

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Appeal No. S- 82 of 2016

Appellants 1. Zulfiqar Ahmed son of Gulzar;
2. Asif Ali son of Shah Nawaz; and
3. Maroof Ali son of Nazal
Through Mr. Athar Abbas Solangi, Advocate

Complainant Through Mr. Muhammad Ali Mangi,
Advocate.

Respondent The State
Through Mr. Sharafuddin Kanhar, A.P.G.

Date of hearing 16.05.2019

Date of Judgment 15.07.2019

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JUDGMENT

SHAMSUDDIN ABBASI, J:- Appellants Zulfiqar Ahmed, Asif Ali and Maroof Ali were tried by learned Additional Sessions Judge-IV, Shikarpur, in Direct Complaint No.02 of 2014 for the offence punishable under Sections 302, 148, 149, PPC {*Re: Mst. Sagheeran v Zulfiqar Ahmed & others*}. By a judgment dated 06.09.2016 they were convicted under Section 302(b), PPC and sentenced them to undergo imprisonment for life as Ta'zir and to pay a fine of Rs.100,000/- {Rupees one hundred thousand} each as compensation to the heirs of deceased under Section 544-A, Cr.P.C., in default whereof they were ordered to undergo simple imprisonment for six months more each. However, the benefit in terms of Section 382-B, Cr.P.C. was extended to them.

2. Succinctly, the case of the prosecution case is that on 29.05.2013 complainant alongwith her daughter, Mufeeda Begum, sons, Altaf Hussain and Khalid Hussain was available in her house when Mst. Noreen daughter of Mazhar Ali Abro, who had come as guest and due to odd hours stayed in her house, after taking meal they went to sleep on their respective cots while electric bulbs were glowing. It was about 2.00 am she woke up on some noise and awakened her son Khalid Hussain. They saw five persons in their house, identified three of them as Zulfiqar Ahmed, Asif Ali and

Maroof Ali and two unknown persons whose faces were opened and identify-able, armed with pistols. The culprits overpowered them and asked to keep quite. Meanwhile, her son Altaf Hussain, daughter Mufeeda Begum and guest Noreen also woke up and on seeing them Zulfiqar fired at her son Altaf Hussain, one bullet hit at his chest and the another one hit at right side of neck while the fires shot by Asif hit his chest and left arm, resultantly her son Altaf Hussain fell down raising cries. Maroof Ali also fired and the bullet hit to Mst. Noreen at her stomach and two of the fires shot by Zulfiqar hit her chest and right arm and she too fell down raising cries. The complainant party raised commotion which attracted co-villagers and on seeing the situation all the culprits ran away without taking any household articles making aerial firing. Meanwhile, the relatives of the complainant informed Police Station Sharif Kharos and within a short period police arrived at the scene. They arranged conveyance and brought both dead bodies to Taluka Hospital Lakhi Ghulam Shah for post-mortem and after completing legal formalities the dead bodies were handed over to them. On next day of funeral the complainant alongwith her relatives and witnesses went to P.S. Sharif Kharos and narrated the whole story. The SHO assured that he will lodge FIR and call them as and when needed. Later on, she came to know that police in collusion with the culprits lodged FIR at their own on behalf of the State and not as per her verbatim. Since the culprits were extending threats for not pursuing the matter, therefore, the complainant approached Court of Sessions for lodgment of her FIR and then filed direct complainant under directions of Court.

3. Statement of complainant was recorded under Section 200, Cr.P.C. was recorded on 17.02.2014 and subsequent thereto the matter was referred to the Judicial Magistrate Lakhi for holding preliminary inquiry and report. Statements under Section 202, Cr.P.C. of witnesses, Khalid Hussain, Mst. Mufeeda, Dr. Khadim Hussain Bhatti and Dr. Naila Shaikh were recorded on 05.03.2014 by Judicial Magistrate Lakhi and on the same day a report under Section 220{2}, Cr.P.C. was submitted and subsequent thereto the direct complainant was admitted, whereby the appellants were sent-up for trial. Bailable warrants in the sum of Rs.50,000/- {Rupees fifty

thousand} were also issued against appellants and in response thereto they appeared in Court and furnished the required bonds.

