

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

Cr. Appeal No. 13 of 2016
(Filed on 12.02.2016)

Raja Muhammad Azad Khan s/o Abdul Mallik, Caste
Rajpoot, r/o Awnah, Tehsil Dadyal, District Mirpur.

..... APPELLANT

VERSUS

1. Sarmad Khan s/o Gulbahar Khan, Caste
Rajpoot r/o Awnah, Tehsil Dadyal, District
Mirpur.
2. Muhammad Yasir s/o Muhammad Qadeer Caste
Pathan r/o Pandak Tehsil Haripur Hazara
presently Awana Tehsil Dadyal District Mirpur.
3. The State through Advocate-General AJ&K.

.... RESPONDENTS

(On appeal from the judgment of the Shariat Court
dated 15.12.2015 in Criminal Appeal No.38/13)

FOR THE APPELLANT: Ch. Muhammad Afzal,
Advocate.

FOR THE STATE: Mr. Mehmood Hussain
Chaudhary, Additional
Advocate-General.

FOR THE ACCUSED
RESPONDENTS: Raja Inamullah Khan,
Advocate.

Date of hearing: 17.04.2017.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.— The titled criminal appeal has arisen out of the judgment of the Shariat Court dated 15.12.2015, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The brief facts of the case are that on the report of complainant, Raja Muhammad Azad Khan, an FIR No.73/2009 dated 07.05.2009 was registered against the accused-respondents in the offences under sections 34, 109, 324, 337-A, APC. It was reported by the complainant that he was traveling in his car along with his driver from Onah to Mirpur for appearance before the reference Court, Mirpur. When they reached near to Darbar Sharif Palli, they found two persons, who by appearance were looking like Pathans, standing alongside the road, the face of one of whom was muffled. The muffled face accused suddenly came in front of car having pistol in hand, upon which his driver stopped the car. He snatched from them the mobile phones and the keys of the car. Thereafter,

he came towards the complainant and with the intention to kill him fired with 30-bore pistol which hit him at left buttock. Thereafter, the he accused fled away. The persons behind the incident are Raja Altaf, Sarmad Khan and Faisal as they are in a litigation with the complainant. After completion of investigation the challan was presented in the Tehsil Court of Criminal Jurisdiction, Dadyal. The learned trial Court, after necessary proceedings, acquitted Sarmad and Yasir, accused-respondents of the charge by giving them the benefit of doubt, vide judgment dated 30.03.2013. The learned High Court while deciding the appeal against the judgment dated 30.03.2013 concurred with the findings recorded by the trial Court, hence this appeal.

3. Ch. Muhammad Afzal, Advocate, the learned counsel for the appellant while stating the facts referred to the FIR and the evidence produced by the prosecution and submitted that the guilt of the respondents is fully proved, especially, the confessional statement of co-accused, Muhammad

Yasir, recorded under section 164 Cr.P.C. clearly proves that respondent No.1 is the principal accused who hatched the conspiracy for the commission of offence. He hired the criminals on payment of Rs.60,000/-. It is further proved from the statement of witness, Muhammad Akhlaq, that the offence has been committed by the accused-respondents but these important aspects of the matter have not been properly considered by the trial Court as well as the learned Shariat Court. The acquittal of respondents is against law and facts of the case resulting into miscarriage of justice. The impugned acquittal judgments are not sustainable, hence, while accepting this appeal and recalling the same, the accused-respondents be awarded maximum punishment provided under law. He referred to the case reported as *The State vs. Mst. Falawat Jan & another* [1992 SCR 366].

4. Mr. Mehmood Hussain Chaudhary, Additional Advocate-General, fully supported the version of the appellant and submitted that the

case is fully proved, therefore, this appeal is liable to be accepted.

