IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-322 of 2010.

Muhammad Soomar and another

Versus

The State

Cr. Acq. A. No.D-278 of 2010.

Abdul Aziz Buriro

Versus.

Khuda Dino and others

Cr. Rev. A. No.D-86 of 2010

Abdul Aziz Buriro

Versus.

Muhammad Soomar and others.

Appellants in Cr. Appeal No.D-322/2010 and private respondents in Cr. Acq. Appeal No.D-278/2010 and Cr. Rev. A. No.D-86/2010	Through Kazi Atif, Advocate
Appellant / applicant in Cr. Acq. Appeal No.D-278/2010 and Cr. Rev. Appl. No.D-86/2010, respectively	Through Mr. Aijaz Shaikh, Advocate
Respondent The State	Through Mr. Khalid Hussain, Assistant Prosecutor General
Date of hearing	29.08.2018.
Date of judgment	29.08.2018.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Since all the aforementioned appeals / revision application have arisen out of one and the same judgment, therefore, we propose to decide the same by this common judgment. The facts and prayers as made by the appellants / applicant in the said matters are that:-

accused Sardar fired from his gun on his father and accused Soomar inflicted hatchet blows to his brother. Accused also caused lathi and blunt side hatchet blow to the complainant, his brother and father respectively. He raised cries which attracted Yasir and Ibrahim and accused fled away. He found his brother Tarique and father dead. Complainant who was also injured left Yasir and Ibrahim over the crops and went to hospital, consequently complainant lodged the FIR."

3. After completing the usual investigation, police submitted the challan against above named appellants as well as their accomplices namely Khuda Dino and others.

4. Formal charge against the accused was framed by trial court at Ex.5. Accused / appellants vide their respective pleas Ex.6 to Ex.14 pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined as many as 09 witnesses and thereafter learned DDPP closed side of the prosecution vide his statement Ex.32.

6. Statements of the accused / appellants / private respondents were recorded under section 342 Cr.P.C. at Ex.33 to 41, in which they have denied the allegations of prosecution while claiming their innocence. They did not examine themselves on oath.

7. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellants / private respondents Muhammad Soomar and Sadaruddin and acquitted the private respondents Khuda Dino, Khizir alias Porho, Din Muhammad, Meharuddin, Abbas, Ali Nawaz and Allah Warayo, as stated above.

8. The facts of this case as well as evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. At this juncture however it is relevant to point out that appellant Mohammed Soomar expired in jail and as such the appeal against conviction and enhancement of sentence only relates to appellant Sadaruddin and thus it is the evidence on record against him and his co-accused which we have concentrated on.

10. Kazi Atif, learned counsel for the appellants / private respondents has mainly contended that the F.I.R. was a false and manipulated one by the

i. In Cr. Appeal No.D-322/2010, appellants Muhammad Soomar and Sadaruddin were tried by learned Ist. Additional Sessions Judge, Hyderabad in Sessions Case No.401/2004, arising out of crime No.105 of 2004, registered at Police Station Husri for offence under sections 302 and 324 PPC. Appellants were found guilty by judgment dated 05.07.2010 and were convicted and sentenced to suffer life imprisonment with fine of Rs.500,000/- each to be paid to the legal heirs of deceased persons according to law. Benefit of Section 382-B Cr.P.C. was also extended to the accused. The appellants have challenged the impugned judgment through instant appeal.

ii. The Criminal Acq. Appeal No.D-278/2010 has been filed by appellant Abdul Aziz, assailing the said judgment, whereby the learned trial Court after full dressed trial convicted co-accused Sadaruddin and Muhammad Soomar whereas acquitted the private respondents No. 1 to 7, by giving them benefit of doubt.

iii. In Cr. Rev. Application No.D-86/2010, applicant Abdul Aziz Buriro has made a prayer to enhance/convert the sentence of life imprisonment awarded to the private respondents Muhammad Soomar and Sadaruddin through said impugned judgment to death.

