

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No.D- 48 of 2009.

Cr. Acquittal Appeal No.D- 16 of 2009.

Cr. Revision Application No.D- 43 of 2009.

Present:

Mr. Justice Mohammad Karim Khan Agha -J

Mr. Justice Zulfiqar Ali Sangi -J

Appellant	Ahsan Mahar through Mr. Athar Abbas Solangi, Advocate in Cr. Appeal No.D-48 of 2009.
Complainant	Mushtaque Ali Mahar through Mr. Asif Ali Abdul Razak Soomro, Advocate in Cr. Appeal No.D-48 of 2009, Cr. Acquittal Appeal No.D-16 of 2009 and Cr. Rev: A. No.D-43 of 2009.
Respondent	Allah Bux Mahar through Mr. Saleem Raza Jakhar, Advocate in Cr. Acquittal Appeal No.D-16 of 2009.
Respondent	The State through Mr. Ali Anwar Kandhro, Addl. P.G.
Date of hearing:	14.01.2021.
Date of judgment:	20.01.2021.

JUDGMENT

Mohammad Karim Khan Agha -J:- By this common judgment, we intend to dispose of these three inter connected matters which arise out of the same judgment out of which appellant Ahsan Mahar by filing Cr. Appeal No.D-48 of 2009 has assailed impugned judgment dated 08.7.2009 passed by learned 1st Additional Sessions Judge, Shikarpur in Sessions Case No.375 of 2006 re: State v. Ahsan and others arising out of Crime No.18 of 2006 of Police Station Chak registered for offence under Sections 302, 337-H(2), 504, 114, 148, 149 PPC whereby the appellant Ahsan Mahar has been convicted and sentenced to suffer R.I for life and pay fine of Rs.50,000/=, in case of default in payment thereof, he shall suffer further S.I for six months, however, benefit of Section

382 (b) Cr.P.C was also extended to the appellant, while appellant/complainant Mushtaque Ali by filing Cr. Acquittal Appeal No.D-16 of 2009 has assailed same impugned judgment to the extent of acquittal of respondent/accused Allah Bux and he/complainant by filing Cr.Revision Application No.D-43 of 2009 has sought enhancement of sentence awarded to appellant/accused Ahsan Mahar under same impugned judgment from life imprisonment to death.

2. The prosecution case as unfolded in the FIR is that:

" Complaint is that in the evening time over fight of kids there had become exchange of harsh word between us and Punhal Mahar and others, thereafter at 7-30 p.m, I, my uncle Haji Sodhal S/O Allah Dino Mahar aged about 58/60 years, my brother Shaukat Ali and cousin Munawar Ali S/O Wali Muhammad Mahar were going together to our home through common street and crossed the houses of accused Punhal Mahar and others, accused namely Ahsan armed with rifle, 2.Master Punhal empty handed, 3.Muhammad Hussain 4.Allah Bux, 5.Muhammad Saleh all of three armed with guns all sons of Dhani Bux Mahar R/O village Mirani taluka Lakhi came out from their house by challenging and assaulted upon us and accused Punhal instigated other accused persons for killing Haji Sodhal, on his instigation accused Ahsan Mahar directly fired from his rifle at my uncle Haji Sodhal with intention to kill, who fell down on the ground, then accused armed with rifle and guns fired from respective weapon over us in order to harass us, we sat down due to fear. Thereafter accused by abusing us and raising slogans went to their house. Thereafter we saw my uncle Haji Sodhal had received fire arm hits on his right arm and abdomen, was bleeding and expired. I left above witnesses over dead body of my uncle Haji Sodhal now am here and lodging FIR that above named accused persons with common intention, by forming unlawful assembly, duly armed with weapons over matter of dispute of children on behest of accused Punhal accused Ahsan Mahar has fired from his rifle directly at my uncle Sodhal and killed him. I am complainant may justice be done."

3. During the course of investigation, accused Ahsan, Punhal and Allah Bux were arrested and sent up to stand trial under charge sheet in which rest of accused Muhammed Hussain and Muhammad Saleh were shown absconders. Formal charge was framed against the accused to which they pleaded not guilty and claimed trial.

4. At the trial, prosecution examined 10 PW's and exhibited numerous documents and other items in order to prove its case. During trial accused Muhammad Punhal expired hence proceedings against him were abated.

However, the statements of accused Ahsan and Allah Bux were recorded under Section 342 Cr.PC in which they claimed their innocence, however, they did not give evidence under oath or call any DW in support of their defence case.

