

IN THE HIGH COURT OF SINDH KARACHI

Criminal Acquittal Appeal No. S-11 of 2013

Before:-Justice Ali Haider 'Ada'

Appellant: Ahmadullah through Mr. Badrul Alam,
Advocate

Respondent No.1: Gul Hameed Ghanchi through Ms.
Samreen Ahtesham and Aga Atta M.
Khan Advocates.

Respondent No.2: The State through Mr. Mumtaz Ali Shah,
Assistant Prosecutor General, Sindh.

Date of hearing: 08.12.2025.

Date of Short order: 08.12.2025.

Date of reasons: 15.12.2025.

JUDGMENT

Ali Haider 'Ada', J:- Through this Criminal Acquittal Appeal, the appellant, being the complainant, has assailed the judgment dated 23.10.2012 passed by the learned Additional Sessions Judge-I, Karachi West, whereby Complaint No.02 of 2007, filed by the present appellant under section 3 of the Illegal Dispossession Act, 2005, was dismissed and the respondents were acquitted.

2. The brief facts, out of the record, are that the appellant instituted a complaint before the learned trial Court asserting that the property in question belongs to Pakistan Railways. According to the appellant, Pakistan Railways, after classification of the land, put Plot No. A, measuring 2200 square yards, situated at Baldia Station, Karachi, to auction. The appellant participated in the process, deposited the consideration amount along with the requisite security, and consequently, an agreement was executed between him and Pakistan Railways. Thereafter, peaceful possession of the plot was handed over to the appellant, who subsequently raised construction thereon and deployed a Chowkidar, namely Muhammad Hanif, for protection of the property. It was further averred that due to his ailment (cancer), the appellant was confined to bed rest. On 27.12.2006, the Chowkidar Muhammad Hanif allegedly informed the appellant that certain persons

from the adjacent plot, armed with deadly weapons, forcibly dispossessed him and took over the subject property. The appellant claimed to have approached the police; however, as no effective action was taken, he was constrained to file the present complaint.

3. After institution of the complaint, the learned trial Court initiated proceedings, called reports from the concerned quarters, took cognizance of the offence, and upon supply of documents framed a charge on 26.03.2007, to which respondent No.1 pleaded not guilty and claimed trial. During the trial, the complainant examined himself as PW-1 and also examined PW-2 Muhammad Hanif, the Chowkidar. Certain documents were produced and exhibited in support of the case. One Khalid Hussain was also examined as a witness. Thereafter, the complainant closed his side. The statement of respondent No.1 under section 342 Cr.P.C. was recorded, wherein he denied the allegations, professed innocence, and prayed for acquittal.

4. Upon conclusion of the trial, the learned trial Court, after hearing the parties and perusing the material available on record, vide impugned judgment dated 23.10.2012, acquitted respondent No.1. Being dissatisfied with the said verdict, the appellant has approached this Court.

5. Learned counsel for the appellant contended that an application under section 540 Cr.P.C. was moved before the learned trial Court for summoning one Noor Muhammad, Chowkidar of the adjacent plot, as a prosecution witness; however, the said application was dismissed, thereby depriving the appellant of an opportunity to place relevant evidence on record. He further submitted that an application under section 428 Cr.P.C. has also been filed before this Court for recording additional evidence. It was argued that the prosecution's case was otherwise fully established against respondent No.1, and the learned trial Court erred in acquitting him, particularly when respondent No.1 failed to produce any document showing lawful entitlement or legal character over the disputed property. Learned counsel further argued that in view of section 417(2-A) Cr.P.C, the appellant, being an aggrieved complainant, was competent to challenge the impugned

judgment even without seeking leave to appeal. In support of his contentions, reliance was placed upon various reported judgments likewise: AIR 1933 Allahabad 735, AIR (33) 1946 Patna 373, AIR (39) 1952 Saurashtra page 3, ILR 1896 page 375, AIR 1944 Patna 373, AIR 1937 Nagpur 285, AIR 1914 Madras 628, 2005 YLR 3280, 1990 MLD 1376, PLD 1959 (WP) Karachi 35, 2010 YLR 930.

