IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Anti-Terr. Jail Appeal No. D-128 of 22

Present : Yousuf Ali Sayeed & Zulfiqar Ali Sangi, JJ

Appellant	:	Ghulam Shabeer Lashari, through Shabbir Ali Bozdar, Advocate.
Respondent	:	The State, through Aftab Ahmed Shar, APG.
Date of Hearing	:	01.11.2023

JUDGMENT

YOUSUF ALI SAYEED, J. – The captioned Appeal calls into question the Judgment passed by the Anti-Terrorism Court Khairpur Mir's on 31.10.2022 in Special Case Number 116 of 2014, stemming from the First Information Report, bearing No. 237 of 2014, registered at Police Station B-Section, Khairpur at 1730 hours on 04.09.2014 (the "**FIR**") at the behest of one Rattal Junejo (the "**Complainant**"), alleging that 20 persons, four of whom were armed with Kalashnikovs, three with G-3 rifles and each of the others with a gun, had suddenly entered his Otaq on 02.09.2014 at about 2130 hours and sought to forcibly abduct his son, Nazeer Ahmed, and another relative, namely Khadim Hussain. However, upon the Complainant and his party raising cries for help, several villagers are said to have rushed to the scene, prompting the assailants to open fire in order to make their escape, resulting in the demise of the Complainant's son and two other villagers, as well as injuries to three others. One of the assailants, namely Abdul Jabbar, was also said to have fallen victim to the fire of his comrades.

2. Twelve other persons were specifically named by the Complainant in the FIR, as having been part of the unlawful assembly, including the Appellant, who was said to have been present at the scene, armed with a gun.

3. In the challan submitted in the matter following the initial investigation, all those twelve persons were shown as absconders along with the seven other unidentified accused, with the case against them remaining dormant, whereas the name of Abdul Jabbar was placed in Column No. 2, shown as deceased. Thereafter, through a supplementary challan, two of the identified accused were also shown to have been killed during a police encounter within the jurisdiction of PS Qazi Ahmed.

4. Following the arrest of the Appellant, the circumstances of which will be narrated in due course, the trial Court bifurcated the case in respect of the remaining absconding accused and proceeded to frame the Charge against the Appellant on multiple counts, under Section 148 PPC, Sections 365 and 511 PPC, Sections 302 and 324 PPC read with Section 149 thereof, as well as Section 7 of the ATA, to which he pleaded not guilty and claimed trial.

5. In order to prove the case against the Appellant, the prosecution examined and relied upon the evidence of as many as twelve witnesses, including the Complainant (PW-1) and four other eye witnesses, namely Khadim Hussain Junejo (PW-2), Abdul Rasheed Junejo (PW-3), Mohammad Rafiq Junejo (PW-4) and Momin Junejo (PW-9), the latter three being persons who had themselves sustained bullet injuries during the encounter at the scene of incident. All of them spoke virtually in unison while placing the Appellant at the scene of the crime and naming him as one of the perpetrators of the attack.

6. The other witnesses examined by the prosecution were the tapedar, the medical examiner, various police functionaries who had conducted or participated in the investigation, including the first Investigating Officer, namely DSP Altaf Hussain Burdi, as well as the officer who was shown as having made the arrest of the Appellant, namely ASI Anwar Ali Rajper, and one of the police officials who witnessed the same, namely PC Mohammad Bilal Malik.

7. Thereafter the Appellant's statement was recorded under S. 342 Cr.P.C (Exh.22), where he denied the allegations and professed his innocence, while producing various documents as Exh. 22-A to 22-I and taking the plea, as he was entitled to do as per Article 24 of the Qanun-e-Shahadat Order 1984, that he was in the Kingdom of Saudi Arabia at the time of commission of the offence. He sought to examine SIO Mohammad Ameen Pathan, the second Investigation Officer of the case as a witness in his defence to support his alibi, with an Application under S.540, Cr.P.C being moved accordingly, which was allowed on 27.10.2022, and the evidence of the above-named witness was then recorded (Exh.24), who produced various documents as Exh.24-A to 24-J respectively.

