JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Acquittal.Appeal.No.D- 01 of 2005

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

Date of hearing: 02.04.2018.

Date of judgment: 02.04.2018.

None present for the appellant.
Mr. Hidayatullah Abbasi, Advocate for respondents No.1to4.
Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh for the State.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Respondents / accused Ayaz Khattak, Malak Muhammad Ashraf, Akhtar and Muhammad Rafique were tried by learned IInd Additional Sessions Judge, Badin in Sessions Case No.112 of 2000 for offences u/s 302, 337-H(ii), 34 PPC. By judgment dated 15.12.2004, the respondents/accused were acquitted of the charge by extending them benefit of doubt. Hence, instant Criminal Acquittal Appeal was filed by complainant Rehmat Khan.

2. Brief facts of the prosecution case as disclosed in the FIR are that deceased Sufi Muhammad Khan was the brother of complainant Rehmat Khan and was reporter of Daily Newspaper “UMAT” and a

magazine namely “GHAZI”. It is alleged that character of Mst. Shahnaz Kumbhar was questionable and she was residing with one Rafique Hajjan against whom deceased Sufi Muhammad was writing from time to time in the newspaper on which the relatives and well wishers of said Shahnaz had been issuing threats to deceased Sufi Muhammad. A week ago prior to the incident, the said Rafique and others had also quarreled with deceased. On the day of incident, i.e. 02.05.2000 complainant was getting his house repaired and after finishing of work at about 1215 hours he was coming to the town and reached at the Canal and saw that his brother deceased Sufi Muhammad Khan was coming on motorcycle, opposite to him and complainant saw that accused Ayaz Pathan fired two or three shots at deceased Sufi Muhammad Khan on his left side with TT Pistol who fell down on the ground with motorcycle. Complainant has further stated that accused Ashraf, his son Akhtar and Rafique Hajjam were also with accused Ayaz who were also having pistols and made aerial firing. The complainant raised cries. In the meantime, accused Ayaz Pathan fired shots with TT Pistol. The incident was also witnessed by PWs Khalid Nawaz, Naeem Iqbal and Fida Hussain Farooquee and others. All of them, raised challenges on which accused persons while raising slogans ran away with their weapons. Deceased Sufi Muhammad succumbed to injuries at the spot. Complainant then left the above witnesses over the dead body and went at police post Khoski on 02.05.2000 at 1340 hours and lodged the

report.

3. After usual investigation, challan was submitted against the respondents/accused named above under above referred sections.

4. Trial court framed charge against the respondents/accused under the above referred sections, to which they pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined in as much as 09 PWs who produced the relevant documents/reports. Thereafter, prosecution side was closed.

6. Statements of accused were recorded u/s 342 Cr.P.C. in which accused claimed false implication in this case and denied the prosecution allegations.

7. Trial court formulated two points for determination and replied the point No.1 with regard to the involvement of accused as doubtful and acquitted the accused by judgment dated 15.12.2004.

8. Complainant filed Appeal against acquittal on 04.01.2005 and notices were issued to the respondents. Appellant Rehmat Khan and his counsel are not in attendance. This appeal against acquittal pertains to 2005. Vide order dated 03.05.2017 none appeared for the appellant. Notice was repeated to the appellant and intimation notice to his counsel. It was made clear that in case none appeared on 22.05.2017 appeal against acquittal shall be heard without waiting further. On 22.05.2017 complainant was present and submitted that his counsel was busy before the Honourable Supreme Court and the appeal was adjourned as a last and final chance. It was observed that in case none appeared on 30.05.2017 the appeal shall be heard. On 30.05.2017 Mr. Irfan Bhutta held brief for Mr. Khawaja Naveed Ahmed, Advocate for appellant and the matter was adjourned. Intimation notice was issued to the counsel for appellant for today but despite intimation notice counsel for the appellant did not appear. Appellant is also called absent. Finding

no other way as the appeal pertains to 2005, we have gone through the entire evidence of prosecution witnesses with the assistance of D.P.G.