6. Conversely, learned counsel for respondent No.1 submitted that the order passed on the application under section 540 Cr.P.C. was never challenged by the appellant and, therefore, attained finality. He further argued that the summoning of additional evidence under section 428 Cr.P.C. is subject to strict parameters, which were not fulfilled in the present case. It was contended that the property in question admittedly belongs to Pakistan Railways, and the lease/allotment documents in favour of the appellant had already been cancelled by Pakistan Railways, which fact that is evident from the record, including documents available at page 103 of the paper book. Learned counsel further referred to the detailed report of Pakistan Railways, available at page 81 of the paper book, wherein it was clearly stated that upon termination of the allotment, possession of the property was resumed by Pakistan Railways. Thus, the very foundation of the allegation of illegal dispossession was misconceived. It was prayed that the impugned judgment, being lawful and well-reasoned, does not warrant interference.

7. Learned Assistant Prosecutor General supported the impugned judgment and submitted that no case of illegal dispossession was made out, as the property, being Government property was resumed by Pakistan Railways in accordance with law. He contended that the learned trial Court rightly appreciated the evidence and acquitted the accused, and therefore, the appeal merits dismissal.

8. I have heard learned counsel for the parties at length and have carefully perused the material available on record.

9. Firstly, the principal contention raised by the appellant is that Noor Muhammad, the Chowkidar of the adjacent plot, ought to have

been examined as a witness. It is, however, an admitted position that the application moved by the appellant under section 540 Cr.P.C. for summoning the said witness was dismissed by the learned trial Court, and the said order was never assailed before any Superior forum. Consequently, the order attained finality. Nevertheless, since the appellant has also filed an application under section 428 Cr.P.C. before this Court for recording additional evidence, the same requires examination at the very outset. For the sake of ready reference, **sections 540 and 428 of the Code of Criminal Procedure, 1898**, are reproduced as under:

540. Power to summon material witness or examine person present: Any Court may, at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case.

428. Appellate Court may take further evidence or direct it to be taken: In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or an Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and Such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

10. Section 428, Cr.P.C. embodies two essential pre-conditions which must be satisfied before additional evidence can be permitted at the appellate stage. Firstly, the proposed evidence must be necessary for the just decision of the case, and secondly, it must be shown that such evidence was not available to the party concerned at the time of trial and has only subsequently come to light despite due diligence. It is by

now well settled that additional evidence cannot be allowed under section 428, Cr.P.C. if the sole purpose is to fill in lacunae or to patch up weaknesses in the prosecution case. Reliance in this regard is placed upon *Muhammad Rahim Sawati and others v. The State* (2024 YLR 1636). Further support is drawn from the authoritative pronouncement of the Honourable Supreme Court in *Dildar v. State* (PLD 2001 SC 384), wherein it was held as under:

"9. There can be no cavil with the proposition that under the law a Court is empowered to summon any person as a witness or examine any person in attendance though not summoned as a witness or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case. Likewise, in dealing with any appeal under Chapter XXXI of the Code of Criminal Procedure, if the Appellate Court considers additional evidence to be necessary, it may either take such evidence itself or direct it to be taken by a Magistrate or a Court of Session after recording its reasons. However, there is a rider clause to the exercise of such powers and these provisions are not to be utilized at the appellate stage to cure the inherent infirmities or fill up a lacuna in the prosecution case. It is well-settled by now that such powers are to be exercised only where the additional evidence was either not available at the trial or the party concerned was prevented from producing it either by circumstances beyond its control or by reason of misunderstanding or mistake.

10. A plain reading of the provisions quoted hereinabove tend to show that widest possible powers have been conferred on a Court for summoning witness or re-calling and re-examining a witness already examined. Apparently the discretion vested in a Court appears to be unrestricted nevertheless such power being in the nature of public trust can only be exercised if such evidence appears to be essential to the just decision of the case and not to fill in the lacuna in a case owing to gross negligence, inefficiency, carelessness and recklessness of a party. An important and relevant ground for the exercise of discretion may be where some evidence is discovered subsequently which could not be collected earlier despite due diligence earlier or where a party was prevented from adducing such evidence at the trial for extraordinary reasons beyond its control and power. But in the instant case photocopies of documents were placed on record therefore non-production of such documents in evidence and its admissibility or otherwise amounted to sheer negligence and carelessness on the part of prosecution. We are fortified in this view by the dictum of the Federal Court rendered in *Ali v. Crown* PLD 1952 FC 71 in which a Full Bench headed by Abdul Rashid. C.J. (as his lordship then was) ruled that the terms in which the power is given by sections 375 and 428, Cr.P.C. vary to some extent. Under section 428, Cr.P.C. the Appellate Court may call for additional evidence "if

it thinks additional evidence to be necessary" but must give reasons for its action. Under section 375, no reasons need be given but the additional evidence required must be upon a "point bearing upon the guilt or innocence of the accused". The essential question for the Court being in either case that of the guilt or innocence of the accused person, the distinction between the two sections in relation to this case is more apparent than real. The limitations of section 428 are obvious. Such an order, stating reasons, would operate to exclude evidence which is not directly relevant to such reasons. Federal Court cautioned by emphasizing that the powers must be exercised judicially, that is to say, so as to preserve in all respects the essential fairness and even-handed justice to both parties. They should not be utilized to cure all the infirmities in the prosecution case in the Appellate Court".

