

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr.Acquittal.Appeal.No.D- 208 of 2004

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 19.04.2018.
Date of judgment: 25.04.2018.

Appellant/complainant present in person.
Mr. Muhammad Ishaque Khoso, Advocate for respondent
No.1.
Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents/accused Allah Warrayo and Deeno were charged, prosecuted and acquitted u/s 302, 324, 504, 34 PPC. The trial was conducted by Mr. Kazi Allah Bux 1st Additional Sessions Judge, Badin who passed the judgment of acquittal on 21.10.2004. Feeling aggrieved by the aforesaid judgment of acquittal, appellant/complainant Jan Muhammad has filed the present appeal.

2. The prosecution case as emerged from the recitals contained in the First Information Report and the evidence adduced during the trial as as under:-

3. Complainant Jan Muhammad is son of Ghanwar (now deceased). Present incident took place on 12.02.1997, complainant alongwith his father was residing in the village Peenghar Khaskheli. Saeeda

wah/canal was passing near the houses of the complainant. Women folk of the complainant used to get water from the said canal and were washing the clothes. On 12.02.1997, respondents Allah Warrayo and Porho appeared at Saeed Wah / canal. They were restrained by the complainant party. In the evening, complainant left house alongwith his father Ghanwar to lookafter the lands. When they reached near primary school at 3-00 p.m. where it is alleged that accused Shafi Muhammad, Allah Warrayo and Dino armed with hatchets and accused Porho armed with gun appeared. Accused Porho instigated other accused, not to spare the complainant and his father, on which complainant has stated that accused Allah Warrayo fired from his gun which hit to the complainant and he fell down. He has further stated that accused Dino and Shafi Muhammad caused hatchet blows to his father Ghanwar. He raised cries which attracted PWs Shahmir and Sono. They witnessed the incident. Accused went away. Father of the complainant succumbed to the injuries and complainant lodged the FIR on 12.02.1997, it was recorded vide crime No.11/1997 u/s 302, 324, 504, 34 PPC at P.S. Talhar. After usual investigation challan was submitted against the accused.

4. Trial court framed charge against the accused. Accused pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined 11 witnesses. Thereafter the prosecution side was closed.

6. Statements of respondents/accused Allah Warrayo and Deeno were recorded u/s 342 Cr.P.C. in which they claimed false implication in this case and denied the prosecution allegations. Accused Allah Warrayo stated that his confessional statement was not true and

voluntarily. Accused did not lead any defence and declined to give statement on Oath in disproof of prosecution allegations.

7. Trial court after hearing the learned counsel for the parties and on assessment of evidence, by judgment dated 21.10.2004 acquitted the accused/respondents as stated above.

8. We have heard the complainant at length. He has stated that respondents/accused caused him injuries and committed the murder of his father and the judgment of the trial court is perverse.

9. Mr. Muhammad Ishaque Khoso, learned advocate for the respondents argued that ocular evidence was contradictory to the medical evidence. That the confessional statement of accused was not true and voluntarily. It is further argued that main accused Shafi Muhammad and Deeno have expired during the proceedings. That the gun used in the commission of offence and empties were not sent to the Ballistic Expert for report. Lastly, it is argued that the respondents have been acquitted by the trial court on sound reasons.

10. Mr. Shahzado Saleem Nahiyoan, D.P.G. for the State supported the judgment of trial court and argued that judgment is not perverse or against the law.

11. In order to appreciate the contentions of the counsel for the parties, the relevant portion of the judgment and the reasons of acquittal recorded by the trial court are reproduced as under:-

“14. The reasonable conclusion from the above discussion can be easily drawn that the P.W. Shahmir was not available at the place of vardat and he has not seen the incident.

