IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate Jurisdiction)

JUSTICE DR. FIDA MUHAMMAD KHAN
JUSTICE SYED MUHAMMAD FAROOQ SHAH

Cr. Appeal No.41/P of 2005.

Said Rahman Constable No.434 Traffic Police Karak, son of Sarwar Khan, R/o Hospital Koroona, Karak City, Tehsil & District Karak.

…..Appellant

Versus

- **Ikhtar Badshah son of Duran Shah, R/o Tehsil Koroona Karak City, Tehsil & District Karak.**
- **The State**

…..Respondents.

Counsel for the Appellant	**---**	**Mr. Astaghfirullah, Advocate.**
Counsel for Respondent	**---**	**Mr. Jalal-ud-Din Akbar Azam Khan, Advocate.**
Counsel for the State.	**---**	**Malik Akhtar Hussain Awan, Assistant A.G, KPK.**
Case FIR No, date & Police Station	**---**	**FIR No.132 dated 29.06.2002, P.S Karak, District Karak.**
Date of impugned Judgment.	**---**	**12.10.2005.**
Date of institution	**---**	**03.12.2005.**
Date of hearing	**---**	**02.10.2018.**
Date of decision	**---**	**02.10.2018.**

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SYED MUHAMMAD FAROOQ SHAH, J.— Captioned appeal under section 417 (2A) Criminal Procedure Code has been directed against the judgment, pronounced on 12.10.2005, by the learned Additional Sessions Judge, Karak, whereby all accused/respondents No.1 to 3 were acquitted from the charges. Through this appeal a prayer to set-aside the impugned judgment and to convict the respondents No.1 to 3 according to law has been made.

2. A perusal of record transpires that by an earlier order passed by this Court on 14.5.2008, on request of learned counsel for the appellant, the appeal was disposed of being not pressed to the extent of *Naqeebullah* and *Kifayatullah,* the respondents No.2 and 3, respectively. However, the appeal to the extent of Ikhtiar Badshah, respondent No.1, was admitted for hearing with direction to the office to delete the names of respondent No.2 &3 from the title of the appeal.

3. The case of the prosecution in nutshell is that *Gul Said* submitted application (*Ex.PW8/2*) to SHO Police Station *Karak* with the effect that on 29.6.2002 he alongwith a constable Gul Bahadar was going to the Civil Hospital *Karak* for treatment. When they reached main bazaar *Karak*, they saw traffic police officials and Rickshaw drivers were exchanging hot words. He got down from the vehicle and tried to apprehend *Naqeebullah* son of *Ikhtiar Badshah* through constable *Gul Bahadar* but in the meantime during scuffle and hot words exchanged in between him (complainant Gul Said) and Rickshaw drivers, the said Rickshaw Driver ran away towards the market. In the meanwhile, many people gathered at the place of occurrence, therefore, the complainant left

the spot to the hospital, and on his return from the hospital, the Rickshaw drivers and other people blocked their way and started beating him and to his companions as well. They also snatched official rifle *klashnikov* forcibly, lying in the vehicle and many persons made gun firing at them in order to commit their murder, as a result of which *Gul Bahadar* and *Said Rahman* traffic police constables became injured. He has further stated that he can identify the accused *Naqeebullah* and *Kifayatullah* and other persons if they are produced before him. The said application was converted into FIR lodged against the accused.

4. Mir Sarfaraz Khan, SHO Police Station Karak, after registration of the case, took up the investigation. He proceeded to the place of occurrence, where he was informed that the injured had already been dispatched to the hospital. Later on, the investigation officer/SHO was summoned by the District Nazim to his office and on the way PW Saifullah IHC met with him; his statement under section 161 Criminal Procedure Code was recorded and on the basis of his statement, section 186 Pakistan Penal Code was also added. In the office of District Nazim Karak ,DSP (not named) handed over one klashnikov/ P-3 alongwith two empties of 7.62 bore, freshly discharged to the I/O, which were produced by *Ikhtiar Badshah*, the respondent/accused *i.e.* father of accused *Kifayatullah* to District Nazim and then the District Nazim handed over it to the said DSP, vide recovery memo (*Ex.PW3/1*); one empty of 7.62 bore freshly discharged, P-5, was produced to him by one Abdullah Khan and he took the same into possession vide recovery memo (*Ex.PW3/2*). He recorded the statements of remaining PWs and on the direction of District