2. The brief facts of the prosecution case as disclosed in the F.I.R. are that complainant Abdul Aziz lodged F.I.R. at Police Station Husri stating therein as under:-

"The complainant is owner of agricultural lands situated in Deh Khathar and had cultivated rice and sugarcane crop at the said land. On eventful day complainant alongwith his father Haji Muhammad and brother Tarique Ali was present at his house and his brother Yasir Ali taking licensed gun left for agricultural land on rotation of water, at about 1-15 pm he returned and informed them that while he was available in his lands, crops in mango and beer trees crows were disturbing him, as such he fired upon the crows and a crow fell down. He further disclosed that Sardar Mallah, the neighbouring Zamindar arrived there, abused that why he made fire as their womenfolk were in fields. On such narrations, the father of complainant told the others to go to Khuda Dino Mallah, his father took licensed rifle and went to the field. At the lands they found Khuda Dino Mallah and others, they were duly armed and 10/11 persons also came there, out of them Khuda Dino with hatchet, Sardar with gun, Soomar with hatchet, Abbas with hatchet, rebuked them. In the meantime accused Khuda Dino inflicted a hatchet blow to the father of complainant,

complainant; that in fact it was the complainant side which was the aggressor and not the appellant; that the appellant was not present at the scene and was elsewhere at the time of the alleged incident; that even if he was there it was an act of self defense ;that the eye witnesses had given false testimony in this made up case; that the injuries of the complainant had all been self suffered as part of the false story; that the witnesses are interested witnesses; that there were major contradictions in the evidence of the witnesses; that the PW's had improved their evidence at trial; that the learned trial judge had erred in misreading and non reading of the evidence which had not been fully appreciated by him and thus for all the above reasons the prosecution had failed to prove its case beyond a reasonable doubt and a such the appellant was entitled to the benefit of the doubt and be acquitted.

11. On the other hand Mr. Aijaz Shaikh, learned counsel for appellant / complainant Abdul Aziz Buriro has contended that there is no legal infirmity in the impugned Judgment and as such the same should be upheld in so far as it related to appellant Sadaruddin except that the trial judge erred in sentencing the appellant Sadaruddin to life imprisonment and that under the relevant law he should have been sentenced to death as there was no mitigating circumstances which justified the reduction in the sentence of death to life imprisonment. With regard to the co-accused Khudda Dino, Khizar alias Porho, Din Mohammed, Meharruddin, Abbas, Ali Nawaz and Allah Warayo in his appeal against their acquittal Mr. Aijaz Shaikh, learned counsel for appellant / complainant submitted that all the co-accused should have been convicted as there was sufficient material on record to show at a minimum they were a part of the common intention to murder the complainants father and brother and as such their acquittal should be over turned and they should be convicted of murder and also sentenced to death as no mitigating circumstance existed in their case. In support of this contention, he relied upon the case of **Muhammad Abid v. State** (2011 SCMR 1148).

12. Learned A.P.G. appearing for the State while supporting the impugned judgment submitted that with regard to appellant Sadaruddin there was no legal infirmity in the impugned judgment and that Sadaruddin's conviction and sentence should be maintained. With regard to the other co-accused he submitted that they had rightly been acquitted since there was no direct evidence against them that they murdered either the complainant's father or brother with hatchet blows.

13. We have heard the learned Counsel for the parties and perused the evidence so brought on record alongwith the impugned judgment with the able assistance of learned counsel.

14. In material part the learned trial court has found as under in the impugned judgment;

> "All the PWs fully supported the prosecution case, so also recovery effected from the each accused and postmortem report, medical certificates of injured Abdul Aziz, ballistic expert and chemical examiner's reports are in positive and supporting the version of the witnesses.
> Specific role is attributed to the accused Saddar having gun and Soomar having hatchets which is also corroborated by all the PWs so also medical evidence. The general allegations are against other accused persons who caused injuries to the injured Abdul Aziz so also common intention is there, therefore, prosecution has successfully proved its case against present accused persons without reasonable doubt.
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> The upshot of the discussion reveals that there is direct evidence against accused Saddaruddin and Muhammad Soomar they were armed with gun and hatchet respectively and due to result of their act deceased Haji Muhammad and Tarique Ali have lost their lives, whereas allegations against remaining accused persons are general in nature and they are not responsible for committing the murder of both the deceased persons. Therefore, vicarious liability is on the shoulders of accused Saddaruddin and Muhammad Soomar.
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> So far as the remaining accused persons is concerned, since there are general allegations against them and alleged recovery of hatchets and Lathis is not supported from independent corner, therefore, the case against them is doubtful and it is settled principle of law that benefit of doubt always goes to the accused".