15. The prosecution is now left with the only evidence of complainant Jan Muhammad regarding the murder of deceased Ghanwar. According to whom accused Dino and

Shafi committed the murder of his father Ganhwar. They have been shown to be armed with hatchets and allegedly hurled hatchet blows to deceased Ghanwar. During the investigation, the police let off accused Shafi and Porho, the accused Porho died subsequently. The evidence does not show any specific part and does not attribute specific injury to the accuse Dino. It has been clarified by P.W Akbar in cross-examination that the complainant has exaggerated the fact of the incident. His evidence transpired that the accused Dino and Shafi were innocent, therefore, they were released. They did not participate in the said crime. P.W. Akbar has also admitted that the complainant has not stated in the FIR that he was brought by Allahdino and others in a trolley. There is recovery of hatchet from accused Dino under the mashirnama Ex.18-F which shows that the recovery of gun from the accused Allah Warrayo. The genuineness of mashirnama Ex.18-F will be discussed in point No.2 but the crux of that discussion will be that the mashirnama of that recovery has not been proved beyond any reasonable doubt. The accused Dino was also produced before Magistrate for his confession as per letter submitted by the SHO police station Badin before the learned Civil Judge and FCM Golarchi but there is no explanation that how and why the confession of accused Dino was not recorded. The reasonable presumption will be that as per admission of P.W Akbar that the accused Deeno was innocent and he did not participate in the incident, therefore, his alleged role in the incident has not been established beyond any reasonable doubt.

16. The place of incident is shown near water course No.10-L on the back of house of Sher Muhammad Shah. The same vardat is shown in the site plan prepared by the tapedar P.W Muhammad Qasim who was shown place of vardat by P.W Shamir and Wali Muhammad. The mashirnama shows that blood stained earth was sealed but it is not mentioned that it was sent to the Chemical Examiner and this sample has even not been produced in court, either by the mashir Wali Muhammad or by P.W Luqman, the ASI who had prepared the site plan. The evidence of SHO Akbar Bajir is also on this subject. There is no chemical report on record, therefore, it can be presumed that the place of vardat which had been shown in the mashirnama is not same and the incident may not had occurred in the manner as alleged in the FIR, particularly when admittedly as stated by P.W Akbar the complainant has exaggerated the facts.

17. The incharge duty officer P.W Luqman has stated in the cross examination that he had not arrested any of the accused, whereas, the mashir Wali Muhammad has stated in the cross-examination that accused Allay Warrayo was arrested by the police on the same day of incident at 7/8 A.M. These material contradictions makes the case of prosecution doubtful.

18. *The motive in respect of the incident as disclosed in the FIR is that the accused were in habit of standing at the water pond wherefrom the women folk of complainant party were fetching the water, therefore, the complainant was preventing them from standing there which fact annoyed them resulting in this un-fortunate incident. The complainant Jan Muhammad has denied the suggestions of learned defence counsel that the accused Allah Warayo had illicit terms with Mst. Arbi, the matter was brought in a Faisla and it was decided that accused Allah Warrayo will leave the village. He also denied that accused Allah Warrayo shifted from the village to Badin but the P.W. Shamir admitted to this extent that they alleged against accused Allah Warrayo for illicit terms with Mst. Arbi and he also admitted that the accused Allah Warrayo was forced to shift to Badin in a faisla. This fact has also been admitted by investigation officer P.W Akbar that his investigation transpired the background of the case was that the complainant party was suspecting that the accused Allah Warrayo was on illicit terms with Mst. Abri and due to this fact the accused Allah Warrayo left the village and started living at Badin. P.W Akbar has stated that he did not record statement of Mst. Arbi or her husband on coming to know about this fact, as such, the fact is that the motive as narrated in the FIR has not been established.*

