

THE HIGH COURT OF SINDH AT KARACHI

(Criminal Appellate Jurisdiction)

Criminal Acquittal Appeal no. 236 2011

PRESENTED

14-05-2011

M. J. J. 14/5/2011
Sr. Registrar (Jud.)

Captain Syed Muhammad Aslam
S/o Syed Aziz Hussain, Muslim adult
R/o B-138 Block-1
Gulistan-e-Jauher Karachi.Appellant

2090

V/S

1. Saiful Islam S/o Misbahul Islam
Muslim adult, R/o Plot No.
D-5 Block '10' A, Rashid Minhas Road,
Karachi.

2. Muhammad Amir S/o Abdul Hameed
Muslim adult, R/o Flat No. C-56,
Empire Center, Near Jauhar Moor
Gulistan-e-Jauhar
Karachi.

3. The State Respondents

**CRIMINAL ACQUITTAL APPEAL UNDER SECTION
417(2-A) OF CRIMINAL PROCEDURE COURT 1898.**

Being aggrieved and dissatisfied by the Judgment dated 16.04.2011, passed by Learned Judicial Magistrate Court No. 16 Karachi East, in criminal case 641/2010, under section 448, 506-B PPC (The State V/s Saiful Islam and others), whereby respondent No. 1 & 2 ^{Acquitted} ~~equated~~ of charged and their bail & bonds cancelled and surety stand discharged, therefore the appellant pray for this on following facts and grounds.

(Certified copy of judgment 16.04.2011 is enclosed herewith and marked as "A")

(4)

HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeal No.236 of 2011

Present: Naimatullah Phulpoto, J.

Date of hearing : 03rd August, 2015
Date of Announcement : 12th August, 2015
Appellant : Captain S. M. Aslam through Syed Abid Hussain Shirazi, Advocate
Respondents : 1. Saiful Islam S/o Misbahul Islam
2. Muhammad Amir S/o Abdul Hameed through Mr. Ayaz Ali Chandio, Advocate
3. The State through Mr. Zafar Ahmed Khan, Addl: Prosecutor General Sindh

J U D G M E N T

NAIMATULLAH PHULPOTO, J.--- Saiful Islam and Muhammad Amir were tried by learned XVI Civil Judge/Judicial Magistrate, Karachi in Criminal Case No.641/2010 for offences under sections 448/506-B PPC of P.S. Shahrah-e-Faisal, Karachi. On the conclusion of trial, respondents/accused Saiful Islam and Muhammad Amir were acquitted of the charge on extending benefit of doubt vide judgment dated 16.04.2011. Complainant Captain (Retd.) S. M. Aslam has preferred this criminal acquittal appeal, seeking setting aside the impugned judgment and award of conviction and sentence to respondents/accused Saiful Islam and Muhammad Amir, in accordance with law.

2. Brief facts of the prosecution case are that complainant Captain (Retd.) S. M. Aslam owns Arshi Marriage lawn, which he had let out to one Nazir Haider Jafri at monthly rent of Rs.250,000/-, such rent agreement was executed. Complainant got Rs.10 lac as advance. It is further stated that said Nazir Haider Jafri did not pay regular monthly rent to the complainant, which resulted mutual cancellation of the rent agreement and it is alleged that Nazir Haider Jafri handed over possession of the marriage lawn to the complainant on 13.10.2009. It is further alleged that on 14.10.2009 at 11:00 a.m. complainant went to lawn along with PWs, namely, Irfan son of Subhan and Irfan son of Akhlaq Ahmed and they saw

accused Saiful Islam and Muhammad Amir who were present in the marriage lawn after breaking the locks. Complainant introduced them as owner of the lawn but it is stated that accused persons issued threats of dire consequences to the complainant. Thereafter, F.I.R. was lodged by the complainant under the above referred sections.

3. After usual investigation case was recommended to be disposed of under "C" class. Thereafter, the complainant approached superior police officers for further investigation and second investigation officer submitted challan against the accused persons under sections 448/506-B PPC.

4. In order to prove its case, prosecution produced following witnesses before the trial Court:

1. PW-1 Capt. (Retd.) S. M. Aslam at Ex-3.
2. PW-2 Azeem Ahmed at Ex-4.
3. PW-3 Nazir Haider Jafri Ex-5.
4. PW-4 Muhammad Imran at Ex-6.
5. PW-5 Muhammsad Irfan Ex-7
6. PW-6 Qasim Raza at Ex-8.
7. PW-7 PI Sajjad Ali at Ex-9.
8. PW-8 ASI Muhammad Waseem at Ex-10
9. PW-9 Akhtar Ali at Ex-11.

