IN TH HIGH COURT OF SINDH CIRCUIT COURT, LARKANA

Cr. Acq. Appeal No.D-05 of 1998

Present: Mr. Justice Zafar Ahmed Rajput
Mr. Justice Mohammad Saleem Jessar

Appellant	:	Mondar Khan Babar Through, Mr. Shamsuddin Abbasi, Advocate
Respondents No.1 to 4	:	Piyar Ali & others Through, Mr. Safdar Ali G. Bhutto, Advocate
Respondent No.5	:	The State Through, Mr. Syed Sardar Ali Shah, D.P.G.
Dates of hearing	:	30.11.2017
Date of judgment	:	30.11.2017

JUDGMENT

Muhammad Saleem Jessar, J.- This Criminal Acquittal Appeal is directed against Judgment, dated 30.06.1998, passed by the learned IIIrd Additional Sessions Judge, Dadu in Sessions Case No. 181 of 1991 arisen out of F.I.R. No.12 of 1991, registered at P.S. K.N. Shah under Sections 302, 307, 114 and 34 P.P.C, whereby accused/respondents No.1 to 4, namely, Piar Ali son of Ali Murad Gadhi, Abdul Sattar son of Piar Ali Gadhi, Ghulam Hussain son of Mohammad Gachal and Asghar son of Mohammad Gachal were acquitted by extending them benefit of doubt.

2. Brief facts of the prosecution case are that complainant/ appellant Mondar Khan lodged aforesaid F.I.R., alleging therein that on 27.12.1990, murder of Ghulam Mohammad alias Ghazi Gachal was committed and such case was registered at K.N. Shah police station and since that day, Asghar and others used to ask him that his relatives had committed murder of their companion, hence, they would take revenge from them. It was further alleged that on the day of incident i.e. 03.02.1991 complainant and his cousin Haji Wali Mohammad and maternal cousin Mohammad Ismail came out of their houses for going to K.N.

Shah and their relative, namely, Lutuf Ali also joined them at Nara Crossing. It was 8.00 a.m. when they were proceeding towards K.N. Shah by foot and saw Piar Ali son of Ali Mardan, Abdul Sattar son of Piar Ali Gadhi, residents of village Beero Khan Gadhi, Asghar son of Mohammad and Ghulam Hussain son of Mohammad, by caste Gachal, residents of village Dital Babar coming duly armed with guns. When they reached near complainant party, accused Asghar instigated his three companions to kill complainant party saying that they were their enemies. On such instigation, accused Piar Ali fired direct gunshot which hit Haji Wali Mohammad on his right side waist and he fell down. Other accused persons, namely, Asghar, Ghulam Hussain and Abdul Sattar abused complainant party by saying that they should run else they would not be spared and fired gun shots directly to kill them but they succeeded in saving themselves by taking positions in the ditches; subsequently, accused persons went away. Haji Wali Muhammad sustained gunshot injury on his right side waist and he fell unconscious. Thereafter, complainant party took injured Haji Wali Muhammad to Taluka Hospital, K.N. Shah where he succumbed to the injuries.

3. After registration of F.I.R., S.H.O. Ali Gohar Qureshi went to K.N. Shah Hospital where he prepared mashirnama of dead body and inquest report in presence of mashirs; he handed over the dead body to M.O. for post mortem and completed other legal formalities. Since, during pendency of investigation he was transferred, he handed over case papers to S.H.O. Mohammad Sadiq Chaang. Who, after completing investigation, submitted the challan in the court of law. A formal charge was framed against the accused to which they pleaded not guilty and claimed to be tried.

4. In order to prove charge against the accused / respondents, prosecution examined P.W-1 complainant Mondar Khan at Ex.12, who produced F.I.R. at Ex.12/A, P.W-2 Ismail examined at Ex.13 while P.W-3 Mohammad Moosa examined at Ex.14, who produced memo of dead body at Ex.14/A, inquest report

at Ex.14/B, memo of incident at Ex.14/C, memo of recovery of bloodstained clothes at Ex.14/D, memo of arrest of accused at Ex.14/E. P.W-4 Arbab Ali, Tapedar, examined at Ex.16, who produced sketch at Ex.16/A, P.W-5 S.H.O. Ali Gohar examined at Ex.17. P.W-6 Dr. Khadim Hussain examined at Ex.18, who produced postmortem notes at Ex.18/A. P.W-7 S.H.O. Mohammad Sadiq Chang examined at Ex.19, who produced memo of recovery at Ex. 19/A, Report of Chemical Analyzer at Ex.19/B and report of Ballistic Expert at Ex.19/C. Thereafter, upon closing its side for evidence by the prosecution, the learned trial Court recorded the statements of accused persons under section 342 Cr. P.C. at Ex.21 to Ex.24, wherein they denied the allegations leveled against them and stated that the prosecution witnesses had deposed against them due to enmity. They; however, neither examined themselves on oath nor produced any witness in their defense. Subsequently, upon the assessment of evidence on record, learned trial Court, vide judgment dated 30.06.1998, acquitted all the four accused/respondents. The appellant/complainant being aggrieved to and dissatisfied with the said Judgment has preferred this Cr. Acquittal Appeal.

