IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO.04/P OF 2013

MST.NAZLI SARDAR DAUGHTER OF SARDAR BAHADUR KHAN,
RESIDENT OF 2-C ABDARA ROAD, UNIVERSITY TOWN, PESHAWAR

APPELLANT

VERSUS

1. MALIK WARIS KHAN SON OF UMAR KHAN
2. MALIK ZAFAR
3. MALIK ABID BOTH SONS OF MALIK WARIS KHAN,
   ALL RESIDENTS OF HOUSE NO.1028,
   STREET NO.38, SECTOR D-IV,
   PHASE-I, HAYATABAD, PESHAWAR
4. THE STATE

……RESPONDENTS

FOR THE APPELLANT	…	MR.ALTAF KHAN, ADVOCATE
FOR RESPONDENTS	…	MR.AMIN UR REHMAN, ADVOCATE
FOR THE STATE	…	MALIK AKHTAR HUSSAIN, ASSISTANT ADVOCATE GENERAL, KPK
NO.& DATE OF FIR POLICE STATION	…	NO.692,DATED 25.08.2003 POLICE STATION, UNIVERSITY TOWN. PESHAWAR
DATE OF THE ORDER OF THE TRIAL COURT	…	14.06.2013
DATE OF INSTITUTION OF APPEAL IN THIS COURT	…	23.08.2013
DATE OF HEARING	…	10.04.2019
DATE OF DECISION	…	10.04.2019
DATE OF JUDGMENT	…	15.04.2019

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- Appellant Mst.Nazli Sardar through Criminal Appeal No.4-P of 2013 assails the legality and validity of the impugned Order rendered on 14th of June, 2013 ("Impugned Order") handed down by learned Senior Civil Judge cum Judicial Magistrate, Peshawar ("Trial Court") whereby respondents Malik Waris Khan son of Umar Khan, Malik Zafar and Malik Abid both sons of Malik Waris Khan have been acquitted of the charges in case FIR No.692/2003 registered with Police Station University Town Peshawar, under the offences, punishable under sections 506,457,448,148,149 and 380 of the Pakistan Penal Code [Act XLV of 1860] ("Penal Code"), read with section 14 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979(VI of 1979) ("Hudood Ordinance") while exercising jurisdiction under section 249-A of The Code of Criminal Procedure, [V of 1898] ("The Code").

2. Essential facts of the instant case are that on 25th of August, 2003 at 09:10 p.m on the written application (Ex.PW.5/1) of complainant Arbab Akbar Hayat (P.W.5),Fazal Muhammad, ASI (P.W.1) lodged an FIR bearing No.692/2003 (Ex.PW.1/1) with Police Station University Town, Peshawar with the allegations that on 24th of August, 2003 at 11.00 a.m in the morning he went out of his house due to some engagements and when he returned home at 12.50 a.m (night), he found several armed persons in and out of his house, who on his query, turned him out of the house by saying that the house belongs to Malik Waris Khan Afridi and Zafar Afridi, who are owners of the house and told him not to come there, otherwise he would be killed. He maintained that cash of Rs.10,00,000/- (rupees ten lacs only) and house hold articles worth Rs.80,00,000/- (rupees eighty lacs only), were lying in the house, therefore, requested for restoration of possession from respondents Malik Waris Afridi, Zafar and Abid.

Mst.Nazli Sardar (P.W.4), claiming to be the owner of the house in question, on 28th of August, 2003 arrived from United States of America and went to her house in the company of police officials. According to her, she unlocked the house and found all her

furniture scattered, doors, locks broken, Safe(Chest) open, jewellery and other valuable articles including documents missing. She maintained that on production of stay order and other relevant document, the possession of the house was restored to her by Inspector General Police, whereafter on the advice of I.G Police she made an application (Ex.PW.4/4) incorporating missing of the said articles.

3. During the course of investigation two Cars and a Coach were taken into possession having been parked in front of Town Nazim-III near Swan Restaurant situated in Hayatabad Peshawar through recovery memo (Ex.PW.2/1) in the presence of Amir Muhammad IHC (P.W.2) and Iftikhar Ahmad Qureshi (P.W.3) Incharge Police Post Town. After recording the statements of the witnesses, arrested and usual investigation the respondents were booked in the instant case to face the consequences of their deeds.