Nazim he postponed the arrest of the accused person for the time being and on receipt of *medicolegal* certificate of constable Mir Saeed and Gul Bahadar, he went to GHQ Hospital KDA Karak, where he found PW *Said Rahman* in injured condition, unable to talk. *Medicolegal* certificate in respect of *Said Rahman* was handed over to the I/O and thereafter on 29.6.2002, he arrested accused *Kifayatullah* who was also admitted in the hospital. On 30.6.2002, he recorded the statement of PW/injured Said Rahman. PW Muhammad Zahir FC No.49 gave him one *Qamees* P-1, one *bunya*n P-2, having cut marks, sent by the medical officer and he took the same vide recovery memo (Ex.PW2/1) prepared in presence of the marginal witnesses. He also recorded the statements of marginal witnesses of the said recovery memos. On 1.7.2002, he inspected the spot and prepared the site plan (Ex.PB). On 30.6.2002, he sent the clothes of *Said Rahman* to **FSL** and the *klashnikov* was dispatched to the arms expert for examination and reports. On 5.7.2002, he contacted the shopkeepers of the said locality but no one was found willing to give statement. On 4.8.2002, he applied for issuance of warrant against accused *Naqeebullah* and *Ikhtiar Badshah* and proceedings under section 87 of Criminal Procedure Code. On 19.8.2002, he arrested the accused *Naqeebullah* and *Ikhtiar Badhshah,* after their pre arrest bail was not confirmed. On 2.10.2002, he recorded the statements of Naib Nazim District Karak and Muhammad Saeed Khattak Nazim UC North, Karak. On completion of investigation, he submitted the final report under section 173 Criminal Procedure Code in the court.

5. On acceptance of charge sheet /challan, the copies of relevant documents, as required under section 265 (C) Criminal Procedure Code, were supplied to the accused and thereafter the Charge against all the three accused/respondents was framed on 12.10.2005 by the trial court for offences punishable under sections 148/149/324/337-A1, 337-F(1) and 186 of Pakistan Penal Code, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined all material witnesses and after close of prosecution side, the statements of the accused persons were recorded under section 342 Criminal Procedure Code, wherein they professed their innocence and claimed their false implication. After thrashing the prosecution evidence in detail and by affording fair opportunity of hearing to both sides, the aforesaid impugned judgment was recorded and pronounced by the learned trial court.

7. Since the appeal has not been pressed against respondents No.2 & 3, therefore, we shall confine ourselves to the extent of *Ikhtiar Badshah* the respondent No.1. Plain reading of the Charge does not transpire specific role in commission of offence assigned separately to all the three accused. In fact common role has been assigned to all the three accused though in prosecution case different specific role in commission of offences were assigned to them.

8. We have thoroughly considered worthy arguments advanced by Mr. *Astaghfirullah* learned counsel representing the appellant/ complainant namely Said Rehman, Police Constable Buckle No.434,

Traffic Police Karak and the arguments in rebuttal by Mr. *Jalal-ud-Din Akbar Azam,* learned counsel for respondent *Ikhtiar Badshah*.

9. Learned counsel representing the appellant/complainant argued that there was sufficient convincing ocular, medical and circumstantial evidence without any animosity adduced by the prosecution against the respondent No.1 which had not been considered by the trial court while recording the impugned judgment, therefore, the said judgment is liable to be set-aside and respondent No.1/accused Ikhtiar Badshah may be convicted in accordance with law.

10. Conversely, *Malik Akhtar Hussain Awan,* learned Assistant A.G, KPK by supporting the impugned judgment made a request for dismissal of the instant appeal preferred against the aforesaid acquittal judgment, mainly on the ground that it is well-reasoned and does not suffer from any legal infirmity; illegality; gross irregularity; misreading or non-reading of evidence brought on record. However, Mr. Jalal-ud-Din Akbar Azam representing the respondent No.1 Ikhtiar Badshah argued that the appeal to the extent of Naqeebullah and Kihayatullah, respondents No.2 & 3, respectively, has not been pressed. Learned counsel further argued that admittedly many private persons have been gathered at the place of occurrence situated in thickly populated area/bazaar but neither statements of the inhabitants of the locality were recorded by the Investigating Officer nor any person of the locality was cited as a prosecution witness, which strengthened the detailed statement of Ikhtiar Badshah, the respondent/ accused under section 342 Criminal Procedure Code if put in juxtaposition, wherein he denied the charge sheet beside

other prosecution evidence, clarification in detail of his false implication in this case by the complainant party is reproduced hereinbelow:-

> **I am innocent and falsely charged. The incident mentioned above took place due to high handedness on the part of Mir Said ex-driver of SP Karak. Mir Said mentioned above was going in plain clothes (white clothes) in official pick up at the relevant time in Karak Bazar. Since he could make his way in the rush at morning time, so he got down of his official vehicle and belaboured Naqibullah accused Rakshaw driver and make him victim of his wrath. Evidently the weapon used at site was the official klashinkove of said Mir Said due to which injuries were caused to Said Rehman and to my son Kifayatullah (accused). As many people in the Bazar gathered for the rescue of the Rakshaw driver but the ex driver of SP left his official kalashinkove to the people and took magazine with himself. The people present there went to the office of District Nazim at Karak in procession and produced the kalashnikove which was snatched by the people from SP driver there and demanded quick action against the police. Regarding this accident I had also lodged FIR No.133 ExD-1. When the same accident through newspaper or otherwise came into the notice of Govt. of NWFP Home and Tribal area department, the Secretary Home Department wrote to the Govt. that in his accident judicial inquiry is necessary so the Govt. on the direction of Home Secretary Peshawar appointed Sahizada Khurshid the then District & Sessions Judge, Karak for judicial enquiry. The kind District and Sessions Judge, Karak conducted the inquiry in this incident recorded the statements of the witnesses. After conducting the inquiry the Sessions Judge, Karak came to the conclusion that the incident took place by the firing of Mir Said driver of SP in which my son Kifayatullah and others were injured. In view of the inquiry conducted by the Judicial Officer his remarks regarding the inquiry was as under:- "*The competent authority is pleased to direct to take immediate action against Mr. Mir Said Ex driver of SP Karak who had undermined the dignity of law enforcement agency."* The same facts were submitted to the Inspector General of Police NWFP Peshawar. The photo copy of the said inquiry ExD-2 consisting of 21 pages is produced. The original brought by Nowrooz Khan Assistant was perused and returned. Both Ex.-D1**

