IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT
JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE
JUSTICE KHADIM HUSSAIN M. SHAIKH, JUDGE

CRIMINAL APPEAL NO.03-I OF 2024

The State through Advocate General
Khyber Pakhtunkhwa at Dar-ul-Qaza, Swat.

...Appellant

VERSUS

1. Shehbaz son of Muhammad Arif,
   R/o Village Merashfati, Dir Upper.
2. Kashar Khan son of Tor Lali,
   R/o Shotkas, Village Sheringal, Dir Upper.
3. Kaleem Khan son of Gul Aman,
   R/o Dog Bala, Dir Upper.

...Respondents

Counsel for the State/Appellant	:	Mr. Muhammad Bashar Naveed, Additional A.G., KP.
Counsel for Respondents	:	Mrs. Surriya Marriam Khaleeq, Advocate.
FIR No., Date & Police Station	:	No. 16, Dated 01.04.2009, Police Station Sheringal, District Dir Upper.
Date of Impugned Judgment	:	28.01.2016.
Date of Institution	:	30.01.2024
Dates of Hearing	:	29.10.2024
Date of judgment	:	20.11.2024

JUDGM ENT

IQBAL HAMEEDUR RAHMAN–CJ. The respondents three in number faced trial in case FIR No. 16 of 2009 registered under different provisions of the Pakistan

Penal Code, 1860 (Act XLV of 1860) (Hereinafter called the Code), Section 7 of the Anti Terrorism Act , 1997 (Act XXVII of 1997) (Hereinafter called Act XXVII of 1997) and Section 17 (4) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Hereinafter called The Ordinance) at Police Station Sheringal, District Dir Upper before the learned Judge, Anti Terrorism Court-III, Swat at Timergara, who while appraising evidence led, formulated the opinion about failure of prosecution to prove the multiple heads of charge against respondents resulting in their acquittal through judgment dated 28th January, 2016.

2. The State by preferring present appeal seeks annulment of judgment pleadings its perversity, result of mis-reading and non-reading of evidence, further suggesting grant of undue importance to the trivial contradictions resulting in failure of justice.

3. Earlier co-accused Sultan Muhammad son of Rehman Gul was arrested and put to face trial where proceedings against co-accused Shakoor son of Gul Azam and Naim Ullah son of Meer Afzal had been abated on account of their death on 21.04.2012 and finally co-accused Sultan Muhammad was acquitted by the trial Court on 23.10.2012.

4. Summarily, on 01.04.2009 at 17:45 hours PW-7 Hayatullah Khan S.I recorded

FIR bearing Crime No.16/2009 (Ex.PA) at Police Station Sheringal, Dir Upper on receipt of *murasla* (Ex.PA/1) sent by PW-5 Waheedullah ASHO, on the basis of report made by PW-1 Shahabul Din HC-626 that on 01.04.2009 at 17:15 hours 18 nominated persons including present respondents and 20/21 unknown persons attacked upon an official pickup carrying police officials near *Balow* at *Jatkot* with hand grenade, Kalashnikovs and other fire arm weapons which caused death of five police officials including SHO Fateh-ur-Rehman and ASI Ameer Khan while injuries to two constables including the complainant and robbed cash of Rs.415,090/- which was amount of salaries of the police, Kalashnikovs of the police with ammunition and a pocket phone and decamped.

5. The present respondents became fugitive of law, who were arrested on 03.05.2013 and 30.11.2013 respectively as is evident from their Card of arrest (Ex.PW-5/16) and application for seeking custody (Ex.PW12/1).

6. On conclusion of the investigation of the case, the respondents were put to trial. Denial of the charge, led the prosecution to produce as many as 13 witnesses including Shahabul Din (PW-1) and HC Abdul Rahim (PW-8), (eye-witnesses) to substantiate the crime.

7. The respondents strenuously refuted the incriminating evidence put to them under section 342 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called the Act V of 1898). None of them opted to record their statement on oath as envisaged under section 340 (2) of the Act V of 1898 or to produce any defence evidence.