8. Be that as it may, on a reading of the evidence, the trial Court returned a finding a guilt against the Appellant in terms of the impugned Judgment, whereby he was convicted and sentenced as follows:

   (a) for an offence under Section 365 read with Section 149 PPC, in respect of which he was sentenced to suffer R.I for seven years and to pay fine Rs. 25,000/- and in case of default to suffer R.I for a further period of three months;

(b) for offences under Section 302 (b) PPC, read with Section 149 PPC, in respect of which he was sentenced to suffer R.I for life on four counts and directed to pay a fine of Rs. 100,000/- and in case of default, to suffer R.I for a further six months. His moveable and immoveable property were also forfeited to the State, and he was directed to pay compensation of Rs. 400,000/- each in lieu of murders of the four deceased persons to the legal heirs, and in case of default to pay the aforesaid compensation, appellant was directed to suffer R.I for six months more;

(c) for an offence under Section 324 read with section 149 PPC, in respect of which he was sentenced to suffer R.I for ten years and to pay fine of Rs. 50,000/, and in case of default, to suffer further R.I for six months;

(d) and for an offence under Section7 of the ATA, in respect of which he was sentenced to suffer imprisonment for life on four counts, and ordered to pay a fine of Rs. 100,000/-, and in case of default thereof, to suffer further R.I for six months.

It was ordered that all of the sentences were to run concurrently, with the benefit of S.382-B Cr. P.C. also being extended.

9. Proceeding with his submissions, learned counsel for the Appellant pointed out that a second investigation had been conducted, following which a supplementary challan had been submitted before the trial Court in which the name of the Appellant had been placed in Column No.2 as he had been found innocent, but the Court had nonetheless seen fit to take cognizance and proceed with the trial. He also pointed out that while the arrest of the Appellant had been shown by the prosecution to have been made on 17.01.2017, from a public road near a CNG Station, the case diaries of the trial Court incongruously reflected that he had surrendered voluntarily on 21.03.2017.

10. Learned counsel invited attention to the Appellant's Statement under S.342 Cr.P.C and pointed out that he had produced a certified copy of the judgment rendered on 24.03.2017 by the learned Sessions Judge, Khairpur in Sessions Case No.50/2017, whereby the Appellant was acquitted in respect of an offence for which he had been charged under S.23(i)(a) of the Sindh Arms Act. He pointed out that the judgment reflected that the Appellant had allegedly been arrested in relation to that offence at the link road Keti Mir Muhammad Ghumro, near Lasnari Damdamo at about 2230 hours on 31.12.2016, yet the version presented by the prosecution in the instant case ran contrarily in that regard. He pointed out that the impugned Judgment was itself silent on this aspect, albeit it having been earlier observed by the trial Court on 21.02.2017 as follows:

> "It is pertinent to mention here that the accused Ghulam Shabir s/o Mir Muhammad @ Miral by caste Lashari firstly arrested by PS Baradi Jatoi on 31.12.2016 and a news clip was published in daily Express Newspaper dated 2nd January, 2017 for his arrest and recovery of gun by the hands of Baradi Jatoi police which police station was situated in district Khairpur Mirs and the present case pertains to the police station B Section Khairpur and both police stations are under the command and control of the one SSP and SSP Khairpur must know about the arrest of accused and recovery of gun by the hands of Baradi Jatoi police on 31.12.2016 (FIR No. 237/2014 of PS Bardadi Jatoi offence u/s: 23(i) (a) SSA 2013 mentioning therein that accused used the gun in crime No. 237/2014 offence u/s: 365, 302, 324, 511, 148, 149 PPC R/W Section 7 ATA, 1997 of PS B Section Khairpur). The same accused has been arrested again by ASI Anwar Ali of PS Shah Hussain @ B Section Khairpur on 17.01.2017 from the place near Ansari CNG road at about 1845 hours in the present case and it is yet to be explained that which version of police is correct either arrest of accused on 31.12.2016 or arrest of accused on 17.01.2017 such act apparently does come within the definition of defective investigation therefore, issue show cause notice to SSP Khairpur and I/O Inspector Muhammad Ameen Pathan as contemplated under section 27/37 of the Anti-Terrorism Act, 1997."

11. Learned counsel argued that the documents submitted by the Appellant as well as the evidence of the defence witness and documents produced by him incontrovertibly established that the Appellant could not conceivably have been at the scene of the crime on the fateful day, yet such evidence had been ignored or overlooked by the trial Court while arriving at a determination of guilt. He prayed that the impugned Judgment be set aside and the Appellant be acquitted.

12. Notice had been issued to the Complainant, who appeared and reposed confidence in the APG whilst stating that he did not intend to engage counsel so as to assist him. For his part, the learned APG sought to defend the conviction on the basis of the evidence tendered by the prosecution witnesses, but could not point out from the impugned Judgment that any of the exculpatory evidence produced in support of the defence plea by the alibi witness had even been considered by the trial Court. He nonetheless sought to rely on the judgment of the Supreme Court in the case reported as Khadim Hussain v. The State 2010 SCMR 1720 in an endeavour to argue that the Appellant's alibi was an afterthought, bereft of substance, and ought not to be given much weightage.

