

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

Cr.Acquittal.Appeal.No.D- 307 of 1996

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

Date of hearing: 15.05.2018.
Date of judgment: 15.05.2018.

Mr. Hakim Ali Siddiqui, Advocate for appellant.
Syed Madad Ali Shah, Advocate for respondents a/w
respondents.
Syed Meeral Shah, A.P.G. for the State.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused were tried by learned Additional Sessions Judge, Tando Adam in Direct Complaint No.17 of 1990 for offences u/s 302, 504, 325, 147, 148, 323, 114 PPC. On conclusion of trial vide judgment dated 05.10.1996, the respondents/accused were acquitted of the charge. Hence, instant Criminal Acquittal Appeal has been filed by complainant Muhammad Umer.

2. Brief facts of the prosecution case as disclosed in the FIR are that initially accused Din Muhammad, Khan Muhammad, Jan Muhammad, Mubarak, Eidan, Achar, Kadir Bux and Wahid Bux were sent up to face trial in crime No.111/1989 of police station, Tando Adam for the offences under sections 302, 324, 323, 147, 148, 149 PPC in FR lodged by one Muhammad Umer.

Complainant Muhammad Umer being dissatisfied with FIR registered at police station Tando Adam and the investigation carried out by police, filed Direct Complaint against accused Achar and others, it was brought on the record vide orders dated 17.02.1990 by learned Additional Sessions Judge, Shahdadpur against all the accused named above after holding preliminary enquiry.

Muhammad Umer in Direct Complaint stated that he along with his brother Muhabat, cousin Muhammad Hassan (deceased) and Ali Nawaz used to cultivate the lands of Haji Alam Fakir Noohpoto situated in Deh Belaro. On 16.07.1989, at about 8-00 a.m, complainant party went to the lands. It is alleged that Akbar younger brother of Muhammad Hassan who had gone to graze the cattle in the jungle returned back weeping at 9-30 a.m and told that while he was grazing cattle in the jungle, when the cattle trespassed to lands of accused persons, he was given fists and kicks blows by accused and snatched his cattle. It is further stated in the complaint, that on hearing such facts, complainant Muhammad Umer along with Muhammad Hassan (deceased), Ali Nawaz and Muhabat went to accused persons to enquire about the facts narrated by Akbar. Muhammad Hassan deceased was ahead and remaining complainant party followed him. It is alleged that Muhammad Hassan deceased asked accused Wahid Bux Mama as to why his younger brother Akbar has been beaten. On this, Wahid Bux instigated co-accused not to spare them. Accused were armed with hatchets, except accused Wahid Bux, who was armed with lathi. It is stated in Direct Complaint that accused Achar caused a hatchet blow with sharp cutting side, on the head of Muhammad Hassan, while accused Din Muhammad gave hatchet blow on the head of Muhammad Hassan. Muhammad Hassan fell down on the ground and went unconscious. It is

alleged that co-accused Khan Muhammad, Qadir Bux and Eidan caused hatchets blows with blunt side to PW Muhabat. Accused Mubarak and Jan Muhammad caused hatchet blows to Ali Nawaz. It is alleged that complainant due to fear did not intervene and raised cries. Thereafter, the accused persons tied the hands of Muhammad Hassan and injured. It is further stated that on the cries co-villagers were attracted. Accused persons ran away. The complainant then took injured to Taluka Hospital, Tando Adam and went to narrate the incident to police. The Medical Officer referred injured Muhammad Hassan to Liaquat Medical College Hospital, Hyderabad for treatment from where injured was referred to Karachi for better treatment where Muhammad Hassan succumbed to injuries. Complainant went to police station for lodging FIR against the accused persons, who were already sitting at P.S with the SHO. Complainant lodged FIR, but it was not correctly recorded. It is further stated in the complaint that when Muhammad Hassan died, the complainant was busy in burial ceremony, thereafter, he got a copy of FIR and he was surprised that the FIR has not been registered as per verbatim of complainant. Hence complainant filed Direct Complaint against the accused. After holding P.E, it was brought on record.

3. Challan was submitted against the respondents/accused under the above referred Sections. It will not be out of place to mention that there were two cases, in respect of same offence. One State case lodged by the complainant Muhammad Umer vide Crime No.111/1989 at P.S Tando Adam. Complainant being dissatisfied, filed Direct Complaint, it was brought on record. Trial court rightly in the view of dictum laid down by Honourable Supreme Court in case of Nur Elahi v The State reported in PLD 1996 SC 708, ordered the Complaint Case to be taken up first and prosecution witnesses listed in police challan to be also examined.