5. On conclusion of the trial, the learned trial court after hearing learned counsel for the parties and appraisal of evidence brought on record, convicted and sentenced the appellant/accused Ahsan Mahar under impugned judgment dated 08.7.2009, while accused Allah Bux was acquitted, giving rise to filing of these appeals against conviction, acquittal and enhancement of appellant Ahsan Mahar's sentence from life to death.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 08.7.2009 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that none of the PW eye witnesses was present at the scene of the incident and that they have fabricated the case against the appellant; that their story is not believable as with so much firing at them all of them managed to escape without receiving any injury; that the appellant and the other co-accused all lived far part and as such they could not have been at the same place at the time of the incident; that the medical evidence contradicts the oral evidence; that there are major contradictions in the evidence of the prosecution witnesses; that the eye witnesses gave their S.161 Cr.PC statements after a substantial period of delay and as such they could not be relied upon; that the rifle was foisted on the appellant by the police; that according to the tapedar who prepared the sketch of the wardat PW 9 Agha Zuliqar Ali in his evidence he had stated that Punhal made straight fire on the deceased which completely contradicted the eye witnesses evidence and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. With regard to the enhancement of his sentence from life to death in the event that this court maintained his conviction he submitted that such enhancement was not justified as the motive had not been fully proven by the prosecution and the crime was not one of particular brutality.

8. Learned counsel for respondent Allah Bux submitted that the grounds for over turning an appeal against acquittal were very narrow which carried a double presumption of innocence and that the only evidence against the respondent was that he was present and had made aerial firing and as such under these circumstances his acquittal should be upheld.

9. On the other hand learned Addl. Prosecutor General and the complainant have fully supported the impugned judgment and contended that the eye witnesses are all reliable, trustworthy and confidence inspiring and fully implicate the appellant in the murder, that the medical evidence supports the ocular evidence; that the murder weapon was recovered from the appellant; that there were positive FSL and chemical reports and as such the prosecution has proved its case beyond a reasonable doubt against the appellant and the appeal should be dismissed and the conviction and sentences maintained. Learned counsel for the complainant however further submitted that it was a fit case for enhancement of sentence from life imprisonment to the death sentence as it had been proven that the appellant had made direct firing on the deceased and the prosecution had proved the motive for the murder namely the fighting between the parties children and since the death sentence was the rule in such cases he prayed for enhancement of the sentence from life imprisonment to the death sentence. In the appeal against acquittal of Allah Bux the appellant contended that there was more than enough evidence on record to convict him of the offence so charged and as such the respondent Allah Bux should be convicted of murder of the deceased and sentenced accordingly.

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

11. Based on our reassessment of the evidence of the PW's, especially the eye witnesses, police PW's, MLO and post mortem report, recovery of rifle from the appellant and empties at the scene and blood stained earth at the scene which lead to a positive FSL and chemical reports we find that the prosecution has proved beyond a reasonable doubt that Haji Sodhal (the

deceased) was shot and murdered by firearm at about 7.30pm on 30.05.06 at common street near the house of the accused situated in village Mirani, taluka Lakhi.

12. The only question left before us therefore is who shot the deceased which lead to his death by firearm injury.

13. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charges against the appellant for which he was convicted for the following reasons;

(a) The FIR in respect of the incident was filed within one hour of the incident and such prompt filing of the FIR rules out the possibility of the complainant concocting a false case against the appellant with the police or any other third party. Even otherwise the complainant had no enmity with the appellant and had no reason to falsely implicate him in a case.

(b) In our view the foundation of the prosecution's case rests on the evidence of the eye witnesses to the murder whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Mushtaque Ali.** He is the complainant in the case and the nephew of the deceased. According to him the incident took place on 30.05.2006 at about 7.30pm when he, his brother Shaukat, cousin Munawar Ali and his uncle Sodhal (the deceased), were coming from the bus stand towards their village when 5 persons all armed except Punhal instigated the others (all of whom were brothers) to kill the deceased where upon **he saw the appellant shoot the deceased with his rifle in his right hand and stomach who after being shot fell to the ground.** The other accused fired at them but they hide on the ground and then ran away and on their return found the dead body of the deceased. It was a day light incident being 7.30pm in the month of May and the eye witness knew the accused who he saw at close range and as such there was no need for an identification parade as the accused was known to him. In his evidence he states that the motive behind the attack on his uncle was on account of children's affairs as children belonging to each party had been fighting that day. His evidence is corroborative of his FIR which was lodged one hour after the incident and thus there was no time for him to cook up a false story. There was no enmity between the accused and his party and thus no reason to falsely implicate the accused. The appellant is also named in the FIR with the specific role of shooting the deceased in his right hand and in his stomach with a rifle.

Admittedly the eye witness was related to the deceased however it is well settled by now that evidence of related

witnesses cannot be discarded **unless** there is some ill will or enmity between the eye witnesses and the accused which there was not in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99).