5. Conversely, Raja Inamullah Khan, Advocate, the learned counsel for the accused-respondents while forcefully defending the impugned judgments submitted that there are concurrently recorded findings of facts of Courts below which are based upon proper appreciation of evidence. According to the prosecution own version only the concocted story of pre-planning is alleged against respondent No.1. There is no allegation of his participation in the commission of offence or presence at the place of incident. The prosecution miserably failed to prove the allegation. Same like, the complainant in his Court's statement even has not uttered a single sentence or word regarding the commission of offence by respondent No.2. So far as the confessional statement is concerned, according to the settled principle of law it is very weak type of evidence and without independent corroborative evidence, specially, the statement of an accomplice cannot be made basis for awarding

punishment. In this case the situation is quite against the prosecution. The so called accomplice resiled from his alleged statement. Even it is proved that the same has not been recorded in the manner provided by law. The statement of other referred witness, Muhammad Akhlaq, is totally unreliable because his statement has been recorded by the Police after a period of two months' of incident. It is also an admitted fact that due to litigation, he had enmity with the respondents. The Courts below have rightly passed the judgments. It is the duty of the prosecution to prove its case beyond any shadow of doubt. After acquittal by the Courts on the basis of concurrent findings, the judgments cannot be set-aside unless any gross violation of law or principle of administration of justice is found. The prosecution failed to prove the case, therefore, this appeal has no substance.

6. We have considered the arguments of the learned counsel for the parties and carefully examined the impugned judgments. The trial Court in its judgment has made minute appreciation of

evidence. While attending the proposition of statement of accused, Muhammad Yasir, recorded under section 164, Cr.P.C. it has been clearly observed that the learned Magistrate has not recorded the same while taking into consideration the mandatory statutory provisions of Code of Criminal Procedure. It is lacking the statutory requirements. According to prosecution story, the accused who committed the offence appears to be Pathan. Neither the presence of accused, Sarmad Khan, at the place of occurrence is alleged nor any overt act is attributed to him regarding the commission of offence. It is alleged in the report that due to enmity, Sarmad Khan and others have planned for assassination of the complainant. The prosecution could not succeed to bring on record any evidence in this context. The judgment of the trial Court is based upon proper appreciation of evidence. The appellant could not succeed to point out any misreading or non-reading of evidence. The learned Shariat Court has concurred with the judgment of the lower Court. Although, it is brief

and a short judgment without reference of evidence but as the same is in conformity with the record, therefore, mere brief judgment is no ground for discarding the same.

7. According to the prosecution own story as narrated in the FIR, the very important direct eye witness of the incident is Muhammad Naeem, driver. The prosecution failed to produce him before the Court and ultimately his evidence was closed by the trial Court vide order dated 27.02.2013. The prosecution has not challenged the validity of this order, thus, it can safely be presumed that the best available evidence has been withheld by the prosecution as it was not favourable to it.

8. So far as the statement of one Muhammad Akhlaq, is concerned, he himself deposed in Court's statement that his statement was recorded by the Police on 07.07.2009 i.e. after two months of incident. His enmity with the accused-respondents is also an admitted fact which makes his statement unreliable.

9. It is celebrated principle of law that an accused is presumed to be innocent till convicted by the competent Court and when the accused is acquitted of the charge he carries the double presumption of innocence. In this case, when there are concurrent findings of Courts below regarding the acquittal of accused, the prosecution is heavily burdened to satisfy the Court that there is strong legal evidence on the record proving the commission of offence by the accused beyond any shadow of doubt but the prosecution failed to discharge its duty.

10. In view of peculiar facts and circumstances of this case, on the basis of retracted confessional statement of accomplice, Muhammad Yasir and statement of Muhammad Akhlaq, prosecution witness, no conviction order can be passed. According to the celebrated principle of law, the confessional statement of an accomplice is a weak type of evidence and it can only be legally valued when there is independent corroborative

evidence but in absence of any corroborative evidence, conviction order cannot be passed.

10. We have also considered the legal precedent referred to by the learned counsel for the appellant i.e., the case reported as *The State vs. Mst. Falawat Jan & another* [1992 SCR 366]. We have no cavil with the principle of law laid down in the referred judgment but it does not support the version of the appellant rather it goes in favour of the accused-respondents that retracted confession require corroboration by other independent evidence.

For the above stated reasons, the appellant has failed to make out any valid ground for interference, thus, finding no force this appeal stands dismissed.

Mirpur,
.04.2017

CHIEF JUSTICE

JUDGE
(J-II)

Date of Announcement: 20.04.2017