

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.D-42 of 2021
Confirmation Case No.D-06 of 2021
Criminal Acquittal Appeal No.D-21 of 2021

PRESENT:

Mr. Justice Muhammad Saleem Jessar
Mr. Justice Abdul Mobeen Lakho

Dates of hearing: : 29.09.2022
Date of Judgment : 19.10.2022
Date of announcement : 26.10.2022

Tauqeer Kalwar, appellant in
Cr. Appeal No.D-42/2021 : through Mr. Achar Khan Gabole,
Advocate.

Shoukat Ali Kalwar, complainant
In Cr.Appeal No.D-42/2021
And appellant in Cr.Acq. Appeal
No.D-21/2021 : through Mr. Shabbir Ali Bozdar,
Advocate.

Abdul Qadeer, Ghulam Mustafa
And Pehilwan, Respondents No.2
to 4 in Cr. Acq. Appeal
No.D-21/2021 : through Mr. Rukhsar Ahmed Junejo,
Advocate.

State : through Mr. Aftab Ahmed Shar,
A.P.G.

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By this single judgment we propose to dispose of Cr. Appeal No.D-42/2021 filed by appellant/convict namely Tauqeer S/o Niaz Muhammad Kalwar, and Cr. Acquittal Appeal No.D-21/2021 filed by complainant Shoukat Ali Kalwar against acquittal of respondents No.2 to 4 namely Abdul Qadeer S/o Ghulam Mustafa, Ghulam Mustafa S/o Muhammad Murad and Pehilwan S/o Haq Nawaz and Confirmation Case/reference No.D-06/2021 under section 374 Cr.P.C submitted by trial Court for confirmation or otherwise of death sentence awarded by trial Court to convict namely Tauqeer S/o Niaz Muhammad Kalwar, as all the three cases arise out of the same judgment.

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2. By means of above said Cr. Appeal the appellant has assailed the Judgment dated 10.06.2021 passed by learned I-Additional Sessions Judge (MCTC), Ghotki in Sessions Case No.67 of 2017⁷, being outcome of FIR No.96 of 2018 U/s 302, 201 and 34 PPC registered at P.S. Adilpur, District Ghotki, whereby accused/appellant was convicted u/s 265-H(ii), Cr.P.C for offence punishable u/s 302 (b) PPC and sentenced to death as Tazir with direction to pay compensation of Rs.10,00,000/= (Rs. Ten lacs) to legal heirs of the deceased as provided u/s 544-A, Cr.P.C and in case of default, the payment of compensation was ordered to be recovered from him as arrears of the land revenue. The appellant/convict was also convicted u/s 265-H(ii) Cr.P.C and was sentenced for offence punishable u/s 201 PPC to suffer rigorous imprisonment for seven years with direction to pay fine of Rs.100,000/= (Rs. One lac) and in case of default, he was ordered to undergo S.I for 6 (six) months more. Both the sentences were ordered to run concurrently. However, benefit under Section 382-B Cr.PC was extended to him.

3. Through above said Cr. Acquittal Appeal the complainant Shoukat Ali S/o Allah Wadhaya has challenged acquittal of respondents No.2 to 4 namely Abdul Qadeer S/o Ghulam Mustafa, Ghulam Mustafa S/o Muhammad Murad and Pehilwan S/o Haq Nawaz vide common impugned judgment.

4. The trial Court has also submitted reference under section 374 Cr.P.C for confirmation or otherwise of death sentence awarded to accused/convict namely Tauqeer S/o Niaz Muhammad Kalwar.

5. Brief facts of the prosecution case, as disclosed in the FIR lodged by complainant Shoukat Ali Kalwar, are that on 11.11.2018, his son, Sajid Ali, aged about 32/33 years, was a Mason. According to him, on 08.11.2018, his son left the house and went for his work towards Adilpur, but on the same day he did not return till late night hours, therefore, he started searching his son, but could not find him. He further stated that, on the very next day, they received information that one beheaded dead body of deceased was lying in the open "Bhanda" of Anaj Mandi Adilpur. Upon receiving such information, he along with his son Deedar Ali and Nadeem Ahmed son of Muhammad Paryal Kalwar, went to the old "Anaj" Mandi Adilpur. At about 1220 hours, they reached there and found in "Bhanda", a dead body, which was lying without its head. They identified the dead body, on the basis of body signs and clothes to be of complainant's son namely Sajid Ali. With the help of police, they got shifted the dead body to the

