

# IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi  
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-47 of 2016

Fawad

Versus

The State

Cr. Rev. Application No.D-40 of 2016.

Naveed Arshad

Versus.

Fawad Khan and another

Cr. Acq. A. No.D-06 of 2016

Naveed Arshad

Versus.

Haji Hussain and others

Appellant / private respondent Fawad in Cr. Appeal No.D-47/2016 and Cr. Rev. A. No.D-40/2016, respectively, as well as private respondents Haji Hussain and others in Cr. Acq. A. No.D-06/2016	Through Mr. Shamsuddin Khushk, Advocate
Applicant / Appellant Naveed Arshad in Cr. Rev. Appl. No.D-40/2016 and Cr. Acq. Appeal No.D-06/2016, respectively	Through Mr. Imam Bux Baloch, Advocate
Respondent The State	Through Ms. Romeshan Oad, A.P.G
Date of hearing	11.09.2018
Date of judgment	11.09.2018



## JUDGMENT

**MOHAMMAD KARIM KHAN AGHA, J.-** Since all the aforementioned appeals / revision application have arisen out of one and the same impugned judgment dated 17.02.2016, passed by the learned Additional Sessions Judge, Shahdadpur in Sessions Case No.27/2012 (Crime No.301/2011 of PS: Shahdadpur, under sections 302, 324, 337-A(i), F(i), L(ii), E(i)(ii), 147, 148 and 149 PPC), therefore, we propose to decide the same by this common judgment. The facts and prayers as made by the appellants / applicant in the said matters are that:-

- i. In Cr. Appeal No.D-47 of 2016, appellant Fawad was tried by learned Additional Sessions Judge, Shahdadpur in the aforementioned Sessions Case and as a result being found guilty of committing the offence by the said impugned judgment dated 17.02.2016, convicted and sentenced under section 302(b) PPC (Taazir) to suffer life imprisonment with fine of Rs.200,000/- u/s 544-A Cr.P.C. to be paid to the legal heirs of deceased according to law. In case of default in payment of fine, the appellant was ordered to suffer S.I. for 06 months more. Benefit of Section 382-B Cr.P.C. was extended to the accused. The appellant has challenged the impugned judgment through instant appeal.
- ii. In Cr. Rev. Application No.D-40 of 2016, applicant Naveed Arshad has made a prayer to enhance/convert the sentence of life imprisonment awarded to private respondent Fawad Khan through said impugned judgment to death.
- iii. The Criminal Acq. Appeal No.D-06/2016 has been filed by appellant Naveed Arshad, assailing the impugned judgment, whereby the learned trial Court after full dressed trial convicted accused Fawad Khan, whereas acquitted the private respondent's No. 1 to 6 by giving them the benefit of doubt. In this acquittal appeal, appellant has prayed that by setting aside the part of the impugned judgment dated 17.02.2016 regarding acquittal of the respondents No.1 to 6 and convict the said respondents for the offence charged against them.



2. The brief facts of the prosecution case as disclosed in the F.I.R. are that complainant Naveed Arshad lodged F.I.R. at Police Station Shahdadpur, as under:-

"That the complainant has agricultural land in which banana and cotton crops have been cultivated. On 10/10/2011, the sons of accused Shahzad Pathan and Fawad Pathan cut the bananas, on this there was dispute between them. On the day of incident, a Faisla was scheduled to be held. The cotton picking was going on by Hari Qurban son of Mumtaz Rajput resident of Sohni Nagar Mohallah, Shahdadpur along with his brother Ali Hassan, Ali Ahmed @ Rano and other family members. At afternoon time, the complainant along with his father namely Arshad Ali son of Ali Ahmed aged about 55 years, brother Nadeem Arshad aged about 32 years and brother Shakeel Arshad came on the land. The father of the complainant Arshad Ali having one repeater No. P-35633/DBBL of 12 bore, bearing license No. 11425/SHD dated 22/10/1991 and 30 bore pistol No. 31013352 bearing license No. 4434/SHD dated 21/04/1986 and when they reached at Katchi Rasti at 3.00 p.m. meanwhile accused (1) Shahzad Pathan having repeater in his hand, (2) Fawad Pathan having pistol, (3) Nawab Pathan having pistol, (4) Bhai Khan Pathan having rifle, (5) Badshah Khan Pathan having gun, (6) Mohiuddin Pathan having desi pistol, (7) Yahya Khan Pathan having Lathi/cane, (8) Haider Khan Pathan having iron rod, (9) Alam Khan Pathan having iron rod, (10) Haji Hussain Pathan having lathi/cane, (11) Ameer Khan Pathan having spade/Belcha, (12) Jamal Khan Pathan having lathi/cane, and three unknown persons came over there and they started firing upon the complainant party with intention to kill them. The accused Shahzad with his repeater and accused Fawad with his pistol fired upon the brother of complainant namely Nadeem Arshad which hit on his chest, leg and foot. The accused Nawab with his pistol and Badshah Khan with his gun fired upon the father of complainant namely Arshad Ali which hit on left side of his abdomen, arm and on legs. The brother of complainant Nadeem Arshad and father Arshad Ali fell down on the land. The weapons of father of complainant, mobile phones and NIC and mobile phone of brother of complainant and his NIC were taken by the accused persons. The complainant tried to



save the injured along with his Haris but the accused persons caused lathi and iron rods blows to them and run away from the spot while firing in the air. The brother of complainant Shakeel Arshad, Qurban, Ali Hassan and Ali Ahmed @ Rano sustained injuries on their face, backside, arms and other parts of the body. Due to firing of accused persons, their companion Mohiuddin and Yahya Khan also received injuries. The complainant party raised cries and on their cries, Nisar Ahmed son of Mukhtiar Ahmed Arain and Rashid son of Rasheed also rushed towards the cries. On seeing them the accused persons run away from the spot while taking their injured companion with them along with the weapons, mobile phones and NICs of father and brother of complainant. The complainant saw that his brother Nadeem Arshad had died and his father was seriously injured who was taken to Taluka Hospital Shahdadpur. The SIP Dodo Khan also reached at hospital along with police staff. The father of the complainant succumbed to his injuries. SIP Dodo Khan completed the legal formalities and post mortem was conducted. He issued letter for medical treatment of the injured. The complainant took away the dead bodies of his father and brother to his house. His uncle Akber came to Shahdadpur in late hours and the complainant narrated the facts to him who advised him to lodge the FIR against the accused persons. Then the complainant went to police station and lodged the FIR against the accused persons."

3. After completing the usual investigation, police submitted challan against the above named accused persons by showing accused Fawad Khan, Haji Hussain Pathan, Yahya Khan Pathan and Mohiuddin Pathan in custody, whereas co-accused Shahzad Pathan, Nawab Pathan, Haider Khan, Alam Khan Pathan son of Amir Khan Pathan, Bhai Khan Pathan, Badshah Khan Pathan, Ameer Khan Pathan, Jamal Khan Pathan, Faiz Mohammad Pathan, Alam Khan Pathan son of Meer Dad Pathan and Adoo son of Qatai Khan Pathan were shown as absconders.
4. A formal charge against the accused was framed at Ex. 14 to which they pleaded not guilty and claimed to be tried at Ex. 15 to 19.
5. During proceeding of the case, accused Alam Khan, Hyder Khan, and Amir Khan were also arrested and their supplementary challan was submitted before the trial Court.



6. Thereafter, an amended charge was framed against all present accused persons at Ex. 21, to which they pleaded not guilty and claimed to be tried vide their respective pleas at Ex. 22 to 28.

7. In order to prove its case prosecution examined as many as 11 witnesses and thereafter learned ADPP closed the side of the prosecution vide his statement Ex.42.

8. Statements of the accused / appellant / private respondents were recorded under section 342 Cr.P.C. at Ex.43 to 49, in which they have denied the allegations of prosecution while claiming their innocence. In their statements, accused stated that in fact, both the deceased duly armed with weapons came at the house of Mohiuddin Pathan, attacked upon him caused fire arm injuries to him. In the result, Shahzad Pathan who is now dead came out and in response and he fired at both the deceased. In the result, both of them received injuries. In revenge, the complainant had involved whole Pathan community in this case falsely. The father of injured accused Mohiuddin lodged FIR No. 340/2011 and his medical certificates already produced in this case by the Medical Officer which is on record. Accused Fawad Khan produced photo stat copy of FIR No. 340/2011 at Ex. 43/A. However, they did not examine themselves on oath nor led any witness in their defense.

9. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellant / private respondent Fawad Khan and acquitted the private respondents Haji Hussain, Yahya Khan, Mohiuddin, Alam Khan, Hyder Khan and Ameer Khan, as stated above.

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

11 Mr. Shamsuddin Khushk, learned counsel for the appellant / private respondents has contended that all the witnesses are highly interested, friends and relatives of complainant; that there is no motive behind the murder; that accused Fawad Pathan has not committed the murder of any deceased and has been falsely implicated in this case; that there is material contradictions in the evidence of PWs; that all the formalities have



been completed by the police at police station; that the deceased had not received any bullet injury on their bodies but they sustained pellet injuries on their bodies which was caused to them by pro-claimed offender Shahzad; that the complainant was not available at the place of incident at the time of incident and the story has been concocted and made improvement in the prosecution case; that there is delay in the registration of F.I.R. for about nine (9) hours and no any plausible explanation has been furnished by the complainant in this regard; that the prosecution case is highly doubtful; therefore, the benefit of the doubt may be given to the accused persons. He has lastly prayed for acquittal of accused Fawad Khan and dismissal of the criminal revision as well as criminal acquittal appeal.

12. Mr. Imam Bux Baloch, learned counsel for appellant / applicant Naveed Arshad has contended that prosecution has successfully proved its case against Fawad Khan Pathan and all the other acquitted co-accused; that the motive of murder has been fully established; that all the surroundings and circumstantial evidence directly connecting the accused / private respondents with the commission of offence; that all witnesses have furnished reliable and trustworthy evidence; that the defense could not succeed to shatter the credibility and veracity of prosecution witnesses; that accused Fawad Khan Pathan has played main role of making firing upon complainant's brother; that the accused do not deserve any leniency, therefore the conviction of life imprisonment awarded by the trial Court to Fawad Khan Pathan may be enhanced / converted to death and the private respondents in Cr. Acq. A. No.D-06/2016 also should be convicted as the prosecution had proved its case against them beyond a reasonable doubt and should also be sentenced to death. In support of his contention in respect of enhancement of sentence from life to death in the case of Fawad Khan Pathan and sentence of death to the other private respondents he relied upon the case of **Muhammad Mansha V The State** (2016 SCMR 958).

13. Learned A.P.G. appearing for the State while supporting the impugned judgment passed by the learned trial Court, has contended that with regard to Fawad Khan Pathan there is more than sufficient evidence on record to show that the prosecution had proved its case against him beyond a reasonable doubt but with regard to the other private respondents she conceded that they had rightly been acquitted by the trial



court by giving them the benefit of the doubt. Furthermore, she did not support the enhancement of sentence from life to death in the case of Fawad Khan Pathan as she was of the view that there was sufficient mitigating evidence to justify the trial court not sentencing him to death.

14. We have heard the learned Counsel for the parties, perused the evidence brought on record alongwith impugned judgment and the relevant law with their able assistance.

15. Turning firstly to appellant Fawad's appeal against conviction. It is settled law that a conviction can be brought home with the evidence of one eye witness alone without corroboration if he is reliable, trust worthy and confidence inspiring. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 S C M R 1857) where it was held at P.1860 at Para 6 as under:

"6. It is true that there is only ocular testimony of P.W. 4 Mst. Khatun Bibi corroborated by medical evidence, P.W. 6 Dr. Muhammad Sarfraz Sial. The fact that there is only ocular testimony of one P.W. which is unimpeachable and confidence-inspiring corroborated by medical evidence would be sufficient to base conviction. **It be noted that this Court has time and again held that the rule of corroboration is rule of abundant caution and not a mandatory rule to be applied invariably in each case rather this is settled principle that if the Court is satisfied about the truthfulness of direct evidence, the requirement of corroborative evidence would not be of much significance in that, as it may as in the present case eye-witness account which is unimpeachable and confidence-inspiring character and is corroborated by medical evidence**". (bold added)

16. In this case we find the complainant's evidence to be confidence inspiring and importantly is corroborated by two other eye witnesses who are not chance witnesses but natural witnesses who have not been shattered let alone damaged on cross examination and saw the appellant shoot deceased Nadeem Arshad with a pistol.

17. With regard to interested witnesses based on the evidence before us we do not consider this to be of much, if any, relevance and in this respect reference is made to the cases of **Muhammad Ehsan (Supra) Naik Muhammad alias Naika and another v. The State** (2007 S C M R 1639) and **Ameer Ali V State** (1999 MLD 758 (Lahore). This is more so since no animus or enmity has been shown towards/against the appellant by any of the P.Ws.



18. It is true that there are some discrepancies/contradictions in the evidence of some PW's however we consider such discrepancies/contradictions to be of only a minor nature and when considered against the totality of the evidence to be of little, if any, significance in the context of this case. In this respect reference may be made to the cases of **Zakir Khan & others v. The State** (1995 SCMR 1793) and **Ameer Ali V State** (1999 MLD 758 (Lahore)).

19. Furthermore, this is a day light incident; that there is no doubt from the evidence that this incident took place; there is no case of mistaken identity; there was no unreasonable delay in filing the F.I.R. and whatever minor delay there was has been adequately explained by the complainant who had to take his injured father to hospital before registering the F.I.R. and as such is not fatal to the prosecution's case and in this respect reliance is placed on **Bukhti-Harem V Sabir** (2016 P.Cr.LJ 1408) and **Roshan Ali Solanghi V State** (MLD 2017 560); that the appellant was both nominated and given a specific role in the F.I.R.; that the appellant was present at the scene; that the recovery of the pistol was made from the appellant along with the CNIC of the deceased Nadeem; that 4 pistol empties were found at the scene which according to the FSL report were fired from the pistol recovered from the appellant; that according to the eye witnesses whose evidence, as mentioned earlier, we consider both reliable and corroborative the appellant Fawad shot the complainants brother Nadeem with the recovered pistol which finds support from the medical report and other evidence on record; that the chemical analysis also proved positive; that there was a motive for the murder namely dispute over the cutting of the complainants banana's by Fawad and Shezad's sons for which a faisla had already been fixed for the day of the incident; that the S.161 statements of the PW's were taken shortly after the incident and that there was no material improvement in their evidence before the trial court; that the appellant and the co-accused attempted to make out a counter case by lodging an F.I.R. against the complainants party but tellingly when this was disposed of by the magistrate in "C" class no attempts were made to appeal this decision by the appellant or any of the co-accused; during the course of his arguments before this court the appellant has now narrated yet another new defense namely that of alibi however this was never raised at his trial, is contrary to his S.342 statement and no evidence was brought on record in support of his alibi;



that in our view the prosecution evidence is mainly consistent in all respects with only a few minor contradictions; that the prosecution story and evidence adduced by the prosecution, which has not been damaged let alone shattered during cross examination, in our view reflects the true occurrence of events.

20. It is a well settled principle of criminal law that it is for the prosecution to prove its case against the accused beyond a shadow of a doubt and if there is any doubt in the prosecutions case the benefit of such doubt, as set out in the case of **Tariq Pervez v. The State** (1995 SCMR 1345) must go to the appellant as of right as opposed to concession. However in considering this aspect of the case we are also guided by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

21. In the recent supreme Court case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12<sup>th</sup> April 2017 the Hon'ble supreme Court in respect of the benefit of doubt held as under at Para 20:

"Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of **Riaz Masih @ Mithoo v. The State** (NLR 1995 Crl. 694)."

22. In this case however when the evidence is read in totality there would be no doubt in a reasonable and prudent person's mind that the appellant was guilty of the offense for which he has been charged not with standing the few minor contradictions in the evidence of the PW's which even otherwise are not fatal to the prosecutions case.

23. In our view the evidence of the key PW's on a whole is reliable, trustworthy and confidence inspiring none of whom were seriously damaged, if at all, during cross examination. Such evidence in our view also represents a continuous chain of evidence from the time of the crime



connecting the appellant to the crime especially when the medical, ballistic and chemical evidence is taken into account. We also note that all the issues raised by the appellant have already been fully dealt with in the impugned judgment in a very detailed and meticulous manner by reference to the evidence and the relevant law.

24. As such the appeal against conviction by appellant Fawad is hereby dismissed.

25. With regard to the enhancement of sentence from life imprisonment to death it is true that the only mitigating factor mentioned in the impugned judgment to justify this is the appellants advanced age being 56. We do not find this reason to be sufficient mitigation to not impose the death sentence even when coupled with the submission of the appellant that he was not a habitual offender which in our view can hardly be considered as a mitigating factor in a murder case. However, when considering mitigating factors we have attempted to take a holistic approach by weighing all the potential factors and when taken together seeing if they may amount to some mitigation. Namely, it appears that the appellant is now about 63 years of age; that he has already spent approximately 8 years in jail; that the complainant's father came armed to the scene and thus the circumstances were confrontational; that it was not a frenzied brutal attack by the appellant in that he fired only a few bullets at the complainant's brother and none at his father (who was also killed during the incident by other co-accused) or any one else in the complainants party and thus considering all the above factors when taken together and the principle that justice should also be tempered with mercy we hereby dismiss the criminal revision for enhancement of appellants Fawad's sentence from life to death and leave the sentence as set out in the impugned judgment in tact.

26. Turning to the appeal against acquittal of the co-accused. The parameters for an appeal against acquittal to succeed are much narrower than in the case of an appeal against conviction. It is settled law that judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous as held by the Honorable 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 Honourable Supreme Court of Pakistan 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:

**Bashir Ahmed v. Fida Hussain and 3 others** (2010 SCMR 495), **Noor Mali Khan v. Mir Shah Jehan and another** (2005 PCr.LJ 352), **Imtiaz Asad v. Zain-ul-Abidin and another** (2005 PCr.LJ 393), **Rashid Ahmed v. Muhammad Nawaz and others** (2006 SCMR 1152), **Barkat Ali v. Shaukat Ali and others** (2004 SCMR 249), **Mulazim Hussain v. The State and another** (2010 PCr.LJ 926), **Muhammad Tasweer v. Hafiz Zulkarnain and 02 others** (PLD 2009 SC 53), **Farhat Azeem v. Asmat Ullah and 6 others** (2008 SCMR 1285), **Rehmat Shah and 2 others v. Amir Gul and 3 others** (1995 SCMR 139), **The State v. Muhammad Sharif and 3 others** (1995 SCMR 635), **Ayaz Ahmed and another v. Dr. Nazir Ahmed and another** (2003 PCr. LJ 1935), **Muhammad Aslam v. Muhammad Zafar and 2 others** (PLD 1992 SC 1), **Allah Bakhsh and another v. Ghulam Rasool and 4 others** (1999 SCMR 223), **Najaf Saleem v. Lady Dr. Tasneem and others** (2004 YLR 407), **Agha Wazir Abbas and others v. The State and others** (2005 SCMR 1175), **Mukhtar Ahmed v. The State** (1994 SCMR 2311), **Rahimullah Jan v. Kashif and another** (PLD 2008 SC 298), **Khan v. Sajjad and 2 others** (2004 SCMR 215), **Shafique Ahmad v. Muhammad Ramzan and another** (1995 SCMR 855), **The State v. Abdul Ghaffar** (1996 SCMR 678) and **Mst. Saira Bibi v. Muhammad Asif and others** (2009 SCMR 946).

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 added)

27. As discussed earlier in this judgment, an accused is also entitled to the benefit of the doubt.
28. In our view, although there may be some evidence against some of the co-accused for their involvement in the complainants father's murder keeping in view that the PW's are not fully corroborative in this respect, the extremely narrow scope of appeals against acquittal as mentioned above and the fact that the co-accused are entitled to the benefit of the doubt and the double presumption of innocence having again reviewed the evidence against the co-accused on balance we consider that the co-accused are entitled to the benefit of the doubt and that the impugned judgment has rightly acquitted them on this basis and as such the appeal against their acquittal is dismissed.
29. For what has been discussed above, we are of the considered view that the impugned judgment is based upon valid and sound reasons, is entirely in consonance with the law laid down by the Honourable Supreme Court of Pakistan and there is no legal infirmity in the same. Resultantly, the Criminal Appeal No.D-47/2016, Cr. Rev. Application No.D-40/2016 and Cr. Acq. A. No.D-06 of 2016 are without merit and the same were dismissed in open Court today by short order, which reads as under:-



"Parties' counsel have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, Cr. Appeal No.D-47 of 2016, Cr. Rev. A. No.D-40 of 2016 and Cr. Acq. A. No.D-06 of 2016 are dismissed alongwith the listed applications."