

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Present:

*Mr. Justice Abdul Maalik Gaddi
Mr. Justice Khadim Hussain Tunio*

Cr. Acquittal Appeal No. D- 465 of 2010

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Date of hearing	05.03.2020
Date of judgement:	05.03.2020
Appellants/Complainant:	Through Syed Tarique Ahmed Shah, Advocate.
Respondents/Accused:	Asif Makrani and Chaman Lal through Mr. Nazeer Ahmed Bhatti, Advocate.
State:	Through Mr. Shawak Rathore, D.P.G.

J U D G M E N T

ABDUL MAALIK GADDI, J- By this common judgment, we intend to dispose of both the above captioned Criminal Acquittal Appeals together as the same being arisen out of one and same crime being crime No.21 of 2009 registered u/s 302, 34 PPC at police station Kundri, whereby the learned Sessions Judge, Umerkot after full-dressed trial vide his judgment dated 30.11.2010 acquitted the respondents by extending them benefit of doubt.

2. The allegations against the accused / respondents as per F.I.R are that on 10.03.2009 at 0900 hours at the land of Shah Nawaz Junejo Deh Kherchelo Taluka Kunri, the accused Muhammad Asif Makrani along with minor accused chaman s/o Leemon duly armed with daggers in furtherance of their common intention stabbed dagger blows to deceased Muhammad Amin s/o Taj Muhammad Junejo (relative of complainant) and committed his murder.

3. It appears from the record that accused Chaman Kolhi was minor / less than the age of 18 years at the time of alleged incident therefore,

vide order dated 27.10.2009, he was declared juvenile offender as per section 2(b) of Juvenile Justice System Ordinance, 2000 and his case was bifurcated.

4. It also appears from the record that charge against both the accused / respondents were framed separately on 27.10.2009 at Ex.2 to which both of them denied the charge and claimed to be innocence vide their pleas at Ex.3.

5. Thereafter, the prosecution in order to prove its case has examined as many as nine (09) witnesses including alleged three (03) eye witnesses of the incident namely, Shamsuddin (complainant), Nek Muhammad and Muhammad Ali as well as Judicial Magistrate Kundri namely Qazi Nadeem Badar, who conducted the identification parade of accused Chaman Kolhi and so also recorded confessional statements u/s 164 Cr.P.C of both the accused. However, these witnesses were duly cross examined by the counsel for respondents / accused. Thereafter, prosecution has closed its side and after closing the side of prosecution the statement of accused / respondents were recorded u/s 342 Cr.P.C wherein they have denied all the allegations levelled by the prosecution by stating that they have been falsely implicated in this case. In order to prove such their contentions, accused Asif Makrani examined D.W. Abdul Karim at Ex.32 and accused Chaman Kolhi examined D.W. Leemon at Ex.31 in their respective cases.

6. It also appears from the record that after appraisal of evidence at the trial, the learned trial Court passed the impugned judgments and having extended benefit of doubt, acquitted the respondents / accused. Being dissatisfied, the appellant / complainant has assailed the legality and propriety of the impugned judgments through instant acquittal appeals.

7. Mr. Syed Tarique Ahmed Shah, Advocate appearing on behalf of appellants in both acquittal appeals contended that the judgments passed by learned trial Court are perverse and the reasons are artificial viz-a-viz the evidence on record; that the grounds on which the trial Court proceeded to acquit the accused persons are not supported from the documents and evidence on record. He further submitted that accused have directly been charged and the discrepancies in the statements of witnesses are not so material on the basis of which

accused could be acquitted. He further contended that learned trial Court has based the findings of acquittal mainly on the basis of minor contradictions on non-vital points of the statements of prosecution witnesses, and that the prosecution evidence has not been properly appreciated. He further submitted that in this matter accused were arrested on 11.03.2009 and recovery was effected from them in presence of mashirs on the same day. However, on the very next day of their arrest, accused Chaman Kolhi was produced before Judicial Magistrate Kundri where PW Muhammad Ali and Nek Muhammad have identified the said accused being involved in this case. He further submitted that confessional statement of both the accused were also recorded on the same day before the same Magistrate wherein they have admitted their guilt; therefore, under these circumstances, he was of the view that these appeals may be allowed and the accused involved in this case may be given exemplary punishment.

