SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:
Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

Criminal Appeal No. 20 of 2016
(Filed on 15.03.2016)

1. Waseem Hussain son,
2. Naseem Akhtar, widow of Muhammad Qayyum,
3. Muhammad Najeeb son of Fateh Alam, caste Jaat, resident of village Sarooh, Tehsil Dudyal, District Mirpur.

…. APPELLANTS

VERSUS

1. Muhammad Rafique son of Ali Ahmed, caste Jaat, resident of Sarooh, Tehsil Dudyal, District Mirpur.

…. RESPONDENT

2. The State through Additional Advocate-General, Mirpur.

…. PROFORMA RESPONDENT

(On appeal from the judgment of the Shariat Court dated 19.01.2016 in Criminal Appeal Nos. 76 and 84 of 2013)

FOR THE APPELLANTS:	Mr. Khalid Rasheed Chaudhary, Advocate.
FOR THE ACCUSED:	Mr. Abdul Majeed Mallick, Advocate.
FOR THE STATE:	Raja Saadat Ali Kiani, Additional Advocate-General.

Date of hearing: 23.11.2016

JUDGMENT:

Raja Saeed Akram Khan, J.— The titled appeal has been directed against the judgment of the Shariat Court dated 19.01.2016, whereby the appeal filed by the accused-respondent, herein, for acquittal, has been accepted while the appeal filed by the complainant for enhancement of the sentence awarded by the trial Court to the accused has been dismissed.

2. The precise facts of the case are that on the complaint lodged by Muhammad Farooq, complainant, an FIR No. 86/92, was registered at Police Station, Dudyal on 09.10.1992. It was reported that today the complainant accompanied by Muhammad Habib, Muhammad Qayyum and Karam Elahi, the residents of Sarooh, while boarding a Tractor went to the land of Muhammad Qayyum on his request for sowing wheat. The said land was leased out by WAPDA to Muhammad Qayyum. After sowing the land, when they were returning to their homes, Muhammad Malik, Muhammad Shafiuqe, Muhammad Rafique, Muhammad Tariq, Muhammad Khalid and Tahir Mehmood, while waylaying attacked them. Muhammad Malik and Muhammad Rafique were armed with 12-bore shotguns; whereas, the rests of the accused were equipped with 30-bore pistols. Muhammad Malik, accused, raised a *lalkara* by directing the

co-accused to kill all of us. Muhammad Malik fired at Muhammad Qayyum which hit him at his left thigh. Soon after that, Muhammad Rafique fired at Muhammad Qayyum with 12-bore gun, which also hit him at his left thigh. Muhammad Qayyum fell on the ground, whereupon, Muhammad Shafique, Tahir and others, armed with Pistols fired at him which hit Muhammad Qayyum on his legs. Karam Elahi tried to rescue the injured, but Muhammad Shafique fired at him with pistol which hit him at neck and arm. Karam Elahi also fell down, thereafter, Muhammad Rafique, accused; inflicted a *butt* blow at his head. The complainant and Muhammad Habib raised hue and cry, whereupon Muhammad Shafique fired at the complainant which missed the target. The complainant and Muhammad Habib save their lives while fleeing away from the scene of occurrence. It was further reported that

Muhammad Qayyum and Karam Elahi are lying on the spot in a critical injured condition. The injured, Muhammad Qayyum later on succumbed to the injuries. The enmity between the parties as stated was the civil litigation over the dispute of the land.

3. After completion of investigation, the *challan* was presented in the Additional District Court of Criminal Jurisdiction, Mirpur on 10.11.1992. All the accused except, Muhammad Rafique absconded. Muhammad Rafique, accused, faced the trial. At the conclusion of the trial, the trial Court vide judgment dated 22.10.2013, while convicting the accused awarded him the sentence of life imprisonment in offence of murder under section 5 of the Islamic Penal Laws. He was further directed to pay a sum of Rs. 10,00,000/- as compensation under section 544-A Cr.P.C., to the legal heirs of the deceased. He was also convicted and

