IN THE FEDERAL SHARIAT COURT
(CRIMINAL APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE SHEIKH NAJAM UL HASAN, CHIEF JUSTICE
MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH

APPEAL NO. 10-K OF 2006

1. ABDUL WAHID BHURT.
2. ABDUL NAWAZ BHURT

   RESIDENT OF BUNGALOW NO.3, LIAQAT UNIVERSITY OF MEDICAL AND HEALTH SCIENCES COLONY, JAMSHORO, SINDH.

APPELLANTS

VERSUS

1. ASHRAF SON OF QABOOL.
2. PEERAL ALIAS PEEROO SON OF QABOOL.
3. GHOSOO ALIAS GHOUS BUX SON OF MUHAMMAD SOOMAR.
4. BUDHO SON OF MUHABAT.

   ALL BY CASTE CHANDIO R/O VILLAGE SOBHO CHANDIO, TALUKA K.N. SHAH, DISTRICT DADU.
5. THE STATE.

RESPONDENTS

COUNSEL FOR THE APPELLANTS	…	ABDUL MATEEN KHAN, ADVOCATE
COUNSEL FOR THE STATE	…	SALEEM AKHTAR, ADDITIONAL PROSECUTOR GENERAL, SINDH.
FIR NO. AND POLICE STATION	…	NO.35 OF 1987 RUKKUN, DISTRICT DADDU.
DATE OF JUDGMENT OF TRIAL COURT	…	19.12.2005
DATE OF PREFERENCE OF APPEAL	…	13.02.2006
DATE OF HEARING	…	23.10.2018
DATE OF DECISION	…	23.10.2018
DATE OF JUDGMENT	…	30.10.2018

MEHMOOD MAQBOOL BAJWA, J: Adverse conclusion formulated by a learned Additional Sessions Judge, Dadu, through judgment dated 19th of December, 2005, resulting in recording of acquittal in favour of respondents No.1 to 4 (Hereinafter called the respondents) prompted the appellants, brother and son of Abdul Hameed Bhurt (deceased) to prefer present appeal calling in question the legality and validity of said judgment, praying for its annulment and recording conviction against the respondents.

2. Factum of occurrence was narrated to Imdad Ali, A.S.I. at police post Khamisa Machi Morry (P.S. Rukkan) on 7th of June, 1987, at 21:30 hours by Amir Bux, complainant (P.W.1) stating that he is working as driver in the office of Sindh Seed Corporation, Dokri. On the said date, he took Deputy Director, Muhammad Rafique Kunbhar to attend meeting at Sakrand. After the meeting, Abdul Hameed Bhurt (deceased), Deputy Director, Sindh Seed Corporation, Sakrand, asked his boss to drop him to his native village and he after taking licensed shot gun and revolver accompanied them.

As per contents of Crime-Report, the complainant was taking deceased to his village while dropping others at Seta Road, when at about 8:45 p.m. they were intercepted by seven persons with open faces having

firearms, lathi, hatchets to whom the complainant identified in the light of the vehicle. On the signal of the accused, the complainant stopped the vehicle and the accused opened fire. One of the shot fired while crossing the wind screen of the vehicle hit to Abdul Hameed on his head, who succumbed to the injuries at the spot. The complainant as per allegations also sustained bullet injuries. The accused also snatched different articles from the complainant and then left the place of occurrence. After a short while, Ali Akbar (P.W.3) came at the spot, intimated the complainant about the occurrence of robbery with him by the accused. While leaving said Ali Akbar to remain at guard at the dead body of the deceased, the complainant reported the matter to the police against un-known assailants.

3. There were seven assailants which were arrested. However, Allan, Akbar alias Akoo and Asloo alias Aslam died during the trial. After recording evidence, the learned Trial Court through judgment dated 30th January, 2002, recorded conviction against the respondents, assailed by way of an appeal before this Court, which was allowed on 25th of September, 2003, by a learned Division Bench of this Court remanding the case to the learned Trial Court in view of its omission to put the whole incriminating evidence to the respondents.

The learned predecessor of the said Court commenced the proceedings from the stage as directed by this Court and after conclusion of trial acquitted the respondents.

4. Learned Counsel for the appellants while questioning the conclusion drawn maintained that the findings are result of mis-reading and non-reading of evidence. To substantiate the contention, first of all, reference was made to the judgment dated 30th January, 2002, recording conviction against the respondents contending that the guilt of respondents was established and the impugned judgment is result of non-application of judicial mind.

Making reference to the evidence of complainant, Amir Bux (P.W.1), Bangul (P.W.2) and Ali Akbar (P.W.3), it was contended that all the three witnesses with one voice narrated the detail of occurrence, categorically deposing about the identification of respondents at the time of occurrence and later on picking them in the identification test, which part of deposition could not be shaken in cross-examination. Referring to the statement of Amir Bux (P.W.1), it was submitted that though the said witness did not disclose factum of his participation in the identification parade but cross-examination in length was made on this aspect resulting

in proof of identity of the respondents participating in the commission of crime.

Though, it was admitted that Ali Akbar (P.W.3) showed hostility regarding identity of respondents as assailants while appearing as a witness, but argued, that he in his statement (Ex.12-A) recorded under Section 164 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code), during the course of investigation, fully supported the case of prosecution, implicating the respondents by all means, which was relevant evidence keeping in view the mandate of Section 265-J of The Code. Argued that said aspect was totally ignored by the learned Trial Court.

Continuing the arguments and making reference to the evidence of Allahdad (P.W.7) and Muzaffar Ali, D.S.P-Investigating Officer (P.W.10), it was submitted that recovery was effected from the respondents and others which was also not taken into consideration.

Relying upon the evidence of Dr. Sayed Ghous Ali (P.W.9), postmortem report (Ex.19-A) and Medico-Legal Report of complainant (Ex.19-B), it was submitted that medical evidence also supported the ocular account.

Drawing our attention to the defence plea, it was submitted that in post-remand proceedings while making statements under Section 342 of

The Code, the respondents took the plea of *alibi* and produced Ashraf (D.W.1), Ghulam Hussain (D.W.2) and Buxial Khan (D.W.3). Referring to their evidence, it was submitted that attempt was an afterthought as the plea was not taken at pre-remand stage and undue importance was given by the learned Trial Court to the said evidence though does not inspire confidence.

5. Controverting the arguments, the learned Counsel representing the respondents while referring to the evidence of complainant (P.W.1), Bangul and Ali Akbar (P.W.2-P.W.3), submitted that admittedly occurrence took place at dark and it was not possible for the complainant to preserve the features of the assailants. Making reference to the contents of the Crime-Report, it was submitted that Bungul (P.W.2) is not the eye-witness of the occurrence and as such reliance upon his statement is an exercise in futility. Deposition of Ali Akbar (P.W.3), contended, cannot be taken into consideration as he in categorical terms stated that he cannot identify the accused while appearing as a witness.

Replying the argument with reference to holding of identification test, it was submitted that neither Supervising Magistrate appeared nor proceedings of identification parade were made part of the record.

6. On 8th of February, 2007, pre-admission notice was required to be issued to the respondents. Process was repeatedly issued but it could not be served upon them with similar reports on each and every date of hearing that the respondents are not available at the given addresses who have left their ordinary place of residence and their fresh whereabouts are not known. Ultimately, they were declared absconders.

7. Record of learned Trial Court was directed to be requisitioned and it was reported that record has been burnt in the incident of 27th December, 2007. Direction for re-construction was issued vide order dated 25th November, 2016 and accordingly file was re-constructed as is evident from letter No.1794 dated 26th October, 2017.

8. First question for consideration before this Court is whether in the absence of respondents, fate of present appeal can be decided.

9. Procedure to proceed with the appeal, either against conviction or acquittal has been given in Section 422 of The Code. According to the provisions referred to in case of appeal under Section 417, the appellate Court shall cause a like notice to be given to the accused. The words "shall cause a like notice to be given to the accused" clearly demonstrates that issuance of notice is essential but service of notice is not a compulsion in order to decide an appeal, particularly, when the

whereabouts of the accused, since acquitted, are not known and efforts were made by the Court to procure their attendance by issuance of process time and again.

10. Present appeal was preferred in the year 2006. Process was issued in the name of respondents repeatedly including bailable warrant of arrest but returned un-served with the reports that the respondents are not available at the given addresses and their fresh whereabouts are not known, leaving no option but to declare them fugitive from law while observing formalities. The attendance of respondents could not be procured even after expiry of more than 11 years.

11. Question of decision of appeal against acquittal in such situation was examined by Hon'ble Supreme Court of Pakistan in the case of "HAYAT BAKHSH AND OTHERS vs. THE STATE" (PLD 1981 SC 265) and it was held at page-280 as follows:

> ……..**"**It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent, for an indefinite period, although the office of the Court would make efforts to secure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more……**"**
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> (Underlining is our)

12. Matter again came up for adjudication before the Apex Court in "BASHIR alias BASHIRA and another vs. THE STATE and others" (1995 SCMR 276) and it was concluded at page-283 as under:

> **……."Although no order can be made to the prejudice of the accused, particularly in appeal against acquittal unless they have had an opportunity of being heard either personally or by counsel, yet there is no legal bar for the dismissal of the appeal against acquittal in the absence of the accused or without hearing them……."**

13. Keeping in view successive reports upon the process regarding non-availability of the accused for a period spreading over years-to-years and proposition of law expounded in the reports referred above, we have heard the arguments of learned Counsel for the appellants and learned law officer.

14. Yardstick for interference in the judgment of acquittal is entirely different from the principles for re-appraisal of evidence in case of conviction. Normally, the Appellate Court will be reluctant to interfere with the findings of a Court below reaching to a different conclusion unless acquittal order is contrary to the proved facts of prosecution case, perverse or bad in law. After securing the judgment of acquittal from the lower Court, the appeal against acquittal would not be allowed when prosecution remained fail to prove the grounds on which learned Trial Court based the acquittals were un-reasonable, un-sound or manifestly

wrong. Interference will be only permissible if the reasons advanced by the learned Trial Court while recording acquittal are speculative or artificial in nature or based on no evidence.

Substitution of opinion would not be permissible if findings assailed are result of proper appreciation of evidence.

15. Keeping in view the above yardstick, we will re-appraise the evidence in the light of the arguments advanced.

16. Admittedly, occurrence took place at night. Case was registered against un-known accused. The complainant (P.W.1) maintained that he saw the assailants in the moonlight. Mode of identifying the accused in such a manner at the time of occurrence cannot be acted upon. Analogy can be drawn by the law laid down in "KHALIL vs. THE STATE" (2017 SCMR 960).

Evidence of Bangul (P.W.2), serving as watchman in the construction company having a camp at the Mori though was relied upon with vehemence but his evidence would not advance the plea of prosecution as admittedly his name does not find mentioned in the Crime-Report as a person witnessing the occurrence, which fact on confrontation was also admitted by the learned Counsel for the appellants. We also make reference to the statement of complainant (P.W.1) who even in his

direct statement after narrating the detail of occurrence maintained that one Akbar came to help him after departure of the accused. In the next breath, he stated that one Bangul also came there to help him. Reply referred to clearly indicates that the said witness cannot be said to be an eye-witness of the occurrence who came at the spot even after arrival of Ali Akbar. We as such are unable to endorse the argument of learned Counsel for the appellants prompting us to bank and act upon the evidence of said witness.

Evidence of Ali Akbar (P.W.3), who was declared hostile also would not advance plea of the appellants in view of deposition of the complainant (P.W.1) highlighting the time of arrival of the said witness at the spot, re-produced for ready reference:

> **"**When the accused decamped from the place of wardat, one Akbar came to help me. He disclosed that the accused persons had also robbed him and had detained him. After their departure he has come to help me.**"**

Time of arrival of the said witness as deposed by the complainant leaves no doubt that the witness was not present at the spot at the time of occurrence. Leaving the aspect of hostility, even if his evidence is taken into consideration, it will not put the case of prosecution on better pedestal because he admittedly came at the spot after the occurrence. The prosecution cannot take any advantage of his deposition stating that 6/7

persons intercepted him when he was going on bicycle from Khamiso Khan Village towards Seeta and they forcibly took their bicycle. We are also not unmindful that he further stated that after sometime he saw one jeep coming from Seeta side going to Khamiso village via culvert and at the turning point, the culprits made firing upon jeep resulting in death of Abdul Hamid Bhurt.

Place of occurrence and point where he was victimized are different. He did not utter even a single word about source of light at the place from where bicycle was snatched. In the circumstances, how it was possible for the said witness to preserve the features of assailants.

17. Deposition of Ali Akbar (P.W.3) was also questioned by the respondents in view of his hostility refusing to identify the accused resulting in such declaration prompting the prosecution to put him questions which might be put in cross-examination. The appellants still bank upon his evidence with the plea that mere declaration of hostility would not be sufficient to ignore his evidence and deposition partly favouring the prosecution can be taken into consideration.

Question of evidentiary value of a hostile witness was examined by Hon'ble Supreme Court of Pakistan in the case of "THE STATE vs.

ABDUL GHAFFAR" (1996 SCMR 678) in which it has been held at pages 684-685 as follows:-

> **"**The learned Division Bench in Kaloo's case while deducting the ratio from Profulla's case held that the testimony of a hostile witness has to be considered as for or against the accused in accordance with the well known and the well-established principles of appreciation of evidence. Subsequently in Islam v. The State (PLD 1962 Lahore 1053) a Division Bench of the West Pakistan High Court, Lahore Bench also considered the question in regard to evaluation of the evidence of a hostile witness. Sardar Muhammad Iqbal, J., with whom M.R. Kayani, C.J. agreed expressed as follows:
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> > "The learned counsel for the appellants contended that since she was declared to be a hostile witness (this is term of convenience and not of law), she is a witness unworthy of any reliance and her evidence, therefore, should be completely brushed aside. This contention has no force. The fact that the witness is dealt with under section 154 of the Evidence Act, and she is cross-examined as to credit, in no way warrants that the Court is bound in law to place no reliance on her evidence. There is also no warrant for the proposition that the party who called and cross-examined her can take no advantage of any part of her evidence. Her evidence is not to be rejected either in whole or in part. But the whole of the evidence so far as it affects both parties favourably or unfavourably, must be taken into account and assessed like any other evidence for whatever it is worth."
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> Subsequently in Fazlul Haque v. The State (PLD 1959 Dacca 931) and Dawood Ali v. The State (PLD 1962 Dacca 613) a Division Bench of the High Court, Dacca, expressed the view that when a witness was cross-examined by the party calling him, his evidence is not to be rejected either in whole or in part but the whole of the evidence so far as it affects both parties favourably or unfavourably, must be taken into account and assessed like any other evidence for whatever is it worth. The learned Judge referred to and

followed the earlier Full Bench decision in the case of Profulla supra.

11. In the light of the above principles it is settled that the testimony of a hostile witness cannot be altogether left out of consideration. The evidence of a hostile witness has to be considered like the evidence of any other witness, but with a caution for the simple reason that the witness has spoken in different tones. When a witness speaks in different voices, it would be for the Court to decide in what voice he speaks the truth. In such cases, the determining test is corroboration from independent source and conformity with the remaining evidence."

Moot point was examined by Hon'ble Shariat Appellate Bench in the case of "SARFRAZ GUL vs. STATE" (PLJ 2004 SC 290) and examining the case law on this aspect, it was held that statement of a hostile witness cannot be brushed aside altogether and the same can be taken into consideration subject to availability of corroboration. Further held that Court is bound to consider and determine as to whether any part of such evidence was worth of belief if examined in the light of other incriminating material and evidence, which had come on record.

18. Perusal of evidence of Ali Akbar (P.W.3) when examined on the touchstone, it becomes crystal clear that his evidence does not find any corroboration from ocular account, as discussed earlier. Even otherwise, how the statement of this witness can be acted upon keeping in view the statement of complainant (P.W.1), frankly admitting that Akbar Ali came at the spot after departure of the accused. His evidence by no stretch of

imagination as such can connect the respondents in the commission of crime.

19. We are not unmindful of the argument advanced by learned Counsel for the appellants seeking help from the statement of said witness recorded under Section 164 of The Code, keeping in view the command of Section 265-J of The Code, which is reproduced for ready reference:

> "**Statement under section 164 admissible**. The statement of a witness duly recorded under Section 164, if it was made in the presence of the accused and if he had notice of it and was given an opportunity of cross-examining the witness, may, in the discretion of the Court, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act, 1872 (II of 1872).

Statement (Ex.12-A) of said witness was recorded in the presence of Ashraf, Peeral alias Peero, Budho (respondents No.1, 2 and 4), Akbar and Aslam (since dead). Ghosoo Alias Ghous Bux (respondent No.3) was not present at the time of recording the statement and as such the said statement cannot be used against the said respondent.

An opportunity was provided to the respondents No.1, 2 and 4 to cross-examine the said witness but it was intimated by them that their advocate shall make cross-examination in the Court.

Now the question for consideration is what is the evidentiary value of his statement. Perusal of the statement of said witness clearly reveals

that the witness saw the accused in the light of jeep identifying the assailants named in the statement under Section 164 of The Code, which is highly impracticable. Even otherwise, the prosecution cannot take advantage of the said statement in order to establish the culpability of respondents No.1, 2 and 4 in view of what was stated by complainant (P.W.1) in his direct statement as referred earlier, according to which Akbar came to help him after decamping the accused from the place of wardat. We are conscious that in the contents of the F.I.R, it finds mentioned that he too was victim of dacoity as his bicycle was snatched but the place where he was victimized and the place of occurrence are not one and the same though may have shorter distance but the fact by itself would not be sufficient to prove the charge against the said respondents. Conviction cannot be recorded on high probabilities.

20. Much stress was laid down upon the identification of respondents during the course of identification parade statedly held under the supervision of the Magistrate. Strangely enough, neither the Supervising Magistrate appeared in a witness box nor proceedings of identification parade were produced and as such the fact by itself is sufficient to brush aside the evidence of all the three witnesses on this aspect.

Deposition of complainant and Bungul (P.W.1-P.W.2) regarding participation in identification parade can be examined from another angle as well.

Perusal of the contents of the Crime-Report reveals that features and description of the assailants does not find mentioned in it. The complainant also admitted in cross-examination that he did not disclose features of the accused persons in the Crime-Report. Omission to highlight the features of the un-known assailants in the F.I.R. is significant, putting a question mark to the evidence of the complainant identifying the respondents in the stated identification parade, which even otherwise cannot be acted upon in view of discussion made in preceding sub-paragraph.

There is also frank admission on the part of complainant (P.W.1) that the accused seven in number were mixed with other 10/15 persons at the time of identification. Since it is a joint identification test, therefore, even if it was held, cannot be acted upon as law requires separate identification parade of each and every accused. Mixing up of the respondents and others, seven in numbers with 10/15 other persons (dummies) is another infirmity to brush aside the proceedings of identification parade. It is further to be noted that the record is totally

silent about the similarity or otherwise of features of the dummies for the obvious reason of non-production of report of identification test.

Non-disclosure of role of the respondents is another legal infirmity, sufficient to brush aside the evidence of the witnesses on this score alone.

21. We have already dilated upon the evidence of Bungul and Ali Akbar (P.W.2-P.W.3) concluding that their evidence cannot be acted upon for the reasons dealt with.

The omissions pointed out in the evidence of complainant (P.W.1) highlighting the legal infirmities with reference to identifying the respondents in identification parade which also exists in the evidence of both the witnesses is sufficient to ignore the evidence of the witnesses on this aspect.

