

Judgment Sheet.

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Acq. Appeal No. S-26 of 2014

Date of hearing : 17.02.2020.

Mr. Mustaque Ahmed Shahani Advocate for Appellant/Complainant.

Mr. Zulifqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Naimatullah Phulpoto, J. Through this Acquittal Appeal, appellant / complainant Abdul Kareem son of Imam Bakhsh Lakho has impugned the judgment dated 25.02.2014 passed by Civil Judge & Judicial Magistrate-II Kandiaro in new criminal case No. 258/2013 for offences under sections 457, 380 PPC. On the conclusion of trial Civil Judge & Judicial Magistrate-II Kandiaro vide judgment dated 25.02.2014 acquitted the respondents/accused from the charges.

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

"The brief facts of the prosecution case are that on 01.03.2011 at 1510 hours complainant got registered FIR stating that the complainant have cattles and the complainant have also one donkey for loading the grass for the cattles. On 27.02.2011 the complainant got bind the cattles and one donkey in his house and the complainant went to bed after taking dinner. On 28.02.2011 at about 0200 hours on the sudden noise the complainant, his uncle namely Muhammad Siddique and his brother Nihal Khan awakened and saw on the light of bulb that three persons are taking away one cow and donkey, the accused persons were loaded with weapons and the complainant

identified them as Sahib son of Din Muhammad Mangrio, Raheem son of Abdul Hakeem Mangrio and Waleem son of Sahib Khan Mangrio. The complainant party remained silent due to fear of weapons. Thereafter, the complainant party along with his witnesses went to Nek Mard of the locality, who suggested for lodging the FIR against the accused persons. Hence, complainant party got registered the instant FIR.”

3. On the conclusion of the investigation, challan was submitted against the respondents/accused Sahib Dino and Raheem Bakhsh under sections 457, 380 PPC while accused Waleem was shown absconder. He was declared Proclaimed Offender.
4. Trial Court framed the charge against respondents/accused for offence under sections 457, 380 PPC. Both accused pleaded not guilty and claimed to be tried.
5. At the trial, prosecution examined four (04) PWs and prosecution side was closed.
6. Statements of accused were recorded under Section 342, Cr. P.C in which both accused claimed false implication in this case and denied the prosecution's allegations. They did not examine themselves on oath nor produced any witness in their defense.
7. Learned trial Court after hearing learned counsel for the parties and assessment of the evidence, by assigning sound reasons in point No.1 of the impugned judgment, acquitted the accused vide judgment dated 25.02.2014, for the following reasons.

“ POINT NO.1.

On this point the P.W 1 Complainant in his evidence has stated the same fact as narrated in the FIR. The PW-2 Nihal Khan in his evidence have also implicated the accused persons. The PW-3 Mashir Qaimuddin is formal hence no need to discuss it. The PW-5 the IO of this case ASI Sikandar Ali in his evidence has deposed that he recovered the alleged stolen cow near the house of accused Waleem. In his cross-examination, he stated that the said cow was not recovered from the possession of accused.

I have heard the learned counsel for the accused and learned ADPP for the State and have gone through the evidence very minutely. After proper appraisal of evidence it is observed that though the complainant and his PWs has supported the prosecution case but their evidence is not confidence inspiring, the complainant and PW Nihal Khan has stated in their deposition that they identified the accused persons at the time of alleged incident and has further stated that it was 02.00 am of night hours. The identification of accused persons by the complainant and the P.Ws at the time of incident at night ours without any source of light seems doubtful. Admittedly, the FIR has been lodged with delay of two days, the complainant has given the explanation for such delay that they first approach his nekmard namely Zahid Ali Lakho who did not meet with them and they again went to same nek mard on next day who meet the complainant and suggested for registration of FIR. To substantiate this point the prosecution did not examine the said Nek Mard Zahid Ali Lakho, hence such explanation of delay cannot terms as plausible and it is observed that the FIR has been lodged with delay of two days without plausible explanation.

The prosecution case is also based on recovery of alleged stolen cow from the possession of absconding accused Waleem, to prove this recovery prosecution examined the IO of the case who in his evidence has stated that the subject cow was not recovered from the absconding accused Waleem, moreover he did not produced the departure or arrival entry, the IO did not associated a person of locality to act as mashir of said recovery. In the circumstances the alleged recovery seems to be doubtful for the reasons given above. There is material contradiction and legal infirmities which has adversely affected the prosecution case and has created the serious doubt to connect the accused persons with commission of alleged offence, it is settled law that if a single doubt creates in prudent mind the benefit of that must be given to the accused not as matter of grace but as matter of right, reliance in this regard is placed on SCMR 2010 Page 230.

In view of reasons, it is concluded that the prosecution has been miserably failed to prove the case beyond the

reasonable shadow doubt hence this point is answered as negative."