Thereafter, prosecution side was closed at Ex-12.

5. Statements of accused were recorded under section 342 Cr.PC. All the incriminating evidence was brought to the notice of the accused/respondents to enable them to offer explanation with regard to the allegations against them. Both the accused denied prosecution allegations, professed innocence and claimed to have been falsely charged. The accused/respondents did not appear in their defence as envisaged by Section 340(2) Cr.PC. However, examined DW's Mst. Rani Arshad and Syed Asif Ali in defence.

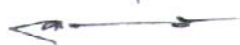
6. The learned trial Court after hearing the arguments of the learned counsel for the parties and going through the material on record arrived to the conclusion that charge against accused/respondents could not be established and prosecution has failed to prove its case. Resultantly, accused/respondents were acquitted of the charge on extending benefit of doubt by judgment dated 16.04.2011 mainly for the following reasons:



"Both the learned defence counsel have emphasized on the point that as the accused have peacefully entered the lawn, therefore, they have not committed any criminal trespass or house trespass. I am conscious of the language of section 441, 442 and 448 PPC, which if read together contemplate that in particular situation even a person having lawfully entered into some property can be a trespasser, but no such situation is attracted here. PW Nazeer who is original tenant as mentioned above has stated that Rs.15 Lacs was fixed as rent, and he has received Rs.10 Lac from the accused persons, therefore, in my view they are not trespasser. Rs.15 lacs cannot be rent for 2 months, surely it is for longer period. I am constrained to mention that role of PW Nazeer is suspicious and questionable. After taking the lawn from the complainant admittedly he committed default in payment of rent, he also took Rs.10 lacs from the accused persons, he also took away steel structure of nearly one and half million rupees, allowed the accused persons to renovate the same, and then stood up and appeared as witness of the complainant and deposed that on 13.10.2009 he handed over the lawn to the complainant. Accused persons were in physical possession of the lawn, and there is no evidence that they had returned the lawn to PW Nazeer. In fact it is mentioned in para 6 of Ex.5-A Tenancy Cancellation Agreement executed on 13.10.2010 that accused persons have forcibly occupied the Marriage Hall, and installed the Board of Purple Apple Lawn. For handing over possession to the complainant, it was necessary that PW Nazeer should have possession of the Lawn. He could not have handed over its possession to the complainant when it was already occupied by the accused. Mere executing a Cancellation agreement on paper does not mean that possession was handed over to PW Nazeer and then to the complainant. It should be mentioned that case of the complainant is that on 13.10.2009 he had put his lock on the Lawn and on 14.10.2009, the locks were broken by the accused persons. Evidence on this point has been mentioned above which is neither probable, nor convincing, nor independent, and as such not believable.

Same is the situation of the evidence regarding offence under section 506-B PPC. The incident of criminal intimidation is alleged to have occurred on 14.10.2010. As discussed above, I have not believed that on 13.10.2009 PW Nazeer had handed over the possession of the Lawn to the complainant, therefore, the consequent incident of 14.10.2009 regarding breaking open the lock, and entry of complainant in the Lawn and consequent reaction of the accused is also not believable. 28 days delay in lodging F.I.R. also create doubt in prosecution case. Point No.1 and 2 not proved."

7. It has been argued by the learned counsel for the complainant/appellant that learned trial Court has passed the impugned judgment on flimsy grounds which are not recognized by law and are also belied by the evidence on record. It is further contended that documentary



evidence regarding booking of the lawn has not been considered by the Court. Learned counsel for the complainant/appellant also contended that evidence of prosecution is firm and uniform on all the material features of the case but learned trial Court has assessed every piece of evidence in isolation and disbelieved the evidence of prosecution on hypothetical grounds, having no relevancy with the case. Lastly he contended that mere fact that there was delay of 28 days in lodging of the F.I.R. would not be fatal to the prosecution case as S.H.O. had refused to register the F.I.R. and complainant approached the high police officials, thereafter his F.I.R. was lodged.

