

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**  
Cr. Acquittal No. 34 of 1999

Present:  
Mr. Justice Naimatullah Phulpoto &  
Mr. Justice Muhammad Humayon Khan.

**J U D G M E N T**

Date of Hearing: 31<sup>st</sup> August, 2016.

Appellant: Ghaus Bakhsh  
Mr. Muhammad Iqbal Memon, advocate.

Respondents: 1. Saleem son of Ali Muhammad  
2. Nazir son of Dhani Bakhsh.  
3. Illahi Bakhsh son of Gul Muhammad.  
Mr. Nusrat Hussain Memon, advocate.

Mr.Saleem Akhter Additional P.G.

NAIMATULLAH PHULPOTO, J.- Respondents/accused Saleem, Nazir and Illahi Bakhsh were tried by learned Additional Sessions Judge Kandiaro in Sessions case No.51 of 1997 State Versus Saleem and others for offences under sections 302, 34 PPC, vide crime No.13 of 1997 registered at Police Station Mehrabpur. After full-dressed trial, respondents/accused by judgment dated 12.07.1999 were acquitted.

2. Brief facts of the prosecution case are that on 20.03.1997 complainant Ghaus Bakhsh lodged his report alleging therein that he had four sons namely Qurban Ali, Dawan Ali, Imran Ali and Irfan Ali. Qurban Ali (now deceased) was married with the daughter of Nigah Ali. Complainant, his brothers Rabnawaz, Muhammad Sachal and father Abdullah were residing in separate houses but surrounded by a common hedge. It is alleged that Mumtaz, cousin of the father of complainant had offered his daughter to Ali Muhammad for the marriage of his son but he had refused. Mumtaz Ali gave his daughter to Nadir Ali son of Kirir on which it is alleged that Muhammad Saleem son of Ali Muhammad was annoyed. It is alleged that on 19.03.1997 complainant was present at his house along with his son Qurban Ali, brother Rab Nawaz and father Abdullah, it was 6.45 p.m. It is alleged that accused Saleem gave call to Qurban Ali and Qurban Ali went out of house with Saleem at 7.45 p.m but did not return home. Complainant has further stated that he had heard two fire

arm reports from Eastern side of the village and went out of house along with his brother Rab Nawaz and Ghulam Abass in search of Qurban Ali at night time and found dead body of Qurban Ali in the morning lying in the wheat crop, having sustained fire arm injuries. Complainant went to the Police Station and lodged F.I.R. It was recorded vide crime No.13 of 1997 under sections 302 P.P.C at Police Station Mehrabpur.

3. After usual investigation, challan was submitted against accused Saleem, Nazeer and Illahi Bakhsh under sections 302, 34 PPC. Case was sent up to Court of Sessions for trial.

4. Learned Additional Sessions Judge Kandiaro framed charge against the accused under sections 302, 34 PPC. Accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution in support of its case examined P.W 1 Dr. Khan Muhammad at Exh.7 who produced post mortem report at Exh.7, P.W 2 Complainant Ghous Bakhsh at Exh.8, who produced F.I.R at Exh.8-A, P.W No.3 Rabnawaz at Exh.9, P.W 4 Ghulam Abbass at Exh.10. P.W 5 Mr. Javed Ahmed Civil Judge & FCM at Exh.11 who produced confessional statements of accused Saleem and Nazir at Exh.11-A and 11-B. PW 6 Fazul Hussain at Exh.12 who produced mashrinama of place of vardat, inquest report, mashirnama of recovery, mashirnama of arrest and body search of accused Illahi Bakhsh at Exh.12-A to 12-D. P.W 7 mashir Imam Bakhsh at Exh. 13 who produced mashirnama of arrest and body search of accused Saleem and Nazeer at Exh.13-A. P.W 8 Ashique Ali at Exh.14 who produced receipt of handing over dead body to complainant at Exh.14-A. PW 9 Tapeer Sahsmuddin at Exh.15 who produced sketch of place of vardat in triplicate at Exh.15-A. P.W S.H.O Illahi Bakhsh Mithiani at Exh.16 who produced ballistic and chemical reports, mashirnama of house search of accused Saleem at Exh.16-A to 16-C.

Thereafter, learned D.D.A closed prosecution side at Exh.17.

6. The statements of accused were recorded under section 342 Cr.P.C at Exh.18 to 20, in which accused denied the prosecution allegations and claimed innocence. Accused did not lead any defense and declined to give statement on oath in disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned counsel for the parties acquitted the accused by judgment dated 12.07.1999, mainly for the following reasons.

28. From the perusal and appraisal of the evidence brought on record by the prosecution it is crystal clear that there is no ocular evidence against the accused persons and only the evidence which is available is in the shape of last seen and judicial confession which too is not inspiring confidence as the complainant and his witnesses have contradicted each other which I have mentioned earlier and in the case law relied by the learned defense counsel the Superior Courts have held in the case law reported in 1972 SCMR page 15 as under:-

“ Mere fact that the accused was last seen with the deceased is not enough to sustain conviction for murder. No link in the chain of circumstances should be broken and thus should not be acceptable on any other Hypothesis: “

29. The complainant and witnesses have failed to satisfy the Court as to why they became suspicious on hearing gun shot reports when according to them deceased and accused persons used to roam round together and even on the day of incident accused Saleem came and took him away for hunting partridges and they have further admitted that they used to hear sound of fire arm reports in the villages, they have failed to satisfy the Court as to why after hearing the gun fire report they apprehend that something wrong has been done. It means that there must be some reason beyond the curtain which they have not disclosed before the Court, therefore, their evidence before the Court has become doubtful.

