

# IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

**Spl. Cr. Appeal No.D-88 of 2022**

**PRESENT: Mr. Justice Muhammad Saleem Jessar  
& Mr. Justice Abdul Mobeen Lakho**

Appellant Abdul Raheem Dayo : through Mr. Muhammad Hamzo  
Buriro Advocate.

Respondents/Pakistan Railways : through Mr. Ghulam Abbas Akhter  
Awan, Advocate a/w Muhammad  
Munir, Traffic Inspector, Khanpur &  
Abdul Rasheed Sr. Inspector,  
Khanpur.

State : through M/s Nisar Ahmed Abro,  
DAG & Karim Bux Janwri, Asstt.  
Attorney General for Pakistan along  
with Mr. Aftab Ahmed Shar, Addl.  
Prosecutor General, Sindh.

Dates of hearing : 23.05.2023

Date of Judgment : 23.05.2023

## **JUDGMENT**

**MUHAMMAD SALEEM JESSAR. J-** By means of instant Special Crl. Appeal the appellant has assailed the Judgment dated 13.06.2022 passed by learned Sessions Judge/Special Judge STA, Ghotki in Special Case No. 172 of 1997, being outcome of FIR No. 112 of 1992 U/s 302/319/337 PPC R/w Section 101/126/127/128 of Railway Act 1890 registered at P.S. Daharki, whereby appellant was convicted under section 101 of Railway Act 1890 and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 10,000/- and in case of default in payment, he was ordered to suffer SI for three months more. The appellant was also convicted under section 319 PPC and sentenced to undergo rigorous imprisonment for five years and to pay Diyat amount of each Qatal amounting to Rs. 25,59,150/- in total, in terms of Rs.170,610/- equivalent to 30.630 grams of silver in view of decision held by Apex Court in the case of

Ali Sher V. The State (1992 PCrLJ 1583). It was further ordered to pay above Diyat amount within the period of five years in installments. However, it has also been ordered that both the sentences shall run concurrently. Beside, the appellant was extended benefit under Section 382-B Cr. PC.

2. Precisely, facts giving rise to filing of instant appeal, as unfolded in the FIR, are that on 01.11.1992 at about 0715 am complainant Fida Hussain Awan of P.S. Daharki received information that 11up Chinab Express had collided with Goods Train between Kobhar and Reti railway lines. On receiving such information, he along with SHO Hussain Bux Panhwar, PCs Liaqat Ali Shar, Allahdad Chachar, Gul Hassan, Muhammad Ibrahim Soomro and Diver Muhammad Hassan Korai proceeded from P.S in Government vehicle and reached at place of incident at main railway line cell 290/2 Kobhar, where ASI Hussain Bux Korai, Incharge PP Reti along with staff, HC Abdul Ghafoor, Incharge PP along with his staff was present there. It is further alleged that engine of Chinab Express and front 2 bogies No.9405 and 9498 were damaged and fallen down and two last bogies of train were also damaged and fallen down, both railway lines up and down were closed due to the accident, which were also damaged. It is further disclosed in the FIR that Guard of the train namely Choudhry Muhammad Hussain informed that the accident had taken place at 0526 am and that the driver of train Muhammad Safdar and fireman Bashir Ahmed were injured and referred to for treatment. Police employees of train, SI Muhammad Nawaz, and HC Tariq Raza. C-Muhammad Siddique, C-Qutubuddin, C-Ishtiaq Hussain, C-Manzoor Ahmed were also on duty. The law enforcing agencies, Administration Officers, Doctors, and Ambulances also arrived there. The injured passengers were taken out from the bogies in their presence and Doctors provided them first aid and for further treatment they were sent/shifted to Sadiqabad Hospital and other Hospitals through Ambulances. The passengers namely, Abdul Ghaffar, Raees alias Walla, Muhammad Asif Shaikh, Shabir Hussain Shah, Ali Muhammad Rajput, Muhammad Ramzan Machhi, Maqbool Khan Dawoodpoto, Tariq Ahmed, Waris Ali Rajput, Gulzar Rajput, Muhammad Kharal, Ghulam Sarwar kharal, Maqbool Ahmed Shaikh, Wajid Khan Pathan, Muhammad Shamim Pathan, Akhtar Khan Pathan, Muhammad Abass Qureshi, Rozina Bibi, Ramesh Rajput, Sharna Gul, Nazar Hussain Lashari, Mst. Kaneeza, Mst. Shan Khoban Pathan, Sajjad Shaikh. Shah Faisal Pathan, Ghulam Qadir Arain, Khalil Ahmed Arain, Mulazim Hussain Bilor, Alah Wadhaya, Pir Bux Bilor, Abdul Rauf Mughal,