8. On the other hand, Mr. Shawak Rathore, learned D.P.G duly assisted by learned counsel for the accused / private respondents in both captioned appeals has supported the impugned judgments by arguing that the impugned judgments passed by the learned trial Court are perfect in law and on facts; that there are general allegations against the respondents / accused for causing alleged daggers blow to the deceased Muhammad Ameen and according to him the evidence so brought on record on behalf of prosecution is contradictory to each other on material particular of the case and it is not known that who caused fatal blow to the deceased; therefore, according to him on the basis of contradictory evidence, no conviction could be awarded to the accused. While elaborating his arguments he submits that identification parade of accused Chaman Kolhi, whose name is not appearing in FIR, was not properly held as it was held through PW Muhammad Ali, who was the alleged eye witness of the incident and so also on his pointation the accused were arrested nor the said identification parade was held through complainant of the case though he was also eye witness of the incident. While attacking the confessional statements it is argued by learned D.P.G. that the confessional statement of both accused were not recorded in accordance with the law and according him it was also not voluntarily and the requisite question with regard to removing of handcuffs was also not asked from the accused and the same was recorded in the printed proforma however, age of the accused chaman

has also not been mentioned in the confessional statement; that whole case of the prosecution is based upon surmises and conjunctures, therefore, no reliance could be safely placed for conviction of the respondents.

9. We have heard the learned counsel for the parties and perused the record.

10. We have examined the documents and evidence so available on record and have found that the prosecution seems to have failed in bringing at home the guilt of accused / respondents, which too is yet to be discovered by other aspect of the case. In the present case there are general allegations against respondents that they caused dagger blows to the deceased Muhammad Ameen whereas this fact has been denied by the respondents in their respective statement recorded u/s 342 Cr.P.C and in support of their claim they have also examined defence witnesses who supported their case and claim.

11. It is noted that the name of accused Chaman Kolhi is not mentioned in the F.I.R and during proceeding before the trial Court he was declared juvenile offender as per section 2(b) of Juvenile Justice System Ordinance, 2000 therefore, his case was proceeded separately. It is also noted that he was allegedly arrested on 11.03.2009 in presence of mashirs namely PW Abdul Latif and Shahnawaz and alleged dagger was recovered from his folder of shalwar. This fact does not appeal to a prudent mind that a person who after committing alleged murder keeping the alleged dagger in his folder of shalwar. Not only this, both the alleged recovery witnesses are said to be near relatives to the complainant party and they were allegedly called by PW Muhammad Ali on telephone from their house therefore, false implication of accused Chaman Kolhi could not be ruled out. It is an admitted fact that identification parade of accused Chaman Kolhi was conducted through PW Muhammad Ali who was said to be the eye witness of the alleged incident and on his pointation the accused were arrested therefore, the identification parade of accused Chaman Kolhi in this case through Muhammad Ali could not be safely relied upon. Not only this, though the complainant Shamsuddin was eye witness of the incident but no identification was held through this witness. This aspect of the case also creates doubt in the prosecution case so far as the case of accused Chaman Kolhi is concerned.

12. We have gone through the memo of identification parade as well as the evidence of Judicial Magistrate Kundri namely Qazi Nadeem Badar and noted that description of dummies / suspects are not mentioned in the memo of identification parade. The presence of PW Nek Muhammad at the place of incident also appears to be doubtful as the alleged incident took place at 0900 hours and nothing on record to show that why and under what circumstances he was available at the place of incident at that time; therefore, the identification parade through PW Nek Muhammad in this case lost its sanctity.

