

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.59/2017

Mst. Nasheed Anam Shahid Siddique Khan

versus

Sheikh Abdul Aziz & another

Appellant by: Malik Ghulam Mustafa Kandwal along with
Malik Muhammad Fiaz Kandwal, Advocates.

Respondents by: Ms. Misbah Ashiq, Advocate along with
respondent No.1.
Mr. Fareed Hussain Kaif, State Counsel.

Date of Hearing: 06.11.2019.

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellant has assailed the order dated 28.03.2017 of the learned Judicial Magistrate 1st Class-West, Islamabad, whereby respondent No.1 has been acquitted in case FIR No.35, dated 02.02.2015, under Sections 379, 427, 440, 457, 148, 149, 506(ii) PPC, P.S. Golra Sharif, Islamabad.

2. Brief facts referred in the instant appeal are that the appellant has lodged the aforesaid FIR against respondent No.1 and others with the allegations that the accused persons have trespassed into the land belongs to the appellant's deceased husband namely Shahid Siddique Khan, comprising of 174-Kanal & 04-Marla in Khasra No.787-850, Mouza Shah Allah Ditta, Islamabad, whereas the late husband of appellant had also filed civil suit as well as criminal cases against such accused persons, and in this regard a local commission was also appointed, who declared appellant's deceased husband in possession of the said land. However, after the death of appellant's late husband, the appellant has engaged Said Anwar, Sultan Muhammad and Muhammad Yaqoob as Chowkidars to protect the land. On 02.01.2015, at about 05 p.m. in the evening, Sheikh Abdul Aziz/respondent No.1, Ch. Hafeez, Tahir Hussain Shah, Zawar Hussain Shah

and dozens of other individuals armed with weapons entered into the land by force, cut the trees down, demolished the rooms, stolen the articles lying in the said rooms and extended life threats to the aforesaid Chowkidars. Consequently, the police during the investigation arrested accused persons, submitted incomplete challan and at later stage arrested respondent No.1 pursuant to recording of supplementary statement. However, Respondent No.1 on filing application under Section 249-A Cr.P.C. was acquitted of the charge by the learned Judicial Magistrate 1st Class (West), Islamabad vide impugned order dated 28.03.2017. Hence, the instant appeal.

3. Despite best efforts of this Court, the appellant's counsel has not put appearance after 16.10.2017 i.e. at the time of admission of criminal appeal, whereafter the case was fixed for hearing on 12.12.2017, 21.02.2018, 17.04.2018, 05.06.2018, 03.10.2018, 29.11.2018, 18.03.2019, 10.05.2019, 24.10.2019 and finally on 06.11.2019, even last warnings were issued on 18.03.2019 and 24.10.2019 to the appellant side to argue their appeal or else the matter shall be decided as per available record. In compliance of warnings/directions, the appellant side submitted written arguments through learned counsel Malik Muhammad Faiz Kandwal, Advocate, who also argued the case.

4. The written arguments submitted on behalf of appellant have been received, wherein it has been contended that the learned Trial Court has not appreciated the evidence available on record despite framing of formal charge against respondent No.1. The requirements of Section 249-A Cr.P.C. were not considered in proper manner, whereas the charge was not groundless and probability of conviction is visible, however all these facts have not been considered by the learned trial Court and even no opportunity was provided to complainant to prove her case against respondent No.1.

5. Conversely, learned counsel for respondent No.1 contended that he was not involved in the instant case, rather he purchased the land through different mutations, which have been acknowledged in the Revenue Court and appended with the record, while there is no probability of conviction, especially when respondent No.1 is owner of land and the entire criminal case is based upon false allegations.

6. Learned State Counsel contended that charge against the accused persons has been framed by the learned Trial Court on 17.11.2015 and 14.11.2015, however the matter has been delayed due to filing of application under Section 249-A Cr.P.C. and till date no evidence has been recorded. It has further been contended that the learned Trial Court can appreciate the record at any stage of trial in terms of Section 249-A Cr.P.C. and there is no bar upon the Court to pass such order, even without recording of evidence.