Muhammad Sarwar, Safdar Ghunio, Pathan Ghunio, Mir Ashiq Ali, Abdul Ghani, Abdul Bari, Muhammad Yousuf, Muhammad Asif, Meharuddin and some other people/ passengers were stuck and died in the bogies. It is further alleged that Railway Officers and relief train of Railway also arrived there and with the help of Law Enforcing agencies, some stuck and dead persons were taken out from bogies. They were Asma Asghar, Wazir Hussain, Rashid Ali, Shuhab Asghar, Muhammad Iqbal, Mst. Romina Asghar, Muhammad Ibrahim, Ghulam Shabir Bullo, Muhammad Aimal. Shah Muhammad, Lato Kachi, unidentified male aged about 35 unidentified woman aged about 25 years and Javed Iqbal Machi. It was further disclosed in the FIR that the incident had taken place due to negligence of ASM Ghulam Murtaza Solangi, ASM Abdul Raheem Dayo (the appellant) and ASM Malik Mushtaq Ahmed. It is also alleged that relief work continued up to 2100 hours and thereafter on the orders of high officials complainant returned at P.S and lodged the FIR on behalf of the State.

3. After completing usual investigation, Investigating Officer submitted challan against accused persons including present appellant before learned Special Judge STA Sukkur Division at Khairpur Mirs.

4. A formal charge against the accused persons was framed to which they pleaded not guilty and claimed for trial.

5. In order to prove its case, the prosecution examined PWs Dr. Shabir Ahmed Awan at Ex.4, who produced post mortem of deceased at Ex.4-A to 4-C respectively, Dr. Zahoorul Hassan at Ex.7, who produced medical certificates of injured at Ex.7-A to 7-Z respectively and at Ex.7-A(i) to 7-A(xi) respectively. PW Shahzad Ali Naqvi was examined at Ex.9, who produced confessional statement of accused Abdul Raheem at Ex.9-A, PW PC Haji Khan at Ex. 11, PW ASI Abdul Ghafoor Hakro at Ex. 12, PW Complainant SDPO Fida Hussain at Ex. 13, who produced mashirnama at Ex. 13-A, copy of FIR at Ex. 13-B, Danistanamas at Ex.13-C to 13-Q respectively, receipts of handing over the dead bodies at Ex.13-R1 to Ex..13-R15, mashirnama of arrest of accused Abdul Raheem at Ex. 13-S, mashirnama of arrest of accused Muhammad Zaman and Muhammad Saleem at Ex. 13-T. PW WHC Ghulam Murtaza Soomro at Ex. 14, he produced letter of burial of unknown dead body at Ex.14-A, PW Ghulam Murtaza Solangi at Ex.15, he produced his 164 Cr.PC statement at Ex. 15-A, PW Syed Ghulam Fareed at Ex. 16, PW Mushtag at Ex. 17, who produced his 164

Cr.PC statement at Ex. 17-A, PW Ramesh Babo at Ex.18, PW Asfand Yar Khan at Ex.19, PW Bashir Ahmed at Ex.20, PW Saeed Akhtar at Ex.22, Dr. Darshan Lal at Ex.23, who produced post mortem reports and inquest reports of dead bodies at Ex.23-A to 23-H respectively, PW Veerbhan Das was examined at Ex.24, who produced post mortem reports and inquest reports of dead bodies at Ex.24-A to 24-D respectively, PW Dr. Ahmed Ali at Ex.25, who produced post mortem reports of dead bodies at Ex.25-A to 25-C, PW Dr. Muhammad Akbar at Ex.26, who produced post mortem reports of dead bodies at Ex.26-A to 26-C. Thereafter, side of prosecution was closed vide statement Ex.27.

6. Thereafter, learned trial court transferred the case to the Court of Sessions Judge Ghotki by virtue of section 190(2) Cr PC for disposal according to law. Thereafter, on 31.3.2004 charge was again framed against the accused persons, to which they pleaded not guilty.