On 25th of November, 2004 the respondents were indicted by framing a formal charge under sections 506,448,457,380,148,149 of the Penal Code read with section 14 of the Hudood Ordinance, to which they pleaded not guilty and claimed trial. The prosecution in order to establish its case produced Fazal Muhammad ASI (P.W.1) who recorded the FIR (Ex.PW.1/1), Amir Muhammad IHC(P.W.2) who stood marginal witness of recovery memo (Ex.PW.2/1) of two Cars and a Coach and Iftikhar Ahmaed Qureshi, Incharge Police Post Town (P.W.3), who is also marginal witness of the recovery of the said vehicles.

The last witness was examined on 16th of May, 2005 whereafter no other witness was produced despite opportunities, thus, the Trial Court while exercising powers conferred under section 249-A of The Code on 31st of May, 2006 recorded acquittal of the respondents, which order was assailed before this Court in pursuance of Criminal Appeal No.23/P of 2006. On 30th of November, 2012, this Court while accepting the referred appeal this Court set aside the Impugned Order and remanded the case for decision afresh.

4. On 5th of January, 2013, the case file was received by the Trial Court and proceeded afresh with the trial by examining Mst.Nazli Sardar (P.W.4) and Arbab Akbar

Hayat (P.W.5). On 30th April, 2013, an application under section 540 of The Code was submitted to summon nine other witnesses alongwith production of record of their previous litigation including civil and criminal proceedings, which was allowed, however, in the meanwhile, the prosecution was directed to produce their witnesses. On failure to do so, the respondents filed an application under section 249-A of the Code dated 30th May, 2013, seeking acquittal of the respondents as it was felt that there was no probability of their conviction as per the available evidence as well as forthcoming evidence as desired.

5. On 14th of June, 2013, the Trial Court allowed the application filed under section 249-A of The Code and thereby acquitted the respondents of the charges, against which the instant appeal has been preferred by appellant Mst. Nazli Sardar.

6. We have heard Mr. Altaf Khan learned counsel for the appellant; Malik Akhtar Hussain Assistant Advocate General KPK for the State as well as Mr. Amin ur Rehman learned counsel for the respondents and perused the available record with their valuable assistance.

7. Learned counsel for the appellant inter-alia contended that there was overwhelming evidence available on record to connect the respondents with the crime but the Trial Court has erred in law as well as on facts by misreading and non-reading of material evidence, which has culminated into miscarriage of justice. Further, it was argued that fair opportunity of hearing has not been afforded for production of the prosecution witnesses, which amounts to throttling of the prosecution by recording acquittal at a pre-matured stage by invoking the provision of section 249-A of The Code making the Impugned Order, erroneous, which merits to be interfered with by setting aside the Order in question and remanding the case for allowing the appellant to adduce the remaining evidence.

On the other hand learned Assistant Advocate General KPK opposed the appeal and vehemently contended that the Order of the trial court is well reasoned, based

on proper appreciation of evidence and that further proceeding with the trial was a futile exercise because the remaining witnesses do not add anything more to the case of the prosecution, so urged that the prosecution has not at all been deprived of any opportunity of production of evidence.

Learned counsel for the respondents while adopting the arguments of the learned AAG, strenuously rebutted the contention so put forth by the learned counsel for the appellant and urged that the appellant has tried to convert a civil liability into a criminal case, evident from the testimony of Mst.Nazli Sardar (P.W.4) and Arbab Akbar Hayat (P.W.5). There is absolutely no direct evidence against respondents either of theft or robbery and that the material witnesses of the occurrence such as Gul Chowkidar and servant Mirza Ali have neither been associated as witness nor produced subsequently in court, casting serious doubt in the prosecution case. He emphasized that the entire evidence, if believed as it is and forthcoming, even then it would be insufficient to hold the respondents guilty of the charges, therefore, the Trial Court has rightly invoked the powers as envisaged under section 249-A of The Code by recording acquittal of the respondents as proceedings ahead would have been nothing but wastage of precious time of the Trial Court. He also added that the counsel for the appellant has failed to point out any illegality, irregularity, misreading and non-reading of evidence, therefore, the appeal against acquittal of respondents needs to be dismissed.

