IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No. S- 129 of 2019

Criminal Acquittal Appeals NoD-123 of 2019 and D-43 of 2021

Criminal Revision Application No. D-67 of 2019

PRESENT: Mr. Justice Muhammad Saleem Jessar
Mr. Justice Abdul Mobeen Lakho

Nadir Khoso, appellant in Cr. Appeal No. S-129/2019 And respondent in Cr.Rev. Application No.D-67/2019	:	through Mr. Shabbir Ali Bozdar, Advocate.
Legal Heirs of deceased Shbbir Ahmed in all four cases	:	through M/s Abdul Rasheed Kalwar, Ghous Bux Shah Kaheri and Ajeebullah Junejo, Advocates
Legal Heirs of deceased Complainant Moula Bux In all four cases	:	through Mr. Qurban Ali Malano, Advicate.
State	:	through Mr. Aftab Ahmed Shar, Addl. Prosecutor General, Sindh.
Dates of hearing:	:	17.05.2023 & 23.05.2023
Date of Judgment	:	14.06.2023
Date of Announcement	:	05.07.2023

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By this single judgment we propose to dispose of above said Cr. Appeal, two Cr. Acquittal Appeals and one Criminal Revision application as all the four cases arise out of the same FIR.

2. By means of Cr. Appeal No. S-129 of 2019 appellant Nadir S/o Gul Muhammad Khoso has assailed the Judgment dated 29.06.2019 passed by learned 1st Additional Sessions Judge/MCTC, Ghotki in Sessions Case No. 40 of 2008, being outcome of FIR No. 05/2008, whereby he was convicted for offence punishable under Sections 302 (b) PPC R/w Section 34 PPC and awarded sentence of life imprisonment as Tazir and to pay compensation of Rs.200,000/- to be paid to legal heirs of the deceased Shabbir Ahmed; however, in default thereof, he was ordered to suffer S.I. for six months more. However, benefit under Section 382-B Cr.PC was extended to him.

3. Through Cr. Acquittal Appeal No. D-123 of 2019 complainant Moula Bux has challenged acquittal of respondent Khan Muhammad @ Ali Bux vide the same judgment.

4. Through Cr. Acquittal Appeal No. D-43 of 2021 legal heirs of deceased Shabbir Ahmed have challenged acquittal of respondent Inayatullah @ Inayat who was acquitted vide order dated 12.11.2021 passed by learned 1st Additional Sessions Judge (MCTC) Ghotki which was passed in the same case i.e. Sessions Case No.40 of 2008 while allowing the application moved by accused Inayatullah under section 265-K Cr.PC.

5. By way of aforesaid Cr. Revision Application No. D-67/2019, above named complainant has called in question the quantum of sentence awarded to accused / appellant Nadir Khoso and has prayed for enhancement of the sentence from life imprisonment to death penalty.

6. Brief facts of the prosecution case, as per FIR lodged by complainant Moula Bux Chachar are that; on the fateful day viz. 10.01.2008, the complainant, his sons Ghulam Shabir, Ghulam Asghar and relative Roshan son of Abdul Rehman were going towards Mirpur Mathelo on their tractor for filling the oil and when at 7:00 am, they reached at link road Wagni Khahi Daro, accused namely, 1. Iltaf son of Ghurio, 2.Abbas son of Ghurio, 3.Nadir son of Gul Muhammad Khoso, 4. Inayat son of Gul Khoso and two unidentified accused persons armed with Kalashnikovs came there and encircled them. Complainant's son Shabir Ahmed aged about 22 years was driving the tractor. Accused Inayat Khoso pointed his Kalashnikov towards him and asked him to stop the tractor. Due to fear, he stopped the tractor, and accused Inayat, by

raising “Hakal” (accosting) said to them that since, they had involved the accused in false cases before police and caused heavy losses to them, therefore, they would be taught lesson. By saying so, he instigated other accused persons to kill them, whereupon, accused Iltaf Shaikh fired with his Kalashnikov upon his son Shabir Ahmed, which hit him, in the meanwhile, complainant and rest of the PWs saved themselves by falling down. Accused Nadir Khoso also made direct fire, which hit the deceased. Thereafter, accused persons succeeded in fleeing away by resorting to aerial firing and raising slogans. After their departure, the complainant took the deceased to the P.S, and after obtaining letter for medical treatment brought dead body to Hospital and got conducted postmortem examination. It was further alleged that after arrival of PW Sarwar (another son of the complainant) burial ceremony of deceased took place, thereafter, complainant went to P.S Sarhad, where his FIR was registered by ASI Muhammad Sajawal Bullo on 11.01.2008. Per FIR, prior to this incident accused Inayat Khoso and others used to say that the complainant party had given their names to police, due to which, they had suffered heavy losses and for this reason, they were annoyed and also used to say that they will see the complainant party, consequently, instant incident had taken place.