7. Thereafter, statements of accused u/s 342 Cr. PC were recorded by learned Sessions Judge, Ghotki vide Ex.34 to 38 respectively. However, counsel for accused filed Application u/s 540 Cr. PC for re-examination of accused Muhammad Zaman and Muhammad Saleem, which was allowed vide order dated 12.4.2005 by learned Sessions Judge, Ghotki and both the accused were examined at Ex.41 and 42 respectively. It is pertinent to mention here that vide order dated 2.10.2006, the above case was again treated to be Special one and was proceeded further under STA jurisdiction and the order already passed on 30.1.2003 was reviewed.

8. Thereafter, statements of accused u/s 342 Cr. PC were again recorded vide Ex.45 to 49, wherein they denied the allegations of prosecution and pleaded their innocence; however, accused Muhammad Zaman and Muhammad Saleem, examined Shoukat Ali at Ex.54 in their defence.

9. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, trial Court vide judgment dated 22.10.2007 **acquitted** three accused persons while convicted and sentenced present appellant while the case against absconding accused Atique Ahmed was ordered to be kept on dormant file till his arrest. Against said judgment the appellant preferred Cr. Jail Appeal No. D-91 of 2007. The said appeal was partly allowed vide judgment dated 03.12.2019 passed by this

Court and the case was remanded to the trial Court for re-writing the judgment, after hearing learned counsel for the parties in accordance with law.

10. After remand, the case was again proceeded with and after hearing learned counsel for the parties, the trial Court vide impugned judgment dated 13.06.2022 acquitted three accused persons while convicted the present appellant, while the case against the absconding accused Atique Ahmed was ordered to be kept on dormant file till his arrest and production before the trial court. Against the said judgment, appellant Abdul Rahim has preferred instant appeal.

11. We have heard the arguments advanced by learned counsel for the appellants, learned counsel for Pakistan Railways as well as learned Additional Prosecutor General appearing for the State and have perused the material available on the record.

12. Learned counsel for the appellants submitted that the appellant at the relevant time when alleged incident took place was working in the capacity of Assistant Station Master, whereas the function to changing the tracks and / or signals etc. due to negligence whereof the said incident took place, was the duty of Station Master and not of the present appellant, who was Assistant Station Master. In support of his submission, he referred to S.R.312/2 at page 200 of the Book *General Rules for Pakistan Railways* and *Subsidiary Rules for Pakistan Western Railways* promulgated by the then Commission for Railways by virtue of Notification No.TG(S)-60/LG-1/1 dated 9<sup>th</sup> September, 1966. He further submitted that even the Station Master has not been examined by the prosecution although his evidence was material. He further submitted that an enquiry was conducted by the then Additional Commissioner but neither the said Inquiry Officer was examined, nor the inquiry report has been produced before the trial Court. He further submitted that the confessional statement allegedly made by the accused / appellant is also not of worth reliance for the reason that the SDM who had recorded such confessional statement could not identify the appellant during the course of his evidence before the trial Court. According to him, besides this there are also other defects in the confessional statement which renders the same to be inadmissible. It has further been submitted that a common / joint charge was framed against four accused persons wherein exactly same allegations were levelled against all the four accused; however, three accused were acquitted whereas present appellant has been

convicted which is against the principle of consistency. He further submitted that in the evidence of P.W. Malik Mushtaque Ahmed at page 343 of the Paper Book, it has been categorically deposed by him that the incident took place due to certain fault in Block-Instrument; however, no technical expert has been examined by the prosecution to confirm such fact. He also pointed out that P.W. Mushtaque in his evidence had admitted that his statement under Section 164 Cr. P.C. was recorded by the Clerk of Mukhtiarkar and not by Mukhtiarkar and said statement was dictated to the clerk by the SHO. He further submitted that even the offence of *Qatl-e-Khata* could not be proved by the prosecution. He, therefore, submitted that in view of defects in the prosecution case, accused was entitled to be acquitted, while extending him benefit of doubt. He prayed accordingly. In support of his submissions, he placed reliance on the cases reported as *Ashiq Elahi and another Vs The State and others (2020 P.Cr.L.J 271) & Muhammad Aslam Vs. Dr. Imtiaz Ali Mughal and 4 others (PLD 2010 Karachi 134)*. In the end he submitted that as far as liability of Diyat and compensation amount is concerned, the Railway Department being employer is liable to pay the same to the legal heirs of the deceased passengers and the compensation to the injured persons.

