

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

Criminal Acquittal Appeal No. D-436 of 2010

**PRESENT:**

Mr. Justice Salahuddin Panhwar  
Mr. Justice Zulfiqar Ahmed Khan

Date of hearing : 07.04.2022

Date of judgment : 07.04.2022

Mr. Aijaz Shaikh, Advocate for appellant.

Mr. Suleman Dahri, Advocate for respondents No.1 and 2.

Mr. Shahzado Saleem Nahiyoon, Additional Prosecutor General for State.

**JUDGMENT**

*SALAHUDDIN PANHWAR, J:* Respondents /accused Soomar and Taj Muhammad were tried by learned II-Additional Sessions Judge, Badin in Sessions Case No.74 of 2010 for offences u/s 302, 114, 34 PPC. After regular trial, vide judgment dated 05.11.2010, the respondents / accused were acquitted of the charges by extending them benefit of doubt. Hence, instant Criminal Acquittal Appeal was filed by complainant Karim Bukhsh.

2. Succinctly, the facts of the prosecution case as disclosed in the impugned judgment passed by the learned trial court are reproduced under:-

“Complainant Karim Bukhsh Mallah lodged FIR at Badin Police Station on 04.04.2002 at 08-00 p.m stating therein that he is zamindar. There is a dispute with Jamali. About three years back Mallahs had killed Jano Jamali, therefore, Allah Bachayo and Muhammad Ismail Mallah were arrested in that murder case and were challaned in the court of law who were released on bail. Therefore, the Jamalis were not happy and used to advance threats that they would take revenge of the murder of Jano Jamali. It is alleged that on the day of incident i.e. 4.4.2002 complainant, Allah Bachayo and Muhammad Ismail had gone to Badin town for some private work. After doing work they were standing at the Seerani Bus Stop for any vehicle. Khamiso, Abdul Jabbar were also standing at Bus stop. It was about 5 p.m all of sudden Ali Bux Jamali, Tajo Jamali, Soomar Jamali and

Master Rabdino Jamali came out from back side of the hotel. Soomar and Tajo were armed with hatchets while Master Rabdino had country made pistol. Ali Bux instigated these persons that their enemy has come, whereupon Master Rabdino fired with his country made pistol upon Allah Bachayo. Allah Bachayo started running to the other side of the road when Somar Jamali and Tajo Jamali who were armed with hatchets gave hatchet blows on his body who fell down. The complainant party raised cries on which accused Master Rabdino Jamali fired with the country made pistol at the head of Allah Bachayo. The accused then ran away. The complainant and PWs found injuries on the person of Bachayo and shifted him to the Civil Hospital Badin where Allah Bachayo died. Thereafter, complainant proceeded to the police station Badin and lodged the FIR stating therein that due to enmity over lands on the instigation of Ali Bux Jamali, Somar Jamali, Tajo Jamali and Rabdino Jamali have murdered his brother Allah Bachayo."

3. After usual investigation, co-accused Ali Bukhsh and Rabdino were let off by police under Section 497 Cr.P.C and their names were kept in column No.2 of the challan sheet. Whereas challan was submitted against the present accused/respondents Soomar and Taj Muhammad under the above referred Sections.

4. Upon indictment, the respondents / accused did not plead guilty and claimed to be tried.

5. At trial, prosecution examined in as much as 10 PWs who produced the relevant documents / reports. Thereafter, prosecution side was closed.

6. Statements of accused were recorded u/s 342 Cr.P.C in which they claimed false implication in this case and denied the prosecution allegations. Accused Soomar further stated that in case under Section 13-E Arms Ordinance he has been acquitted. He further stated that they have been falsely involved due to enmity as deceased was accused in murder case of his uncle. They however, neither examined on oath nor led any evidence in their defence.

7. Trial court after hearing the learned counsel for the parties and on assessment of evidence, vide judgment dated 05.11.2010 acquitted the respondents / accused, hence this acquittal appeal is filed.

8. At the outset, learned counsel for appellant while referring the evidence of complainant and medical evidence contends that deceased

received firearm injuries alongwith hatchet injuries; that though Rabdino and Ali Bux were let off by the police however rest of the two accused persons Soomar and Taj Muhammad were arraigned who faced trial; that learned trial court acquitted the respondents while relying on minor contradictions and non-examination of PW Khamiso without taking into consideration the fact that prosecution proved its case beyond shadow of doubt by producing confidence inspiring evidence; that the impugned judgment is passed by the learned trial court in slipshod manner hence requires interference by this Court.