7. It appears that prior to registration of FIR on 10.01.2008 at about 0900 hours, police had noted injuries on the person of deceased and prepared such Mashirnama and inquest report, Mashirnama of last worn cloths of the deceased. After registration of the FIR Police visited the place of wardat on 11.01.2008, recovered blood stained earth, so also one empty bullet and one missed bullet of china company from the wardat and sealed the same at spot.

8. Previously before the arrest of accused Nadir Khoso and Inayatullah etc. accused Iltaf was convicted by the trial Court, whereas, co-accused, namely, Abbas and Ali Gul were acquitted on 16.01.2011. Later on, convicted accused Iltaf had challenged his conviction before this Court and vide judgment dated 05.12.2018 he was acquitted by this Court and such acquittal judgment was maintained by the Honourable Supreme Court of Pakistan in Criminal Petition No.127/2019 vide judgment dated 02.04.2019.

9. Subsequently, after the arrest of accused Khan Muhammad alias Ali Bux and Nadir Khoso a formal charge against them was framed vide Exh.02, to

which they pleaded not guilty and claimed their trial vide pleas Exh.03 and 04, respectively.

10. To prove its case, prosecution has examined complainant Haji Moula Bux at Exh.05, who verified the FIR already produced in his evidence at Exh.12-A, PW-2 Ghulam Asghar at Exh.06, on the application of complainant, the learned ADPP had given up the PW-Roshan son of Abdul Rehman Chachar at Exh.7. P.W-3/Mashir Muhammad Qasim at Exh.08, who verified Mashirnama of injuries of the dead body and Danistnaa, at Exh.16-A and 16-B, memo of clothes of deceased as Exh.16-C, Mashirnama of place of incident, recovery of one missed bullet, one empty bullet and blood stained earth of the deceased, as Exh.16-D, Mashirnama of arrest of accused Iltaf Shaikh, as Exh.16-E, memo of recovery of KK from accused Iltaf as Exh.16-F, Mashirnama of arrest of accused Abbas Shaikh and recovery of one KK alongwith four live bullets, as Exh.16-G. PW-4 Corpse bearer PC Abdul Qadir examined at Exh.09, who verified the receipt, through which, he handed over dead body of deceased to his father, as Exh.18-A, memo of blood stained clothes of deceased as Exh.16-C. PW-5 the Medical Officer, Dr. Arbab Ali, examined at Exh.10, who verified the postmortem report, which was already produced by him, in his evidence, as Exh.15-A, PW-6, author of FIR, I.O. ASI Pathan Khan examined at Exh.11, who verified the FIR, already available on record, at Exh.12-A, and Mashirnamas already produced in evidence, at Exhs.16-A, 16-B, 16-C, Mashirnama of place of wardat at Exh.16-D, departure entry No.08 as Exh.17-A, Mashirnama of arrest of accused Iltaf Shaikh as Exh.16-E, entry No.8, already produced in evidence as Exh. 17-B, accused Iltaf allegedly produced crime weapon viz. KK and four live bullets, at Exh.16-A, Ballistic Expert report and Chemical Examiner report as Exh.17-C, 17-D, mashirnama of arrest of accused Abbas Shaikh and recovery of bullets as Exh.16-G. P.W-7 Tapedar Abdul Waheed, at Exh.12, who verified scaled site plan of the place of occurrence, already produced in his evidence, as Exh.22-A. Thereafter, the learned ADPP for the state closed the side of prosecution vide his statement dated 29.08.2017 vide Exh.13.

11. The statements of accused u/s 342 Cr.P.C vide Exhs.14 and 15 were recorded by the trial Court on 21.05.2019, respectively, in which, they had denied the allegations of prosecution leveled against them and professed their innocence and false implication in this case. They; however, did not examine

themselves on oath in terms of section 340 (2) Cr.P.C nor produced any witness in their defence. However, accused Khan Muhammad alias Ali Bux had produced certified copy of the judgment dated 05.12.2018 passed by this Court vide Criminal Jail Appeal No. S-18 & S-19 of 2011, wherein co-accused Iltaf was acquitted and such his acquittal was maintained by Honourable Supreme Court of Pakistan.

12. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing advocates for the parties, trial Court vide impugned judgment convicted and sentenced the appellant Nadir Khoso, as stated above while accused namely Khan Mohammad was acquitted. The appellant Nadir Khoso has challenged his conviction through instant criminal appeal while complainant has challenged the acquittal of accused Khan Muhammad.

13. Accused Inayatullah was acquitted by another order dated 12.11.2021 whereby his 265-K Cr.PC application was allowed and the complainant has also challenged his acquittal as stated above. The complainant has also filed above said Revision Application for enhancement of sentence awarded to accused Nadir Khoso.