13. Mr. Ghulam Abbas Akhtar Awan, Advocate /SPP Railways, assisted by Mohammad Munir, Traffic Inspector and Abdul Rasheed Sr. Inspector, Railway Station Khanpur (Punjab), submitted that though the appellant was designated as ASM, yet was given charge of Station Master, therefore, he was the person, who was responsible for maintaining the railway track as well as signal system. On query by the Court, he submitted that job of Station Master is almost to hold the office where tickets are sold and so far as changing of track and signal is concerned, other persons accompanied with him were responsible. He; however, submitted that there was auto-system for changing the tracks as well as signals which is always run by Station Master. However, he added that ASM is deemed to be Station Master while holding the charge of the office. However, he could not controvert the fact that in the rules of Pakistan Railways nowhere it is mentioned that ASM shall be deemed to be the Station Master and enjoys the function as well as responsibility of Station Master. In the last, he opposed the appeal and prayed for its dismissal.

14. Learned D.A.G. while adopting the arguments advanced by the counsel for Pakistan Railways, supported the impugned judgment.

15. Mr. Aftab Ahmed Shar, Additio P.G; however, did not support the impugned judgment as, according to him, no record relating to other two Assistant Station Masters as well as present appellant, allegedly being incharge of the Station has been produced by the prosecution. Nor any record has been furnished regarding the persons who were deputed to pull and push the signals at the relevant point. In this view of the matter, according to him, the entire story regarding *Qatl-e-Khata* is under mystery and has not been established by the prosecution.

16. It seems that the allegation against present appellant is that at the relevant time he was working as ASM and thus was responsible for maintaining the railway track and signal system, however, due to negligence on his part and other accused persons the alleged incident took place.

17. According to learned counsel for the appellant, the responsibility to maintain the railway track and signal system was that of Station Master, whereas the appellant was Assistant Station Master. In this connection he referred to SR 312/2 page 200 of the Book namely General Rules for Pakistan Railways. It would be advantageous to reproduce hereunder said provision of Pakistan Railways.

***“S.R. 312/2. Station Master responsible for line-clear. The Station Master on duty is alone responsible for every “Train out of Station” and “Lin-clear” signal given during his duty. For this reason he must not allow anyone else to work his Block instruments. The Tyer’s Old Type, P.W.R., New Type and “U” Instruments are provided with control keys which can lock the instruments irrespective of the position of the commutator. When the key is removed from the instrument the latter is locked. The Station Master must keep this key in his personal possession throughout his turn of duty and he must make it over personally to his relief, recording the fact in the station diary.”***

18. It is an admitted position that the appellant was not designated as “Station Master” but he was working as ASM. However, according to Mr. Ghulam Abbas Akhtar, appearing for Pakistan Railways, though the appellant was not the Station Master; however, he was held responsible for the traffic as well as safety of the property within the limits of Pakistan Railways. In this connection he referred to Section 37 of the Manual of Railway Laws. According to him on the day of incident the Station Master was on leave and in his absence the appellant was to perform such duty. It seems that the prosecution during the course of recording of evidence has not produced any document which substantiates the plea of the learned counsel for Pakistan Railway that on said

date of the incident Station Master was on leave. Likewise, the prosecution has not produced any tangible evidence to prove that it was the duty of ASM to maintain the Railway track and signal system.

19. The counsel for Pakistan Railways also submitted that although the appellant was working in the capacity of ASM; however, according to him, ASM is deemed to be the Station Master while holding the charge of his Office. Again nothing was adduced by the prosecution during the course of evidence in order to establish such plea that ASM while holding the charge of his office shall be deemed to be the Station Master and enjoys his functions as well as the responsibilities of Station Master. It has also come in evidence through PW-4 Complainant SIP Fida Hussain that a high level enquiry was conducted in the matter regarding the incident and in said enquiry Mr. Dareshani Divisional Commercial Officer was appointed as Enquiry Officer. However, again the prosecution has miserably failed to examine said Enquiry Officer before the trial court nor any enquiry report has been placed on the record. The complainant also stated in his evidence that an enquiry was also conducted by Agha Qadirdad Khan Durrani however, he has also not been examined before the trial court. Besides, Federal Inspector Railway who had inspected the site has also not been examined before the Trial Court. Besides, the prosecution has also not examined any Technical Expert from the Block Station in order to confirm that no fault has occurred in Block Station. PW Mushtaq, who was posted as ASM Railway Station Kobhar at the relevant time, in his cross examination admitted, ***"I also received a reception signal on a instrument, known as block instrument, since I had received the signal of block instrument without the arrival of the train, hence I guess there may be defect in the block instrument. I have stated in my police statement that incident might have taken place due to defect in the block instrument."***