8. After hearing the arguments and carefully examining the evidence, the learned trial Court, while taking into account the contradictions in the evidence, acquitted the respondents from all charges. The trial Court highlighted contradictions in the prosecution's evidence, particularly focusing on the identification of the accused. The relevant portion of the judgment is reproduced below:

> "17. The above discussion leads the Court to the conclusion that at the time of firing both the injured were inside the vehicle, which was covered by a thick sheet called 'Tarpal' and that the firing was made from the front and left side of the vehicle. In such state of affairs the injured were not in a position to see and indentify the accused. Accused were also not previously known to the said PWs, who belonged to different villages. Hence, nomination of the accused by name by the injured with their parentage and residential addresses was impossible. Contention of the said injured that they were injured outside the vehicle, and they saw and identified the accused facing trial firing at them is not correct. Site plan also negates contention of the said PWs, wherein, they have been shown injured inside the vehicle. Identification of the accused at the spot is not established from convincing and reasonable proof. Relationship of present accused with any militant group is also not established. The prosecution evidence is not solid, reasonable, and convincing. From the prosecution evidence, involvement of accused facing trial in the occurrence is not established beyond doubt. Since, the prosecution could not prove its case against the accused facing trial beyond reasonable doubt, hence they deserve acquittal. "

9. The State earlier preferred appeal before Hon'ble Peshawar High Court of Mingora Bench where proceedings against respondent No.3 Kaleem Khan were abated vide order dated 25th January, 2023 and finally for want of jurisdiction, it was remitted to this Court through judgment dated 05.12.2023.

10. Pre-admission notice was ordered to be issued to the respondents on 14.02.2024. In response to the process issued, the respondents No.1 & 2 put their appearance in the Court and maintained that they cannot engage advocate due to paucity of funds and prayed for providing them a counsel at State Expenses to represent them. Hence, Mrs. Surriya Marriam Khaleeq, Advocate was appointed for their defence at State Expenses out of the panel of Counsel maintained for the purpose.

11. The learned Law Officer representing the appellant/State contended that PW-1 and PW-8 have categorically and specifically identified the respondents who committed murder of five persons. He also contended that respondents remained absconders for four years which shows their involvement in the offence. Making reference to the site plan it was maintained that one of the injured was shown in the site plan which supports version of prosecution. Concluding the arguments, it was submitted that minor contradictions are not fatal to the case of prosecution and

prayed for convicting the respondents and awarding sentence.

12. On the other hand, the learned counsel for the respondents contended that respondents have been acquitted due to benefit of doubt.

Continuing the arguments it was submitted that reason for abscondence of the respondents cannot be said to be sufficient grounds for involvement in the crime. Contented that as per statement of the witnesses, the culprits were between the age of 30 to 45 years, however, the respondents while recording their statement of accused under section 340 (2) of the Act V of 1898 were of advance age. It was further contended that no recovery was made from the possession or on the pointation of respondents. Summing up the argument it was argued that there are major contradictions in statement of the prosecution witnesses which makes the entire case doubtful and prayed for dismissal of the appeal.

13. Arguments heard. Record perused.

14. The entire episode of the murder and dacoity has been witnessed by PW-1 Shahabul Din HC, who is an injured as well as complainant of the instant case and PW-8 Abdur Rahim HC, who was also injured during the occurrence. Shahabul Din/PW-1 in his examination-in-chief stated that he along with the injured and dead bodies were brought to the BHU by public through private vehicles where he reported the matter to S.I. Hayatullah Khan (PW-7) who was I.O. of this case. While

Waheedullah Inspector/PW-5 stated that constable Shahabul Din/PW-1 reported the matter to him which he reduced to writing in shape of *murasila*. Similarly, FIR (Ex.PA) also reveals that *murasila* was sent by Waheedullah Khan ASHO Sheringal. Narration of facts of the incident by the complainant which were incorporated in shape of *murasila* depicts contradiction between the statements of PW-1 and PW-5 which is fatal to the case of prosecution.

15. The PW-1 while recording his examination-in-chief stated that "*when we reached near 'Balow' near 'Jatkot' it was 17:15 hours. When accused Khalid, Fazli Manan, Saeedullah, Umar Khitab, Ferhad, Shakoor, Sultan Muhammad, Shehbaz, Zafar, Sultan Rehman, Naeemullah, Zakirullah, Fayaz, Wazir, Gul Aman, Faqiray, Laiqshah, Kashar Khan and other unknown accused started firing and also threw hand grenades at our vehicle*". But during cross-examination he contrarily stated that "*I was sitting in the rear portion of the vehicle, which was covered by a thick sheet called 'Tarpall'. I had not seen any of the accused firing on us, when I was in the vehicle. The witness volunteered that it was only after I jumped from the vehicle I saw the accused firing on us. I received five fire arm injuries on my body*". The PW-1 in his cross-examination also stated that, "*I and said Abdul Rahim had jumped from the vehicle simultaneously*". However, Abdul Rahim HC/PW-8 in his cross-examination contradicted that, "*as we were sitting in the rear portion of the vehicle our faces were to the back side of the vehicle. The firing was started*