9. We have heard Mr. Hidayatullah Abbasi, Advocate for respondents No.1 to 4 and Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General Sindh and scanned the entire evidence available on record. Trial court has recorded acquittal in favour of the respondents/accused mainly for the following reasons:-

> ***"****27. It has come on record through the evidence of prosecution witnesses that deceased Sofi Muhammad Khan at the time of incident was on motorcycle. It has been deposed by complainant Rehmat Khan that he saw that his brother deceased Muhammad Khan was going towards the house on the motorcycle. PW Naeem Iqbal an eye witness in his evidence has also deposed that they then came out from the Hotel and he saw that his uncle deceased Sofi Muhammad Khan was lying on the road at his motorcycle. PW Khalid Nawaz in his deposition has deposed that at about 12.15 PM he heard 2 or 3 fires. After gunshot fires when he and PWs came out from the Hotel he saw deceased Sofi Muhammad Khan was lying on the ground alongwith his motorcycle. PW Ali Nawaz the mashir of various events has also spoke about the motorcycle of deceased. The investigating officer of the case namely Inspector Asghar Jat even has stated in his cross-examination that he also prepared mashirnama of recovery of motorcycle in presence of the same mashirs. It may be mentioned here that neither the motorcycle has been shown as case property in the case nor such mashirnama of its recovery has been brought on record. In my opinion the motorcycle should have been the case property of this case but the investigating officer of the case has not mentioned the motorcycle as case property. It has been stated by the investigating officer Inspector Asghar Jat that he had checked the motorcycle but there were no blood stained on it. He stated that he had returned motorcycle to the complainant on 2.5.2000 after a receipt which he produced as Ex.32. PW Inspector Asghar Jat also admitted that the case property is not to be returned to complainant except with permission of the court, but as per his own version he did not obtain any such permission from the court or for return of the motorcycle. It has been further stated by him in his cross examination that he did not verify the papers of the motorcycle to find out as to whom it belonged. He further stated that he injured about heirs of the deceased who was a married man, he had also children but no any such no objection was obtained from the heirs of deceased for delivery of the motorcycle to the complainant. It is an*

admitted position that the deceased was fired at on the motorcycle and after fire shot he fell down alongwith motorcycle, therefore, it is unbelievable that the said motorcycle was delivered to the complainant by the investigating officer without observing the legal formalities. Therefore, I am of the opinion that the investigating reveals dishonestly. It has been held in a case law reported in 1975 P.Cr.L.J 750 that whenever investigation reveals dishonestly grave doubts are cast on the case for the prosecution.

28. PW Khalid Nawaz in his cross examination at one place stated that only complainant went with the dead body. Thereafter he stated that Arif, Shoukat, Najam Khan, Naveed and other persons came alongwith dead body. Thereafter, he deposed that all the above named four persons accompanied the complainant from the place of incident with dead body and then returned back with them. To a question this witness has stated that the above named four persons accompanied the complainant with dead body to the Hospital is true and not his previous statement that the complainant alone went with the dead body. PW Inspector Ashgar Ali Jat the investigating officer of the case has stated in his cross examination that he did not prepare any mashirnama of securing of motorcycle when it was secured. He admitted that already he stated in his cross examination that mashirnama of securing of motorcycle was prepared by him in presence of same mashirs but now he has stated that he did not remember, therefore, his last version is correct one. PW Inspector Aftab Ahmed Agheem has stated in his cross examination that previously in his examination in chief he had stated that after sending the articles to Malkhana he had not seen them thereafter at all. However, the fact is that he had seen them at the time of sending the same to the Chemical Examiner. He stated in his cross examination that the latter statement of him is correct and not the previous. The above witness in my opinion have perjured themselves on material particulars, hence their version would not be given any consideration with regard to certain other aspects of the matter. Once a person is proved to be a liar on the particular point, his evidence on other points also becomes debatable. The reliance is placed on a case law reported in National Law Reporter (NLR 1985 Criminal) Mir Dad v. State (Pesh) placitum 'B'.

29. Besides the above legal flaws, dents and defects in the prosecution case, there are also other material contradictions between the evidence of prosecution witnesses. PW Naeem Iqbal (Ex.13) in his cross examination has stated that Moosa Mallah was present in the Hotel at the time of incident while complainant in his cross examination has stated that Mooso was not there but his brother whose name he did not remember came out from the Hotel on firing. PW Mashir Ali Nawaz in his cross examination has stated that the police had not secured the

