SUPREME COURT OF AZAD JAMMU AND KASHMIR
(SHARIAT APPELLATE JURISDICTION)

PRESENT:

Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

Criminal appeal No.34 of 2018
(Filed on 31.12.2018)

Ammad Asghar son of Muhammad Asghar Khan, caste Sudhan, r/o Kharick, Tehsil Rawalakot, District Poonch. (Deceased's son).

….APPELLANT

VERSUS

1. Tahir Sarwar son of Muhammad Sarwar, caste Sudhan, r/o Tarnoti Hurnamera, Tehsil Rawalakot, District Poonch, presently confined at District Jail Poonch Rawalakot.

……ACCUSED-RESPONDENT

2. The State through Advocate-General of Azad Jammu and Kashmir, having his office at Muzaffarabad.
3. Muhammad Farooq Khan son of Sajawal

Khan, caste Sudhan, r/o Kharick, Tehsil Rawalakot, District Poonch, (the complainant).

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 30.10.2018 in criminal appeals No.32 and 42 of 2015)

FOR THE APPELLANT:	Ch. Shoukat Aziz, Advocate.
FOR THE ACCUSED-RESPONDENT:	S.A. Mehmood Khan Saddozai, Advocate.
FOR THE STATE:	Mr.Muhamamd Zubair Raja, Additional Advocate-General.
Date of hearing:	04.11.2019

JUDGMENT:

Raja Saeed Akram Khan, J.- The appeal (supra) has been addressed against the judgment of the Shariat Appellate Bench of the High Court (High Court) dated 30.10.2018, whereby the appeal filed by the accused-respondent, herein, for acquittal has been accepted, whereas, the appeal filed by the

complainant party, for enhancement of the sentence awarded by the trial Court has been dismissed.

2. Brief facts of the case are that a case in the offence under section 302, APC, was registered at Police Station, Rawalakot, on the complaint of proforma-respondent No.2, herein, on 19.09.1989. It was reported by the complainant that his nephew Muhammad Asghar Khan (deceased) was posted in Government Boys Middle School Tarnoti for the last three years. On 19.09.1989, at about 8:00 am, the deceased left for school in routine. The complainant was also going towards school, when he reached near Gird Station, Kharick at about 10:00 am, one Muhammad Haleem told him that he had heard that Muhammad Asghar was murdered by someone at Tarnoti. On this, the complainant led towards Tarnoti , on the way

he met one Rehmat Khan near the shop of Qazi Muhammad Hussain who told him that the dead-body of the deceased is lying on the road at Raitora, the place situate in Tarnoti. On the report of the complainant police registered the case against unknown persons and started investigation. After usual investigation the police presented *challan* against two accused persons, namely Shahid Hakeem and Muhammad Fayyaz, in the District Court of Criminal Jurisdiction Rawalakot which was later on entrusted to the Additional District Court of Criminal Jurisdiction Rawalakot on 07.02.2005. To the extent of accused-respondent a supplementary *challan* was presented on 21.01.2010. During the course of trial one of the accused, Shahid Hakeem expired, whereas, the other accused, Muhammad Fayyaz was proceeded under section 512, Cr.P.C. On the completion of the

prosecution evidence the statement of the accused-respondent under section 342, Cr.P.C. was recorded and on the conclusion of the trial, the trial Court vide its judgment dated 20.03.2015, convicted the accused-respondent and awarded him 14 years' simple imprisonment as *Tazir* under section 302(b), APC and 7 years' simple imprisonment under section 13 of the Arms Act, 1965. He was also ordered to pay Rs.5,00,000/- to the heirs of the deceased as compensation under section 544-A, Cr.P.C and in case of failure to deposit the said amount he shall further undergo for simple imprisonment of 6 months. Feeling dissatisfied from the judgment of the trial Court both the parties filed separate appeals before the High Court. The learned High Court vide impugned judgment dated 30.10.2018, decided the appeals in the terms indicated in the preceding paragraph, hence, this appeal.