14. We have heard the arguments advanced by learned counsel for the parties and have perused the material made available before us on the record.

15. It seems that there is delay of 33 hours in lodging of the F.I.R. because alleged incident took place on 10.01.2008 at 0700 hours whereas the F.I.R. was lodged in evening of the next day i.e. on 11.01.2008 at 1600 hours. From contents of the FIR it is crystal clear that Shabbir Ahmed after receiving injuries had died at the spot and his dead body was taken to police station by complainant party. It is not understandable that when Shabbir Ahmed had succumbed to his injuries at the spot and his dead body was taken to police station then what prevented the complainant to get the FIR registered when he had taken the dead body to police station. No plausible explanation has been furnished by the prosecution for such long delay which creates doubt regarding false involvement of the accused in the case.

16. On the point of delay in lodging FIR, the Hon'ble Supreme Court in the case of Ayub Masih v. The State (PLD 2002 SC 1048) held as under:-

> *"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether.* ***Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence.*** *It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."*

17. In the case of Sabir Hussain V. The State (2022 YLR 173), it was held as under:

> *"9. The complainant has knowledge about missing of the deceased on 13.07.2019, but despite that, the complainant did not lodge the report, and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the report of missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at 10:30 a.m., with a delay of four hours from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant creates a reasonable doubt in the prosecution case. Reliance in this behalf is placed in the case of Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127)."*

18. In view of above, possibility of deliberation and consultation on the part of complainant party and false implication of the accused cannot be ruled out.

19. There is yet another worth-importance point. Although P.W. Roshan Ali was alleged to have seen the incident and his statement under section 161 Cr. P.C. was also recorded by the police, thus he was an important eye witness of the incident, but he was not produced before the trial court and was given up by the prosecution on the basis of application moved by the complainant. In statement of the DDPP whereby P.W. Roshan Ali was given up, it is mentioned, "In view of the application of complainant I do hereby give up PW namely Roshan Ali s/o Abdul Rahman." It is not understandable that as to why such an important and essential eye-witness was given up by the prosecution merely on the whims of the complainant. This is also injurious to the prosecution case as it is settled principle of law that despite availability of essential witnesses, non-examination of such witnesses in the case gives inference that in case such witness had been examined, he would have deposed

against the prosecution, as envisaged under Article 129(g) of Qanoon-e-Shahadat Order, 1984.

20. In this connection, reference may be made to a decision of Apex Court laid down in case of ***Abdul Ghani*** Vs. ***The State*** reported in **2022 S C M R 2121**, wherein a Full Bench of the Supreme Court held as under:

> ***"Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned state counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case. Non-production of the said Head Constable No. 25 indicates that safe transmission has also not been established by the prosecution. It has already been held by this Court in the cases of Amjad Ali v. The State (2012 SCMR 577), Ikramullah and others v. The State (2015 SCMR 1002), Taimoor Khan and another v. The State and another (2016 SCMR 621), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039) and Khair-ul-Bashar v. The State (2019 SCMR 930) that in a case containing the above mentioned defect on the part of the prosecution, it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond the shadow of doubt."***

21. Previously, in case of ***Bashir Ahmed alias Manu*** vs. ***The State*** reported in **1996 SCMR 308** it was held by Honorable Supreme Court that ***despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, could easily be drawn that had they been examined, they would not have supported the prosecution version.*** In another case reported as ***Mohammad Shafi*** vs. ***Tahirur Rehman*** **(1972 SCMR 144)** it was held that ***large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested Witness in support of its case, therefore no implicit reliance could be placed on the evidence of interested eye-witnesses.***

22. Another significant point is that previously accused Iltaf was convicted by the trial Court, whereas co-accused Abbas and Ali Gul were acquitted vide judgment passed on 16.01.2011 and complainant did not challenge their

acquittal before the higher forum. However, convicted accused Iltaf Shaikh had challenged his conviction before this Court (Bench at Sukkur), and vide judgment dated 05.12.2018 passed by one of us (Mohammad Saleem Jassar, J.), accused Iltaf Shaikh was acquitted and such acquittal judgment was maintained by Honourable Supreme Court of Pakistan in Criminal Petition No.127/2019 vide its esteemed judgment dated 02.04.2019.