5. We have heard he learned counsel for the appellant, respondents as well as learned D.P.G., appearing for the State, and have gone through the material available on the record with their assistance.

6. Learned counsel for the appellant has contended that the impugned judgment of acquittal passed by the trial Court is illegal having been passed without properly appreciating and evaluating the evidence brought on record. He further contended that the trial Court has ignored the ocular testimony of the eye-witnesses without any proper justification although they have fully implicated the accused in the commission of the alleged offence. He added that although eye-witnesses are related to the deceased but merely on such basis their testimony cannot be discarded if otherwise the same is confidence inspiring. He has also contended that the impugned judgment is based on assumptions and

presumptions, so also surmises and conjectures and without assigning sound and cogent reasons for acquitting the respondents. According to him, there is also strong motive which goes in favour of the appellant/complainant but the trial Court without any proper justification has disbelieved such motive. He prayed for setting aside the impugned judgment and for convicting the respondents. In support of his contentions, learned counsel has relied upon the cases of *Ghulam Hussain and 2 others vs. The State* ***(1998 P.Cr.L.J. 779)***; *Yaqoob Shah vs. The State* ***(1995 SCMR 1293)***; *Muhammad Aslam and others vs. The State* ***(2005 P.Cr.L.J. 1352)***; ***(PLJ 2012 Lahore (Cr. Cases) 909)***; *Dildar Hussain vs. Muhammad Afzal alias CHAL and 3 others* ***(PLD 2004 SC 663)***; *Muhammad Ashraf vs. The State* ***(2011 SCMR pages 1046)***; *Sh. Muhammad Abid vs. The State* ***(2011 SCMR pages 1148)***.

7. Conversely, learned counsel for respondents No.1 to 4, while supporting the impugned judgment, maintained that the impugned judgment has been passed after discussing each and every point involved in the case and cogent and sound reasons have been assigned by learned trial Judge in recording his findings. He also raised a preliminary legal objection to the maintainability of the appeal contending that the appeal is barred by limitation as the same has been filed after 18 days of the stipulated time. He further contended that the criteria for deciding a Criminal Appeal filed against acquittal are totally different from that of a Criminal Appeal against conviction. According to him, in the acquittal appeal presumption of double innocence is available and only in exceptional cases the judgment of acquittal is converted into a judgment of conviction. He further contended that the eye-witnesses are related to the deceased, as such, they are interested witnesses and their testimony cannot be relied upon without any strong corroboration. He added that although independent witnesses were available at the time of incident at the spot but they were not associated as witnesses and instead interested witnesses were examined. He further contended that only one

empty was recovered from the spot whereas prosecution allegation is that all the accused fired upon complainant party. He further contended that there is delay in sending the relevant articles to the Chemical Examiner as well as to the Ballistic Expert, so also there is delay in effecting recovery of fire arm weapons from the accused. He lastly prayed for dismissal of the appeal and maintaining the impugned judgment. In support of his contentions, he has relied upon the case of *Muhammad Sharif vs. Tahirur Rehman and3 others* ***(1972 SCMR 144)***; *Rasoo, Muhammad vs. Asal Muhammad and 3 others* ***(1995 SCMR 1373)***; *Alam Khan vs. SWANS Khan and 3 others* ***(1996 SCMR 1742)***; *Muhammad Zaman vs. Muhammad Afzal and 3 others* ***(2005 SCMR 1679)***; *Azhar Ali vs. The State* ***(PLD 2010 SC 632)***; *Muhammad Asghar and another vs. the State* ***(PLD 1994 SC 301)***; *Khan Mir vs. Sher Khan* ***(1987 SCMR 213)***; ***(1991 P.Cr.L.J. 193)*** *and Lal Bux vs. Dhani Bus and 3 others* ***(2013 P.Cr.L.J. 345)***.

8. Learned D.P.G., while adopting the arguments advanced by the learned counsel for the respondents has supported the impugned judgment. He has asserted that the impugned judgment has been passed in accordance with the law.

