SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Shariat Appellate Jurisdiction**]**

PRESENT:
Raza Ali Khan, J.
Khalid Yousaf Chaudhary, J.

Criminal Appeal No.36/2024
(Filed on 20.06.2024)

Pervez Iqbal & others

…… APPELLANTS

VERSUS

Khadim Hussain & others

….. RESPONDENTS

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 30.05.2024 in Criminal Appeals No.62, 84 of 2020 and Reference No.35/2020]

FOR THE APPELLANTS:	Mr. Reaz Ahmed Alam, Advocate.
FOR ACCUSED-RESPONDENTS:	Raja Inaamullah Khan, Advocate.
FOR THE STATE:	Mr. Ahmed Saad Khan, Assistant Advocate-General.

Date of hearing: 26.01.2026.

JUDGMENT:-

Khalid Yousaf Chaudhary, J.– The supra titled criminal appeal has been directed against the judgment of the Shariat Appellate Bench of the High Court *(hereinafter to be referred as High Court),* dated 30.05.2024, rendered in Criminal

Appeals Nos.62 and 84 of 2020 along with Reference No. 35 of 2020.

2. The brief facts of the case are that the complainant Pervaiz Iqbal lodged a written report at Police Station Afzalpur, on 23.05.2008 alleging therein, that on the same day at about 6:15 to 6:30 p.m., Basharat Ali son of Sabir Hussain called his nephew Ghazanfar Hussain son of Aziz Hussain to the vicinity of Ghasipur graveyard, situated about seven to eight hundred yards from the complainant's house, where Basharat Ali and his brother Tariq were already present and negotiating the sale of a motorcycle. On reaching there, a quarrel started between Ghazanfar Hussain, Basharat and Tariq, which was witnessed by the complainant and his brother Imtiaz Hussain from their house, and upon hearing cries raised by Ghazanfar Hussain, they reached at the spot at about 7:00 p.m., where Khalid Hussain son of Sabir Hussain and Tariq Mehmood son of Rehmat Khan also arrived. It was alleged that Tariq son of Sabir Hussain was armed with a pistol, Tariq Mehmood son of Rehmat Khan was carrying a 12-bore pump-action rifle, while Sabir Hussain, Khalid Hussain, Basharat and Khadim Hussain were armed with sticks, and that upon a lalkara raised by Khadim Hussain, Tariq son of Sabir Hussain, with intention to kill, fired three straight shots at Imtiaz Hussain, one hitting the right side of his neck, the second near the same area and the third on the backside of his left arm, causing him to fall to the ground, whereas the remaining accused inflicted injuries upon the complainant with sticks and Tariq Mehmood attempted to open fire but his weapon failed.

On the said report, the offences under sections 147, 148, 149, 324 and 337-A, APC were registered, and upon the death of injured Imtiaz Hussain during the course of treatment, section 302, APC was added, while recovery of a 30-bore pistol and a 12-bore pump-action rifle without license led to addition of section 13 of the Arms

Act, 1965. After completion of the investigation, a challan under section 173, Cr.P.C. was presented in the Additional District Criminal Court, Mirpur. Charges were framed under section 265-D, Cr.P.C., on 23.07.2008. The accused persons claimed innocence and refuted the allegations, whereupon the prosecution was directed to lead evidence in order to prove the guilt. During trial the principal accused, Tariq Hussain son of Sabir Hussain absconded and was proceeded against under section 512, Cr.P.C., whereas the remaining accused, upon recording of their statements under section 342, Cr.P.C., refuted prosecution evidence, claimed innocence, however, failed to produce evidence in defence and to record their statements on oath under section 340(2) Cr.P.C. At the conclusion of the trial, the accused Tariq Hussain son of Sabir Hussain was sentenced to death as Qisas under section 302(a), APC along with five years' simple imprisonment and fine under section 13 of the Arms Act and was directed to pay compensation of Rs.10,00,000/- to the legal heirs of the deceased. Accused Basharat Ali was sentenced to two years' simple imprisonment along with Arsh and Daman for causing injuries to the complainant. Accused Tariq Mehmood son of Rehmat Khan was sentenced to two years' simple imprisonment with fine under section 13 of the Arms Act, while accused Sabir Hussain, Khadim Hussain and Khalid Hussain were acquitted of the charge by extending them the benefit of doubt, vide judgment dated 28.09.2020. Feeling dissatisfied from the said judgment the complainant filed an appeal before the High Court against the acquittal and enhancement of the sentence awarded to the accused whereas the accused respondents, herein, filed appeal against their conviction. A reference was also sent for confirmation of the death awarded to the absconder, Tariq Hussain s/o Sabir Hussain. After necessary proceedings, the learned High Court through the impugned consolidated judgment dismissed the appeal filed by the complainant, whereas the appeal filed by the