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

5. At the trial, complainant examined 08 PWs, thereafter, side was closed.

6. Statements of respondents/accused were recorded u/s 342 Cr.P.C. in which accused claimed false implication in this case and denied the allegations of complainant.

7. Trial court, after hearing the learned counsel for the parties and on assessment of evidence, vide judgment dated 05.10.1996 acquitted the accused. Hence, this appeal is filed.

8. Mr. Hakim Ali Siddiqui, learned advocate for appellant mainly contended that witnesses were injured; that trial court ignored their presence and evidence; that contradictions in the evidence were minor in nature; that incident was not disputed; that accused Mubarak had admitted that he received injuries in the incident. However, learned advocate for appellant/complainant admitted that that injuries sustained by accused Mubarak have not been disclosed by any of the P.Ws in their evidence. In support of his contentions, learned counsel has placed reliance on the cases reported as 1. Anwar Shamim and another v. The State (2010 SCMR 1791), 2. Ghulam Abbas v. The State (2008 SCMR 1352), 3. Noor Muhammad v. The State and another (2005 SCMR 1958), 4. Khizar Hayat v. The State (2001 SCMR 429), 5. Ijaz Ahmed v. The State (2009 SCMR 99), 6. Samiullah and another v. Jamil Ahmed and another (2008 SCMR 1623), 7. Zulfiqar Ahmed and another v. The State (2001 SCMR 492), 8. Muhammad Nawaz v. The State (2005 P.Cr.L.J 1939), 9. State through Advocate-General, Sind and Ex-Officio

Public Prosecutor v. Ashraf and another (1984 P.Cr.L.J) and 10. Mst. Shamim Akhtar v. Saifur Rehman and 3 others (1995 P.Cr.L.J 1466).

9. Syed Madad Ali Shah, learned advocate for respondents / accused argued that that place of incident was disputed; blood stained earth was collected from the place of incident which has been shown in the Direct Complaint and not from the place of incident which has been shown in an F.I.R; that according to the F.I.R. place of wardat has been shown as Deh Belaro Village Wali Muhammad Dahri, land of Haji Alam Fakir Nooh Poto. It is further argued that advocate for appellant / complainant was required to seek leave to appeal in the case of acquittal in Direct Complaint. Such directions were issued to the advocate for appellant / complainant by this court on 06.11.2000. Advocate for appellant sought time but he didn't comply with it. He further argued that at the time of admission of appeal this fact was suppressed by advocate for appellant / complainant. He argued that the appeal is not maintainable u/s 417(2) Cr.P.C. Learned advocate for respondents/accused further contended that postmortem examination of deceased Muhammad Hassan was not conducted, as such, cause of death could not be ascertained; that Medical Officer of DOW Medical College, who examined the deceased, was not examined before the trial court. It is argued that complainant said that deceased died after one week of incident. P.W Muhabbat said that deceased died after 20 days of the incident, whereas, according to medical certificate deceased died on 21.07.1989. It is further argued that in the FIR incident took place on 16.07.1989 at 11:30 a.m. but in the Direct Complainant it was shown that incident took place on 16.07.1989 at 09:30 a.m. He argued that motive in the F.I.R. was dispute over rotation of water but in the Direct Complaint dispute was over cattle grazing. Learned advocate for

respondents further argued that according to the prosecution case, independent witnesses were attracted on cries but none was examined at trial. Lastly, argued that this is a 29 years old case. Respondents/accused have suffered long agony of trial. Trial court rightly acquitted the accused. Presumption of double innocence goes in favour of respondents/accused, acquittal appeal merits no consideration. In support of his contentions, he has relied upon the cases reported as Muhammad Nadeem alias Nadeem Hussain v. The State and another (2017 YLR 2291), 2. Ghulam Yasin v. The State (2014 YLR 1283), 3. Muhammad Moin v. Haji Pathan and 7 others (2017 P.Cr.L.J 535), 4. Mst. Naseeban Khatoon and another v. The State (2014 YLR 899) and 5. Muhammad Zahir and another v. Shah Saeed and 2 others (2016 P.Cr.L.J 1821).

10. Syed Meeral Shah A.P.G. for the State argued that acquittal judgment recorded by the trial court is well reasoned and requires no interference. He has also referred to the medical certificate of the deceased which shows that deceased had died due to cardiac rest and kidney failure. Learned A.P.G. prayed for dismissal of acquittal appeal.

