

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Appeal No.D-51 of 2003
Crl. Acquittal Appeal No.D-16 of 2003

PRESENT:

Mr. Justice Naimatullah Phulpoto,
Mr. Justice Salahuddin Panhwar,

Appellants : Rehmatullah Narejo & others, through Mr. Athar
in Crl. Appeal : Abbas Solangi, Advocete.
No.D-51/2003.

Appellant in : Ghulam Sarwar Narejo, through Mr. Ahsan
Crl. Acquittal : Ahmed Qureshi, Advocate.
Appeal D-16/
2003 and
Complainant in
Crl. Appeal
No.D-51/2003.

Respondent in : The State, through Mr. Imtiaz Ali Jalbani,
Crl. Appeal : Assistant Prosecutor General.
No.D-51/2003.

Respondents : Ghulam Shabir Narejo & others, through
in Crl. Acqtl. : Mr. Athar Abbas Solangi, Advocate.
Appeal D-16/03.

Date of hearing: 14-05-2014. Date of
Judgment: .05.2014.

J U D G M E N T.

NAIMATULLAH PHULPOTO, J.- Appellants/accused Rehmatullah, Ghulam Hyder and Ghulam Mustafa, all sons of Bagh Ali, by caste Narejo, alongwith acquitted accused were tried by the learned VI-Additional Sessions Judge, Larkana, in Sessions Case No.461/1999, arising out of Crime No.136/1999, registered at Police Station Ratodero, under Sections 302, 34, 114, 148, 149, 337-H(2), PPC. After full-dressed trial appellants Rehmatullah, Ghulam Hyder and Ghulam Mustafa were found guilty and through the judgment dated 03.4.2003 they were convicted under Section 302(b), PPC and sentenced to imprisonment for life and to pay compensation of Rs.25,000/- each to the legal heirs of deceased; in case of default whereof they were ordered to suffer six months R.I more. Benefit of

Section 382-B, Cr.P.C was extended to them. However, co-accused Ghulam Shabir, Habibullah and Sikandar Ali were acquitted by extending them benefit of doubt. Appellants Rehmatullah and others have preferred the appeal against their conviction and sentence. Complainant Ghulam Sarwar filed Acquittal Appeal No.D-16 of 2003 against the aforesaid judgment arising out of the same crime, whereby acquittal was recorded in the favour of respondents/accused Ghulam Shabir, Habibullah and Sikandar Ali.

2. Since the appeal against conviction and sentence and criminal acquittal appeal arise out of the same judgment dated 03.4.2003, as same appreciation of evidence is required, therefore, by this single judgment, we intend to dispose of the same.

3. Brief facts of the prosecution case as disclosed in the F.I.R lodged by complainant Ghulam Sarwar Narejo on 18.6.1999 at P.S Ratodero, are that on the day of incident the complainant, his cousin Muhammad Awais, Ghulam Abbas and Ghulam Rasool were returning back to their house from lands. It was 6.00 p.m., when they reached in street near their house. It is alleged that accused Ghulam Hyder, Ghulam Shabir, Ghulam Mustafa, Rehmatullah, Sikandar and Habibullah, armed with guns, appeared there and challenged the complainant party saying as to why they had got arrested their brother and nephew in a case. If case is not withdrawn they would kill them; the complainant party due to fear of accused rushed to their house. Accused chased them. It is alleged that accused Ghulam Mustafa instigated co-accused to kill the complainant party, whereupon all the accused fired at the complainant, but as complainant party had entered into house and went upstairs, as such the fires missed. It is alleged that deceased Awais raised head from the wall and it is stated that accused Ghulam Hyder fired at him, which hit Muhammad Awais on his forehead, who fell down. It is further stated that fires of accused hit on the walls of the house and then the accused persons fled away. The complainant then saw that Muhammad Awais was lying unconscious. Complainant took him in injured condition to CMC Hospital, Larkana for treatment, where he

left injured Muhammad Awais with P.Ws and he went to Police Station Ratodero and lodged F.I.R against accused under Sections 324, 148, 149, 114, and 337-H(2), PPC; later-on injured Muhammad Awais succumbed to injuries in the hospital, therefore, section 302, PPC was inserted by police.