3. Ch. Shoukat Aziz, Advocate, the learned counsel for the appellant argued that the impugned judgment is perverse and arbitrary in nature as the learned High Court failed to appreciate the evidence brought on record in a legal manner. He contended that it is a case of circumstantial evidence and the prosecution fully succeeded to make out an unbroken chain; therefore, in such a situation the accused-respondent was not deserved for acquittal. He added that the trial Court after thorough appreciation of the evidence brought on record convicted and sentenced the accused-respondent, but the learned High Court without any justification acquitted him of the charge. He added that the statements of the prosecution witnesses are in line with each other and despite lengthy cross-examination the defence failed to shake their confidence. He forcefully contended that the accused-

respondent remained absconder for more than 20 years and suchlike person who made himself fugitive from law was not entitled for any leniency. He added that the absconsion itself is a strong piece of evidence against the accused-respondent which suggests that he along with co-accused murdered one innocent person. He further added that one of the accused is still absconder and no positive step has been taken for his arrest, whereas, one of the accused was died his natural death during the trial of the case. He maintained that the evidence of the material witnesses has not been taken into account by the High Court in a legal manner. The witnesses specifically implicated the accused-respondent in the commission of offence; but the learned High Court has not recorded even a single reason for disbelieving the statements of the witnesses. He added that immediately after

the murder of the deceased, the accused-respondent managed his posting by transfer in the same school wherein the deceased was performing his duties but this important aspect escaped the notice of the High Court. He submitted that the accused-respondent while recording his statement taken the plea that he has been involved in the case on political motivation, and under law it was incumbent upon him to prove this version by producing evidence but he failed to produce any evidence in this regard. He submitted that the recovery of the crime weapon was made on the pointation of the accused-respondent but the learned High Court has not considered and discussed this strong piece of evidence while passing the impugned judgment. He lastly submitted that as the chain of circumstantial evidence is unbroken, therefore, the trial Court should have awarded normal penalty of death

to the accused-respondent but the trial Court awarded 14 years' simple imprisonment to the accused-respondent and the learned High Court instead of modifying the sentence acquitted him of the charge; thus, the acquittal order being perverse, arbitrary and fanciful is liable to be vacated. He referred to and relied upon the case law reported as *Mu* [1999 P.Cr.LJ 488], *Muhammad Iqbal v. Muhammad Arshad and another* [2003 SCR 543] and *Qamar Shehzad and 3 others v. The State* [2010 SCR 543].

4. On the other hand, Mr. S.A. Mehmood Khan Saddozai, Advocate, the learned counsel for the accused-respondent strongly controverted the arguments advanced by the learned counsel for the complainant-appellant. He submitted that the impugned judgment is perfect and legal which has been passed after evaluating the evidence brought on record in a

legal manner. He added that it was a blind murder and the prosecution failed to prove the case through circumstantial evidence, therefore, the learned High Court has rightly acquitted the accused of the charge and the instant appeal is also liable to be dismissed. He submitted that the accused-respondent has been made a scapegoat by the police just to show its efficiency. He added that it is settled principle of law that once an acquittal order has been passed there must be overwhelming and strong circumstances are required to interfere with the same, whereas, no such circumstances are available in the instant case. He lastly submitted that the trial Court committed grave illegality while convicting the accused-respondent in a case of no evidence which has rightly been rectified by the learned High Court. He referred to and relied upon the case law reported as *Muhammad Basharat v.*

Syed Saqib Shah and 4 others [2013 P.Cr.LJ 388] and *Muhammad Javed v. Muhammad Khalid and 2 others* [2019 YLR 197].

6. Mr. Muhammad Zubair Raja, Additional Advocate-General, while adopting the arguments of the learned counsel for the appellant submitted that there was no ill-will of the complainant against the accused to falsely implicate him in the case. The case against the accused-respondent is fully proved by the prosecution by producing evidence, thus, the learned High Court was not justified to acquit him of the charge.

7. We have heard the learned counsel for the parties and the learned Additional Advocate-General and also gone through the record along with the impugned judgment. According to the prosecution story the accused-respondent due to previous enmity

murdered the deceased with the connivance of co-accused, Shahid Hakeem and Muhammad Fayyaz. The record shows that initially FIR was registered against unknown persons and later on, during investigation one, Asghar Muneer was arrested who got recorded his statement under section 164, Cr.PC. wherein, he disclosed that the deceased was murdered by Shahid Hakeem (co-accused). It is pertinent to mention here that the said, Asghar Muneer also appeared before the Court and while recording his statement deposed that he has no information about the involvement of the accused-respondent in the commission of offence and in the statement under section 164, Cr.P.C. he narrated the story as instructed by the police. Relevant portion of his statement is reproduced here which reads as under:-

"وقوعہ قتل میں ملزم طاہر سرور کے ملوث ہونے کی نسبت مظہر کو علم نہ ہے۔ جو بیان زیر دفعہ 164 ض ف امروز مظہر کو پڑھکر سنایا گیا ہے وہ بیان پولیس نے ڈیڑھ ماہ زیر حراست رکھ کے یہ بیان پڑھایا تھا۔"