4. Charge against appellants was framed at Ex.3 to which they pleaded not guilty and claimed trial.

5. The complainant testified her case on five witnesses. Complainant herself appeared as witness No.1, Mst. Mufeeda as witness No.2, Khalid Hussain as witness No.3, Dr. Khadim Hussain Bhatti as witness No.4 and Dr. Naila Shaikh examined herself as witness No.5.

6. Statements of appellants under Section 342, Cr.P.C. were recorded at Exs.13 to 15, wherein they denied the allegations leveled against them by the complainant and pleaded their innocence. However, they opted not to make a statement on oath under section 340(2), Cr.P.C. and did not produce any witness in their defence.

7. The trial Court, on conclusion of trial and after hearing the respective parties, found appellants guilty of the offence charged with and recorded conviction and sentence, referred herein above.

8. Feeling aggrieved by the conviction and sentence recorded by the trial Court vide impugned judgment dated 06.09.2016, the appellants preferred this appeal.

9. It is contended on behalf of appellants that the complainant has filed direct complaint in respect of the same incident against which FIR No.07 of 2013 under Section 302, PPC was registered at Police Station Sharif Kharos, District Shikarpur, on the same day against appellant Zulfiqar and the proceedings in that FIR have come to an end in terms of his acquittal by a judgment dated 15.01.2014, passed by Additional Sessions Judge-IV, Shikarpur. It is submitted that it is a case of double jeopardy; that the time of occurrence, place of incident and both deceased are same in both cases; that the complainant has filed the direct complaint after acquittal of appellant Zulfiqar Ahmed, hence the complaint on the

face of it, seems to be false in view of acquittal of appellant Zulfiqar Ahmed in another trial by the Court of competent jurisdiction in respect of same occurrence; that provisions of Article 13 of Constitution of Pakistan and Section 403, Cr.P.C. are attracted in this case whereby a protection has been provided from double jeopardy. The learned counsel while emphasizing his arguments has submitted that the impugned judgment is bad in law and facts, hence the conviction and sentence recorded by said judgment is liable to be set-aside and the appellants are entitled for acquittal. In support of his submissions, he has placed reliance on the cases of *Alamdard Hussain Shah v Abdul Baseer Qureshi* {PLD 1978S.C. 121}, *Zia-ur-Rehman v The State* {2015 P.Cr.L.J. 1502} and *Muhammad Ali Abbas v The State* {PLD 2014 Lahore 148}.

10. In contra, the learned APG, duly assisted by the learned counsel for the complainant, has submitted that the impugned judgment is based on sound reasoning; that specific role of firing has been attributed to the appellants;; that there are no major contradictions; that witnesses have fully supported the case and they established the guilt of the appellants beyond shadow of doubt; that the ocular version has been corroborated by medical and circumstantial evidence; that this is not a case of double jeopardy. Lastly submitted that the impugned judgment does not suffer from any legal infirmity and require no interference by this Court and prayed for dismissal of appeal being devoid of merits.

11. I have attended with care to the submissions made at the bar. Undoubtedly, an order of acquittal was passed on 15.01.2014 in favour of appellant Zulfiqar Ahmed and no appeal was filed in this behalf. It has, thus, become final and constitutional protection against prosecution over again was fully attracted. Complainant in her direct complaint has stated that on next day of funeral, she alongwith her relatives and witnesses went to P.S. Sharif Kharos for lodgment of FIR where the SHO given an assurance that he will lodge her FIR and call her as and when needed and later on it came to her knowledge that police in collusion with accused lodged FIR at their own on behalf of the State and not as per her verbatim, hence the registration of FIR with regard to same incident as alleged in the

direct complainant is admitted. Instead of approaching high-ups of police and/or Court of competent jurisdiction for redressal of her grievances in this behalf, the complainant filed direct complainant, which was proceeded and ended into conviction of the appellants whereas the FIR lodged by police with regard to same incident as alleged in the direct complaint was also proceeded by the Court of competent jurisdiction and come to an end in terms of acquittal of appellant Zulfiqar Ahmed. Such an order of acquittal is prior to filing of the direct complainant and attained finality having not been challenged before appellate forum.