9. In contra, the learned counsel for respondents as well as learned Additional Prosecutor General contend that impugned judgment is speaking one as sufficient contradictions were brought on record. Two accused persons were let off by police though the complainant preferred an application under Section 193 Cr.P.C but that was declined and he failed to challenge the same hence benefit of doubt extended by the learned trial judge was in accordance with law and these findings cannot be reversed on the evidence of two witnesses who were disputed by witness Khamiso particularly.

10. Being relevance adjudication of the learned trial judge on ocular account is reproduced hereunder:-

“Ocular evidence:-

The ocular account of the incident has been furnished by complainant Karim Bux and PWs Ismail and Abdul Jabbar. The complainant Karim Bukhsh and PW Ismail are real brothers of deceased Allah Bachayo. The complainant Karim Bux has stated in his evidence that there was dispute between them and the accused over the lands situated in Deh Ahmed Rajo-4. About three years prior to this incident deceased Jan Muhammad Jamali was murdered in which Allah Bachayo, Ismail, Muhammad Yousif and Sharif were challaned. Accused Allah Bachayo and Ismail were released on bail. Jamalis were saying that they would take revenge of murder of deceased Jan Muhammad Jamli. On the day of incident he along with his brother Allah Bachayo and Ismail came in Badin town with their personal work. After completing their work in the town they came at Seerani Bus Stop in Badin town. They saw Jabbar and Khamiso Noherio were also present there. It was 5 p.m time they saw Soomar, Tajo, Rabdino and Ali Bux came from back side of hotels. Soomar and Tajo were having hatchets. Rabdino was armed with country made pistol. Ali Bux instigated others not to spare their enemies. On the instigation of Ali Bux accused Rabdino fired from his pistol in the air. On this his brother Allah Bachayo started running away when he reached in the mid of road when accused Tajo and Soomar caused him sharp sided hatchet blows who fell down on the road. In the meantime accused Raboo put pistol upon the head of Allah

Bachayo and fired upon him and then accused escaped away. Thereafter they took Allah Bachayo to Civil Hospital Badin, where he died. He left Ismail, Khamsio and Abdul Jabbar with dead body and went to police station Badin where he lodged FIR. Police then came in the hospital, inspected the dead body. He has stated that accused Soomar and Tajo present in Court are same while accused Ali Bukhsh and Raboo were let off by the Police.

The other witnesses Ismail and Abdul Jabbar have also stated the same facts more or less. The complainant Karim Bukhsh has stated during cross-examination that they came in Badin town at 9 a.m. They came in Badin to purchase the clothes but PW Ismail has stated that they came in Badin at about 10 or 11 a.m. They purchased the clothes and also purchased other goods which were with them. The complainant Karim Bux has stated that they were at shop of cloth owned by Ismail Memon all the day prior to the incident but PW Ismail has stated in his cross-examination that they were present at the shop wherefrom they purchased other commodities and they were with them prior to the incident. Both the complainant and PW Ismail have stated that the incident took place at Seerani Bus Stop in Badin town where number of persons were present for going to their destinations as well as other persons were available there. The complainant Karim Bukhsh has stated in evidence that when they reached at Seerani Bus Stop they saw that Jabbar and Khamiso Noherio were already present there but PW Abdul Jabbar has stated in his evidence that when they came at Seerani Bus stop where Allah Bachayo, Ismail and Karim Bux were already present. This creates serious doubt even about the presence of both these witnesses. PW Abdul Jabbar and Khamiso belong to other caste and they are by caste Noherio, one of them PW Khamiso has been given-up by the state counsel on the ground that he was not supporting the prosecution case, as such inference can be drawn against the prosecution that prosecution withheld important piece of evidence and when this PW was not examined by the prosecution case then it can be presumed that although he was cited as witness but he was not supporting the prosecution case and was not wanting to give evidence on oath to dispose the true facts in the Court, as such, it creates doubt upon the evidence of other PWs. PW Abdul Jabbar has given the names of all the accused with their parentage when even the complainant and PW Ismail have not given the parentage of the accused. This shows the interestedness of this witness that he came prepared being tutored to give evidence in favour of the prosecution case. The complainant has stated in his evidence that Rabdino was armed with country made pistol and Ali Bux instigated others not to spare their enemies. But PW Abdul Jabbar stated that Rabdio fired from his pistol and told that none should come near to them but latter sentence has not been stated by complainant as well as PW Ismail. Complainant Karim Bukhsh has stated in his evidence that his brother Allah Bachayo started running away when he reached at the road accused Soomar and Tajo caused him sharp sided hatchet blows who fell down on the road but PW Abdul Jabbar has stated in his evidence that he has not stated before the police that Allah Bachayo started running away when reached at the mid of road where accused Soomar and Tajo caused hatchet sharp sided blows to him but he has only stated that Master Raboo fired from his country made pistol and told that none should come near to them and then accused Soomar and Tajo caused hatchet blows on the head