from the front side and left side of the vehicle. When I jumped out of the vehicle, I was hit on my left leg. While my other colleagues were hit inside the vehicle". The PW-1 also stated in his cross-examination that, "*I had seen only eight persons firing on us. Their age was ranging from 30 to 45 years. I do not know whose fire shot had hit me*" which clearly suggests that he had not seen the present respondents firing on them. Interestingly the respondents were not among those who made firing identified by the PW-1 and PW-8 at the time of occurrence and while recording their statements before the trial Court. It is also important to note that Shahbaz and Muhammad Galeem/respondent No.3 while recording their statement under section 342 of the Act V of 1898 about six and half years after the incidents were of 70/71, 58/59 and 71/72 years of age respectively negating the stance of PW-1.

16. Question of corroboration was dealt with by Hon'ble Supreme Court in case of "SHERA MASIH and another v. THE STATE" (PLD 2002 SC 643) and it was held at page-652 as follows:

> "We, therefore, hold that in a case in which it is found that veracity of the eye-witnesses and direct evidence alone is not enough to satisfy the mind of Court and corroboration from independent source is felt necessary, the ocular evidence should be read together with corroboratory and confirmatory evidence to determine the guilt of a person. However, the corroboration may be sought from direct or circumstantial evidence and it need not amount to confirm the whole story-narrated by the witness rather it would be sufficient only in material points under consideration and further the degree of corroboration rests on substantial discretion of the Courts which vary in the facts and circumstances of each case. The

> corroboration is insisted upon when the evidence is not of such a degree which should be made basis of conviction such as in case of enmity between the parties or the witnesses are interested, related or inimical and or not independent or in a situation in which it is felt that without corroboration conviction only on the basis of ocular account is not safe. The corroboration can even be sought from the suggestion put by defence to the witnesses in cross-examination and admission of accused which may satisfy the mind of the Court regarding truthfulness of the witnesses as the rule of corroboration being rule of abundant caution is followed only to satisfy the mind of the Court regarding the guilt of an accused and it is not an inflexible rule to be followed necessarily in each case in all circumstances. There is ample case-law on the point that the rule of independent corroboration need not to be insisted in the cases in which no exaggeration in the statements of witnesses is found and their veracity is not suffering from any apparent defect but in a case in which it is felt necessary it should not be insisted in each and every detail rather due importance should be given to the conclusion drawn by the trial Court as it had the opportunity of watching the demeanors of witnesses to form first hand impression to the truthfulness or otherwise of their evidence."

It is surprising that when assailant threw hand grenades and resorted to firing, in such state of panic, how the injured eye witnesses were able to identify the assailants in which official vehicle was also damaged. It is also not understandable that how the names and parentage of the assailants numbering 18, who were belonging to different villages, came to the knowledge of the injured eye witnesses i.e. PW-1 and PW-8. In view of such glaring contradictions, we are of the considered view that the ocular testimony of PW-1 and PW-8 is unworthy and does not inspire confidence cannot be relied upon.

17. The Complainant/PW-1 also narrated in *murasila* Ex.PA/1 and while appearing as PW-1 stated that accused belonged to the banned Taliban

organization but no source of information regarding their nexus with the Taliban was brought on record by the prosecution to prove its stance.

18. PW-7 DSP Hayatullah, who was S.I./ Investigation Officer, in his cross examination admitted that no pieces of mortar shell and hand grenade were recovered from the place of occurrence nor any sign of mortar shell or hand grenade was observed on the vehicle. Similarly, no blood stained earth was taken into possession from the place of occurrence to prove the place as place of occurrence. Even no post mortem examination was conducted on the dead bodies of the police officers/officials to ascertain the manner of receiving hand grenade injuries. Report of fire arms experts Ex.PF of crime empties in absence of recovery of fire arms weapon is of no avail.

19. The case of present respondents is not distinguishable to that of acquitted co-accused Sultan Muhammad and the State also could not give any cogent reason for not filing an appeal against the acquittal of accused Sultan Muhammad, who, on the same set of evidence, was acquitted.

