

IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT:

**MR. JUSTICE DR. SYED MUHAMMAD ANWER, ACTING CHIEF JUSTICE
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH**

CRIMINAL APPEAL NO.03-K OF 2021

ASAD ALI SON OF GHULAM NABI, RESIDENT OF MIR COLONY, NEAR TELEPHONE EXCHANGE, TANDO JAM CITY, TALUKA AND DISTRICT HYDERABAD.

APPELLANT

VERSUS

1. PIR QAMAR ZAMAN SON OF PIR AMANULLAH, RESIDENT OF VILLAGE PIR MUHAMMAD ZAMAN SHAH, TALUKA AND DISTRICT HYDERABAD.
2. KHALID HUSSAIN SON OF KAJLA MAGSI, RESIDENT OF VILLAGE SHARIF HEJWANI, TALUKA JHAL MAGSI, BALOUCHISTAN.
3. BASHEER AHMED SON OF ABDUL RASOOL MAGSI, RESIDENT OF VILLAGE MANZOOR JAMALI, TALUKA JHAL MAGSI, BALOUCHISTAN.
4. THE STATE.

RESPONDENTS

Counsel for the Appellant	Mr. Roshan Ali Azeem Mallah, Advocate
Counsel for the Respondents	Syed Tariq Ahmed Shah, and Syed Shazeel Hasan, Advocates
Counsel for the State	Mr. Zahoor Shah, Additional Prosecutor General, Sindh
FIR No., Date and Police Station	83/2012, 29.04.2012, Tando Jam
Date of Impugned Judgment	20.01.2021
Date of Institution	19.03.2021
Date of Hearing	31.05.2022
Date of Judgment	08.12.2022

J U D G M E N T

Khadim Hussain M. Shaikh –J. By means of the captioned Criminal Appeal, appellant Asad Ali, who was injured and son of complainant Ghulam Nabi, has called in question Judgment dated 20.01.2021, passed by the learned Model Criminal Trial Court-II/IVth Additional Sessions Judge,

Hyderabad in Sessions Case No.670 of 2012 re-The State vs. Pir Qamar Zaman and others, emanating from FIR No.07 of 2012 registered at Police Station Tando Jam, District Hyderabad for Offences under Section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, (**"The Ordinance"**), whereby respondents Pir Qamar Zaman, Khalid Hussain and Bashir Ahmed, have been acquitted of the charge, extending them benefit of doubt.

2. Briefly the facts of the case are that on 29.04.2012 at 1000 hours, complainant Ghulam Nabi son of Ali Muhammad Mallah appeared at police station Tando Jam and lodged his FIR, mainly stating therein that on that day while he (complainant) and his brothers namely Gulab, Ghulam Hussain, Wazeer and Akhtar Hussain alongwith their families were available in their house located in Meer Colony near Telephone Exchange Tando Jam, when at about 06:30 a.m. Pir Irshad Shah, having repeater in his hand, Pir Badar, armed with rifle, Pir Abbas armed with pistol and Pir Qamar armed with pistol alongwith three unknown persons, whom they have seen clearly and they will identify them on seeing again, entered in their house. Out of three unknown persons one person was armed with rifle while the rest two had guns in their hands. They on the force of their weapons obtained keys of *almirah* from the complainant and then they entering into a room of their house, took licenced repeater gun of the complainant's brother Wazeer, hanging on the wall and started taking articles after opening the *almirah* to which the complainant's sister namely Mst. Amina resisted whereupon the accused had caused blows to Mst. Amina, who starting bleeding. On cries complainant's other brothers woke up and grappled the accused, who fired from their weapons so as to rescue them, with the result that complainant's son Asad Ali also sustained

a firearm injury on his leg. It is alleged that in the firing made by the accused three persons from their side sustained injuries, out of whom two accused were captured and whereas one injured accused was taken away by the other accused boarding in Mehran and black colour Corolla cars, standing outside their house. Then on checking, the complainant found cash amount of Rs.150,000/- and some ornaments of gold missing. The complainant handed over the custody of two apprehended accused to the police and later on he came to know that the apprehended accused were Bashir Ahmed son of Abdul Rasool and Khalid Hussain son of Kajla. Then the complainant appeared at the police station and lodged the subject FIR. On the same date accused Pir Qamar Zaman Shah was arrested by the police.

