IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

JUSTICE MEHMOOD MAQBOOL BAJWA
JUSTICE SYED MUHAMMAD FAROOQ SHAH

Cr. Appeal No.03-K of 2013

The State --------- Appellant.

Versus

1. Rehmatullah Marwat son of Haji Mausam Khan,
   Resident of Flat No. E-6 Shumael View Phase-1,
   GulzarHijri, Karachi.
2. Muhammad AslamAwan s/o Muhammad Din,
   Resident of Quarter No. 355, G-Police Line,
   Thana Fairior, Karachi.
3. Muhammad AslamJagarani s/o Mazari Khan,
   Resident of Flat No. 1/3, Nouman Complex 3-D/3
   Gulshan-e-Iqbal, Karachi.
4. Shafiq-ur-Rehman s/o Muhammad Zaman
   Resident of Flat No. 668 Mohalla
   Muhammad Nagar Bus Stop 89,
   Landhi, Karachi. ---------- Respondents.

Counsel for the Appellant/State	**---**	**Mr.Saleem Akther Buriro, Addl.PG, Sindh**
Counsel for the Respondents	**---**	**Mr.Dilawar Hussain Khatna, Advocate.**
Counsel for the Complainant	**---**	**Mr. Ashraf Ali Butt, Advocate**
FIR No, date& P.S	**---**	**FIR No.179 dated 06.07.2001,**
	---	**P.S Jamshed Quarter, Karachi (East).**
Date of impugned judgment	**---**	**25.11.2011.**
Date of institution	**---**	**21.03.2013.**
Date of hearing	**---**	**25.10.2018.**
Date of decision	**---**	**25.10.2018.**

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JUDGMENT

SYED MUHAMMAD FAROOQ SHAH, J.—By invoking the extraordinary jurisdiction of this Court under Section 417 (1) Cr.P.C,the State through

Prosecutor General, Sindh has directed the captioned appeal against the judgment of acquittal, pronounced by the learned 1st Additional Sessions Judge, Karachi (East) on 25.11.2011, whereby the accused/Respondents were acquitted.

2. Succinct facts of the prosecution case as narrated by the applicant/complainant Muhammad Imran Butt in his application (Ex: 12-A), converted into the FIR No. 179/2001 (Ex: 15-A), lodged on 06.07.2001 at Police Station Jamshed Quarters, Karachi, regarding incident occurred on 18.03.2001 are that in between 0100 hours to 0200 hours, the accused persons being police personals in furtherance of their common intention criminally trespassed into '*Kabari*' shop of uncle of the Complainant namely Sarfraz Butt and illegally/wrongfully confined Complainant Imran Butt, his uncle Sarfraz Butt and other persons at Verandah of Police Station Jamshed Quarters, Karachi (East) for more than ten (10) days, knowingly that they are acting contrary to law and dishonestly removed cash Rs. 48,000/-, broken gold rings and bangles of PW Sarfraz Butt.

3. On completion of usual investigation, final report under Section 173 Cr.P.C submitted before competent court of law having jurisdiction was duly accepted and after completing all codal formalities, formal charge (amended consolidated charge) was framed against the Respondents for an offence punishable under Section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with sections 392/220/344/452/34 PPC, to which accused pleaded not guilty and claimed to be tried.

4. To substantiate its case, the prosecution examined all material witnesses and on completion of prosecution evidence, statements of the accused persons were recorded by the trial Court under Section 342 Cr.P.C, in which the accused persons professed their innocence. The trial Court, in detail and elaborate impugned judgment, acquitted the respondents by extending them benefit of doubt.

5. We have considered worthy arguments advanced by learned Counsel for the parties at length and carefully scanned the material available on record.