23. The relevant portion showing reason assigned by the trial court for acquitting above said two accused namely, Abbas vide judgment dated 16.01.2011 and Ali Gul by giving them benefit of doubt, is reproduced as under:

> ***"15/- So far as, accused Abbas and absconding accused Inayat, Khan Mohammad alias Ali Bux and Ali Gul is concerned, absconding accused Inayat Khan Mohammad alias Ali Bux gave "Hakal" whereas the remaining accused namely Abbas, Ali Gul and Khan Mohammad only shown their presence and no overt act have been attributed to them. There is no independent reliable evidence to prove that they had actually participated as alleged. As such I believe that the either present accused Abbas and absconding accused Inayat, Khan Mohammad alias Ali Bux and Ali Gul were at all present at the time of incident or they had not participated in the incident. "***

24. We are afraid; aforesaid observation made by the trial court seems to be contrary to the evidence of alleged eye-witnesses of the incident. In his cross-examination complainant Moula Bux admitted, "The accused persons shown their weapons to my son Shabir Ahmed therefore he got tractor stop…..**All the accused persons made fires towards us**." Likewise, alleged eye-witness Ghulam Asghar deposed, ***"We saw 6 persons armed with weapons came over there, they were 1.Iltaf Shaikh, 2. Abbas, 3- Ali Gul, 4.Nadir, 6- Inayat and 6-Ali Bux, they were armed with Kalashnikovs."*** In his cross-examination he admitted***, "All 6 accused came out from western side of the road. When accused pointed their weapons towards us for the purpose of star firing I, Roshan and complainant left our seat and came out from tractor but driver Shabir Ahmed was sitting at driving seat. From this it is apparent that the prosecution witnesses have also assigned role to the acquitted accused in the commission of the alleged offence, as quoted above. Besides, mashir P.W. Meer Mohammad in his examination-in-chief deposed, "On 28.2.2008, police recovered one Kalashnikov from co-accused Abbass in my presence and Mohammad Qasim, such Mashirnama was prepared. I was acted as Mashir. I produce mashirnama of recovery of co-accused Abbass as Exh. 16/G."***

25. Apart from above, as stated above, co-accused Iltaf Shaikh had also been acquitted by this Court.

26. Needless to emphasize that ***'rule of consistency'*** demands that if an accused has been acquitted from the charge by disbelieving evidence of prosecution witnesses, other accused charged with similar allegations is also entitled to have same concession / treatment and the evidence of that particular witness cannot be made basis for convicting other accused. In this Connection it would be advantageous to refer to a judgment of Honorable Supreme Court passed in the case of ***Mohammad Asif*** Vs. ***The State*** reported in **2017 SCMR 486** wherein it was held as under:

> ***"I is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory. Evidence independent source and shall be unimpeachable in nature but coming from that is not available in the present case." In another case reported as Umar Farooque v. State (2006 SCMR 1605) Honourable Supreme Court held as under: "On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted. "***

27. Yet in another case reported as ***Mohammad Akram*** vs. ***The State*** **(2012 SCMR 440)** the Apex Court while holding that ***same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge***, acquitted the accused.

28. In another case reported as ***Umar Farooque*** v. ***State*** **(2006 SCMR 1605)** Honourable Supreme Court held as under:

> ***"On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted."***

29. Learned trial Court has elaborately dealt with the point that the case of present appellant Nadir Khoso is **distinguishable** from that of acquitted accused persons, particularly accused Iltaf Shaikh who, after his conviction by the trial Court, was acquitted by this Court, as stated above. In the circumstances, it is necessary to deal with and examine this point in the light of record and the evidence of prosecution witnesses.

30. The prosecution case is that on the day of the incident complainant, his son and others were going towards Mirpur Mathelo on their tractor for filling the oil and when at 7:00 am, they reached at link road Wagni Khahi Daro, four accused persons named in the F.I.R. and two unidentified persons armed with Kalashnikovs came there and encircled them. Complainant's son Shabir Ahmed aged about 22 years was driving the tractor. Accused Inayat Khoso pointed his Kalashnikov towards him and asked him to stop the tractor. Due to fear, he stopped the tractor, and thereafter, accused Inayat, by raising "Hakal" said to them that since, they had involved the accused in false cases before police and caused heavy losses to them, therefore, they would be taught lesson. By saying so, he instigated other accused persons to kill them, whereupon, accused Iltaf Shaikh fired with his Kalashnikov upon his son Shabir Ahmed, which hit him, in the meanwhile, complainant and rest of the PWs saved themselves by falling down. Accused Nadir Khoso also made direct fire, which hit the deceased. From this it is crystal clear that, in fact, it was Iltaf Shaikh who had initiated the firing and the first shot fired upon the deceased was from the K.K. of accused Iltaf Shaikh. It was thereafter that present appellant Nadir Khoso also fired shot upon the deceased. The trial Court while distinguishing the case of present appellant Nadir Khoso vis-a-vis the case of acquitted accused Iltaf Shaikh has laid much emphasis on the point that no crime weapon was recovered from appellant Nadir Khoso unlike the acquitted accused Iltaf Shaikh. In this connection, the trial Court has made following observations:

> ***"….while acquitting the accused Iltaf, it had come on the record that one doubtful ambiguity had also noticed by the Honourable appellate Court in shape of matching of 7.62 mm bore crime empty with the 7.62 mm bore SMG Rifle and as per evidence of the complainant all the accused were armed with KKs. Therefore, the crime weapon, which was recovered from accused Iltaf had created some doubt and on the basis whereof, by giving benefit of doubt he was acquitted……***
> ***Whereas, no crime weapon has been recovered from the accused Nadir, hence, no such kind of ambiguity has been noticed by me in this respect. Therefore, it can safely be said that on this point the case of accused is totally distinguishable from the acquitted accused Iltaf."***
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> **……..**
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> ***"The third ground, which makes the case of accused Nadir distinguishable from the case of acquitted accused Iltaf is that, after the arrest of the accused Iltaf crime weapon was recovered from him on 23.01.2008,but such weapon was received by the Ballistic Expert on 24.09.2008 i.e. after the delay of more than 07 months as is evident from Exh.17-C, whereas, nothing had been recovered from the present accused Nadir, as after this incident, which had taken place on 10.01.2008 till 27.02.2012 accused Nadir had remained***

> ***absconder and there is every possibility that he might have destroyed the crime weapon, or concealed it, that is why, police could not recover from him such weapon, hence, on this point the case of the accused Iltaf is distinguishable as there is no question of sending the crime weapon with the delay.***

31. We cannot subscribe to aforesaid reasoning given by the trial Court. From ocular testimony of instant case, it is apparent that alleged eye-witnesses have categorically deposed that appellant Nadir Khoso being armed with K.K. had fired upon the deceased in their presence. Needless to emphasize that it is now well settled that preference is to be given to the ocular testimony and not to recovery of crime weapon. Even if no recovery is made but the ocular testimony is trustworthy and of unimpeachable nature, then the accused could be convicted without there being recovery of any crime weapon from his possession. Recovery is only a corroboratory piece of evidence. In this connection, reference can be made to the case of ***Ajmal and others*** Vs. ***The State and others*** reported in 2016 Y L R 623 [Lahore] wherein it was held as under:

> ***"Even otherwise law is quite settled on the point that an accused cannot be sentenced only on the ground that some recovery has been effected from him because at the most it can be considered only one incriminating material against the accused which is corroboratory in nature and to prove the guilt of an accused the prosecution has to produce a compact and concrete composition of evidence which is missing in this case qua the culpability of Aamir alias Hamid appellant."***

32. In another case reported as ***Khush Bar*** Vs. ***The State***, reported in (2018 P.Cr.L.J Note 63) Gilgil Biltistan Chief Court it was held that ***recovery of weapon by itself is only a corroboratory piece of evidence which did not have any decisive role.***

33. It does not mean that every ocular testimony is to be believed without passing the same through the test of credibility and truthfulness and without determining as to whether such ocular testimony is of ***unimpeachable*** character, so that it could be made the basis for conviction of an accused.

34. The trial Court has also taken another ground for distinguishing the case of present appellant from the cases of acquitted accused Iltaf Shaikh; ***from the very first day accused Nadir had chosen to remain absconder, which clearly show that he was involved in this case and he deliberately avoided to face the trial***. It seems that while making such observation, the trial Court has ignored

the well settled principal of law that *mere absconsion is no proof of guilt.* In this connection, reference may be made to the case reported as ***Shahzad Akhtar*** Vs. ***Mohammad Azam*** reported in **2019 MLD 551 [Lahore]**, it was held that ***the abscondance is merely a suspicion and cannot prove charge as a substantive piece of evidence.***

35. The role attributed to co-accused Iltaf Shaikh (since acquitted) was that he allegedly caused Kalashnikov fire which hit on left thigh of the deceased Shabbir Ahmed; whereas, appellant Nadir Khoso is said to have fired upon deceased Shabbir Ahmed which landed on his hand; however, injury attributed to co-accused Iltaf Shaikh was severe than that of appellant Nadir Khoso and said co-accused has been acquitted by this Court through judgment dated 05.12.2018 and such his acquittal was also maintained by the Apex Court vide its esteemed judgment dated 02.04.2019 (Criminal Petition No. K-127/2019). As far as motive is concerned, same was with complainant Moula Bux, father of deceased; however, not a single injury or even scratch was caused to him by any of the accused, which shows either the offence was unseen or the complainant as well as PWs had not witnessed its happening. In both the situations, it shows that the motive against present appellant has also not been established. If the motive as shown by the complainant in his FIR that they (accused) while accosting to complainant asked him that he had been implicating them in false criminal cases, therefore, he will not be spared. Per prosecution case, the complainant was also seated with the deceased over the tractor; however, after parking, the complainant and PWs had alighted while the deceased remained on his driving seat. Even the complainant against whom accused allegedly had a motive, was empty handed, yet was not caused any injury or scratch by the accused. Such dilemma has not been thrashed out by the prosecution through its evidence even the trial Court has not touched it in depth and failed to find out the cause as well as motive behind alleged incident. In such a situation, the case against appellant Nadir Khoso has also become a doubtful; besides, on similar evidence, co-accused has already been acquitted, therefore, propriety of law demands that the appellant should also be extended constant treatment.