11. In order to appreciate the contentions of the counsel for the parties, the relevant portion of the judgment and the reasons of acquittal recorded by the trial court are reproduced as under:-

“In the present case, the defence of the accused person is that on the day of incident at about 11:30 a.m. Muhabat deceased Muhammad Hassan and Ali Nawaz duly armed with hatchets attacked accused Mubarak when he was working in his fields and Muhabat caused hatchet injury on his person. All the accused are related inter-se viz. Din Muhammad, Khan Muhammad, Jan Muhammad and Mubarak are brothers, while

accused Achar is their cousin and accused Eidan and KadirBux are sons of their maternal uncle, deceased Wahid Bux (since dead) and are falsely implicated in the case. In support of defence plea, accused had examined D.W Dr. MashkoorBaig vide Ex.-56, who has testified that injured Mubarak was referred to him by Tando Adam Police on 16.07.1989 for examination, report and certificate and he found following injuries on his person caused by hard and blunt substance: -

- 1. Multiple abrasions 2 cm each, 3 in number on right zygomatic area.*
- 2. Lacerated wound 4 cm x 0.5 cm into scalp deep on right parietal region.*

Such medico legal certificates of accused Mubarak is produced as Ex-56/B. D.W-2 Qamaruddin is examined and evidence of this defence witness is in respect of place of incident.

In the present case witnesses Muhabat and Ali Nawaz are the injured persons as such their presence at the time of incident cannot be doubted. Same is the position of accused Mubarak who is also an injured person but the injuries on the person of accused Mubarak are suppressed by complainant MuhammadUmer and witnessesMuhabat, Ali Nawaz and Ali Akbar.

As discussed above, the presence of complainant, Muhammad Umer at the time of incident is doubtful due to the evidence of injured Muhabat, that he was not there when incident took place, so also of witness Ali Akbar and TapedarKhudabux, the evidence of witness Muhammad Umer cannot be relied upon as of eye witness of the incident. A part from it the injury sustained by accused Mubarak is suppressed by

witnesses and had not given any explanation that how accused Mubarak sustained injuries.

The evidence of complainant Muhammad Umar, Muhabat and Ali Nawaz is considered in the light of evidence furnished by SIP Allah Dito. SIP Allah Dito has testified in the evidence that complainant Umer arrived at Police Station, Tando Adam and lodged FIR about the incident, which is produced as Ex-14. He has further testified that he visited the place of wardat in company of complainant, Umer and mashirs whereas complainant Umer has stated that after reporting the mater to police, since the condition of injured Muhammad Hassan was serious, hence he proceeded to the hospital fromwhere the injured was referred to Hyderabad and then to Karachi hospital. As per contention of FIR the incident took place due to turn of water in the cotton crop. Witness Muhammad Rahim who had acted as mashir of wardat, which is produced as Ex-30 is examined and the mashirnama of wardat shows that place of incident is a cotton crop. Though the complainant and his witnesses were not satisfied with the contents of FIR entered by the police but SIP Allah Ditto and mashir Muhammad Rahim is not cross-examined by the complainant to rebut his version though chance was given, as such evidence of SP Allah Ditto and mashir Muhammad Rahim goes unchallenged. This unchallenged evidence of witness SIP Allah Ditto and Muhammad Rahim considered carefully and it taken into consideration as true.

Reliance is placed on 1994 Pak. Cr. L.J P.288.

(b) penal code (XLV of 1860)

*-----S.302-----Appreciation of evidence---
-----unchallenged statement, worth of-----
unchallenged statement of a witness cannot
be brushed aside and has tobe taken into
consideration as true (P.291) B.*

Suppressing the injury of the accused Mubarak by the witnesses in their evidence had casted clouds on their truthful evidence, and is not fitting in with other evidence as such the evidence of witnesses Umer, Ali Nawaz and Muhabat does not inspire confidence. Reliance is placed on 1985 Pak.Cr.L.J P.2276.

(d) penal code (XLV of 1860).

***-----S.302-----Evaluation of evidence-----
for disbelieving a particular witness, presence of
numerous infirmities with his statement not necessary--
--Even a single circumstance which created reasonable
doubt in a reasonable prudent mind as to truth of
statement of witness Held was sufficient for exclusion
of evidence from consideration (P.2280) G.***

(e) penal code (XLV of 1860)

***-----S.302-----Eye-----witnesses-----
Appreciation of evidence, Eye-----witnesses instead
of explaining injury of accused suppressing same-----
statement of such witnesses not in consonance with
probabilities and not fitting in with other evidence and a
such inspiring no confidence-----Exclusion of
statement of such eye----witnesses from consideration
held would be in accordance with safe administration
of justice (PP 2279, 2280) D, F & H.***

From the unchallenged evidence of SIP Allah Ditto and the mashirnama of wardat produced Ex-30 by witness Muhammad Rahim, it stands proved that the incident had taken place in the cotton crop, and the complainant after a period of about 25 days had filed the direct complaint, in which the place of incident is shown in jungle. This also proves that after the death of injured Muhammad Hassan, complainant and his witnesses had changed their version of the occurrence

and have made improvements at the trial than their earlier version and as such their evidence becomes doubtful and story as given by the complainant is not free from doubt.