12. Insofar as FIR No.07 of 2013 is concerned, the same was registered on 30.05.2013 at 2300 hours on behalf of State through SIP Abdul Aziz Chandio, Station House Officer, P.S. Sharif Kharos wherein the incident is shown to have taken place on the same day viz 30.05.2013 at 0200 hours. The complainant/SHO has stated that on 30.05.2013 he was present at police station. It was about 0230 hours a phone call was received at police station through Cell No.0300-3293608 whereby the caller namely, Shamsuddin Abro informed that one Zulfiqar Ali son of Gulzar Ahmed Abro, resident of Shahqulipur, has committed murders of Altaf Hussain son of Faiz Muhammad and Mst. Noreen daughter of Mazhar Ali Abro by firing with pistol on the allegation of "*Karo Kari*". On receipt of such information he proceeded to the place of incident and saw the dead bodies of Altaf Hussain aged about 25 years and Mst. Noreen aged about 18 years lying in the house of one Faiz Muhammad Abro. He inspected the dead bodies and found fire arm injuries on right side of chest through and through passed, the second one on right side of neck through and through passed and third one on left arm through and through passed on the person of deceased Altaf Hussain and the blood was oozing from the wounds whereas deceased Mst. Noreen has sustained fire arm injuries on left side of her abdomen through and through passed, right arm muscle through and through passed and right side of chest and the blood was oozing from the wounds. The complainant/SHO after completing the formalities on spot shifted the dead bodies to Taluka Hospital Lakhi Ghulam Shah for autopsy and after the post-mortems were conducted handed over the dead body of deceased Altaf Hussain to his brother Khalid Hussain whereas the dead body of Mst. Noreen was handed over to her

maternal uncle Jamsheer Abro. It has been categorically stated in the FIR that since none appeared at police station for registration of case, therefor, he lodged the FIR on behalf of the State. It is a matter of record that appellant Zulfiqar Ahmed, nominated in the FIR, was sent up for trial, which ended into his acquittal by judgment dated 15.01.2014, passed by learned Additional Sessions Judge-IV, Shikarpur, in Sessions Case No.414 of 2013. It is pertinent to mention here that acquittal of appellant Zulfiqar Ahmed has not been challenged either by Mst. Sagheeran {complainant} or State and such an order has attained finality.

13. As regards the Direct Complaint is concerned, the same was filed on 03.02.2014 after disposal of Sessions Case No.414 of 2013 vide judgment dated 15.01.2014 wherein complainant Mst. Sagheeran has nominated three accused Zulfiqar Ahmed, Asif Ali and Maroof Ali and two unknown persons for committing murder Altaf Hussain and Mst. Noreen by firing with pistols and claimed that both had died due to firing of Zulfiqar Ahmed, Asif Ali and Maroof. She stated that one of her relatives informed P.S. Sharif Kharos and police arrived at the scene of occurrence within a short span of time and after completing the usual formalities shifted the dead bodies to Taluka Hospital Lakhi Ghulam Shah where post-mortems were conducted and then dead bodies were handed over to them. The complainant has further stated that on next day of funeral, she alongwith her relatives and witnesses visited police station for lodgment of her FIR where police assured that they would lodge FIR and call her as and when needed and later on she came to know that police lodged FIR at their own on behalf of State and not as per her verbatim, hence she approached the Court of competent jurisdiction for lodgment of second FIR and then filed the direct complaint.

14. It is a fact that the direct complaint has been filed after acquittal of accused in State case. During investigation or trial, she did not avail such remedies provided by law and waited for final adjudication of the State case and after its disposal on merits she filed the direct complaint. The State case was registered on 29.05.2013 and challan was submitted before the Court of competent jurisdiction and finally judgment was announced on 15.01.2014. The

attitude of the complainant seems to be doubtful that she remained silent for such a long period and did not approach police or Court of law for redressal of her grievance, she only filed application under Section 22-A & B, Cr.P.C. for registration of second FIR after the delay of about seven months when the State case was at final stage.

15. To appreciate the point raised by the learned counsel for appellants on the proposition of double jeopardy, it would be conducive to reproduce Article 13 of the Constitution, which spells out a fundamental right that no person can be retried or punished twice for the same offence. It provides as follows:-

13. Protection against double punishment and self-incrimination. No person----

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself.

Similar protection is provided for in Section 403, Cr.P.C. read with section 26 of the General Clauses Act, but the same offers a purely procedural shield. Article 13 of the Constitution on the other hand, has translated this procedural check into a Constitutional guarantee which cannot be taken away or whittled down even through a legislative measure. Here it would be conducive to reproduce Section 403, Cr.P.C., which reads as under:-

“403. Persons once convicted or acquitted not to be tried for the same offence (1) *A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which is different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.*

(2) A person acquitted or convicted for any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sections 235, subsection (1).

