

JUDGMENT

This is an appeal against judgment dated 26.11.2021 in which the learned Judicial Magistrate Section-30 East-Islamabad acquitted respondent No.1, Khan Afzal, who had been charged under Sections 427 and 447, P.P.C. for mischief causing damage to property and for criminal trespass, respectively.

2. The prosecution's case was that Khan Afzal tore down a wall that separated a house owned by him and a property constructed on a 03 Marla in Kehwat No.402, Khatooni No. 515, Khasra No. 1430/11-15 in Khanna Dak ("Property") owned by the appellant, who was the complainant in the case ("Complainant"). It was the Complainant's contention that he purchased the Property from his aunt, who was the ex-wife of Khan Afzal, and the marriage of Khan Afzal and the Complainant's aunt Mst. Shehnaz Parveen had broken-down after Khan Afzal contracted another marriage. The prosecution claimed that by tearing down the wall separating Khan Afzal's house from that of the Property claimed by the Complainant, Khan Afzal had rendered himself liable for charges under Sections 427 and 447, P.P.C. After framing of charge Khan Afzal denied the same and demanded a trial.

3. The learned Judicial Magistrate has summarized the evidence adduced during the trial in sufficient detail, which need not be rehearsed here. After considering the evidence, the learned trial Court concluded that the ingredients of the offences that the appellant had been charged were not made out. The learned trial Court took into account the fact that the Complainant as PW-1 was unaware of the existence of the utility connections at the Property, the ownership of which was claimed by him and trespass against which was being alleged by him. It further noted that the Complainant as PW-1 had acknowledged that he did not have possession of 06 Marlas house within which Khan Afzal had allegedly broken a wall resulting into the charges brought against him. The learned trial Court observed in relation to PW-2 that the Investigating Officer had not investigated where the Complainant resided along with his family and had not scrutinized the titled documents presented by the Complainant in relation to the Property, trespass against which formed the subject-matter of the charges against the Khan Afzal. The learned trial Court found that there was no ocular testimony other than that of the Complainant himself supporting the prosecution's case regarding the breaking of the wall by Khan Afzal or intimidation of the Complainant by Khan Afzal and that consequently offence under Section 447 of P.P.C. was not made out. It further found that the site map reflected the place of occurrence at the back end of the house and the wall identified as having been broken by Khan Afzal was not the wall that separated the house of Khan Afzal and the Property claimed by the Complainant. It further found that there was no finding with regard to the cost of damage inflicted on the Complainant's Property and consequently the ingredients of offence under neither Section 427 nor Section 447, P.P.C. were made out. The learned trial Court while relying on the judgment of the august Supreme Court *Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others* (PLD 2019 SC 675) observed that the USB and photographs presented by the Complainant could not be read into evidence as their authenticity had not been proved in accordance with the law laid down by the august Supreme Court. The learned trial Court, therefore, concluded that the prosecution had failed to bring forth confidence-inspiring evidence against Khan Afzal in the case filed by the complainant, who was the nephew of Khan Afzal's ex-wife, and consequently acquitted Khan Afzal.

4. Learned counsel for the appellant took the Court through record of the learned trial Court and emphasized that Khan Afzal had admitted before the police authorities in an Iqrarnama filed by him that he had initiated the demolition of wall and that he would suspend further demolition but then he demolished the entire wall which led to the registration of the FIR by the Complainant. He submitted that the learned trial Court had not appreciated the testimony of the Complainant as PW-1 and that it had been held by the august Supreme Court in *Asfandiyar v. The State* (2021 SCMR 2009) that even the statement of the solitary witness was sufficient to prove a criminal charge. He further submitted that there was no mandatory requirement for police authorities to prepare a scaled site plan and the learned trial Court's disregard of the site plan was not in accordance with law. He submitted that the Complainant had established his ownership of the Property by placing on record as Exh-P1/1-2 the sale deed between the Complainant and Mst. Shehnaz Parveen wife of Khan Afzal. He submitted that the learned trial Court had not taken into account the fact that Khan Afzal was the owner of 03 Marlas of land that he had purchased from Mst. Ejaz Parveen and that such land was separate from the land that the Complainant had purchased from Mst. Shehnaz Parveen on which the Property in question was built. He submitted that the prosecution had successfully established that the appellant had trespassed the Property and had caused damage to the Complainant's Property and 4 consequently the ingredients of offences under Sections 427 and 447, P.P.C. were made out as could be verified from the evidence adduced through the USB and Photographs presented before the Court.