8. In reply, Mr. Ayaz Ali Chandio, learned counsel for the accused/respondents controverted the arguments and supported the impugned judgment on the same grounds which weighed by the learned trial Court. He has argued that PW Imran was servant of the complainant. PW Nazeer has admitted in his evidence that he had handed over possession of the disputed marriage lawn to the accused persons and executed such agreement. It is further contended that there was no eye witness of actual occurrence. Learned counsel for the accused/respondents argued that complainant is previous convict as he had leveled false allegation against his wife Mst. Rubi Akhtar regarding her character. He referred to the Criminal Revision No.27-K/1993 (Captain S. M. Aslam versus Adam Jokhio and Mst. Rubi Khatar) filed in the Federal Shariat Court. It is contended that petition of complainant was dismissed by judgment dated 05.01.1994. Learned counsel for the accused/respondents has also referred to the case of Captain S. M. Aslam versus Mst. Rubi Akhtar and another, reported in 1998 SCMR 1400 and argued that evidence of complainant has rightly been disbelieved by trial Court.

9. Mr. Zafar Ahmed Khan, learned Additional Prosecutor General Sindh argued that there was no eye witness of actual incident. PW Nazir has admitted that he handed over possession of the marriage lawn to the accused persons by receiving the rent. He further argued that judgment of the trial Court is based upon sound and cogent reasons and appeal filed by the appellant is without merits.



10. I have given due consideration to the evidence on record in the light of arguments addressed by the learned counsel for the parties. Complainant/appellant has filed the present appeal against acquittal of the accused/respondents. It needs no reiteration that there is marked difference between appraisal of evidence in appeal against conviction and an appeal against acquittal. In appeal against conviction appraisal of evidence is done strictly and in appeal against acquittal, the same rigid method of appraisal is not to be applied as there is already finding of acquittal given by the trial Court after proper analysis/appreciation of evidence on record. In the acquittal appeal, interference is made by this Court only when it appears that there has been gross misreading of evidence which amounts to miscarriage of justice. In an appeal against acquittal, this Court would not, in principle, ordinarily interfere and instead would give due weight to the findings of the Court acquitting the accused. The Court would not interfere with acquittal merely because of re-appraisal of evidence it comes to the conclusion different from that of Court acquitting the accused provided both the conclusions are reasonably possible. Ordinarily, scope of appeal against acquittal of accused is considerably narrow and limited. The criteria laid down for appeal against acquittal is entirely different than the criteria of hearing of appeal against conviction. Reference can be made to the case of Muhammad Usman and 2 others versus the State (1992 SCMR 489).

11. After close scrutiny of the prosecution evidence I have come to the conclusion that prosecution has totally failed to prove its case against the accused/respondents, sound reasons have been assigned by the trial Court. Additionally, there was no eye witness of actual occurrence. PW Nazir has admitted in his evidence that possession was handed over to the present accused/respondents on receiving rent from them. In cross-examination PW Nazir Haider has replied that, *"It is correct that it is written in my statement that I handed over peaceful possession of lawn to accused Saiful Islam for rent of Rs.15 lacs for the month of Ramadan. It is correct that accused had peacefully entered into the possession of marriage lawn with my permission."* As such, prosecution failed to prove that accused had committed criminal trespass. No prosecution

witness has deposed that criminal trespass was committed by accused while entering into the marriage lawn. Trial Court has rightly observed that PW Nazeer was the original tenant and there was no evidence that PWs Nazir had returned back marriage lawn to the complainant. Prosecution has also failed to prove that accused committed criminal intimidation by threatening the complainant. As such, from prosecution evidence, ingredients of sections 448 and 506-B PPC are not attracted and trial Court has correctly come to the conclusion that involvement of the accused/respondents Saiful Islam and Muhammad Amir in the case is highly doubtful. The impugned judgment is neither perverse nor reasons assigned therein are artificial and flimsy or based on misreading and non-reading of evidence or different opinion can be gathered. After examining the entire evidence available on record, I find that none of above recognized ingredients as reported in the case of Mst. Askar Jan and others versus Muhammad Daud and others (2010 SCMR 1604) are attracted to the present case.

12. In the light of what has been discussed above, Criminal Acquittal Appeal No.236/2011 filed by appellant Captain (Retd.) S. M. Aslam is without merits, same is dismissed.

12.8.2015
JUDGE

Gulber/P.A

Phone: 9212310.

NO: Cr. P. 63 - K OF 2015
SUPREME COURT OF PAKISTAN

Karachi, the 05th July, 2017

From:

The Sr. Court Associate,
Supreme Court of Pakistan,
M.R. Kayani Road,
Karachi.

