

Judgment sheet.
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**
Cr. Appeal No.S-103 of 1997.

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing: 28 .09.2017.

Date of decision: 28.09.2017

Appellants: Through Mr. Ghulam Nabi Meo, Advocate.

The State Through Mr. Shahzado Saleem Nahiyoon
DPG.

None present for complainant.

J U D G M E N T :-

ABDUL MAALIK GADDI, J- Through instant appeal, the appellants have challenged the judgment dated 30.10.1997 passed by the learned Additional Sessions Judge Umerkot in Sessions Case No.45 of 1994 of P.S. Umerkot, Re: State vs. Photo & others, whereby the learned trial court after full-dressed trial convicted and sentenced the appellants in last para of the impugned judgment which reads as under:-

“I, therefore convict and sentence each accused U/S 307 PPC R.I (Rigorous Imprisonment) for 7 years, U/S 457 PPC R.I. for 7 years, U/S 380 PPC RI for 5 years and U/S 411 PPC R.I for two years, they are further directed to pay Rs.20,000/- (Twenty thousand) each as fine, if recovered half of it be given to injured PWs Khair Muhammad, Sultan and Lal Muhammad in equal shares. In default of payment of fine they will suffer R.I for one year more, they are given benefit of section

382-B Cr.P.C. All the accused are present on bail they are taken into custody and remanded to Central Prison Hyderabad under pucca warrant to serve out the sentence awarded to them now. Copy of judgment is supplied to accused free of cost.”

2. Briefly the case of the prosecution as narrated in FIR is that on 27.01.1990 at about 4-00 P.M time complainant Noor Nabi appeared at P.S Umerkot and lodged his report against unknown culprits stated therein that:-

“on the night of incident 27.01.1990 at about 1-00 A.M. night time he woke up on barking of dogs and saw that his pair of bullocks which he had tethered in the hedge of his house were missing and on the light of torch he saw foot prints of three persons who had stolen his bullocks, he raised cries thieves thieves, which attracted villagers Khair Muhammad, Sultan, Lal Muhammad, Bashir Ahmed and others. Complainant narrated the above facts thereafter one party consisting Khair Muhammad, Sultan, Lal Muhammad and Bashir Ahmed went on tractor for Naka Bandi when complainant and other villagers took hoof marks of bullocks and foot prints of culprits, Khair Muhammad, Sultan and Lal Muhammad alighted from tractor near village Basar Malhi and within 5/10 minutes they saw that three culprits were coming towards them alongwith stolen bullocks, Khair Muhammad, Sultan and Lal Muhammad challenged them and caught hold one of the culprit on which remaining culprits directly fired upon them more than one shots which hit them and they fell down and accused after leaving bullocks ran away, when complainant and other villagers who were taking foot prints, heard fire arm report and commotion they went running there and saw that Khair Muhammad, Sultan and Lal Muhammad were lying injured and were bleeding they had fire arm injuries on their bodies and bullocks were also standing there, injured Khair Muhammad and others narrated above story to complainant who sent injured to hospital for their

treatment, thereafter complainant alongwith others took foot prints of culprits which dis-appeared at metaled road Mirpurkhas, thereafter complainant appeared at PS and lodged his report against unknown culprits as stated above.

3. The charge was framed against the accused persons at Exh.02, to which they pleaded not guilty.

4. At trial, prosecution examined PW-1 complainant Noor Nabi at Exh.06; he produced FIR at Exh.6/A. PW-2 Muhammad Ashraf at Exh.8; he produced mashirnama of wardat and injuries at Exh.8/A to 8/C. PW-3 Sultan at Exh.10 he is injured eye witness, PW-4 Khair Muhammad at EXh.11 he is injured eye witness, PW-5 Lal Muhammad at Exh.12 he is also injured eye witness. PW-6 ASI Matheno Khan at Exh.13 he is IO of the case. PW-7 Dr. Muhammad Jam at Exh.14 he was medical officer Taluka hospital Umerkot and he had examined injured PWs Lal Muhammad, Sultan and Khir Muhammad and issued their medical certificates and produced the same alongwith police letter at Exh.14/A to 14/D thereafter learned DDA closed the side of prosecution through statement at Exh.15.

5. Statement of accused were recorded under section 342, Cr.P.C at Exh.16 to 18, wherein they denied the allegations of prosecution and have not examined themselves on oath and nor examined any defence witness to disprove the allegations of prosecution and they have stated that they are innocent falsely

implicated by police and had not committed any offence of this case, prayed for justice.

6. After hearing the parties' counsel, learned trial court came to the conclusion that the case has been proved against the appellants/accused; he convicted and sentenced them as stated above.