and other parts of body of Allah Bachayo who fell down. PW Ismail has stated in his evidence that accused Ali Bux instigated others that their enemy was present hence kill him. PW Ismail has also stated during cross examination that he has not stated before police that they took Allah Bachayo in Datsun of Talib Parhiar. He has also stated that cleaner of the Datsun may be present there. Complainant and PWs have stated that they put injured in Datsun and their hand and clothes where stained with blood but police did not secure their clothes nor noted the blood on their hands. PW Abdul Jabbar has stated during cross-examination that he brought his NIC in which the address of village Bukhari is not mentioned. His NIC shows his residence at Taluka Deeplo District Tharparkar. He has also stated that his present address is given as PO Khoski Taluka Tando Bago District Badin. He has also stated in the cross-examination that he is residing in village Bukhari which was situated at the distance of five kilometers away from the village of the complainant. He came there in the year 2002 for cultivation of the lands. On the day of incident they came in Badin town to purchase house hold articles. They left those articles with them there, after the incident. He has also stated that they and Karim Bux, Ismail and Allah Bachayo reached together at bus stop Seerani. He has stated that when they came at Seerani Bus Stop, the complainant parties were already present there. He has further stated that he cannot say exactly that when they reached bus stop, the complainant and others were already present. He has stated that he may have stated in his statement before police that when he and Khamiso reached Bus Stop Seerani, complainant Karim Bux, Allahy Bachayo and Ismail were already present there. At the time of incident other peoples were not available and after the incident many peoples gathered there. He has stated that they were present at cabins and hotels.

From the evidence of PW Abdul Jabbar it appears that he is originally resident of Deeplo Tharparkar and he was chance witness and his contradictory evidence to the evidence of complainant and PWs clearly creates doubt upon his presence at the time of the incident. Moreover, the complainant and PWs have stated that accused Rabdino, Ali Bux, Soomar and Tajo were present there out of them Raboo caused pistol shot on the head of Allah Bachayo while accused Taj Muhammad and Soomar gave hatchet blows to deceased Allah Bachayo. Accused Rabdino and Ali Bux were let off by the police during investigation. Complainant partly also filed application for joining them in the trial and such application was also dismissed, as such it has come on record that accused Raboo and Ali Bukhsh did not participate in the alleged incident as per investigation of the case, as such, the complainant and PWs falsely involved two persons hence their evidence is not said to be relied upon against two remaining accused. It has been held in a case reported in 2009 SCMR 230 that if the prosecution witness could involve one accused in a false case, then their statements qua the other accused could not be relied upon the absence of very strong, independent and corroboratory evidence against them. In the case report in PLD 2002 Supreme Court 643 it has been held as under:-

(C) Penal code (XLV of 1860) ---

---S.302--- Appraisal of evidence ---principles---Maxim: "Falsus in uno falsus in omnibus" ---Applicability---where the witnesses are found false against one accused, their evidence being of doubtful character would not be acceptable qua the remaining accused without independent corroboration, and thus if the evidence of a witness is discarded to the extent of one accused, the same should not be automatically excluded from consideration qua other accused as the same can still be used against the remaining accused if it is supported by any other evidence of independent character---Principle of "falsus in uno falsus in omnibus", therefore, cannot be accepted as mandatory rule and given preference over the principle of "sifting the grain from the chaff", as by doing so the true spirit of criminal administration of justice shall be defeated. [p.661] C.

