

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

Before:

Mr. Justice Muhammad Saleem Jessar  
Mr. Justice Abdul Mobeen Lakho

Criminal Acquittal Appeal No.D- 89 of 2009

Chutto Khan                                  Versus                                  Haji Kambir and others

Appellant Chutto Khan                                  :                                  none present on his behalf

Respondents No.1 to 11                                  :                                  Haji Akbar, respondent No.9 present in person, whereas remaining private respondents are called absent

Date of hearing & judgment                                  :                                  27.10.2020

**JUDGMENT**

**MUHAMMAD SALEEM JESSAR, J.**-Through this Criminal Acquittal Appeal, appellant has assailed the judgment dated 23.05.2009, handed down by learned Ist. Additional Sessions Judge, Mirpurkhas in Sessions Case No.175 of 1998 (re: The State Vs. Haji Kambir Khan and others) being outcome of FIR No.91 of 2008, registered at P.S. Jhudo, under sections 302(a), 324, 337-H(ii), 147, 148, 149, 504, 34 PPC, whereby after full dressed trial, respondents No.1 to 11 have been acquitted of all the charges.

2. It appears that appellant has filed memo of instant acquittal appeal in the office on 24.06.2009, whereas it was fixed before the Court for hearing on 03.12.2009, when it was admitted for regular hearing. After admission of appeal, the appellant as well as his counsel had failed to pursue it vigilantly.

3. We have gone through the impugned judgment and the evidence adduced by the prosecution witnesses before trial Court as well as annexed with the file. As per prosecution case, the accused had caused injuries to injured P.Ws namely Muhammad Rahim, Khamoon, Phool Chand and Allah Bux. Out of them injured Allah Bux succumbed to his injury(ies). Per contents of F.I.R, deceased Allah Bux was beaten by three accused and had sustained three injuries on his head which, according to medico-legal certificate, were of hard and blunt substance; whereas, per memo of injuries the deceased had sustained multiple injuries over one and other; whereas the complainant has implicated large number of people from one family. Per opinion of Medico-Legal Officer Dr. Hidayatullah, the injury No.1, according to post-mortem notes, was the cause of death but was moderate and was not serious. The Medico-Legal Officer, who conducted post-mortem of deceased Allah Bux was not produced and other Doctor namely Anwaruddin being well conversant with the handwriting of Dr. Hidayatullah, was produced before the trial Court. The well conversant / Dr. Anwaruddin was neither handwriting specialist / expert nor was a witness of the case. Due to split opinion of two Medico-Legal Officers, said injury cannot be believed to be the fatal for life of the deceased.

4. The respondent / accused Abdul Rehman and Haji Akbar, who allegedly had taken plea that at the time of incident they were not present in the village and such defense evidence was also recorded on their behalf, which has rightly been discussed and kept in juxta position by the trial Court.

5. As far as injured Khamoon is concerned, he had deposed in his evidence that Ajab and Tarique alias Phadoo had caused lathi blows on his chin as well as head and after receiving injuries he went unconscious, therefore, he had not seen who caused injuries to whom. In view of such his evidence, the evidence of injured / P.W Khamoon was rightly held by the trial Court to be not confidence inspiring.

6. Before parting with the judgment, it will be appropriate to reproduce the relevant / concluding paras No.42 to 45 of the impugned judgment, which read as under:-

*“ 42. Besides this the prosecution has failed to brought the witnesses Phoolchand and Tikam in the witness Box who alleged are the eye witnesses of the incident. It has been held in the case law reported in 1908 SCMR 715 that:*

*“ It is certainly a case of suppression of material facts on the part of the prosecution. It has been shown that Muhammad Zaman was present at the spot and he was particularly asked by the complainant party to fire at the assailants. He was, thus, a very important witness but the prosecution in its wisdom failed to produce him in support of its story. His non-production has created doubt in the prosecution version. The presumption is that in case he had appeared, he would not have supported the prosecution. On the contrary, he would have favoured the defence plea. The prosecution case may be seen from this angle as well that as many as six accused mentioned above, were acquitted of the murder charge while discarding the prosecution evidence as a whole. The same set of evidence cannot be, therefore, be accepted for the conviction of the appellant in this case of capital charge. This is a case of doubt all around. It may be noted that there was no sufficient light available at the time occurrence to identify the accused particularly to show that the fatal shot was fired by the appellant. By giving the benefit of doubt, we set-aside the conviction and sentence of the appellant”.*