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Appeal D-37/2016 Suk

Appeal D-17/2020 Suk

Appeal D-31/2021 Suk

C. P. D-11/1991 Suk

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C. P. D-392/2006 Suk

C. P. D-206/2008 Suk

C. P. D-750/2008 Suk

C. P. D-743/2009 Suk

C. P. D-28/2010 Suk

C. P. D-370/2010 Suk

C. P. D-1941/2011 Suk

C. P. D-1046/2012 Suk

C. P. D-2135/2012 Suk

C. P. D-3556/2012 Suk

C. P. D-1857/2013 Suk

C. P. D-1876/2013 Suk

C. P. D-3059/2013 Suk

C. P. D-967/2013 Suk

C. P. D-1066/2016 Suk

C. P. D-1018/2017 Suk

C. P. D-1205/2017 Suk

C. P. D-1975/2017 Suk

C. P. D-259/2018 Suk

C. P. D-426/2019 Suk

C. P. D-63/2022 Suk

C. P. D-1021 Suk

C. P. D-1022 Suk

C. P. D-368/2019

C. P. D-19/2020

C. P. D-2021 Suk

C. P. D-2021 Suk

C. P. D-17/2021

C. P. D-16/2022

Taluka Hospital Ghotki, where post-mortem was conducted. After post-mortem they brought the dead body of deceased to their village, where same was buried after completing funeral ceremonies in graveyard. He further alleged that in order to cause disappearance of evidence of murder of deceased, the culprits managed to conceal the head of deceased, while throwing the dead body in the "Bhanda" of Anaj Mandi, Adilpur. According to him, after completion of burial and funeral ceremony on 11.11.2018, he went to the PS Adilpur and lodged the FIR against the unknown culprits.

6. Record further reveals that after registration of the FIR, on 09.01.2019, complainant had appeared before the SHO P.S. Adilpur and got recorded his further statement, wherein, he had specifically nominated accused Abdul Qadeer, Pehilwan and Tauqeer. On 17.01.2019 complainant had also got recorded his 164 Cr.P.C statement, before the Court of learned Judicial Magistrate (Family Court) Ghotki, wherein, he disclosed the names of four accused, namely, Ghulam Mustafa, Qadeer Ahmed, Tauqeer and Pehilwan. The motive behind the incident, as per further statement and 164 Cr.P.C statement of the complainant was that deceased Sajid Ali alias Baloch had divorced the daughter of the accused Ghulam Mustafa and sister of accused Abdul Qadeer, so also he wanted to marry with the divorced wife of accused Tauqeer, to which, they had issued threats to him. In this regard, all the accused in furtherance of their common intention had committed the murder of his son in a brutal manner by cutting his head from body.

7. On completion of usual investigation, challan was submitted against accused in the competent court of law, showing accused Tauqeer in custody, whereas, rest of the accused namely Abdul Qadeer, Ghulam Mustafa and Pehilwan on bail.

8. After establishment of the trial Court being Model Criminal Trial Court (MCTC), the R&Ps of this case were received by the trial court on 29.10.2019 by way of transfer.

9. A formal charge against accused was framed and read over to them at Ex.2, to which, they pleaded not guilty and claimed to be tried vide their pleas recorded at Ex.3 to 6.

10. In order to prove its case, prosecution led evidence and examined PW-1, complainant Shoukat Ali Kalwar at Ex.7, who produced receipt, through which,

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he had received the beheaded dead body of deceased as Ex.7-A, FIR as Ex.7-B his further statement & 164 Cr.P.C statement as Ex.7-C & 7-D. P.W-2, Deedar Ali was examined at Exh.08, who produced his 164 Cr.P.C statement as Exh.8-A. P.W-3 Mashir Wajid Ali was examined at Exh.09, who produced mashirnama of recovery of dragger "Churro" voluntarily produced by accused Tauqeer as Exh.9-A. PW, Nadeem Ahmed and mashir Hazoor Bux Langah were given-up by the prosecution through statement of learned DDPP for state at Ex.10. P.W-4, IO / ASI Muhammad Sadiq Narijo was examined at Exh.11, who produced attested copy of departure entry No.8, as Exh.11-A, Mashirnama of inspection of beheaded dead body of deceased as Exh.11-B, Danistnama as Exh.11-C, inquest report, as Exh.11-D, attested copy of arrival entry No.12 as Exh.11-E. P.W-5, second IO SIP Roshan Deen Burdi was examined at Exh.12, who produced mashirnama of place of wardhat, as Exh.12-A, rough sketch of wardhat as Exh.12-B, Mashirnama of last worn cloths of the deceased, stained with blood as Exh.12-C, two pictures of the deceased as Exh.12-D, PS copy of RC No.262 dated 13.12.2018 as Exh.12-E. PW-6, Tapedar Irshad Ahmed Kalwar was examined at Exh.13, who produced the sketch of wardhat as Exh.13-A. PW-7, SIP Muhammad Murad Sahto was examined at Exh.14, who produced Mashirnama of arrest of accused Tauqeer as Exh.14-A. PW-8, Mashir Faiq Ali was examined at Exh.15, who produced Mashirnama of recovery of head (Mundhi) of deceased Sajid Ali alias Baloch as Exh.15-A. PW-9, corpse bearer PC Abul Khair was examined at Exh.16. PW-10, Dr. Gobind was examined at Exh.17, who produced the postmortem report of deceased as Exh.17-A. PW-11, IO Inspector Abdul Majeed Arain was examined at Exh.18, who produced order of DIG, through which, investigation was consigned to him, as Exh.18-A, letter issued to MO, for DNA test of recovered head and left little finger in sealed condition, as Exh.18-B, carbon copy of letter dated 13.12.2018, through which, he sought permission from the SSP for dispatching the left little finger & one head "Mundhi" of deceased to the MO, as Exh.18-C, letter addressed to MO for sending the blood sample of father of deceased, as Exh.18-D, letter addressed to Forensic & Molecular Biology Laboratory for DNA testing LUMHS, Jamshoro, as 18-E, letter through which, he sought permission from JM (Family Court) Ghotki for recording 164 Cr.P.C statements of complainant & PW Deedar Ali, learned Magistrate passed order thereon, as Exh.18-F, attested PS copy of entry No.16, through which, interrogation was made for recovery of crime weapon, as well as entry No.17, through which, left the PS alongwith accused, as Exh.18-G, PS copy of RC No.29, through which, knife "Churro" was dispatched to the