convict respondents was accepted and while setting aside the judgment of the trial Court they were acquitted of the charge. The reference sent by the trial Court for confirmation of death sentence awarded to accused Tariq Hussain was also answered in negative. The present appeal is the outcome of the aforesaid judgment of the learned High Court.

3. Mr. Reaz Ahmed Alam, the learned Advocate appearing on behalf of the complainant–appellants, submitted that the impugned judgment passed by the learned High Court is contrary to law and the record of the case and, as such, is not sustainable in the eye of law. He further contended that the prosecution had successfully proved its case beyond reasonable doubt through cogent, trustworthy and confidence-inspiring evidence. According to the learned counsel, the evidence on record established that all the accused nominated in the FIR were present at the place of occurrence, duly armed with a 12-bore rifle and sticks, and had acted in concert in furtherance of a common intention as well as a common object. He submitted that the accused persons had constituted an unlawful assembly within the meaning of law, having assembled with the object of committing the offence, and each member of the said assembly actively participated in the occurrence. The presence of five or more accused, their simultaneous arrival at the spot, the attribution of specific roles, and the use of deadly and non-deadly weapons clearly attracted the applicability of the provisions relating to unlawful assembly, thereby rendering each accused vicariously liable for the acts committed by any member thereof in pursuance of the common object of the assembly. The learned counsel argued that the ocular account furnished by the prosecution witnesses stood fully corroborated by the medical and forensic evidence, conclusively connecting the accused persons with the commission of the offence. He submitted that the recoveries of the weapons of

offence, including the 12-bore rifle and sticks, effected during the course of investigation, further strengthened the prosecution case. Despite such overwhelming evidence, the learned trial Court illegally acquitted some of the accused and awarded lesser punishment to others, in clear disregard of the settled principles governing cases of unlawful assembly and joint liability. He further submitted that the learned High Court, while rendering the impugned judgment, failed to appreciate the evidence in its true and correct perspective and erred in acquitting those accused who had been convicted by the trial Court with lesser punishment, as well as in maintaining the acquittal of Khadim Hussain, Sabir Hussain and Khalid Hussain, notwithstanding clear, consistent and reliable evidence regarding their presence at the place of occurrence, specific attribution of roles, recovery of sticks, and corroboration through medico-legal report. According to the learned counsel, once the formation of an unlawful assembly and the commission of the offence in furtherance of its common object stood proved, the law mandated the award of the prescribed punishment, and any deviation therefrom amounted to a serious miscarriage of justice. The learned counsel also assailed the judgment of the learned High Court regarding setting aside the reference for confirmation of the death sentence awarded to absconder-accused, Tariq Hussain son of Sabir Hussain. He submitted that the learned trial Court had rightly invoked the provisions of section 512, Cr.P.C., and awarded the sentence in accordance with the binding precedents laid down by the august Supreme Court of Pakistan, whereas the learned High Court erred in placing reliance upon a judgment of a High Court of similar jurisdiction to annul the same. He added that the learned High Court misconceived the maintainability and scope of the complainant' appeal by treating it as an ordinary appellate matter, whereas, in fact, the appeal had been filed under section 25 of the Islami Penal Laws and was required to be examined in the exercise

of Shariat Appellate jurisdiction. According to the learned counsel, the cumulative effect of the aforesaid legal and factual infirmities rendered the impugned judgment wholly untenable, calling for its interference and reversal by this Court. In support of his submissions, the learned Advocate placed reliance upon the case reported as [2019 SCMR 1122] and prayed for acceptance of the appeal.

