

Ordinance, 1979 read with section 34-PPC, in the case FIR No. 3 of 2008, registered at the Police Station City, Khajjak District Sibi on 16.04.2008, on a written complaint of the Appellant.

2. Succinct story of the prosecution case in hand as gleaned from the aforesaid FIR are that Dr. Muhammad Ismail (Complainant) on the basis of hearsay occurrence disclosed to him by his Chowkidar PW-4/ Mehmood Khan that on the night between 15/16.04.2008 at about 2:00 A.M, when he was present at agricultural land owned by the complainant alongwith three other persons for installation of tubewell machine, when the Appellant/ mechanic Amanullah alongwith three other persons, two of them duly armed with *Klashinkovs* including the Appellant, tied their hands and removed **Coils** of two **transformers** lying there, one was new **transformer** which was purchased by the Complainant, amounting to Rs.325,000/-. The culprits had also taken away one Nokia mobile set and two bicycles. The application (Ex.P/1-A) of the complainant was converted into the FIR (Ex.P/6-A). PW-6, SHO/SI Muhammad Boota Gujjar took up the investigation and on the next date i.e. 17.04.2008 arrested nominated accused/appellant Amanullah, prepared the memo of occurrence, recovered two bodies of **transformers** and till 25.04.2008 he could not make arrest of remaining accused nor recovered the robbed articles. Subsequently, on 27.04.2008 the investigation of the case was entrusted to IP/SHO Tariq Nawaz, who prepared memo of disclosure (فردانکشاف) (Ex. P/5-A), in the presence of PW.5, Head Constable Meer Khan and Police Constable Muhammad Usman on 29.04.2008, wherein arrested Appellant/accused Amanullah

allegedly admitted the commission of offence and disclosed the names of remaining three accused but neither they were arrested nor the concerned police succeeded to recover the robbed articles and after recording the statements of remaining PWs and on completion of usual investigation, the interim challan (Ex. P/8-A), submitted in the Court of law was accepted.

3. After initiating the proceedings under section 87 & 88 Cr.P.C against the absconder accused namely Muhammad Riaz alias Riaz Ahmed s/o Rahim Bakhsh i.e. brother of the Appellant, the trial was commenced by framing charge against the Appellant/accused for an offence punishable under section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with section 34-PPC, who denied his culpability and claimed trial.

4. The prosecution, in order to substantiate the accusation, produced all material witnesses and on conclusion of prosecution evidence, statement of the Respondents/accused Amanullah was recorded by the trial Court under section 342 Cr.P.C, who denied the allegation of the prosecution put to him. However, he did not opt to make statement on oath or to adduce evidence in his defence.

5. The impugned judgment and the evidence put-forth by the prosecution have thoroughly been scanned with the able assistance provided by Mr. Ahsan Rafiq Rana, Advocate representing the Appellant, Mr. Ghulam Farooq Mengal, Advocate for the Respondent and Mr. Muhammad Naeem Khan Kakar, learned Additional Prosecutor General, Baluchistan for the State.

6. It is not out of context to mention that from careful perusal and scrutiny of record of the learned trial Court, it appears that the co-accused Muhammad Riaz alias Riaz Ahmed i.e. brother of the Appellant was subsequently apprehended on 29.01.2009, after the pronouncement of impugned judgment and supplementary challan submitted against him had been duly accepted on 13.02.2009. The application under section 265-k Cr.P.C filed on his behalf on dated 07.03.2009 was allowed by the learned trial Court, mainly on the ground that he was not identified by the eye witnesses during evidence, to be one of the culprits. Consequently, he was acquitted under section 265-K Cr.P.C vide Order dated 12.03.2009, against which no appeal under section 417 Cr.P.C has been preferred by the Complainant or by the State.

