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

Cr.Acquittal.Appeal.No.D- 11 of 2016

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

Date of hearing: 16.05.2018.
Date of judgment: 16.05.2018.

Mr. G. M. Afaque, Advocate for appellant.
Syed Meeral Shah, A.P.G. for the State.

## J U D G M E N T

***NAIMATULLAH PHULPOTO, J***: Respondent/accused Fahadullah alongwith three other accused was tried by learned Additional Sessions Judge, Tando Allahyar in Sessions Case No.138 of 2012 for offences u/s 302, 342, 344, 34 PPC. By judgment dated 25.02.2016, the respondent/accused was acquitted of the charge by extending him benefit of doubt. Hence, instant Criminal Acquittal Appeal was filed by complainant Najamuddin.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 23.01.2011 at 5-00 p.m complainant Najamuddin and his brother Muhakumuddin were going on motorcycle, they were signaled to stop by four persons at Jara Water Chamber Raod, out of them two were in police uniform and two in civil dress. Complainant and his brother were made to sit in police mobile and their eyes were fastened. After travelling about one and half hour, they were locked in separate rooms

in a house, tortured and were demanded Rs.25,00,000/- for release. The accused persons detained them for 10/11 days. It is alleged that accused persons were calling each other with names as Qasim Bhatti, Amanullah and Fahadullah. It is alleged that on 02.02.2011 at 10-00 a.m, Muhakumuddin brother of the complainant was murdered due to torture of the above named accused on the next day at 4-00 a.m, dead body of Muhakumuddin was removed in a Pajero while complainant, whose eyes were tied, was shifted in a car and dropped at some unknown place. It is alleged that accused threatened the complainant, not to disclose the incident to anyone else he would also be killed. After one hour, complainant removed cloth from his eyes and found dead body of his brother. Complainant informed the incident to police, thereafter police arrived there and shifted dead body to Civil Hospital, Tando Allahyar. After postmortem examination, complainant took the dead body for burial. Thereafter complainant lodged F.I.R. on 30.07.2011 at P.S Tando Allahyar u/s 302, 342, 344, 34 PPC.

3. After usual investigation, challan was submitted against the present accused/respondent under the above referred Sections co-accused Qasim, Asadullah and Arif were shown as absconders.

4. Trial court framed charge against the respondent/accused, to which he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined in as much as 07 PWs who produced the relevant documents/reports. Thereafter, prosecution side was closed.

6. Statement of accused was recorded u/s 342 Cr.P.C. in which he claimed false implication in this case and denied the prosecution

allegations. Accused produced an application u/s 22-A & B Cr.P.C. alongwith order filed by the complainant. He however, neither examined himself on oath nor led any evidence in his defence.

7. Trial court after hearing the learned counsel for the parties and on assessment of evidence, vide judgment dated 25.02.2016 acquitted the accused, hence this acquittal appeal is filed.

8. Mr. G. M. Afaque, learned counsel for appellant mainly contended that finding of acquittal is not sacrosanct and reasons given by the trial court are speculative. It is further submitted that the finding of acquittal is the result of misreading of evidence which resulted miscarriage of justice. Counsel for the appellant / complainant has read over the evidence of prosecution witnesses and submitted that acquittal of respondent was perverse and is not sustainable in law. He has therefore, prayed that the acquittal may be converted to conviction.

9. Syed Meeral Shah, learned A.P.G. supported the acquittal judgment and argued that the trial court rightly appreciated the evidence. Learned A.P.G. further submitted that acquittal recorded by the trial court requires no interference.

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

> ***"The complainant deposed that on 23.01.2011 he and his deceased brother were took away by some unknown person, out of them some were in police uniform and some were in plain clothes in the police mobile and one Alto Car. Complainant moved application u/s 22-A and B Cr.P.C on 12.07.2011 i.e. after about 170 days, for which no plausible explanation has been given. I tis pertinent to mention here that ASI Wahid Bux deposed that after postmortem, he advised the complainant for lodging***

*the FIR, on which complainant told him that he will lodge that FIR after funeral ceremony and he further stated that prior to producing the order of learned 1-Additoinal Sessions Judge, Hyderabad, the complainant did not appear before him for lodging the FIR. The prosecution failed to explain the delay in login the FIR. The complainant allegedly witnesses of kidnapping, maltreatment and dead body of his real brother but in spite of that he did not got to P.S to promptly lodge FIR, although the police official who saw dead body advised him for lodging the FIR.*