sentenced under section 15 IPL for a sum of Rs. 5,000/- as *Hakumat-e-Adal,* and the benefit under section 382(b) Cr.P.C. was also given to him. Against the judgment of the trial Court dated 22.10.2013, both the parties filed separate appeals before the Shariat Court. In the previous round, the learned Shariat Court vide judgment dated 14.12.2013, while accepting the appeal of the accused set aside the judgment of the trial Court and acquitted him of the charge. On appeal, this Court vide judgment dated 29.05.2015, remanded the case to the Shariat Court to decide the same afresh after hearing the parties and taking into account all the facts and evidence brought on record, in the light of the arguments. The learned Shariat Court after remand of the case heard the arguments and vide impugned judgment dated 19.01.2016, again accepted the appeal filed by the accused, herein, and set-aside the sentence

awarded by the trial Court while acquitting him of the charge. The other appeal filed by the complainant was dismissed, hence this appeal.

4. Mr. Khalid Rashid Chaudhary, Advocate, the learned counsel for the complainant-appellants argued that the learned Shariat Court failed to appreciate the evidence brought on record in a legal manner. He contended that the prosecution succeeded to prove the case beyond reasonable doubt as all the witnesses fully supported the prosecution version and they remained consistent on the material points. He added that one of the eyewitnesses had also sustained the injuries in the occurrence. In this way, the presence of the eyewitnesses at the place of occurrence is beyond any shadow of doubt. He contended that it is a case of direct evidence and when the prosecution succeeded to prove the same through ocular account the other evidence which is only corroborative in

nature, can be ignored. He contended that the learned Shariat Court while discussing the subsequent events passed the acquittal order and ignored the direct ocular evidence. He further contended that the reasoning assigned by the learned Shariat Court for acquittal of the accused is not sustainable in the eye of law as all the prosecution witnesses fully implicated the accused in the offence of murder. It has been proved that at the time of occurrence the accused was armed with firearm weapon and he inflicted the injury on the vital part of the deceased. In continuation of arguments, he submitted that no enmity of the witnesses against the accused has been brought on record which may show the false implication of accused in a murder case. The place, manner and the time of occurrence has not been denied even by the defence side. He maintained that the contradictions pointed out by the learned Shariat

Court are minor in nature which can easily be ignored in presence of overwhelming ocular account. Mere on the ground that criminal cases are found registered against the witnesses; their testimony cannot be discarded especially when no conviction was recorded on the basis of said criminal cases. He added that the matter was thoroughly investigated more than once and the accused was not declared innocent. The seats of injuries have fully been corroborated by the medical evidence; the site-plan also fully corroborates the version of the prosecution but all these facts escaped the notice of the learned Shariat Court while passing the impugned judgment. The learned Shariat Court has not considered the opinion of the doctor and also not appreciated the postmortem report in its true perspective and tried to bring the case in the purview of circumstantial evidence, whereas, it is a case of direct evidence. He contended that

all the PWs and the deceased belong to the same family; therefore, the presence of the PWs at the place of occurrence is very much natural. Moreover, discarding the testimony of the witnesses merely on the ground of relationship is also not warranted under law. He added that the motive is a double edged weapon and admittedly the occurrence took-place due to previous enmity between the parties but the learned Shariat Court has not considered this aspect of the case. He further added that the impugned judgment is liable to be set aside on the ground that no reason whatsoever has been assigned by the Shariat Court while disturbing the well reasoned judgment of the trial Court. The accused is fully involved in the murder of Muhammad Qayyum, who actively participated in the occurrence along with the co-accused and he deserves the death sentence. The learned counsel relied upon the cases reported as *Raja*

Sarfraz Azam Khan & others v. State and others [2005 SCR 166], *Muhammad Asif and another v. Muhammad Ilyas and another* [PLJ 2005 SC (AJ&K) 37], *Muhammad Khurshid Khan v. Muhammad Basharat and another* [PLJ 2007 SC (AJ&K) 43], *Muhammad Mushtaq v. The State* [PLD 2001 SC 107] and *Sheikh Javed Iqbal v. Muhammad Bashir & 5 others* [2010 SCR 208].