30. Now I am coming to the judicial confession of the accused persons. The Civil Judge & FCM, who has recorded the confession has failed to observe the procedure laid down for recording the judicial confession in case Re: Liaquat Bahadur ETC versus the state reported in PLD 1987 FCS 43, which I would like to reproduce as under:-

“ Confession how to be recorded. Accused not warned immediately before recording confession held not voluntarily. These question must be asked before recording confession.

1. How long have you been with the police ?
2. Has any pressure been brought to bear upon you to make the confession ?
3. Have you been threatened to make the confession ?
4. Has any inducement been given to you ?
5. Have you been told that you will be made an approver ?
6. Why are you making this confession ?

Hand cuff should be removed. Police sent out of Court room and the accused given time to ponder

and explained that he is not bound to make a confession if he makes it, it will be used against him, whether he makes a confession or not he will not be sent back to police custody ? “.

31. In view of the above quoted authority and the guidelines of the superior Courts, I am of the humble view that the confessional statement of accused Saleem and Nazir recorded by the Civil Judge & FCM has not value in the eyes of law.

32. The crux of the above discussion and appraisal of the evidence is that the prosecution has miserably failed to prove its case against the accused persons beyond any shadow of reasonable doubt, I, therefore, answered the above points No.2 and 3 in negative.

8. Being aggrieved and dissatisfied with the acquittal judgment recorded by the trial Court, appellant/complainant Ghous Bakhsh filed appeal against acquittal. During pendency of appeal respondent/accused Illahi Bakhsh expired and proceedings against him were abetted vide order dated 07.03.2013. We intend to dispose of aforesaid appeal against acquittal.

9. The evidence produced before the Trial Court finds an elaborate mention in the impugned judgment passed by learned Additional Sessions Judge Kandiaro dated.12.07.1999. Therefore the same may not be reproduced here so as to avoid duplication and unnecessary reproduction.

10. Mr. Muhammad Iqbal Memon learned advocate for appellant/complainant argued that learned trial Court while acquitting the accused had not appreciated the evidence available on record according to settled principles of law. He has argued that there was last seen evidence against accused. Complainant party had heard fire arm reports. Prosecution had established motive against accused Saleem. Confessional statements were made by accused before Civil Judge & FCM, which are corroborated by medical evidence. He has argued that impugned judgment suffers from legal infirmities and acquittal has been wrongly recorded. Lastly argued that trial Court has committed gross misreading of evidence which resulted in miscarriage of the justice.

11. On the other hand, Mr. Saleem Akhter Additional P.G assisted by Mr. Nusrat Hussain Memon Advocate for respondents/accused Saleem and Nazeer supported the impugned judgment and argued that findings of Trial Court were based upon sound reasons. It was un-witnessed night time incident. Judicial Confessions of accused were not recorded by Civil Judge & FCM according to settled principles of law. In support of the contentions learned Additional P.G has relied upon the case of Muhammad Usman and 2 others Versus the State 1992 SCMR 489.

12. After hearing learned counsel for the parties and going through the record, we have come to the conclusion that learned trial Court has rightly acquitted the accused for the reasons that it was un-witnessed night time incident. Last seen evidence has been disbelieved by the trial Court for the sound reasons while observing that the prosecution evidence was contradictory. Mere fact that accused was last seen with the deceased was not enough to record conviction. According to prosecution appellants No.1 and 2 Saleem and Nazeer had made judicial confession before First Class Magistrate, but it is not disputed that judicial confession attributed to the appellants had been retracted by accused before the trial Court, thus, said judicial confession could not be relied upon in absence of any independent corroboration which was lacking in this case. Trial Court has rightly disbelieved Judicial confession. The medical evidence produced by the prosecution was not of much avail to the prosecution because the murder had remained un-witnessed and thus, medical evidence could not point out the actual culprits. It appears that case of prosecution against the accused primarily based upon suspicion against the accused but the law is well settled that suspicion howsoever grave or strong can never be a proper substitute for proof beyond reasonable doubt required in a criminal case, as held by Hon'ble Supreme Court in the case of Muhammad Ashraf versus The State 2016 S C M R 1617. 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 versus The State 1992 S C M R 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, *Hamifuddin 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 visualized 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 reappraisal 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 reappraisal 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 I 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 conclusion are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the j 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 versus Government of Sindh through Advocate General Sindh, Karachi versus 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."*

Upon our own independent evaluation of the evidence available on record and keeping in view law enunciated in above case law, we have not been able to take a view of the matter different from that taken by the trial Court. Apart from that no misreading or non-reading of the evidence on the part of trial Court has been

pointed out by learned counsel for appellant so as to warrant interference with impugned judgment of acquittal. This appeal is, therefore **dismissed**. Bail bonds and sureties of respondents No.1 and 2 shall stand discharged. These are the reasons for our short order dated 31.08.2016.

JUDGE

JUDGE

Irfan/PA.