The eye witness was a natural witness and not a chance witness. He lodged his FIR with promptitude and named the other eye witnesses in the FIR who also gave evidence as PW's along with the accused with specific roles. He had no enmity with the appellant and had no reason to falsely implicate him. His evidence was not dented despite lengthy cross examination. At no time during cross examination was it suggested that he was not present at the scene and in his S.342 Cr.PC statement there is only a bare denial. With regard to the eye witness not being shot this is explained by the fact that he took cover, that the deceased was 8 to 10 paces behind him and was therefore isolated from the group and was the focus of fire and that co-accused Punhal only instigated the other co-accused to shoot at the deceased. Most of the fire at the eye witnesses was also aerial in nature in order to harass them. He and the other eye witnesses were able to hide in his house which was close by or a close by pond as shown by the tapedar's sketch. The 5 co-accused were all at the same place at the same time because as per the tapedar's report/sketch they were all living in houses within 20 feet of each other behind the compound and therefore had come out together to avenge the injury to Punhal's daughter. In effect the co-accused were living together. As to the tapedar's statement that Panhal shot the deceased he was not an eye witness and his evidence is hearsay which is inadmissible. As such based on the above discussion we believe the evidence of this eye witness especially in terms of his correct identification of the appellant and the appellant's role in the crime. We find his evidence to be reliable, trust worthy and confidence inspiring and we can convict on his evidence alone. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857).

(ii) **Eye witness PW 2 Shaukat Ali** corroborates eye witness **PW 1 Mushtaque Ali** in all material respects. He is named in the FIR which was lodged within one hour of the incident which dislodges any inference that he is not reliable because he gave his S.161 Cr.PC statement after two days which in any event is not an exorbitant delay based on the particular facts and circumstances of the case where the deceased had to be taken to hospital and then buried. He was also seen by the IO within two hours of the incident at the wardat when the IO came to inspect the wardat so his presence at the scene cannot be doubted and ties in with the complainant's evidence that the other two eye witnesses were left to stand over the dead body. He again discloses the motive of the killing namely a quarrel had broken out in respect of the affairs of the children between Punhal and them. The same considerations apply to him as to eye witness **PW 1 Mushtaque Ali** as discussed above.

(iii) Eye witness PW 5 Munawar Ali corroborates eye witness PW 1 Mushtaque Ali and eye witness PW 2 Shaukat Ali in all material respects except he does not discuss the motive. Like PW 2 Shaukat Ali he is named in the FIR which was lodged one hour after the incident, gave his S.161 Cr.PC statement within 2 days of the incident, was present at the wardat when the police inspected the dead body an hour after the incident and as such the same considerations apply to him as the other two eye witnesses mentioned above.

Thus, based on our believing the evidence of the 3 eye witnesses what other supportive/corroborative material is there against the appellant?

(c) PW 4 Ghulam Mustafa who was the son of the deceased was not an eye witness but found his father's dead body at the scene. His evidence is more believable in our view as he did not pretend to be an eye witness when he was not which would have been tempting for him keeping in view that the deceased was his father. He corroborates the complainant returning with the police who inspected the dead body of the deceased who recovered empties and secured blood from the scene of the incident and corroborates that his father had received fire arm injuries on his right arm and abdomen which was also inspected by the police. He was a mashir and his name is noted in the mashirnama's of the inspection of the wardat when the dead body was present, empties and blood stained earth recovered. He was not dented in cross examination and had no enmity with the accused which would lead to him falsely implicating him. We believe his evidence which is also corroborated by the inquest report which shows wounds on the right arm and abdomen which he states he saw in his evidence. His evidence is further corroborated by PW 8 Muhammed Yousaf who was the IO of the case who in his evidence states that he came to the wardat with the complainant and inspected the dead body, noted the injuries, collected blood stained earth, collected empties and prepared the relevant mashirnama's of which PW 4 Ghulam Mustafa was one of the mashir's.

(d) PW 8 Muhammed Yousaf who was the IO was an independent police officer and it was not suggested that he had any enmity or particular friendship or relationship with any of the parties and thus we have no reason to doubt his evidence which is fully corroborative of that of the complainant and PW 4 Ghulam Mustafa regarding his inspection of the dead body and wardat. He also was not damaged despite a lengthy cross examination.

(e) PW 6 Abdul Razzak who registered the FIR corroborates that the complainant informed him about the motive for the attack. Namely, a dispute between the children which is also recorded in his FIR. He corroborates the statement of the complainant coming to the police station to register the FIR alone.