The complainant and PWs have not specifically stated that in their evidence that which accused caused which injury on which part of the body of the deceased but they have leveled general allegations against accused Soomar and Taj Muhammad that they caused hatchet injuries to the deceased. As per medical evidence only one injury sustained by deceased Allah Bachayo has been declared as fatal, as such, it cannot be attributed to any of the accused particularly when two accused have already been let off from the case, as such, common intention of the accused has been broken up hence they are not proved to have shared common intention with each other. The complainant and PWs have stated that accused Rabdino caused injury with pistol but this accused has been let off from the case, hence accused Soomar and Taj Muhammad cannot be found guilty for causing the injury to deceased with pistol which has not been attributed by the complainant and PWs to them in their evidence.

In view of the above discussions I have come to the conclusion that there are material contradictions and inconsistencies in the evidence of complainant and PWs which have created serious doubt upon the veracity of their evidence. In this case, there is admitted enmity between the parties and murder case of accused party was already pending against the deceased Allah Bachayo and others hence in such situation the evidence of the complainant and PWs lacks independent corroboration in the circumstance that their evidence has been found shaky as there are material contradictions in their evidence and their presence at the place of incident is also doubtful. It is also noted that none of the complainant and PWs caused a single injury to accused persons even none of them received single injury at the hands of accused and it cannot be such a situation that they were only watching the incident when they claim that they came together and were present together at that time. Therefore ocular evidence of the prosecution is doubtful and it cannot be relied upon as the evidence of the complainant and witnesses is neither believable nor inspiring confidence."

11. Keeping in view the contentions raised by learned counsel for the respective parties, we have examined the judgment carefully. Admittedly, PW Khamiso who was the eye witness of incident was given up by State on the

plea that he is not supporting the prosecution case. Learned trial judge while adjudicating contended that since Khamiso was not supporting the prosecution case as such "*inference can be drawn*" against the prosecution that prosecution withheld the important piece of evidence, as such, it was held that it created doubt upon the evidence of other PWs. Learned trial judge has further found material discrepancies / contradictions in the evidence of rest of the prosecution witnesses. Needless, to mention that the medical evidence can never be primary source of evidence for the crime itself but is only corroborative which may confirm the ocular evidence with regard to the seat of injury, nature of injury and kind of weapons used in the occurrence and it cannot connect the accused with the commission of crime. In the present case, two accused persons were let off by police; one accused Rabdino against whom allegation of causing pistol injury was also released at investigation stage. The I.O had also not believed the story of the complainant during investigation and subsequently at trial, the learned trial Court had also disbelieved the prosecution case.

12. It is also to be kept in mind that the present appeal is against acquittal and the golden thread which runs through the administration of criminal justice while hearing the appeal against the acquittal is that even if two views are possible their innocence, the view which is favourable to the accused should be accepted and the finding of acquittal recorded by the Trial Court should not be disturbed by the appellate Court. The reason is that while passing the order of acquittal, the presumption of innocence in favor of the accused is re-enforced. In case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocence unless he is proved to be guilty by a competent Court and secondly the accused having secured an acquittal, the presumption of innocence is, re-enforced and strengthened by the Trial Court.

13. The Honourable Supreme Court in the case of **the State through P.G Sindh and others vs. Ahmed Omar Sheikh and others (2021 SCMR 873)** has held as under:

"Admittedly the parameters to deal with the appeal against conviction and appeal against acquittal are totally different because the acquittal carries double presumption of innocence and same could be reversed only when found blatantly perverse, illegal,

arbitrary, capricious or speculative, shocking or rests upon impossibility. If there is a possibility of a contrary view even then acquittal could not be set aside as has been settled in the cases of *The State v. Khuda Dad and others* (2004 SCMR 425), *Muhammad Nazir v. Muhammad Ali and another* (1986 SCMR 1441), *Rehmatullah Khan v. Jamil Khan and another* (1986 SCMR 941), *Mst. Daulan v. Rab Nawaz and another* (1987 SCMR 497) and *Gulzar Hussain v. Muhammad Dilawar and others* (1988 SCMR 847)."

14. The principles with regard to the scope of the powers of the appellate Court in an appeal against acquittal are well settled. The powers of the appellate Court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate Court cannot substitute its view in the place of that of the trial Court. It is only when the approach of the trial Court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate Court can interfere with the order of acquittal.

15. After perusing the impugned judgment of the trial court and the record of this case; we are of the considered view that the reasoning given by the trial court while acquitting the respondents is neither arbitrary nor perverse nor fanciful and the same does not call for any interference by this Court. This Acquittal Appeal having no merit is accordingly dismissed.

JUDGE

JUDGE

Tufail