20. In this view of the matter, it was necessary that any Technical Expert should have been examined by the prosecution in order to make a definite statement as to whether the incident was the result of any defect / technical fault or it occurred due to negligence of the employees of Pakistan Railways. As stated above, the case of the prosecution is that under the relevant rules it was the duty and function of the Station Master to maintain tracks and signal system; however, the Station Master was on leave on the day of incident, therefore the appellant being ASM was responsible to perform such function which he failed to do so being accused of negligence on his part. However, despite this the



prosecution has failed to examine the person who was working in the capacity of Station Master on the day of incident. On account of non-examination of above said Mr. Dareshani, Divisional Commercial Officer, Mr. Agha Qadir Dad Durrani, Federal Inspector who had made site inspection, any responsible technical expert and the person who was working in the capacity of Station Master on the day of incident, an adverse presumption under **Article 129(g)** of the Qanun-e-Shahadat Order, 1984 can be drawn that in case the aforesaid persons would have been examined, they would have not supported the prosecution case. In this connection reference may be made to a decision of Honourable Supreme Court given in the case of *Abdul Ghani Vs. The State* reported in 2022 S C M R 2121, wherein a Full Bench of Honourable Supreme Court held as under:

*“Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned State Counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under **Article 129(g)** of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case.”*

21. It appears that prosecution witnesses in instant case have made certain material admissions which go in favour of the accused and are injurious to the prosecution case. PW-3 Shahzad Ali Naqvi who was posted as SDM Mirpur Mathelo at the relevant time and had recorded confessional statement of accused/appellant Abdul Rahem, in his examination in chief admitted, *“I cannot identify the accused with certainty due to lapse of time”*. Thereafter, there is a note of the trial Court to the effect, *“He pointed out a person standing at Serial No.2 who on enquiry disclosed his name as Mohammad Zaman”*. In his cross examination he admitted, *“I had not demanded NIC from the accused to verify about his identity. Accused was produced by SHO Pir Bux, Panhwar”*.

22. PW-4 Fida Hussain Awan who was posted as Additional SHO, P.S. Daharki at the relevant time, in his examination in chief he deposed, *“I then recorded the statements of the P.Ws. u/s 161 Cr.P.C. I had recorded the statement of Hussain Bux. The enquiry was conducted by Additional Commissioner Qadir Dad Durani and Federal Inspector Railway, and I used to produce the Railway staff responsible for the accident before the enquiry committee which lasted for 15/20 days. On 06.12.1992 I arrested accused*

*ASM Abdul Rahim, under mashirnama which I produce as Exh. 13/S it is same correct and bears my signature and signatures of Mohammad Sanwal and Arab. I interrogated the accused. On the same day I produced accused Abdul Rahim before SDM, Mirpur Mathelo for recording his confessional statement". In his cross examination, he admitted, "I had not received enquiry report. I do not know about any decision of the enquiry.....I continued with investigation of the case but whenever I was called upon the enquiry committee I used to produce those persons before the committee. Under directions of the Railway Authority accused Abdul Rahim appeared at P.S and was arrested".*

23. PW No. 6 Ghulam Murtaza in his evidence produced his 164 Cr. P.C. statement wherein he had stated that incident had occurred due to fault in block instrument.

24. PW Malik Mushtaq Ahmed in his evidence admitted that his 164 Cr. P.C. statement was recorded by clerk of concerned Mukhtiarkar and FCM, Mirpur Mathelo and that SHO dictated the statement to the clerk. He further admitted, *"I also received a reception signal on an instrument, known as block instrument, since I had received the signal of block instrument without the arrival of the train, hence I guess there may be defect in the block instrument. I have stated in my police statement that incident might have taken place due to defect in the block instrument.*

25. PW No.11 Ramesh Babo who was posted as Mukhtiarkar & FCM Mirpur Mathelo at the relevant time, in his examination in chief deposed that *on 10.12.1992 I was Mukhtiarkar & FCM Mirpur Mathelo. On that day police produced two witnesses namely Ghulam Murtaza and Mushtaque for recording their 164 Cr. P.C. statement. The accused Abdul Raheem and others were also present. I recorded their 164 Cr. P.C. statement read it over to witnesses and obtained their signature. Accused did not cross examine the witnesses and informed that they will cross examine the witness in the Session Court.*