*So in the case in hand the P.Ws phoolchand and Tikam are the eye witnesses of the incident but they have not been examined/ produced by the prosecution in order to support the prosecution which creates doubt in the story of prosecution case.*

*43. P.W Saindad, the mashir was declared hostile by the prosecution as he has not supported to the prosecution case regarding corroborative pieces of evidence. P.W Saindad stated that all the mashirnamas were prepared at Saman Goth. While P.W. Mehmood, who is also mashir deposed that only one memo was prepared in his presence then he become ill therefore, police had shown some recoveries and informed him that the same has been recovered from the accused persons. In his cross examination he stated that some signatures were obtained on documents on same day and some on the following day, therefore, in the above situation the recovery of the crime weapons is doubted.*

*44. The prosecution in this case examined two I.Os of the case. I.O Bhooromal stated that he has secured the blood stained mud from the place of vardat on 06.10.1998 after 10 days of the incident and only this single aspect of the case reveals that the investigation conducted by I.O Bhooromal was unfair. First I.O ASI Ghulam Mustafa stated that he had seen the injured of injured and deceased at RHC Jhudo while the mashir of injuries in his evidence deposed that at about 1-30 pm. police came at place of vardat and had seen the injuries of injured and deceased at the place of vardat. The I.O Bhooromal stated that he had secured the blood stained mud from the place of vardat after 10 days of the incident though the alleged place of incident is katcha path and the same blood stained mud was sent for chemical examination and the chemical examiner report reveals that the articles sent for chemical examination contains human blood. In the above situation when the first I.O had not secured the blood stained mud from the place of vardat and second I.O. secured the same after 10 days of incident also creates doubt in the story of prosecution case.*

*45. From the above discussion I have come to the conclusion that ocular testimony, consisting of complainant, and injured witnesses, is itself not trust worthy and there are material contradiction in the evidence of these witnesses and they do not corroborate with each other. Two material P.Ws*

*Phoolchand and Tikam who are the eye witnesses of the incident have not been brought in the witness box for recording their evidence. Moreover the recovery of crime weapons and blood stained mud is also doubtful as the mashir has been declared hostile and co-mashir states that the mashirnamas were prepared at Saman Leghari Goth. The medical evidence in shape of post mortem report and medical certificate also not corroborate by the medical officers and the prosecution has also failed to record the evidence of Dr. Shafqat Ghani who had conducted the post mortem of deceased Allah Bux. In the above situation, I hold that the case of prosecution is not free from doubt. The point No.3 is therefore, replied as not proved.”*

7. There is no cavil with the legal proposition that an acquittal appeal stands on a different footing than an appeal against conviction. In acquittal appeal, the Superior Courts generally do not interfere with unless they find that miscarriage of justice has taken place. The factum that there can be a contrary view on re-appraisal of evidence by the Court hearing acquittal appeal simpliciter would not be sufficient to interfere with acquittal judgment. In case of **Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others** (PLD 2009 Supreme Court 53), Honourable Supreme Court of Pakistan has laid down following dictum:-

*“11. Needless to emphasize that when an accused person is acquitted from the charge by a Court of competent jurisdiction then, double presumption of innocence is attached to its order, with which the superior courts do not interfere unless the impugned order is arbitrary, capricious, fanciful and against the record. It was observed by this Court in Muhammad Mansha Kausar versus Muhammad Asghar and others, (2003 SCMR 477). "that the law relating to reappraisal of evidence in appeals against acquittal is stringent in that the presumption of innocence is doubled and multiplied after a finding of not guilty recorded by a competent court of law. Such findings cannot be reversed, upset and disturbed except when the judgment is found to be perverse, shocking, alarming, artificial and suffering from error of jurisdiction or misreading non-reading of evidence.... law requires that a judgment of acquittal shall not be disturbed even though second opinion may be reasonably possible".*

8. It is also well settled law that medical evidence may confirm the ocular evidence with regard to the seat of the injury, nature of the injury, kind of weapon used in the occurrence' but it would not connect the accused with the commission of the crime.

9. In view of above legal position, it appears that instant appeal has wrongly been filed, even the basic principle for initiating appeal against acquittal as laid down by Honourable Supreme Court of Pakistan in the case of **Ghulam Sikandar and another v. Mamaraz Khan and others** (PLD 1985 Supreme Court 11) are also lacking in this case. The impugned judgment does not suffer from any

illegality or infirmity which may warrant interference by this Court. Accordingly and in view of above facts and case law, instant appeal against acquittal is dismissed alongwith pending application.

JUDGE

JUDGE

S