3. After usual investigation, respondents Pir Qamar Zaman, Khalid Hussain and Bashir Ahmed (who hereinafter will be referred to as the respondents) were sent up with the final report under Section 173 of The Code of Criminal Procedure, (Act V of 1898) ("**The Code**"), showing therein Pir Irshad Ali, Pir Badar Zaman and Abbas Ali as absconders.

4. Record reflects that charge Ex.05 dated 21.12.2013 was framed against the respondents and co-accused Pir Irshad Ali to which they pleaded not guilty and claimed their trial vide their pleas Ex.05-A, B, C & D respectively. On a query the learned counsel for the respondents and learned Additional Prosecutor General have stated that co-accused Pir Irshad Shah in the wake of interim pre-arrest bail granted to him attended the Court and his matter relating to grant of pre-arrest bail went up to the level of Hon'ble Supreme Court of Pakistan and in the meanwhile the aforesaid charge was framed against the respondents and co-accused Irshad Shah, but subsequently on declining the pre-arrest bail, the latter

had absconded away and then following the legal formalities he (Pir Irshad Ali Shah) and two other co-accused namely Pir Badar Zaman Shah and Pir Abbas Ali Shah were declared proclaimed offenders.

5. At the trial, the prosecution examined Ghulam Hussain as PW.1 at Ex.6, Gulab as PW.02 at Ex.7, injured Asad Ali as PW.03 at Ex.8, Dr. Gibran as PW.4 at Ex.11, who produced provisional and final Medico Legal Certificates of injured Asad at Ex.11/A and Ex.11/B; police letter of injured Bashir at Ex.11/C, provisional Medico Legal Certificate of injured Bashir at Ex.11/D; Dr. Anwer Baloch as PW.5 at Ex.13, who produced lash chakas form Ex.13/A and postmortem report of deceased Mst. Amina Ex.13/B; HC Farman Ahmed as PW.6 Ex.14, who produced four memos of injuries Ex.14/A to Ex.14/D, memo of arrest of accused Bashir and Khalid Ex.14/E, memo of arrest of accused Pir Qamar Zaman Ex.14/F; SIP Siraj Ahmed Shaikh as PW.7 at Ex.15, who produced memo of handing over the custody of injured accused Bashir and Khalid Ex.15/A, FIR Ex.15/B, memo of place of occurrence Ex.15/C, seven photographs of Mst. Amina, Asad and place of incident Ex.15-D/1 to Ex.15-D/7 respectively; DSP/SHO Muhammad Yaqoob as PW.8 at Ex.17, who produced order dated 04.05.2012 of SSP Hyderabad Ex.17/A and Chemical Examiner Report Ex.17-B; WMLO Dr. Farnaz Andleeb as PW.9, who produced provisional medico-legal certificate of injured deceased Mst. Amina Ex.18-A; and, mashir Hazar Ali Lund as PW.10 at Ex.19 and then the side of the prosecution was closed vide statement Ex.20.

6. After the closure of prosecution side, the statements of respondents Pir Qamar Zaman, Khalid Hussain and Bashir Ahmed under Section 342 of The Code were recorded at Ex.21, Ex.22 and Ex.23 respectively wherein they denying the prosecution allegations, professed their innocence and

false implication. They, however, neither examined themselves on oath, nor did they examine any person as their defence witness. Respondents Khalid Hussain and Bashir Ahmed, further contended that the complainant party had committed the murder of their relative Sohrab Magsi and that they have been falsely implicated in this case by the complainant party with malafide intention so that they should not pursue the murder case of their relative Sohrab.

7. At the conclusion of the trial and after hearing the parties' counsel, the learned trial Court acquitted the respondents of the charge, extending them benefit of doubt vide impugned acquittal judgment dated 20.01.2021, as discussed in paragraph-I *supra*.

8. Having felt aggrieved by the impugned acquittal judgment dated 20.01.2021, injured Asad Ali has preferred the instant Criminal Appeal.