26. PW-12 Asfandyar Khan, who was Luggage Guard in Railway Department at the relevant time, in his examination in chief deposed, *"I do not know as to who was responsible for the collusion. My statement was recorded by the police. I do not know about the accused persons".*

27. PW-13 Bashir Ahmed, who was working as Fireman on the day of incident, in his examination in chief deposed, **“Accident has occurred to the negligence of Station Master Retti as before complete arrival of goods train he had clear line for 11up Chanab Express.**

28. It appears that learned trial court while convicting the appellant, has laid much stress upon the confessional statement allegedly made by him before SDM Mirpur Mathelo. In his statement recorded u/s 342 Cr. P.C. the accused has denied to have made any confessional statement. The SDM Mirpur Mathelo at the time of recording his evidence could not identify the accused/appellant before the Trial Court, rather he pointed out a person standing at Serial No.2 who on enquiry disclosed his name as Mohammad Zaman. He further made admission that he had not demanded NIC from the accused to verify his identity at the time of recording confessional statement. He further admitted in his cross examination that he had not mentioned in the body of confessional statement that the accused was remanded to judicial custody. Learned counsel for the accused / appellant also pointed out that the learned SDM did not append the required certificate at the bottom of the confessional statement. On perusal of the confessional statement we find that such submission of the appellant’s counsel is correct.

29. Apart from above according to PW-4 Fida Hussain he had produced the appellant / accused before the SDM Mirpur Mathelo for recording his confessional statement; however, the SDM Mirpur Mathelo in his evidence has belied such statement by stating, ***“Accused was produced by SHO Pir Bux, Panhwar”***.

30. In view of above, the confessional statement allegedly made by the accused/appellant becomes doubtful particularly in view of other discrepancies/lacunae made in the prosecution case as stated above.

31. As stated above, the SDM Mirpur Mathelo had admitted in his cross examination that he has not made any specific note in the body of the confessional statement that he had remanded the accused to Judicial Custody. According to learned counsel for the appellant, the appellant was not remanded to Judicial Custody after recording the alleged confessional statement, rather he was again sent to police custody. This submission of the appellant’s counsel finds support from the fact that the PW-11 Ramesh Babu, Mukhtiarkar & FCM

Mirpur Mathelo, in his evidence has deposed that on 10.12.1992 PWs Mushtaq and Ghulam Murtaza were produced before him for recording their 164 Cr. P.C. statements. He also admitted that on said date the accused persons including present appellant also appeared before him; however, they did not cross examine the witness and stated that they would cross examine them before the Session Court. From this it is apparent that the accused / appellant after recording his confessional statement was not remanded to Judicial Custody but was remanded to Police Custody because; had the appellant been in Jail, then how could SIP Fida Hussain produce him before the Mukhtiarkar & FCM Mirpur Mathelo on 10.12.1992 i.e. after four days of the recording of his confessional statement. SIP Fida Hussain has not said a single word in his evidence that he had sought the custody of the appellant from the Jail Authorities in order to produce him before the Mukhtiarkar for the purpose of being present at the time of recording 164 Cr.P.C. statements of PWs. Malik Mushtaque Ahmed and Ghulam Murtaza. It is now well settled that if the accused is not remanded to judicial custody and is sent to police custody after recording his confessional statement that is fatal to the prosecution case.

32. There is yet another aspect of the case which is of worth importance. From perusal of the charge framed against four accused i.e. the present appellant and three acquitted accused, it is crystal clear that exactly same allegations have been levelled against all the four accused despite that the appellant has been convicted while other three accused persons have been acquitted of the charge. Apart from this, from perusal of the contents of FIR, we find that it has been mentioned therein that *on enquiry at the spot, it was disclosed that due to negligence in duty by Ghulam Murtaza Solangi, ASM Abdul Rahim Dayo posted at Railway Station Reti and ASM Malik Mushtaq Ahmed posted at Kobhar Station, incident had taken place.* However, the prosecution has not furnished any plausible explanation / justification that when in the FIR the allegations regarding negligence due to which said accident had allegedly taken place, has been attributed to all three accused persons named in the FIR, then as to how and why the other two persons namely, ASM Malik Mushtaq Ahmed and Ghulam Murtaza Solangi had been exonerated from the charge and have been arrayed as prosecution witnesses, whereas the appellant has been sent up for trial. In this view of the matter, the *rule of consistency* comes in to play.