6. Learned Additional Prosecutor General, Sindh representing the State/Appellant assisted by Mr. Muhammad Ashraf Butt, advocate argued that the learned trial Court while acquitting the accused has failed to appreciate the settle principle of law of Evidence Act in its letter and spirit as statements of witnesses, on material points were not challenged and rebutted in cross examination, in absence of any circumstance to the contrary, therefore, the same would be legally presumed to have been accepted. It is further argued that the learned trial Court also failed to appreciate the verdicts of the Hon'ble High Court of Sindh and Hon'ble Supreme Court of Pakistan thereby the proceedings arose out from the said FIR No. 77/2001 was quashed by the Courts and was upheld by the Apex Court and the present proceedings were outcome of the false declared FIR. He also argued that the learned trial judge acted on the basis of non-reading and misreading of evidence rather carelessly in acquitting the accused without first examining the material available on record to justify the conviction; besides, all the documentary or verbal evidence deposed and exhibited by the PWs is unchallenged and unrebutted on the points of commission of offences in which they were charged. It is further argued that it is well settled principle of law that if any piece of evidence or a certain point raised in examination in chief is not challenged in the cross examination then is presumed to be accepted as true by the other side; more particularly, respondents/accused have committed heinous crime so that under the settled norms of justice decided by the Superior Courts, the discrepancies, irregularities and immaterial contradiction may not be hurdle in the way of to do substantial justice and learned trial Court may be dilated upon each and every aspect of the matter, which falls within the jurisdiction of the trial Court. Learned State Counsel contended that the trial Court judgment suffered from obvious and glaring defects and infirmities. In the last, he prayed that the judgment recorded by the trial Court (impugned herein) may be set-aside and respondents/accused be convicted accordingly.

7. Conversely, learned Counsel representing the respondents/ accused, while arguing the case, submits that the Complainant and his uncle Sarfraz Butt, cousin namely Kamran Butt were booked in case Vide FIR No. 77/2001 on 18.03.2001, under Section 6/9 of CNS Act r/w sections 109/182/211 P.P.C and its investigation was entrusted to Muhammad Aslam Awan SI, who produced the accused before Judicial Magistrate for the purpose of remand. It is argued that the Complainant, who is an Advocate, after release on bail, has got order of reinvestigation of the case from the Sindh High Court and subsequently the complainant also obtained the findings of reinvestigation against the aforesaid FIR. The complainant also obtained the directions from Sindh High Court i.e. "*statement of the complainant be recorded and if the cognizable offence is made out then FIR be registered in proper section*"; however, complainant approached to the police station and has filed application instead to record his statement and that application was wrongly converted into FIR though according to the said statement, no offence has been made out and as such wrong FIR with wrong sections have been registered. Learned Counsel has further argued that the main object and contention of complainant is to initiate criminal proceedings against the police party, who allegedly raided upon the shop of Sarfraz '*Kabaria*' and looted Rs. 48,000/- and eight broken gold bangles as such police party trespassed and thus falsely involved them in this case. According to the learned Counsel for the accused, the complainant is admittedly not an eye witness; more particularly, complainant was produced before the Judicial Magistrate concerned on different dates but no complaint was filed by the complainant regarding any wrongful confinement or any maltreatment by the Respondents. Learned Counsel, at the end, argued that SI Rehmatullah Marwat, being SHO of the area, went to the spot to rescue the police party which was detained by the complainant's family; more particularly, it is not possible unless FIR No. 77/2001 declared false, no fresh FIR against the accused persons can be lodged but in the present case FIR No. 179/2001 was lodged on 06.07.2001 and the FIR No. 77/2001 was declared false on

18.07.2001 and as such the present case on the basis of FIR No. 179/2001 has no legality and therefore, the entire proceedings were *void ab-initio*, hence the appeal is liable to be dismissed. Learned Counsel argued that neither the acquittal is based on evidence leading to miscarriage of justice n*or* the impugned judgment is based upon surmises, suppositions and conjectures and the acquittal is result of reasons, which appeal to a prudent mind. Next argued that it is settled principle of law that extraordinary remedy of an appeal against acquittal is quite different from an appeal directed against the findings of conviction and sentences. The appellate jurisdiction under Section 417 Code of Criminal Procedure can be exercised by this Court if gross injustice has been done in the administration of criminal justice as the scope of appeal against acquittal is considerably limited because presumption of double innocence of the accused is attached to the acquittal.