5. On the other hand, Mr. Abdul Majeed Mallick, Advocate, the learned counsel for the accused-respondent while controverting the arguments advanced by the learned counsel for the complainant-appellants submitted that the impugned judgment is perfect and legal which has been passed after due appreciation of the evidence available on record, therefore, interference by this Court in not warranted under law. He added that once an acquittal order has been passed, that cannot be set aside until the same is found perverse, arbitrary and

shocking in nature. He contended that the presence of the eyewitnesses is highly doubtful as there are glaring contradictions in the statements recorded by the Court. It is settled principle of law that the slightest doubt must go in favour of the accused. He further contended that according to the prosecution story, the occurrence took place in a thickly populated area but surprisingly no one from the locality has been cited as witness. In continuation of the arguments, he submitted that the learned Shariat Court has discussed all the facts and evidence in depth and rightly came to the conclusion that the case to the extent of accused is full of doubt. It is evident from the contradictions made in the ocular account that PWs concealed the real facts. He added that the motive established by the prosecution is not proved as not an iota of evidence has been brought on record that any litigation was

pending between the parties. It is settled principle of law that once motive has been established it is duty of the prosecution to prove the same but in the instant case the prosecution failed to discharge its burden. He strongly argued that the report of the Chemical-Examiner was part of the record but the same has not been tendered in evidence. In such scenario, the provisions of Article 129 of the Qanun-e-Shahadat, 1984 are fully attracted. He added that the site-plan itself negates the version of the prosecution regarding the injuries attributed by the accused as no such type of injury can be caused from the point shown in the site-plan. He added that it is not denied by the prosecution that all the three eyewitnesses remained involved in the criminal cases. Thus, their testimony cannot be believed safely. He forcefully argued that the origin of the occurrence is shrouded in mystery as the

prosecution failed to bring on record anything recovered from the place of occurrence. No evidence, whatsoever has been produced to substantiate the stance taken by the prosecution that at the time of occurrence the complainant party was sowing the wheat in the land through a tractor as no quantity of grain or tractor was taken into custody by the police. He added that nothing is mentioned regarding the recovery of crime empties in the site-plan which is suggestive of the fact that the place of occurrence as narrated by the prosecution is not the same and the prosecution has invented a fabricated story. The eyewitnesses are of criminal minded and expert to invent such like stories; therefore, the statements of such witnesses cannot be relied safely without strong corroboration. He further submitted that the material contradictions have been found in the statements of the prosecution witnesses which

cannot be ignored lightly. He added that it is unbelievable that dye to a *butt* blow at the head of one Karam Ellahi, the *butt* of the gun was broken but the injury was found simple in nature. The manner of occurrence is different as narrated by the prosecution. He added that it is the case of the prosecution that the death of the deceased caused due to excessive bleeding but no blood stained earth clay was recovered from the place of occurrence. He relied upon the cases reported as *Tasawar Hussain v. The State & 9 others* [2016 SCR 373], *Ali Muhammad v. Muhammad Akram and another* [2014 SCR 351] and *Javed Iqbal v. Fayyaz Ahmed & another* [2014 SCR 1441].

6. In rebuttal, the learned counsel for the complainant-appellants submitted that the points raised by the learned counsel for the accused have been fully answered by the prosecution while producing un-rebutted

evidence. He drew the attention of the Court towards the statement of Muhammad Farooq, PW, and submitted that the said witness categorically stated regarding the place of occurrence. He submitted that the explanation regarding the broken *butt* has been furnished as the *butt* made of wood was not so firm and at the time of inflicting injury the same was broken.

7. Raja Saadat Ali Kiani, Additional Advocate-General while appearing on behalf of the State has also adopted the arguments advanced by the learned counsel for the complainant-appellants.