9. Before touching merits of the case, we would first deal with the legal objection raised by the respondents' counsel regarding limitation. From the perusal of certified copy of the impugned judgment, it appears that the judgment was passed on 30.06.1998, application for supplying certified copy of the judgment was made, so also cost for the same was paid on the same day i.e. 30.06.1998 and copy was made ready and delivered to the appellant on 20.07.1998, while, instant appeal was presented on 18.08.1998 i.e. within the time as prescribed under the law for filing an acquittal appeal. In this view of the matter, the legal objection raised by the respondents regarding limitation is not sustainable and it is held that the appeal is within time.

10. It is well-settled law that the scope of acquittal appeal is considerably narrow and limited and obvious approach for dealing with the appeal against the conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of accused is attached to the order of acquittal. In the case of *Zaheer Din Vs. The State* **(1993 S.C.M.R 1628)**, following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:-

> *"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:-*
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> *(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.*
>
> *(2) The acquittal will not carry the second presumption and will also thus lose the first one if on pints having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.*
>
> *(3) In either case the well-known principles of re-appraisement of evidence will have to be kept in view while examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observations of some higher principle as noted above and for no other reason.*
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> *(4) The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would*

conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

11. Keeping in view the above guiding principles and adverting to the merits of the case, we have scanned the prosecution evidence. It transpires that there are material contradictions in the evidence of prosecution witnesses so also certain admissions have been made by them, which create doubts in the prosecution case. According to complainant Mondar Khan, on the day of the incident he was going to K.N. Shah for purchasing fertilizer and P.W. Ismail was also going with them for the same purpose, whereas P.W. Lutuf was going to K.N. Shah in connection with some personal work and the deceased was accompanying by them for making payment of the fertilizer. This statement of the complainant has been contradicted by P.W. Ismail, who has deposed that he was going to K.N. Shah in order to purchase household articles. He did not depose if he was going alongwith the complainant for purchasing fertilizer as deposed by the complainant. He further belied the version of the complainant that he (complainant) was going for purchasing fertilizer by deposing that the complainant was going with them only to give company. He also contradicted the statement of the complainant that the deceased was going with them for making payment of the fertilizer by saying that the deceased was going with them in connection with a work but he showed his ignorance about the nature of the said work. He also showed his unawareness of the work for which P.W. Lutuf was accompanying them.

12. The complainant and P.W Ismail also contradicted each other on the point of reaching of the people from Village Baid, which is admittedly a thickly populated area. According to the complainant, none from the said village reached

the spot after the incident, whereas P.W. Ismail admitted in his cross-examination that many persons gathered at the spot from said village.

13. Presence of complainant at the spot also seems to be doubtful in view of the fact that he is admittedly a primary school teacher and the day of the incident was a working day, as to how instead of attending his duty at the school he was going to K.N. Shah for purchasing fertilizer. He has not stated, at all, that on the day of the incident he had taken leave from the school. This fact also gets strength from the fact that admittedly his other brothers are the farmers, therefore, if the fertilizer was to be purchased, then the same could have been done by his other brothers, who had experience of the same field.

14. Admittedly, the complainant as well as P.Ws Ismail, Moosa and Lutif are related to the deceased and enmity between the parties is also an admitted fact. There is no cavil to the proposition that the evidence of the related witnesses is also worth-reliance, however under the peculiar circumstances of the case, it requires strong corroboration from other pieces of evidence. In the case of *Zahoor Ellahi vs. The State* **(1997 SCMR 385),** it has been held that *eye-witnesses who were related to the deceased, their evidence requires independent corroboration.* Similar observations have made by the Honourable Supreme Court in the cases of *Umar Hayat and 3 others vs. The State* **(1997 SCMR 1076)** and *Ata Muhammad and others vs. The State* **(1995 SCMR 599).**

15. There is yet another aspect of the case. It has come in the evidence of the eye-witnesses that the people had gathered at the spot. However, prosecution did not bother to associate any independent witness amongst the persons who had reached the spot immediately after the incident. This causes serious damage to the prosecution case as it is settled principle of law that despite availability of disinterested witnesses, their non-examination in the case leads to adverse inference, as envisaged under Article 129(g) of Qanoon-e-Shahadat Order, 1984,

that in case such witnesses had been examined, they would have deposed against the prosecution, as held in the case of *Bashir Ahmed alias Manu vs. the State* **(1996 SCMR *308)***. In another case of reported as Mohammad Shafi vs. Tahirur Rehman* **(1972 SCMR 144),** it has been held that *when large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, no implicit reliance could be placed on evidence of interested eye-witnesses.* In the case of Ghulam Shabbir vs. Bachal **(1980 SCMR 708),** it was observed that *no witness of locality nor owner of hotel was produced in support of prosecution case nor any independent evidence to corroborate testimony of the three eye-witnesses was produced, as such, the acquittal was upheld by the Honourable Supreme Court.*

