IN THE HIGH COURT OF SINDH. CIRCUIT COURT, LARKANA

Cr. Jail Appeal No.S-16 of 2021

Appellant Mehar Ali Solangi (since deceased)	: Through Mr. Athar Abbas Solangi, Advocate
The State	: Through Mr. Ali Anwar Kandhro, Addl. Prosecutor General, Sindh.

Date of hearing : 07.04.2022.
Date of Judgment : 07.04.2022.

J U D G M E N T.

MUHAMMAD SALEEM JESSAR, J:- The appellant, Mehar Ali Solangi, was convicted by Special Judge Anti-Corruption (Prov.), Larkana, vide impugned Judgment dated 27.02.2021, passed in Spl. Case No.34/2013 re-The State v. Mehar Ali Solangi, arisen out of Crime No. 18/2011, PS ACE, Shikarpur, for an offence punishable u/s 409, PPC read with section 5(2) of the Prevention of Corruption Act-II of 1947 and sentenced to suffer four years R.I. and to pay fine of Rs.50,000/-, and in default of payment of fine, to further undergo S.I. for three months more; he was also sentenced under section 409, PPC to suffer four years R.I. and to pay fine of Rs.50,000/-, and in default of payment of fine, to undergo S.I. for three months more. The sentences were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was also extended to the appellant. He challenged his above conviction and sentences by filing the present appeal.

2. This appeal, being statutory right of convict, was admitted for hearing vide order dated 08.03.2021. Thereafter, on an application under section 426, Cr.P.C. (M.A. No.964/2021), vide order dated 26.03.2021, the sentence awarded to the appellant was suspended and he was released on bail.

3. Before proceeding further, it would be appropriate if a new twist in the case is discussed first. Per report furnished by the Circle Officer, Anti-Corruption, Shikarpur, the appellant, Mehar Ali Solangi, had expired on 12.01.2021. To such effect, Death Certificate of the appellant was issued by the Secretary, Union Council Wada Machhi, District Shikarpur through NADRA, which has been perused and taken on record.

4. Learned counsel, Mr. Athar Abbas Solangi, who was appearing for the appellant during his lifetime, submitted at the very outset, that though the appellant, Mehar Ali Solangi, had died during pendency of his appeal but the legal heirs of the appellant are not coming forward to pursue the above criminal appeal for reasons best known to them. However, per learned counsel, it is settled law that one can die but right to sue against him or on his behalf does not die. In support of his argument, he relied on the case of *Dr. Ghulam Hussain & others v. The State* **(1971 SCMR 35)** and also referred to Order XXII, rule 4(4), CPC. Therefore, he went on to submit that by considering the flaws in the impugned judgment and the discrepancies in the evidence brought on record by the prosecution, the appeal may be allowed and the appellant may be acquitted of the charge. Learned counsel submitted that in view of provisions of section 423, Cr.P.C. this Court can pass any order i.e. to maintain or vary the conviction, or acquit the appellant. Mr. Athar Abbas Solangi, further submitted that if the impugned judgment is overturned in

appeal, the legal heirs of the appellant would, at-least, inherit the back benefits which their predecessor would have got, had he succeeded in appeal in his lifetime.

5. On the other hand, learned Addl. P.G., appearing for the State, after going through the evidence adduced by the prosecution before the trial Court has very candidly extended his no objection and has also placed reliance upon the case reported as *Mukaram Khan v. The State & another* **(2021 MLD 176)**.

6. Heard arguments and perused the record and the case-law cited by learned counsel for the appellant as well as the APG.

7. In view of the fact that the appellant had expired during pendency of his appeal, the first question which arises for determination is whether this appeal abates in view of the provisions of Section 431 of the Cr.P.C. or not. Learned counsel for the appellant relied on the case of *Dr.Ghulam Hussain & others v. The State* **(1971 SCMR 35)** and also referred to the provisions of Order XXII, rule 4, CPC in support of his arguments. Although, the case of *Dr. Ghulam Hussain & others v. The State* **(1971 SCMR 35)** is relevant for the purpose of this criminal appeal, but the provisions of Civil Procedure Code 1908, cannot be referred to, in a case falling under the ambit of the Code of Criminal Procedure, 1908, particularly when a specific provision to deal with the situation in hand is available in the Cr.P.C. The consequences of death of an appellant during pendency of his criminal appeal against conviction and sentence are elaborated in Section 431, Cr.P.C. The provisions of section 431, Cr.P.C. deal with abatement of appeal on the death of an appellant. The above section reads as under:

> "431. Abatement of appeals: Every appeal under Section 411-A, sub-section (2), or Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter except an appeal from a sentence of fine shall finally abate on the death of the appellant."