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chemical examiner Rohri, as Exh.18-H, positive chemical report as Exh.18-I, SHO P.S. Adilpur, received DNA testing report, through SSP Ghotki at Mirpur Mathelo as Exh.18-J, DNA reports, in all four pages alongwith covering file as Exh.18-K to 18-O, receipt as Exh.18-P. PW-12 Inspector Muhammad Haneef was examined at Exh.19, who produced PS copy of RC No.221, through which, blood stained earth had dispatched to the Chemical Examiner, Rohri, as Exh. 19-A, positive report of Chemical Examiner as Exh.19-B. PW-13 DSP Ghulam Ali Jumani, Crime Branch, DIG-P, Sukkur Range was examined at Exh.20, who produced attested PS copy of report as Exh.20-A. Thereafter, learned DDPP for state closed side of prosecution vide statement Ex.21.

11. The statements of accused u/s 342 Cr.P.C were recorded at Ex.22 to 25, wherein, they denied the prosecution allegations and stated that they have been falsely implicated in this case and prayed for justice. However, they did not examined themselves on oath as provided under section 340 (2) Cr.P.C in order to disprove the prosecution allegations. However, accused Tauqeer produced certified copy of the memo of Cr. Misc. Application bearing No.D-1041 of 2018 re: Niaz Muhammad Vs. SSP Ghotki at Mirpur Mathelo and others alongwith affidavit, order dated 13.2.2018, passed on such application as Exh.22-B. The accused persons got examined DW-1, Sanaullah Kalwar at Exh.26 and DW-2, Mumtaz Hussain Kalwar at Exh.27.

12. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellant Tauqeer, as stated above while other accused persons namely Abdul Qadeer, Gulam Mustafa and Pehilwan were acquitted. Appellant/convict challenged his conviction by filing above said criminal appeal while complainant filed above noted Cr.Acq. Appeal against the acquitted accused persons.

13. We have heard arguments advanced by learned counsel for the parties and have perused the material available on the record.

14. Mr. Achar Khan Gabole advocate for appellant Tauqeer Kalwar in CrI. Appeal No.D-42/2021 submitted that appellant Tauqeer was given an advocate on State expenses; however, said advocate did not put a single question to the prosecution witnesses at the time of trial rather opted to adopt the questions put by the counsel for co-accused, therefore, accused was condemned unheard and

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Counsel: A.G

was not given proper opportunity of hearing as enshrined under the Constitution of Islamic Republic of Pakistan, 1973. He, therefore, prayed that case may be remanded to trial Court for denovo trial. He further submitted that appellant Tauqeer Kalwar was all along on bail during trial; therefore, he may be directed to remain on bail after remand of the case. He further argued that after pronouncement of the impugned judgment, the appellant Tauqeer is confined in Central Prison Sukkur; however, it may be directed that his custody may also be shifted to District Prison Ghotki and further submitted that if case is going to be remanded, the trial Court may be directed to decide the case within shortest possible time. In support of his contentions, he placed reliance on the cases report as 2011 SCMR 735 (Ghulam Rasool Shah and another Vs. the State) relevant page (742), 2018 P.Cr.L.J 200 (Allah Dino and 2 others Vs. The State), 2011 SCMR 23 (Abdul Ghafoor Vs. The State), 2019 MLD 306 (Rajib Ali Naich and others Vs. The State) and 2013 MLD 244.

15. Mr. Shabbir Ali Bozdar advocate for complainant in Crl. Appeal No.D-42/2021 and for appellant in Crl. Acquittal Appeal No.D-21/2021, submitted that both, the conviction of appellant/convict Tauqeer as well as acquittal of other accused persons, have been challenged, therefore, if the case is to be remanded to the trial Court, it will be appropriate to remand cases of all accused persons for cross examination of the prosecution witnesses. After compliance of direction, the trial Court may re-write the judgment according to the evidence which is ought to be placed before the trial Court. He placed his reliance on the cases reported as 2020 P.Cr.L.J 1286 and 2022 SCMR 1187 (Bashir Ahmed and others Vs. The State and another).

