

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA**

Criminal Acquittal Appeal No.D- 50 of 2019.

PRESENT:

Mr. Justice Amjad Ali Sahito.

Mr. Justice Jan Ali Junejo.

Appellant : Gulzar Ali Sethar through Mr.Shakeel Ahmed G. Ansari, Advocate.

Respondents No.1 to 4. : Nemo

Respondent No.5 : The State through Mr. Aitbar Ali Bullo, D.P.G.

Date of Hearing : 13.5.2025.

Date of Order : 13.5.2025.

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

**JAN ALI JUNEJO-J.-** This Criminal Acquittal Appeal is directed against the judgment dated 23.11.2019 passed by the learned 1<sup>st</sup> Additional Sessions Judge/MCTC, Shikarpur, whereby after full-fledged trial, the accused/respondents No.1 to 4 were acquitted of the charge in Sessions Case No.421/2009 Re: State v. Jinsar Sethar and others arisen out of Crime No.45./20009 of P.S Rustam registered for offence under Sections 302, 337-H(2), 148, 149 PPC.

2. Crux of the prosecution case, as unfolded in the FIR, is that in the background of old murderous enmity between complainant and accused Jinsar and Nabilo @ Abdul Nabi, on account of such enmity Abdul Nabi and others had shifted away from village Boriri to District Naushehro Feroz. On 22.05.2009, in the night time, complainant, his brother Dildar Ahmed, cousin Dilshad Ahmed and uncle Ahmed were sitting in the hotel of Abdul Rasheed till 11.00 P.M, night. Accused Jinsar 2, Zaheer 3, Nabilo @ Abdul Nabi 4, Abdul Rasool 5, Ayoub 6, Javed 7, Shahzor 8, Mehro 9, Jatt all duly armed with Kalashnikovs entered into hotel and overpowered upon the complainant party and asked them to remain silent when so many persons were sitting in the hotel, Accused Nabilo @ Abdul Nabi instigated other accused to take revenge of Abdul Raheem murdered by Dildar Ahmed, On such instigation, the rest of the accused persons asked the persons sitting in the hotel to be away from Dildar Ahmed

and then made straight fire shots upon him. Accused Jinsar fired from his Kalashnikov upon his brother, which hit him on upper side of left nipple. Accused Zaheer fired from his KK upon Dildar Ahmed which hit him on left nipple. Accused Abdul Rasool fired from his KK upon Dildar Ahmed which hit him on his left side of back. Accused Ayoub fired with KK upon his brother Dildar Ahmed which hit him on his buttock. Accused Javed fired from his KK, which hit Dildar Ahmed on left lumber region. Accused Shahzor fired from his KK which hit Dildar Ahmed on his left buttock. Accused Mehro fired from his KK, which hit Dildar Ahmed right side buttock, who while raising cries fell down and then accused fired in air and went towards northern side of the street by saying that they have taken the revenge of Abdul Raheem Sethar. The complainant leaving above PWs to guard the dead body of the deceased Dildad Ahmed, went to police station and lodged the FIR to the above effect.

3. After investigation of the FIR, the present accused were found innocent and their names were placed in column No.2 of the final challan dated 24.07.2009. Later on the Court of 6<sup>th</sup> Civil Judge & J.M Shikarpur not agreed with the conclusion reached by police and joined the present accused to face the trial.

3. Amended charge was lastly framed by the court of learned 2<sup>nd</sup> Additional Sessions Judge Shikarpur on 16.03.2015, at Exh.26, to which the accused pleaded not guilty and claimed to be tried as per their separate pleas recorded at Exh.27 to Exh.32.

4. The prosecution in order to prove it's case examined PW-1 Complainant/Eye witness Gulzar Ali at Exh.33, PW-2/Eye witness Ali Ahmed at Exh.34, PW-3 Eye witness Dilshad at Exh.35, PW-4 Author of FIR ASI Arbab Ali at Exh.37, PW-5 Corpse bearer PC Abdul Ghaffar at Exh.39, PW-6 Mashir Iqbal Ahmed at Exh.41, who produced mashirnama of visiting the place of incident at Exh.41/A and danistnama at Exh.41/B, PW-7 Dr. Noor Ahmed at Exh.43, he produced post mortem report and lash chakam form at Exh.43/A to Exh.43/B, PW-8 SIP retired Ghulam Nabi Chang at Exh.48, he produced mashirnama of arrest of accused Muhammad Ayoub at Exh. 48/A, chemical examiner report at Exh.48/B, and PS copy of roznamcha entry at Exh.48/C, PW-9 Mashir of arrest of accused

Muhammad Ayoub HC Ghulam Shabbir at Exh.49, The learned DDPP closed the side of prosecution vide statement at Exh.50.