8. A perusal of the above-quoted section 423, Cr.P.C. reveals that it caters to three distinct appeals: (i) an appeal under section 411-A, sub-section (2), Cr.P.C., which deals with an appeal to the High Court from any order of acquittal by the High Court in the exercise of its original criminal jurisdiction; (ii) an appeal under section 417, Cr.P.C. which also relates to appeal against acquittal, and (iii) every other appeal under Chapter XXXI. The appeal filed by the deceased appellant falls under the category (iii), as it was filed under section 410, Cr.P.C. The only exception provided under section 431, Cr.P.C. is that an appeal in which the appellant, apart from sentence of imprisonment, has also been sentenced to fine, shall not abate on the death of the appellant.

9. Thus, the clear import of the provision of section 431, Cr.P.C. is that a criminal appeal filed under section 411-A or sub-section (2) of section 417 or any other appeal under Chapter XXXI of Cr.P.C., abates on the death of the appellant, but an appeal against a sentence of fine shall not abate by reason of the death of the appellant. The wisdom behind such exception seems to be that imposition of fine is not a matter which affects appellant's person, but one which affects the rights of his legal heirs to the estate left behind by him and which now devolves on his legal heirs. Where an accused has appealed against the sentence of imprisonment and fine and before the appeal is heard and disposed of in accordance with law, the appellant dies, that part of the appeal which relates to the sentence of imprisonment, as it relates to the person of the appellant himself, shall abate on the death of the appellant; but the other

part of the appeal, which relates to the sentence of fine, shall not abate on the death of the appellant for the simple reason that it, after the death of the appellant, does not relate to the person of the appellant but it directly affects the estate left behind by the deceased appellant which now, after the death of the appellant, stands devolved on his legal heirs as per their legal shares.

10. In the above-cited case of *Dr. Ghulam Hussain & others v. The State* **(1971 SCMR 35)**, in which also the appellant had died during pendency of his appeal, the Hon'ble Supreme Court observed that *"…appellant died during the pendency of the appeal. As, however, a sentence of fine was inflicted by the Courts below in addition to the sentence of imprisonment, the appeal does not abate under section 431 of the Criminal Procedure Code. The legal heirs of the deceased - appellant have appeared through counsel and wish to challenge the conviction on the merits."*

11. In the case of *Sheikh IQBAL AZAM FAROOQUI through Legal Heirs Versus The STATE through Chairman NAB* **(2020 SCMR 359)**, the Hon'ble Supreme Court dealing with a similar case held as under:

> "4. Corporal consequences of a conviction wither away with the death of the convict, therefore, appeal filed by the convict would automatically abate, as the death severs all temporal links with his corpus. However, financial liability, consequent upon conviction and shifted upon the estate, would certainly require the appellate court to decide the appeal on its own merit as in the event of its failure, the liability is to be exacted from the assets devolving upon the legal heirs. A plain reading of section 431 of the Code *ibid* confirms the above contemplation of law."

12. At this juncture, it would not be out of place to divert my attention to another important aspect of the matter. The appellant was convicted and sentenced by the trial Court, as stated above. Now, there is a

stigma attached to his name which, even on his death, will hound the family of the deceased. Thus, even after the death of the appellant, his legal heirs, apart from being interested in the pecuniary and pensionary benefits of the deceased can also pursue the matter to clear any slur on the reputation of the deceased which not only impinges on the human dignity but also weighs heavily on the dignity and honour of his family. Our Constitution in very clear terms guarantees fundamental rights to every citizen. In this regard, reference may be made to Article 14 of the Constitution, which deals with inviolability of dignity of man and thus the appellant has the fundamental right to clear his name and this right survives even after his death, as the stigma attached to his reputation will remain attached to his name until it is removed through proper process of law. Similarly, right to life (Article 9 of the Constitution) also includes right to livelihood which passes on to the legal heirs of the deceased appellant as after his conviction and sentence, the appellant must have been dismissed from services and deprived of his service benefits. If the appellant was acquitted and his sentence was set aside, then he becomes entitled to reinstatement in service and to service benefits as well and all these service benefits would pass on to his legal heirs.