8. Before adverting to the merits or demerits of the case in hand, it may be advantageous to reproduce hereinbelow penultimate paragraphs 42 & 43 of the impugned judgment:-

> "42. *I am of the firm belief that initially the police party taken the PW Sarfraz and an iron box from his shop and brought at PS and allegedly recovered ½ kilogram heroine and that case was proved to be false in the investigation by the crime branch and subsequently the FIR was quashed by the Hon'ble High Court on 15.03.2002. The present FIR was lodged by the Complainant after three months after their arrest in FIR No. 77 of 2001. The story of commission of offence / Harrabah is appearing to me to be an afterthought story. Had the police any intention to commit robbery they may have committed robbery at the shop of the PW Sarfraz what was the need for them in that situation to bring at the P.S and lodged an FIR against him under Section 6/9 Narcotics Act. Delay in lodging of FIR is another factor which has made the case of prosecution doubtful. The delay in lodging of FIR is condonable keeping in view of the circumstances of each case, however, heavy duty is casted upon the prosecution to explain the same otherwise the prosecution case becomes doubtful. These were the observations made in the case law reported in PLJ 2004 SC 552. The delay in lodging of FIR has not been explained by the complainant in his statement under Section 154 Cr.P.C nor even in his deposition recorded before this Court in order to explain the reasons and circumstances which prevented him from lodging the FIR for such long period. The complainant has stated in his examination in chief*

that he was released on bail in FIR No. 77 of 2001 on 07.04.2001. The complainant is not a layman he was a practicing lawyer even at the time of registration of that case, he may have directly approached to the concerned PS for registration of FIR soon after of his release or even had approached the concerned Court for filing application under Section 22-A Cr.P.C. even may have filed a private complaint within reasonable time but this was not done and the statement under Section 154 Cr.P.C was recorded on 06.07.2001 after approximately three months from his release on bail. These circumstances have made the case of prosecution highly doubtful.

43. Additionally the availability of the gold bangles at the Kabari shop are not appealing to a prudent mind, no recovery of the robbed article was affected from the accused persons. So far question of involvement in the Narcotics case and wrongful confinement or the trespassing in the shop of complainant are concerned, that was committed the present accused in Crime No. 77 of 2001 under Section 6/9-b Narcotic Act r/w. 353/342 PPC which was disposed of in "B" class and resultantly the FIR was quashed by the Hon'ble High Court on 15.03.2002. In that case, the course available with the complainant side was to have filed the complaint against the accused under Section 182 and 211 PPC which has not been done by the complainant side in the present case. It is also pertinent to mention here that after the FIR No. 77 of 2001, under Section 6/9 of Narcotics Act proving to be a false case against the complainant and his uncle Sarfraz from the FIR under Section 6/9 of Narcotic Act was registered against the present accused after keeping the same foisted upon the complainant party and FIR No. 179/2001 was registered but in that case, the accused persons have also been released by the CNS Court vide its judgment dated 31.03.2009."

9. It is an admitted position that alleged incident had taken place on 18.03.2001, while the matter was reported on 06.07.2001, after sufficient period of months together, without any plausible cause. The Complainant was involved in narcotics cases and he was granted bail on 07.04.2001 and, even after his release on bail, he did not make the complaint for considerable delay without any sufficient reason till 06.07.2001 though he has filed writ petition for reinvestigation of the case but did not lodge any complaint for registration of the case regarding his illegal confinement/ commission of *Harraba* and his involvement in a false case. Complainant and PW Sarfraz Butt were confined under the allegation of possessing narcotics for an offence punishable under Section 6/9 of C.N.S Act, 1997 and such FIR was registered against them. *Insofar* as arrest of Sarfraz from his shop and

taken up the iron box by the accused/respondents is concerned, it is not a disputed fact but the controversy remains to be resolved is that whether after taking Sarfraz Butt alongwith iron box at Police Station, Police party committed *Harraba* on gun point though it has been alleged by the concerned police party that half kilogram Heroine was recovered from the said trunk.