36. In view of above, it can safely be held that ***rule of consistency*** does apply in instant case and the present appellant Nadir Khoso is entitled to be extended benefit of such legal concession.

37. From perusal of the record it seems that there are certain discrepancies and lacunas in the prosecution case which create doubts in the prosecution case. For instance; 161 Cr. P.C. statements of the PWs were recorded after a delay of about two days which is also fatal to the prosecution case; the sketch prepared by the Tapedar of the beat shows that the place of incident was a metaled road, therefore recovery of blood stained earth from the road was also doubtful; that last worn clothes of the deceased were not sent to the Chemical Examiner for examination and report; that neither the tractor nor even the tractor seat where the deceased after sustaining injuries was lying, was produced and adduced in evidence; and that although it was natural that driving chair would have been stained with blood but no blood was secured therefrom.

38. The accumulative effect of above admission is that doubts have been created in the prosecution case, benefit whereof must be extended to the accused.

39. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In instant case prosecution does not seem to have proved the allegations against the accused/appellant by producing unimpeachable evidence, thus doubts have been created in the prosecution version. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

> *"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but* ***no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution****."*

40. In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

> *"The prosecution must prove its case against the accused beyond reasonable doubts* ***irrespective of any plea raised by the accused in his defenc.*** *Failure of prosecution to prove the case against the accused, entitles the accused to an* ***acquittal****."*

41. It is also now well settled that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In present case, there are various admissions in the evidence of the prosecution witnesses, so also certain discrepancies and lacunas in the prosecution case which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story.

42. In this connection, reference may be made to a recent case of ***Ahmed Ali and another*** Vs. ***The State*** reported in **2023 SCMR 781**, wherein a Full Bench of Honourable Supreme Court has held has under:

> "12. Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as Tajamal Hussain v. The State (2022 SCMR 1567), Sajjad Hussain v. The State (2022 SCMR 1540), Abdul Ghafoor v. The State (2022 SCMR 1527 SC), Kashif Ali v. The State (2022 SCMR 1515), Muhammad Ashraf v. The State (2022 SCMR 1328), Khalid Mehmood v. The State (2022 SCMR 1148), Muhammad Sami Ullah v. The State (2022 SCMR 998), Bashir Muhammad Khan v. The State (2022 SCMR 986), The State v. Ahmed Omer Sheikh (2021 SCMR 873), Najaf Ali Shah v. The State (2021 SCMR 736), Muhammad Imran v. The State (2020 SCMR 857), Abdul Jabbar v. The State (2019 SCMR 129), Mst. Asia Bibi v. The State (PLD 2019 SC 64), Hashim Qasim v. The State (2017 SCMR 986), Muhammad Mansha v. The State (2018 SCMR 772), Muhammad Zaman v. The State (2014 SCMR 749 SC), Khalid Mehmood v. The State (2011 SCMR 664), Muhammad Akram v. The State (2009 SCMR 230), Faheem Ahmed Farooqui v. The State (2008 SCMR 1572), Ghulam Qadir v. The State (2008 SCMR 1221) and Tariq Pervaiz v. The State (1995 SCMR 1345)."

43. In view of above, it can safely be held that prosecution has not succeeded in proving its case against the accused beyond shadow of reasonable doubt.

44. So far as, Criminal Acquittal Appeal No.D-123 of 2019 filed against the acquittal of accused Khan Muhammad is concerned, it may be observed that the trial court while dealing with his acquittal has observed as under:

> ***"……during evidence adduced by prosecution accused Khan Muhammad alias Ali Bux was only shown to be present alongwith his KK at the place of the incident, which he had not used and his role is similar to that of Ali Gul and Abbas (rather on better footings as his name does not transpire in the FIR), who had been acquitted by the***

trial Court and their acquittals were never challenged before the Honourable High Court of Sindh. Hence, the case of accused Khan Muhammad alias Ali Bux is not distinguishable from the case of acquitted accused Ali Gul and Abbas, whereas, the case of accused Nadir is totally distinguishable from the case of the acquitted accused Iltaf. Therefore, by giving the benefit of doubt I am of the candid view that no case against accused Khan Muhammad alias Ali Bux has been proved by the prosecution. Since, in first round of litigation out of six accused, three accused, namely, Iltaf, Abbas and Ali Gul had already been acquitted vide judgment dated 26.01.2011 by this Court, and vide judgment dated 05.12.2018 of Honourable High Court of Sindh, Bench at Sukkur and both the acquittal judgments had attained finality. Resultantly, the sure number of accused having fallen short of five, the element of rioting would not stand legally proved for lack of the required number of the accused for constituting unlawful assembly……"