However, after the statement of Asghar Muneer, recorded under section 164, Cr.P.C. the police arrested Shahid Hakeem, co-accused, who also got recorded his statement under section 164, Cr.P.C. wherein, he stated that he along with Tahir Sarwar and Muhammad Fayyaz was although present at the spot but accused-respondent, herein, alone hit the deceased with the shot of 12 bore gun. The said co-accused was died during the pendency of trial and his statement in the Court was not recorded, therefore, without strong corroboration only on the basis of the statement of co-accused recorded under section 164, Cr.P.C. conviction could not be recorded. Reference may be made to a case reported as *Muhamamd Ayub and another v.*

Imran and 6 others [2015 SCR 1321], wherein it has been held by this Court that:-

> "15. …According to celebrated principle of law without corroboration through independent source the statement of such like person cannot be relied for awarding conviction in criminal case. Even otherwise, according to settled principle of law the statement of an accomplice cannot be made ground for awarding punishment to another accused but it can only be having the binding force to the extent of the persons who made the confessional statement."

The trial Court has also mentioned in paragraph No.6 of the judgment that according to the settled principle of law the statement of the co-accused under section 164, Cr.P.C. although can be read against the accused-respondent but on the basis of the

same he cannot be declared a culprit as the co-accused may just to save himself has recorded such statement. The relevant findings on the trial Court read as under:-

"شہادت استغاثہ کے تجزیہ کے دوران ملزم طاہر سرور کو وقوعہ سے منسلک کرنے کی جو دوسری دلیل شریک ملزم شاہد حکیم کا بیان زیر دفعہ 164 ض ف ہے۔ قانون کا مسلمہ اصول ہے کہ شریک ملزم کا اعترافی بیان اس کے خلاف تو پڑھا جا سکتا ہے لیکن اس کی بنیاد پر دوسرے کو سزاوار نہ قراردیا جا سکتا ہے۔ اس لئے کہ ہو سکتا ہے کہ ملزم اپنے آپ کو سزا سے بچانے کے لئے دوسرے کو ملوث کرے اور شریعت اسلامیہ میں بھی یہی اصول کار فرما ہے کہ ہر انسان اپنے اعمال کا جواب دہ ہے۔ ایک کے گناہ کی سزا دوسرے کو نہ دی جا سکتی ہے۔"

However, the trial Court despite recording findings (supra) convicted the accused-respondent. To ascertain that on the basis of what sort of evidence the trial Court convicted the accused-respondent, we also thoroughly examined the material available on record. Admittedly, it is a blind murder and the whole case rests upon the circumstantial evidence and under law every link of unbroken chain of

circumstantial evidence must be proved and if any link is not proved then the conviction cannot be recorded. In the case in hand, no one was nominated in FIR and even after the occurrence no one from the complainant party ever disclosed that there was any enmity of the accused-respondent towards the deceased. The accused-respondent was implicated in the case on the alleged statement of co-accused recorded under section 164, Cr.P.C. on 02.12.1989 and then after a lapse of three months' period some close relatives of the deceased got recorded their statements under section 161, Cr.P.C. wherein, they stated for the first time that few days ago from the occurrence hard words were exchanged between the accused-respondent and the deceased and the accused-respondent also extended the threats to do away with his life. It may be observed here that if any such

episode was in the knowledge of the relatives of the deceased why they did not disclose the same immediately after the commission of offence as the same could be helpful in the investigation of the case. In this regard, nothing is available on record to make it clear that why the complainant party remained mum for a longtime, which clearly indicates that the story has been invented later which makes the foundation of the case doubtful.

8. One of the prosecution witnesses, Muhammad Khaliq stated in his statement that he was performing his duties as Headmaster in Middle School Tarnoti, wherein, the deceased was posted as Primary Teacher. On the day of occurrence he was on duty when he was informed by a person namely Manshad that his school teacher Muhammad Asghar has been murdered by someone, at that time the accused-respondent was already present in

the school and he along with the accused-respondent and others went on the spot. This witness further deposed that the accused-respondent was also performing the duties in the same school as a Primary Teacher and on the day of occurrence the accused-respondent was present in the school in the early hours, whereas, the deceased often come to the school late by time due to some health problem. After going through the statement of this witness, the prosecution’s stance that the accused-respondent was the beneficiary of the death of deceased as he immediately after his death managed his posting at his home station in place of deceased, appears to be doubtful as the Headmaster of the institution has admitted that the accused-respondent prior to the occurrence was posted in the said school. Moreover, from the statement of this prosecution witness it also appears that at the

time of occurrence the accused-respondent was already on duty in the school. The trial Court in this regard has formed the opinion that the accused-respondent after making the plan of murder of the deceased might have gone to the school. The relevant findings of the trial Court are reproduced as under:-