*The complainant stated that after 11 days of kidnapping the accused persons left him and dead body of his brother to some unknown place. It is pertinent to mentionhere that during those 11 days, the family members of complainant and deceased have not made any efforts for recovery of complainant and deceased.*

*The complainant deposed that accused persons demanded Rs.25,00,000/- from them for release but they refused. He further stated that accused persons used to talk with his mother for money. It is worthy to mention here that prosecution has failed to bring anything on record to show that how accused persons used to talk with mother of complainant. The mother of complainant was also not made as witness who was material and important witness.*

*The complainant deposed that accused persons kept him and his brother in separate room and tortured them while ASI Wahid Bux who firstly saw the dead body has deposed that he has not seen any mark of violence on the dead body.*

*Doctor who conducted the postmortem sent pieces of liver and lung, one kidney, stomach and piece of small intestine and preservative of deceased for chemical examiner but as per report of chemical examiner tests performed for the detection of the following substances and are found negative in the above said articles No.1 to 4.*

*01. Alkaloid group*
*02. Volatile group*
*03. Metallic group*
*04. Corrosive group*
*05. Insecticide group.*
*06. Chlorpromazine group.*
*07. Amphetamine group*
*08. Barbiturates*
*09. Mandrax*
*10. Diazepam*
*11. Lorazepam*
*12. Barium sulphide*

*13. Zinc Phosphide*
*14. Copper sulphate*
*15. Amitriptyline*
*16. Nortriptyline*
*17. Naphthalene.*

***They show that deceased was not died due to poising.***

***The complainant deposed that accused persons took him in the car and dead body of his brother in Pajaro Jeep and left them to some unknown place and directed him not to disclose any thing to any person about the incident and after one hour he removed the cloth from his eyes and walk about ½ K.M, thereafter he saw the police check post where he informed police officials about the incident. It is pertinent to mention here that complainant stated that after one hour he removed the cloth from his eyes after leaving him by accused persons then how he can say that accused took him in the car and dead body in Pajaro Jeep. ASI Wahid Bux stated that on the place of incident where the dead body was lying he has seen footprints of one person only.***

***The complainant in his application U/S. 22-A and B Cr.P.C stated that when they reached near Jara Water chambar Road they saw one police mobile and Suzuki Alto Car on the left side of the road and near the vehicle one person was in plain clothes and two police constables were standing who stopped them, out of them one person introduced himself as ShahidHussainBajwa and others were Ehsanullah son of Idrees, Fahadullah son of Manzoor Ahmed and QasimBhatti forcibly thrown them in police mobile and made them bling folded but at the time of his examination-in-chief he has not disclosed the names of accused persons who were present while he was stopped near police mobile and Suzuki Alto Car. He stated that accused persons were calling as Fahadullah, QasimBhatti and Ehsanullah. No identification of accused was held before Magistrate. Evidence of ASI Wahid Bux is very important as he has initiated the initial proceedings of investigation and he deposed that when he reached on the pointed place where he saw Njamuddin son of Ramzan Kumbhar was already present who informed him that dead body is of Mahakamuddin son of Ramzan and he was brother of deceased and also informed him that some persons took him and Mahakamuddin some place for making of gold and when they failed to make gold those persons maltreated and tortured them due to which Mahakamuddin died. It is worthy to mention here that in the Lash Chakas form Ex-12/B it is mentioned that "Najamuddin informed the police about the death of his brother Mahakamuddin and further informed the police that one unknown person has taken him and his deceased brother Mahakamuddin for making of gold,***

***on the failure he has maltreated him and his deceased brother, due to which his brother Mahakamuddin died".***

***ASI Wahid Bux has also produced entry No.16 Ex-12/F and from perusal of the same, it appears that complainant informed him that some persons have taken away to him and his deceased brother for making of fold and on failure they tortured them, due to which his brother died. From perusal of these documents, which were prepared on the day when dead body was shown to the police, the names of accused persons are not mentioned.***