33. On the point of 'rule of consistency', it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of Muhammad Asif v. The State reported in 2017 SCMR 486 wherein it was held as under:

*“It is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case.”*

In another case reported as Umar Farooque v. State (2006 SCMR 1605) Honourable Supreme Court held as under:

*“On exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted.”*

In another case reported as Muhammad Akram v. The State (2012 SCMR 440) the Apex Court while holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge, acquitted the accused. In view of this legal position, appellant should also have been extended same benefit as given to the aforesaid six exonerated accused.

34. The accumulative effect of above lacunas and defects in the investigation is that prosecution has not succeeded in proving its case against the accused / appellant beyond shadow of reasonable doubt which is the requirement of the law.

35. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In instant case prosecution does not seem to have proved the allegations against the accused/appellant by producing unimpeachable evidence, thus doubts have been created in the prosecution version. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

*“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but **no such duty is cast upon***

*the accused, he has only to create doubt in the case of the prosecution.”*

In another case reported as Shamoona alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

*“The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal.”*

36. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In present case, there are various admissions in the evidence of the prosecution witnesses which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the recent case of *Ahmed Ali and another Vs. The State* reported in **2023 SCMR 781**, a Full Bench of Honourable Supreme Court has held as under:

“12. Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as *Tajamal Hussain v. The State* (2022 SCMR 1567), *Sajjad Hussain v. The State* (2022 SCMR 1540), *Abdul Ghafoor v. The State* (2022 SCMR 1527 SC), *Kashif Ali v. The State* (2022 SCMR 1515), *Muhammad Ashraf v. The State* (2022 SCMR 1328), *Khalid Mehmood v. The State* (2022 SCMR 1148), *Muhammad Sami Ullah v. The State* (2022 SCMR 998), *Bashir Muhammad Khan v. The State* (2022 SCMR 986), *The State v. Ahmed Omer Sheikh* (2021 SCMR 873), *Najaf Ali Shah v. The State* (2021 SCMR 736), *Muhammad Imran v. The State* (2020 SCMR 857), *Abdul Jabbar v. The State* (2019 SCMR 129), *Mst. Asia Bibi v. The State* (PLD 2019 SC 64), *Hashim Qasim v. The State* (2017 SCMR 986), *Muhammad Mansha v. The State* (2018 SCMR 772), *Muhammad Zaman v. The State* (2014 SCMR 749 SC), *Khalid Mehmood v. The State* (2011 SCMR 664), *Muhammad Akram v. The State* (2009 SCMR 230), *Faheem Ahmed Farooqui v. The State* (2008 SCMR 1572), *Ghulam Qadir v. The State* (2008 SCMR 1221) and *Tariq Pervaiz v. The State* (1995 SCMR 1345).”

37. For the forgoing reasons, by a short order dated 23.05.2023 instant Special Cr. Appeal was allowed, consequently, impugned Judgment dated 13.06.2022 passed by learned Sessions Judge/Special Judge STA, Ghotki in Special Case No. 172 of 1997, being outcome of FIR No. 112 of 1992 U/s 302/319/337 PPC R/w Section 101/126/127/128 of Railway Act 1890 registered at P.S. Daharki, for above said offences was set aside. Resultantly, the appellant

Abdul Raheem S/o Shamsuddin Dayo was acquitted of the charges and he was ordered to be released forthwith, if his custody was no longer required by the jail authorities in any other custody case.

38. Before parting with the case, it may be observed that although prosecution has not succeeded in proving its case against the present appellant; however, one cannot close its sight/eyes from the fact that 15 precious lives have been lost whereas 44 passenger had sustained grievous injuries for no fault on their part. It would be also against the commonsense to hold that such fatal accident would have taken place without any fault / negligence of any Railway employee (s). It is a settled principal of law that master/employer would be liable for the wrongful acts of his employees/servant. In this connection reference may be made to the case of *Karachi Transport Corporation V.S. Muhammad Hanif* reported in **2009 SCMR 1005** wherein Hon'ble Supreme Court held, **inter alia, that an employer is always vicariously liable for acts of its employees perform in the course of duties. It is a matter of record that Defendant No. 4 to 14 were performing their official duties and acts under the supervision, control and authority of Defendants No.1, 2 and 3. Hence, Defendants No. 1, 2 and 3 and particularly Defendant No.1 which is a Provincial Government, are liable to compensate the plaintiff, besides other Defendant.**