7. The main contention of the learned counsel for the appellants is that the impugned judgment of conviction and sentence is perfunctory, opposed to law and facts on record; that the witnesses so examined are near relative to each other and interested one and their evidence too contradictory to each other, therefore cannot be safely relied upon; that the appellants are facing agony of protracted trial since 1994 without their fault; that the learned trial court did not consider the real facts while passing the impugned judgment and did not apply its judicious mind; that the learned trial court did not consider the lacunas in the case of prosecution and passed 'botch-up judgment', whereby innocent appellants/accused are suffering woe since then, therefore he prayed for their acquittal.

8. Conversely, learned D.P.G argued that the contradictions in the evidence of prosecution witnesses are minor in nature and the accused are specifically nominated in the commission of heinous offence which is against society, therefore they are not liable to any grace or relief in their favour.

9. I have carefully considered the arguments as advanced by the learned counsel for the parties and carefully scanned the material so available before me.

10. Read-through the contents of FIR as well anticipation the whole situation of the case it is very regret to say that while passing the impugned judgment the learned Presiding Officer / trial judge did not consider the reality of the case vigilantly and failed to apply his judicious mind, whereby the persons who involved in this case have been dragging willingly since long, as such for those lacunas, I am to try my level best to light-on and illustrate the attention hereunder, so that, this painful practice / exercise is not permissible bylaw and to saving the skull of innocence who being punched down either by their enemy or involved by some of blacksheep (s) who are still in the police department.

11. Whereas, while ascertaining a criminal case under the law, which consists upon two aim ingredients the one of ocular testimony which is supported by another circumstantial evidence, hence for the sake of convenience the same in this case is discussed hereunder one by one.

(1) **OCCULAR TESTIMONY**

12. The ocular testimony in this case is only consisted upon the star-eye witnesses namely injured Sultan, injured Khair

Muhammad and injured Lal Muhammad. However, the evidence of complainant namely Noor Nabi is silent and upon here-say in both event of one incident, as at the time of alleged theft of bullocks and after that at the time of receiving injuries by aforesaid witnesses.

13. Before sketching the above evidences, I have perused the base of the case which is FIR and the same was lodged against unknown culprits. The plain reading of the FIR it contemplates that on the midnight of incident on 27.01.1990 at about 1-00 A.M the complainant woke up on barking of dogs and saw that his pair of bullocks which he had tethered in the hedge of his house were missing and it is very strange on the light of torch he saw foot prints of exactly three persons as narrated by him in this FIR. Further, it is stated in the FIR that after stolen away his bullocks, the complainant raised cries as thieves thieves, which attracted villagers as shown above and complainant narrated the above facts thereafter one party consisting Khair Muhammad, Sultan, Lal Muhammad and Bashir Ahmed went on tractor for Naka Bandi, when complainant and other villagers took hoof marks of bullocks and foot prints of culprits, Khair Muhammad, Sultan and Lal Muhammad alighted from tractor near village Basar Malhi and within 5/10 minutes they saw that three culprits were coming towards them alongwith stolen bullocks, Khair Muhammad, Sultan

and Lal Muhammad challenged them and caught hold one of the culprit on which remaining culprits directly fired upon them more than one shots which hit them and they fell down and accused after leaving bullocks ran away. Looking to this fact that when complainant woke up on the barking of dogs which appears the presence of thieves and stolen bullocks, but such fact is mum in FIR and thereafter the story is made in the manner that complainant raised cries and on his cries the villagers gathered there and they made a team in groups for searching accused, however, there was a quite enough timing for accused persons to run away from the occurrence, but it seems that the accused persons were also waiting for complainant party at Basar Malhi village which was situated at the distance of about three kilometers away from the first place of incident i.e. the house of complainant.

14. The aforesaid story is itself seems on flimsy ground, which apparently proofs by adducing the above eye witnesses at trial. Whereas, PW/injured namely Sultan in his examination-in-chief obviously states that at the cries of complainant he alongwith PW Khair Mohammad and Lal Muhammad went there where PW Bashir told them that thieves have stolen a pair of bullocks of complainant Noor Nabi. He in same line in his cross states that when they went at the house of complainant he was not present there and his women folk and 2/3 other persons were available