> **and Ex.D-2 subject to objection. Moreover, in this case complt: Mir Said and PW Gul Bahadar have patched up the matter and they have requested about our acquittal. Certified copies are ExD-3.**

The learned counsel argued that the presumption of innocence of the respondent after acquittal becomes double; more particularly it is not the case of the prosecution or appellant that the impugned judgment is perverse and the reasons of acquittal are artificial and ridiculous.

11. It is essential to mention here that section 265-D Criminal Procedure Code provides that after observing the police report and all other documents and the statements filed by the prosecution, as the case may be, the trial court is to form his opinion as to the existence of ground for proceeding trial. Spectrum of a charge should be such that all eventualities and exigencies, the conclusion of trial can be met with the caution so that no prejudice is caused to the accused as it is settled law that the trial court has not only to consider the police report or the complaint for framing of charge but has to consider all other documents and statements available on record (***2004 YLR 1802; 2002 SCMR 63; 1985 SCMR 1314).*** Object of framing a *Charge* in the case is to enable each accused to know precise accusation against him which he is required to meet before evidence is adduced by the prosecution against him. The Charge in the instant case appears to be framed in a slipshod manner, without explaining accusation levelled against each accused separately, therefore, it cannot be said to be a Charge framed in accordance with the provisions 265(D) Criminal Procedure Code.

12. At this juncture learned counsel for the appellant by explaining the defective Charge submits that framing of defective charge

may not vitiate the trial against the accused. However, in reply to specific quarries made by this court, the learned counsel was found unable to point out any misreading, non-reading of prosecution evidence by the learned trial court in impugned judgment. On the contrary, the impugned judgment appears to be elaborate, well reasoned; based on correct appreciation of evidence which did not warrant interference.

13. It is pertinent to mention here that in criminal cases, the prosecution is bound to prove its case against the accused beyond reasonable doubt and if some doubt is created in the prosecution case, then the accused be acquitted not as a matter of grace but as a matter of right. A perusal of impugned judgment depicts that the complainant *Mir Said* and PW *Gul Bahadar* have compromised with the accused and their joint statement in this regard was recorded by the trial court on 27.7.2004. However, the injured PW *Said Rehman* did not compromise with the accused hence the case was proceeded against the accused. The learned trial court while appraising and thrashing the prosecution evidence pointed out specific material contradictions in the statements of PWs; moreso, medical evidence also does not support the prosecution case.

14. Suffice it to say that the impugned judgment does not suffer from misreading *or* non appraisal of evidence *or* lack of appreciation of material evidence or reception of evidence illegally *or* jurisdictional defects *or* evidence of material nature produced by the prosecution were not recorded *or* the acquittal order on the face of it is contradictory *or*/and the order of acquittal was based without affording opportunity to the prosecution by violating principles governing the appreciation of evidence

or that the acquittal judgment is based upon surmises, suppositions and conjectures and the acquittal is based upon reasons which do not appeal to a reasonable mind. For the sake of convenience 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 on principle of law, then the order of acquittal is not interfered with.

15. 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 Cr.P.C. 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 as held in **2002 SCMR 713.**Order of acquittal passed by trial Court 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 as held in **2012 P Cr. L J 1699 (FSC) 2013 YLR 223 + 2011 P Cr. L J 1234.** In **2013 P Cr. L J 374,** it was held that appellate court would not interfere, unless

misreading of evidence, violation of legal provisions, jurisdictional defect; acquittal order on face of it being contrary was established (**2013 P Cr. L J 345 and PLJ 2009 FSC 284).** It shall be advantageous to mention here that the appellate Court by exercising its powers under section 417 Cr.P.C, could interfere only if the order of acquittal is based on misreading, non-appraisal of evidence or/was speculative, artificial, arbitrary and foolish as held in **2008 MLD 1007.** In **2002 MLD 293** and **2000 YLR 190** the dicta laid down is that 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.

16. For the foregoing reasons, we reached at the irresistible conclusion that there is hardly any improbability or infirmity in the impugned judgment of acquittal recorded by the learned trial Court, which being based on sound and cogent reasons, unexceptional, do not warrant any interference by this Court, and is accordingly maintained. Resultantly, the captioned appeal is dismissed.

JUSTICE SYED MUHAMMAD FAROOQ SHAH

JUSTICE DR. FIDA MUHAMMAD KHAN

Peshawar the
October 2nd 2018
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