13. The reason for the legal heirs for not coming forward to pursue this appeal on behalf of the deceased appellant seems to be either ignorance of the legal heirs who might be of the view that once the appellant died the appeal might have ended and there was no need to pursue the same or it might be due to the financial constraints as the bread-earner of the family was facing criminal trial and was deprived of his income.

14. However, there is one impediment as, in the cited cases, the legal heirs of the deceased came forward to challenge the conviction of the deceased appellant on merits. In the present case, as stated by learned counsel appearing for the deceased appellant, the legal heirs of the deceased have not come forward to proceed with the appeal on merits.

15. In this regard, reference may be made to the case of ***BASHIR AHMAD MALIK*** *Vs.* ***THE STATE*** **(1988 PCr.LJ 1693)**, decided by a learned single Judge of this Court, wherein a similar situation arose, as after the death of the appellant, the leaned counsel for the appellant requested the Court to proceed with the appeal on merits. The Hon'ble single Bench proceeded with the appeal in the following words:

> "It will be worthwhile to mention here that during the pendency of the above appeal the appellant died, but in spite of that the learned counsel appearing for the appellant requested the Court that the matter should be heard and decided on merits. In this connection he relied upon 1971 SCMR 35. My learned brother was pleased to order that the appeal has not abated, and it should be heard on merits."

16. Be that as it may, in view of the above discussion, I am of the considered view that the instant criminal appeal does not abate in view of the death of the appellant, as a sentence of fine was passed by the trial court. Hence, the same could be heard and decided on merits even on the request of the learned counsel who was appearing on behalf of the appellant during his lifetime.

17. Now, taking up the merits of the case, the first lacuna in the prosecution case is that the FIR against the deceased appellant was lodged after a delay of about three years. From the deposition of PW-1 Ghulam Sarwar (Exh.5) it transpires that the weapons were checked in the year 2008 (even no date and month is mentioned); however, the FIR

was lodged in the year 2011. This is a very long period for which there is no explanation whatsoever. It is trite law that an FIR must be lodged with promptitude in order to give it reliability and credibility unless such delay can be explained. First Information Report (FIR) is regarded as the cornerstone of the prosecution case which gets the ball rolling in a criminal case. If there is a flaw in lodging of the FIR, like delay in filing the same, then the same goes to the root of the case and a doubt is created in the prosecution case qua the accused, as in that case possibility of consultation and conspiracy cannot be ruled out. This delay in the present case, where the appellant alleged in his 342, Cr.P.C. statement that the officials were inimical to him, is all the more fatal to the case of the prosecution.

18. However, the trial Court completely ignored the law laid down on the point of delay in filing of FIR by the superior Courts. In the case of *Mehmood Ahmed & others v. The State* **(1995 SCMR 127)**, the Hon'ble Supreme Court, while dealing with delay of two hours in lodging of the FIR observed as under:

> "If Qamaruzzam was in post haste to reach the police station immediately and had rushed without talking to Abdur Rashid, then there is no explanation why he reached there at 8 p.m. Although in some circumstances a delay of two hours may not be of much importance yet in the facts and circumstances of this particular case as they have happened, the delay has great significance. It can be attributed to consultation, taking instructions and calculatedly preparing report keeping the names of accused open for roping in such persons whom ultimately prosecution may wish to implicate."

19. The Hon'ble Apex Court further observed that "*where the delay is unexplained, accused have not been named in the F.I.R. and circumstances justify that the open F.I.R. and delay has purposely been*

maneuvered to name the accused later, such managed delay and gaps adversely affect the prosecution."

20. In the present case, the appellant remained posted at various police stations of District Shikarpur, however, no such complaint was made against him nor any FIR was lodged against him during these long three years. It seems that the delay in lodging the FIR against the appellant points to consultation, taking instructions and a conspiracy to punish him on account of some other grudge including departmental intrigue against him cannot be ruled out.