4. Conversely, Raja Innamullah Khan, the learned counsel for the respondents/accused, while fully supporting the impugned judgment, submitted that the same is lawful, well-reasoned and does not call for any interference by this Court. He contended that a careful reading of the ocular account demonstrates that the occurrence was not the result of any prior planning or common intention, rather the respondents were alleged to have reached the spot after the main incident had already taken place. He further submitted that the record unmistakably establishes that the respondents are neither previous convicts nor habitual, hardened, desperate or dangerous criminals and, therefore, in terms of the governing statutory provisions, they could not legally be awarded a sentence of imprisonment, particularly when the complainant Pervaiz Iqbal did not ascribe any specific injury to respondent Basharat Ali in his statement before the Court. The learned counsel emphasized that the appeal filed by the complainant-appellants for enhancement of the sentence was incompetently filed rather it was enjoined upon the appellants to file the revision petition. The contention of the learned counsel for the appellants that the appeal was filed under section 25 of IPL, has also no force. The learned High Court has dealt with the proposition in a legal manner. He further argued that once the respondents stood acquitted by a competent Court, they acquired a double presumption of innocence, which could not be displaced in the absence of any glaring illegality, perversity or misreading of evidence. Concluding his

submissions, he maintained that the appellants had failed to point out any legal infirmity or jurisdictional error in the impugned judgment and, therefore, the present appeal is liable to be dismissed. In support of his submissions, the learned Advocate, referred to and relied upon the cases reported as [1996 SCR 215], [2005 SCR 272], [2014 SCR 351], [2015 SCR 1335] and prayed for dismissal of the appeal.

The learned Advocate, though not appearing as counsel for the absconder-accused Tariq Hussain, however, he was asked by the Court to assist and to express his opinion regarding the legality of the death sentence awarded to the principal accused in absentia. He submitted that the learned trial Court, while convicting and sentencing the principal accused to death, entirely disregarded the mandatory requirement of law that, prior to conviction and imposition of sentence, the accused must be examined under section 342, Cr.PC, and all incriminating evidence brought on record must be put to him for explanation. He contended that no such statement of the principal accused was recorded before his abscondence, thereby rendering the subsequent conviction and sentence wholly illegal. He further submitted that the learned trial Court misconceived the scope and applicability of section 512, Cr.PC by concluding the trial and awarding capital punishment in the absence of the accused, whereas the learned High Court correctly appreciated the legal position and, in consonance with the settled principles of law, rightly declined to confirm the death sentence.

5. Mr. Ahmed Saad Khan, the learned Assistant Advocate-General appeared on behalf of the State and while adopting the arguments advanced by the learned counsel for the appellants, prayed for acceptance of the appeal.

6. We have heard the learned counsel for the parties as well as the learned Assistant Advocate-General and have carefully perused the record made available along with the impugned judgment. It reveals from the record that the accused-respondents, herein, were tried for commission of the offences under sections 147, 148, 149, 324, 337-A and 302, APC read with section 13 of the Arms Act, arising out of an FIR lodged by complainant Pervaiz Iqbal on 23.05.2008. During trial, the principal accused Tariq Hussain absconded and proceedings were conducted against him under section 512, Cr.P.C., whereas the remaining accused faced trial and recorded their statements under section 342, Cr.P.C. Vide judgment dated 28.09.2020, the trial Court sentenced Tariq Hussain to death as Qisas along with imprisonment, fine and compensation, convicted Basharat Ali and Tariq Mehmood with lesser sentences, and acquitted the remaining accused by extending them the benefit of doubt. Appeals were thereafter filed by the complainant and the convicted accused, along with a reference for confirmation of death sentence, whereupon the learned High Court, through the impugned consolidated judgment, dismissed the complainant's appeal, whereas the appeal filed by the accused-respondents was accepted, resulting into setting aside their convictions and declining to confirm the death sentence awarded to the absconder accused.