13. We have considered the arguments advanced and examined the material on record.

14. The prosecution's case against the Appellant is predicated on the ocular accounts of the Complainant and other eye-witnesses, namely Khadim Hussain Junejo (PW-2), Abdul Rasheed Junejo (PW-3), Mohammad Rafiq Junejo (PW-4) and Momin Junejo (PW-9).

15. All five of them identified the Appellant as one of the assailants who had participated in the attack while armed with a gun, and maintained a uniform stance under cross-examination, but without specifically attributing any particular role, with it being stated generally that all the assailants had engaged in firing. As it stands, a perusal of the impugned Judgment reflects that the trial Court's determination hinges on their testimony, in as much as it was observed *inter alia* that:

> "The complainant party identified the present accused Ghulam Shabeer Lashari."
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> "Complainant and 04 private witnesses fully implicated the present accused in commission of present offence, who saw the present accused Ghulam Shabeer Lashari, when he alongwith his companions duly armed with weaons, being the members of unlawful assembly and in prosecution of their common object, attacked upon the complainant party and tried to abduct Nazeer Ahmed and Khadim Hussain, on the resistance of complainant party, all the accused including present accused made straight firing upon the complainant party with intention to commit their murders."
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> "All the above said eye witnesses/material witnesses were cross-examined by the learned defence counsel on material points but nothing has come on record to discredit their evidence."
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> "The ocular evidence led by prosecution coupled with the medical evidence would hence be acceptable and it cannot be rejected. In this case, occurrence has not been denied. It is worthwhile to mention here that no ill-will has been attributed either against the complainant and other eyewitnesses in order to show, that due to some grudge/reason, they have deposed falsely against the present accused."

16. While the evidence of the eye-witness may indeed have remained consistent, with the presence of the injured witnesses at the scene not being in doubt, and while their cumulative testimony would have considerable evidentiary value in the normal course, the same cannot be viewed in isolation of the Appellant's alibi plea, placing him abroad on the given day, as substantiated by the material brought on record through his own Statement and through SIO Pathan.

17. Clearly, in view of that specific plea, the prosecution's case and the defence version ought to have been properly appraised in juxtaposition in order to arrive at a just conclusion as to the culpability of the Appellant, as observed by the Supreme Court in the case reported as Ali Ahmad and another v. The State and others PLD 2020 SC 201. However, the Appellant's plea and the corroborative material produced appears to have been ignored or overlooked by the trial Court, with the trial Court apparently being swayed by the gravity of the offence in as much as it was contrarily observed in the impugned Judgment that:

> "Mere saying by the present accused in his respective statement recorded u/s 342 Cr.P.C that due to enmity the present case has been registered against him and filing of documents regarding his innocence, does not entitle the accused for his acquittal until and unless it is proved independently; but in this case/crime, no sufficient material has been brought on record in defence, which could show the false implication of the present accused."
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> "In this case, no sufficient material has been brought on record in defence, which could be benefited to the present accused."
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> "In this regard, plea of alibi has been taken by present accused in his statement u/s 342,Cr.P.C regarding his innocence, does not entitle the present accused for his acquittal until and unless it is proved independently but in this case/crime, no sufficient material has been brought on record in defence, which could show his false implication due to enmity by complainant party and same could not be benefited to the present accused at this stage as complainant and eyewitnesses/material witness identified the present accused Ghulam Shabber Lashari at the time of incident and in Court and deposed before this Court that the present accused is same, who amongst the culprits at the time of incident, in which the accused committed the murders of four innocent persons and caused firearm injuries to three members of complainant party, hence; the prosecution has established this point against the present accused Ghulam Shabir Lashari through ocular and circumstantial evidence coupled with medical evidence…"

18. Needless to say, a blinkered approach is wholly undesirable from the standpoint of the safe administration of justice, with it having been observed and emphasised by the Supreme Court in the case reported as Naveed Asghar and 2 others v. The State PLD 2021 SC 600 that:

> 10. The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.