19. *There is confession of accused Allah Warrayo recorded by the Magistrate, learned Civil Judge & FCM Golarchi on 20.02.1997. P.W Saleem Raza learned Civil Judge & FCM Golarchi has produced the confession and has stated that the accused Allah Warrayo was produced by the police under the letter No.11 of 1997 dated 20.02.1997 and his confession was recorded by him accordingly. The mashirnama of arrest of accused Allah Warrayo shows his arrest on 19.02.1997, whereas, the P.W Wali Muhammad has stated in the cross-examination that the accused Allah Warrayo was arrested by the police on the same day of incident at about 7/8 P.M i.e. 12.02.1997. The date of arrest of accused Allah Warrayo has become controversial and the P.W Luqman who had registered the FIR, prepared the mashirnama of place of vardat on 12.02.1997, he stated that he did not arrest any of the accused on the date but this fact has been falsified by the mashir P.W Wali Muhammad, who is mashir of arrest of accused Allah Warrayo, therefore, prima-facie it appears that there is delay of five days in producing the accused Allah Warrayo for confession, which delay is fatal to the confession. It has been admitted by the P.W Saleem Raza that the police produced four accused Allah Warrayo alias Papoo, Dino, Shafi and Porho in letter dated 20.02.1997 but they only produced accused Allah Warrayo, whereas, there is nothing on record to indicate that why and under what circumstances their confession was not recorded particularly when the letter No.Ex.19-B shows that four accused were produced by the police before Magistrate, hence this fact makes the case doubtful. It appears that this all has been arranged to implicate the accused Allah Warrayo. The confession of accused Allah Warrayo has been produced as*

Ex.19-A wherefrom it appears that the signature of the accused Allah Warrayo were obtained on only two pages third and fourth while his signature was not obtained on the pages No.1 and 2. This fact also makes the whole case doubtful.

20. The circumstances as stated above show that the accused was arrested on 12.02.1997 while his arrest was officially shown on 19.02.1997 however, he was in custody from 12.07.1997 and produced after five days on 20.02.1997. This delay has been held fatal to the acceptance of a Judicial confession as held in PLJ-1987 Quetta Page 96, PLJ-1987 Cr.C (Quetta) Page 271 and PLD-1960 Karachi Page 817. There is also no mention any where in the confession that the Magistrate told that he would be sent back to Judicial custody, therefore, in view of PLJ-1995 FSC-109, PLJ-1987 I (Quetta)-96, such confession of accused can not be relied upon.

21. Summing up the above discussion, it has become amply clear that the prosecution has not established the case beyond any reasonable doubt that the accused Allah Warrayo and Deeno committed murder of deceased Ganhwar Mughari intentionally, therefore, this point is answered as not proved.

22. Point-3 Coming now to the point-3, it may be stated that according to FIR , it has been shown that the accused Allah Warrayo was with gun, which he fired at the complainant as a result thereof, he received injuries. The complainant Jan Mohammad has stated that accused Allah Warrayo fired at him as a result thereof he suffered injury on left arm and chest. P.W. Shamir has stated that accused Allah Warrayo also caused fire arm injury to the complainant Jan Mohammad, the medical certificate also shows that the P.W. Complainant Jan Mohammad suffered two fire arm injuries. The complainant Jan Mohammad has stated in the evidence that accused Allah Warrayo was armed with hatchet and accused Porho was armed with gun. This part of evidence is clearly in conflict with the FIR in which he has alleged that accused Allah Warrayo was armed with gun and fired at him and his above statement in Examination in Chief falsifies the allegations in the FIR , as such, the fire arm injuries have not been caused by accused Allah Warrayo but these have been obviously attributed to accused Porho who has been shown to be armed with gun, the Police has let off him during the investigation. He died after the case was challaned. Moreover, according to FIR Ex:18-A, accused Allah Warrayo led the Police and produced the gun before the Police on 19.2.1997 as there is recovery of gun from accused Allah Warrayo but as per complainant Jan Mohammad's own-showing that he did not fire but it was the accused Porho who has fired from whom there is no recovery. There is very important legal aspect on this point that the Police did not send the gun to Ballistic Expert, for report, as such, the fact of fire from the gun allegedly recovered from accused Allah Warrayo has been shrouded in mystry. Consequently, I hold

that the accused Allah Warrayo did not cause fire arm injury to deceased Ganhwar, therefore, this point is answered as not proved.

23. On over all appraisalment of entire evidence of the prosecution and on considering the surrounding and attending circumstances of the case, I have drawn this conclusion that the prosecution have miserably failed to bring home charge of murder of deceased Ganhwar and injuries on the person of complainant Jan Mohammad against this accused. In the result, the accused Allah Warrayo and Deeno Khaskheli are acquitted under section 265-H(1) Cr.P.C. They are present on bail, their bail bonds stand cancelled and sureties discharged.”