20. It is to be noted that conviction cannot be based on high probabilities. Suspicion, however, strong cannot take the place of proof. Reliance is placed upon "YASIN alias GHULAM MUSTAFA vs. THE STATE" (2008 SCMR 336). Relevant para is reproduced herein below:-

> "It is also an established principle of the administration of criminal justice that conviction cannot be based on any other type of evidence howsoever, convincing it may be, unless direct or substantive evidence is available. Even, guilt of an accused cannot be based merely on high probabilities that may be inferred from evidence in a particular case."

Failure of prosecution to prove identity of the respondents has put a serious dent to the case of prosecution, benefit of which has to be granted to the respondents as a matter of right.

21. It is the Rule of law as enunciated in "GHULAM SIKANDAR and another vs. MAMARAZ KHAN and others" (PLD 1985 SC 11), "CAPTAIN ABDUL RAHIM vs. NAEEM SAGAR and others" (2009 SCMR 288), "THE STATE through MEHMOOD AHMED BUTT vs. SHARAF-UD-DIN SHEIKH and another"(2013 SCMR 565) and "MUHAMMAD ZAMAN vs. THE STATE and others" (2014 SCMR 749) that ordinarily following points shall be considered by the Appellate Court amongst others while re-appraising the evidence to make interference in the judgment of acquittal.

i) Slowness of the appellate Court to make interference in the verdict of acquittal.

ii) Attachment of due weight and consideration to the findings of the lower Court particularly when had the occasion not only to record the evidence but also observing the demeanor of the witnesses.

iii) Decision of acquittal affirms the initial plea regarding innocence of the accused unless proved otherwise.

iv) Right of the accused to the benefit of doubt.

v) Admission of evidence illegally.

vi) Ignoring the material evidence.

vii) Manifest wrong, perversity or uncalled for conclusion from facts proved on record.

viii) Parameter for re-appraisal of evidence has to be applied strictly being different as compared to the yardstick for interference in the judgment of conviction.

Possibility of formulation of another opinion does not furnish any ground to set aside the judgment of acquittal if based on evidence.

22. Needless to state that even a single circumstance creating reasonable doubt would be sufficient to grant premium to the accused. Once acquittal is recorded, double presumption of innocence is created which cannot be interfered unless the appellate Court reaches to the conclusion that findings are speculative and artificial or arbitrary. Possibility of formulation of another opinion by itself would not be sufficient to make interference. (See: "THE STATE and others v. ABDUL KHALIQ and others" (PLD 2011 S.C 554) and "MUHAMMAD ZAFAR and another vs. RUSTAM ALI and others" (2017 SCMR 1639). Relevant para is reproduced hereinbelow:-

> "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 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 (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."

23. It is settled principle of law that extraordinary remedy of an appeal against an acquittal is quite different from an appeal preferred against the findings of conviction and sentence. Obviously, the appellate jurisdiction under Section 417 of Act V of 1898 can be exercised by this Court if gross injustice has been done in the administration of criminal justice, more particularly, wherein, findings given by trial Court are perverse, illegal and based on misreading of evidence, leading to miscarriage of justice or where reasons advanced by trial Court are wholly artificial. Scope of appeal against acquittal of accused is considerably limited, because presumption of double innocence of the accused is attached to the order of acquittal

which is based on correct appreciation of evidence, would not warrant interference in appeal. Accused earns double presumption of innocence with the acquittal; First, initially that till found guilty he has to be considered innocent; and second, that after his acquittal by trial Court further confirmed the presumption of innocence. It shall be advantageous to mention here that the appellate Court by exercising its powers under section 417 of Act V of 1898, could interfere only if the order of acquittal is based on misreading, non-appraisal of evidence or/was speculative, artificial and arbitrary. The order of acquittal passed by the trial Court being balanced and well reasoned, would hardly call for interference of the appellate Court in appeal and similarly the appellate Court should not disturb acquittal if main grounds on which trial Court had based its acquittal order are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished.

24. Re-appraisal of evidence does not suggest that the conclusion is result of mis-reading or non-reading of evidence. Likewise the reasons assigned regarding failure of prosecution to prove the charge cannot be said to be either artificial or speculative.

25. Epitome of above discussion is that conclusion recorded by learned trial Court is based on evidence, not subject to interference keeping in view the yardstick for re-appraisal of evidence in case of acquittal

26. Pursuant to above, we endorse the conclusion assailed, resulting in dismissal of appeal against acquittal.

IQBAL HAMEEDUR RAHMAN
CHIEF JUSTICE

JUSTICE KHADIM HUSSAIN M. SHAIKH
JUDGE

Dated: 20.11.2024
Ajmal/*