19. In order to appreciate the significance of the Appellant's alibi, one has to look to his Statement under Section 342 Cr.P.C, where he stated that he wished to examine SIO Pathan as a witness in his defence and, when asked whether he had anything else to say, responded by stating:

> "Sir, I am innocent. I have been falsely implicated in this case due to enmity with complainant as my wife Mst. Kamalan received the dead body of accused Abdul Jabbar. My son Irshad Ali moved application before DIG. I produce the same at Exh.22/A. My wife moved application before this Court. I produce the same at Exh. 22-B. I also produce the order at Exh.22/C. I also produce the PS copy of application moved by wife Mst. Kamalan before SSP Khairpur. I produce the same at Exh.22/D. I have been acquitted in a case of section 23 (i) (a) Sindh Arms Act, 2013. I produce the same at Exh.22/E. I produce the copy of verification of passenger at Exh.22/F. I also produce verification at Exh22G to 22 G 3, I also produce tickets at Exh. 22/H and 22/I. I am innocent. I was not available in Pakistan at the relevant time of offence. I pray for justice."

20. As it transpires, the Application referred to by the Appellant was moved by his wife before the Special Judge, Khairpur within days of registration of the FIR, alleging that the Appellant had been falsely implicated and praying for a fair and impartial investigation to be conducted, but was dismissed on 23.09.2014 with it being observed that the plea was premature as the matter was still under investigation and the challan had not been submitted as yet.

21. Be that as it may, the matter did eventually come to be reinvestigated, as shown through the deposition of SIO Pathan, the relevant excerpts of which read as follows:

"On 18-01-2017, I was posted as SIO at PS Mirwah. I received the letter of SSP Khairpur vide letter RDR-70 dated 18-01-2017 for further investigation of crime No. 237/2014 u/s: 365, 511, 302 PPC R/W section 7 of ATA 1997 PS B Section Khairpur."

"On 20-04-2015 SSP Khairpur passed order on the application of Mst. Kamalan Khatoon thereby it was directed to call the applicant to hear her personally and take necessary legal action in accordance with law. I produce the said application at Exh.24/C. On 21-04-2015 SSP Khairpur issued letter to General Manager Procedure Bureau PIA Head Office Karachi, regarding verification of passenger Ghulam Shabir Lashari. I produce the same at Ex. 24/D. in pursuance of the letter of SSP the Deputy General Manager (PIA) issued letter on 27-04-2015 regarding verification of passenger Ghulam Shabir who disclosed in the instant letter that (as per our record he traveled Karachi-Jiddah sector on 01-06-2014 on PK-731, however our record shows that he did not use his return ticket i.e. for Jiddah-Karachi sector that he was originally booked for 15th June, 2014. I produce such letter at Exh.24/E. On 31-5-2014, the accused Ghulam Shabir was vaccinated. I produce the vaccination certificate at Exh. 24/F. During investigation, I recorded the statements u/s: 161 Cr.PC of independent witnesses namely Ehsan Ali Leghari Waryam Ali Jalbani and Mohammad Hayat Jalbani, who disclosed that the accused Ghulam Shabir was innocent and he was not available in Pakistan as he had gone to Saudi Arabia for performing Umrah. On 13-01-2017 Assistant Director FIA issued letter to SSP Khairpur regarding verification of accused Ghulam Shabir. I produce the covering letter and traveling history of accused as Exh. 24/G and Exh.24/H respectively. On 13-02-2017, I received the letter from SSP Headquarter Khairpur. I produce such letter at Ex.24/I, it is same and correct. Such enclosed copy/letter has already been produced at Ex 24/G. On 14-02-2017, I received the letter of SSP Khairpur who passed order under my recommendation that accused Ghulam Shabir be released u/s 497 (ii) Cr.PC due to lack of evidence against him. I produce above letter as Exh.24/J, it is same and correct. Thereafter, after conducting all the codal formalities, I submitted the supplementary challan before this Court while placing the accused Ghulam Shabir in column No. 2 u/s; 497 (ii) Cr.Pc, which is the record of Judicial file of this Court. Accused present in the court is same."