21. Now, adverting to the evidence brought on record by the Prosecution, the main witness Ghulam Sarwar (Ex.5), who was Armour in District Shikarpur, had clearly deposed in his examination-in-chief that his statement was not recorded by the I.O. Even he was not in a position to disclose the specific number or description of the weapons allegedly changed or misappropriated by the appellant nor such weapons were produced by the prosecution. During his cross-examination, this witness stated that "it is correct that the property was not sealed at police station". Although, he stated that entry with regard to checking of weapons was made, but the same was not produced in Court during evidence. Further, this witness had admitted that he had no certificate from any competent institution regarding checking of ammunition, however, time and again he says that he issued certificates in respect of weapons. He did not produce any certificate from any ballistic expert in respect of the weapons which were found defective during inspection. It was also necessary to have produced a report that those weapons were handed over to the appellant complete in all respects. In the absence of

such report it is impossible to attribute any misappropriation to the appellant.

22. The evidence of PW Abdul Quddus, Inspector, DIG Office (Exh.9 at page 87 of the paper book) is of great importance. It would be advantageous to reproduce his entire cross-examination, which reads as under:

> *"Cross to Mr. Muhammad Ali Memon, Adv: for the accused.*
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> *My statement was recording [recorded] in the year 2011 after registration of case against the accused. It is correct that I had not physically checked the arms and ammunition missing. It is correct that I am not arms and ammunition expert in order to ascertain that whether some articles are changed as alleged. It is correct that I am not eye witness of the alleged incident. Voluntarily stated it is mentioned in the report of DSP and **arms expert**. It is correct that I have not disclosed the specific number of weapons to the DPO on telephone. I had not specifically stated in my 161, Cr.P.C statement in respect of changing number of weapons. It is correct that I have not stated in my statement that weapons were issued to whom. It is correct that I have personally checked the weapons. It is incorrect to suggest that I deposed falsely."*

23. The above witness clearly states that he is not the eye-witness of the alleged incident; however, he states that "it is mentioned in the report of DSP and **arms expert"** while it has come in the evidence of PW Ghulam Sarwar (Ex.5) that the weapons were not sent to any ballistic expert and he also admitted that he was not a qualified person in respect of weapons. It is also worth noting that though the inspection of weapons was allegedly carried out in 2008, the statement of this witness was recorded in the year 2011. Why the FIR was not registered immediately and without any delay, has not been explained by the prosecution.

24. The trial Court also did not take into consideration the deposition of PW Manthar Ali, ASI (Exh.17), who has clearly stated that there was

dispute between the appellant and PC Masti Khan with regard to bullets of G-3, as PC Masti Khan was demanding fresh bullets which the appellant refused, which created a rift between them and, thereafter, PC Masti Khan submitted his complaint to RPO. It seems that this witness was cross-examined by the appellant himself and during his cross he stated that "*Prior to my posting at P.S. Rustam you shifted wooden door, window and iron gate…"* How this witness could make any statement about an act which was done before his posting at the said police station. There is also contradiction between his deposition and that of PW-1 Ghulam Sarwar, as this witness says that spare parts of two SMGs were changed, while PW-Ghulam Sarwar says that three weapons were found defective/changed. Thus, this witness is not an ocular witness of the above facts which have been made basis for the conviction of the appellant.

25. PW Mohammad Panjal (Exh.6) deposed in Court in his cross-examination that 'Malkhana' was not checked in his presence, while PW Abdul Karim, a Carpenter, deposed that police obtained his signatures on papers and even he showed certain wooden articles lying at his shop which neither were showing any mark on them to be termed government property, nor the same was recovered by the I.O. Masti Khan. The evidence of this PW was recorded on 02.02.2016 and PW Abdul Karim stated that "*I had prepared the frames as stated by the accused and same are lying with me.*" Thus, the wood was still lying with this PW in the year 2016, however, it has not been stated that when such wood was given to him by the appellant. It is also not clear as to how this wood can be termed as stolen from the Police Station or misappropriated by the appellant in the

absence of any evidence. It has also come in the evidence that the appellant had grudge over non- providing of bullets to PC Masti Khan who has spent the same somewhere else rather than official duty, had made complaint to SSP against the appellant. All these factors were not considered by the learned trial Court while convicting the appellant.