8. After scanning and analyzing the prosecution evidence and impugned Order in view of the arguments advanced by the adversaries, we have concluded with no doubt in mind that the prosecution has tried to prove the title and possession of the bungalow in question rather to prove the criminal felony as alleged against the respondents.

At the time of lodging of FIR (Ex.PW.1/1) Arbab Akbar Hayat, complainant (P.W.5) in his report (Ex.PW.5/1) which took him eight hours in lodging the FIR (Ex.PW.1/1) did not mention that the house in question was owned by Mst.Nazli Sardar

(P.W.4) and that she was abroad at the relevant time, rather portrait himself to be the owner and resident of the house in question, blaming the respondents to have illegally occupied the said house wherein Rs.10,00,000/-(rupees ten lacs only) other house hold articles worth Rs.80,00,000/- (rupees eighty lacs) were lying. His report whereupon FIR (Ex.PW.1/1) was lodged as well as his statement recorded before the Court transpires that he had seen no one taking away the money as well as the house hold articles. Complainant (P.W.5) merely apprehended but was not sure of having been deprived of the said money and house hold articles. He also did not say that the house belonged to Mst.Nazli Sardar (P.W.4) and that he was asked to visit the house in question with the purpose to look after the same in absence of Mst. Nazli Sardar (P.W.4). However, subsequently after recording the statement of Mst.Nazli Sardar (P.W.4), he came up with the improved story as narrated by her (P.W.4). He admitted in the cross-examination that in the FIR he has pretended himself to be the owner of the property in question and that he did not show himself as custodian of the house in question. He also admitted that the cash amount as well as other house hold articles were never shown to him, but voluntarily stated that Mst.Nazli Sardar (P.W.4) told him verbally.

Arbab Akbar Hayat (P.W.5) neither in his police report nor before the court stated to have seen the respondents on the fateful day on the crime scene. According to him, he sustained injuries by the person present at the crime scene, but failed to substantiate his stance by producing any medical evidence. Even otherwise, he did not state in his police report that he had received injuries caused by the assailants, thus his assertion regarding sustaining injuries is nothing but a dishonest improvement with the purpose to strengthen the case of the prosecution. Mst.Nazli Sardar (P.W.4) deposed that she entrusted the house to her Secretary namely Shahnaz daughter of Daulat Khan who had brought two servants namely Mirza Ali and Gul, whereas on the contrary Arbab Akbar Hayat (P.W.5) did not mention a word about the said Secretary Shahnaz being entrusted

with the responsibility to look after the house. In his police report Arbab Akbar Hayat (P.W.5) did not mention about the presence of said servant Mirza Ali and Chowkidar Gul. The aforesaid two witnesses namely Mirza Ali and Gul has neither been associated as witnesses by the prosecution during investigation nor any attempt was made during the trial to produce them. The Hon'ble Supreme Court of Pakistan while interpreting Article 129(g) of the Qanun-e-Shahadat Order, 1984 ("Order of 1984") expounded the ratio in the case of LAL KHAN VERSUS THE STATE (2006 SCMR 1846) that non-production of most natural and a material witness of occurrence, would strongly lead to an inference of prosecutorial misconduct, which would not only be considered a source of undue advantage for prosecution but also an act of suppression of material facts causing prejudice to accused. It was also held that the act of withholding of most natural and a material witness of occurrence would create an impression that had such witness been brought into the witness-box, he might not have supported the prosecution. In the attending case, the said material witnesses have not been produced as such this Court has no option but to infer that if said witnesses had stepped in the witness-box, they might not have supported the case of Mst.Nazli Sardar (P.W.4) and Arbab Akbar Hayat (P.W.5).

9. Criticizing the testimony of Mst. Nazli Sardar (P.W.4), learned counsel for the respondents urged that she had left for United States of America long before the day of alleged occurrence and had arrived on 28th of August, 2003 and as such she was absolutely unaware of the entire episode, therefore, her testimony is based on hearsay evidence and nothing else except relevant to the civil and criminal litigation pending between her, the respondents and her step-mother Mst.Shamim Sardar. This assertion of the learned counsel for respondents is endorsed by us too.