15. Turning firstly to appellant Sadaruddin's appeal against conviction. It is settled law that a conviction can be brought home with the evidence of one eye witness alone without corroboration if he is reliable, trust worthy and confidence inspiring. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 S C M R 1857) where it was held at P.1860 at Para 6 as under:

> "6. It is true that there is only ocular testimony of P.W. 4 Mst. Khatun Bibi corroborated by medical evidence, P.W. 6 Dr. Muhammad Sarfraz Sial. The fact that there is only ocular testimony of one P.W. which is unimpeachable and confidence-inspiring corroborated by medical evidence would be sufficient to base conviction. **It be noted that this Court has time and again held that the rule of corroboration is rule of abundant caution and not a mandatory rule to be applied invariably in each case rather this is settled principle that if the Court is satisfied about the truthfulness of direct evidence, the requirement of corroborative evidence would not be of much significance in that, as it may as in the present case eye-witness account which is unimpeachable and confidence-inspiring character and is corroborated by medical evidence".** (bold added)

16. In this case we find the complainant's evidence to be confidence inspiring and importantly is corroborated by two other eye witnesses who are not chance witnesses and have not been shattered let alone damaged on cross examination.

17. With regard to interested witnesses based on the evidence before us we do not consider this to be of much, if any, relevance and in this respect reference is made to the cases of **Muhammad Ehsan** (Supra) **Naik Muhammad alias Naika and another v. The State** (2007 S C M R 1639) and **Ameer Ali V State** (1999 MLD 758 (Lahore). This is more so since no animus or enmity has been shown towards/against the appellant by any of the P.Ws.

18. It is true that there are some discrepancies/contradictions in the evidence of some PW's however we consider such discrepancies/contradictions to be of only a minor nature and when considered against the totality of the evidence to be of little, if any, significance in the context of this case. In this respect reference may be made to the cases of **Zakir Khan & others v. The State** (1995 SCMR 1793) and **Ameer Ali V State** (1999 MLD 758 (Lahore).

19. Furthermore, this is a day light incident; that there is no doubt from the evidence that this incident took place; there is no case of mistaken identity; there was no delay in filing the F.I.R. and whatever minor delay there was has been adequately explained by the complainant who was injured in the incident and needed medical treatment before registering the F.I.R.; that the appellant was give a specific role in the F.I.R.; that the appellant was present at the scene; that the recovery of the gun was made from the appellant; that according to the eye witnesses whose evidence we consider both reliable and corroborative the appellant Sadaruddin shot the complainants father with the recovered gun which is corroborated by both the ballistics report and medical report and other evidence on record; that the chemical analysis also proved positive; that in our view the prosecution evidence is mainly consistent in all respects with only a few minor contradictions; that the appellant failed to produce any alibi evidence which he did not raise as a defense at trial; that even in his S.342 statement the appellant did not raise his "new story" that in fact it was the complainant who was the aggressor; that there is no material on record to show that the complainants injuries were self inflicted; even otherwise why would the complainant have the need to inflict such injuries on himself if both his brother and father had been shot. This does not appeal to reason and it has never been the case of either side that the complainant killed his father and brother and in this regard reference may be made to the case of **Muhammad Asif v. The State** (2017 S C M R 486); that the prosecution story and evidence adduced by the prosecution, which has not been damaged let alone shattered during cross examination, in our view reflects the true occurrence of events.

20. It is a well settled principle of criminal law that it is for the prosecution to prove its case against the accused beyond a shadow of a doubt and if there is any doubt in the prosecutions case the benefit of such doubt, as set out in the

case of **Tariq Pervez v. The State** (1995 SCMR 1345) must go to the appellant as of right as opposed to concession. However in considering this aspect of the case we are also guided by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

> "It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

21. In the recent supreme Court case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12th April 2017 the Hon'ble supreme Court in respect of the benefit of doubt held as under at Para 20:

> "Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of **Riaz Masih @ Mithoo v. The State (NLR 1995 Crl. 694)**."

22. In this case however when the evidence is read in totality there would be no doubt in a reasonable and prudent person's mind that the appellant was guilty of the offense for which he has been charged not with standing the few minor procedural irregularities and minor contradictions in the evidence of the PW's which even otherwise are not fatal to the prosecutions case.

23. In our view the evidence of the key PW's on a whole is reliable, trustworthy and confidence inspiring none of whom were seriously damaged, if at all, during cross examination. Such evidence in our view also represents a continuous chain of evidence from the time of the crime connecting the appellant to the crime especially when the medical, ballistic and chemical evidence is taken into account.

24. As such the appeal against conviction by appellant Sadaruddin is hereby dismissed.

25. With regard to the enhancement of sentence from life imprisonment to death it is true that no mitigating factors have been mentioned in the impugned judgment to justify this as is required by law. However it appears that the appellant is about 60 years of age; that he has serious medical issues; that he has already spent approximately 15 years in jail; that the complainant's father came armed to the scene and thus the circumstances were confrontational; that it was not a frenzied brutal attack by the appellant in that he fired only one or two bullets at the complainant's father who was also injured by others through hatchets; that the appellant did not fire at the other deceased and thus

considering all the above factors when taken together and the principle that justice should also be tempered with mercy we hereby dismiss the criminal revision for enhancement of appellants Sadaruddin's sentence from life to death and leave the sentence as set out in the impugned judgment in tact.