motorcycle from the place of vardat but it was taken away by the heirs of deceased. He further stated that complainant Rehmat Khan took away the motorcycle of deceased to the shop of Rafique Carpenter near Jam Mosque, while PW Asghar Ali Jat the investigation officer in his cross examination has stated that they brought the motorcycle at the police post Khoski in another hired Datsun which was arranged by the complainant. PW mashir Ali Nawaz in his cross examination has stated that when he reached at the place of wardat no any cloth was lying on the dead body and they put the dead body in the cot and then put the cloth upon him and put the same in the Datsun along with cot. He has further stated that he did not know the colour of cloth but it was sheet but it was not Ajrak while PW PC Ber the corpse bearer in his cross examination has stated that the Ajrak which was lying on the dead body remained with heirs of deceased. The investigating officer PW Inspector Asghar Ali Jat in his cross examination has deposed that no cloth was spread on it (dead body) and a cot was brought after his arrival on which the dead body was put after the dead body was verified by him. The dead body was placed on the cot after one hour after his arrival. PW Inspector Asghar Ali Jat the investigating officer of the case in his cross examination has stated that about four police personnel were with him at the place of incident. PW Bermal and one other police man came with him from PP Khoski whereas two other police personnel came from the check post Shadi large, while PW PC Bermal the corpse bearer has given completely contradictory version by deposing in his examination in chief that he had gone with SHO Nazar Muhammad Dishak. He gave him dead body of deceased Sofi Muhammad Khan for postmortem from hospital, when they reached there the dead body was lying on the cot. While the other PWs have deposed in their evidence that only Asghar Jan had come at the place of incident. This shows that PC Ber Mal had not accompanied the inspector Asghar Jat to the vardat but he accompanied the SHO Nazar Muhammad Deshak to vardat but the said SHO Nazar Muhammad Deeshak has not been examined by the prosecution. PW mashir Ali Nawaz in his cross examination has stated that Asghar Jat was with them at hospital. While PW Asghar Jat the IO of the case in his cross examination has stated that he sent the dead body to Hospital for postmortem examination through Constable Bermal in one Datsun hired by the complainant. In the Datsun with the dead body only Ber Mal PC and complainant went to hospital and no other person. All the above noted contradictions in my opinion are major contradictions and have made the case of prosecution very doubtful and the same cannot be altogether ignored while dealing with point No.02 as framed above.

30. MOTIVE:- It is not always for prosecution to set up a motive for the crime. But once it has set up a motive and if it fails to establish the motive, it is the prosecution that suffers. Here the motive is that a lady Mst. Shah Nawaz

was a bad character lady and deceased Sofi Muhammad Khan used to write the article against her on which the lovers of said Mst. Shahnaz became annoyed. The complainant in his evidence has not deposed anything about the bad character of said Mst. Shahnaz. Even complainant has stated in his cross examination that accused Ayaz has no enmity with him. No any name of any of lover of Mst. Shahnaz has been given in the FIR nor disclosed by prosecution witnesses in their evidence recorded in court. On the other hand, the defence has brought on record that the deceased Sofi Muhammad Khan was a reporter and he used to write in Newspaper UMAT against the big Zamindars of the locality who had enmity with him hence those zamindars/MNAs might have got killed the deceased Sofi Muhammad Khan. It has also been brought on record that even deceased Sofi Muhammad was involved in a murder case bearing FIR No.26 of 1999 u/s 302/34 PPC of PS Diplo. The careful reading of the evidence of prosecution witnesses shows that the prosecution has miserable failed to prove the motive against the accused persons. It has been held in a case law namely Aslam Khan v. The State reported in 1995 P.Cr.L.J page 459 (Peshawar) that in every criminal case motive plays a very vital role and the law is that once the prosecution alleges a motive then it is bound in duty to carry the same to its logical conclusion. Alleging motive or proving motive is not incumbent for the proof of the prosecution, and for securing conviction. Nevertheless, once the prosecution come out with clear cut allegations with regard to certain motive then it becomes obligatory on the prosecution to prove the same because prosecution story sterms therefore." Here in the case in hand, the prosecution has alleged motive in very clear words by stating that decease Sofi Muhammad Khan was a reported of Daily Newspaper UMAT and used to write against a bad character lady Mst. Shahnaz on which her lovers annoyed and resultantly the incident occurred but the same has not been proved by the prosecution.

31. <u>CONCLUSION</u>:- In the conclusion I would say that there was inconsistent, unreliable, untrustworthy and interested evidence brought on record by the prosecution. The ocular testimony is not only interested but inconsistent, contradictory, medically and other evidence and no reliance could possibly be placed on such character of evidence and there is no alternative but to conclude that the prosecution has miserably failed to substantiate the allegations as leveled against the accused. The recovery of the pistol and bullets from the possession of accused Ayaz in the manner as alleged appears to be very doubtful for the reasons that enumerated above. Under such circumstances, accused Ayaz son of Haji Khumar Gul Pathan, Malak Muhammad Ashraf son of Nooruddin Malak, Akhtar son of Malak Muhammad Ashraf Malak and Muhammad Rafique son of Bashir Ahmed Rajput are given benefit of reasonable doubt and they are acquitted accordingly from the charge of the

case under section 265-H(1) of the Criminal Procedure Code.

Accused Malak Muhammad Ashraf, Akhtar and Muhammad Rafique are on bail, their bail bonds stand discharged.

