DPG has failed to disclose any misreading and non-reading of evidence. In the case of **Muhammad Zafar and another v. Rustam and others** (2017 SCMR 1639), the Hon'ble Supreme Court of Pakistan has held that:-

“We have examined the record and the reasons recorded by the learned appellate court for acquittal of respondent No.2 and for not interfering with the acquittal of respondents No.3 to 5 are borne out from the record. No misreading of evidence could be pointed out by the learned counsel for the complainant /appellant and learned Additional Prosecutor General for the State, which would have resulted into grave miscarriage of justice. The learned courts below have given valid and convincing reasons for the acquittal of respondents Nos. 2 to 5 which reasons have not been found by us to be arbitrary, capricious or fanciful warranting interference by this Court. Even otherwise this Court is always slow in interfering in the acquittal of accused because it is well-settled law that in criminal trial every person is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. As a sequel of the above discussion, this appeal is without any merit and the same is hereby dismissed”

13. Suffice it to say that there is hardly any improbability or infirmity in the impugned judgment of acquittal recorded by the learned trial Court, which is based on sound and cogent reasons that do not warrant any interference by this Court. Learned Deputy Prosecutor General, Sindh 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**.

JUDGE

JUDGE