13. It is surprising to note that on the same day accused / respondent Chaman Kolhi was produced before the same Judicial Magistrate Kundri for recording his confessional statement. Perusal of confessional statement of accused Chaman Kolhi reveals that it was recorded on the day when the identification parade was held and before same Magistrate. During the course of arguments, we have specifically asked the question from the learned counsel for appellants / complainant that when identification parade was held on a day then what was the necessity to hold the confessional statement of accused Chaman Kolhi on the same day before same Magistrate, he has no satisfactory answer with him. It is also noted that the age of accused Chaman Kolhi has not been mentioned by the learned Magistrate in the confessional statement though he was minor at the time of occurrence.

14. On perusal of confessional statement of accused Chaman Kolhi it also reveals that the learned Magistrate has not mentioned the age of said accused whether he was minor or adult though he as per order dated 27.10.2009 has been declared juvenile offender and his case was bifurcated. No marks of identification of accused were mentioned by the Magistrate. The confessional statement was recorded in English and answer of its questions were in sindhi. Nothing on record to show whether the accused Chaman Kolhi was well acquainted with English language or not. Moreover, the question with regard to removing of handcuffs was not put to the accused at the time of recording of confessional statement and the same was recorded in the printed form. It is not specifically mentioned in the confessional statement that through whom accused Chaman Kolhi after making his statement was remanded to judicial custody as he was produced before the Judicial Magistrate by the police. No question is put to the accused that how

long he has been remained with the police custody. When these infirmities were brought to the notice of learned counsel for the appellants / complainant, he has again no satisfactory answer with him.

15. It is well settled that to base conviction solely on the basis of confessional statement which need to be voluntarily and true but as observed above the confessional statement of accused Chaman Kolhi has not been recorded in accordance with law. The other defect of the case is that confessional statement of accused Chaman Kolhi was recorded by the Magistrate who did not take careful and precautionary measures regarding the accused being minor. It is also a case of minor therefore, under the law accused Chaman Kolhi being juvenile should have been provided opportunity of counselling either through his guardian or a lawyer; however, such opportunity was not offered to him by the Magistrate before recording his confessional statement. In this regard, we are supported with the case of **Hashim Qasim and other v/s The State** (2017 SCMR 986). Perusal of record reveals that no convincing or confidence inspiring evidence is available on record to convict the accused Chaman therefore, the learned trial Court seems to have passed judgment of acquittal in accordance with law.

16. So far as the case of accused Asif Makrani is concerned, though he has named in the F.I.R but as observed above there are general allegations against this accused that he caused dagger blow to deceased Muhammad Ameen. We have already observed above that the involvement of accused Chaman Kolhi in this case is doubtful therefore, it cannot be said that co-accused Asif Makrani is responsible for the murder of deceased Muhammad Ameen on same set of evidence. It is settled principle that if prosecution evidence has been disbelieved in respect of co-accused person(s), as has been done in case of co-accused Chaman Kolhi, then same set of evidence could not be relied upon in respect of other co-accused unless they were corroborated by other evidence which came from unimpeachable independent source, which is lacking in this case. It is noted that this accused was arrested on 11.03.2009 in presence of PW Abdul Latif and Shahnawaz. Both the said witnesses appeared to call by PW Muhammad Ali from their house therefore, their evidence could not be safely relied upon for the reasons that the alleged dagger / weapon was also recovered from the fold of shalwar of accused and this fact when

confronted to learned counsel for appellants that whether a person after committing murder of an innocent person can be presumed to have been roaming by keeping such weapon in fold of his shalwar for two days so that police may come and arrest him as well as recover such weapon from his possession, he has no satisfactory answer with him; however, this aspect of the case does not appeal to a prudent mind.

17. It is noted that as per medical evidence 23 incised injuries were caused to the deceased Muhammad Ameen whereas as per "danishtnama" 18 injuries were found on the body of deceased.

