

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

Cr.Acquittal.Appeal.No.D- 201 of 2011

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 07.05.2018.
Date of judgment: 07.05.2018.

Mr. Aijaz Shaikh, Advocate for appellant.
Mr. Chaudhry Aftab Ahmed Warraich, Advocate for
respondents No.1 to 3.
Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Pirdan and others were charged, prosecuted and acquitted. The trial was conducted by Syed Saghir Hussain Zaidi, Sessions Judge, Tharparkar at Mithi who passed the judgment of acquittal on 26.05.2011. Feeling aggrieved by the aforesaid judgment of acquittal, complainant Soorto filed this Criminal Acquittal Appeal No.D-201/2011.

2. The prosecution case as emerged from the recitals contained in first information report and the evidence adduced during the trial is as under:-

3. The facts of the prosecution case, as per FIR, lodged by complainant Soorto s/o Partab alias Phatu are that the complainant

resides in village Joghrio where Pardan & Haroo Bajeer respondents/accused also reside, both parties had dispute with each other. Complainant further stated that his father Partab alias Phatu s/o Nago, uses to sleep at cattle-pen for looking after cattle / goats, situated at half kilometer away from the village. On the night of 23/24-06.2010, his father Partab alias Phatu after taking meals, went towards cattle-pen on the next morning of 24.06.2010, the brother of complainant namely Pancho went there for fetching milk, but he immediately returned back and informed that their father Partab alias Phatu was lying dead having hatchet injuries on his head and arms. On this information, the complainant, his brother Panchoo, Bheemon s/o Loungo & Bheemon s/o Kesso and others rushed there, where they found deceased lying on a cot. The complainant party noticed foot-prints of two persons, out of whom, one had ladies chappal, while another had male chappal. Complainant party tracked the foot-prints marks with the help of foot-tracker which led them to the house of Pirdan & Haroo. The complainant party further stated that they searched the foot-prints nearby the hut, but they did not find it, due to which the complainant party suspected that Pirdan s/o Veenjhraj, Haroo s/o Durango & Jairam s/o Veenjhraj, Loono s/o Veenjhraj and Kalo s/o Haroo have committed the murder of their father due to the brotherly dispute. The complainant by leaving his brother and others near the dead body of his father, went to P.S. Nangarparkar, where he lodged FIR. It was recorded vide Crime No.39 of 2010 u/s 302, 34 & 109 PPC at P.S. Nangarparkar. After usual investigation challan was submitted against the accused under the above referred sections.

4. Trial court framed charge against the respondents/accused at Ex.2. Accused pleaded not guilty and claimed to be tried.

5. In order to prove it's case, prosecution examined 08 witnesses. Thereafter, prosecution side was closed.

6. Statements of respondents/accused were recorded u/s 342 Cr.P.C in which they claimed false implication in this case and denied the prosecution allegations. Accused neither examined themselves on Oath nor they led any evidence in their defence in disproof of the prosecution allegations.

7. Trial court after hearing the learned counsel for the parties and on assessment of evidence, by judgment dated 26.05.2011 acquitted the accused/respondents as stated above. Hence, this appeal.

8. Mr. Aijaz Shaikh, learned advocate for the appellant contended that the learned trial court has passed the impugned judgment without application of judicial mind. He further contended that ocular account was fully supported by medical evidence. He further contended that the trial court did not appreciate the evidence according to the settled principles of law. Lastly, it is submitted that this acquittal may be converted into conviction.

9. On the other hand, Mr. Chaudhry Aftab Ahmed Warraich, learned advocate for the respondents No.1 to 3 as well as Mr. Shahzad Saleem Nahiyoon, D.P.G for the State argued that the FIR was delayed and regarding same incident Direct Complaint was also filed. They have argued that the judgment of acquittal is based upon sound reasons and appeal is without merit.

10. After hearing the learned counsel for the parties, we have perused the judgment of trial court. The relevant portion is reproduced hereunder:-

“After hearing the learned counsel for the parties, I have carefully consider the arguments advanced by the learned counsel for both the parties and have minutely gone through the evidence/material brought on record during trial with the assistance of the counsel, I found that there are material contradictions, infirmities, inconsistencies, discrepancies and other legal flaws in the case in hand, which has not only shaken the prosecution case, but has made the entire case as doubtful one favouring the accused persons and in such circumstances, no conviction can be awarded to the accused persons. The perusal of evidence reveals that it is the case of two version, first version given by the complainant in his FIR which is absolutely different from the contents of the present direct complaint. It is also a matter of record that the complainant is not an illiterate person, as he is a primary school teacher and he signed the FIR in English and it is clearly mentioned in the FIR that the copy of the FIR was given to him immediately just after reducing it in writing and it is beyond imagination that he being literate person, did not go through its contents and remained silent for about two months when the bail was granted to the accused persons by this court and perhaps he on the advice of his counsel, filed this direct complaint by improving his case, otherwise in my view, it is a case of blind murder and no one witnessed the same and the involvement of the accused is linked with the help of a foot-tracker, who admittedly is the uncle of the complainant and is weakest type of evidence, even otherwise, in such circumstances, if the evidence of foot-tracker is recorded, then it wouldn't be helpful, because he is not an independent and trustworthy witness. Apart from above, the involvement of the accused on the basis of process took through foot-tracker, is not admissible in the eyes of law. Beside it, since the complainant himself has resiled from his own