there. However, on the contrary the PW Lal Mohammad in his chief examination states that he alongwith his brothers went at the direction of cries and met with complainant Noor Nabi and on their enquiry the complainant himself disclosed the above story. Not only this but also this witness/injured Sultan belies the story of prosecution case while clearly stating in his examination-in-chief that in second place of incident i.e. Basar Malhi they saw accused Photo, Allah Bux and Karamullah alongwith stolen bullocks accused Photo has hatchet and small lathi (Ghobato), accused Karamullah had hatchet and Ghobata while again says accused Karamullah had pistol and accused Allah Bux had hatchet and Ghobata, while in same way in the bottom of his examination in chief he also states that prior to incident accused were not known to him. He further states that they caught hold accused Photo on which accused Karamullah and Allah Bux attacked upon them by firing and Pw/injured Khair Muhammad states that they caught hold one accused and remaining accused fired upon them, however PW/injured Lal Mohammad states in chief that they did not catch any of the culprit. This witness has also admitted that police did not record his statement under section 161 Cr.P.C. Moreover, Pw/injured Khair Mohammad while unveiling the prosecution case more admitted in his cross examination that prior to incident accused were known to him. It is further admitted by him that he

had not given the names of accused as culprits as police had not recorded his statement u/s 161 Cr.P.C. Also PW/injured Sultan even as sidecutting the way of prosecution in his examination-in-chief, states that after second event of incident when they were injured, the accused left the bullocks and ran away thereafter police who was on patrolling also came there and they narrated story to police, police referred them to hospital. But, in this means PW Khair Mohammad states in his chief that after fled away the accused persons, complainant and other peoples and Raees Umed Ali Lashari came there and they took them at police station and from police station they were taken to hospital for treatment. The eye-witness Lal Mohammad who is also star witness the whole event did not support the prosecution case while clearly saying that he cannot say that accused present in court are same and after the incident PW Bashir took them to hospital and police did not record his statement u/s 161 Cr.P.C, therefore there is material contradictions in above main / star witnesses which cuts at the root of whole episode of prosecution case.

15. Notwithstanding, perusal of record it appears that accused Photo was arrested on 30.5.1990 and identification parade of this accused was made before the court of law on 14.6.1990 after the delay of about 15 days. It also appears that on the statement of accused Photo the co-accused Allah Bux and

Karamullah were nominated in this case as accused, such statement feeble one under the law and creates highly doubt in the case of prosecution.

16. Now, there remains circumstantial evidence of mashir of this case namely Mohammad Ashraf who acted as mashir of place of incident and injuries, ASI Matheno Khan and Dr. Muhammad Jam, who examined the injures of injured. As looking to the above material contradictions between the ocular account, the evidence of these formal witnesses brings no fruitful to the case of prosecution in order to convict the accused persons. Even though, as discussed above, making known the all aspect as well lacunas of the case it is essential to light on the same here.

17. PW Muhammad Ashraf, who had acted as mashir of vardat of case. He in his cross-examination states that the empty cartridges secured by police from vardat were of yellow colour, however, the mashirnama at Exh.8/B viz. memo of place of incident indicates that police secured empty cartridges of 12 bore in which two were of red colour and one was of sky blue clour. Further, this witness also disclosed in his cross that the memo of place of incident viz.Exh.8/B was prepared by police at Umerkot police station and his signature was obtained in it there. He also in his cross admitted that memo of injuries as Exh.8/C was prepared

at police station Umerkot and he had signed the same there. This witness had also left many contradictions in his evidence which was an adequate amount of creating doubt in the case of prosecution. Similarly, ASI Matheno Khan stated in his examination-in-chief that he had not investigated the case. On 30.5.1990 he arrested accused Photo and he was produced before Third Class Magistrate Umerkot for his identification test, by injured PWs correctly picked out accused Photo among the Domies such mahsirnama was prepared by Head Munshi and T.C.M Umerkot in presence of mashirs Talib Hussain and Nazeer Ahmed. Lastly, Dr. Muhammad Jam, who had examined the injured persons deposed the same facts as narrated in his evidence, however, in cross he described that injured were brought at hospital by one Din Muhammad s/o Allah Warrayo Maher.

18. Come across to the above circumstances so brought on record and evidence which is contradictory on material particulars, therefore, I have no hesitation to hold that the prosecution has failed to prove its case against the appellants and the learned trial court did not appreciate the evidence properly. It is settled position of law that if there is slight apprehension regarding prosecution case being untrue, its benefit extends to the accused. Reliance is placed in the case of **Tariq Perves v. The State** reported as **1995 SCMR 1345**, wherein it has been held that if a single circumstance

creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a matter of grace, but as a matter of right. Similar view has also been taken in the case of **Muhammad Akram v. The State** reported as **2009 SCMR 230.**

19. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellants and the learned trial court did not appreciate the evidence and record properly, resultantly appeal is allowed. The impugned judgment is set-aside and the appellants are acquitted from the charge. They are present on bail, their bail bond stands cancelled and surety discharged.

JUDGE.