To,

The Registrar,
High Court of Sindh,
Karachi.

591
INWARD TO CRL
BRANCH CRL
DATE 08/07/17
HIGH COURT OF SINDH AT KARACHI

SUBJECT:- CRIMINAL PETITION NO:63-K OF 2015
(Capt. Syed Muhammad Aslam Vs.
Saiful Islam and others)

On appeal from the Judgment/Order of
the High Court of Sindh, Karachi.
Dated:12-08-2015, in Cr. Acq. Appeal
No.236/2011

In continuation of this Court's letter of even number dated:
28-09-2015, I am directed to enclose herewith for information and necessary
action a certified copy of the Order of this Court dated:29-06-2017, Dismissing
the above-cited Criminal Petition.

2. I am further directed to return herewith the original record of the
High Court of Sindh Karachi, received in this Court under cover of your letter
No: Cr. Acq. A. 236/2011, dated:06-10-2015.

3. The receipt of this letter along-with its enclosure may kindly be
acknowledged.


(**SYED ZAFAR ALI**)
Sr. Court Associate

Encl:- 1. Certified copy of Order.
2. Original R & Ps. No. Cr. Acq. A. 236/2011 a/w one Paper Book.

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تصدیق نامہ موت

Death Certificate

یونین کونسل 7 شریف آباد لیاقت آباد ٹاؤن کراچی سٹی

اقتباس اندراجات برطانیہ روزنامات یونین اول

شہری رجسٹر نمبر 1/2002
 نام موتی دستگیر (پورا نام)
 تاریخ اور وقت وفات 18-3-2003
 عمر وقت وفات 85 سال



مقام وفات اور موتی دستگیر کا پتہ وقت وفات گھر RS111 شریف آباد منڈول
 معائنہ کا نام (آخری مرتبہ جس نے معائنہ کیا)
 مہر وقت (معائنہ کے تصدیق نامہ کے مطابق)
 مرنے والے کا نام اپنی

یونین کونسل 7 شریف آباد میں اندراج کرانے کی تاریخ 29.3.2003
 تاریخ تدفین 19-3-2003
 مقام تدفین (قبرستان کا نام) عینی نظری منوں گوٹھ کراچی
 مرنے والے کا اندراج یونین کونسل 7 شریف آباد کے رجسٹر میں اطلاع دینے والے افراد ادارے کے قریب موجود ہون کے مطابق ہے
 اقتباس کی درخواست مورخہ 29.3.2003 جاری کی گئی
 روپیہ بابت ٹیکس 50/-
 تاریخ 29.3.2003 جاری کیا گیا۔

کتاب نمبر 22 اندراج نمبر 102 تاریخ 29.3.2003

ASAD H. SIDDIQUI
 NAZIM
 Registrar
 Muzaffargarh Town-Kar.

رجسٹر کارڈ صافی جمال اختر
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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Gulzar Ahmed
Mr. Justice Maqbool Baqar
Mr. Justice Sajjad Ali Shah

Criminal Petition Leave to Appeal No. 63-K/2015

Against the Judgment dated 12.08.2015 passed by High Court of Sindh Karachi in Criminal Acquittal Appeal No. 236 of 2011)

Capt. Syed Muhammad Aslam.

Petitioner

VERSUS

Saif-ul-Islam & others.

Respondent (s)

For the Petitioner

: In person

For the Respondent No.1

: Mr. Khaleeq Ahmed ASC
Mr. K. A. Wahab AOR

For the Respondent No.2

In person

For the Respondent No.3

Mr. Shahadat Awan P.G. Sindh

Date of Hearing

: 29.06.2017

ORDER

Sajjad Ali Shah, J.

The Petitioner seeks leave of this Court against the Order dated 12.08.2015 passed by learned Single Judge in chambers of the Sindh High Court in Criminal Acquittal Appeal No. 236 of 2011, whereby, the learned Single Judge while dismissing the appeal maintained the acquittal of the Respondent/accused.

