JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Criminal Appeal No. 167/2016

Muhammad Jehangir
Versus
The State & others

Appellant by:	Mr. Aamir Azad, Advocate
Respondents 2 & 3 by:	Raja Iftikhar Ahmad Advocate along with respondents No.2 & 3.
State by:	Mr. Zohaib Hassan Gondal, State Counsel alongwith Muhammad Mateen Sub-Inspector.
Date of Hearing:	19.08.2020

Ghulam Azam Qambrani, J.: This appeal has been filed against the impugned judgment dated 29.07.2016, passed by the learned Judicial Magistrate, Section 30, Islamabad- East, in case F.I.R 375 dated 17.12.2014, under Sections 324,337-AII, 34 PPC registered at Police Station Lohi Bher, Islamabad, whereby respondents No. 2 & 3 were acquitted.

2. Briefly stated facts of the case as narrated by the complainant, Muhammad Jahangir are that his brother Muhammad Munir went to Pakistan Korang Town for supply of milk. The complainant also departed for cattle market Rawat alongwith Muhammad Sagheer son of Muhammad Munir, when they reached near U-turn, Lohi Bher link road Farash Rajgan, Muhammad Munir was on "*kachha"* passage towards Pakistan Korang town and at about 6: 30 AM, accused Talib and Khalid sons of Meharban Khan came in the way. Talib was armed with 7-MM pistol while Khalid had a danda with him, they stopped Muhammad Munir and Khalid gave lalkara, Talib made three straight fires with the intention of committing murder and Muhammad Munir received two fires shots on his head while third fire was missed, but Muhammad Munir was luckily saved. The motive behind the occurrence was previous civil

litigation between the parties, hence, the above said F.I.R was lodged.

3. After registration of F.I.R, the investigation was completed and report under Section 173 Cr.P.C was submitted. Formal charge was framed against the accused/ respondents on 30.05.2015 to which they pleaded not guilty and claimed trial. Therefore, the prosecution evidence was summoned. In order to prove the case, prosecution examined the following witnesses;-

(i)	PW.1	Muhammad Jahangir s/o Faiz Alam,
(ii)	PW.2	Muhammad Munir s/o Faiz Alam,
(iii)	PW.3	Tanvir Akhtar Malik, CMO, Polyclinic, Islamabad,
(iv)	PW.4	Muhammad Sagheer s/o Muhammad Munir,
(v)	PW.5	Akhtar Zaman ASI,
(vi)	PW.6	Muhammad Ishaq SI.

4. Statements of the accused/ respondents No. 2 & 3 under Section 342 Cr.P.C. were recorded, wherein all the incriminating evidence recorded in their presence was put to them. They claimed innocence, however they deposed on oath as their own witness as per Section 340 (2) Cr.P.C. They opted to produce defence evidence and produced Talib Hussain DW-1, Khaliq Dad alias Khalid as DW.2, Abdul Ghafoor as DW.3, Muhammad Mushtaq Khan as DW.4 and Raja Mubarik Hussain as DW.5 as their witnesses. In reply to a question "*why the case has been registered against you and why the prosecution witnesses deposed against you*", the accused/ respondent No.3 Khaliq Dad replied as under.-

> *" I am innocent and none of the witness provided any cogent evidence against me which could connect us with the commission of the alleged offence. PWs 1,2 & 4 are related interse close with each other having strong motive to falsely involved me in this case. Delay in lodging the FIR smacked of deliberation, concoction to rope us in this case. I was not even present at the place of alleged occurrence, rather I was present at my home which has been confirmed by twelve persons and the PW.6 (I.O) has got exhibited the affidavits of said persons as Ex.PH/1 to PH/12. When I was not even present at the place of occurrence, possession of alleged weapon (Danda) and my association with co-*

accused does not arise at all. There existed civil dispute between the parties and when the same were decided in our favour, the complainant dragged us in the instant false and frivolous criminal litigation with deliberation and consultation of the police officials. Even otherwise the prosecution evidence could not connect me in their deposition as they not correspond to each other as record incident had not took place in the manners as claimed by the prosecution. Time of occurrence and time of arrival of police at the place of occurrence did not conform to the medical evidence or to the contents of FIR. "

In reply to a question "*why the case has been registered against you and why the prosecution witnesses deposed against you*", the accused/ respondent No.2, Talib Hussain replied as under.-

" I am innocent and none of the witness provided any cogent evidence against me which could connect us with the commission of the alleged offence. PWs 1,2 & 4 are related interse close with each other having strong motive to falsely involved me in this case. Delay in lodging the FIR smacked of deliberation, concoction to rope us in this case. I was not even present at the place of alleged occurrence, I am a security guard, I remained on duty from 7.00 pm on 16.12.2014 to 7.00 am on 17.12.2014, which has been confirmed by twelve persons including my colleagues and the PW.6 (I.O) has got exhibited the affidavits of said persons as Ex.PH/1 to PH/12. When I was not even present at the place of occurrence, possession of alleged weapon (Danda) and my association with co-accused does not arise at all. There existed civil dispute between the parties and when the same were decided in our favour, the complainant dragged us in the instant false and frivolous criminal litigation with deliberation and consultation of the police officials. Even otherwise the prosecution evidence could not connect me in their deposition as they not correspond to each other as record incident had not took place in the manners as claimed by the prosecution. Time of occurrence and time of arrival of police at the place of occurrence did not conform to the medical evidence or to the contents of FIR. "

5. After recording evidence and hearing arguments of the learned counsels for the parties, the learned Judicial Magistrate

Section 30, Islamabad (East), passed impugned judgment, dated 29.07.2016, hence this appeal.

6. The learned counsel for the appellant has contended that the impugned judgment dated 29.07.2016 passed by the learned Trial Court is illegal, against the facts and manifestly wrong; that the judgment passed by the learned Trial Court is perverse and arbitrary. Further contended that sufficient evidence is available against the accused persons to connect them with the alleged offence. Next contended that accused are nominated in the F.I.R, it is a broad day occurrence; that there are no contradictions in the statements of the PWs; that two empties of bullets were recovered from the spot. Lastly prayed for setting aside the impugned judgment.

7. Conversely, learned counsel for the accused/ respondents opposed the contentions raised by the learned counsel for the appellant contending that it was an unseen occurrence; that civil litigation were pending between the parties, which has been decided in their favour; therefore, just to pressurize them, self-inflicted wounds have been shown; that no pistol was recovered from them; that the empties, which were allegedly recovered from the place of occurrence were also not sent to the laboratory for their examination. Further contended that the "*Chaadar"* Ex.PC was admittedly not stained with blood and was not in a sealed parcel condition; that they have been falsely implicated in this case; they are innocent; that nothing is on the record from which it can be established that the respondents/ accused committed any offence and the learned trial Court has rightly acquitted the respondents/ accused. Learned State Counsel submitted that Ex.PJ is not part of record; that admittedly the empties were not sent to the Laboratory; that the recovery has not been effected from the accused/ respondents.

8. I have heard the arguments of learned counsel for the parties and have perused the material available on record.

9. The case of the appellant is that his real brother Muhammad Munir went to Pakistan Korang Town for supply of milk, whereas he also departed for cattle market alongwith Muhammad Sagheer son of Muhammad Munir, and when they reached near U-turn, Lohi Bher link road Farash Rajgan, Muhammad Munir was on "*kachha"* passage towards Pakistan Korang town and at about 6: 30 AM, Talib and Khalid sons of Meharban Khan, Talib was armed with 7-MM pistol while Khalid had a danda with him, they stopped Muhammad Munir and Khalid gave lalkara, Talib made three straight fires with intention to commit murder of Muhammad Munir, who received two fires shots on his head while third fire was missed, but Muhammad Munir was luckily saved. The motive behind the occurrence was previous civil litigation between the parties, hence, the above said F.I.R was lodged.

10. Muhammad Jahangir complainant while appearing as PW.1 deposed that on 17.12.2014, he and Muhammad Sagheer were going towards cattle market, whereas his brother Muhammad Munir who deals with the business of selling milk, was going ahead of them. They were waiting for the taxi at U-turn of Lohi Bher, whereas his brother Munir was going towards Pakistan Town. His brother Muhammad Munir was intercepted by the accused persons Khalid and Talib at 6:30 am; Talib made straight fire at his brother, which hit him on his head, who fell down and that he shifted his brother to Polyclinic Hospital; he further deposed that in his presence the police took into possession two empties of 7mm and one blood stained *"Chaadar"* from the place of occurrence. In his cross-examination, he admitted that civil litigation is pending between the parties; Muhammad Munir while appearing as PW-2 deposed that on 17.12.2014, at the U-turn of Lohi Bher at about 06:30am Khalid and Talib while armed with 7mm rifle and danda, respectively came in front of him and Talib gave three straight fires at him, two fires hit him on his head, whereas one fire was missed and that this occurrence was seen by his brother Jahangir and son Saghir, who took him to Poly Clinic hospital in a vehicle; that the

place of occurrence is 20-25 feet away from the main road and 10-15 feet away from the U-turn. Dr. Tanveer Afsar Malik while appearing as PW-3 deposed that the injured Muhammad Munir was taken to hospital by Mir Khan Pathan. This statement negates the story mentioned by PW-1 & 2 that they took Muhammad Munir injured to the polyclinic hospital. The names of Muhammad Jahangir and Muhammad Saghir PWs, brother and son of the injured Muhammad Munir are also not mention in the relevant column of medico legal report Ex.PE, whereas the name of Mir Khan Pathan is mentioned there. Further the said Mir Khan Pathan was also not associated during the investigation, nor he was produced as a witness by the complainant. More so, PW-1 & PW-2 have not mentioned anything about the said Mir Khan Pathan. The absence of the Muhammad Jahangir and Muhammad Saghir PWs at the hospital is also belied by the statement of PW-3, who deposed that no close relative of the injured was accompanying him. Both PW- 1 & 2 failed to show as to why they were going to cattle market early in the morning. As per statements of PW-1 & 4, the eye witness, they were standing approximately 20-25 feet away from the place of occurrence and they have been watching the whole occurrence of raising lalkara by Khalid and making fire by Talib/ accused. It is very strange that both these PWs did not come forward to rescue the injured Muhammad Munir from a distance of 20-25 fe/'et. All these facts and circumstances, *prima facie* make it clear that both the eyewitness were not present at the place of occurrence, therefore, their testimonies are not trust worthy. In this regard I am fortified by the law laid down in ***Zulfiqar Ali Vs. Imtiaz and others*** (2019 SCMR 1315) wherein it has been held as under:-

> *"According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB.*

> *There is a reference to M/s. Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled."*

11. As per Ex.PE, there was graze wound exposed, skin flap over scalpe, two lenear lacerations approximately 8-10 cm with no active bleeding. This Medico Legal Report was further challenged by the accused persons upon which a medical board was constituted. In the opinion of the medical board, Ex.PJ, out of two injuries, one wound may be due to fire arm injury while the second wound's reason cannot be explained as fire arm graze wound only causes one wound, not two wounds, which makes the Medico Legal Report of PW-3 doubtful.

12. The story of the prosecution also become doubtful when PW-3 observed two lenear lacerations at the skull of the injured, which shows that two fire shots kissed the skull of the injured whereas it is not possible that the two fire shots hit at the same part of the body of the injured, which resulted into graze wounds or lenear lacerations. The same is only possible if the fire shots are made spontaneously without any gap. Therefore, it can be said that the injuries received by the PW-2 Muhammad Munir are result of friendly hand, which makes the prosecution case doubtful.

13. On the other hand, the accused failed to prove the plea of *alibi* taken by them in their defence as DW-1 failed to state about the location of the shop and also failed to produce any document to

prove that he was an employee of any security company. DW-3 & DW-4 also could not utter a single word regarding the actual place of duty of Talib Hussain/ accused. Similarly, the stance of accused Khaliq Dad that he was present at his house is also not proved as during the course of cross-examination, he stated that he was sleeping at his home and got woke up at about 07:30am whereas, the witness Raja Mubarak Hussain DW-5 deposed during cross-examination that he saw Khaliq Dad in the courtyard of house at 06:30 am. All these things show that the defence have failed to establish the plea of *alibi*.

14. Keeping aside the above, the general principle in criminal jurisprudence is that the prosecution is to prove its case beyond doubt and this burden does not shift from prosecution even if the accused person takes up any particular plea and fails in it. Keeping in view all these facts and circumstances, the learned trial Court has rightly held that the story of occurrence as narrated and deposed by the eyewitnesses, is full of doubts and it cannot be accepted by a judicial mind and that the opinion of medical board makes the Medico Legal Report of Dr. Muhammad Tanveer Afsar Malik PW-3 doubtful. Both the eye-witnesses are also discrepant on the manner and mode of their arrival at the crime scene. In the totality of circumstances, prosecution case cannot be viewed as entirely free from doubts. Hence, extending the benefit of doubt, the accused persons were acquitted in the case through a well-reasoned judgment. In this regard, reliance is placed upon the case reported as *"Muhammad Karim Vs. The State*"(**2009 SCMR 230**) has held as under:-

> *"in case of doubt, the benefit thereof must be given to convict as a matter of right and not as a matter of grace, for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts, single circumstance creating reasonable doubt in a prudent mind about the guilt of convict makes him entitled to benefit, not as matter of grace and concessions, but as matter of right."*

In the case reported as ***Muhammad Imran Vs. The State*** (2020 SCMR 857), it has been held as under:-

> "*It is by now well settled that benefit of a single circumstance, deducible from the record, intriguing upon the integrity of prosecution case, is to be extended to the accused without reservation; the case is fraught with many. It would be unsafe to maintain the conviction. Criminal Petition is converted into appeal and allowed. The appellant is acquitted from the charge; he shall be released forthwith, if not required to be detained in any other case."*

In the case of "*Ghulam Akbar and another Vs. The State*" (**2008 SCMR 1064**), it has been held as under:-

> *"It is cardinal principle of criminal jurisprudence that the burden of proving the case beyond doubt against the convict securely lied upon the prosecution and it did not shift. Similarly, the presumption and probabilities, however, strong may be, could not take the shape of proof."*

In the case reported as *"Sanaullah Vs. The State through Prosecutor General"* **(2015 P.Cr.L.J. 382 (Balochistan)**), it has been held that as under:-

> *"Rule of prudence, stipulated that prosecution had to prove its case beyond the shadow of doubt. Convict had not to prove his innocence, until and unless proved guilty. Benefit of slightest doubt would necessarily be extended in favour of convict and not otherwise."*

15. 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 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. The Court of appeal should not interfere simply for the reason that on 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.

16. It has been held in "*The State v. Muhammad Sharif"* **(1995 SCMR 635)** and *"Muhammad Ijaz Ahmad v. Raja Fahim Afzal and 2 others*" **(1998 SCMR 1281)** as under:-

> "the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below."

This Honourable Supreme Court of Pakistan in "*Ghulam Sikandar and another v. Mamaraz Khan and others"* **(PLD 1985 SC 11)** has authoritatively ruled that whole examining defects about order of acquittal, substantial weight should be given to the findings of subordinate Courts whereby accused are exonerated from committing the crime. Obviously approach for dealing with appeal against, conviction would be different and distinguishable from appeal against acquittal, because presumption of double innocence is attached in the later case.

17. It is 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, as presumption of double innocence is attached, in the latter case Reliance in this regard is placed upon the case of "*Inayatullah Butt v. Muhammad Javed and 2 others"* [**PLD 2003 SC 562**]. Until and unless the judgment of the trial Court is perverse, completely illegal and on perusal of evidence, no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, the Court will not exercise jurisdiction under section 417, Cr.P.C.

18. The learned counsel for the appellant has failed to advance any ground to justify the setting aside of the acquittal judgment. There is no misreading or non-reading of evidence nor the findings of the learned trial Court are patently illegal. The findings of acquittal, by no stretch of imagination, can be declared as perverse, shocking, alarming or suffering from errors of jurisdiction and misreading or non-reading of evidence.

19. For what has been discussed above, the instant appeal having no force is hereby **dismissed**.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 7th day of September, 2020.

JUDGE

"Approved for reporting."

S.Akhtar