FIR, therefore, whatever is mentioned in it, is not considerable. No, there remains only the evidence of the complainant, his brother PW Bhojo, and a chance witness Bheemon. Admittedly, the statement of complainant hinges on the hearsay evidence and he is not the eye-witness of the occurrence, while the P.W. Bhojo (as per complaint case) had seen the incident with his own eyes, who in his deposition (Ex.09) has stated that on 23.06.2010, at about 10-00 P.M, he and his father deceased Partab were sleeping in the cattle-pen. At about 12-00 are 1-00 A.M. he heard the voice of some rattling and woke-up and saw the accused Haroo equipped with hatchet, while accused Jairam with lathi and accused Pirdan empty-handed and on the instigation of accused Pirdan, accused Haroo caused sharp side of his hatchet to his father Partab, while accused Jairam was standing nearby the place. He further stated that on seeing it, he tried to save his father, but due to threats and fear of accused, he couldn't go near them. It is further stated by P.W Bhojo (who is star witness of this case) that accused Haroo inflicted sharp side of his hatchet on the face, head and other parts of body of his father Partab, where he died at spot on his cot and thereafter by issuing him threats, the accused persons went away and after departure of the accused, he raised cries, which attracted to P.W's Bheemon s/o Loung, Bheemon s/o Kesso and other co-villagers, who also saw the accused persons in the way and early in the morning he dialed telephone call from his "V-phone" to his brother Soorto (complainant) on his mobile phone at Mithi, whereby he informed about the incident. This piece of evidence is contradictory with the contents of para No.3 of the direct complaint, in which it is mentioned that on 24.06.2010 at about 6-00 A.M, the complainant was informed on phone by his brother P.W Bhojo that their father Partab @ Phatu has been murdered by accused Pirdan and others. It is further stated that the complainant after arranging the

conveyance, reached at the place of incident at about 11-00 A.M. where his brother Bhojo, Bheemon s/o Loungo, Bheemon s/o Kesso and others were also available. On enquiry, the P.W Bhojo disclosed that he along with his father Partab @ Phatu (now deceased) were sleeping in the cattle-pen and he woke-up on commotion (but he did not mention the time of incident) and saw that the accused Haroo equipped with hatchet, who was causing hatchet blow to his father deceased Partab @ Phatu on the instigation of accused Pirdan, who was empty-handed, while accused Jairam was standing near cot of deceased Partab having lathi in his hand. He tried to intervene, but accused Pirdan, while abusing, threatened him that if he will move, he will be killed. He further stated that since deceased Partab didn't bow down before them, despite repeated messages/ threats, therefore, he has been killed and has been made a lesson for others. He further stated that he remained silent due to fear and thereafter all the accused persons went away by threatening him and later-on he saw his father Partab @ Phatu having serious injuries and was succumbed to his injuries. The perusal of content of direct complaint, it is nowhere mentioned that he raised cries, which attracted P.Ws Bheemon s/o Kesso & Bheemon s/o Loungo and other villagers. This shows that he has made improvements in his statement recorded in this court during trial. It is also worth mentioning to note that he has not specified that how many injuries were caused by the accused Haroo to the deceased Partab, whereas the Medical Officer (who conducted the post-mortem of the deceased Partab) has reported 06 injuries on his person, which belies the version of case in hand. Moreover, P.W Bhojo in the statement has stated that his deceased father Partab died instantaneously on spot on his cot just after receiving the injuries, while the Medical Officer Dr. Aurangzeb has opined the time between the injuries and death within half an hour,

which shows that the medical evidence is contradictory with the ocular testimony. It is also surprising that when the accused were causing injuries to deceased Partab, the father of P.W Bhojo, he remained silent and he did not try to save his father, for which the accused persons did not cause him even a single injury nor touched him, especially when it was while in notice of the accused persons that he (P.W Bhojo) is the eyewitness of the incident and he will depose against them, which is unnatural and beyond imagination and his evidence being interested witnesses is incredible as he is the real son of the deceased and brother of complainant Soorto. Even otherwise, no independent witness of the locality is examined by the complainant except P.W Bheemon s/o Loungo, who is admittedly resident of different village Kharsar, which is situated at a distance of 8/9 K.Ms away from the place of incident, therefore, this witness also seems to be an interested witness, which creates dent in the prosecution case. It is also unbelievable that if the version as narrated in the complaint case is admitted to be true, in which it is stated that the incident was happened at about 12-00 /1-00 A.M and the P.W Bhojo remained silent till morning up to 6-00 AM. and then he called / telephone to the complainant, which seems unnatural and the mind general prudent does not accept and it appears that the alleged incident was taken place in the night time being un-witnessed and no one had seen the incident including the P.W Bhojo. This aspect of the case also finds support from the memo of the place of incident Ex.18/A, which is silent about the availability of another cot of P.W Bhojo which also confirms the incident to be un-witnessed and was not happened in a manner as narrated in the direct complaint. Furthermore, the FIR was lodged with a considerable delay of about 11/12 hours and if suppose the legal heirs of the deceased were waiting for reaching of the complainant Soorto, who admittedly