16. Mr. Aftab Ahmed Shar, Additional P.G for the State did not oppose the proposal so advanced by advocates for the appellant/convict as well as the complainant to the extent of remand of the case; however; he submitted that entire judgment has been assailed, therefore, it will be appropriate for the parties to get remanded the cases of all accused persons. He, however, opposed denovo trial as according to him charge of the case is not defective and appellant Tauqeer Kalwar was not properly given chance to defend the case, therefore, he may be given chance to defend his case properly. He further argued that presiding officer of the trial Court was also duty bound to ascertain the truth by putting such questions from the prosecution witnesses as enshrined u/a 161 of Evidence Act / Qanun-e-Shahadat Order, 1984, but he opted to remain mum. He further argued that if the trial Court (presiding officer) would acted in accordance with law, then

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this Court would have not been burdened. However, he opposed the proposal of Mr. Gabole to the extent of appellant Tauqeer Kalwar to be released on bail and submitted that appellant Tauqeer has been inflicted death penalty and if he wishes to be enlarged on bail, he may be burdened to furnish the surety amount equivalent to Diyat amount. In support of his arguments, he placed reliance upon A.I.R (29) 1942-Patna-90, A.I.R 1936 Lahore 887, 2011 SCMR 23 (Abdul Ghafoor Vs. The State) and 1975 SCMR 01 (Hakim Khan and another Vs. The State and another). He also referred chapter 24 of the High Court Rules part-I (C) and submitted that trial Court was bound and obliged to put the questions to the prosecution witnesses to ascertain the truth and if the counsel provided to appellant Tauqeer was not capable to conduct cross, then the trial Court had to ascertain the truth for just decision of the case, which the trial Court (presiding officer) did not perform.

17. Mr. Rukhsar Ahmed Junejo, advocate assisted by Miss Aisha Saeed advocate for respondents Nos.2 to 4 in CrI. Acquittal Appeal No.D-21 of 2021 submitted that FIR was registered by the complainant against unknown culprits; however the complainant got recorded his further statement on 19-11-2018 in which he had implicated Abdul Jabbar Kalwar and Abdul Majid Korai, who were arrested by the police on 20-11-2018 and were remanded to police custody up to 28-11-2018. On 28-11-2018 both accused namely Abdul Jabbar Kalwar and Abdul Majid Korai were discharged by the Judicial Magistrate concerned. He further submitted that complainant got recorded his second further statement on 09-01-2019, wherein, he had implicated Abdul Qadeer, Pehilwan, Tauqeer and Ghulam Mustafa. On 17-01-2019, 164 Cr.P.C statement of complainant Shoukat Ali was recorded before the Judicial Magistrate concerned, wherein he supported his second further statement dated 09-01-2019. He, therefore, submitted that it was blind case and the respondents in CrI. Acquittal Appeal had rightly been acquitted of the charges by the learned trial Court, therefore, remand of the case to the extent of respondents/acquitted accused will be against the norms of justice. Mr. Junejo added that after prolonged trial, the respondents have been acquitted of the charges, therefore, they have earned double presumption of their innocence and remand of case to their extent will tantamount to double jeopardy, as one cannot be vexed twice for same offence. He, therefore, submitted that by maintaining their acquittal, case of appellant Tauqeer Kalwar may be remanded as prayed by the counsel for said accused. In support of his contention, he placed reliance on cases report as 2018 P.Cr.L.J 200.

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18. In the first instance, we would like to deal with Cr. Acquittal appeal No. D-21/2021 filed against the acquittal of accused Ghulam Mustafa, Abdul Qadeer and Pehilwan.

19. It appears that most important witnesses in this case are complainant, P.W.1 Shoukat Ali Kalwar and P.W.2 Deedar Ali, who are father and brother of the deceased respectively. Complainant in his evidence deposed that his son deceased Sajid Ali, aged about 32 years was doing work as Mason at Adilpur. He further deposed that on 08.11.2018, his son left the house and went to his work towards Adilpur, but did not return on the same day, so they made search for him but could not find him. According to him, on 09.11.2018, they received information that Adilpur police had found one beheaded dead body of the deceased. After receiving such information, he went to the old "Anaj" Mandi Adilpur, where the dead body was lying without its head. He further deposed that before their arrival, 40/50 persons were available there. He further stated that with the help of police they got shifted the dead body of his son towards Taluka Hospital Ghotki and after postmortem, it was handed over to him and after his funeral ceremony, he went to the PS Adilpur on 11.11.2018 and lodged the FIR, against unknown culprits. He further stated that after registration of the FIR, he tried to search the real murderers of his son, during which through some channels, they received news and, meanwhile, they also recalled their matrimonial dispute with Ghulam Mustafa and others, as his son had solemnized marriage with the daughter of Ghulam Mustafa namely Mst. Shagufta and out of that wedlock there was one female child namely, Hania and later on such relationship had ended in shape of *Talaq* (Divorce), but his son used to visit the house of his father in law in order to meet his daughter Baby Hania, whereupon his father in law Ghulam Mustafa and his brother in law Qadeer Ahmed used to remain annoyed and they also issued threats of murder to him. He further stated that in continuation of his efforts, he also came to know that one Muhammad Tauqeer had also divorced his wife, who was the daughter of Muhammad Hassan Kalwar. Later on, some rumors had spread that his son Sajid Ali wanted to contract marriage with divorced wife of Tauqeer and for this reason, Tauqeer Ali used to say that whosoever will marry with his divorced wife, he (Tauqeer) will separate the head from his body. He further deposed that, thereafter, accused Pehilwan, who was the maternal uncle of Tauqeer and Qadeer also became annoyed with them especially, when his son had divorced his wife. Later on, they came to know that due to certain strained matrimonial affairs i.e. dispute over the

