IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 111-L of 1997

The State through Advocate General, Punjab

…… Appellant

Versus

Habib s/o Chiragh Din, Caste Barwala, r/o Village Kehr Warha, District Sheikhupura.

Respondent

For the appellant	…	Ch. Muhammad Sarwar Sidhu Additional Prosecutor General, Punjab.
For the Respondent	…	Mr. Anees Muhammad Shahzad, Advocate.
No.& date of FIR	…	No.87/1993, dt.07.05.1993 Police Station P.S Manan Wala, Sheikhupura.
Date of judgment of trial court	…	23.12.1993
Date of Institution in this Court	…	08.07.1997
Date of hearing	…	07.03.2018
Date of decision	…	07.03.2018

JUDGMENT

SYED MUHAMMAD FAROOQ SHAH J:- By invoking the original appellate jurisdiction under section 417(1) Cr.P.C, the instant appeal has been directed by the State through Advocate General Punjab against the impugned judgment dated 23.12.1993, authored and pronounced by the learned Judge Special Court for Speedy Trials, Multan Camp at Lahore, whereby the respondent Habib s/o Chiragh Din was acquitted from the charge of an offence punishable Under Section 10 r/w 18 of Zina (Enforcement of Hudood) Ordinance, 1979 and secondly Under Section 302-PPC. Initially, the captioned appeal was instituted by the State through Advocate General Punjab on 16.01.1996 in Lahore High Court, Lahore, from where the same has been transferred to this Court on the point of jurisdiction vide order dated 24.04.1997. This Court has received the appeal on 08.07.1997.

2. A perusal of record reflects that this Court admitted the appeal on 10.02.1999 and notices beside coercive process were issued against the respondent, which could not be served. However, on issuance of perpetual non-bailable warrants of arrest, the respondent was arrested. Vide order dated 01.06.2011 passed by this Court, he was released on bail and being a case of capital punishment provided u/s 302 of PPC a full Bench was constituted for hearing this acquittal appeal.

3. Subsequently, due to absence of respondent before this Court, once again bailable warrants of arrest to ensure his attendance were issued and vide order dated 03.12.2014 the instant appeal was adjourned *sine-die*

with direction that the accused will be produced before this Court as and when arrested. Thereafter, vide order dated 13.06.2017, the case was fixed for regular hearing and decision on merits in consonance with the dictum laid down in case reported as **PLD 1970 SC 177**.

4. Arguments heard. Record perused with the able assistance provided by learned counsel representing both parties.

5. Prior to adverting into the submissions advanced from the Bar, it may be appropriate to highlight succinct story of prosecution case as narrated by one Muhammad Sarwar, complainant in FIR No. 87/1993 dated 07.05.1993, lodged at Police Station *Manan Wala,* u/s 302 of Pakistan Penal Code; therein it is alleged that on 07.05.1993 at about 06:30 PM in village *Kehr Warha* he alongwith his wife Mst. Sharifan was cutting shaftal fodder from their land and Manzoor Ahmad s/o Sharaf Din was also sitting beside them. They heard shrieks of Um-e-Kalsoom (daughter of complainant) aged 10 years from the guava garden of Ch. Bashir Ahmed. Um-e-Kalsoom was grazing the buffalo at that time. On her cries, they all rushed to the place of occurrence and found that Habib s/o Chiragh Din of the same village was cutting the throat of Um-e-Kalsoom with a sickle and succeeded to escape in the dense garden though he was chased by them. It is alleged that at their sight said *Habib* caught hold of *Um-e-Kalsoom* with intention to commit Zina with her and due to her cries, he killed her with sickle. It is further alleged by the complainant that while leaving his wife, Manzoor Ahmad and other villagers at place of occurrence, he went to the police station and in the way, he met with a police constable, who recorded his statement, which was

incorporated into FIR. The concerned police took up the investigation, came at the spot, collected blood stained earth and sent the dead body for post-mortem, which was duly conducted. On following day i.e. 08.05.1993, the accused was arrested and on completion of usual investigation final report u/s 173 Cr.P.C was submitted before the concerned Magistrate, who took the cognizance. The trial Court charged the accused for an offence punishable u/s 10 read with Section 18 Offence of Zina (Enforcement of Hudood) Ordinance, 1979; secondly u/s 302 of Pakistan Penal Code. By asserting his innocence, the accused did not plead guilty to the Charge. Prosecution, to support their contention examined all material witnesses and on conclusion of prosecution evidence, statement of accused u/s 342 Cr.P.C was recorded and after hearing the parties the trial culminated on acquittal of accused.

