

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

Cr.A.No.29-D/2018

Sarwar Khan

Versus

Abdul Wahab & The State.


JUDGMENT

For appellant: Sheikh Iftikhar-ul-Haq Advocate.

For respondents: Mr. Shah Shujaullah, Advocate for respondent No.1.

Mr. Adnan Ali, Asstt: A.G. for State.

Date of hearing: **28.9.2022.**

 **SHAHID KHAN, J.-** Sarwar Khan, the appellant/complainant, has called in question, acquittal of Abdul Wahab, respondent/accused, through the subject appeal, under Section 417(2-A) Cr.PC, whereof, the learned Sessions Judge, Tank, on conclusion of trial of the respondent/accused, charged in case FIR No.133, dated 15.6.2011, under Sections 302/34 PPC, of police station Mullazai, Tank, recorded acquittal of the accused by extending him the benefit of doubt.

2. The facts, in brief, are that the appellant/complainant Sarwar Khan through an application under Section 22-A(6) Cr.PC sought registration of criminal case against the accused, Abdul



Ghaffar Khan the then SHO police station Mullazai, Tank with his team, including Aslam Khan HC, and Abdul Wahab ATS/FC Police Force, District Tank. It was averred that on 24.5.2011, he alongwith Rafiullah son of Pasham Khan, Azad Khan and Adam Khan sons of Mohibullah had gone to the landed property of his uncle Ghaffar Khan for thrashing wheat crop and had overnight stayed. Early in the next morning, after finishing the work, they were proceeding to their houses. At about sunrise time, they reached near their houses. The local police was present there. The respondent/accused Abdul Wahab and co-accused Abdul Ghaffar Khan and Aslam Khan asked them to 'hands up', at which his nephew Rafiullah tried to run away due to fear. The said three accused started firing at Rafiullah as a result of it, he was hit and died on the spot. Thereafter, the accused took the dead body of Rafiullah alongwith them. The deceased was empty handed and was not required in any criminal case to the local police. The appellant/complainant and L.Rs of deceased Rafiullah, made their every effort for registration of proper criminal case but in vain and left with no option but to approach the learned Ex. Officio Justice of Peace/Sessions Judge, Tank, for appropriate remedy. Application in this regard was floated and accepted vide judgment & order, dated 14.6.2011, resultantly, the above referred FIR was registered.

3. The respondent/accused Abdul Wahab alongwith co-accused Abdul Ghaffar Khan and Aslam Khan were arrested and on completion of investigation, challan was drawn and routed through the relevant prosecution branch followed by sent up for trial.

4. On commencement of trial, copies of the evidence (oral & documentary) delivered to the respondents/accused. The accused were confronted with the statements of allegations through formal charge, they denied the allegations and pleaded not guilty and claimed trial.

5. The prosecution to bring home charge against the accused, recorded the account of 06 witnesses and closed its evidence. At the conclusion of prosecution evidence, the accused were examined under Section 342 Cr.PC. They professed innocence and false implication in the case. However, neither they wished to be examined on Oath as required under Section 340(2) Cr.PC nor wanted to produce evidence in their defence. On conclusion of trial, the learned trial Court/Sessions Judge, Tank, after hearing both the sides, acquitted the respondent/accused Abdul Wahab vide impugned judgment, dated, 22.3.2018.

6. It is worth mentioning that by the same judgment, dated, 22.3.2018, co-accused Abdul Ghaffar Khan and Aslam Khan were convicted under Section

302(b) PPC and sentence for life imprisonment with payment of Rs.5,00,000/- as compensation under Section 544 Cr.PC to the legal heirs of the deceased or in default, thereof, to suffer imprisonment for 06 months.

7. Needless to highlight, the convicted accused approached this Court through an appeal bearing Cr.A.No.13-D/2018 against their conviction & sentence, it was accepted, vide order dated 11.9.2018, on the basis of compromise, and consequently they were acquitted.