26. Turning to the appeal against acquittal of the co-accused. The parameters for an appeal against acquittal to succeed are much narrower than in the case of an appeal against conviction. It is settled law that judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honorable Supreme Court in the case of **The State v. Abdul Khaliq and others** (PLD 2011 Supreme Court 554). Moreover, the scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of the innocence is significantly added to the cardinal rule of criminal jurisprudence as the accused shall be presumed to be innocent until proved guilty. In other words, the presumption of innocence is doubled as held by the Honourable Supreme Court of Pakistan in the above referred judgment. The relevant para is reproduced hereunder:-

> "16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both the sides, it may be mentioned that both the learned counsel agreed that the criteria of interference in the judgment against acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Courts about the rules which should be followed in such cases; the dicta are:
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> **Bashir Ahmed v. Fida Hussain and 3 others** (2010 SCMR 495), **Noor Mali Khan v. Mir Shah Jehan and another** (2005 PCr.LJ 352), **Imtiaz Asad v. Zain-ul-Abidin and another** (2005 PCr.LJ 393), **Rashid Ahmed v. Muhammad Nawaz and others** (2006 SCMR 1152), **Barkat Ali v. Shaukat Ali and others** (2004 SCMR 249), **Mulazim Hussain v. The State and another** (2010 PCr.LJ 926), **Muhammad Tasweer v. Hafiz Zulkarnain and 02 others** (PLD 2009 SC 53), **Farhat Azeem v. Asmat Ullah and 6 others** (2008 SCMR 1285), **Rehmat Shah and 2 others v. Amir Gul and 3 others** (1995 SCMR 139), **The State v. Muhammad Sharif and 3 others** (1995 SCMR 635), **Ayaz Ahmed and another v. Dr. Nazir Ahmed and another** (2003 PCr. LJ 1935), **Muhammad Aslam v. Muhammad Zafar and 2 others** (PLD 1992 SC 1), **Allah Bakhsh and another v. Ghulam Rasool and 4 others** (1999 SCMR 223), **Najaf Saleem v. Lady Dr. Tasneem and others** (2004 YLR 407), **Agha Wazir Abbas and others v. The State and others** (2005 SCMR 1175), **Mukhtar Ahmed v. The State** (1994 SCMR 2311), **Rahimullah Jan v. Kashif and another** (PLD 2008 SC 298), **Khan v. Sajjad and 2 others** (2004 SCMR 215), **Shafique Ahmad v. Muhammad Ramzan and another** (1995 SCMR 855), **The State v. Abdul Ghaffar** (1996 SCMR 678) and **Mst. Saira Bibi v. Muhammad Asif and others** (2009 SCMR 946).

From the ratio of all the above pronouncements and those cited by the learned counsel for the parties, it can be deduced that 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 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 or wholly artificial or a shocking conclusion has been drawn. Moreover, in 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 (Emphasis supplied). 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, expect when palpably perverse, suffering from serious and material factual infirmities.** It is averred in The State v. Muhammad Sharif (1995 SCMR 635) and Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. **It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals**." (bold added)

27. As discussed earlier in this judgment an accused is also entitled to the benefit of the doubt.

28. In our view, although there may be some evidence against some of the co-accused for their involvement in both the complainants father and brother's murder keeping in view that a number of the co-accused have already spent around 6 years in jail prior to their acquittal, the extremely narrow scope of appeals against acquittal as mentioned above and the fact that the co-accused are entitled to the benefit of the doubt and the double presumption of innocence having again reviewed the evidence against the co-accused this appears to be more of a general nature and on balance we consider that the co-accused are entitled to the benefit of the doubt and that the impugned judgment has rightly acquitted them on this basis and as such the appeal against their acquittal is dismissed.

29. These are the reasons for our short order which was announced to day in open court and reads as under:

"Parties advocate have been heard at length. They have concluded their arguments. For the reasons to be recorded later on Cr. Appeal No.D- 322

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of 2010 stands dismissed. Cr. Acq. Appeal No. D- 278 of 2010 is dismissed and Cr. Rev. Appl. No. D- 86 of 2010 is also dismissed as no case for enhancement of sentence is made out as in the present case there appears to be mitigating circumstances, therefore, the question does not arise in this case for enhancement of sentence for accused Sadaruddin who is confined in jail whereas accused Muhammad Soomar has already been expired due to his natural death as per report submitted by Superintendent Central Prison, Hyderabad."