45. Now adverting to the acquittal appeal No. D-43 of 2021 challenging the acquittal of accused Inayatullah, it seems that he was acquitted by the trial Court while allowing his application under Section 265-K Cr. P.C. vide order dated 12.11.2021. The trial Court while acquitting him has mainly relied upon the principle of ***rule of consistency*** and has based its findings on the acquittal of co-accused Iltaf Shaikh. He has elaborately dealt with the maxim ***"Falsus in uno, falsus in ominibus"*** and while relying upon the judgments of Superior Courts, has made following observations:

"15. After hearing learned counsel for both parties, I have gone through material available on the record including case laws of Honourable Superior Courts. There is no denying the fact that each criminal case is to be decided on its own evidence, hence involvement of accused in other FIRs viz. No. 35/1992 or three subsequent FIRs will not earn conviction in the case in hand. Learned counsel for complainant argued that 'Maxim' "Falsus in uno, falsus in ominibus" is not applicable in Pakistan's system designed for dispensation of justice in criminal cases and for such contention his reliance was upon Munir's case, reported at 2019 SCMR 79, wherein although on same set of evidence benefit of acquittal was extended to co-accused and ultimately criminal petition for leave to appeal filed by complainant was refused. The second case of Raza khan, reported at 2013 MLD 810, relied upon by learned counsel for complainant is mainly for decision of bail application, while reliance of learned counsel for accused on case law reported at PLD 2019 SC 527, wherein Munir's case (2019 SCMR 79) was specifically referred at page No. 553 and some observations were rendered at paragraph No.14 on same page, and finally at paragraph No. 21 at page 562, Honourable Supreme Court of Pakistan declared that the rule of 'Falsus in uno, falsus in ominibus' shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and sprit.

16. Undisputedly, the Doctrine of "Falsus in Uno, Falsus in omnibus" (false in one thing, false in all), has been revived and made applicable in the prevalent system of criminal administration of

> ***justice, by recent judgment of Honourable Supreme Court of Pakistan, and now same is of universal application that when a witness has been found false with regard to the implication of one accused about whose participation he had deposed on oath the credibility of such witness regarding involvement of the other accused in the same occurrence would be irretrievably shaken, or that, where some accused were not found guilty the other accused would ipso facto stand acquitted, unless prosecution evidence was corroborated by corroboratory evidence, which came from an independent source and was also of unimpeachable in nature……***
>
> ***17. In view of above discussion, contentions of learned counsel for accused (para No. 6 to 12 supra) are more appealing to prudent mind and if any additional evidence in shape of other witnesses is brought on record, that will not improve case of prosecution for seeking conviction on capital charge, and if, any other attempt, on the part of prosecution / P.Ws is made, for making improvements in prosecution case, will definitely render them unworthy of credence in view of case law relied upon by learned defense counsel, and in that eventuality too there remains no probability of accused being convicted of any offence."***

46. We find weight in aforesaid observations made by the trial Court while delivering aforesaid two acquittal judgments and do not find ourselves in a position to disturb such findings. Even otherwise, the criteria for deciding an appeal against conviction and an appeal against acquittal of an accused, is totally different from each other, inasmuch as, it is settled principle of law that an accused before his conviction is presumed to be innocent and if after trial, he is acquitted, in such an eventuality he earns double presumption of innocence, thus, an acquittal judgment or order normally does not call for any interference and the same could be interfered with only in exceptional case. In the case of **AHMED OMAR SHEIKH and others** reported in **2021 S C M R 873,** it was held by a Full Bench of Honourable Supreme Court as under:

> ***"33. Admittedly the parameters to deal with the appeal against conviction and appeal against acquittal are totally different because the acquittal carries double presumption of innocence and same could be reversed only when found blatantly perverse, illegal, arbitrary, capricious or speculative, shocking or rests upon impossibility. If there is a possibility of a contrary view even then acquittal could not be set aside as has been settled in the cases of The State v. Khuda Dad and others (2004 SCMR 425). Muhammad Nazir v. Muhammad Ali and another (1986 SCMR 1441), Rehmatullah Khan v. Jamil Khan and another (1986 SCMR 941), Mst. Daulan v. Rab Nawaz and another (1987 SCMR 497) and Gulzar Hussain v. Muhammad Dilawar and others (1988 SCMR 847)."***

47. In the case of **SHER MUHAMMAD KHASKHELI** Vs. **2ND ASSISTANT SESSIONS JUDGE and 6 others** reported in **2021 Y L R**