8. Complainant being dissatisfied with the acquittal of the accused has filed this appeal.

9. Learned advocate for the appellant/complainant mainly contended that complainant and other witnesses had deposed that at the time of incident bulbs were burning and respondents were identified but trial Court in the impugned judgment has mentioned that no source of light has been given. It is further argued that there was one day delay in lodging of the FIR but the trial Court has mentioned that there was two days delay in lodging of the FIR. However, counsel for the appellant/complainant submits that there was no recovery from the respondents. Lastly, it is submitted that judgment of the trial Court is perverse and arbitrary and prayed for converting acquittal order to the conviction.

10. Mr. Zulifqar Ali Jatoi Additional P.G supported the judgment of the trial Court and argued that admittedly it was night time incident and source of light were the bulbs but those bulbs were not recovered by the Investigation Officer during investigation. It is further submitted that there was one day delay in lodging of the FIR for which no plausible explanation has been furnished by the complainant. He further argued that trial Court has properly appreciated the evidence and acquittal of the accused / respondents is neither perverse nor based upon misreading of evidence. He has supported the judgment of the trial Court.

11. 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 *The State and others v. Abdul Khaliq and others* (PLD 2011 Supreme Court 554), following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:

“16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both the sides, it may be mentioned that both the learned counsel agreed that the criteria of interference in the judgment against 'acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Courts about the rules which should be followed in such cases; the dicta are:

Bashir Ahmad v. Fida Hussain and 3 others (2010 SCMR 495), *Noor Mali Khan v. Mir Shah Jehan and another* (2005 PCr.LJ 352), *Imtiaz Asad v. Zain-ul-Abidin and another* (2005 PCr.LJ 393), *Rashid Ahmed v. Muhammad Nawaz and others* (2006 SCMR 1152), *Barkat Ali v. Shaukat Ali and others* (2004 SCMR 249), *Mulazim Hussain v. The State and another* (2010 PCr.LJ 926), *Muhammad Tasweer v. Hafiz Zulkarnain and 2 others* (PLD 2009 SC 53), *Farhat Azeem v. Asmat ullah and 6 others* (2008 SCMR 1285), *Rehmat Shah and 2 others v. Amir Gul and 3 others* (1995 SCMR 139), *The State v. Muhammad Sharif and 3 others* (1995 SCMR 635), *Ayaz Ahmed and another v. Dr. Nazir Ahmed and another* (2003 PCr.LJ 1935), *Muhammad Aslam v. Muhammad Zafar and 2 others* (PLD 1992 SC 1), *Allah Bakhsh and another v. Ghulam Rasool and 4 others* (1999 SCMR 223), *Najaf Saleem v. Lady Dr. Tasneem and others* (2004 YLR 407), *Agha Wazir Abbas and others v. The State and others* (2005 SCMR 1175), *Mukhtar Ahmed v. The State* (1994 SCMR 2311), *Rahimullah Jan v. Kashif and another* (PLD 2008 SC 298), 2004 SCMR 249, *Khan v. Sajjad and 2 others* (2004 SCMR 215), *Shafique Ahmad v. Muhammad Ramzan and another* (1995 SCMR 855), *The State v. Abdul Ghaffar* (1996 SCMR 678) and *Mst. Saira Bibi v. Muhammad Asif and others* (2009 SCMR 946).

*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 re-appraisal 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. It is averred in *The State v. Muhammad Sharif* (1995 SCMR 635) and *Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others* (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals."*

12. In the recent judgment in the case of *Zulfiqar Ali v. Imtiaz and others* (2019 SCMR 1315), Hon'ble Supreme Court has held as under:

"2. According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB. There is a reference to M/s Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the

deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not open to any legitimate exception. It is by now well-settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled. Criminal Appeal fails. Appeal dismissed."

13. I have heard learned counsel for the parties and perused the evidence as well as impugned judgment carefully. Admittedly there was one day delay in lodging in the FIR, for which no plausible explanation has been furnished. It is the case of prosecution that complainant soon after the incident went to the nekmard Zahid Ali Lakho and narrated him the incident but he has not been examined by the prosecution. Trial Court has observed that best piece of evidence has been withheld by the prosecution. Presumption could be drawn that if he had been examined he might have not been supported the case of prosecution. Admittedly, it was night time incident, trial Court in the judgment has mentioned that source of light has not been disclosed by the complainant but in the evidence, it has come on record that bulbs were burning but those bulbs were not recovered by the Investigation Officer during investigation. Findings of the trial Court in this regard appears to be justified. Moreover, there was no recovery of the stolen cow from the respondents. I have minutely examined the evidence. So far the ingredients of section 457, 380 PPC are concerned, those ingredients are not satisfied from the evidence. Even otherwise this is the acquittal appeal and in the acquittal appeal after acquittal there is double presumption of the innocence of the accused and their liberty cannot be curtailed lightly. Judgment of the trial Court appears to be justified and well-reasoned. Learned counsel for the appellant / complainant has not been able to point out any serious flaw or infirmity in the impugned judgment. View taken by the learned

trial Court is a possible view, structured in evidence available on record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted 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.

14 . This Criminal Acquittal Appeal is without merit and the same, is **dismissed**.

J U D G E

Irfan/PA