IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

PRESENT:-
Mr. Justice Shamsuddin Abbasi
Mr. Justice Ali Haider 'Ada'

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Criminal Jail Appeal No.D- 28 of 2021
{Confirmation Case No.D- 25 of 2021}
[Abid Ali son of Allah Dad Magsi v The State]

Criminal Jail Appeal No.S- 45 of 2021
[Abid Ali son of Allah Dad Magsi v The State]

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Mr. Irfan Badar Abbasi, Advocate for the Appellant.
Mr. Ali Anwar Kandhro, Additional Prosecutor General assisted by Zain ul Abideen Abbasi, Assistant Prosecutor General [Sindh].

Dates of hearing **12.08.2025 & 19.08.2025**

Date of Judgment **02.09.2025**

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JUDGMENT

SHAMSUDDIN ABBASI, J. Through Criminal Jail Appeal No.D-28 of 2021 Abid Ali son of Allah Dad Magsi, appellant, has challenged the validity of the judgment dated 04.09.2021, penned down by the learned Additional Sessions Judge-I (Model Criminal Trial Court) [MCTC], Kambar, in Sessions Case No.409 of 2020 (FIR No.89 of 2020) registered at Police Station 'A' Section, Shahdadkot, for offences under Sections 302, 114, 148 and 149, PPC, through which he was convicted and sentenced and sentenced as under:-

> *"**40.** For findings on points supra and keeping in view the guidelines laid down by Honourable Superior Courts, this Court convicts the present accused Abid Ali s/o Khamiso Magsi in terms of section 265-H(ii) Cr.P.C. and therefore sentence him with fine of Rs.50000/- for offence u/s 148 r/w section 149 PPC and in case of non-payment to under S.I. for six months as well as to death as Tazir for commission of murder [qatl-e-aamd] of complainant's father Khadim Hussain Buledi u/s 302[b] PPC r/w Section 149 PPC with direction that he be hanged by his neck till he is dead subject to confirmation by Honourable High Court of Sindh Circuit Court Larkana and he is also ordered to pay 5,00,000/- [five lac rupees only] as compensation amount for payment to the legal heirs of deceased in terms of section 544-A Cr.P.C. In case of non-payment of aforesaid compensation amount he shall suffer S.I. for six months.*
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> *Copy of this judgment be supplied to convict today free of cost under proper receipt in terms of section 371 Cr.P.C. with information that he may prefer appeal, if any, within seven days*

of this judgment and a copy thereof be communicated to the learned DPP, Kambar Shahdadkot. Moreover, proceedings of this case be also respectfully submitted before the Honourable High Court of Sindh, Circuit Court Larkana for confirmation in terms of section 374, Cr.P.C.

The convict Abid Ali who has been produced under custody is remanded back to Central Prison, Larkana with conviction warrant & slip in order to serve out sentence as per law. However, the case against the proclaimed offenders be kept on dormant file till their arrest or otherwise as per law".

2. Through Criminal Jail No.S-45 of 2021 the appellant has also challenged his conviction and sentence of five years rigorous imprisonment with fine of Rs.20000/- and one year more simple imprisonment in lieu of fine, awarded by the same Court in the case of recovery of an unlicensed pistol vide Sessions Case No.318 of 2021 [FIR No.129 of 2021] registered at Police Station 'A' Section Shahdadkot, for offence under Section 24 of Sindh Arms Act, 2013 through separate judgment dated 04.09.2021, whereby the benefit in terms of Section 382-B, Cr.P.C. was extended to the appellant.

3. A Reference in terms of Section 374, Cr.P.C. was also sent to this Court for confirmation of death sentence, awarded to the appellant by the learned trial Court.

4. Lal Bakhsh Magsi, aged about 51 /52 years, was shot dead due to murderous enmity on 12.07.2020. The deceased is father of complainant Kamran Ali. About two years back nephew of Habibullah Magsi was killed in police encounter, but Habibullah blamed complainant's cousin Riaz Magsi for commission of murder of his nephew. On the fateful day i.e. 12.07.2020 the complainant alongwith his father Lal Bakhsh Magsi, brother Asghar Ali and cousin Badal Khan was going to his shop of A/C repairing, situated at Bago Road, by foot and when reached at Eidgah Shahdadkot at about 10:15 am, they were intercepted by five persons, who came on two motorcycles. Abid Ali son of Khamiso Magsi, Sikandar son of Allah Dad Magsi and Nadir son of Allah Dad seated on one motorcycle whereas Habibullah son of Baharo Magsi and one unidentified person, without mask, were on another motorcycle. Abid Ali, Habibullah, Sikandar and unidentified person took out pistols and they on the instigation of

Nadir Magsi shot straight fires at Lal Baksh Magsi, who fell down on the ground and seeing him fell, all of them boarded on motorcycles and decamped from the scene. Lal Bakhsh Magsi sustained firearm injuries on left side of neck, back of right side near shoulder, elbow of right arm and below armpit of left side. Blood was oozing and he went unconscious. The complainant immediately informed the police and with the help of others took Lal Baksh Magsi to Taluka Hospital Shahdadkot, who succumbed on the way to hospital. Police arrived at the hospital, completed legal formalities and after getting done the post-mortem handed over the dead body to complainant party. The complainant after freeing from funeral rites appeared at P.S. 'A' Section, Shahdadkot and lodged FIR under Sections 302, 148, 149 and 114, PPC on 13.07.2020.

5. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under the above referred Sections, whereby the appellant was sent-up to face the trial. He was also sent up to face trial under Sections 24 of Sindh Arms Act, 2013 for recovery of an unlicensed pistol of 30 bore, alleged to be used in the commission of murder of Lal Bakhsh Magsi, through separate charge sheet.

6. Worth to mention here that in the earlier round of litigation, after a full dressed trial the learned trial Court acquitted co-accused Nadir Ali vide judgment dated 28.01.2021, which has not been challenged either by the complainant or the State and such acquittal order has attained finality.

7. The appellant was charged for commission of murder of Lal Bakhsh Magsi under Section 302, 114, 148 and 149, PPC. He was also indicted for recovery of unlicensed arm falling under Section 24 of Sindh Arms Act, 2013. He pleaded not guilty to the charged offences and claimed a trial in both cases.

8. At trial, the prosecution has examined as many as eight witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

9. Dr. Dileep Kumar appeared as witness No.1 [Ex.19], SIP Gulsher as witness No.2 [Ex.20], PC Arif Hussain as witness No.3 [Ex.21], Saleem Ahmed [Tapedar] as witness No.4 [Ex.22], Kamran Ali as witness No.5 [Ex.23], Asghar Ali as witness No.6 [Ex.24], Ashique Ali as witness No.7 [Ex.25] and ASI Zahoor Ahmed as witness No.8 [Ex.26]. All of them have exhibited certain documents in their evidence and were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.27.

10. Appellant was examined under Section 342, Cr.P.C. at Ex.28. He has denied the allegations imputed upon him by the prosecution, professed his innocence and stated his false implication by the complainant owing to murderous enmity with his maternal uncle Habibullah. He opted not to make a statement on Oath under Section 340(2), Cr.P.C. nor produce any witness in his defence.

11. Upon completion of the trial in both cases, the learned trial Court found the appellant guilty of the offences for commission of murder of Lal Bakhsh Magsi and recovery of unlicensed pistol, used in the commission of offence, and, thus, convicted and sentenced him followed by a Reference for confirmation of death sentence as detailed in paras 1, 2 and 3 [supra], which necessitated the filing of listed appeals, which are being decided together through this common judgment.

12. It is contented on behalf of the appellant that he is innocent and has falsely implicated in this case by the complainant on account of murderous enmity with his maternal uncle Habibullah. Next contends that the FIR has been lodged after one day of the incident and that too without furnishing any plausible explanation, hence the possibility of consultations and due deliberations particularly in the background of the previous enmity cannot be ruled out. Also contends that the allegations are general in nature and no specific role is attributed to the appellant. Next contends that the prosecution has failed to place on record any cogent and reliable evidence to substantiate that deceased was done to death due to firing of the appellant. Per learned counsel, the ocular

account has been furnished by related and interested witnesses, whose testimony is unsafe to rely upon especially when they have not been corroborated by an independent witness. Next contends that the witnesses were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellant. Also contends that the medical evidence is not in line with the ocular account furnished by the prosecution whereas the circumstantial evidence brought on record in shape of recovery of crime weapon is of no importance more particularly when witnesses of ocular account being close relatives have narrated a different story and contradicted each other on crucial points and secondly the sole mashir has not supported the recovery. The learned counsel while summing up his submissions has submitted that the impugned judgments are bad in law and facts, based on misreading and non-reading of evidence, without application of a conscious judicial mind and against the principle of natural justice, hence liable to be set-aside and the appellant deserves to be acquitted of the charges. The learned counsel for the appellant in support of his submissions has placed reliance on the cases of *Ayub Masih v The State* [PLD 2002 Supreme Court 1048], *Nazir Ahmad alias Haji and another v The State* [1995 SCMR 1347], *Muhammad Asif v The State* [2017 SCMR 486], *Riaz Ahmed v The State 2010 SCMR 846], Muhammad Riaz and others v The State and others], Sarfraz and another v The State* [2023 SCMR 670] and *Muhammad Abbas v The State* [2025 SCMR 1145].

13. The learned APG for the State while controverting the submissions of learned counsel for the appellant has submitted that the delay in lodgment of FIR has been well explained, hence the same is of no importance in view of the peculiar facts and circumstance of the case more particularly when an advance information was conveyed to the police soon after the incident. Next contends that that the witnesses while appearing before the learned trial Court remained consistent on each and every material point and despite undergoing a lengthy cross-examination did not shatter their evidence, which has been corroborated by medical evidence coupled with the circumstantial evidence. Also contends that the findings recorded by the learned trial Court in the impugned judgments are based on fair evaluation of evidence and documents brought on

record, hence call for no interference and the appeals deserve to be dismissed.

14. We have heard the learned counsel for the respective parties at length, given our anxious consideration to their submissions, and have also scanned the entire record carefully with their able assistance.

15. As to the unnatural death of deceased is concerned, suffice to observe that the factum of Qatl-i-Amd of Lal Bakhsh Magsi has not been denied by the defence and the same has also been established through strong and convincing evidence, adduced by PW.1 Dr. Dileep Kumar. We, therefore, are in agreement with the learned trial Court that deceased died unnatural death resulting from injuries caused with firearm.

16. What emerges from the record is that the complainant in his FIR as well as while appearing before the learned trial Court has nominated appellant Abid Ali, Sikandar, Habibullah and an unknown person, who on instigation of co-accused Nadir conjointly made direct fires from their respective pistols at his father Lal Bakhsh Magsi, who having sustained injuries on different parts of his body succumbed on the way to hospital. Complainant Kamran Ali is real son of deceased Lal Bakhsh Magsi whereas eye-witnesses Ali Asghar is his real brother and Badal Khan is his cousin. Per deposition of complainant, the accused persons, who were five in number, armed with pistols, came at scene of offence on two motorcycles while he alongwith his father Lal Bakhsh Magsi [deceased], brother Ali Asghar and cousin Badal Khan was on the way to his shop of A/C repairing by foot and reached near Eidgah, Shahdadkot City, when they were intercepted by accused party and as soon as they alighted from motorcycles, Nadir Ali instigated rest four to kill Lal Bakhsh Magsi, who made straight firing from their respective pistols, resultantly his father Lal Bakhsh Magsi sustained four firearm injuries on his neck, right side of back scapular region through and through, right side of elbow [crossed from inner side through and through] and left side of armpit [crossed from right side of bosom /breast near right armpit through and through] and

fell down on the ground and soon thereafter all accused made their escape good on their motorcycles.