> "جہاں تک ملزم طاہر سرور کا ترنوٹی سکول میں موجودگی کا معاملہ ہے تو اس نسبت خود شہادت استغاثہ سے ثابت ہے کہ وہ ترنوٹی سکول میں حاضر تھا۔ اگرچہ اس نے تحریری ثبوت پیش نہ کیا ۔ جو تحریری ثبوت نسبت تبادلہ جات استغاثہ کی جانب سے پیش کئے گئے وہ اپنی جگہ درست بھی مان لئے جائیں تو اس سے ملزم کی تعیناتی کے بارے میں استغاثہ کے موقف کی تائید ہوتی ہے لیکن ملزم طاہر سرور کی عملاً موجودگی پر متذکرہ متذکرہ نوٹیفکیشن ہرگز دلالت نہ کرتے ہیں اور اس موقف کو درست تسلیم کرنے کی صورت میں بھی ملزم طاہر سرور سازش کے الزام سے مبرا نہ ہو سکتا ہے۔ اس لئے کہ یہ ممکن ہے کہ سازش تیار کرنے کے بعد وہ سکول آگیا اور جن افراد کو مامور کیا ہو اُنھوں نے متذکرہ سازش کے مطابق اپنا کام سر انجام دیا ہو۔"

The trial Court at one hand believed that the accused-respondent is the person who hit the deceased by firearm weapon but on the other

hand assumed that the accused-respondent maybe involved in the plan of murder. It appears that the trial Court has recorded the conviction only on assumptions which is not warranted under law.

8. The perusal of the judgment of the trial Court shows that one of the grounds assigned by the trial Court for recording conviction is abscondence of the accused-respondent. The claim of the accused-respondent is that the complainant in the Court premises attacked him; therefore, to save his life he preferred to abscond. However, we deem it proper to observe here that abscondence alone is not the substitute of the real evidence as sometime the people do abscond though falsely charged in order to save themselves from agony of prolonged trial. The prosecution has to prove the case against the accused by producing unimpeachable

evidence and mere on the basis of abscondence conviction cannot be recorded as it is just a corroborative piece of evidence. Reference may be made to a case reported as *Abdul Khaliq v. The State* [2006 SCMR 1886], wherein while dealing with the proposition it has been held that:-

> "The factum of absconsion has also been taken into consideration by the learned High Court which alone is not sufficient to award conviction under section 302, P.P.C. as it is just a corroboratory piece of evidence."

There are many other serious contradictions and flaws in the other pieces of evidence collected by the prosecution as after discussing some evidence we have observed hereinabove that the prosecution story is doubtful, hence, we do not intend to discuss all the evidence in detail as under law a single

circumstance available in the case which creates reasonable doubt in a prudent mind about the guilt of the accused is sufficient to acquit him of the charge.

8. We also deem it appropriate to observe here that the instant appeal has been filed against acquittal order and it is cardinal principle of criminal jurisprudence that an accused, who has been acquitted of the charge is credited with two advantages, one; the innocence available to him at the pre-trial stage and the other which is earned by him on the basis of the acquittal order passed by the Court of competent jurisdiction and acquittal order can only be interfered with when the same is found perverse, arbitrary, whimsical, unreasonable, artificial, ridiculous, shocking in nature, based on misreading of material evidence, highly conjectural or based on surmises unwarranted under law, but in the

instant case no such eventuality is found available. There is plethora of judgments on the point, however, for instance reference may be made to a case reported as *Waseem Hussain and 2 others v. Muhammad Rafique and another* [2017 SCR 428], wherein, it has been held that:

> "The instant appeal has not been filed against the conviction rather the same has been filed against acquittal order and it is settled principle of law that an accused, when acquitted of the charge, enjoys double presumption of innocence and once an acquittal has been made, the same can only be set aside if the Court comes to the conclusion that the order is capricious, fanciful, perverse, arbitrary and against the settled norms of justice."

After evaluating the material available on record and the relevant law on the subject, we

are unanimous on the point that the prosecution has failed to substantiate the accusation by producing confidence inspiring evidence against the accused in the case in hand as not a single chain of the link is proved beyond reasonable doubt. As it is a fit case where benefit of doubt must be given to the accused, therefore, the learned High Court has committed no illegality while acquitting the accused-respondent.

In the light of what has been discussed above this appeal having no force is hereby dismissed.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**
__.11.2019

Ammad Asghar v. Tahir Sarwar & others

ORDER:-

The judgment has been signed. The same shall be announced by the Registrar after notifying the learned counsel for the parties.

Muzaffarabad, **CHIEF JUSTICE JUDGE**
__.11.2019