We may add here that Bungul (P.W.2) in cross-examination admitted that accused were known to him prior to the incident who also replying another question maintained that he did not give complete description of the accused to the police suggesting that he is illiterate. This witness in examination-in-chief maintained that he clearly saw the culprits in the moonlight whose faces were open. Seeing the assailants in the moonlight does not enable the person to preserve and remember the features of the accused.

22. Great stress was laid down on behalf of appellants on the recovery of weapon of offence as is evident from the statements of Allahdad (P.W.7) and Muzaffar Ali, D.S.P-Investigating Officer (P.W.10). Evidence of Allah Dad is not required to be examined as recovery was effected in his view from Ali alias Allam and Asloo alias Aslam (since dead). Recovery of hatchet and double barrel gun from Peeral alias Peero (respondent No.2) and lathi from Budho (respondent No.4) as deposed by I.O. (P.W.10) is of little significance as lathi and hatchet are not weapons of offence as is evident from the evidence of Dr. Sayed Ghous Ali (P.W.9) who stated that complainant (P.W.1) suffered only firearm injuries. Recovery of double barrel gun also cannot provide corroboration as no empty was secured from the spot.

23. In the opinion of learned Counsel for the appellants, medical evidence provides corroboration to the ocular account, sufficient to prove the guilt of the respondents.

We regret to share and endorse the opinion for two-fold reasons. First, the ocular account produced by the prosecution, discussed in detail from all aspects, does not inspire confidence and as such question of provision of corroboration does not arise at all. Second, though the postmortem report (Ex.19-A) and evidence of Dr. Sayed Ghous Ali

(P.W.9) suggest injury in front of four head of the deceased as stated by the witnesses but there is a conflict of medical and ocular account with reference to injuries inflicted on the person of complainant (P.W.1).

As per Medico Legal Report (Ex.19-B), the complainant sustained three injuries which were caused by firearm like shotgun. The complainant (P.W.1) though stated in his direct statement that he received bullet injuries but simultaneously deposed that the accused also inflicted injuries upon his body with lathies. He in cross-examination, strangely enough deposed that he received 8/10 hatchets injuries upon his left leg, backside and on right chest.

In the circumstances, argument advanced by learned Counsel for the appellants is without force.

24. Referring to the reasons advanced by the learned Trial Court in the judgment assailed, it was submitted that the learned Trial Court gave undue weight to the evidence of Ashraf (D.W.1), Ghulam Hussain (D.W.2) and Buxial Khan (D.W.3), and statement of Ashraf (respondent No.1) stating to produce witnesses in defence regarding plea of *alibi*. No doubt, plea of *alibi* was not agitated by the respondents while putting suggestions to the prosecution witnesses in cross-examination as pointed out by learned Counsel for the appellants but the fact by itself is not sufficient to grant premium to the prosecution, considering failure of defence to prove the plea in view of settled proposition of law casting

duty upon the prosecution to prove its case beyond shadow of doubt on the strength of its own evidence. Failure of the accused to prove his plea, may be false or vexatious, by itself would not be sufficient to grant premium to the prosecution. We are fortified in our view by law laid down in "MUKHTAR AHMED vs. THE STATE" (PLD 2002 SC 792), "NADEEM and others vs. The STATE and others" (2014 PCr.L.J. 374) (Federal Shariat Court) and "MUHAMMAD ASHRAF vs. THE STATE" (2012 SCMR 419).

25. Due to failure of prosecution to prove its case beyond shadow of doubt as discussed from different angles, the learned Trial Court rightly reached to the conclusion which is neither perverse nor arbitrary. The respondents earned double presumption of innocence in their favour having the judgment of acquittal based on evidence and as such no interference is called for resulting in dismissal of present appeal.

SH. NAJAM UL HASAN
Chief Justice

MEHMOOD MAQBOOL BAJWA
Judge

SYED MUHAMMAD FAROOQ SHAH
Judge

Dated, Islamabad the
30th October, 2018.

Approved for Reporting

JUDGE