16. It is also noteworthy that the alleged recovery of the crime weapons was effected on 16.051991 and bloodstained earth was collected from the spot on 03.02.1991, however, perusal of the report of the Chemical Examiner and that of Ballistic Expert Ex.19/B and 19/C, respectively, reveal that the bloodstained earth was received on 10.11.1991 whereas empty cartridges were received on 11.11.1991 i.e. after delay of about nine and six months respectively. Despite the report being positive, such delay in sending the relevant articles makes the reports to be of no evidentiary value. In the case of *Samandar @ Qurban and others vs. The State* reported as **2017 MLD 539 Karachi,** while dealing with the point of delay in sending the weapon to Ballistic Expert, this Court held as under:

> *"Apart from above sending of crime weapon to ballistic expert for forensic report with delay of 20 days of their recovery also added further doubt into the prosecution case, thus in view of above coupled with non-compliance of section 103, Cr. P.C., it can safely be presumed that alleged recovery of crime weapon was not made from the possession of the appellants as alleged by the prosecution."*

> *"It is settled law that the prosecution has to prove its case beyond shadow of any reasonable doubt and if slightest doubt occurs in the prosecution case with regard to the commission of alleged offence, then its benefit should be given to the accused not as a matter of*

grace or concession but as a matter of right as held in the case of Tariq Pervez Vs. The State reported in 1995 SCMR 1345."

Further reference in this respect may also be made to the decisions reported in 1998 P.Cr.L.J.779 and 1995 SCMR 1293.

17. Moreover, it has been stated in the F.I.R, so also has come in the evidence that when after sustaining firearm injuries, deceased Haji Wali Mohammad fell down on the ground, all the accused while abusing the alleged eye-witnesses, reprimanded them to run away else they would not be spared and fired gunshots directly upon them to kill them but they succeeded in saving themselves by taking positions in the ditches. This is not believable for the reason that when according to the complainant and eye-witnesses, the accused themselves asked them to run away else they would not be spared then as to why the accused simultaneously opened fire arms upon the complainant party to kill them. If the accused had any intention of killing them, they could have easily done so by making straight firing upon them also. Hence, alarming the complainant party to run away else they would not be spared is not understandable, rather it seems to be ridiculous.

18. The above discussion shows that more than one discrepancy have come on record in the story of prosecution and of course the manner and method in which the complainant has attempted to improve his case to fix the respondents in a criminal case. The requirement of law in criminal justice system is that the guilt of the accused has to be proved beyond shadow of doubt. By now it is settled law that even one discrepancy or dent in the prosecution story is enough to extend benefit of doubt to the accused. In this case, there are number of infirmities and contradictions in evidence of the prosecution witnesses, which make the entire case doubtful against the present respondents/accused.

19. As regard to the consideration warranting the interference in the appeal against acquittal and an appeal against conviction certain principles have been

laid down by the Hon'ble Supreme Court in various judgments. In the case of *State/ Government Sindh through Advocate General Sindh, Karachi versus Sobharo* ***(1993 SCMR 585),*** Honourable Supreme Court has laid down the principle that in the case of appeal against acquittal while evaluating the evidence distinction is to be made in appeal against conviction and appeal against acquittal. Interference in the latter case is to be made when there is only gross misreading of evidence, resulting in miscarriage of justice. Relevant portion of the said judgment is reproduced as under:-

> *"We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view 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."*

20. It is also a settled principle of law that the courts act slowly in interfering with an order of acquittal, unless grounds for acquittal are perverse or wholly illogical or unreasonable. In the case reported as *Mirza Noor Hussain vs. Farooq Zaman and 2 others* **(1993 SCMR 305)** it was held by the Honourable Supreme Court that *the Court cannot substitute its own findings in place that of the trial Court, the judgment thereof is supported by sound reasons unless the findings are artificial, shocking, ridiculous, based on misreading of evidence and leading to miscarriage of justice.* In another case reported as *Yar Mohammad and 3 others vs. The State* **(1992 SCMR 96)**, the Honourable Supreme Court observed as under:

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

21. In view of above facts and discussion, it can safely be held that since the prosecution has failed in proving its case against the respondents/accused beyond shadow of reasonable doubt, as such the trial Court has rightly acquitted them by extending them benefit of doubt. Consequently, instant Cr. Acquittal Appeal was dismissed by us by a short order, dated 30.11.2017, and above are the reasons for the said short order.