18. We have seen the mashirnama of arrest and recovery available on record as to whether the alleged daggers were bloodstained or not and found that the alleged property was received on 11.03.2009 however, the same were sent to the chemical examiner i.e Director Laboratories and Chemical Examiner, Government of Sindh, Karachi for testing purpose on 29.06.2009, which was received by the said office on 04.09.2009 after the delay of more than three (03) months for which no explanation has been furnished that during such period whether the crime weapons / case property was kept in safe custody, if it was lying in the malkana then why entry of keeping the same has not been brought on record. It is also noted that the case property was sent for chemical examination through HC Ratan Singh but the said HC Ratan Singh has not been examined by the prosecution to corroborate the version of prosecution.

19. We have also noted the other infirmities and lacunas in the statements u/s 164 Cr.P.C of accused Asif Makrani to the effect that confessional statement was recorded in English and answer of its questions were in sindhi. Nothing on record to show whether accused Asif Markani was well acquainted with English language or not. Moreover, the question with regard to removing of handcuffs was not put to the accused at the time of recording of confessional statement and the same was recorded in the printed form. It is astonishing to note that confessional statements as well as identification parade were recorded / held on same day by same Magistrate and this Magistrate being a prosecution witness in this case should have not proceeded with the case of recovery of illicit weapons; however, by doing so, it has caused a dent in prosecution case. When these infirmities were confronted to

learned counsel for the appellant / complainant, he again has no satisfactory answer with him.

20. As for as the alleged confessional statements of accused are concerned, the same have not only been retracted but are not voluntary as mentioned in 342 Cr.P.C. statement of the accused and corroborated by DWs in their evidence. The confessional statement has not been corroborated on material particular points. Furthermore confession is circumstantial corroborative piece of evidence on which evidence conviction cannot be based. In *Khalid Javed and another v. the State* 2003 SCMR 1419 it was held as under:-

(t) Criminal Procedure Code (V of 1898)---

--S.164—Qanun-e-Shahadat (10 of 1984), Art. 39—Confession—Voluntariness/retraction—Test—Principles—Court has to satisfy itself that the accused got recorded a true confessional statement—If the confession was retracted and was alleged to have been obtained under coercion, before believing the same it was imperative to examine as to whether same was corroborated by other evidence on material points—Where such corroboration was not available, confessional statement would be inadmissible. [p.1454]X

21. It is an admitted position that at the place of alleged recovery independent persons were available but none of them was made as mashir. Recovery of an article is a corroborative piece of oral evidence; however, in absence of reliable oral evidence conviction cannot be based on any piece of corroborative evidence. Reference can be made to **Mal Gul v. the State** (2009 SCMR 4).

22. It is also noted that the alleged incident had taken place in 2009 and the respondents have already suffered the agony of protracted trial as well as pendency of instant appeals since 2010 and they are appearing before this Court since then without any fault on their part although they have already been acquitted by the competent Court of law.

23. In the circumstances, we are of the view that the prosecution case is not free from doubts and it is well settled principle of law that even a single circumstance creating a reason doubt, the benefit of which, always goes in favour of accused, however, in the instant case there are material discrepancies in prosecution evidence. In this regard, reliance can be placed upon case of '*Tariq Parvez v. The State*' [1995 SCMR

1345] wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to appellant it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as matter of right".

24. Considering all the above aspect of the case, we have come to the conclusion that the trial Court has rightly extended the benefit of doubt in favour of the accused / respondents and the impugned judgments contain valid reasons for extending benefit of doubt to the respondents in these appeals hence, do not require any interference by this Court. We may further observe that there is clear distinction in between appeal against conviction and appeal against acquittal. Accused who has/have been acquitted in a crime can claim double innocence, one at the pre-trial stage and the other he/they may earn on the basis of judgment of acquittal in his/their favour from the court of competent jurisdiction. The competent Court in the instant matter has extended benefit of doubt to the accused / respondents after examining the entire evidence, therefore, we see no reasons to interfere with the impugned judgments. Resultantly, these Criminal Acquittal Appeals stand dismissed along with pending application(s), if any.

JUDGE

JUDGE

"Hafiz Fahad"