IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Acquittal Appeal No.D-23 of 2017

PRESENT
Mr. Justice Naimatullah Phulpoto
Mrs. Justice Rashida Asad.

Date of Hearing:	*18.08.2020*
Date of Judgment:	*18.08.2020*
Appellant:	*Ali Murad S/o Rasool Bux through Mr.Imtiaz Ali Chanhio, Advocate.*
Respondents:	*Muhammad Hassan @ Dodo and others through Mr. Taj Muhammad Keerio, Advocate.*
The STATE:	*Through Mr. Nazar Muhammad Memon, Addl. P.G.*

J U D G M E N T

RASHIDA ASAD,J.- Through this Criminal Acquittal Appeal, appellant / complainant has impugned the judgment dated 22.07.2017, passed by learned Sessions Judge, Umerkot in Sessions Case No.86 of 2014 in Crime No. 04 of 2014, registered at PS Ghulam Nabi Shah for offences under Sections 302, 324, 506(2), 114, 337-H(ii) and 34, PPC. On conclusion of the trial, vide judgment dated 22.07.2017, respondents No.1 to 6/ accused namely Muhammad Hassan, Karim Dad, Hakim, Abdul Majeed, Nihal and Mehboob were acquitted.

2. Brief facts of the prosecution case, as reflected in the impugned judgment, are as under:-

"That on 19.02.2014 at 2030 hours complainant namely Ali Murad S/o Rasool Bux Mallah lodged FIR at PS Ghulam Nabi Shah stating therein that he is zamindar. About four months ago he

obtained 8 acres agricultural land on lease from Mahar Ali s/o Muhammad Usman Nohri, which is being looked after by him. As the said land was adjacent to the land of Mehbood Rajar, he got annoyed and extended threats. On 18.02.2014, in the evening he was present at the otaq of his land, when his guest Umed Ali son of Muhammad Sulleman Rahu resident of Sulleman Rahu, Taluka Samaro, Muhammad Rafique s/o Muhammad Alam Rahu and Soomar s/o Mir Muhammad Khaskheli came to him . It is further alleged in the F.I.R. that they were sleeping after taking dinner. Suddenly at about 4.00 a.m, they woke up on barking of dogs and saw on charge light and identified Mehbood Ali armed with rifle, Nihal Rajar armed with Kalashnikov, Dodo Rajer armed with repeater, Majeed armed with pistol, Hakim armed with hatchet entered into their otaq, approaching their cots. Accused Nihal Rajar gave Hakal to sit and instigated others not to spare, on the instigation of Nihal Rajar, Mehbood Rajar opened fire from his rifle, upon Umed Ail Rahu, who fell down. others also fired upon them with intent to kill but they saved by fallen on the ground. They raised cries to which above named accused persons fled away while issuing threats of murder. Thereafter they saw that Umed Ali Rahu sustained fire injury near his shoulder on the chest through and through and heavy blood was oozing, he succumbed to his injuries on the way to hospital. They brought dead body at Pithoro hospital and informed Ghulam Nabi Shah Police on phone. Police after completing legal formalities and post mortem handed over the dead body to the brother of deceased Muhammad Hassan, thereafter complainant appeared at PS and lodged the F.I.R against the present respondents /accused.

3. On completion of the investigation, challan was submitted against the accused/respondents.

4. Learned Trial Court framed the charge against the accused/respondents, to which they pleaded not guilty and claimed to be tried.

5. Statements of respondents / accused were recorded under Section 342 Cr.P.C at Ex-25 to 30 respectively, in which all the accused denied the prosecution's allegations and claimed false implication in this case. Accused Muhammad Hassan alias Dodo produced certified true copies of plaint of civil suits adjudicated between accused and Mahar Ali.

6. Learned trial Court after hearing learned counsel for the parties and assessment of the evidence vide judgment dated 22.07.2017 acquitted the accused / respondents on following observations:-

> *"From the available record and the evidence so brought on record by the prosecution which I discussed above is full of doubt. The ocular account is concerned, it would be seen that on the date of incident it was 4.00 a.m, the identification of the accused persons on charge light, the charge light was not produced neither secured from the place of incident according to the PWs, the accused who were at the distance of more than 20/22 feet from the cots, therefore, their identification in the odd night hours, without any source of light is doubtful. Moreover, according to the complainant the firing continues for about 10/12 minutes and 82 empty shells were recovered from the place of incident at the distance of 15/16 feet away from the dead body and only one bullet was hit to deceased while other persons had not sustained any scratch while there was no hindrance in between accused and complainant party and the complainant party was at the mercy of accused, but they were not injured. The presumption would be that PWs were not present at the time of incident. In this respect, I am fortified by the dictum laid down in case of Abdul Majeed vs. Mulazim Hussain and others (PLD 2007 SC 637).*
>
> *Besides above there is conflict in between the ocular and medical evidence. PW Muhammad Rafique deposed that at the time of firing the accused were standing 20/22 feet away from their cots but the medical officer, who conducted the post mortem has deposed that the fire was made from a distance of 4 to 10 feet. Even otherwise the I.O. Inspector Ghulam Hyder Kanhio deposed that the distance between cots and dead body was about 30 to 35 feet, while the empties were collected from 15/16 feet away from the dead body. However, all the pieces of evidence produced by the prosecution have failed to inspire any confidence, then medical evidence cannot suffice all by itself to take the prosecution case any far. It is established law that medical evidence cannot fix the identity of a culprit. In this respect, I am fortified by dictum laid down in*

case of Nadeem alias Baba vs. The State (2006 P.Cr.L.J.944-Lahore).