4. After usual investigation challan was submitted against the accused under Sections 302, 324, 114, 148, 149, 337-H(2), PPC. Case was sent up to Court of Sessions, Larkana. The same was made over to learned VI-Additional Sessions Judge, Larkana for disposal according to law.

5. A formal Charge against the appellants was framed by the trial Court at Ex.3 under above-referred Sections. To the charge, accused pleaded 'not guilty' and claimed trial.

6. At the trial, prosecution examined following witnesses. PW-1 Complainant Ghulam Sarwar at Ex.012, who produced F.I.R at Ex.12-A, photostat copy of application moved to DPO, Larkana at Ex.12-B; PW-2 Ghulam Rasool at Ex.13; PW-3 SIP Muhammad Sharif, I.O at Ex.14, who produced mashirnama of place of vardhat at Ex.14-A, mashirnama of injuries of Muhammad Awais at Ex.14-B, Inquest report at Ex.14-C, PW-4 Muhammad Ismail, mashir, at Ex.15, who produced mashirnama of arrest of accused Rehmatullah at Ex.15-A, recovery of gun from accused Rehmatullah at Ex.15-B, P.W-5 Ghulam Nabi, another I.O of the case, at Ex.17; P.W-6 Dr. Uzm Ali at Ex.18, who produced postmortem report of deceased Muhammad Awais at Ex.18-A. Learned DDA closed the prosecution side vide his statement at Ex.19, dated 23.1.2003.

7. Statements of the accused Rehmatullah, Ghulam Hyder, Ghulam Shabir, Ghulam Mustafa, Habibullah and Sikandar were recorded under Section 342, Cr.P.C at Exs.20 to 25, in which all the accused claimed false implication in the case due to enmity and denied the prosecution allegations. They have stated that the P.Ws have deposed against them as they are related *inter se* and interested. However, no evidence was led by accused in defence. Appellants

declined to examine themselves on oath in disproof of prosecution allegations and claimed innocence.

8. Learned trial Court after hearing the learned Counsel for the parties and assessment of the evidence brought on the record, convicted and sentenced appellants Rehmatullah, Ghulam Hyder and Ghulam Mustafa and acquitted Ghulam Shabir, Habibullah and Sikandar Ali of the charge, by judgment dated 03.4.2003.

9. Mr. Athar Abbas Solangi, learned advocate for the appellants Rehmatullah and others, contended that co-accused Ghulam Shabir, Habibullah and Sikandar Ali have been acquitted by the trial Court and on same evidence appellants Rehmatullah and others were convicted, they also deserve the equal treatment of acquittal. Mr. Solangi argued that there was enmity between the parties; ocular evidence has not been corroborated by Ballistic and Chemical Examiners reports. He has submitted that according to the prosecution case, accused Rehmatullah fired at the walls of the house of the complainant, but no sign/hole has been noted by the investigating officer in the mashirnama of place of the vardhat. He has also argued that prosecution has failed to bring on record evidence that accused Ghulam Mustafa instigated co-accused for committing murder of the deceased. It is also argued that motive was alleged in the F.I.R, but it was not proved at the trial. He has argued that all the incriminating pieces of evidence were not put to the accused in their statements recorded under Section 342, Cr.P.C. Lastly, he argued that prosecution case is highly unnatural and doubtful. Mr. Athar Abbas Solangi, appearing on behalf of the accused/respondents in the appeal against acquittal argued that trial Court has assigned sound reasons for recording the acquittal of accused Ghulam Shabir, Habibullah and Sikandar Ali. He has submitted that ocular evidence was not corroborated by some independent piece of evidence so far part assigned to the acquitted accused is concerned. He has further argued that after acquittal, respondents/accused 1) Ghulam Shabir, 2) Habibullah, and 3)Sikandar Ali have earned double presumption of innocence and

according to Mr. Solangi appeal against acquittal is without substance. Mr. Solangi argued that prosecution failed to prove its case and judgment of acquittal is not perverse. In support of such contentions, he has placed reliance on the case reported as *The State v. Abdul Khalique*, (PLD 2011 SC 554).