10. It needs to be reiterated that extraordinary remedy of an appeal against an acquittal is quite different from an appeal preferred against the findings of conviction and sentence. Obviously, the appellate jurisdiction under Section 417 Code of Criminal Procedure can be exercised by this Court if gross injustice has been done in the administration of criminal justice, more particularly, wherein, findings given by trial Court are perverse, illegal and based on misreading of evidence, leading to miscarriage of justice or where reasons advanced by the learned trial Court are wholly artificial. Scope of appeal against acquittal of accused is considerably limited, because presumption of double innocence of the accused is attached to the order of acquittal. Order of acquittal passed by trial Court, more particularly, the paragraphs 42 &43 of the impugned judgment, reproduced hereinabove are based on correct appreciation of evidence, would not warrant interference in appeal. It is settled principle of law that accused earns double presumption of innocence with the acquittal; first, initially that till found guilty he has to be considered innocent; and second, that after his acquittal by trial Court further confirmed the presumption of innocence as held in **2012 P Cr. L J 1699 (FSC)** (*Said Rasool V Sajid and 3 others*), **2013 YLR 223** (*Mst. Zahida V Koki Khan and 2 others*), **2011 P Cr.L J 1234** *Abdul Ghafoor V Zafid Wali. In the case reported in--* **2013 P Cr. L J 374** (*Fateh Muhammad Kobhar v. Sabzal and 4 others*) it was held that appellate court would not interfere in acquittal order, unless misreading of evidence, violation of legal provisions, jurisdictional defect; acquittal order on face of it being contrary was established. Reliance in this regard may also be placed on **2013 P Cr. L J 345 and PLJ 2009 FSC 284.** Suffice is to say that the order of acquittal passed by the trial Court

being balanced and well-reasoned, would hardly call for interference of the appellate Court in appeal and similarly this Court cannot disturb acquittal if main grounds on which trial Court had based its acquittal order are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished. In such context, law has elaborately been expounded in **AIR 1934 P C 227** (2) (*SheoSwarup and others v. King Emperor,* (ii) **P L D 1985 S C 11** (*GhulamSikandar and another v. Mamraz Khan and others*), (iii) **PLD 1977 S C 529** (*FazalurRehman v. Abdul Ghani and another),* (iv) **P L D 2011 S C** 554 (*The State and others v. Abdul Khaliq and others),* (v) **P L D 2010 S C 632** (*Azhar Ali v. The State*), (vi) **2002 S C M R** 261 (*Khadim Hussain v.Manzoor Hussain Shah and 3 others*), (vii) **P L J 2002 S C 293** (*Khadim Hussain v.Manzoor Hussain Shah and 3 others)* (viii) **2013 P.Cr.L.J 374** (*Fateh Muhammad Kobhar v. Sabzal and 4 others),* (ix) **2011 P.Cr.L.J 856 (FSC)** (*Mst. Salma Bibi v. Niaz alias Billa and 2 others),* (x) **PLD 1994 S C 31,** (*Ghulam Hussain alias Hussain Bakhsh and 4 others v. The State and another),* (xi) **2010 S C M R 1592** (*Qurban Hussain alias Ashiq v. The State*), (xii) **2017 S C M R 633** (*Intizar Hussain v. HamzaAmeer and others*) are fully attracting in the peculiar facts and circumstances of the case. In the case of *Intizar Hussain v Hamza Amir and others,* reported in **2017 SCMR 633**, the Hon'ble Supreme Court held;-

نیز انصاف اور قانون کا مسلمہ اصول یہ ہے کہ اگر دو مختلف نوع کے رپورٹ یا شہادت فوجداری مقدمہ مثل میں آ جائے تو عدالت اس شہادت اور مواد کو ترجیح دے گی جو ملزم کو فائدہ دے ناکہ اس شہادت اور مواد کو جو کہ استغاثہ کے حق میں جاتا ہو۔ لہٰذا اس مسلمہ اصول جوکہ ایک صدی پر محیط ہے کو بروئے کار لاکر ملزم کو اس کا فائدہ لینے کا حق پہنچتا ہے .

11. Adverting to the legal proposition of law, the trial Court has correctly held that a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused; entitle him to such benefit not as a matter of grace but as a matter of right; more particularly conviction cannot be based on high probabilities and suspicion cannot take the place of proof, therefore, the acquittal recorded by the learned

trial Court after proper appraisal of evidence is in accordance with law. Crux of the aforementioned discussion is that the prosecution has failed to bring home the charge against the Respondents beyond reasonable doubt and the defense succeeded to create serious doubt and dents in the prosecution case; thus the trial court rightly acquitted the Respondents of the charge. Suffice it to say that no case of interference in the impugned judgment is made out. Consequently, we reached at the irresistible conclusion that the instant appeal against the impugned judgment is having no merits for consideration.

13. These are the reasons of short order of dismissal of appeal of even date announced by us in court.

JUSTICE MEHMOOD MAQBOOL BAJWA

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Karachi
October 25th 2018
Faisal Mumtaz/PS