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marriage of his son with the divorced wife of accused Tauqeer Ahmed, they all had hatched a conspiracy for cause of murder of his son by separating his head from his body. He further deposed that after that he alongwith his two sons namely Wajid Ali and Deedar Ali had gone towards the side of Ghulam Mustafa and informed them that they had come to know that this murder was committed by them, so he asked them to clarify their position whereupon, they required some time. Thereafter, they also went to the father of Tauqeer namely, Niaz Ahmed so also towards accused Pehilwan, who too requested them to give them some time. He further deposed that after two/three days accused Ghulam Mustafa, Tauqeer, Qadeer, Pehilwan along with one Sanaullah came to their Otaq and confessed their guilt, but they requested them not to disclose such fact in public, as in such case they would face disrespect in the society. They also said to complainant party that they will give them "Faisla", but they never returned back thus, the complainant was compelled to report the matter to police and for this purpose he went to the Police Station on 09.1.2019, where he got recorded his further statement there. He further stated that on 17.1.2019, his 164 Cr.P.C. statement was recorded before Judicial Magistrate Ghotki. Thereafter, he had submitted one application to IG Sindh, and on the basis of such application, the SSP Inayatullah Bhatti had conducted enquiry and during said enquiry, his statement was also recorded by one Inspector Jumani Sahab. He recognized the accused present in the Court to be the same.

20. P.W 2 Deedar Ali deposed that on 08.11.2018, his deceased brother had left the house towards Adilpur, where, he was doing his work as a mason, but his brother did not return till late night. He further stated that on 09.11.2018, they received information that police had recovered a dead body from old Anaj Mandi Adilpur, and same was without head. They went to old Anaj Mandi, where on the basis of clothes and other signs, they identified it to be the body of his brother Sajid Ali. Thereafter, with the help of police, they went to the Taluka Hospital Ghotki and after post-mortem same beheaded dead body of his brother was shifted towards their village, where burial and funeral ceremony was held. He further deposed that on 11.11.2018, his father had lodged FIR against unknown accused and then police had arrested some persons, but they were released after some time. He further deposed that, in the meanwhile, they kept on searching the murderers of their brother, and received some news and recalled their old matrimonial affairs, and the threats, which were issued to them, so on the basis of their old memories, the concluded that all present accused had committed murder

of his brother, due to stringent old matrimonial affairs. He further deposed that after two weeks of registration of the FIR, they went towards the accused side and asked them to clear their positions, but they required some time and then after 3/4 days accused came alongwith their elders, to their Otaq, and one Sanaullah Kalwar also came along with them. He further deposed that at their Otaq all the accused had confessed their guilt and requested to give them some time, for giving them "Faisla", but they never returned back. He further deposed that on 09.1.2019, the IO had recorded his further statement and on 17.1.2019, his 164 Cr.P.C statement was recorded before Judicial Magistrate Ghotki. Lastly, he identified the accused present in the court to be the same, who had committed the murder of his brother.

21. However, both above said witnesses have made certain material admissions which have put severe dents in the prosecution case to the extent of acquitted accused namely, Ghulam Mustafa, Abdul Qadeer and Pehilwan which goes in favour of said accused persons. Both the witnesses have admitted that the crime was not witnessed by any of the prosecution witnesses. The complainant and other PWs in their respective statements have clearly deposed that FIR was lodged against some unknown culprits and later on, on the basis of previous enmity and suspicion, they had nominated three accused, namely, Abdul Qadeer, Pehilwan and Tauqeer Ahmed in their further statements, which were recorded on 09.01.2019 and then again when their 164 Cr.P.C. statements were recorded, the complainant and PWs had nominated one more accused namely, Ghulam Mustafa along with above named three accused because as per complainant party, deceased Sajid Ali prior to this incident had divorced his wife Mst. Shagufta, who was daughter of accused Ghulam Mustafa and sister of accused Abdul Qadeer.

22. Complainant Shoukat Ali during his cross-examination made following admissions:

"Once accused Ghulam Mustafa had beaten to my son and accused Abdul Qadeer had hurled abuses to him, but we had not lodged FIR of that incident. It is fact that my son had not directly disclosed to me, voluntarily says, he had narrated the whole story to his mother"..... "It is fact that in my examination in chief I had not specifically stated that accused Pehilwan had individually issued threats to us, voluntarily says, accused Pehilwan with other accused once had issued threats to us."..... "Ghulam Mustafa and Qadeer about two days prior to pronouncement of "Talaq" had issued threats to us, that they will commit the murder of Sajid Ali, if he will not give divorce to his

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wife. After Talaq, Ghulam Mustafa and Qadeer had not issued the threats to us.”

23. PW Deedar Ali in his cross-examination admitted as under :

“Accused had never issued threats to us after divorce but once prior to divorce they had issued threats to my father. It is fact that we came know through the other people that accused had issued threats to us.” “My brother Sajid Ali had not filed any suit in any Court for meeting purpose of his daughter.”