1759, a Division Bench of this Court, while quoting various decisions of Honourable Supreme Court, held as under:

> ***"8. The principles for appreciation of evidence in appeal against the acquittal are now well settled, for, an accused is presumed to be innocent and if after trial, he is acquitted, he earns double presumption of innocence and acquittal judgment or order normally does not call for any interference unless it is found arbitrary, capricious, fanciful, artificial, shocking and ridiculous and while evaluating the evidence, difference is to be maintained in an appeal from conviction and an acquittal appeal and in the latter case the interference is to be made only when there is none reading and gross mis-reading of the evidence, resulting the miscarriage of justice and on perusal of the evidence no other decision can be given except that the accused is guilty. Reliance in this context is placed on the case of Yar Muhammad and 3 others v. The State (1992 SCMR 96). The Hon'ble apex Court of Pakistan has observed that:***
>
> > ***"Unless the judgment of trial Court is perverse, completely illegal and on perusal of evidence no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, High Court will not exercise jurisdiction under section 417, Cr.P.C." It was further held that "in exercising this jurisdiction, High Court is always slow unless it feels that gross injustice has been done in the administration of criminal justice".***
>
> ***In the case of Muhammad Shafi v. Muhammad Raza and another (2008 SCMR 329). the Hon'ble Supreme Court of Pakistan has held that:***
>
> > ***"An accused is presumed to be innocent in law and if after regular trial he is acquitted he earns a double presumption of innocence and there is a heavy onus on the prosecution to rebut the said presumption. In view of the discrepant and inconsistent evidence led, the guilt of accused is not free from doubt, we are therefore, of the view that the prosecution has failed to discharge the onus and the finding of acquittal is neither arbitrary nor capricious to warrant interference. The petition having no merit is dismissed and leave is refused."***
>
> ***In the case of State/Government of Sindh through Advocate General, Sindh, Karachi v. Sobharo (1993 SCMR 585), the Hon'ble Supreme Court of Pakistan has held that:***
>
> > ***"while evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal appeal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice."***
>
> ***In the case of Muhammad Yaqoob v. Manzoor Hussain and 3 others (2008 SCMR 1549), the Hon'ble Supreme Court has held that:***
>
> > ***"It needs no reiteration that when an accused person is***

> ***acquitted from the charge by a Court of competent jurisdiction then, double presumption of innocence is attached to its order, with which the superior Courts do not interfere unless the impugned order is arbitrary, capricious, fanciful and against the record. It was observed by this Court in Muhammad Mansha Kausar v. Muhammad Asghar and others 2003 SCMR 477 "that the law relating to re-appraisal of evidence in appeals against acquittal is stringent in that the presumption of innocence is double and multiplied after a finding of not guilty recorded by a competent Court of law. Such finding cannot be reversed, upset and disturbed except when the judgment is found to be perverse, shocking, alarming, artificial and suffering from error of jurisdiction or misreading/non-reading of evidence ..... law requires that a judgment of acquittal shall not be disturbed even though second opinion may be reasonably possible."***

In the case of State and others v. Abdul Khaliq and others (PLD 2011 SC 554), Hon'ble Supreme Court has held 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 of wholly artificial or a shocking conclusion has been drawn. Moreover, in a 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. 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".***

48. In view of above, it can safely be held that the trial Court has rightly acquitted the accused namely, Khan Mohammad and Inayatullah vide two

separate judgments, thus their acquittal orders do not call for any interference by this Court.

49. So far as Criminal Revision Application for enhancement of sentence awarded to accused Nadir Khoso from Life Imprisonment to Death Penalty is concerned, in view of his acquittal vide instant judgment, said Revision Application has become infructuous.

50. The upshot of above discussion is:

(i) Criminal Appeal bearing No. S-129 of 2019 is hereby allowed and the impugned judgment dated 29.06.2019 passed by the learned 1st Additional Sessions Judge, MCTC Ghotki in Sessions Case No.40 of 2008 being outcome of FIR No.05 of 2008 of P.S Sarhad, under sections 302, 114, 147, 148 and 149 PPC is hereby set-aside. Consequently, Appellant Nadir Khoso son of Gul Muhammad Khoso is hereby acquitted from all the charges. He may be released forthwith if not required in any other custody case.

(ii) Criminal Acq. Appeals No.D-123 of 2019 and D-43 of 2021 are hereby dismissed and the acquittal orders passed by the trial court vide above said judgment dated 29.06.2019 and order dated 12.11.2021 to the extent of accused Khan Mohammad and Inayatullah respectively are hereby maintained.

(iii) Cr. Revision Application No.D-67 of 2019 is hereby dismissed as having become infructuous.

Judge

Judge