reached at about 11-00 AM., at the place of incident, even then the FIR carries the delay of more than 2/3 hours, with tantamount that it has been lodged after due deliberation and consultation. Furthermore, on the point of motive behind the incident is of dispute over matrimonial affairs between the parties, the complainant has failed to examine any witness in his support, as such, it remained shrouded in mystery. The record further show that the complainant has also failed to examine the Tapedar of the beat and did not produce the sketch of the place of incident in order to ascertain the truth and clear picture of the place of incident, which also makes his case doubtful, specially when the evidence of the mashir and I.Os also made doubtful by declaring them hostile and not relying the memo. Apart from above, the complainant has also failed to bring on record the direct complaint, his statement recorded under Section 200 Cr.P.C. and so also the statement under Section 202 Cr.P.C. of P.W Bheemon, which has caused legal flaw in the complainant's case.

In such circumstances and the evidence brought on record, I am not convinced with the complainant efforts and case and I am of the opinion that the complainant's case is full of doubts and it is well settled principle of law that the benefit of doubt always goes in favour of the accused. I place my reliance on the case law reported in 1995 SCMR 1345 & 2001 P.Cr.L.J 845 (Karachi), and therefore, I answer point No. 2 as "not proved". Finding accordingly.

The case law relied upon by the learned counsel for the complainant, is quite distinguishable to the facts and circumstances of the present case, as such, the same is not applicable to the present case.

Point No. 3

As a sequel of above discussion and findings on point Nos. 1 & 2, I am of the humble view that the complainant has miserably failed to prove his case beyond any shadow of doubt against any of the accused persons, therefore, by extending the benefit of doubt, I hereby acquit all the three accused persons namely Pirdan, Jairam and Haroo under Section 265-H(i) Cr.P.C. They are present on bail, their bail bonds stand cancelled and sureties are discharged.

Since the complainant has already resiled / disowned from the contents of his FIR and by declaring the state case as not recorded as per his verbatim, as per his version and whereas the the accused in direct complaint case (which is an offshoot of the state case being S.C. No. 30 of 2010), have been acquitted under Section 265-H(i), Cr.P.C., therefore, the accused persons in the state case are also acquitted under the same judgment and since they are present on bail, as such, their bail bonds stand cancelled and sureties are discharged and they are set at liberty in the State case too. Let the copy of this judgment be also kept in the file of the State case.”

11. We have carefully perused the prosecution evidence and impugned judgment passed by the trial court dated 26.05.2011. We have come to the conclusion that the trial court rightly acquitted the accused for the reasons that actual incident was un-witnessed. PWs were closely related to the deceased and interested. PW Bhoojo is son of deceased but his conduct was unnatural, he did not come forward for rescue of his father, which reflected that he had not witnessed the incident. Complainant lodged FIR, thereafter filed Direct Complaint and improved the case. To sustain conviction in an offence of capital punishment evidence of unimpeachable nature was required which was not available in this case. Prosecution failed to produce reliable

evidence before trial court. Trial court for sound reasons disbelieved prosecution evidence. There were several circumstances in the case which had created reasonable doubt in the prosecution case. In the cases of circumstantial evidence strong evidence is required for convicting the accused, which is lacking in this case.

12. Moreover, appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different as held in the case of *Ghous Bux v. Saleem and 3 others* (2017 P.Cr.L.J 836).

13. Judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. The scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence as the accused shall be presumed to be innocent until proved guilty. In other words, the presumption of innocence is doubled as held by the Honourable Supreme Court of Pakistan in the case of *The State and others v. Abdul Khaliq and others* (PLD 2011 Supreme Court 554).

14. It is well settled that High Court can only interfere in an appeal against acquittal if the view of learned trial judge is either manifestly perverse on facts or vitiated in law. If the view taken by the trial judge can reasonable be said to be arrived at, this court does not substitute it with its own view as held in the case of *The State v. Abdul Khaliq and others* (PLD 2011 Supreme Court 554). Moreover, principles for appreciation of evidence in appeal against acquittal are different from the appeal against conviction.

15. For the above stated reasons, there is no merit in the appeal against acquittal. Acquittal recorded by trial Court in favour of respondents/accused is based upon sound reasons, which require no interference. As such, the appeal against acquittal being without merits was dismissed by our short order dated 07.05.2018 and these are the reasons whereof.

JUDGE

JUDGE

Tufail