(f) In our view the medical evidence of PW 3 Dr. Jamil Ahmed fully corroborates the ocular evidence of the eye witness PW's and other PW's in that the deceased received two bullet wounds with one being

to the right hand and one being to his abdomen which firearm injuries lead to his death. There was no blackening around any of the wounds which supports the eye witness evidence that the deceased was not shot from close range but from over 3 feet away.

(g) That one day after the incident the appellant and two other co-accused were arrested by PW 7 PC Masaud Ahmed and PW 10 SHO Saeed Ahmed on spy information by a bridge where a 7MM rifle was recovered from the appellant along with 5 7MM bullets. The fact that co-accused Punhal was arrested unarmed which was the same as his position (unarmed) at the time of the incident as noted in the FIR in our view further supports the fact that the arrest took place at the time and place so given in evidence and that the rifle was not foisted on the appellant as if this was a false arrest and recovery the police would most probably also have foisted a weapon on co-accused Punhal.

(h) Two empties of 7 MM were recovered from the wardat and these matched the rifle recovered from the appellant by way of a positive FSL report.

(i) That there was a positive chemical report in respect of human blood found at the scene.

(j) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793). The evidence of the PW's provides a believable corroborated unbroken chain of events from the shooting of the deceased, to the registration of the FIR, the inspection of the dead body at the wardat, the post mortem report to the arrest of the appellant with the murder weapon (rifle) supported by positive FSL report and chemical reports. The evidence of no PW was dented on cross examination let alone damaged.

(k) That it does not appeal to reason, logic or commonsense that close relatives of the deceased would let the real murderer of their uncle go scot free by substituting him with an innocent person.

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can caste any reasonable doubt on or dent the prosecution case. The defence case is one of bare denial. No evidence was given under oath by the appellant, he called no DW in his defence and simply claimed his innocence in his S.342 Cr.PC statement. He did not cross examine any of the PW's on any area which may have raised doubt on any aspect of their evidence or that he had any kind of defence apart from claiming false implication despite their being no enmity between the parties and no reason for any of the PW's to falsely implicate him. Thus, in the face of three reliable, trust worthy and confidence inspiring eye witnesses we do not believe the defence case which has not at all dented the prosecution case.

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14. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and hereby maintain his conviction.

15. With regard to sentencing although we find that the prosecution has proved the motive for the murder through the fight between the children and the trial court gave no reason for awarding the lesser sentence of life imprisonment we find that the murder was not carried out in a brutal or heinous manner as only two shots were made on the deceased which subsequently lead to his death in a situation where the appellant had the opportunity to shoot and kill all the eye witnesses but showed restraint. Thus we are of the view that the appropriate sentence in this case is one of life imprisonment as opposed to the death penalty especially as the appellant has already served nearly 15 years of his substantive sentence and is a first time offender with a family to support. Thus, the criminal revision application is dismissed and the sentence handed down in the impugned judgment is maintained.

16. With regard to the appeal against acquittal of co-accused/respondent Allah Bux it is settled law that judgment of acquittal should not be interjected unless findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Supreme Court in the case of **The State v. Abdul Khaliq and others** (PLD 2011 Supreme Court 554). Moreover, the scope of interference in appeal against acquittal is narrow and limited because in an acquittal the presumption of the innocence is significantly added to the cardinal rule of criminal jurisprudence as the accused shall be presumed to be innocent until proved guilty. **In other words, the presumption of innocence is doubled** as held by the Supreme Court in the above referred judgment. The relevant para is reproduced hereunder:-

"16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both

the sides, it may be mentioned that both the learned counsel agreed that the criteria of interference in the judgment against acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Courts about the rules which should be followed in such cases; the dicta are.....

*From the ratio of all the above pronouncements and those cited by the learned counsel for the parties, it can be deduced that the scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent is doubled. The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous (Emphasis supplied). The Court of appeal should not interfere simply for the reason that on the re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities. It is averred in *The State v. Muhammad Sharif* (1995 SCMR 635) and *Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others* (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals." (bold and italics added)*

17. Having gone through the evidence and the impugned judgment we find that there has been no misreading or non reading of the evidence and that such evidence has been appreciated by the learned trial court in its proper perspective, that the impugned judgment is based on sound reasons and there is no question of the findings in the impugned judgment being perverse, arbitrary, foolish, artificial, speculative and ridiculous in respect of the acquittal of accused/respondent Allah Bux who it seems was simply present at the scene of the incident and only made aerial firing and was therefore extended the benefit of the doubt. As such we find no merit in the appeal against acquittal which is hereby dismissed.

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18. Thus, in summary the appeal against conviction is dismissed, the criminal revision application is dismissed and the appeal against acquittal of accused / respondent Allah Bux is dismissed.

19. These appeals and criminal revision application stand disposed of in the above terms.