22. A perusal of those documents reflects *inter alia* that on 24.01.2017 and 31.01.2017, the Senior Superintendent of Police, Khairpur, had addressed a letter to the Additional Director, FIA Immigration, Quaid-e-Azam International Airport, Karachi, seeking verification of the travel history of the Appellant, stating therein that he had disclosed during the course of investigation that he was in Saudi Arabia on the date and time of offence (i.e. 02.9.2014 at 2130 hours) and did not return from there until he was deported on 05.08.2016. It was requested in the letter that the travel history of the Appellant be examined so as to ascertain whether he had gone to Saudi Arabia or not, and if so, to intimate when he had come back to Pakistan, so that the investigation of the case could be finalized. In response, the Assistant Director IBMS FIA Immigration QIA Airport, Karachi replied vide a letter dated 13.02.2017, whereby he forwarded the travel record of the Appellant as per the Integrated Border Management System database, which showed that he had departed from Karachi on 01.06.2014 at 1844 hours via Flight No. PK-731 bound for Jeddah, and had returned to Pakistan from there on 05.08.2017 at 1900 hours on Flight No. SV-722, which landed at Benazir Bhutto International Airport, Islamabad.

23. The testimony of the defence witness and the documents produced and exhibited through him remained unimpeached by the prosecution. As that documentary evidence is largely in the form of an official record, it is of particular relevance in establishing the absence of the Appellant from the country as on the date of the offence. Under the given circumstances, the Appellant's alibi cannot be said to be an afterthought or to have been contrived. Nor can the documentary evidence produced in support of the defence plea be dismissed as having been fabricated to unduly support the Appellant. No suggestion to that effect has even been made by the prosecution.

24. In a case like this, where the alibi is not based on mere oral testimony, but is substantiated by documentary evidence, an objection that the plea was not raised at the first stage would not be of particular consequence. Furthermore, the prosecution could very well have rebutted the evidence, especially as the existence of a number of the documents was known to them from the time of the second investigation, but failed to do so. Furthermore, the fact that the FIR was lodged 2 days after the occurrence lends credence to the assertion that the Appellant came to be linked by virtue of his wife being related to Abdul Jabbar and to have received his mortal remains. Ergo, we are of the view that the Appellant's alibi stood sufficiently proven so as to raise reasonable doubt regarding the prosecution case to his extent, notwithstanding the ocular evidence, and are fortified in our assessment by the judgments of the Supreme Court in the cases reported as Mehboob Ur Rehman v. The State 2013 SCMR 106 and Aminullah v. The State PLJ 1982 Supreme Court 592.

25. In *Mehboob Ur Rehman* (Supra), on the subject the standard and burden of proof vis-à-vis an alibi, it was observed that:

> "6. The most significant aspect of the matter as noted by us is the fact that the appellant/accused had himself surrendered before P.W.10 S.I./I.O. Muhammad Ashraf Khan along with the letter from the Commanding Officer of Gilgit Scouts dated 17-8-2000 to the effect that the appellant was on duty in Gilgit on the day of occurrence which was produced in evidence as Exb.P.W. 10/2 by said witness. Similarly under cross examination he has also produced the statement of five persons from the appellant's unit namely Mazhar Shah son of Sajawal Shah, Muhammad Tariq son of Saifullah, Said Bakht Khan Naib Subaidar, Shamsher Khan son of Mir Tazam Khan and Muhammad Zahoor son of Noor Khan as Exb.P.W.10/D1 to the effect that indeed the appellant was on duty with them

in Gilgit on the day of incident. This would therefore mean that at the earliest opportunity the appellant had insisted upon his plea of alibi before the police authorities and also stated as much in his statement under section 342, Cr.P.C. before the learned trial Court. P.W.10 S.I./I.O. Muhammad Ashraf Khan was not declared hostile or cross examined by the Prosecution insofar his evidence regarding the appellant's alibi is concerned. In this regard it is well settled that the accused while raising a defence plea is only required to show that there is a reasonable possibility of his innocence and the standard of proof is not similar to that as expected of the prosecution which must prove its case beyond any reasonable doubt. Consequently where a witness (in this case strangely for the Prosecution) has introduced certain documents in evidence which would substantiate the appellant's plea of alibi, then the onus would shift to the Prosecution to disprove the same which as noted above was not done."

26. In the same vein, it was held in *Aminullah* (Supra) as follows:

> "12. As indicated above, there was cleavage of opinion between the learned Judges who originally heard these appeals in this Court, on the question of law regarding the extent of the burden of proof which lay on the accused, who sets up a plea of alibi. The counsel appearing before us did not endeavor to address arguments on this question. However, before dealing with the evidence adduced by the prosecution and the defence at the trial, it will be appropriate briefly to state the position of law bearing upon this question.
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> 13. The divergence of opinion between the learned Judges stemmed from their interpretation and application of section 103 of the Evidence Act, to criminal cases. Section 103 lays down that the burden of proof as to any particular fact lies on that person who wishes the Courts to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person. Salahuddin Ahmad, J. (as he then was) and Muhammad Yaqoob Ali, C.J (as he then was) concurring with him, relying on *Surat Chandra Dhupi v. Emperor* (AIR 1934 Calcutta 719), *Suraj Bakhsh Singh v. Emperor* (AIR 1933 Oudh 369); and *Muksed Molla v The Crown* (PLD 1957 Dacca 503), held the view that under section 103 of the Evidence Act, the onus lay upon the defence to