Reliance is placed on 1994 P.Cr.L.J P.1965.

Penal code (XLV of 1860)

-----S.302-----Appreciation of evidence-----Eye witnesses having completely changed at the version of the occurrence at the trial after the death of the deceased could not be relied upon-----crime emptyrecovered from the spot having matched with the gun recovered from the accused was no avail prosecution in the absence of any other connecting link----- Accused was acquitted on benefit of doubt in circumstances (P. 1968) A and B.

Further reliance is placed on 1991 P.Cr.L.J P.849

Penal Code (XLV of 1860)

-----S.302/34-----Appreciation of evidence-----Eye -----Witnesses at the trial and improved upon their earlier version given in FIR and before police under S.161 Cr.P.C-----Statements of such eye witnesses were extremely doubtful and the story as given by them was not even free from doubt-----occurrence was not found to have taken place at the Baithak of witnesses as stated by them----- prosecution case was thus not free from doubt-----Accused were acquitted in circumstances (PP.853, 854) A, B,C,D&E.

The contradictory evidence in respect of the injuries sustained by the deceased and witnesses, with

medical evidence and suppressing of injuries sustained by accused Mubarak, created a doubt in the complaint's case, hence, to prove the case independent corroboration was necessary, complainant Muhammad Umer and witnesses Ali Nawaz and Muhabat have stated that on the cries, the villagers came at place of incident and accused went away with their weapon but not a single villager attracted to the place of incident is examined by the complainant in the case, to prove his version. Non-examining of such witness has proved that the incident had not taken place as stated by complainant and witnesses. It was incumbent upon complainant to produce evidence from unimpeachable source and non-production of the same has proved that complainant and witnesses had changed their version with regard to the incident and also changed the place of incident as such their evidence could not be believed and cannot be relied upon.

There is recovery of hatchets but the same are not referred to chemical examiner when it is stated by the witnesses that the same were blood stained.

The motive of the incident is alleged that accused Wahid Buxsnatched the buffaloes from Ali Akbar and further accused intended to cause harassment to that complainant party to leave the village. No doubt such incident are taken place due to some motive, but if a motive is alleged then it is the duty of prosecution to prove the same through evidence with logic, complainant has not produced any villager as witness with regard to the motive of the accused that they intended to cause harassment against the complainant party to leave the village. No such previous incident is brought in evidence. So for the snatching of buffaloes is concerned, it is not believable that the complainant party went to the accused for enquiry and without assigning any cause accused made assault at the

deceased and injured. Even the witnesses have not testified that Ali Akbar informed them after snatching of buffaloes by accuse Wahid Bux that other accused were also present there. As such the motive alleged by the complainant stands proved.

In the present case as per medial evidence three persons had received in all six injuries whereas the complainant has made eight accused in the case, who all are closely related with each other. There are also contradictions in respect of weapons carried by the accused in the complaint as well as in FIR and it is tendency to involve more and more accused in the case with intent to involve and pressurize the accused party and this fact cannot be over looked.

In the present case persons from both the sides are injured and both the parties had come out with different version as to the occurrence and in such cases the corroboration of independent evidence was very much necessary, which complainant has not produced.

Reliance is placed on 1985 P.Cr.L.J P.59.

(a) Penal code (XLV of 1860)

-----S.302, 307, 148 & 149-----persons from both sides injured-----Both sides coming out with different versions as to occurrence-----corroboration by independent evidence necessary (Evidence) (P.67) A.

In the present case, the accused Mubarak had placed right of self defence. It is admitted position that he is injured accused and his injuries were suppressed by the complainant, hence it presumes that his plea of defence had got some force in the absence

of strong independent evidence produced by the complainant side. Even otherwise it is the complainant who has to prove the case against the accused by producing independent evidence beyond any doubt.

The appraisal of evidence is that complainant in the present case has failed to produce independent evidence. All the witnesses are related and interested. The ocular version is changed with regard to the occurrence and place of incident. The ocular version is contradictory with medical evidence and the injuries on the part of accused Mubarak are suppressed. The blood stained weapons are not referred to the chemical examiner and their recovery is doubtful. The motive of the incident is not proved and the complainant has failed to prove the case against the accused beyond any doubt as such my findings to point No.2 are as not proved.