8. Arguments heard. Record perused.

9. The version of appellant/complainant is that on 24.5.2011, he alongwith his nephews, Rafiullah son of Pasham Khan, Azad Khan and Adam Khan sons of Mohibullah had gone to the landed property of their uncle Ghaffar Khan for thrashing wheat crop and have overnight stayed there. On the next morning, in the early hours, the threshing process concluded and they were proceeding to their houses. At the fateful time about the sunrise, when they reached near their houses, contingent of the local police was noticed and the respondent/accused Abdul Wahab and convicted co-accused Abdul Ghaffar Khan and Aslam Khan were commanded to 'hands up'. Rafiullah, nephew of the complainant attempted to run away due to fear. The police

party (accused) started firing at Rafiullah, as a result of it; he was hit and died on the spot.

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10. The post-mortem report (Ex.PM) of the deceased speaks of a single entry & exit wound of 1/3" x 1" in diameter on his person. The I.O secured 19 crime empties of 7.62 bore vide recovery memo Ex.PW-6/3 from the scene of occurrence, whereof, at the fateful time, the police party has been shown to be present and reflected in the site plan. During proceedings in application under Section 22-A(6) Cr.PC, submitted by the appellant/complainant before learned Ex. Officio Justice of Peace, the accused had submitted their reply. In para-7 of the said reply, it is averred that the respondent/accused Abdul Wahab was posted in ATS squad, he was having RPG rifle and no firing was made from it. All the arms and ammunition issued to the respondent/accused were correctly deposited in the quarter concerned.

11. Daily diary No.18, dated 25.5.2011, of police station Mullazai, Tank, and statement of Razaullah Moharrir are part & parcel of the case. It reveals that at the relevant time, date and place of occurrence, Abdul Ghaffar Khan SHO (convicted accused), Naqeebullah ASI, Muhammad Aslam HC No.186 (convicted accused), Constable Raees Khan No.88, Constable Zia-ud-Din

No.48, Constable Hikmatullah No.376, Constable Shaukat No.6516, Constable Majaz No.6483 and Driver Hikmatullah No.363, members of police party were present on the scene of occurrence. However, the investigation is silent about the presence of respondent/accused at the fateful time on or around the scene of occurrence. An iota of evidence has neither been collected nor furnished during the trial which could prima facie even remotely speak of the presence of the respondent/accused on or around the scene of occurrence and have direct or indirect nexus with the commission of offence. So much so, name of respondent/accused Abdul Wahab does not find its mention even in the daily diary and on this score alone the Court can safely observe that the prosecution has been failed to substantiate through cogent & worth reliable evidence not only the actual presence of the respondent/accused on or around the scene of occurrence but also his active and due participation in the incident/commission of offence.

12. In the circumstances, the evidence so collected during the investigation followed by furnished during the trial is absolutely silent about the presence of an accused person on or around the scene of occurrence, what to say of his due participation in the commission of offence, loud and clear his due involvement in the incident with specific role and has not been substantiated,

during the trial, the Court is left with no option but to give him the benefit of doubt not as a matter of grace but as a matter of right. For the good reason that benefit of doubt is not a grace but right of the accused and it is not necessary that there should be many circumstances creating doubts, even a single circumstance, creating reasonable doubt in a prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace & concession but as a matter of right. Reference is made to the case "*Muhammad Akram v. State*" (2009 SCMR 230).



13. Even otherwise, the order of acquittal cannot be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is less than the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted,

or the purpose of ascertaining as to whether the accused committed the offence or not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, only then it is a compelling reason for interference.

14. Above all, at the bar, neither any illegality, material irregularity, jurisdictional defect in the impugned judgment of learned trial Court has been highlighted nor substantiated which could call for interference of the Court in the impugned judgment of the learned trial Court. It can safely be observed that the occurrence has not taken place in the mode & manner so alleged and attempted to be presented by the prosecution.

15. Consequently, this appeal having no merit and substance stands dismissed.

Announced.
Dt: 28.9.2022.
Imran/*


JUDGE


JUDGE


30/09

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Shahid Khan