9. The learned Counsel for the appellant has mainly contended that all the PWs have fully supported the prosecution version; that the learned trial Court, without appreciating the evidence in proper manner, has passed the impugned acquittal judgment; that the medical evidence is in line with the ocular account; and, that the prosecution has proved its against the respondents beyond any shadow of doubt, the learned counsel placing his reliance on **1993 PCRLJ 128, 2013 SCMR 590, 1998 MLD 1107, 2005 PCRLJ 1273 AND 2018 PCRLJ NOTE 57** prays that this criminal acquittal appeal may be allowed and the respondents may be convicted.

10. Conversely, the learned Advocate for the respondents has mainly contended that there was delay of more than 03 hours in lodgment of the FIR, which has not been properly explained by the prosecution; that no specific role was assigned to the respondents; that the motive for

commission of the crime set-forth by the prosecution has not been proved; that there are material contradictions in the evidence led by the prosecution; that the medical evidence is in conflict with the ocular account; that the prosecution has failed to prove its case against the respondents beyond reasonable doubt and, that the complainant party by throwing very wide net implicated the respondents in this case falsely by exaggerating the number of accused; and, that the learned trial Court after appreciating the evidence brought on the record, has acquitted the respondents. The learned counsel prays for dismissal of the instant criminal appeal. The learned Additional Prosecutor General, Sindh on behalf of the State, supporting the impugned acquittal judgment of the learned trial Court, has contended that there is no substance in the captioned criminal appeal and prays for dismissal thereof.

11. We have considered the submissions of learned counsel for the parties and learned Additional Prosecutor General, Sindh and have gone through the evidence brought on the record with their assistance.

12. From a perusal of the record, it would be seen that the incident was shown to have taken place on 29.04.2012 at 06:30 a.m. and whereas the FIR was lodged on 29.04.2012 at 10:00 a.m. i.e. after more than 03 hours of the incident despite the fact that per prosecution police station Tando Jam was at the distance of only one furlong from the place of incident and on receiving information the police of P.S Tando Jam immediately reached at the place of incident at about 07:00 a.m. where the complainant allegedly handed over the custody of two apprehended respondents namely Bashir Ahmed and Khalid Hussain; moreover, the statements of the PWs under Section 161 of The Code were recorded on 05.05.2012 i.e. after six days of the incident and lodgment of the FIR and there is no plausible

explanation for such an inordinate delay in lodgment of the FIR and in recording the statements of the PWs, first Investigating Officer SIP Siraj Ahmed Shaikh stated that **“Investigation of the present crime remained with me for five days; it is fact that during such 05 days complainant did not produce any PW before me for recording 161 Cr.P.C statement”**, and such inordinate delay, in reporting the matter and recording the statements of the PWs, is incomprehensible; it is reiterated that the delay in lodgment of the FIR has been viewed with grave suspicion, how much it throws clouds of suspicion on the seeds of prosecution, depends upon a variety of factors, it requires careful scrutiny when number of accused is large and such delay has resulted in embellishment, which was a creation of afterthought, assuming importance in absence of convincing explanation, which prima facie points out to fabrication of the prosecution story; and increasing the number of accused, by false implication of the innocent person, throwing very wide net and in the wake of previous hostility between the parties over the landed property, which is admitted in evidence by PW.1 Ghulam Hussain Mullah stating that **“It is correct that civil suit No.561/2011 was filed by the accused side against me and my brothers over the plot, which was decreed in favour of the accused. Vol: says the said suit was filed by accused against us and impleading their own sister over the plot which was sold out to us, the suit was decreed as exparte and we challenged the said decree which was set aside and now matter is again pending in civil Court”**, such an unexplained inordinate delay in lodgment of the FIR and in recording statements of the PWs under Section 161 of The Code, being significant could not be lost sight of, for, under the given circumstances, the possibility of false implication of the respondents, who have not been assigned any specific role in commission of the offence, by

exaggeration in the number of accused, after consultations and deliberations, could not be ruled out. Reliance in this context is placed on the case of **AKHTAR ALI AND OTHERS V. THE STATE (2008-SCMR-6)**, wherein the **Hon'ble Supreme Court of Pakistan** has held that:-

“It is also an admitted fact that the FIR was lodged by the complainant after considerable delay of 10/11 hours without explaining said delay. The FIR was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of FIR provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the FIR.”

In the case of **AYUB MASIH VS. THE STATE [PLD 2002 SC 1038]**, the **Hon'ble Supreme Court of Pakistan** has held that:

“Unexplained inordinate delay in lodging the FIR is an intriguing circumstance, which tarnishes the authenticity of the FIR, casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the FIR is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused.”

In case of **MUHAMMAD ASIF VS. THE STATE [2017 SCMR 486]**, the **Hon'ble Supreme Court of Pakistan** has held that:

“There is a long line of authorities/precedents of this Court and the High Courts that even one or two days unexplained delay in recording the statements of eye witnesses would be fatal and testimony of such witnesses cannot be safely relied upon.

13. Furthermore, in the FIR no specific role was assigned to the respondents, but in the evidence PW.1 Ghulam Hussain stated that **“Khalid and Bashir robbed gold ornaments from our house. They also robbed away licenced repeater of my brother Wazeer”**, who both, per prosecution, were apprehended empty handed at the time of incident, which took place at 06:30 a.m., as neither the alleged robbed ornaments of gold and/or licenced repeater of Wazeer were secured from them nor the weapons allegedly carried by them at the time of incident were recovered from them while PW.2 Gulab did not ascribe any overt act to respondents Khalid and Bashir and whereas PW Asad Ali, who being injured can be termed to be a star witness in this case, stated that co-accused Pir Irshad Shah fired upon him hitting his right leg, but he neither implicated the respondents (Pir Qamar Zaman, Khalid Hussain and Bashir Ahmed) nor did he state about commission of robbery in their house. For the sake of convenience his evidence is reproduced here:-

I am student of 9th class at that time, on 29.04.2012, I was sleeping in my house when I heard the sound of firing to which I woke up and saw that Pir Irshad Shah having repeater in his hand was standing in our house to whom I enquired as to why he had entered in our house to which accused Pir Irshad Shah straight away issued fired upon me which hit me on my right leg due to which I fell down and became unconscious. Police recorded my statement u/s 161 Cr.P.C in hospital. Accused Pir Irshad Shah present in court is same.

PW.1 Ghulam Hussain stated that **“I caught hold of accused Bashir and my brother Wazeer (not examined) caught hold of accused Khalid at the distance of 3 to 5 feet”**, while PW.2 Gulab stated that **“my brother and other family members have captured the accused”**, and whereas PW.3 injured Asad Ali did not state about catching hold of respondents Khalid Hussain and Bashir Ahmed; according to PW.1 Ghulam Hussain **“after 1 and 1 ½ hour police arrived at the place of incident”**, while

per PW.2 Gulab **“police itself came at place of incident with half an hour of incident”** and whereas PW.3 injured Asad did not state about arrival of police at the place of incident; according to the Investigating Officer SIP Siraj Ahmed Shaikh, who then was an ASI, on receiving information about the incident he alongwith PC Farman and PC Mehmood arrived at the place of incident where they saw sister and son of Ghulam Nabi Mullah namely Mst. Amina and Asad lying injured and two accused persons lying injured in the veranda of the house whose custody was handed over to him by complainant Ghulam Nabi in presence of mashirs Hazar Ali Lund and Zahoor-ud-Din Mullah and memo of handing over the custody Ex.15/A was prepared at 07:00 a.m., but according to PW.1 Ghulam Hussain and PW.2 Gulab stated that no such document was prepared during that time, while PW.3 injured Asad did not state about preparation of memo of handing over; according to prosecution the incident took place inside the house of the complainant where accused allegedly entered into the house and committed robbery from a room of the house where on resistance accused caused injuries to deceased Mst. Amina and they allegedly also caused injury to PW.3 injured Asad on his leg; PW.7 ASI Siraj Ahmed Shaikh, who initially investigated the case being Investigating Officer for 05 days, having prepared series of documents including all the mashirnamas of injuries, mashirnama of place of incident, mashirnama of blood stained clothes, mashirnamas of arrest the respondents, danistnama and inquest report etc, stated in cross examination that **“it is fact that crime number is mentioned in all the memos of injuries; after about 01 and half hour of registration of FIR, I prepared memos of injuries; it is fact that FIR was registered at 1000 hours”**, meaning thereby the mashirnamas of injuries were prepared after 11:30 a.m. while according to PW.6 mashir HC Farman Ahmed, Rajput,