10. The admitted documents (Ex.PW.4/5) to (Ex.PW.4/27) and (Ex.PW.4/29) to (Ex.PW.4/31) produced by Mst.Nazli Sardar (P.W.4) comprising of civil and crimination litigation reveals the chequered history of civil and criminal lis pendens which is also

includes the proceedings initiated under section 3 of The Illegal Dispossession Act, 2005 filed by Mst.Nazli Sardar (P.W.4) on 30th April, 2010 in the court of the District and Sessions Judge Peshawar speaks itself regarding the rivalry of the parties. Mst.Shamim Sardar, the step-mother of Mst.Nazli Sardar (P.W.4) claims to have acquired the house in question from her husband as consideration of 'Haq Mehr' who sold it out to one Ishfaq and the respondents claims to have purchased the same from said Ishfaq through a valid deed of alienation, whereas Mst.Nazli Sardar controverts and denies such transaction. This Court is least concerned with the issue of title and possession of the house in question as admittedly the competent courts are seized of the matter to finally adjudicate the issue in between them.

11. As observed earlier, the thrust of the testimony of Mst.Nazli Sardar (P.W.4) and Arbab Akbar Hayat (P.W.5) had consistently been upon establishing the title and possession and not upon the charges leveled against the respondents, culminating into acquittal of the respondents. In the instant case neither money nor any valuable house hold articles have been recovered from the respondents to corroborate and strengthen the case of the prosecution.

12. As far as the contention of the learned counsel for the appellant regarding not affording the opportunity to produce remaining witnesses cited in the application under section 540 of The Code is concerned, we have gone through the gist of the documents required by the appellant for production in the court. The official witnesses through whom the prosecution intend to prove are related to the civil and criminal litigation, which may be relevant in the civil and in the case of illegal dispossession with regard to title and possession of the house in question but does not help the prosecution in the instant case, holding the respondents culpable, henceforth the contention raised by the learned counsel for the appellant with regard to non-production of a fair opportunity to produce evidence has no force.

13. One of the question, which arose before us was as to whether the Trial Court has rightly exercised the powers as contemplated under section 249-A of The Code or otherwise. For convenience, section 249-A is reproduced herein below:

> "***Sec.249-A. Power of Magistrate to acquit accused at any stage***. *Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if, after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence."*

The court of a Magistrate has been bestowed with the powers to acquit an accused at any stage of the case, if either the charge is groundless or when there is no probability of an accused being convicted. Similar powers have been conferred by section 265-K of The Code to the Sessions Courts and the High Courts under section 561-A of The Code by exercise inheretent powers. In section 249-A of The Code, emphasis is drawn towards the impression *'at any stage'*. Obviously the Legislator has intentionally not imposed any restriction to such powers of acquittal either before recording of evidence, during or at a later stage of the proceedings of the trial. Reference is made to the dicta laid down in the case of THE STATE THROUGH SECRETARY, MINISTRY OF INTERIOR VERSUS ASHIQ ALI BHUTTO (1993 SCMR 523) and BASHIR AHMAD VERSUS ADDITIONAL SESSIONS JUDGE, FAISALABAD AND FOUR OTHERS (PLD 2010 S C 661). The only condition attached is that either the charge is groundless or when there is no probability of accused being convicted.

14. In this case Mst.Nazli Sardar (P.W.4) was admittedly not present on the crime scene whereas Arbab Akbar Hayat (P.W.5) though showed his presence on the crime scene but did not state to have seen the respondents on the crime scene. The rest of the formal witnesses Amir Muhammad IHC (P.W.2) and Iftikhar Ahmad Qureshi (P.W.3) are witnesses to the recovery of two cars and a coach which has nothing to do with the alleged crime.

After analyzing of the aforesaid witnesses, we have concluded that it is a case of no evidence at all and, therefore, the acquittal recorded by the Trial Court while exercising jurisdiction under section 249-A of The Code is in accordance with law as there was absolutely no probability of respondents being convicted on the basis of the evidence already recorded as well as forthcoming as nothing more could be added to the case of the prosecution.

15. Upshot of the above discussion is, that the appellant has failed to show any illegality and perversity in the Impugned Order, which can persuades us to interfere in the order of acquittal recorded by the Trial Court.

The appeal against acquittal of the respondents, having been found by us to be devoid of merit is dismissed.

These are the reason for our short order dated 10th of April, 2019.

(SYED MUHAMMD FAROOQ SHAH)
JUDGE

(SHAUKAT ALI RAKHSHANI)
JUDGE

Islamabad 15th of April, 2019/
M.Akram/