7. As per prosecution version, the Appellant was arrested on 17.04.2008 i.e. next day of lodging the FIR, but his disclosure (فرد انكشاف) (Ex. P/5-A) was recorded on 29.04.2008, i.e. after about 12 days, without any reason or plausible cause. As per contents of the memo of disclosure, the Appellant has admitted commission of offence and stated that with the help of his brother and two others he removed "**Coils**" from the **transformers** owned by the complainant and shifted the same on bicycles owned by the Chowkidar PW Mehmood and another person. Marginal witnesses of memo of disclosure are Head Constable Meer Khan and Police Constable Muhamamd Usman. PW-5 Head Constable Meer Khan, one of the main marginal witnesses, who produced memo of disclosure (فرد انكشاف) (Ex. P/5-A), categorically stated in his examination-in-chief

that the Appellant Amanullah committed theft of *transformers* owned by the Complainant, but he has nowhere stated that the Respondent/accused admitted theft of *Coils*, Mobile Phone of Chowkidar or bicycles. In cross-examination, he has further clarified that the Appellant was arrested from his shop, where they proceeded alongwith Dogs. He has emphatically denied in cross examination that *two transformers* owned by Dr. Muhammad Ismail (Complainant) had not been stolen. Though, it is an admitted position that two heavyweight *transformers* cannot be shifted on bicycles. Evidence brought by the prosecution on record reveals that on 16.04.2008 at 2:00 A.M (night), the alleged incident had taken place, the complainant was informed in the morning at 5:00 A.M, who proceeded at the Police Station. The Investigation Officer SIP Muhammad Boota (PW-6) stated that he lodged the FIR on 16.04.2008 at 1:30 P.M and then proceeded at the place of occurrence within ten minutes. However, the Complainant stated that he lodged FIR on 16.04.2008 at 07:00 A.M in the morning. PW-2 Azizullah being an eye witness stated in his examination-in-chief that the Appellant robbed *Coils of transformers*, shifted on two bicycles. He has further stated in cross-examination that police visited the place of occurrence at 8:30 A.M in the morning. Another eye witness PW-3/Ameer Muhammad deposed that police visited the place of occurrence and recorded his statement at 8:30 A.M (morning). PW-4/ Mehmood Khan, Chowkidar, who being star witness of the prosecution has also stated that police visited the place of occurrence at 8:00 or 8:30 A.M in the morning and took the *transformers* from the place of occurrence, after preparation of memo of recovery (Ex. P/4-A).

He has shown ignorance about weight of stolen *Coils*. FIR was lodged at 1.30 PM. Difference of timings of visiting of place of occurrence by the police reveals that either the investigation was conducted by the police before lodging the FIR *or* that the statements of eye witnesses are incorrect. Moreso, PW-8, SHO/IP Tariq Nawaz, who submitted final report under section 173 Cr.P.C, against the Appellant stated about disclosure made by the Appellant. However, he admitted in cross-examination that preparation of disclosure (Ex. P/5-A) did not reveal date and timings of its preparation. Head Constable Meer Khan, marginal witness of disclosure Memo has not supported the case of the prosecution with regard to alleged admission made by the Accused, by stating in examination-in-chief that the Appellant had taken away two *transformers* but he did not state removal of *Coils* or theft of two bicycles and a Nokia phone as mentioned in the disclosure memo.

8. It needs to be iterated that under article 39 of the *Qanun-e-Shahadat Order, 1984*, Confession by accused of his guilt under custody of police, which is not made in the presence of Magistrate, in the absence of any strong corroborative piece of evidence is having no legal sanctity in the eyes of law, therefore, if it all, the extra judicial confession made by the Appellant in the custody of police is not admissible in evidence; more particularly, it has not been supported by one of the examined marginal witness, PW-5 Head Constable Meer Khan.