6. We have carefully scanned the evidence, available on record. Ocular testimony depends on deposition of complainant/PW Muhammad Sarwar, the father of the deceased and one Manzoor Ahmed. In his deposition, the complainant has tried to support the contents of FIR; however, with regard to attempt of 'zina' upon deceased girl he stated that "***I have estimated that the accused had gone there to commit rape***" and further stated that his daughter had worn shalwar & kameez when she was injured and that on hearing the shrieks of his daughter they reached at the spot within 10 minutes and started shouting. He further stated in cross-examination that the accused was wearing his clothes when he ran away. PW Manzoor Ahmad, cousin of complainant stated in his examination-in-chief that they saw Habib accused injuring the neck of Um-e-Kalsoom with a

sickle in the *Khal*. They chased the accused that ran away; he supported the complainant by stating that the accused wanted to commit rape and when the deceased resisted he murdered her. He has also tried to support the complainant but in cross-examination stated that the complainant told him that Um-e-Kalsoom was grazing buffalo but he did not see her grazing the buffalo. He did not see her taking the buffalo from her house. He has also stated that there was no enmity of the complainant against the accused, therefore, they have guessed that accused attempted to commit rape.

7. Investigating officer Muhammad Sharif SI who lodged the FIR, arrested the accused, made recovery of blood stained sickle and after conducting formal investigation submitted the challan, stated in cross-examination that neither he recovered the stick which was in hands of deceased, nor he found any buffalo at the place of occurrence and he did not ask the complainant to show him the buffalo, which was being grazed by the deceased and except recording the ocular testimony of two witnesses he did not procure any probe that the deceased was grazing a buffalo. Further, stated that there was no sign of struggle on the spot. He has also admitted not to associate Ch. Bashir Ahmed, owner of the garden, where deceased was grazing buffalo. He has also admitted that he neither recovered blood stained clothes of the deceased nor the accused was medically examined as there was no scratch on the body of the accused so he was not medically examined. He stated that the blood stained sickle was recovered after six days of occurrence, on pointation of accused (in custody). Further stated "***I have noted that the accused limps bit while walking***". With regard to delay

in sending the crime weapon i.e. blood stained sickle to the FSL, he stated that he could not give any reason why the parcel regarding blood stained sickle was sent on 18.05.1993 by the Moharrar/Head Constable. He has admitted that inhabitants of the locality did not participate in recovery proceedings of the crime weapon ie: sickle as they were not made witnesses. Further stated that Medical Officer reported the time between the death and post-mortem was 24 hours but he did not care this difference.

8. From perusal of record, it appears that the Deputy District Attorney has given up Mst. Sharifan Bibi, an important eye witness being real mother of the deceased.

9. ***In so far as*** medial account of prosecution version is concerned, it is an admitted fact that rape has not been committed with the deceased. Moreso, there is no iota of evidence collected by the prosecution to establish the attempt of commission of Zina with deceased by the accused. With regard to fatal injury i.e. cut of throat, Doctor Mr. Muhammad Saddique, M.O of DHA Hospital stated that after sustaining injury No. 1, one could try to shout but he could not shout. Further stated that he did not observe any mark of violence or dragging as there was no mud staining on the dead body.

10. In our view, it is not attracting to a prudent mind that allegedly lame accused was chased by three persons including real parents of the deceased but could not succeed to caught hold of him from a nearby distance, on seeing the act of slaughtering their minor daughter. It is also an admitted position that no sign of attempt to commit the offence of rape with the minor deceased were found visible. In such view of the matter, we found