5. In their statements recorded under section 342 Cr.PC, at Exh.51 to Exh.54, all the accused including respondents No.1 to 4 refuted the allegations of prosecution and claimed to have been falsely implicated. Accused did not opt to examine themselves on oath but examined the DW-1 SIP Anwar Ali at Exh.56, DW-2 Wali Muhammad at Exh. 57, DW- 3 Manthar Ali at Exh.58 and DW-4 Ali Asghar at Exh. 59. Thereafter, learned counsel for the accused closed the side vide statement at Exh.60.

7. On conclusion of trial, after hearing learned counsel for the parties, learned trial Court passed judgment dated 23.11.2019 whereby accused/respondents No.1 to 4 have been acquitted, hence this appeal.

8. Learned counsel for the appellant/complainant has argued that the impugned judgment having been passed without appreciating sufficient evidence brought on record is illegal and liable to be set aside. He submitted that accused/respondents were nominated in the FIR with specific role causing injuries to the deceased Dildar Ahmed which resulted into his murder at the spot, therefore, acquittal of accused/respondents No.1 to 4 has caused serious miscarriage of justice under impugned judgment passed by trial Court, which is liable to be set aside.

9. Conversely, learned D.P.G supported the impugned judgment and contended that after recording of evidence, prosecution failed to prove motive against present accused /respondents; the ocular account was not supported by medical evidence and false implication of present accused in the background of previous enmity can not be ruled out more particularly when admittedly all the eye witnesses being closely related to the complainant were highly interested and partisan. Besides, the prosecution evidence also suffered to multiple contradiction on material aspects.

11. We have heard learned counsel for the respective parties and perused the material brought on record.

12. Allegation against the present accused/respondents No.1 to 4 is that in the background of previous murderous enmity, on 22.05.2009 nine accused persons named in the FIR including respondents No.1 to 4 duly armed with K.Ks entered into a hotel at 11.00 P.M where complainant along with his brother Dildar Ahmed, cousin Dilshad Ahmed and uncle Ahmed as well as so many other people were sitting when Accused Nabilo @ Abdul Nabi instigated others to take revenge of Abdul Raheem who had been murdered by Dildar Ahmed, on which co-accused Jinsar and Zaheer fired from their Kalashnikovs individually upon his brother, which hit him on upper side of left nipple and left nipple respectively. Out of present accused/respondents No.1 to 4, Accused Abdul Rasool, fired from his KK upon Dildar Ahmed at left side of his back, Accused Ayoub fired with KK upon Dildar Ahmed on his buttock, Accused Javed fired from his KK upon Dildar Ahmed on left lumber region and accused Shahzor fired upon Dildar on his left buttock. While co-accused Mehro also fired from his KK upon Dildar Ahmed on his right side buttock. Resultantly Dildar Ahmed died at the spot.

13. Perusal of record reflects that as per FIR, seven accused persons including respondents No.1 to 4 have allegedly been assigned role of causing firearm injuries to deceased but as per post mortem report (Exh.43/A) there were four entry wounds and three its exit wounds. As per FIR, present accused Abdul Rasool and Javed having been allegedly assigned role of causing firearm injuries to deceased on his back and right side of lumber region but post mortem report does not indicate so. Besides PW-7 admitted in his cross examination that there was no entry wound on the back side of the deceased. Moreover, the injuries alleged to have been assigned to remaining present two accused Ayoub and Shahzor were on left side on buttock but as per post mortem report there is only one entry wound on left buttock.