24. From above admission, it is apparent that even the threat issued by the acquitted persons were prior to pronouncement of divorce and not after the divorce, and that too, as admitted by the witnesses themselves, only once, although the degree of annoyance after the pronounce of divorce would have been higher than that of prior to pronouncement of divorce, but admittedly the complainant party did not issue any threat to accused after pronouncement divorce. This fact is also to be taken with great significance that P.W. 2 Deedar Ali has also clearly admitted that complainant party had come to know about issuing threats by the accused to them through other people, meaning thereby complainant party was not issued any sort of threat directly and the fact that accused had issued threats to them was also *hearsay*.

25. It is also worthwhile to point out here that in the F.I.R. the allegation was against some **unknown** persons and it was only after registration of the FIR, on 09.01.2019, that the complainant got recorded his further statement before the SHO P.S. Adilpur therein he nominated accused Abdul Qadeer, Pehilwan and Tauqeer. Even at that stage the complainant did not involve accused Ghulam and it was on 17.01.2019 that complainant in his 164 Cr.P.C statement, duly recorded before the Court of learned Judicial Magistrate, Ghotki, made improvement in his further statement recorded before the S.H.O. and also nominated Ghulam Mustafa.

26. It may be observed that no doubt there was enmity in between complainant party with Ghulam Mustafa, Abdul Qadeer and Pehilwan, but perusal of statements of above said prosecution witnesses, clearly reflects that the enmity in between them was not of such a severe nature, so as to persuade the acquitted accused to kill the deceased in such a brutal manner, particularly when there was no litigation pending between them. Putting the case of accused/convict Tauqeer and that of acquitted accused Ghulam Mustafa and others in juxtaposition, there appears to be great difference between the gravity of enmity/grudge which

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accused/convict Tauqeer on the one side, and accused Ghulam Mustafa and others, on the other side, had possessed against the deceased. Accused Ghulam Mustafa and others were annoyed with the deceased only on the ground that he had divorced daughter of Ghulam Mustafa and sister of Abdul Qadeer and maternal niece of accused Pehilwan. Although divorce is not appreciated from the Islamic point of view, so also in our present society but now-a-days this is not taken so seriously so that it may pursue the parents and other relative of divorcee to take a serious and severe action like murdering the person who has divorced the girl. Contrary to that, the people of our society, particularly inhabitants of interior side are very strict in such matters which involve 'Ghairat'. In instant case although accused Tauqeer has divorced his wife; however, they had passed several years as husband and wife, therefore he made it an issue of his 'Ghairat' when he had heard that deceased intended to contract marry with his divorced wife.

27. Apart from this, neither accused Ghulam Mustafa and accused Abdul Qadeer nor accused Pehilwan had ever been formally arrested by the police nor any crime weapon had been recovered from them contrary to accused Tauqeer nor the prosecution has produced during the course of trial any other proof against them so as to connect them with the commission of alleged offence. Rather perusal of entire evidence reveals that they were implicated only on the basis of presumption and suspicion of the complainant party. In this view of the matter, it can safely be held that prosecution has failed to prove that indeed all three accused had hatched any conspiracy with the main accused Tauqeer. It seems that only on the basis of their previous enmity and suspicion they have implicated three acquitted accused. Apart from this, no incriminating article relating to murder of the deceased Sajid Ali has been recovered from the acquitted accused.

28. 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 the 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.

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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."

29. In another case reported as Shamoon 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 defenc. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal."

30. It is also now well settled that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In the 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.

31. In this connection, reference may be made to the case of *Muhammad Masha Vs. The State* reported in 2018 SCMR 722, wherein the Honourable Supreme Court held as under:

"Needless to mention here that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt, if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim, "it is better that ten guilt persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervaiz Vs. The state (1995 SCMR 1345). Ghulam Qadir and 2 others Vs. The state (2008 SCMR 1221), Muhammad Akram Vs. The state (2009 SCMR 230) and Muhammad Zaman Vs. The state (2014 SCMR 749)".

32. Yet, there is another legal aspect of the case. The criteria for deciding an appeal against conviction and an appeal against acquittal of an accused, is totally different from each other, inasmuch as, it is settled principle of law that an accused before his conviction is presumed to be innocent and if after trial, he is acquitted, in such an eventuality he earns double presumption of innocence, thus, an acquittal judgment or order normally does not call for any

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interference and the same could be interfered with only in exceptional case. In the case of AHMED OMAR SHEIKH and others reported in 2021 S C M R 873, it was held by a Full Bench of Honourable Supreme Court as under:

"33. 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)."

33. In the case of SHER MUHAMMAD KHASKHELI Vs. 2ND ASSISTANT SESSIONS JUDGE and 6 others reported in 2021 Y L R 1759, a Division Bench of this Court, while quoting various decisions of Honourable Supreme Court, held as under:

"8. The principles for appreciation of evidence in appeal against the acquittal are now well settled, for, an accused is presumed to be innocent and if after trial, he is acquitted, he earns double presumption of innocence and acquittal judgment or order normally does not call for any interference unless it is found arbitrary, capricious, fanciful, artificial, shocking and ridiculous and while evaluating the evidence, difference is to be maintained in an appeal from conviction and an acquittal appeal and in the latter case the interference is to be made only when there is none reading and gross mis-reading of the evidence, resulting the miscarriage of justice and on perusal of the evidence no other decision can be given except that the accused is guilty. Reliance in this context is placed on the case of Yar Muhammad and 3 others v. The State (1992 SCMR 96). The Hon'ble apex Court of Pakistan has observed that:

"Unless the judgment of trial Court is perverse, completely illegal and on perusal of evidence no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, High Court will not exercise jurisdiction under section 417, Cr.P.C." It was further held that "in exercising this jurisdiction, High Court is always slow unless it feels that gross injustice has been done in the administration of criminal justice".