prove its plea of *alibi* affirmatively. This view was held by the learned Judges, notwithstanding the fundamental principle underlying our system of criminal jurisprudence that "the onus of proving its case against the accused lies entirely upon the prosecution and it does not shift at any point of time", which was expressly adverted to. All the learned Judges, however, substantially agree on the principle that the Court has to judge the guilt or innocence of the accused uninfluenced by the consideration that the accused had failed to prove his plea of *alibi*, on the basis of the prosecution evidence, so that if the prosecution fails to prove its case upon its own evidence or the accused succeeds in raising reasonable doubt, the benefit of acquittal must be given to him. The other learned Judges, namely, Dorab Patel, and Muhammad Akram, JJ (as they then were) after an extensive review of the case law (if I may say so with respect) bearing on the question, held the view that the onus of proving affirmatively his alibi does not lie upon the accused, to the extent and in the sense onus lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. Therefore, the accused, in order to succeed on his plea of *alibi* need only to produce evidence sufficient to raise in the mind of the Court a reasonable possibility that he may be at the place where he asserts he was, rather than at the place of the crime at the time of occurrence. In such a case a reasonable doubt will have arisen as to his participation in the commission of the crime, the benefit of which, must be given to him. The Court, therefore, has to examine the evidence of the prosecution in juxtaposition with the defence evidence of *alibi*, and then upon the whole evidence to judge whether the accused can be found guilty beyond reasonable doubt and to convict him only when it is so possible. I am in respectful agreement with the enunciation of the correct legal position, on the question of onus of proof on an accused person under section 103 of the Evidence Act, by Muhammad Akram, J, as under:-

> "It was rightly remarked in *R. v. Lobell* (1957 All. E. R. 734) relied upon by my learned brother Salahuddin Ahmed, J. that "there is a difference between leading evidence which would enable a jury to find an issue in favour of the defendant and in putting the onus on him. The truth is that the jury must come to verdict on the whole of the evidence that has been laid before them." In my respectful opinion in the reported case of *Mukshad Mulla and others v. The Crown* (PLD 1957 Dacca 503), noticed by my learned brother, Salahuddin Ahmed, J., the Court failed to bear in mind this difference and I am,

> therefore, unable to approve of some of the observations made on reference to section 103 of the Evidence Act in that case. Similarly on principle, I am unable to appreciate the observations in the reported case of *Sunj Bakhsh Singh v. Emperor* to the effect that because there is satisfactory evidence that "a man committed a crime at a certain place and at a certain time, a Court will never find any difficulty in rejecting an *alibi* he may seek to establish, even if that *alibi* be supported by what, on the surface, would appear to be satisfactory evidence." There is always a rational approach in all cases to the entire evidence viz that produced by the accused in support of his plea of *alibi* and that by the prosecution in support of his conviction. The conclusion as to the guilt or innocence of the accused must rest on the basis of the entire evidence considered and weighed as a while for and against the prosecution. If in the process a reasonable doubt is raised as to the complicity of the accused the benefit of doubt must be allowed to him."

27. Conversely, Khadim Hussain's case (Supra), as cited by the learned APG, is distinguishable on the facts, as there the alibi was raised at the tail end of the trial without any evidence being led for purpose of substantiation, hence is of no avail to the prosecution. Here, the argument that the plea of alibi was taken belatedly has no force in view of the fact that by the time of the Appellant's appearance before the trial Court, the matter had been reinvestigated and such plea along with its supporting material had already come to the fore through that process.

28. It is well settled in criminal jurisprudence that even a single circumstance that creates reasonable doubt in a prudent mind as to the guilt of an accused entitles him to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. If any authority is required, one need look no further than the Judgments in the cases reported as Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez, v. The State 1995 SCMR 1345.

29. As such, the Appeal is allowed, with the impugned Judgment being overturned and the Appellant being acquitted of the charge and the conviction and sentence awarded to him in the underlying case being set aside, and it being ordered that he be released forthwith, unless required in connection with any other custody case.

JUDGE

JUDGE

Sukkur.
Dated: