

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CRIMINAL APPEAL NO. 303 OF 2019

THE STATE

VERSUS

MUHAMMAD AYAZ

Appellant by : Mr. Ishtiaq Ahmed, State counsel.
Mr. Fakhar Abbas, S.I.

Respondent by : Mr. Faisal Bin Khurshid, Advocate.
Respondent in person.

Date of hearing : 10.03.2022.

SAMAN RAFAT IMTIAZ, J.:- The present Criminal Appeal has been filed by the State through the Advocate General, Islamabad Capital Territory (“ICT”) to assail the Judgment dated 03.05.2019 (“**Impugned Judgment**”) passed by the learned Additional Sessions Judge/Judge MCTC, East-Islamabad (“**Trial Court**”), whereby the Respondent [Muhammad Ayaz] has been acquitted of the charge framed pursuant to FIR No.251/14 dated 10.09.2014 registered for the offences under Sections 302 and 34, P.P.C., with the Police Station Lohi Bher, Islamabad.

2. Facts gleaned from the memo of appeal as well as from the contents of the FIR are that a criminal case was registered at the behest of the Complainant, Muhammad Shoaib s/o Muhammad Ishaque, who alleged that he is a resident of Aurangabad, Tehsil Jand, District Attock and that he along with his brother Muhammad Inayat runs a shuttering store at National Police Foundation on the main double road, opposite Wagon Stop No. 136. On 10.09.2014, at about 6.30 p.m., he and his brother were at the said store when his said brother went to offer prayers at the nearby mosque. When the brother arrived at Saqi Motor’s parking, the Respondent Muhammad Ayaz along with the co-accused, Haq Nawaz s/o Muhammad Aijaz, residents of Aurangabad, Tehsil Jand, District Attock appeared on a motorcycle and that Haq Nawaz, in front of the Complainant, shot the Complainant’s brother directly with his pistol, which hit him on his right shoulder. Whereas, the Respondent fired directly at the Complainant’s brother twice with his pistol; one of which hit him on his left ear, as a result of which

Complainant's brother fell to the ground. As the Complainant rushed toward his brother, the Respondent and Haq Nawaz fled from the scene. By the time the Complainant reached the brother, he had succumbed to his injuries and died on the spot. The motive behind the occurrence was stated to be that the Respondent suspected that the Complainant's brother was having an affair with the Respondent's sister due to which the Respondent had tried to kill the Complainant's brother in their village once before.

3. The co-accused Haq Nawaz s/o Aijaz Khan was murdered during the pendency of the trial, hence the charge against him stood abated on 29.05.2018.

4. A preliminary objection was raised by the learned counsel for the Respondent regarding maintainability of the instant appeal on the ground that it has not been filed by the Public Prosecutor. It has been argued that it is the Public Prosecutor who is authorized under Section 417(1), Code of Criminal Procedure, 1898 ("Cr.P.C.") to present an appeal to the High Court from an original or an appellate order of acquittal passed by any court other than a High Court. It has been pointed out, that instead of the Public Prosecutor the instant appeal has been filed by the Advocate General, ICT, who according to the learned counsel for the Respondent has no power to file the appeal under Section 417(1) Cr.P.C. In support of the aforementioned objection the learned counsel for the Respondent relied upon *State through Advocate General, Sindh Vs. Hanif Ahmed and others*, 1994 SCMR 749 and *The State Vs. Nooro alias Noor Muhammad*, 1998 PCr.LJ 35 (Karachi).

5. In response to such objection the learned State counsel drew our attention to Sanction No.3(31)-Law/2018-771 dated 03.09.2019, whereby the Chief Commissioner, ICT, requested the Advocate General, ICT, to file an appeal against acquittal under Section 417 Cr.P.C., against the judgment passed by Raja Asif Mehmood, Additional Sessions Judge/Judge MCTC, East, Islamabad dated 03.05.2019 whereby learned Judge acquitted the Respondents in the case of FIR No.251 dated 10.09.2014 under Sections 302/34, P.P.C., Police Station Lohi Bher, Islamabad.

6. Before going further it will be beneficial to reproduce the provisions of Section 417, Cr.P.C.

417. Appeal in case of acquittal: (1) Subject to the provisions of sub-section (4); the

Provincial Government may in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(2-A) A person aggrieved by the order of acquittal passed by any Court-.other than a High Court, may, within thirty days, file an appeal against such order.

(3) No application under sub-section (2) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from: the date of that order,

(4) If, in any case, the application under sub-section (2) for the grant of special leave to appeal from an order of acquittal is refused no appeal from that order of acquittal shall lie under sub-section (1).

7. As may be seen from the above, it is the Provincial Government who directs the Public Prosecutor to present an appeal to the High Court against an acquittal order. In the case of the Islamabad Capital Territory (“ICT”) it is the Chief Commissioner, ICT who exercises the powers of the Provincial Government by virtue of the Islamabad Capital Territory (Administration) Order, 1980. Therefore, to such extent the Chief Commissioner, ICT, who has issued the Sanction dated 03.09.2019 was authorized to give direction for purposes of filing of appeal against acquittal under Section 417(1) Cr.P.C. However, the question arises whether direction could have been given to the Advocate General, ICT for such purpose when the bare perusal of the provision shows that it is the Public Prosecutor who may be directed by the Provincial Government for the said purpose.

8. The question was dealt with by a learned Division Bench of the Honourable High Court of Sindh at Karachi in the case of *The State Vs. Nooro alias Noor Muhammad*, 1998 PCr.LJ 35 (Karachi) wherein the appeal against acquittal was presented by an Assistant Attorney General, Sindh, under instructions of the Advocate General, Sindh, who according to Notification No.U.O.OP:(7)(14)/85/320 dated 26th of May, 1985 issued by the Secretary of Government of Sindh Law Department was sanctioned to prefer an appeal by the orders of the Governor. The competency of such appeal was questioned at the very outset on the ground that the Assistant Advocate General was not a Public Prosecutor within the meaning of Cr.P.C. The Honourable Sindh High Court examined the definition of the terms “Public Prosecutor” and “Advocate General” as given in clause (a) & (t) of sub-section (1) of Section 4 of Cr.P.C., which are reproduced as follows:

(a) **Advocate General:-** 'Advocate General' includes also a government Advocate or where there is no Advocate-General or Government Advocate such Officer as the Provincial Government may from time to time appoint in this behalf.

(t) **'Public Prosecutor'** means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting an prosecution on behalf of the State in any High Court in the exercise of its original criminal jurisdiction.

9. For ease of reference, Section 492, Cr.P.C., is also reproduced hereunder:

492. Power to appoint Public Prosecutors: (1) The Provincial Government, may appoint, generally, or in any case, or for; any. specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) Officer-in-charge of prosecution in the district may, in the absence of the Public Prosecutor, or where no Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Provincial Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.

10. The Honourable Sindh High Court observed that the definitions make it clear that the purpose and intent of the two are distinct from one another and nowhere has it been provided in the Cr.P.C., that an Advocate General will also be the Public Prosecutor. The Honourable Sindh High Court opined that had the intention of the law maker been otherwise there was no reason for the two terms to be defined separately in the Cr.P.C. In view of the above the court held that the legal requirement under Section 417, Cr.P.C., is therefore, that the appeal should be presented to the High Court by Public Prosecutor and for such purpose the Public Prosecutor should alone be directed to present such an appeal.

11. With regard to the sanction to the Advocate General by the Government, the Honourable Sindh High Court held that merely by such sanction it cannot be assumed that the Advocate General had Ex-Officio been appointed as Public Prosecutor. For all the foregoing reasons, the Honourable Sindh High Court dismissed the appeal against acquittal as having been filed by an incompetent person. The Honourable Sindh High Court in reaching the above decision had relied upon the *State through Advocate General, Sindh Vs. Hanif Ahmed and others*, 1994 SCMR 749.

12. We have also examined the said judgment of the Honourable Supreme Court wherein the Additional Advocate General in support of an acquittal filed by the Assistant Advocate General relied upon a Notification dated 25.10.1960 issued by the Governor of the erstwhile West Pakistan in exercise of powers conferred by Section 492 (1) Cr.P.C. whereby he appointed the Additional Advocate General

West Pakistan, Lahore as the Public Prosecutor generally for West Pakistan. The Apex Court held that even if it were assumed that the above Notification continued to operate even after the dissolution of West Pakistan it does not improve the case of the appellant as the acquittal appeals in such case were not filed by the Additional Advocate General but was filed by the Assistant Advocate General. The Honourable Supreme Court ruled that firstly there is no delegation of authority by the Additional Advocate General in the favour of Assistant Advocate General and even otherwise such authority could not be delegated in view of the maxim *delegatus non potest the delegare*. The appeals in such circumstances were dismissed.

13. We have also come across in our research, the case of *The State Vs. Sher Bahadar*, 2004 MLD 267, wherein the learned Division Bench of the Honourable Peshawar High Court considered a similar objection with regard to an acquittal appeal filed by the Advocate General after sanction from the Provincial Government. In such case, the respective learned Advocate General placed on file a Notification No. 1002-LD dated 23.04.1937 which read as under:-

“In supersession of this Government Notification No. 1087-HA, dated the 29th April, 1932, and in exercise of the powers conferred by section 492 of the Code of Criminal Procedure, 1898, His Excellency the Governor of the North West Frontier Province is pleased to appoint the Advocate General, North-West Frontier Province to be Public Prosecutor North-West Frontier Province, generally for the North-West Frontier Province, from the date of his appointment.”
[Emphasis added].

14. After due analysis of the relevant provisions of the Government of India Act 1935, the Independence Act 1947, the Constitution of the Islamic Republic of Pakistan 1956, the Constitution of the Islamic Republic of Pakistan 1962, and the Constitution of the Islamic Republic of Pakistan 1973, providing continuity of laws until repeal, the Honourable Peshawar High Court concluded that the said Notification was still in force as it had neither been repealed nor substituted. The Honourable Peshawar High Court considered the case of *State through Advocate General, Sindh Vs. Hanif Ahmed and others*, 1994 SCMR 749 and *The State Vs. Nooro alias Noor Muhammad*, 1998 PCr.LJ 35 (Karachi) and held that in all such cases the acquittal appeals were filed by officers who had not been appointed as Public Prosecutor under Section 492 Cr.P.C., whereas the appeal before the Honourable Peshawar High Court had been filed by the Advocate General N.W.F.P., who was duly appointed as Public Prosecutor under the aforementioned Notification thus the objection of the learned counsel for the respondent regarding competency of the appeal was overruled.

15. We have carefully considered the aforementioned case law which makes it abundantly clear that only a Public Prosecutor can be directed by the Provincial Government to file an appeal against an acquittal order under Section 417(1) Cr.P.C and therefore, it is only the Public Prosecutor who can prefer an appeal thereunder. In the case of ICT it is the Chief Commissioner, ICT, who acts in place of the Provincial Government. Therefore, the Chief Commissioner, ICT is certainly authorized to direct the Public Prosecutor to file an acquittal appeal under Section 417(1) Cr.P.C., however, such direction can under no circumstance be given to anyone other than the Public Prosecutor. A direction / sanction given by the Chief Commissioner, ICT to anyone other than a Public Prosecutor will not clothe such person with the power requisite for purposes of filing an appeal under Section 417(1) Cr.P.C. unless such person has been appointed as Public Prosecutor pursuant to Section 492, Cr.P.C., as had been done in the case of *The State Vs. Sher Bahadar*, 2004 MLD 267.

16. In the case before us, the State has failed to place before this Court any notification by way of which the Advocate General ICT was appointed as Public Prosecutor for ICT pursuant to Section 492, Cr.P.C. In the absence thereof, the Sanction dated 03.09.2019 directing the Advocate General ICT, to file the present appeal is a nullity in the eyes of the law as the Chief Commissioner, ICT had no authority to give such direction to anyone other than the Public Prosecutor. In view of the above analysis, the objection raised by the Respondent's counsel regarding maintainability is upheld

17. Without prejudice to the foregoing, no case is made out even otherwise on merits of the case. The Impugned Judgment shows that the learned Trial court acquitted the Respondent mainly due to the fact that the prosecution failed to corroborate the solitary statement of the Complainant through cogent, reasonable, reliable and confidence inspiring evidence particularly in view of the fact that the Complainant was an interested and chance witness. The reasons for concluding that the Complainant was a chance witness is that the evidence presented created serious doubts about his presence at the place of occurrence and the benefit of the doubt was given to the Respondent.

18. The first reason for doubting the Complainant's presence at the place of occurrence is the contents of the FIR itself. As per the facts narrated by the

Complainant in the FIR which were reiterated by the Complainant in his Examination-in-Chief, both the Complainant and his deceased brother were present at their shuttering store on 10.09.2014 at about 6.30 p.m., when his brother went to offer prayers at the nearby mosque. It was not stated that the Complainant accompanied his brother to the mosque. Yet the Complainant went on to allege that when the brother arrived at Saqi Motor's parking, the Respondent and Haq Nawaz arrived on a motorcycle and shot the Complainant's brother in front of the Complainant. No explanation as to how he suddenly arrived at the scene is available on the record. Therefore, it is doubtful that the events that allegedly took place after the Complainant's deceased brother left their shop were witnessed by the Complainant.

19. The veracity of the Complainant is also questionable given that he claimed that he has a shuttering store at National Police Foundation whereas PW-6 who claimed to be the Complainant's friend and neighbor stated in his cross examination that the Complainant's business is situated near Fauji Foundation Hospital, Rawalpindi. It was pointed out by the learned counsel for the Respondent that Fauji Foundation Hospital, Rawalpindi is very far from the place of occurrence. Furthermore no shuttering store was identified in the site plan produced as Ex:PD. The Investigating Officer who appeared as PW-9 admitted that he did not interrogate the Complainant about the reason for his presence since there was no shuttering store.

20. Last but not the least, PW-8 who was the Sub-Inspector and duty officer at the relevant time stated in his Examination-in-Chief that a call was made to Rescue 15 at about 6:35 p.m., on 10-09-2014 about a firing incident. He stated further that he visited the spot where dead body of a person was lying in front of the parking area of Saqi Motors and meanwhile the Complainant also reached there. The foregoing testimony indicates that the Complainant was not at the place of occurrence with the body when the Sub-Inspector reached there. PW-8 further revealed in his cross examination that he did not observe any bloodstains on the clothes and hands of the Complainant. Indeed it is unlikely that the Complainant would not have been stained with the deceased brother's blood if he was in fact present at the time of his death and had rushed towards him after he had been shot as mentioned in the FIR.

21. As observed in *Anwar Shamim versus The State*, 2010 SCMR 1791, it is settled law that mere relationship between the witness and the deceased is not enough to discard their evidence. However, Courts are under an obligation to ascertain whether the interested witness should be believed without corroboration. For all the foregoing reasons, we find that the Complainant's presence at the place of occurrence is neither believable nor plausible and as such cannot be relied upon without corroboration.

22. However, no independent witnesses were produced by the prosecution despite the fact that according to the I.O who appeared as PW-8 people had gathered randomly at the place of occurrence who gave him divergent views about the place and distance of firing, thereby indicating that there were independent witnesses available. As noted in *Nadeem alias Nanha alias Billa Sher vs. State*, 2010 SCMR 949 it is a cardinal principle of criminal jurisprudence that any genuine doubt arising out of the circumstances of the case should be extended to the accused as a matter of right and not concession. Under the facts and circumstances of the case, it is difficult to say that the prosecution proved its case beyond a shadow of doubt.

23. In view of the above discussion, we hereby **dismiss** the instant appeal as not having been filed by the competent person under the provision of Section 417(1) Cr.P.C., and also on merits.

(MOHSIN AKHTAR KAYANI)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on 09th June, 2022.

JUDGE

JUDGE

JUNAID

Approved for Reporting
Blue Slip added.