Suffice it to say, that the complainant deposed that deceased Umed Ali Rahu sustained rifle fire arm injury, but riffle was not recovered from the possession of accused Mehboob or any accused or from his house. The medical officer deposed that definitely wounds mentioned by him in post mortem report caused by gun. Therefore, there is no circumstantial evidence to connect the accused with the commission of offence."

7. The appellant / complainant being dissatisfied with acquittal of the accused / respondents has filed this appeal.

8. Learned Counsel for the appellant / complainant has mainly contended that the impugned judgment of the trial Court is based on misreading and non-reading of the evidence. It is also argued that the trial Court has disbelieved strong evidence without assigning sound reasons, and prayed for converting the acquittal of the accused to the conviction.

9. Learned counsel for the private respondents as well as learned Additional Prosecutor General Sindh supported the impugned judgment by stating that there is no misreading and non-reading of the evidence.

10. It is settled law that ordinary scope of acquittal appeal is considerably narrow and limited and obvious approach for dealing with the appeal against the conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of accused is attached to the order of acquittal. In the case of ***Zaheer Din v. The State* (1993 SCMR 1628),** following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:-

"*However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases-law on, the question of setting aside an acquittal by this Court. They are as follows:--*

(2) The acquittal will not carry the second presumption and will also thus lose the first one if on pints having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

(3) In either case the well-known principles of reappraisement of evidence will have to be kept in view while examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observations of some higher principle as noted above and for no other reason.

(4) The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the 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 conclusion 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. **"**

11. It appears that the alleged incident had taken place at 4.00 a.m, and accused persons were identified on charge light. Admittedly, neither the charge light was produced nor secured from the place of incident. According to the PWs, the accused were present at a distance of more than 20/22 feet from their cots, thus their identification, in the odd hours of night, without any source of light is doubtful. Moreover, according to the complainant the firing continued for about 10 to 12 minutes and 82 empty shells were recovered from the spot, whereas only one bullet hit the deceased and other persons had not sustained any scratch when the complainant party was at the mercy of accused. It is observed that if attack of such magnitude as alleged is presumed in such a small space, practically everybody present there would have been seriously injured or killed. Therefore, there was no circumstantial guarantee or judicial sanctity of their presence on the spot at the

time of occurrence. Furthermore, there is conflict in the ocular and medical evidence. PW Muhammad Rafique deposed that at the time of firing the accused were standing 20/22 feet away from their cots but the medical officer, who conducted the post mortem has deposed that the fire was made from a distance of 4 to 10 feet. However, all the pieces of evidence produced by the prosecution have failed to inspire any confidence, then medical evidence cannot suffice all by itself to take the prosecution case very far. It is established law that medical evidence cannot fix the identity of a culprit. The complainant deposed that deceased Umed Ali Rahu sustained fire shot from rifle, but riffle was not recovered from the possession of accused Mehboob or any accused.

12. We also observed that there are many omissions and contradictions in the evidence of the prosecution witnesses affecting the entire fabric of the prosecution case. The motive set up by the prosecution in the FIR and during evidence has been found to have remained un-proved. The motive, as alleged, was an afterthought and has not been proved by any credible evidence. The complainant has knitted the entire story which is bereft of any reason and is hard to believe being of no legal worth and reliance. In view of the combined study of the entire evidence and careful reappraisal of the same, it leads to an inescapable conclusion that the prosecution case is full of improbabilities, legal and factual infirmities of fatal nature and is pregnant with bristling doubts of grave nature. Thus, the prosecution has miserably failed to connect the next of the accused with the crime in any manner whatsoever.

13. The material discrepancies and lacunas in the prosecution case have also been highlighted by the trial Court in impugned judgment. The prosecution has failed to prove it’s case against the respondents / accused as it was the primary duty of the prosecution to establish the case independently instead of depending upon the weaknesses of the defence. We have also examined the overall evidence of the prosecution witnesses and have come to the conclusion that prosecution had miserably failed to prove it’s case

against the respondents / accused. The acquittal recorded in favour of the accused by the trial Court is well-reasoned and cannot be interfered unless some cogent and confidence inspiring material is brought on record by the prosecution which is absent in this case.

14. In an appeal against acquittal this Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when appeal is admitted for reappraisement of evidence so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

15. Learned Counsel for the appellant / complainant has not been able to point out any serious flaw or infirmity in the impugned judgment. The view taken by the learned trial Court is a possible view, structured in evidence available on the record and as such is not open to any legitimate exception. It is by now well settled that acquittal once granted to an accused cannot be recalled merely on the possibility of a contra view. Unless, impugned view is found on fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.

16. In view of foregoing reasons stated above, this Criminal Acquittal Appeal is without merit and the same is dismissed.

JUDGE

JUDGE

Ali Haider