14. As far as motive for commission of offence is concerned, admittedly there was standing enmity between complainant and co-accused Jinsar and Nabilo @ Abdul Nabi who were declared proclaimed offender. Thus, admittedly there was no motive against the present accused/ respondents and apparently the complainant thrown wider net to implicate maximum accused of rival party under the garb of previous enmity with co- accused Jinsar and Nabilo @ Abdul Nabi.

15. We have also scanned the prosecution evidence recorded at the trial which suffers from material contradictions as well as conflict between ocular account and medical evidence creating serious doubt into the prosecution case against the present accused/respondents No.1 to 4.

16. Perusal of impugned judgment dated 03.11.2019 also reflects that it is well reasoned and elaborated. It would be imperative to reproduce relevant paras of the impugned judgment hereunder:

“20. As per FIR so many persons were available on the relevant date and time at hotel whereas PW-1 complainant in his cross examination deposed that only hotel owner was there when they went to take a cup of tea at hotel. PW-1 complainant in his cross examination deposed that it was dark night, however, he improved his version by deposing that the bulbs were glowing. Strangely, neither the glowing bulbs have been shown in FIR by the complainant nor PWs in their statements stated about the presence of glowing bulbs. Even PW-3 who alleged to have witnessed the incident but surprisingly he in his cross examination deposed that he does not know whether it was moon light or not. PW-1 complainant in his cross examination deposed that distance between the deceased and accused was 4/5 paces, while PW-2 in his cross examination deposed that accused fired from distance of 23 paces. PW-2 in his cross examination has deposed that Television was running but PW-3 in his cross examination deposed that it was closed. PW-1 complainant in his cross examination deposed that they were sitting in second row from back side count, while PW-3 in his cross examination deposed that they were sitting in front side of the bench from western side. As per FIR, the dead body of deceased was directly brought at hospital whereas PW-3 in his cross examination deposed that they taken the body to house.

21. In addition to above, it will be beneficial to reproduced the relevant portion of cross examination of PW-3 in which he deposed as under:-

“No report was made to police before the complainant approached at PS. We consulted with our uncle and then complainant visited PS for lodging of FIR”

22. Looking to the above contradictions and particularly, the delay in lodging of FIR for about 15 hours though the distance between place of incident and PS was hardly two and half kilometers which clearly makes the exaggeration on the part of the complainant party to involve the maximum number of persons in the case. It is an accepted proposition that in cases of enmities there is a general tendency to rope in as many as possible as having participated in the assault. Even, very notable persons are

also roped in having no connection whatsoever with such disputes.

23. According to Chemical Examiner Report at (Exh.48/B), it contained human blood, but this by itself does not connect present accused with the indicated offences. More so the blood stained allegedly secured was dispatched and received to chemical examiner laboratory Sukkur at Rohri on 06.06.2009, it means the same was dispatched after delay of 12 days after the alleged incident. The recovery of empties under mashirnama at Exh(41/A) but there is no report of FSL on record of case file, hence, the recovery of blood stained earth and empties are of no evidentiary value whatsoever.

24. Most striking feature in this case is the motive of incident and that extent I have no hesitation to say that motive has not been proved by the prosecution against the present accused. As per FIR the motive has allegedly been assigned against accused Jinsar and Nabilo @ Abdul Nabi who have been declared as Proclaimed Offenders.

25. In this context I am being fortified on the case of Sarfraz Masih v. the State reported in [2017 P.Cr.L.J Lahore 280], in which it has been held as under:-

“Motive once alleged, it was incumbent upon the prosecution to prove the same. Prosecution in case of failure, to prove the motive, would suffer. Attending circumstances had cast doubt about the motive. Appeal was allowed and accused was acquitted of the charge by setting aside the conviction and sentences recorded by the trial Court”

26. The defence of the present accused is that on the alleged date, time and place they were not present there. In support of their such pleas examined DW-1, DW-2, DW-3 and DW-4. DW-1 was police officer who was entrusted with the inquiry of the case against the present accused who inquired and found the present accused as innocent. On the basis of his such inquiry report, the names of present accused were placed in the column No.2 of the challan. DW-1 including other DWs were cross examined by the learned State counsel but he could not discredit their evidence. More importantly, PW-8 IO SIP Ghulam Nabi Chang in his cross examination admitted that Anwar Gopang (DW-1) was famous for his honesty in the department who had been entrusted many inquiries even from the Honourable High Court of Sindh, and after holding inquiry he declared all four accused as innocent. He also admitted that he recorded the statements of many persons of the village and they disclosed him that accused Ayoub, Jawed, Abdul Rasool and Shahzor were innocent and were not available at the place of incident on the relevant date and time.