5. Learned counsel for respondent No.1 submitted that there is double presumption of innocence attached to an accused who had been found not guilty by a trial Court. She submitted that the prosecution presented no evidence regarding the Complainant's possession of the Property. The testimony of the Complainant as PW-1 established that he was neither in possession of the Property nor was aware of who had installed utility connections at such Property. And further acknowledged in his testimony that he had not undertaken construction of the Property. In the absence of proof of possession of the Property, no case for criminal trespass or causing damage to the Property of the Complainant could be made out. She submitted that as the Complainant was not in possession of the Property as has been tacitly acknowledged by PW-2 in his testimony who stated that the Complainant was resident of Haripur and that as part of the investigation, PW-2 did not investigate where the Complainant resided along with his family. That the ownership of the Property was in dispute in two cases, which were pending adjudication before the civil Courts and the possession of the Property was not established through evidence. Thus, neither the offence of criminal trespass nor that of causing damage under Sections 447 and 427, P.P.C. were made out. She stated that the fard produced as Exh-P1/2 also appeared to be a fake document as it stated that payment of consideration was made on 01.09.2020 and the Property was transferred on 07.09.2020 by the ex-wife of Khan Afzal to the Complainant but the deed was documented on 10.09.2020. She sought for the appeal to be dismissed.

6. The fact that the ownership of the Property is the subject matter of civil suits pending before the Courts of competent jurisdiction in which the appellant and respondent are parties is not disputed. The question of ownership of the land on which the Property is constructed is therefore presently subjudice. The prosecution could not establish to the satisfaction of the learned trial Court that the Complainant was in possession of the Property. The testimony of Complainant as PW-1 supports the finding of the learned trial Court that the Complainant could

not establish that he was in possession of the Property. The Complainant as PW-1 acknowledged that he was unaware of the number of utility connections available at the Property and could adduce no evidence establishing his possession. It should not be hard for a person in possession of a property to establish the same through direct and secondary evidence in the event that such person resides at such property. The Investigation Officer as PW-2 had also admitted that he never investigated where the Complainant customarily resided with his family. The site map produced as Exh-P10 reflects that identification mark 1 is the place where the wall was allegedly torn down by Khan Afzal. But such wall is reflected as back wall of the property being claimed by the Complainant and not the adjoining wall between the house of Khan Afzal and the Property being claimed by the Complainant. The appellant could not establish before the Court that the learned trial Court misappreciated the law laid down by the august Supreme Court in Ishtiaq Ahmed Mirza as to how pictorial and video evidence was to be adduced in evidence.

7. Notwithstanding the lack of consideration of such video evidence, even if there was any photographic or video evidence regarding Khan Afzal tearing down a wall, such secondary evidence would not constitute an offence under Section 427 or 447, P.P.C. unless it was first established that such wall was torn down within property that belonged to someone else. In the instant case, the ownership and the possession of Property being claimed by the Complainant is in dispute. The question of ownership is pending adjudication before two civil Courts. And the possession of the Property by the Complainant has not been established by the prosecution. In the absence of establishing through credible evidence that the property within which a wall was broken-down by Khan Afzal belonged to the Complainant, neither an offence under Section 427, P.P.C. could be made out nor that under Section 447, P.P.C. It is also well settled law that acquittal carries with it double presumption of innocence.

8. In view of the above, this Court finds the impugned judgment suffers from no legal infirmity. The instant appeal is without merit and is accordingly dismissed.

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