2. Briefly, the Petitioner/Complainant claims to be the owner of "Arshi Marriage Lawn" which he had let out to one Nazeer Hader Jafari vide Tenancy Agreement dated 1.6.2009. It is claimed by the Petitioner that since the said Nazeer Haider Jafari failed to pay the monthly rental, therefore, through a mutual cancellation agreement the possession of the marriage

was handed over to the Complainant on 13.10.2009. Per Petitioner, on 14.10.2009 at about 11:00 a.m., when he went at his marriage lawn alongwith PW Irfan son of Subhan and Irfan son of Akhlaq Ahmed, he saw

that Respondent/accused had entered the marriage lawn after breaking

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[Signature]
Court Associate
Court of Pakistan
Karachi

open the locks, when he introduced himself to be the owner of the marriage lawn, he was threatened of dire consequences. Consequently, an FIR under Section 448/506-B PPC was registered on 12.11.2009.

3. It appears that initially Final Report under Section 173 Cr.P.C. was submitted under 'C' class, the matter was reinvestigated and ultimately the accused were challaned. A formal charge was framed on 4.10.2010, the accused pleaded not guilty and claimed trial. Consequently, the prosecution examined nine (9) witnesses. Thereafter, the statements of Respondent/accused under Section 342 Cr.P.C. were recorded. The Respondent did not appear in their defence as envisaged under Section 340(2) Cr.P.C. but examined two (2) defence witnesses namely; Mst. Rani Arshad and Syed Asif Ali. The trial Court after hearing the arguments of the respective counsel acquitted the Respondent/accused vide its Judgment dated 11.06.2011 by extending benefit of doubt. The acquittal was challenged before High Court which also did not find favour and acquittal appeal was dismissed through impugned judgment.

4. Petitioner present in person contended that the prosecution has proved its case beyond any shadow of doubt despite the trial Court as well as the High Court believed the evidence of prosecution on hypothetical grounds, having no relevancy with the case. It was further contended that delay in the FIR could not be fatal to the prosecution case, as the SHO had earlier refused to lodge the FIR on time. Per Petitioner, even now the accused persons are not in possession of marriage lawn but in fact one Mst. Gulnaz widow of Muhammad Tariq in accordance with the report of the Judicial Magistrate appointed by this Court is in possession.

5. We have heard the Petitioner at length and examined the record.

6. The case of the Petitioner is that he had rented out the marriage lawn to one Nazeer Haider Jafari who on 13.10.2009 had returned the possession to him, however, not only Nazeer Hussain Jafari as a prosecution witness has categorically stated in his deposition that he had handed over

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Court Associate
Court of Sessions
Karachi.

the possession of the marriage lawn to the Complainant against a monthly rent of Rs.15,00,000/- and had received a sum of Rs.10,00,000/- from the Respondent/accused persons, but a perusal of Tenancy Cancellation Agreement dated 13.10.2010, through which the Complainant claims to have received the possession from his tenant Nazeer Hussain Jafari, reflects that the possession of the property was with the Respondent/accused which Respondent/accused had received from the Petitioner's tenant Nazcer Haider Jafari against rental of Rs.1,000,000/-. There is nothing on record to show that the Respondent/accused persons had handed over possession of the property to Nazeer Haider Jafari for onward handing over to the Petitioner. Additionally, the Petitioner/Complainant himself admitted in his cross-examination that he was not a witness to the alleged breaking up of the locks and therefore, the prosecution has miserably failed to produce or adduce any evidence showing forceful entry.

7. The trial Court has for very cogent reasons acquitted the Respondent/accused and such reasons were accepted by the Appellate Court and the Petitioner has brought nothing new to our notice to take a different view. The following portion has been rightly relied and appreciated in its true perspective by the learned High Court in its impugned judgment:-

"Both the learned defence counsel have emphasized on the point that as the accused have peacefully entered the lawn, therefore, they have not committed any criminal trespass or house trespass. I am conscious of the language of section 441, 442 and 448 PPC, which if read together contemplate that in particular situation even a person having lawfully entered into some property can be a trespasser, but no such situation is attracted here. PW Nazeer who is original tenant as mentioned above has stated that Rs.15 Lacs was fixed as rent, and he has received Rs.10 Lacs from the accused persons, therefore, in my view they are not trespasser. Rs.15 Lacs cannot be rent for 2 months, surely it is for longer period. I am constrained to mentioned that role of PW Nazeer is suspicious and questionable. After taking the lawn from the complainant admittedly he committed default in payment of rent, he also took Rs.10 lacs from the accused persons, he also took away steel structure of nearly one and half million rupees, allowed the accused persons to renovate the same, and then stood up and appeared as witness of the complainant and deposed that on 13.10.2009 he handed over the lawn to the complainant. Accused persons were in physical possession of the lawn, and there is no evidence that they had

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