27. In such a situation, the Courts are called upon to be very cautious and swift the evidence with care where after a close scrutiny of evidence, a reasonable doubt arises in the mind of the Court with regard to the participation of those who have been roped in falsely, the Court would be oblige to give the benefit of doubt to them.

28. In case of Ayoub Masih vs. The State [reported in PLD 2002 SC 1048] in which it has been held as under:-

Rule of benefit of essentially rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Doubt must be reasonable and not imaginary. Said rule was based on maxim, “ it is better that ten guilty persons be acquitted rather than one innocent person be convicted and occupied a pivotal place in the Islamic Law and inforce rigorously in view of the saying of Holy Prophet (PBUH) that “ mistake of Qazi(judge) in releasing a criminal is better than a mistake in punishing an innocent.

29. In another case of Ashique Hussain vs. The State reported in 1993 SCMR 417, the Honourable Apex Court consisted of their five lordships who remarked as under:-

302 burden of proof—Prosecution is duty bound to prove the case against the accused beyond doubt and this duty does not change or vary in the case in which any defence plea is taken.

302 Defence plea--- Defence plea is to be considered in juxta position with prosecution case and in the final analysis if defence plea is proved or accepted then prosecution would stand shattered and discredited. The defence plea is substantiated to the extent of creating doubt to the credibility and the prosecution case that would be enough but in case it is not established benefit accrues to the prosecution on that account and its duty bound to prove the case beyond doubt would not be diminished if defence plea is not proved or is found to be palpable false.

30. In such a situation, the Courts are called upon to be very cautious and swift the evidence with care where after a close scrutiny of evidence, a reasonable doubt arises in the mind of the Court with regard to the participation of those who have been roped in falsely, the Court would be oblige to give the benefit of doubt to them.”

17. Thus prosecution failed to bring on record sufficient evidence to connect the accused/respondents with the commission of alleged offence. In view of such circumstances, this Court is of the

considered view that prosecution has failed to prove its case beyond shadow of reasonable doubt.

18. It is a well-settled principle of law that a criminal case is to be decided based on the totality of impressions gathered from the circumstances of the case and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact stated by him. A similar view had been expressed by the Honourable Supreme Court of Pakistan in the case **of State v. Rab Nawaz and another (PLD 1974 SC 87) wherein Honourable Supreme Court** has observed that a criminal case is to be decided based on the totality of circumstances and not based on a single element.

19. It is noteworthy that in the impugned judgment the learned trial Judge has pointed out some material contradictions, which are sufficient to declare that the prosecution could not establish the case against the respondents/accused beyond reasonable doubt and where a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard, reliance is placed on the cases of **Tariq Pervaiz v. The State [1995 SCMR 1345]** **Muhammad Akram v. The State [2009 SCMR 230]** **and LalBux alias Lal v. the State (2023 YLR 321) (authored by Zulfiqar Ahmed Khan J.)**

20. It is an important to note that an appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from appeal against acquittal. It is well settled law that once the trial court records an acquittal, the accused earns presumption of double innocence, and the appellate court should not reverse such findings unless find the reasoning in the impugned judgment to be perverse, arbitrary, foolish, artificial, speculative and ridiculous or based on misreading or non-reading of evidence, as was held by the Supreme Court in the case of **State v. Abdul Khaliq and others (PLD 2011 SC 554).**

21. In these circumstances, we are of the considered opinion that the quality and standard of prosecution evidence is lacking, which is required to establish a criminal case for justifying



conviction and sentence. Hence, we are of the view that acquittal of respondents No.1 to 4 recorded by learned trial Court under impugned judgment dated 23.11.2019 does not call for any interference by this Court, therefore, the instant criminal acquittal appeal being devoid of merits is dismissed.

**JUDGE**

**JUDGE**

Shabir/P.S