7. First of all, we intend to take up the contention of the learned counsel for the appellants that the learned High Court has committed an error while reversing the death sentence awarded to the absconding accused, Tariq Hussain son of Sabir Hussain. A perusal of the record reveals that the said accused absconded himself during the course of the trial, thereby remaining absent from the proceedings. The matter falls squarely under the ambit of Section 512, Cr.PC. For convenience we would like to reproduce the said provision which reads as under:-

> "512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or [send for trial to the Court of Sessions or High Court] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable."

A perusal of the above clearly reveals that if it is proved that an accused has absconded and there is no immediate prospect of his arrest, the competent trial Court may proceed to record the evidence of witnesses on behalf of the prosecution in his absence. The statute, however, clearly stipulates that such proceedings are limited to recording evidence and do not authorize the Court to conclude the trial or pass a conviction and sentence in the absence of the accused. It is well-settled that any evidence recorded under Section 512 Cr.P.C. can be utilized against an accused only upon his arrest. In the instant case, the principal accused absconded prior to the recording of his statement under Section 342, Cr.P.C, meaning thereby that no opportunity of hearing was provided to him. Despite this, the learned trial Court proceeded with the trial and ultimately sentenced him to death. Such proceedings are not only in contravention of the clear mandate of the statute but also violate the fundamental right No.19, pertaining to a fair trial guaranteed under Article 4 of the Azad Jammu and Kashmir Interim Constitution, 1974. We are fortified in our view from the judgment of the Apex Court of Pakistan, delivered in the case reported as *Muhammad Arif vs. The State* [2008 SCMR 829], wherein it was observed as under:-

> "5. As the trial of the petitioner was conducted in absentia and without providing him opportunity of hearing, therefore, for the reasons recorded in the case of Mir Ikhlaq Ahmad (ibid), we hold that the judgments, convictions and sentences rendered by both the Courts in the absence of the petitioner, to his extent, are not sustainable under the law and violative of the provisions of the Constitution, which necessitated retrial of the case."

In view of the above we are justified to hold that section 512, Cr.P.C. merely authorizes the recording of evidence in the absence of an accused; however, such evidence is admissible against him only after he has been apprehended and duly tried. The superior Courts have consistently held that a trial against an absconding accused must recommence upon his arrest to ensure compliance with principles of natural justice and statutory requirements. Accordingly, the learned High Court rightly set aside the death sentence awarded to the absconding accused and directed that the trial against Tariq Hussain shall be conducted afresh upon his apprehension, thereby safeguarding the accused's statutory and constitutional right to be present and to defend himself before conviction.

8. So far as the contention of the learned counsel for the appellants regarding the alleged unjustified acquittal of the accused respondents is concerned, it may be observed here that the standards governing acquittal and conviction are materially different and that, upon acquittal, an accused carries a double presumption of innocence which cannot be displaced unless the impugned judgment is shown to be perverse, arbitrary, capricious, or founded upon misreading or non-reading of material evidence resulting in a miscarriage of justice, as the mere possibility of another view is not a valid ground for interference. We are fortified in our view from the case reported as *Sarwat Bibi and others vs.*

Muhammad Idrees Kiani and another [2024 SCR 509], wherein it was observed by this Court as under:-

> "…. It is settled principle of law that after acquittal an accused carries double presumption of innocence, and an acquittal order cannot be interfered with until and unless the non-reading of evidence or any other perversity or miscarriage of justice is pointed out…."