34. In the case of Muhammad Shafi v. Muhammad Raza and another (2008 SCMR 329). The Hon'ble Supreme Court of Pakistan has held that:

"An accused is presumed to be innocent in law and if after regular trial he is acquitted he earns a double presumption of innocence and there is a heavy onus on the prosecution to rebut the said presumption. In view of the discrepant and inconsistent evidence led, the guilt of accused is not free from doubt, we are therefore, of the view that the prosecution has failed to discharge the onus and the finding of acquittal is neither arbitrary nor capricious to warrant interference. The petition having no merit is dismissed and leave is refused."

35. In the case of State/Government of Sindh through Advocate General, Sindh, Karachi v. Sobharo (1993 SCMR 585), the Hon'ble Supreme Court of Pakistan has held that:

"while evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal appeal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice."

36. In the case of Muhammad Yaqoob v. Manzoor Hussain and 3 others (2008 SCMR 1549), the Hon'ble Supreme Court has held that:

"It needs no reiteration that when an accused person is acquitted from the charge by a Court of competent jurisdiction then, double presumption of innocence is attached to its order, with which the superior Courts do not interfere unless the impugned order is arbitrary, capricious, fanciful and against the record. It was observed by this Court in Muhammad Mansha Kausar v. Muhammad Asghar and others 2003 SCMR 477 "that the law relating to re-appraisal of evidence in appeals against acquittal is stringent in that the presumption of innocence is double and multiplied after a finding of not guilty recorded by a competent Court of law. Such finding cannot be reversed, upset and disturbed except when the judgment is found to be perverse, shocking, alarming, artificial and suffering from error of jurisdiction or misreading/non-reading of evidencelaw requires that a judgment of acquittal shall not be disturbed even though second opinion may be reasonably possible."

37. In the case of State and others v. Abdul Khaliq and others (PLD 2011 SC 554), Hon'ble Supreme Court has held that:

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"The scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory of wholly artificial or a shocking conclusion has been drawn. Moreover, in a number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. The Court of appeal should not interfere simply for the reason that on the re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities".

38. In view of above, it can safely be held that the trial Court has rightly acquitted the accused namely, Ghulam Mustafa, Abdul Qadeer and Pehilwan, thus the acquittal order does not call for any interference by this Court.

39. Now, advertent to the case of appellant Tauqeer, who has challenged his conviction and sentence by filing Cr. Appeal No.D-42 of 2021, it seems that learned counsel for the appellant has emphasized on his contention that the accused was not afforded proper opportunity of cross-examination as the counsel who was appointed to plead his case on government expenses, did not put even a single question during the cross-examination of the prosecution witnesses and the said advocate simply adopted the cross examination made by the counsel for other accused persons. Learned Additional P.G., appearing for the State also submitted that the trial Court was duty bound to ascertain the truth by putting such questions from the prosecution witnesses as provided in Article 161 of

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Qanun-e-Shahadat Order, 1984, but he opted to remain mum. He, therefore, did not oppose the request of learned counsel for appellant Tauqeer for remanding the case to the trial court and re-writing the judgment after providing proper opportunity of cross-examination to the accused.

40. Before proceeding further, it would be advantageous to reproduce hereunder above-referred Article 161 of the Qanun-e-Shahadat Order, 1984:

"The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he places, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the Judgment must be based upon facts declared by this Order to be relevant, and duly proved:

Provided also that this Article shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Articles 4 to 14, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under Article 143 or 144; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted".

41. From bare perusal of the contents of Article 161 of Qanun-e-Shahadat Order, 1984, it is apparent that legislature has bestowed power upon a Judge to ask any question from any witness, or the parties and to order any person to produce any document or thing, in order to discover or to obtain proper proof of relevant facts of case. It further goes on to say that in the process of exercising such power, neither the parties nor their agents shall have any right or option to raise any objection to any such question or order. In the instant case, when the counsel for pauper accused was not performing properly his professional duty to properly defend his client / accused, in such an eventuality it was incumbent upon the trial Judge to have exercise the aforesaid power bestowed upon him by the legislature, more particularly in a case which could have ultimately ended in capital punishment, as was done in the present case.