11. In view of the settled legal position discussed hereinabove, there is no justification to summon or record any additional evidence at the appellate stage. The proposed witness, Noor Muhammad, is stated to be the Chowkidar of the adjacent plot, whereas the appellant had already examined Muhammad Hanif, the Chowkidar posted at the disputed property. The evidence now sought to be produced is, therefore, neither necessary for the just decision of the case nor can it be said that the same was unavailable at the time of trial. Rather, the attempt appears to be aimed at filling in apparent gaps in the prosecution's case, which is impermissible under section 428 Cr.P.C.; accordingly, the application for additional evidence does not merit acceptance.

12. Now coming to the next phase of the case, it is an admitted and undisputed position that neither the complainant nor the accused is the owner of the plot in question. The property was originally owned by Pakistan Railways and was put up for auction in accordance with its internal classification and policy. Thus, Pakistan Railways alone retains exclusive ownership rights over the subject property, and any right claimed by the complainant was purely derived in nature, flowing from the auction/lease or license documents issued by Pakistan Railways. In this regard, the report submitted by Pakistan Railways carries significant evidentiary weight, wherein it has categorically stated that the auction/lease/licence documents issued in favour of the complainant were duly terminated and that a cancellation letter was issued accordingly. Once such documents stood cancelled, the complainant ceased to have any lawful right, title, or interest in the

property. Consequently, the requirement for invoking the provisions of the Illegal Dispossession Act, 2005, was no longer available. In such circumstances, the question of illegal dispossession does not arise, particularly when Pakistan Railways itself has taken the position that possession of the plot was resumed by it after cancellation of the allotment.

13. Furthermore, even if it is assumed for the sake of argument that some third party or stranger had unlawfully occupied the property, the primary and lawful course available to the complainant, if he believed himself to be aggrieved, was to approach the original owner, i.e., Pakistan Railways. The law provides a complete and effective mechanism under the relevant statutory framework, including **The Federal Government Lands and Buildings (Recovery of Possession) Ordinance, 1965**, whereby Pakistan Railways is fully empowered to seek eviction of unauthorized occupants from its property. The fact that no such proceedings were initiated by Pakistan Railways and that no grievance was raised by it against respondent No.1 clearly demonstrates that the original owner did not consider the respondent to be an illegal occupant. This further weakens the complainant's claim and renders the allegation of illegal dispossession wholly misconceived and contrary to the factual matrix.

14. It is also well settled that proceedings under the Illegal Dispossession Act, 2005, are not to be entertained as a matter of routine. A complainant invoking this special law carries a heavy burden to establish each link of the chain, including lawful possession at the relevant time and forcible dispossession without due process of law. In terms of **Article 117 of the Qanun-e-Shahadat Order, 1984**, the burden of proof squarely lies upon the prosecution/complainant. In the present case, such a burden has not been discharged. The evidence produced by the complainant is insufficient to establish lawful possession or illegal dispossession in the manner alleged.

15. It is further pertinent to note that an appeal against acquittal has a very narrow scope. Once an accused has been acquitted, he enjoys a double presumption of innocence, firstly, the general presumption of

innocence, and secondly, the presumption reinforced by the acquittal recorded by the trial Court. Unless the impugned judgment is shown to be perverse, arbitrary, suffering from patent illegality, or based on misreading or non-reading of material evidence, interference by the appellate Court is not warranted. Reliance in this regard is placed upon *Fida Hussain alias Saboo v. The State* (2025 SCMR 993).

16. In the present case, nothing has been pointed out from the record to demonstrate that the impugned judgment suffers from any legal infirmity, material irregularity, or perversity. The learned trial Court has rightly appreciated the evidence available on record and has arrived at a well-reasoned conclusion. No ground is made out for interference by this Court.

17. For the foregoing reasons, the Criminal Acquittal Appeal is dismissed. Consequently, the pending application, including the application under section 428 Cr.P.C. also stands dismissed.

JUDGE

Wasim/PS