no occasion to disbelieve or discard the observations made by the learned trial Court that stout young person like PW Manzoor Ahmad who was 36 years old and was found healthy, could not succeed to apprehend lame accused at a short distance; more particularly the complainant was also not an old man and he could have shouted, therefore, the story of chase was correctly disbelieved by the learned trial Court. Recovery of incriminating weapon i.e. sickle was disbelieved on two counts; firstly, the learned trial Court observed that the crime weapon was recovered from a thickly populated area but inhabitants of the locality did not participate in the alleged recovery and *secondly,* it was recovered on 13.05.1993, after inordinate delay of arrest of the accused, made on 08.05.1993; moreso, the parcel of sickle was sent to chemical examiner without explaining the delay of five days and the report of serologist is found missing, showing that the said sickle was stained with human blood or any other blood. Said fatal injury could have not been considered irregular wounds as according to the statement of Dr. Muhammad Saddique, the victim did not sustain any irregular wound, nor did he find any mark of violence or dragging on the body of the victim. The Doctor has reported 24 hours between the death and post-mortem and autopsy was conducted at 09:30 AM i.e. 14:30 hours, after the incident, which reflects that the incident took place in the morning and not in the evening, more particularly, some indigestive food was found in the stomach of the deceased, meaning thereby, the incident took place a few hours after she had her morning meal.

11. It is well settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he shall be entitled to such benefit not as a matter of grace, but as a matter of right, as held in ***1995 SCMR 1345*** **(Tariq Pervez Vs. The State), (ii)** ***1997 SCMR 25*** **(Muhammad Ilyas Vs. The State) & (iii)** ***2008 SCMR 1221*** **(Ghulam Qadir Vs. State).** From cursory examination of prosecution evidence, the story as set up by the prosecution, appears to be concocted and cannot be considered trustworthy due to contradictions and inconsistencies in between the ocular, medical and circumstantial evidence.

12. It need not to be reiterated that the scope of interference in appeal against acquittal is most narrow and limited because after acquittal the accused shall be presumed to be innocent, in other words, the presumption of innocence is doubled, more particularly, the impugned judgment does not show mis-reading or non-reading of evidence, which has resulted into the miscarriage of justice. Moreso, we do agree with worthy submissions of learned counsel for the accused that attending facts and circumstances of relevant evidence available on record, transpires that the Trial Court has correctly extended benefit of doubt in favour of the accused, leading towards the real doubt, sufficient to acquit him. Even otherwise, the appellate Court may not frequently interfere with acquittal merely because of re-appraisal of evidence it concludes different from that of the Court acquitting accused. Law requires that a judgment of acquittal would not disturb even though second opinion could be reasonably possible. Reliance in this regard may conveniently be placed on **PLD 2010 SC 632, (ii) 2002**

SCMR 261, (iii) PLJ 2002 SC 293, (iv) 2013 P.Cr.LJ 374, & (v) 2011 P.Cr.L.J. 856 (FSC). While reappraising evidence we have to keep in mind with the settle parameters for interference in the judgments of acquittal, substitutions of opinion is not permissible until and unless conclusion is perverse or arbitrary and if two views are possible, view in favour of accused has to be given preference; if need arises reliance in this regard may conveniently be placed on **PLD 1994 SC 31, (ii) 2010 SCMR 1592 & (iii) 2017 SCMR 633.**

13. It is not out of context to mention here that the captioned appeal was instituted by the state through Advocate General Punjab on behalf of state. Law has already laid down by the Hon'ble Supreme Court that an Advocate General is not a Prosecutor General within the meaning of Section 492 Cr.P.C and any acquittal appeal filed by him on behalf of state is incompetent. In this regard, it may be stated here that the statutory provision of law i.e. Section 417 (1) Cr.P.C is fully applicable which clearly manifest that for the purpose of filing appeal against acquittal order, the Government can only appoint the Public Prosecutor and as per scheme of legislature, the Advocate General do not come within the purview of the Public Prosecutor within the meaning of Section 417 (1) Cr.P.C. Reliance may be placed on the case reported as **The State through Advocate General Sindh Vs. Hanif Ahmed & others (*1994 SCMR 749*) & (ii) Mst. Aziz Fatima through Advocate General and others Vs. The State (*1997 P.Cr.L.J 618*).**

14. In view of foregoing, we reached at the irresistible conclusion that in light of dicta as laid down in the above cited rulings on the point of

non-maintainability as well as on merits, the appeal is incompetent and misconceived as impugned judgment appears to be well reasoned and elaborate, does not warrant any interference by this Court, which is hereby maintained. Resultantly, the appeal is dismissed being not maintainable and having no merits for consideration.

JUSTICE SYED MUHAMMAD FAROOQ SHAH

JUSTICE MEHMOOD MAQBOOL BAJWA

JUSTICE SHAUKAT ALI RAKHSHANI

Announced on 07.03.2018
at Islamabad
M. Salman Habibi/