8. We have heard the arguments and gone through the record along with the impugned judgment. As per record, in the alleged occurrence dated 09.10.1992, one person was died and the other was critically injured. In the FIR, lodged with the police

station, 6 accused were nominated, however, except the accused-respondent, herein, all other accused have absconded, after the commission of offence. The role attributed to the accused in the FIR, is that at the time of occurrence, the accused was armed with 12-bore gun fired a shot which hit the left thigh of the deceased and also gave a *butt* blow at the head of Karam Ellahi, injured. The trial Court at the conclusion of the trial convicted and sentenced the accused, life imprisonment, however, the learned Shariat Court acquitted him of the charge vide impugned judgment. The instant appeal has not been filed against the conviction rather the same has been filed against acquittal order and it is settled principle of law that an accused, when acquitted of the charge, enjoys double presumption of innocence and once an acquittal has been made, the same can only be set aside if the Court comes to the conclusion that the

order is capricious, fanciful, perverse, arbitrary and against the settled norms of justice. Reliance may be placed on a case reported as *Javed Iqbal v. Fayyaz Ahmed & another* [2014 SCR 1441], wherein, while dealing with the proposition it has been held that:-

> "10. After century's deliberation, there is a universal unanimity among the Courts administering criminal justice that the benefit of doubt always goes to the accused. It is also settled that for setting aside an acquittal order there must be strong reasons supported by evidence on record. Even otherwise, after acquittal, the accused enjoys double presumption of innocence. In this regard reference can be made to a latest judgment in the case reported as *Muhammad Saleem vs. Abid Hussain & others* [2013 PSC (Crl.) 346], wherein this Court has enunciated the principle of law on the subject in the following manner:-

> ‘12. It is by now settled principle that to get an acquittal order converted into conviction, is a difficult job for the prosecution; it is like a liberated bird who had flown away towards the limitless space and free air, but now prosecution wants to get him back again into the cage. In the light of principle of law enunciated by the superior courts of the country, an acquittal order can only be interfered with when it is proved that it has been delivered with foolish appreciation of evidence, with perverse actions and where the reasons adduced for the release of an accused were not acceptable to the mind of a prudent man.’ ”

Keeping in view the principle supra, we have to examine; whether the impugned judgment is capricious, fanciful, perverse and arbitrary or not. Against the acquittal order the learned counsel for the appellants have advanced lengthy arguments, however, if the same

summarized, sole point appears that it is a case of direct evidence and the prosecution succeeded to prove the same through ocular account. In this way, the other evidence which is only corroborative in nature can be ignored but the learned Shariat Court has not considered this aspect of the case. Before entering into the merits of the case, we deem it appropriate to mention here that there is no cavil with the proposition that when a case is proved through ocular account the corroborative evidence can be ignored, however, if the Court reaches the conclusion that the eyewitnesses are interested and inimical towards the accused then testimony of said PWs cannot be relied upon safely without corroboration by the other evidence brought on record, moreover, the ocular account non-appealing in nature also requires strong corroboration. Reliance may be placed on a case reported as *Muhammad Yaqoob v. The State & 2*

others [2014 SCR 121], wherein it has been held that:

> "8. Of course, if the witness is interested, partisan or inimical towards the accused, his deposition cannot be accepted unless corroborated by such unimpeachable independent evidence which by itself may be sufficient to record conviction."

Similarly in a case reported as *Nazir Ahmed and others v. The State* [PLD 1962 SC 269], it has been held that:

> "But we had no intention of laying down an inflexible rule that the statement of an interested witness who has (by which expression is meant a witness who has a motive for falsely implicating an accused person), can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and,

so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty the Court will in the case of an ordinary interested witness look for some circumstances that gives sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. This is what is meant by saying that the statement of an interested witness ordinarily needs corroboration. For corroboration it is not necessary that there should be the word of an independent witness supporting the story put forward by an interested witness. Corroboration may be afforded by anything in the circumstances of a case which tends sufficiently to satisfy the mind of the Court that the witness has spoken the truth."