Point No.3.

In view of the findings mentioned above, I extend the benefit of doubt to the accused Achar, Din Muhammad, Khan Muhammad, Eidan, Mubarak, Jan Muhammad, KhudaBux and acquit them u/s. 265-H Cr.P.C. They are on bail, their bonds stands cancelled and sureties discharged.”

12. In order to appreciate the main contention of Syed Madad Ali Shah, with regard to maintainability of acquittal appeal in Direct Complaint, Section 417 Cr.P.C is reproduced as under:-

“417. Appeal in case of acquittal. (1) Subject to the provision of sub-section (4), the Provincial Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant party may present such an appeal to the High Court.

(2-A) A person aggrieved by the order of acquittal passed by any Court other than a High Court, may, within thirty days, file an appeal against such order.

(3) No application under sub-section (2) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order.

(4) If, in any case, the application under sub-section (2) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1).

(5) An appeal against an order of conviction or acquittal under sections 354-A, 376, 376-A, 377 or 377-B of the Pakistan Penal Code, 1860 (Act XLV of 1860) shall be decided within six months."

There is legal force in the contention of learned advocate for the respondent/accused that special leave to Appeal was required, it was not granted to the appellant/complainant in terms of Section 417 (2) Cr.P.C. No application for grant of special leave to Appeal from an order of acquittal was submitted before this court. As such, present Appeal which arises out of the acquittal order passed in Direct Complaint is not maintainable in the eyes of law. Record further reflects that advocate for the appellant/complainant sought time to satisfy the court but he could not satisfy. Apart from that, we have come to the conclusion that prosecution failed to prove its case against the respondents/accused for the reasons that all the PWs were closely related to the deceased. There was dispute between the parties. Independent persons were attracted at the time of incident but the prosecution failed to examine them at trial. Complainant Muhammad Umer claimed to be the eye witness of incident but PW Muhabat in cross examination has replied

that Muhammad Umer was not present at the time of incident. Trial court rightly disbelieved his evidence. In case, complainant was present at the time of incident, he would have also sustained injuries but not a single injury was caused to him. It was also against human conduct that close relatives of the complainant were receiving injuries but the complainant did not come forward to rescue them. In this case, place of incident in the direct complaint as well as in the FIR were different. Trial court rightly held that the place of incident was disputed. In the FIR it is mentioned that incident took place on 16.07.1989 at 11-30 a.m. whereas in the Direct Complaint filed after 25 days, it is mentioned that the incident took place on 16.07.1989 at 9-30 a.m. Trial court has rightly observed that the prosecution witnesses suppressed the injuries sustained by accused Mubarak. We have perused the record which reflects that injured Mubarak had sustained injuries and he was medically examined and the Medical Officer was also examined before the trial court. As regards to the evidence of injured witnesses, it is observed that injuries on the person of the injured persons would show that they were present at the time of incident but injured witnesses have to prove that they were telling the truth. In this case, injured witnesses suppressed injuries of accused Mubarak as such, their evidence was not reliable. Court inquired from the advocate for appellant /complainant that P.W Muhabbat in cross-examination has admitted that complainant Muhammad Umer was not present at the time of incident, he submits that it is a matter of record. So far relationship is concerned, it is admitted that P.Ws were closely related to the deceased. It is also admitted by the Counsel for appellant/complainant that medical evidence was contradictory. Counsel for appellant/complainant has admitted that hatchet and lathies though blood stained but were not sent

to the Chemical Examiner for analysis and report. Counsel for the appellant/complainant admits that Doctor had examined accused Mubarak and certified that Mubarak had sustained injuries. In the F.I.R. so far motive is concerned, it is stated that incident occurred due to dispute over water rotation, but in the direct complaint, it is mentioned that cattle of the complainant party were snatched by the accused persons, which resulted in the present incident. Direct complaint was filed after 25 days of the registration of the F.I.R. Moreover, blood stained earth was collected from the place of incident which has been shown in the direct complaint and not from the place of incident which has been shown in the F.I.R.

13. 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).

14. The scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of the 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).

15. Before parting with our judgment, we would also like to state that incident took place in the year 1989 and the impugned judgment of acquittal has been passed nearly 22 years ago. Right from then the sword has been hanging on the head of the respondents/accused.

16. We would be failing in our duty if we do not mention that appeal has been fairly and strenuously argued by learned counsel for the

appellant and State, especially Syed Madad Ali Shah, counsel for the respondents. He has been of tremendous assistance to us in this case.

17. 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 15.05.2018. These are the reasons whereof.

JUDGE

JUDGE

Tufail