***It is pertinent to note that accused can only be convicted if the case of prosecution is proved beyond any shadow of doubt. So unless the case is proved beyond shadow of doubt no person can be convicted. The Honourable Supreme Court of Pakistan has held in case reported in 1995 SCMR 1639 that ocular evidence may be classified into three categories, firstly, wholly reliable; secondly, wholly unreliable; and thirdly, partly reliable and partly unreliable. The first category furnishes safe basis for conviction without corroboration. Conviction cannot be recorded on testimony of second category of witnesses, though very strong corroboration is available. As regards third category, conviction may be recorded only if such evidence is corroborated by oral or circumstantial evidence coming from distinct sources. In another case reported in 1999 SCMR 1220 Honourable SupremeCourt of Pakistan has held that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. No evidence is available against present accused regarding his involvement in the above crime. There is nothing on record to show that place where dead body was lying owned by accused person.***

***In the light of above discussion the entire prosecutions story against accused persons is full of doubts and there are exaggerations and the evidence is not inspiring confidence and the prosecution has miserably failed to bring home guilt against the accused persons. Consequently, point No.1 is answered as not proved.***

***<u>POINT NO.3.</u>***

***In view of discussion and finding on point No.1 and 3, I come to the conclusion that prosecution has failed toprove its case against the accused beyond reasonable doubt. Accordingly, accused Fahadullah is acquitted U/S 265-H(i) Cr.P.C. He is present on bail, his bail bond stands cancelled and surety is discharged while case against absconding accused persons***

***Qasim, Ehsanullah and Arifbe kept on dormant file as and when they are arrested."***

11. We have carefully perused the prosecution evidence and impugned judgment passed by the trial court dated 25.02.2016. We have come to the conclusion that the prosecution failed to establish its case against the accused/respondent for the reasons that incident was un-witnessed. There were material contradictions in the evidence of prosecution witnesses on material particulars of the case. There was inordinate delay in lodging the FIR for which no plausible explanation was furnished. After arrest of the accused, no identification parade was held through complainant. Identification of accused before the trial court was unsafe as held by Honourable Supreme Court in the case of Gulfam and another v. The State (2017 SCMR 1189). Relevant portion is reproduced as under:-

***"6. It has further been observed by us that the above mentioned eye-witnesses had statedly identified the appellants even before the trial court during the trial but a perusal of the statements made by the said eye-witnesses before the trial court shows that both Muhammad Rafiq complainant (PW17) and Muhammad Ishaq (PW18) had only referred to the accused persons "present in court" but had failed to individually identify either of them with reference to any role allegedly played by them in the incident in issue. Identification of an accused person before the trial court during the trial has already been held by this Court to be unsafe particularly when the eye-witnesses making their statements before the trial court were examined after many other prosecution witnesses had already been examined and on all such occasions the accused persons could conveniently be seen by the eye-witnesses in the dock. In the present case the eye-witnesses were witnesses Nos. 17 and 18 meaning thereby that 16 other prosecution witnesses had already, been examined by the trial court and on all such occasions the present appellants could conveniently be seen by the eye-witnesses in the dock in the courtroom. This is why identification of an accused person before the trial court during the trial has been held by this Court to be unsafe in the cases of Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), Muhammad Afzal alias Abdullah and another v. State and others (2009 SCMR 436), Nazir Ahmad v. Muhammad Iqbal (2011 SCMR 527), Shafqat Mehmood and others v. The State (2011 SCMR 537), Ghulam Shabbir Ahmed and another v. The State (2011***

> ***SCMR 683) and Azhar Mehmood and others v. The State (2017 SCMR 135).”***

We have no hesitation to hold that the prosecution utterly failed to prove its case against the respondent/accused. Finding of acquittal recorded by the trial court in favour of respondent/accused is neither perverse nor ridiculous. There were also several circumstances in the case which had created reasonable doubt in the prosecution case. Therefore, benefit of doubt was rightly extended in favour of the accused.

12. 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:**
>
> > **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."**

> **13. In another case of State/Government of Sindh through Advocate General Sindh, Karachi v. Sobharo (1993 SCMR 585), it is held as follows.**

> **"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."**

13. 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 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).

> **“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."**

14. For the above stated reasons, there is no merit in the appeal against acquittal. Acquittal recorded by trial Court in favour of respondent/accused is based upon sound reasons, which requires no interference. As such, the appeal against acquittal is without merits and the same is dismissed.

JUDGE

JUDGE

Tufail