“all the memos of injuries produced by me were prepared at RHC Tando Jam at the same time at 0900 hours”; and whereas on top of all the four mashirnamas of injuries of injured Mst. Amina (deceased) appellant Asad, accused Khalid Hussain and Bashir Ahmed word **waqat** (time) was written, leaving the spaces blank for inserting certain time later on; according to PWs Ghulam Hussain and Gulab they took injured Asad and Amina to RHC Tando Jam, and whereas per Investigating Officer Siraj Ahmed Shaikh he brought all injured to RHC Tando Jam where he issued letter for treatment of injured persons; per PW.4 Dr. Gibran injured Asad was brought at RHC Tando Jam with police letter at 08:10 a.m. and injured Bashir was brought there at 09:30 a.m. and according to PW.9 Dr. Farnaz Andleeb, injured Mst. Amina was brought at RHC Tando Jam through police letter No.56 dated 29.04.2012 and she examined her at 09:30 a.m.; per PW.7 Investigating Officer Siraj Ahmed Shaikh he alongwith PC Farman and PC Mehmood inspected the place of incident in presence of mashirs Hazar Ali Lund and Zahoor-ud-Din after the aforesaid events, which is even evident from the mashirnama of place of vardhat Ex.13/C, making reference of the aforesaid crime No., but the time of its preparation is not mentioned therein, which was obviously prepared after 11:30 a.m. and whereas according to PW.10 mashir Hazar Ali Lund, at about 06:45/0700 hours complainant alongwith police party came there in his house and inspected the place of incident in his presence, and in the veranda they saw sister of complainant namely Mst. Amina lying injured on an iron cot and then they went to first floor where son of complainant namely Asad was lying on cot in injured condition in a room; furthermore, the daily diaries relating to receiving information about the incident and their reaching at the place of incident immediately and taking over custody of respondents Bashir Ahmed and Khalid Hussain from the complainant

and their return to RHC Tando Jam and then to P.S and so also regarding further movements of the Investigating Officer and his other staff from police station to the places namely RHC Tando Jam for inspecting the injuries of injured Asad, injured accused Khalid Hussain and Bashir Ahmed and so also arrest of accused Khalid Hussain and Bashir Ahmed, who were shown arrested from RHC, the place of incident for its inspection, the place where accused Pir Qamar Zaman Shah was shown arrested and LUMS hospital Hyderabad for the purpose preparing danistnamas and inquest reports earlier of deceased accused Sohrab and then of deceased Mst. Amina, where postmortems of both of them were carried out and then their return to the police station from all the aforesaid events, were neither proved to have been made in the relevant daily diary register nor were produced in evidence, although the same were essential to be adduced in evidence so as to establish the movements of the police towards the places where the proceedings discussed *supra*, were shown to have been conducted, to specific questions Investigating Officer ASI Siraj Ahmed Shaikh admitted stating that **“it is fact that I have not produced any roznamcha entry regarding the events of investigation”**; likewise, PW.8 subsequent Investigating Officer DSP Muhammad Yaqoob Jatt stated that **“I had inspected the place of incident on 05.05.2012; it is fact that I have not produced any entry to show that on 05.05.2012 I had visited the place of incident”**.

14. Undoubtly, the lady inmates were available in the house of the complainant, one of them namely Mst. Gul Bano was shown to have accompanied injured lady Mst. Amina from the house of the complainant to RHC Tando Jam and then to LUMS hospital Hyderabad and she was shown to have remained with lady injured Mst. Amina, who died in hospital at Hyderabad after three days of the incident, but none of the lady inmates

of the house of the complainant including that Mst. Gul Bano was examined by the prosecution; Investigating Officer DSP Muhammad Yaqoob admitted that **“I have not recorded 161 Cr.P.C statement of any lady inmate of the house of the complainant; it is fact that the place of incident is thickly populated area; I did not record the statement of any locality person from the place of incident during investigation”**.