39. Reference may also be made to the case of *Kareem Bux V.s. State* reported in **2011 P.Cr. L.J 463**, decided by Quetta High Court. The relevant facts in the said case were that a train had derailed and in that accident 8 persons died and about 114 persons were injured. In said accident some employees of the Railway were held responsible and case was registered against them. It was held that **act of accused would come within the definition of clause (s) of Section 101 of Railways Act 1890. Apart from act of accused the trial court has not considered the fact that accused alone were not responsible for the accident and Railway would take upon itself an obligation to carry passenger safely to his journey, and to cause him no injury by way of willful or careless act or omission. Since the Railway was governed and being run by its employees, it was equally responsible for any damage caused to the life and property of passenger by the negligence of any Railway servant.** It was further held that **since sentence could not be awarded to the employees, Railway was bound to compensate the deceased as well as injured of the accident, who were its passengers.**

40. Reference may also be made to an un-reported judgment passed by a learned Single Bench of this Court sitting on Original Side in Suit No. 1395/2005. The relevant facts in said case were that one Abdul Haq Ghouri had lost his life due to a fatal accident. In fact defendant No.3 who was employee of defendant No.1 and 2, being joint owners of the NLC Trailer, while driving said NLC Trailer in an excessively high speed, hit the motorcycle which was being driven by Syed Farhan Ali while deceased Abdul Haque Ghouri was sitting on the rear side, as a result, both fell down and were dragged while Abdul Haq Ghouri succumbed to the fatal injuries caused to him on the spot. The widow of deceased Abdul Haque initiated a claim under the Fatal Accident Act 1855 claiming compensation for herself as well as for other legal heirs of the deceased. Accordingly, the suit was decreed. While delivering the judgment and dealing with the point of vicarious liability, it was held as under:-

***“It is the Defendant No.1 who is ultimate beneficiary of establishment of the N.L.C. There can be no denial to the fact that the trailers are given by the defendant No. 1 against money (hire amount) hence brings fruit for the defendant No.1. The defendant No.1, being the controlling authority and beneficiary, cannot claim any exception of its own negligence even coming on surface through its servant/ driver because the contract is made with the defendant No.1 and not with the driver of the trailer hence it would be the defendant No.1 who would be ultimately responsible for any loss / damage, if occurs, during the way. The defendant No.1, during trial, came with plea that the defendant No.3 has deserted but this stand even would not help the defendant No.1 to escape the liabilities which fall upon it being the Authority/ owner of the trailer in question so also employer of the defendant No.3. Thus, considering the discussion on the issue Nos. 1 & 2 followed by above explained legal position, I am of the clear view that the defendants No. 1 & 2 are jointly liable. Since the defendant No.2 is the ultimate controlling Authority of defendant No.1 hence, it (Government) shall continue with the responsibility to ensure discharge of liabilities by defendant Nos. 1 & 2.”***

41. In view of above legal position, we would direct the Pakistan Railways Department / Authority(ies) to make payment of the Diyat amount, Arsh and Daman, as the case may be, to legal heirs of the deceased passengers who lost their precious lives during the incident, so also compensation to all the passengers who got injured in aforesaid accident, after proper verification, identification and as per rules. The Divisional Superintendent, Sukkur, Pakistan Railways, in coordination with SHO, P.S concerned as well as I.O of the case would initiate such action by preparing a list of all legal heirs of the deceased and the injured passengers who sustained injuries at the time of railway accident, within fifteen (15) days from the date of receipt of this judgment and



would make efforts and ensure to complete such exercise within a period of six (06) months, under intimation to this Court through Addl. Registrar of this Court at Sukkur.

42. Let a copy of judgment along with R&Ps of Special Case No.172/1997 (re-the State Versus Abdul Raheem Dayo and others) be sent to trial Court / Sessions Judge / Special Judge (STA), Ghotki, for compliance. Let a copy of judgment be communicated to Divisional Superintendent, Pakistan Railways, Sukkur, General Manager Railways/CEO, Pakistan Railways Headquarters, Alama Iqbal Road, Lahore and the Chairman, Pakistan Railways / Federal Secretary to the Government of Pakistan, Pakistan Railways Department, Federal Secretariat, Block-D, Islamabad through courier, for compliance. A copy of this judgment may also be provided to the offices of Deputy Attorney General for Pakistan and Addl. Prosecutor General, Sindh, for correspondence and compliance.

43. Learned Additional Registrar of this Court is directed to ensure compliance without causing further delay.

Judge

Judge