7. Arguments heard, record perused.

8. Perusal of record reveals that the appellant is the complainant of case FIR No.35, dated 02.02.2015, under Sections 379, 427, 440, 452, 148, 149, 506(ii) PPC, P.S. Golra Sharif, Islamabad, wherein it is alleged that land measuring 174-Kanal & 04-Marla in Khasra No.787-850, Mouza Shah Allah Ditta, Islamabad was purchased by Shahid Siddique Khan i.e. deceased husband of appellant, who had improved the said property by affixing razor-wires, constructed rooms and planted trees, while he had some disputes with different individuals namely Tahir Shah and Zawar Shah, whereby different civil and criminal cases were pending and the local commission duly appointed by the Courts submitted the reports, which reflect that late husband of appellant was in possession of the property in question. However, after the demise of the appellant's husband, the appellant has hired Said Anwar, Sultan Muhammad and Muhammad Yaqoob as

Chowkidars for protection of the land. On 02.01.2015, Sheikh Abdul Aziz/respondent No.1, Ch. Hafeez, Tahir Hussain Shah, Zavar Hussain Shah together with dozens of other armed personnel entered into the said premises and took over the possession of the land in question by force and subsequently demolished the rooms and cut down the trees. It was further alleged by the appellant that the accused persons committed theft and removed articles belong to the appellant.

9. Despite submission of the challan in the Court and framing of charge against the accused persons no evidence was recorded for reason that an application under Section 249-A Cr.P.C. was filed by respondent No.1, whereby the learned Trial Court accepted the said application and acquitted respondent No.1 of the charge through the impugned order.

10. The read-through of the application filed under Section 249-A Cr.P.C. reveals that respondent No.1 has taken the plea that he was neither nominated in the FIR nor any overact was attributed to him, and even he was not identified in this case, rather he has been implicated through supplementary statement after 07 months of the occurrence without disclosing the source of information.

11. The meticulous perusal of the record discloses that name of respondent No.1 has been mentioned in the FIR as well as in the statements recorded under Section 161 Cr.P.C. by the Chowkidars namely Sultan Khel, Syed Anwar and Muhammad Yaqoob, while the plea taken by respondent No.1 that he was subsequently nominated in this case is not reflected from the record of the learned Trial Court, which could only be appreciated during the course of evidence and as such, report under Section 173 Cr.P.C. is not supporting the plea of respondent No.1.

12. I have also gone through the impugned order of the learned Trial Court, whereby respondent No.1 has been acquitted on the ground that the charge is groundless having no probability of conviction. This view of the learned trial Court suffers from non-reading and non-appreciation of evidence available on record as the three (03) Chowkidars through their statements recorded under Section 161 Cr.P.C. have nominated respondent No.1 at the first instance, even otherwise, the local commission reports dated 27.02.2001 and 20.09.2003 tendered in the previous round of proceedings in suits titled Shahid Siddique Khan vs. Syed Tahir Shah and Tahir Hussain Shah vs. Shahid Siddique Khan, etc. clearly reflect that Shahid Siddique Khan i.e. appellant's late husband was in possession of the suit property. Similarly, one electricity connection on the basis of demand note dated 28.03.2000, Electric Inspector report and electricity bill appended with the challan also reveal the initial possession of the suit land in favour of the appellant's late husband. Manifestly, the learned trial Court by overlooking and without appreciating all these facts has passed the impugned order, rather the learned Trial Court has put much emphasis on the conduct of investigating agency for not taking incriminating evidence during the course of investigation, which itself is not a ground to give premium to accused persons.

13. In view of above discussion, the probability of conviction has not been seen by the learned Trial Court in a proper manner, rather the impugned order was passed in haste, therefore, the instant appeal is hereby ALLOWED and the impugned order dated 28.03.2017 of the learned Judicial Magistrate, 1st Class (West), Islamabad is SET ASIDE, and the matter is remanded to the learned Trial Court to decide the case after recording of evidence of the parties, however during the interregnum, the respondent shall remain on bail subject to furnishing

of fresh bail bonds in the sum of Rs.200,000/- to the satisfaction of the learned Trial Court.

14. While considering the entire background of the case, the learned Trial Court seized with the matter is directed to conclude the trial within next 04 months by calling evidence of the prosecution on day-to-day basis and shall ensure that every accused person shall appear before the learned Trial Court, whereas the concerned S.H.O. and Investigating Officer shall also produce all evidences before the learned Trial Court to complete the trial.

15. Moreover, perusal of the order sheet reveals that after filing of the application under Section 249-A Cr.P.C. by respondent No.1, the matter has been kept pending on numerous dates and such kind of delay on the part of Court is not appreciable, therefore, direction is issued to the learned Sessions Judges as well as to the concerned Magistrates dealing with criminal cases that the trial shall not be suspended on filing of application under Section 249-A Cr.P.C. or 265-K Cr.P.C. on behalf of accused person, rather such application shall be decided within next two (02) to three (03) dates.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 19.11.2019.

JUDGE

Khalid Z.