Reliance may also be had to the case reported as *Ali Muhammad vs. Muhammad Akram & another* [2014 SCR 351], wherein it was observed by this Court as under:-

> "After the acquittal, an accused enjoys double presumption of innocence; one before the trial and other after the acquittal ……"

The same view was reiterated by this Court in the case reported as *Ghulam Rasool & another vs. The State & another* [2011 SCR 324] in the following terms:—

> "We have also considered the arguments of counsel for the complainant in respect of acquitted accused. The trial Court acquitted the accused and the Shariat Court maintained the acquittal order. The acquittal order passed in favour of an accused has double presumption of innocence. After considering all the evidence, we are unable to agree with the argument of the counsel for the complainant……"

Applying the above principle, we have gone through the record minutely. It transpires that the prosecution, in support of its case, alleged that stick blows were inflicted upon the complainant by the accused respondents. However, the medical evidence on record discloses only two injuries, and the complainant, in his deposition, failed to attribute any specific injury to any particular accused. Moreover, the evidence raises serious doubt regarding the presence of the acquitted respondents at the scene of occurrence at the relevant time. The testimony of the witnesses remained vague and generalized, without assigning any distinct role to the individual accused, thereby undermining the prosecution's case.

Similarly, in respect of accused Basharat Ali, the record indicates that the complainant did not attribute any specific role or act of violence to him, nor did he identify him as the person responsible for inflicting any injury. In the absence of clear and definite evidence linking him to the commission of the offence, a conviction under sections 337-A(ii) and 337-F(i), APC could not legally be sustained. Furthermore, the alleged recovery of stick, relied upon by the prosecution, appears doubtful and the statutory mandate of section 337-N(2), APC, which requires the Courts to exercise restraint in awarding imprisonment to an accused who is not a hardened or habitual offender, is attracted. The Superior Courts have repeatedly emphasized that in cases involving minor doubt, the benefit of doubt must be extended to the accused.

Likewise, regarding accused Tariq Mehmood son of Rehmat Khan, the only allegation recorded against him relates to the recovery of a 12-bore pump-action rifle. The evidence concerning the recovery, as reflected from the record, suffers from material contradictions regarding the description of the weapon and the circumstances of its recovery, and one of the recovery witnesses was shown to be inimical towards the accused. The Superior Courts have consistently held that conviction under the Arms Act cannot be sustained on the basis of doubtful or unreliable recoveries, as the law requires the prosecution to establish such recoveries beyond reasonable doubt. In view of the foregoing, and having considered the evidence in the light of the settled principles enunciated by the Superior Courts, it is clear that the learned High Court, after proper appreciation of the evidence and in accordance with the settled law on interference with acquittals, rightly extended the benefit of doubt to the accused respondents and recorded their acquittal. The acquittal, as reflected from the record, does not suffer from any

illegality, perversity, or misreading of evidence and, therefore, warrants no interference by this Court.

9. The other argument of the learned counsel for the appellants regarding the unlawful assembly, has also no substance, as the evidence on record does not conclusively establish that the accused were part of any premeditated plan or shared a common object to commit the offence. The ocular account shows that some of the accused reached the spot after the main incident had already occurred and did not actively participate in causing injuries or firing with weapons. Mere presence at the scene, without proof of prior concert, coordination, or intent in furtherance of the criminal act, is insufficient to attract liability under Sections 141–149, APC. The prosecution has also failed to ascribe specific roles to the acquitted accused or demonstrate that they acted in concert with the others in the unlawful assembly. In these circumstances, the learned High Court rightly extended the benefit of doubt to the accused, and the legal principles governing vicarious liability under Section 149 APC cannot be invoked in the absence of clear evidence of their participation in the common object of the assembly.

10. The learned Advocate representing the parties have also raised arguments regarding the maintainability of the appeal filed by the complainant before the High Court, challenging the acquittal of certain accused and seeking enhancement of the sentence. However, having reached the conclusion that the prosecution has failed to establish its case against the accused respondents beyond a shadow of doubt, and that the learned High Court has rightly acquitted them of the charges, it is not necessary to adjudicate upon this issue.

11. After thorough examination of the record, the impugned judgment, and the legal principles governing the subject,

we are of the considered view that the learned High Court has meticulously appreciated the evidence, correctly applied the statutory provisions, and adhered to settled principles of criminal jurisprudence. No illegality, infirmity, or perversity has been pointed out warranting interference by this Court.

Consequently, finding no force in this appeal, the same is hereby dismissed.

JUDGE **JUDGE**

Muzaffarabad.
10.02.2026.