42. In this connection, reference may be made to the case of *SHEREEN GUL alias FATIMAVs. SPECIAL JUDGE, ANTI-TERRORISM COURT-I,*

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ISLAMABAD and others, reported in 2015 P Cr. L J 724, wherein while dealing the said point, it was held by a Division Bench of Honourable Islamabad High Court held as under:

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"The law favours adjudication of cases on merit rather than technicalities and should always be interpreted in aid of justice and fairplay. Article 161 of the Qanun-e-Shahadat Order, 1984, also empowers a Judge to put questions or order for production of a documents in order to obtain proper proof of the relevant facts, in any form, at any time from any witness or from the parties and also cross-examine any witness upon any answer given in reply to any such question except some exceptions provided in the order ibid. We are not persuaded with the argument of the learned Counsel for the appellant that impugned order resulted into filling up the lacunas left in the case."

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43. In the case of *Abdul Ghafoor Vs The State* reported in 2011SCMR 23 a FULL BENCH of Honourable Supreme Court held as under:

"6. Admittedly both the eye-witnesses namely P. W.10 Ziaraf Ali and P.W.11 Manzoor Hussain were not cross-examined. The learned High Court adverted to this aspect but held that the appellant is to be blamed as sufficient opportunities were given to cross-examine these witnesses. In paragraph 16 of the judgment, the learned High Court observed as follows:--

"We may also mention that the examination-in-chief of the two eye-witnesses namely Ziaraf Ali (P. W.10) and Mansoor Hussain (P.W.11) was recorded on 24-11-1998 and thereafter at least 10 opportunities were granted to the defence, which failed to cross-examine the said witnesses and even no application under section 540, Cr.P.C. was ever moved to the learned trial Court for re-summoning these two eye-witnesses for the purpose of cross-examination. Even no application was moved before this Court for the said purpose although seven years have already passed when the impugned judgment was passed. So this court cannot discard the statements of both P.Ws. 10 and 11, which have gone unchallenged while the presence of P. W.12 at the spot was stamped by the injuries sustained by him during the occurrence, which cannot be doubted."

7. With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a

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defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2-12-1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously' neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be provided one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground. The impugned judgment of the learned High Court dated 19-3-2000 and that of the learned trial Court dated 30-5-2000 are set aside. The case is remitted to District and Sessions Judge, Rawalpindi who shall either proceed with the matter himself or entrust the same to Additional District and Sessions Judge. The appellant shall be treated as under trial prisoner. He shall be given one opportunity to cross-examine the two witnesses referred to in paragraph 6 above and thereafter the court shall decide the matter within 15 days of the said opportunity given. The parties are directed to appear or arrange representation before the District Judge for 20-5-2010 who shall proceed with the matter in terms of this order."

44. In view of above legal and factual position and keeping in view the unanimous opinion of the counsel for accused Tauqeer and learned Additional prosecutor general Sindh, appearing for the State and also the consent given by the counsel for acquitted accused in the Cr.Acq. Appeal to the extent of remanding the case of accused Tauqeer only. We deem it fit and proper to remand the case of accused Tauqeer in Cr. Appeal NoD-42/2021 to the trial Court only for the purpose of providing opportunity of cross-examination to accused Tauqeer. So far as the case of acquitted accused is concerned, we are not inclined to remand the same to the trial court as proposed by the counsel for the complainant/appellant in the Cr.Acq.Appeal for the reasons and grounds discussed elaborately while dealing with the Cr.Acq.Appeal.

45. The upshot of above discussion is that:

- (i) The Judgment dated 10.06.2021 passed by learned I-Additional Sessions Judge (MCTC), Ghotki in Sessions Case No. 67 of 2019, being outcome of FIR No. 96 of 2018 U/s 302, 201 and 34 PPC registered at P.S. Adilpur, District Ghotki is hereby set aside and the case to the extent of accused/Appellant Tauqeer is

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remanded back to the trial court for providing opportunity of cross-examination to accused Tauqeer and re-writing the judgment keeping in view all the material available on record including the cross examination to be conducted on behalf of accused/appellant Tauqeer;

- (ii) Consequent upon setting aside of the impugned judgment whereby death penalty was imposed upon accused/appellant Tauqeer, confirmation reference is answered in negative;
- (iii) Cr.Acq. Appeal No.D-21/2021 is hereby dismissed and the acquittal order passed by the trial court vide above said judgment to the extent of accused Abdul Qadeer S/o Ghulam Mustafa, Ghulam Mustafa S/o Muhammad Murad and Pehilwan S/o Haq Nawaz is hereby maintained.

46. So far as the request of the counsel of accused Tauqeer that as the accused has all along remained on bail during the trial of the case, therefore, he may be enlarged on bail is concerned, we find ourselves not in agreement with the proposal given by learned Counsel for the appellant as well as learned Additional Prosecutor General that if the accused is to be enlarged on bail, then the accused may be directed to furnish solvent surety equivalent to the Diyyat Amount. Since the appellant has been awarded death penalty; therefore, proposal so advanced by learned Counsel for the appellant as well as learned Additional Prosecutor General cannot be acceded to. Hence, the appellant shall be treated as under trial prisoner. It is expected that the trial court shall dispose the matter by re-writing the judgment in the above terms within shortest possible time preferably within six months from the date of receipt of this judgment. Office is directed to send the R&Ps of Sessions Case No.67/2019 to the trial court alongwith copy of judgment for compliance.

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Approved for reporting

Abdul Mubeendakho (J)

Announced by Mr. Justice Tahir