26. There is also an allegation that the appellant misappropriated funds meant for construction work. In this regard PW-Manthar Ali during his examination-in-chief stated that he contacted a mason who after going though the work done by the accused disclosed that old bricks have been utilized in the said work and not more than 50,000/- were incurred in this work. This is not a professional way to handle a serious matter like enquiry against some person. There is no date mentioned to see as to when the inspection was made and there is also no measurement of work. Such serious matters cannot be dealt with in such a casual manner. It was necessary that a qualified person was engaged and proper measurement of work was taken. This lapse also goes against the prosecution.

27. A careful perusal of (the) entire evidence adduced by the prosecution witnesses before trial Court reveals that none of them deposed that they alleged(ly) had seen the appellant whilst committing the offence by changing spare parts of such weapons and subsequently same were sold out or kept by him for his personal use. Even none has deposed that the amount allegedly entrusted to him was in (what)shape, whether it was in cash or (in the form of) any instrument. Moreover, the use of such alleged misappropriated amount was also not found by the inquiry officer to believe that the appellant had misappropriated the funds as well as (the) weapons allegedly entrusted to him. Even no

list/charge-sheet was produced or exhibited to show that certain amount including weapons were entrusted to the appellant during his posting as WHC and that subsequently (same were) misappropriated by him. In absence of any recovery or concrete-cum-tangible evidence, the appellant cannot be held responsible for the alleged misappropriation, therefore, charge under Section 409, PPC was not established by the prosecution.

28. The duty of the prosecution is to connect the accused with the alleged offence committed by him in such a way that there is no doubt in any prudent mind about the innocence of the accused. The word “doubt” is of primal importance as there is no duty cast on the accused to prove himself innocent, but the duty is cast upon the prosecution to prove the accused guilty beyond any reasonable doubt. A mere doubt in the prosecution case would be enough to entitle the accused for the benefit of doubt. If there is one circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to benefit of doubt not as a matter of grace and concession but as a matter of right. Reference can be made in this behalf to the case of *Tariq Pervez v. The State* **(1995 SCMR 1345)**. The prosecution has not been able to discharge its duty in the present case.

29. In view of the above discussion, I am of the considered view that the prosecution has not been able to successfully prove that the offences alleged against the appellant have been brought home in such a way that there is no doubt in a prudent mind about the innocence of the appellant. There are numerous flaws / doubts in the prosecution case, as discussed above, in the prosecution case, which render the prosecution case not sustainable.

30. After going through the evidence, the learned APG gave his no objection. He also relied on the case of ***Mukaram Khan*** (supra). In the cited case, the appellant was convicted under section 302, PPC to imprisonment for life and to pay fine of Rs.400,000/- in terms of section 544-A, Cr.P.C. The appellant was also sentenced under section 324, PPC to undergo imprisonment for three years and fine of Rs.10,00/-. The learned Judge of the Peshawar High Court held that compensation is not a punishment under section 302, PPC and also is not "fine" as mentioned in section 431, Cr.P.C., therefore, the appeal, on the demise of the appellant would stand abated to the extent of the compensation and sentence of imprisonment. However, the sentence of fine, was held to survive the death of the appellant and after discussing the merits of the case, was set aside.

31. This criminal appeal was heard on 07.04.2022 and it was allowed by a short order of the same date as under:

> "For the reasons to be recorded later-on, instant appeal is allowed. Consequently, impugned judgment dated 27.2.2021 penned down by Special Judge, Anti-corruption (Prov.), Larkana, in Special Case No.34/2013 re-The State v. Mehar Ali Solangi & another, being outcome of Crime No.18/2011 of P.S ACE, Shikarpur, under Section 409, PPC read with Section 5(2) Act-II of 1947, is hereby set aside and the appellant is acquitted of the charge."

32. Above are the reasons for my short order dated 07.04.2022. It may be clarified that the appeal stands abated on the death of the appellant to the extent of sentence of imprisonment; however, the appeal to the extent of imposition of fine is allowed and the sentence of fine is set aside. However, it may be further clarified that, back benefits, if any, payable to the deceased should be paid to the legal heirs of the deceased appellant after due verification and proper identification. The

appellant was on bail, his bail bond stands cancelled and the surety is discharged. The surety papers may be returned after due verification and proper identification.

Larkana, the 07th April, 2022. Judge