12. We would now like to give the reasons which have weighed with us in confirming the impugned judgment. First of all we would like to point out the prosecution has not been able to prove motive through cogent, reliable and trustworthy evidence. We are alive to the fact that entire prosecution would not be thrown out simply because the prosecution has failed to prove the motive. The failure of the prosecution to prove the motive would make us exercise maximum caution in evaluating the testimony of the eye witnesses. Complainant is highly interested witness, the son of the deceased. Other witnesses are closely related to the deceased. Since they are extremely interested witnesses, we would exercise further caution in assessing their testimony. We have been taken through the entire evidence by the learned D.P.G. and we are constrained to say that the prosecution evidence is not reliable and has rightly been rejected by the trial court, for the detailed reasons stated in its' judgment dated 21.10.2004.

13. We are also alive to the fact that the complainant is an injured witness but the injuries only guarantee his presence and not his truthfulness. It is well settled law that before the testimony of an injured witness is accepted by the court, the court should be satisfied that it is

cogent, reliable, unimpeachable and trustworthy. We are regretted that we cannot classify the evidence of the complainant in the same category. Moreover, gun recovered from respondent Allah Warrayo was not dispatched with empties to the ballistic expert for report. Judicial confession made by accused Allah Warrayo was also not true and voluntarily for the reasons that accused was arrested on 12.02.1997 but his arrest was shown on 19.02.1997 and he was produced before the Magistrate on 20.02.1997 for recording his confessional statement. Delay of 05 days in recording the confessional statement of accused has not been explained by the prosecution. Confession has been retracted by the respondent/accused at trial. We have minutely examined the confession, it was not recorded by the Magistrate according to the prescribed procedure. It was not made clear to the accused Allah Warrayo that he would not be remanded back to the same police in case, he refused to give his confessional statement. Magistrate failed to ask accused that from which date he was in the police custody and where he was detained and what threats/tortures were given to him by the police. Unfortunately Magistrate recorded confession in casual manner it was not the requirement of law. Trial court has rightly disbelieved it. PW Shahmir has deposed that respondent Allah Warrayo caused firearm injury to the complainant Jan Muhammad. Medical certificate reflects that the complainant had sustained two firearm injuries. Complainant in his evidence at Ex.8 has deposed that accused Shafi Muhammad, Allah Warrayo and Deeno were armed with guns but at the same time while assigning part to the accused persons complainant stated that accused Allah Warrayo fired him from his gun. Statement of the complainant Jan Muhammad is self contradictory and untrustworthy.

14. The learned trial judge after considering the evidence of the aforesaid witnesses, rightly passed the impugned judgment of acquittal. At the very outset, we would like to mention that we are deciding the appeal against acquittal. It is well settled law that High Court can only interfere in an appeal against acquittal if the view of the learned trial judge is either manifestly perverse on facts or vitiated in law. If the view taken by the trial judge can reasonable be said to be arrived at, this court does not substitute it with its own view. The scope of interference in appeal against acquittal is also narrow and limited because in an acquittal the presumption of the 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 the innocence is doubled. This Court is always slow in interfering with the acquittal judgment. Counsel for the appellant / complainant has failed to satisfy us that the judgment has been passed by the trial Court in violation of the law or it suffer from error of grave misreading or non-reading of the evidence. Rightly reliance has been placed on the case of *The State v. Abdul Khaliq and others* (PLD 2011 Supreme Court 554).

15. We may point out that this ratio has been reiterated by the Honourable Supreme Court of Pakistan in its subsequent decisions and is good law even today.

16. We would also like to state that incident took place nearly 20/21 years ago and the impugned judgment has been passed nearly 14 years ago. Right from then the sword has been hanging on the head of respondent Allah Warrayo.

17. In the result, the impugned judgment of acquittal in favour of the respondent/accused Allah Warrayo is based upon sound reasons and requires no interference. Consequently, instant Criminal Acquittal Appeal No.D-208/2004 is hereby dismissed.

JUDGE

JUDGE

Tufail