According to the prosecution case as set-out in the FIR, the accused caused blows to Mst. Amina, on her showing resistance to the robbery of ornaments of gold, but the weapon or substance used for causing blows to her is no where mentioned in the FIR, however, PW.9 Dr. Farnaz Andleeb, who initially on 29.04.2012 examined deceased Mst. Amina in injured condition at RHC Tando Jam, had found only two injuries on her person caused by hard and blunt substance as is evident from the provisional medico-legal certificate issued by her vide No.98/2012 dated 07.05.2012 Ex.18/A available at page 93 and whereas the postmortem report Ex.13/B revealed three injuries on the person of deceased Mst. Amina, caused by firearm weapon; according to PW.1 Ghulam Hussain and PW.2 Gulab absconding co-accused Pir Irshad Shah made two straight fires, one hitting the mouth of deceased Mst. Amina and the other did hit the leg of injured Asad, who also ascribed role of firing at him to accused Pir Irshad Ali Shah, but PW.5 Dr. Anwer Baloch, who carried out postmortem on the dead body of deceased Mst. Amina stated that **“it is fact that as per postmortem report deceased was not having any injury at her mouth”**; according to PW.4 Dr. Gibran he examined only two injured persons namely Asad and Bashir and no medical evidence relating to deceased accused Sohrab and injured accused Khalid Hussain was brought on record by the prosecution.

15. On our own independent evaluation of the evidence as discussed *supra*, we find that the prosecution has failed to bring home the guilt of the appellant to the hilt and we are of the view that there was no occasion for conviction of the respondents namely Pir Qamar Zaman Shah, Khalid Hussain and Bashir Ahmed, therefore, the learned trial Court was right in acquitting them, extending them benefit of doubt.

16. It is worthwhile to mention here that the principles for appreciation of evidence in appeal against the acquittal are now well settled, for, an accused is presumed to be innocent and if after trial, he is acquitted, he earns double presumption of innocence, which will remain attached with the judgment of acquittal and heavy onus is on the prosecution to rebut the said presumption; such acquittal judgment cannot be interfered with unless it is proved that same is arbitrary, shocking, capricious, fanciful and on perusal of the evidence no other decision can be given except that the accused is guilty, and there has been complete misreading of evidence leading to miscarriage of justice; and, while evaluating the evidence, difference is to be maintained in appeal from conviction and in appeal against acquittal. Reliance in this context may be placed on cases of **MUHAMMAD SHAFI V. MUHAMMAD RAZA AND ANOTHER (2008 SCMR 329)**, **STATE/GOVERNMENT OF SINDH THROUGH ADVOCATE GENERAL, SINDH, KARACHI V. SOBHARO (1993 SCMR 585)**, and **YAR MUHAMMAD AND 3 OTHERS V/S THE STATE (1992 SCMR 96)**. The case law cited at bar by the learned counsel for the appellant being distinguishable on facts and circumstances is not helpful for the appellant as none of the cases cited *supra* by the learned counsel involved the facts and circumstances, as are involved in the case one in hand.

17. In view of what has been discussed above, we are of the considered view that the finding of acquittal, rendered by the learned Trial Court, is neither arbitrary nor is capricious and the impugned acquittal judgment, passed by the learned trial Court, is apt to the facts and circumstances of the case. The learned counsel for the appellant has also not been able to point out any illegality or infirmity or perversity or even any jurisdictional defect in the impugned judgment, calling for interference of this Court in exercise of jurisdiction in an appeal against acquittal judgment. Accordingly, the instant criminal appeal being devoid of merit is dismissed.

**(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE**

**(JUSTICE DR. SYED MUHAMMAD ANWER)
ACTING CHIEF JUSTICE**

*Islamabad, the
8th of December, 2022
Khurram*