10. Mr. Imtiaz Ali Jalbani, Assistant Prosecutor General, assisted by Mr. Ahsan Ahmed Qureshi, advocate for the complainant, argued that eye-witnesses of the incident have categorically deposed that accused Ghulam Hyder fired at deceased Muhammad Awais, which hit him. Medical evidence corroborated such ocular version. It is argued that accused Ghulam Hyder absconded away immediately after the commission of the offence, resultantly, crime weapon could not be recovered from him. Learned APG argued that ocular evidence is confidence inspiring in this case, it is corroborated by medical evidence and motive has been proved. He has argued that independent corroboration in the shape of the reports of the experts was not required to such strong ocular evidence in this case. Regarding appeal against acquittal, he has argued that trial court did not appreciate the evidence properly and recorded acquittal on insufficient grounds. Learned APG argued that trial Court while acquitting accused has committed error of law and facts, which resulted grave miscarriage of justice.

11. Mr. Ahsan Sahmed Qureshi, appearing on behalf of the complainant, reiterated the same arguments and argued that trial Court has rightly convicted the appellants Rehmatullah, Ghulam Hyder and Ghulam Mustafa. However, he contended that trial Court failed to appreciate the evidence against acquitted persons. In support of the contentions reliance has been placed on the cases reported as *Safdar Hayat v. The State*, (1996 SCMR 1029), *Javed Akhtar v. The State* (1998 P.Cr.L.J 1009), *Ayub Masih v. The State* (1999 P.Cr.L.J 1678), *Zulfikar Ali Shah v. The State* (2000 P.Cr.L.J 894) and *Rehman Said v. The State* (2000 P.Cr.L.J 1245).

12. In order to appreciate the contentions raised before this Court by the Counsel for the parties we have gone through the entire

evidence and judgment dated 03.4.2003 passed by the learned VI-Additional Sessions Judge, Larkana. For the sake of convenience, para 20 of the judgment is reproduced as under :-

“20. I have given careful consideration to the submissions of learned Counsel for the accused and the learned DDA for State, as well as perused the record. From perusal thereof it transpires that the case of prosecution is that accused in prosecution of their common object have formed the unlawful assembly and have intentionally caused the murder of deceased Muhammad Awais, as Muhammad Awais has registered the case against the brother and nephew of the accused party. On refusal of Muhammad Awais to withdraw from the case they have fired at him which hit him over the left eye on forehead, who consequence thereof has expired. The complainant has deposed in lines of the F.I.R and the eye-witness Ghulam Rasool has also supported the version of complainant in his evidence. The police has secured 3 empties from the place of vardhat which corroborate the version of complainant that the accused Ghulam Hyder has fired at deceased Awais, the medical evidence also shows that the deceased had two injuries i.e. only wound over the left eye brow on forehead, having no charring or blackening, which also corroborate the ocular evidence of the complainant to the extent of seat of injuries and distance of fire, besides the police has secured gun from the accused Rehmatullah, who led the police to the place of recovery and produced the same to police in presence of the mashirs. I have also gone through the cross-examination of all the P.Ws and find that the evidence of P.Ws remained unshaken and unshattered and there are no major contradictions or any such material discrepancy from which doubt can be inferred. Since the ocular evidence is corroborated by circumstantial and medical evidence, notwithstanding non-recovery of crime weapon from accused Ghulam Hyder hence no adverse effect on prosecution case, inasmuch as ocular testimony is supported by medical evidence. The reliance can be placed on the authority reported in P.L.J 1979 Cr.C. 202, therefore, I am of the opinion that the prosecution has successfully discharged its burden to the extent of this point. However, from the record the presence of accused Ghulam Shabir, Habibullah and Sikandar has not been proved, inasmuch as none of the P.Ws have assigned any role to these accused except general allegation of ineffective firing, from which the presumption about participation of these accused cannot be inferred in circumstances, as such the cumulative effect of entire evidence leads to any irresistible inference that accused Rehmatullah, Ghulam Hyder and Ghulam Mustafa have committed offence charged with, hence the point No.2 is answered as doubtful, whereas the point No.3 is answered in affirmative.”

13. It may be mentioned here that unnatural death of deceased Muhammad Awais is not disputed in this case. Dr. Uzm Ali has categorically stated that on 19.6.1999 SHO PS Ratodero referred to him injured Muhammad Awais, who had sustained firearm injuries and injured succumbed to the injuries in CMC hospital and he conducted his postmortem examination. We, therefore, hold that deceased died of unnatural death as described by Doctor. So far ocular account is concerned, prosecution examined following witnesses : -

Complainant Ghulam Sarwar. He has deposed that deceased Muhammad Awais was his cousin. Incident took place on 18.6.1999 at 6.30 p.m. On the same date, complainant Ghulam Sarwar, Muhammad Awais, Ghulam Abbas and Ghulam Rasool were returning to home from lands, when reached near houses, they saw the accused coming from Northern side in the street, they were 1) Ghulam Hyder, 2) Ghulam Mustafa, 3) Ghulam Shabir, 4) Rehmatullah, 5) Sikandar and 6)Habibullah. They challenged complainant party and asked to withdraw the case lodged against them by deceased Muhammad Awais, else they would be killed. Accused Ghulam Mustafa instigated rest of the accused to kill complainant party. Complainant deposed that due to fear they rushed to their houses and then accused chased them to house, they went on roof of the house to hide. He had deposed that deceased Muhammad Awais raised head over the wall. Thereafter, accused Ghulam Hyder fired from gun at Muhammad Awais, which hit him on his left side forehead. Complainant party raised cries. Other accused persons made firing, which hit the walls of complainant's house. On the cries, Mohalla people were attracted there and then accused on seeing them went away towards south while firing in the air. Muhammad Awais was injured in the incident, he was removed to hospital in a jeep. P.W Ghulam Rasool and Ghulam Abbas were also with Muhammad Awais at hospital, complainant admitted Muhammad Awais in hospital, then went to Police Station Ratodero, where he lodged the F.I.R. Complainant has implicated all the accused for committing the offence.

In the cross-examination, the complainant replied that PW Ghulam Abbas is brother of deceased Muhammad Awais and his cousin, and PW Ghulam Rasool is also his cousin. Complainant admitted that he told the police about the hole in the wall of house, but police has not mentioned the same in F.I.R. He further replied that he alongwith injured reached in the hospital on the day of incident at 7.30 p.m., where he stayed for 15 to 20 minutes, then went to Police Station Ratodero. He also replied that the police visited the place of incident. He has denied the suggestion that in the application moved by him to D.P.O, Larkana he had mentioned that Ghulam Mustafa had asked the deceased to withdraw the case and on refusal deceased Muhammad Awais was killed by PC Ghulam Mustafa. He has also denied that he has committed murder of deceased Muhammad Awais by declaring him 'Karo' with his sister Mst. Amina. Complainant further denied that he has lodged false case against the accused due to enmity.

P.W Ghulam Rasool. He has deposed that complainant Ghulam Sarwar is his cousin. Deceased Muhammad Awais was also his cousin. On 18.6.1999, at 6.30 p.m he alongwith P.Ws Ghulam Sarwar, Ghulam Abbas and deceased Muhammad Awais was returning from landsto house, when reached near their houses, saw accused persons coming from Northern side of street, they were 1) Rehmatullah, 2) Ghulam Hyder, 3) Ghulam Mustafa, 4) Ghulam Shabir, 5) Sikandar and 6)Habibullah son of Ghulam Shabeer, all armed with guns, who challenged complainant party to withdraw the case pending against their brother and nephew lodged by Muhammad Awais else they would kill complainant party. They rushed to their houses. Accused Ghulam Mustafa instigated co-accused to kill complainant party. He has deposed that accused fired at them and then they went to upstairs for hiding themselves, while accused came from the western side of house. he further deposed that deceased Muhammad Awais stood and tried to see the accused from the wall of the top, thereafter, the accused Ghulam Hyder fired at Muhammad Awais which hit him at left side of his forehead. Muhammad Awais raised cries and fell down, rest of accused had also fired, fires hit to

the wall of the house. On the cries, mohalla people were attracted and accused on seeing them went towards south. Complainant Ghulam Sarwar and P.Ws Ghulam Abbas removed the injured Muhammad Awais to C.M.C Hospital, Larkana for treatment, from where Ghulam Sarwar went to Police Station Ratodero for lodging the F.I.R. Police recorded his statement. PW Ghulam Rasool has fully implicated all the accused in this case.

In cross-examination, he replied that while they were going inside the house, the accused fired at them which hit on the wall and door of the house. He further replied that he did not accompany the complainant to police station for lodging F.I.R. He has denied suggestion that complainant Ghulam Sarwar had killed the deceased Muhammad Awais by declaring him as Karo with his sister Mst. Amina. He denied suggestion that he had not witnessed the incident and was deposing falsely at the instance of complainant.

14. It was the material evidence with the prosecution for appreciation by this Court.

15. From the close scrutiny of the evidence and reasoning recorded by the trial Court in the judgment, it appears that specific part has been assigned to appellant Ghulam Hyder. He fired from his gun at deceased Muhammad Awais, which hit him at his forehead and he succumbed to the injuries in the hospital. Complainant Ghulam Sarwar has deposed that “accused Ghulam Hyder challenged and fired his gun at deceased Muhammad Awais, which hit him on his left side forehead”. P.W Ghulam Rasool supported the version of complainant and deposed that “accused Ghulam Hyder directly fired at Muhammad Awais which hit him at left side of his forehead above the eye”. Medical evidence corroborates such version. ***Mere acquittal of some of the accused statedly involved in the commission of the offence by trial court by extending benefit of doubt to them would not demolish the case of prosecution as a whole against remaining accused, as the legal maxim ‘falsus in uno, falsus omnibus’ would have no application in such circumstances.*** Reliance is placed upon the case of *Muhammad*

Zaman v. The State, reported in 2014 SCMR 749. We, therefore, hold that trial Court has rightly appreciated evidence and convicted and sentenced appellant Ghulam Hyder. Consequently, there is no merit in his appeal, hence appeal filed by appellant Ghulam Hyder is dismissed. So far the case of Rehmatullah and Ghulam Mustafa is concerned, admittedly they did not cause any injury to the deceased, though they were armed with deadly weapons. It is the case of prosecution that Rehmatullah and Ghulam Mustafa fired upon the walls of the house of the complainant, but no damage/hole has been noticed by the investigating officer in the walls. Mashirnama of place of vardhat is silent to that effect. There was also no motive against appellant Rehmatullah and Ghulam Mustafa for committing murder of the deceased Muhammad Awais and case of these appellants was identical to the case of acquitted accused Ghulam Shabir, Habibullah and Sikandar Ali. On same evidence respondents/accused Ghulam Shabir, Habibullah and Sikandar Ali were acquitted by the trial court and conviction on same evidence recorded against Rehmatullah and Ghulam Mustafa is not sustainable on rule of consistency. However, case of Ghulam Hyder was distinguishable, as discussed above. Trial Court has assigned sound reasons by differentiating case of Ghulam Hyder. Even otherwise, it is primary duty of trial Court to appreciate the evidence in its correct perspective, we therefore, hold that prosecution has failed to prove its' case against appellants Rehmatullah and Ghulam Mustafa beyond reasonable doubt. Had there been more assailants at the time of incident, they would have also fired upon deceased, but it is case of prosecution that accused Ghulam Hyder fired upon deceased. The number of assailants in the circumstances of the case appears to have been exaggerated. It has been observed that it is customary practice of implicating many accused persons for the offence. Therefore, appeal filed by Rehmatullah and Ghulam Mustafa against judgment dated 03.4.2003 is allowed. Appellants Rehmatullah and Ghulam Mustafa are acquitted of the charge. They shall be released forthwith if they are not required in some other case.

16. So far appeal against acquittal is concerned, it appears that trial Court has assigned sound reasons for recording acquittal in favour of respondents/accused Ghulam Shabir, Habibullah and Sikandar Ali. Moreover, after acquittal, acquitted accused have acquired presumption of double innocence. It is settled law 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 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. 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. Judgment of acquittal 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 reappraisal 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. Said accused have acquired now a triple presumption of innocence which could not be dispelled by complainant's Counsel on any score. Reliance is placed on the case of *The State v. Abdul Khaliq*, (PLD 2011 SC 554).

16. In view of above, we find no merit in the acquittal appeal, which is accordingly dismissed.

JUDGE

JUDGE

Qazi Tahir/*