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offences constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provision of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

16. If one were to look for precedents dealing with a situation close to the one in hand; *Sherin Bacha v. Namood Iqbal*{PLD 1993 SC 247} provides an answer. In this case, the respondents had filed a complaint under section 447, P.P.C. alleging that after delivery of possession the appellants had tried to dispossess them. This complaint on being found to be false was ordered to be filed, the same was, somehow, got revived and fresh inquiry/trial commenced. The Government, however, on receipt of a revision application set aside the order of revival of the complaint holding that possession having been delivered by the Tribal Affairs Department, there was no occasion for fresh trial. Government's decision was challenged before the High Court in its Constitutional Jurisdiction. The High Court held that as the complaint under section 447, P.P.C. had not been dealt with properly; it required to be re-investigated/re-tried and the case was consequently sent back to the trial Court for fresh proceedings. The accused/appellant moved Hon'ble Supreme Court and agitated the principle of *autrefois acquit* (protection of Article 13 of the Constitution read with Section 403, Cr.P.C.). It was submitted that they had been tried already on the same facts in a police case by E.A.C. Malakand and acquitted them on 13.03.1989 and their acquittal had remained unchallenged until the above referred decision of the High Court in Writ jurisdiction was passed on 17-4-1990. The Hon'ble Supreme Court of Pakistan held that the verdict of acquittal having not been challenged before any higher forum, neither

the Constitution, nor the Code of Criminal Procedure read with General Clauses Act permitted retrial of an offence. It was held that a person having once been tried as an accused and finally acquitted, he acquired a vested right and Constitutional protection against a second trial for the same offence.

17. A bare reading of the above referred provisions of law spell out protection to a person who is prosecuted for an offence and tried by a competent Court of law and the trial has finally ended in terms of conviction or acquittal and he cannot be tried again on the same charge. This principle of law is based on maxim *autrefois convict autrefois acquit* i.e. that a person who has once been tried by a competent Court for an offence and convicted or acquitted cannot be tried again for the same charge. I, thus find myself in agreement with the learned counsel for the appellants that as the FIR lodged by police ended into acquittal and attained finality, the retrial in the subsequent direct complaint offended against appellants' fundamental rights of immunity from double prosecution or punishment. In this respect, reliance may well be made to the case of *Shehr Yar v. Bacha and 4 others* {1997 MLD page-1672}, it is held that:--

Section 403, Cr.P.C. contemplates of a situation where a person having once been tried by a Court of competent jurisdiction and acquitted by such Court cannot be tried again for the same offence nor for any other offence based on similar facts.

18. The instant case viewed from all angle is suggestive of the fact that a case vide FIR No.07 of 2013 had already been decided on merits by a Court of competent jurisdiction and ended into acquittal as such the proceedings in subsequent direct complainant in respect of the same occurrence leveling same allegations fall within the ambit of same offence. In such circumstances provisions of Article 13(a) of the Constitution of Islamic Republic of Pakistan, 1973, Section 403 of the Code of Criminal Procedure, 1898 and Section 26 of the General Clauses Act, 1897 are relevant in the instant case inasmuch the appellants are facing same charges as leveled in FIR No.07 of 2013, wherein a Court of competent jurisdiction had already taken the cognizance and rendered a

judgment of acquittal on merits, which has attained finality inasmuch such order of acquittal has not been challenged either by Mst. Sagheeran {complainant} or State before appellate forum. Thus, provisions of Section 403 Cr.P.C. and Article 13 of Constitution of Pakistan are very much attracted in the present case.

19. For the foregoing facts and circumstances of the case, I am of the considered view that this is a case of double prosecution and falls within the ambit of Section 403 Cr.P.C. and Article 13 of Constitution of Pakistan of Islamic Republic of Pakistan, 1973, hence the conviction and sentence recorded in the subsequent trial with regard to same incident, the fate of which has already been decided by a Court of competent jurisdiction and attained finality, is unjust, unwarranted and liable to be set-aside. Accordingly, the conviction and sentence recorded by the learned trial Court vide judgment dated 06.09.2016 are set-aside and the appellants are acquitted of the charge. They be released from the jail forthwith, if not required to be detained in any other case.

20. The instant Criminal Appeal stands allowed in the foregoing terms.

JUDGE