Accused Ayaz Khatak Pathan is produced in custody he is remanded back with direction that he be released forthwith it not require to be detained in any other custody case."

10. Mr. Hidayatullah Abbasi, learned counsel for the private respondents No.1 to 4 contended that the ocular evidence is contradictory to medical evidence. He further submits that all the witnesses were chance witnesses and their evidence was not confidence inspiring. He submits that the judgment of the trial court is well reasoned and has been passed in accordance with law.

11. Mr. Shahzado Saleem Nahiyoon, learned D.P.G. appearing on behalf of the State supported the impugned judgment of the trial court and argued that trial court has recorded acquittal on sound reasons.

12. We have carefully perused the prosecution evidence and impugned judgment passed by the trial court dated 15.12.2004. We have come to the conclusion that the trial court rightly acquitted the accused for the reasons that there were material contradictions in the evidence of prosecution witnesses with regard to the material particulars of the case. Motive as set up by the prosecution was also not established at the trial. In this case complainant Rehmat Khan and the PWs were chance witnesses. They failed to explain their presence infront of the hotel at the time of incident. Complainant was brother of the deceased. Other eye witnesses were also closely related to the deceased. It has come on record that private persons were available at the place of incident but they were not examined by the prosecution.

Prosecution evidence required independent corroboration which was lacking in this case. A number of infirmities / lecunas have been rightly taken into consideration by the trial court in the impugned judgment. Prosecution case was highly doubtful. Therefore, doubt was extended rightly in favour of the accused.

13. Moreover, appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. As held in the case of Ghous Bux v. Saleem and 3 others (2017 P.Cr.L.J 836):-

> **"It is also settled position of law that the appreciation of evidence in the case of appeal against conviction and appeal against acquittal are entirely different. Additional P.G has rightly relied upon the case of Muhammad Usman and 2 others v. The State 1992 SCMR 489, the principles of considering the acquittal appeal have been laid down by honourable Supreme Court as follows:**
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> > **It is true that the High Court was considering an acquittal appeal and, therefore, the principles which require consideration to decide such appeal were to be kept in mind. In this regard several authorities have been referred in the impugned judgment to explain the principles for deciding an acquittal appeal. In the impugned judgment reference has been made to Niaz v. The State PLD 1960 SC (Pak.) 387, which was reconsidered and explained in Nazir and others v. The State PLD 1962 SC 269. Reference was also made to Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 and Khan and 6 others v. The Crown 1971 SCMR 264. The learned counsel has referred to a recent judgment of this Court in Yar Mohammad and 3 others v. The State in Criminal Appeal No.9-K of 1989, decided on 2nd July, 1991, in which besides referring to the cases of Niaz and Nazir reference has been made to Shoe Swarup v. King-Emperor AIR 1934 Privy Council 227 (1), Ahmed v. The Crown PLD 1951 Federal Court 107, Abdul Majid v. Superintendent of Legal Affairs, Government of Pakistan PLD 1964 SC 426, Ghulam Mohammad v. Mohammad Sharif and another PLD 1969 SC 398, Faizullah Khan v. The State 1972 SCMR 672, Khalid Sahgal v. The State PLD 1962 SC 495, Gul Nawaz v. The State 1968 SCMR 1182, Qazi Rehman Gul v. The State 1970 SCMR 755, Abdul Rasheed v. The State 1971 SCMR 521, Billu alias**

Inayatullah v. The State PLD 1979 SC 956. The principles of considering the acquittal appeal have been stated in Ghulam Sikandar's case which are as follows:-

"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:-

(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 the reappraisement 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 points 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 reappraisement of evidence will have to be kept in view when 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 observances of some higher principle as noted above and, for no other reason.

(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."**
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> **13. In another case of State/Government of Sindh through Advocate General Sindh, Karachi v. Sobharo (1993 SCMR 585), it is held as follows.**
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> **"14. 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 and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed."**

14. Judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. 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 cordinal 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 case of The State and others v. Abdul Khaliq and others (PLD 2011 Supreme Court 554). 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:

> **Bashir Ahmad 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 2 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), 2004 SCMR 249, 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 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 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, except 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."

15. For the above stated reasons finding of acquittal recorded by the trial court is neither artificial nor ridiculous. In our considered view there is no merit in the appeal against acquittal. Acquittal recorded by trial Court in favour of respondents/accused is based upon sound reasons, which requires no interference. As such, the appeal against acquittal being without merits was dismissed by our short order dated 02.04.2018 and these are the reasons whereof.

JUDGE

JUDGE

Tufail