9. It is now settled proposition of law that a single circumstance creates a reasonable doubt in a prudent mind about the guilt of accused, then he shall be entitled to such benefit not as a matter of grace but as a

matter of right. Prosecution is bound to prove its case beyond any shadow of doubt. Admittedly, conviction cannot be based on high probabilities and suspicion cannot take the place of proof, therefore, no legal sanctity is attached to the FIR lodged after inordinate delay merely on disclosure of some source of information. In latest authoritative pronouncement of the Hon'ble Apex Court, in the case of **Muhammad Mansha vs. The State (2018 SCMR 772)**, the dicta as laid down in such context is that:-

*“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better that ten guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of **Tariq Pervez Vs. The State (1995 SCMR 1345)**, **Ghulam Qadir and 2 others Vs. The State (2008 SCMR 1221)**, **Muhammad Akram vs. The State (2009 SCMR 230)** and **Muhammad Zaman Vs. The State (2014 SCMR 749)**.”*

10. Reasoning of acquittal recorded by the learned trial Court does not warrant any interference as impugned judgment does not suffer from lack of appreciation of reception of evidence legally and acquittal order on the face of it is not based upon surmises and conjectures. On the contrary, it is based upon reasons which do appeal to a reasonable mind. The settled criteria to entertain the appeal against acquittal as laid down by the Superior Courts is that if two different views or positions of the case, and the view taken by the trial Court can be justified on the basis of facts or in principle of law, then the order of acquittal is not interfered with. It is also 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. Suffice it to say that the impugned judgment does not reflect that the learned trial Court had committed gross injustice in the administration of criminal justice, more particularly, at the very inception, co-accused namely Muhammad Riaz alias Riaz Ahmed on his arrest has been acquitted under section 265-k Cr.P.C and the said speaking order has not been questioned or challenged before the appellate forum. It is an admitted position that scope of an appeal against acquittal of accused is considerably limited, more particularly, the order of acquittal passed by the trial Court in this case is based on correct appreciation of evidence, does not warrant interference in appeal.

11. It is now settled proposition of law that the appellate court cannot frequently interfere with the acquittal merely because reappraisal of evidence it comes to the conclusion different from that of the trial court acquitting accused. Suffice it to say that the learned trial court correctly observed that the prosecution has miserably failed to prove its case against the Respondents/accused beyond the shadow of reasonable doubt. Keeping in mind the law as laid down by the august Supreme Court of our country, the scope of interference in appeal against acquittal is narrowest and limited because after acquittal, the accused shall be presumed to be innocent; in other words, the presumption of innocence is doubled.

12. In likewise appeals against acquittal, we have already fortified our above views by placing reliance on the case law in such context, expounded in **A I R 1934 P C 227 (2)** (*Sheo Swarup and others v. King*

Emperor, (ii) **P L D 1985 S C 11** (*Ghulam Sikandar and another v. Mamraz Khan and others*), (iii) **P L D 1977 S C 529** (*Fazalur Rehman v. Abdul Ghani and another*), (iv) **P L D 2011 S C 554** (*The State and others v. Abdul Khaliq and others*), (v) **P L D 2010 S C 632** (*Azhar Ali v. The State*), (vi) **2002 S C M R 261** (*Khadim Hussain v. Manzoor Hussain Shah and 3 others*), (vii) **P L J 2002 S C 293** (*Khadim Hussain v. Manzoor Hussain Shah and 3 others*) (viii) **2013 P.Cr.L.J 374** (*Fateh Muhammad Kobhar v. Sabzal and 4 others*), (ix) **2011 P.Cr.L.J 856 (FSC)** (*Mst. Salma Bibi v. Niaz alias Billa and 2 others*), (x) **PLD 1994 S C 31**, (*Ghulam Hussain alias Hussain Bakhsh and 4 others v. The State and another*), (xi) **2010 S C M R 1592** (*Qurban Hussain alias Ashiq v. The State*), (xii) **2017 S C M R 633** (*Intizar Hussain v. Hamza Ameer and others*).

13. For the foregoing reasons, we are of the considered opinion that there is hardly any improbability, infirmity and perversity in the impugned judgment of acquittal recorded by the learned trial Court. Neither acquittal is arbitrary, capricious and fanciful and against the record, nor contrary to evidence brought on record, which being based on sound and cogent reasons, do not warrant any interference by this Court, and is accordingly maintained. These are the reasons of short order of dismissal of appeal.

JUSTICE SHAUKAT ALI RAKHSHANI

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Quetta the
December, 06 2018
 M.Ajmal/**.