It may be observed here that some important factors involved in the instant case are constrained us to hold that ocular account furnished by the prosecution cannot be relied upon safely without strong corroboration i.e. (i) the star-witnesses, Muhammad Farooq, Muhammad Habib and Muhammad Sagheer are the real brothers; they also closely related to the deceased and enmity between the parties is admitted; (ii) as per purgation report the star-witnesses were not found *Aadil*; moreover, all the star-witnesses bear the criminal history and they admitted in their statements that they remained arrested in different criminal cases including the murder case; and (iii) according to the medico legal report one firearm injury was found at the body of the deceased, whereas, as per ocular account two 12-bore gun shots and many pistol shots were alleged to hit the deceased. In the earlier round, when acquittal

appeal in the instant case came up for hearing before this Court, the Court while highlighting some important points, required to be dealt with in detail, remanded the case to the Shariat Court in the terms indicated as under:-

> "According to the prosecution story, two shots were fired from different angles by two accused, whereas, according to the medical report there is only one injury on the body of the deceased; the question arises whether such like injury can be caused by two separate shots; fired from different angles…….
>
> Another question which clicks in our minds is that it is alleged by the prosecution that blow inflicted with the butt of the gun was so severe that due to infliction of such blow the butt was broken then how the injury alleged to be caused by the butt of the gun is show simple in nature in the medico legal report. This question is also required to be examined in detail.."

The perusal of the impugned judgment shows that the learned Shariat Court has discussed the aforesaid points in detail, however, for our own satisfaction; we have also examined the same. According to the FIR and the statements of the eyewitnesses at first Muhammad Malik, accused, fired a shot with 12-bore gun at the left thigh of Muhammad Qayyum (deceased) and thereafter the accused-respondent fired a shot with 12-bore gun which also hit him at his left thigh. The medico legal report speaks that the size of central part of the fatal wound is ½ inch and is of circular type. As normally it is not possible that two fire shots of 12-bore gun made from different angles hitting the same part of the body can cause such like injury, therefore, we have examined the site-plan and the medico legal report to ascertain the true fact. According to site-plan at the time of occurrence the deceased is shown at point No.1, whereas, the

accused, Muhammad Malik, at point No.3 and Muhammad Rafique, accused-respondent, at point No.4. The distance between point No.1 and 3 has been shown as 15 feet and point No.1 and 4 as 9 feet. The medico legal report shows that the deceased at the time of occurrence was facing the assailant. The relevant portion of the report reads as under:-

> "Weapon used: Gun shot.
>
> Distance: about 15 feet.
>
> Relative position of victim & assailant: The victim was facing the assailant."

As the first fire is attributed to have been fired by accused, Muhammad Mailk, therefore, it can be said that the deceased was facing the assailant, Muhammad Malik. Now the question arises that if the deceased was facing Muhammad Malik, accused, then how the second fire attributed to the accused-respondent hit the same part of the body of the deceased made from a different angle. In this regard, no

explanation has come on the record which makes the case to the extent of the accused-respondent doubtful. Furthermore, as per medico legal report the fire shot which hit the deceased was made from a distance of 15 feet, whereas, in the site-plan the distance of accused-respondent and the victim has been shown as only 9 feet. If the accused-respondent hit the victim at the distance of 9 feet then after excluding the length of the gun the distance remains only 5/6 feet and in such situation this fire may cause blackening, tattooing and leaves the particles of gun power as has been stated by the doctor in his statement but no such elements were found at the body of the deceased. The complainant while recording his statement in the examination-in-chief although has stated that initially Muhammad Malik fired a shot which hit the left thigh of the deceased and soon after the accused-respondent fired a shot

which also hit the same part of the body of the deceased, however, in cross-examination he admitted only one gunshot. The relevant portion of the statement reads as under:-

"جس وقت قیوم کو گولی لگی تھی وہ راستہ پر چل رہا تھا مقتول پر کھڑے ہونے کی حالت میں فائر ہوا تھا اُسکے گرنے کے بعد اُسکو کوئی فائر لگا تھا علم نہیں"

It may also be observed here that the eyewitnesses stated in their statements that the accused, Muhammad Shafique, Muhammad Tariq, Muhammad Khalid and Tahir Mehmood caused injuries at the legs of the deceased with pistol shots, whereas, the medico legal report does not support this part of the story. It is an admitted position that the gun recovered from the accused-respondent was not in working condition at the time of its seizure. The version of the prosecution is that during the course of occurrence a blow with the *butt* of the gun was made due to which the *butt* was broken, in the result of which the same became out of order.

Although, the crime weapon allegedly used by the accused-respondent was sent to the Forensic Science Laboratory and the prosecution has brought on record the report but the same has not been tendered in evidence or proved according to the legally prescribed manner. Three star-witnesses of the case, Muhammad Farooq (complainant/eyewitness), Muhammad Habib (eyewitness/recovery witness) and Muhammad Sagheer (recovery witness) are the real brothers and closely related to the deceased. It is an admitted fact that the place of occurrence is situate near to thickly populated area but no independent person has been cited as witness from the locality. The time of occurrence has been stated as 2:00 pm. The witness, Muhammad Habib stated in his statement that he shifted the injured persons with the help of the wife of injured, Karam Ellahi and two children from the place of occurrence at

about 3:45 to 4:00 pm., meaning thereby, that approximately for two hours after the occurrence the bodies of deceased and injured remained at the place of occurrence. The relevant portion of the statement reads as under:

"کرم الٰہی کی بیوی کے موقع پر آنے کے بعد ہم تقریباً آدھ گھنٹہ موقع پر رہے تھے۔ ہم نے کسی کو آواز دیکر مدد کے لئے نہ بلایا تھا۔ جب مضروبین کو موقع سے کشتی میں رکھکر چلے تو چار پونے چار کا عمل ہو گا۔"

It is also an admitted position that in the locality there are many houses of the relatives of the complainant party, in such a situation, it does not appeal to the prudent mind that even after lapse of such a long time no one from the locality came forwarded to enquire about the incident. All these aspects of the case create doubt in the prosecution story and it is well established principle of law that benefit of every possible doubt should be extended to the accused and even a slightest doubt is sufficient to acquit the accused of the charge. Reliance

may be placed on a case reported as *Muhammad Rafique v. Aurangzeb & another* [2015 SCR 974], wherein this Court held as under:-

> "It is settled phenomena of law that the benefit of every possible doubt should be extended in favour of the accused. Even a slightest doubt is sufficient to acquit the accused, whereas, it is a case of number of doubts."

In another case reported as *State v. Faisal Munir* [PLJ 2009 FSC 284], it has been held that:

> "11. The accused, as a matter of right and not the complainant, is entitled to benefit of doubt. A genuine doubt even on one crucial point can secure acquittal of the accused."

As it is the basic duty of the prosecution to prove the case beyond any shadow of doubt, whereas, keeping in view the facts and circumstances of the case and the material available on record, we are of the view that the

prosecution failed to prove the allegation of murder against the accused-respondent beyond any reasonable doubt.

9. The other allegation leveled against the accused-respondent that he inflicted a *butt* blow on the head of Karam Ellahi, is also cloudy as the version of the prosecution is that the blow was so severe due to which the *butt* of the gun was broken and he remained unconscious for a considerable time, whereas, the medico legal report shows that the injury inflicted at the head of Karam Ellahi is simple in nature. In this way, it can easily be said that the version of the prosecution is not corroborated by the medical report. In the case in hand, there are many other flaws as in the FIR, a specific motive has been established that litigation between the parties is pending in the Courts but during trial the prosecution failed to prove the same. There are also some material contradictions in the

statements of the eyewitnesses as Muhammad Habib stated that he went to the hospital at 8:00 pm and Muhammad Farooq (complainant) was already present there and they remained with the dead-body throughout the whole night, whereas, the complainant stated in his statement that he returned from the hospital at 8:30 pm and against went to the hospital by the next morning. The origin of the occurrence is also mysterious as it has not been explained that in which survey number of the land the occurrence took place and non-appearance of any independent witness from the locality at the spot further supports this view. The alleged tractor trolley and the boat through which the injured were shifted to Dudyal have not been recovered. It is well settled principle of administration of criminal justice that for reversal of an acquittal order the perversity, arbitrariness or capriciousness in the impugned

order must be established. In the case in hand, after analyzing the whole material available on record we arrived at the conclusion that no perversity, arbitrariness or capriciousness is found in the impugned judgment. As the learned Shariat Court has passed the acquittal order after evaluating the evidence in a legal manner and not committed any illegality; thus, law does not permit to interfere with the same.

The outcome of the above discussion is that this appeal having no force is hereby dismissed.

Mirpur, **JUDGE** **JUDGE**
__.01.2017