17. The crime in this case is shown to have taken place on 12.07.2020 at 10:15 am whereas the FIR has been lodged on 13.07.2020 at 9:00 pm, resulting a delay of about 35 hours. According to complainant, soon after the incident, he intimated P.S. 'A' Section, Shahdadkot and at the same time took his father in a chingchi rickshaw towards Taluka Hospital Shahdadkot and as soon as the rickshaw reached near the hospital, his father succumbed to his injuries and after observing legal formalities and having conducted the post-mortem, his dead body was handed over to him and after completing funeral rites he visited P.S. and lodged FIR on 13.07.2020 at 9:00 pm. Surprising to note that the complainant, his brother Asghar Ali and eye-witness Badal Khan were present at hospital and in their presence the police arrived there, but none either from the two sons or a close relative of deceased voluntarily come forward to record a statement under Section 154, Cr.P.C. nor SIP Gulsher, who reached at hospital on receipt of information, insisted anyone of them to become a complainant. The only excuse that has come on record on the part of complainant is that firstly he brought the dead body at hospital and after freeing from funeral rites went to P.S. and lodged FIR on next day of incident. The explanation put-forth by the complainant is not convincing. Per deposition of PW.1 Dr. Dileep Kumar [Ex.19] PC Arif Hussain Lashari handed over him dead body of deceased Lal Bux on 12.07.2020 alongwith lash chakas form for conducting post-mortem. He started post-mortem at 11:00 am and finished at 12:00 noon on the same day and after completion thereof handed over the dead body to PC Arif Hussain Lashari. The prosecution has also examined PC Arif Hussain as PW.3 Ex.21, who while appearing before the learned trial Court has deposed that after conducting the post-mortem he handed over the dead body of deceased to his heirs and obtained an acknowledgment receipt, but failed to produce the same in his evidence to substantiate as to at what time the dead body was handed over to his heirs. It is to be noted that post-mortem was conducted at 11:00 am and completed at 12:00 noon on 12.07.2020 and soon thereafter the dead body of deceased was handed over to PC Arif Hussain, who handed over the

same to complainant party. The question arises why the complainant kept mum and did not lodge FIR till 9:00 pm on 13.07.2020. Non-lodging of FIR in time without furnishing any plausible explanation gives rise to a presumption that the FIR has been lodged after consultation and due deliberation. The Hon'ble apex Court, in absence of any plausible explanation, has always considered the delay in lodgment of FIR to be fatal and castes a suspicion on the prosecution story, extending the benefit of doubt to the accused. It is a well-settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Reliance in this behalf may well be made to the case of *Zeeshan @ Shani v The State* (2012 SCMR 428) wherein it has been held that *"delay of more than one hour in lodgment of FIR give rise to an inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful".* In another case reported as 2010 SCMR 97 *(Noor Muhammad v The State)* it has been held that *"when the prosecution could not furnish any plausible explanation for the delay of twelve hours in lodging the FIR, which time appeared to have been spent in consultation and preparation of the case, the same was fatal to the prosecution case".* We are, thus, of the view that the explanation furnished by the prosecution in lodgment of FIR after 35 hours of the incident is not plausible, benefit whereof must go to the appellant.

18. The incident is shown to have taken place on 12.07.2020 at 10:15 am and per deposition of complainant he took his father to Taluka Hospital Shahdadkot in a chingchi rickshaw and when the rickshaw was near to hospital his father succumbed to his injuries, meaning thereby it was not a case where the deceased died at spot, he was alive at that time and died on the way to hospital as deposed by the complainant and eye-witness. This aspect of the matter has been negated by the post-mortem report, available at Ex.11/B page 81 of the paper book, which shows time of death of deceased as 10:15 am

on 12.07.2020. PW.1 Dr. Dileep Kumar in his cross-examination has also rendered his opinion that *"deceased succumbed to injuries soon after sustaining injuries, which may be within seconds or minutes".* On the other hand, according to PW.2 SIP Gulsher on 12.07.2020 he was present at P.S. 'A' Section, Shahdadkot as duty officer when complainant informed him about commission of murder of his father so he went to hospital and inspected the dead body as well as prepared Danishnama in presence of mashirs Ashique Ali and Muhammad Jaffar at 10:40 am and then returned back to P.S. leaving there PC Arif Hussain for post-mortem, who came at P.S. and handed over him receipt of handing over dead body and blood-stained clothes of deceased. He has neither disclosed as to at what time PC Arif Hussain returned to P.S. from hospital nor produced any entry of his arrival as well as of PC Arif Hussain at P.S. He has not disclosed as to at what time the complainant informed him about the incident and when he reached hospital. He has only produced departure entry, available at Ex.12/A at page 91 of the paper book, which shows time of departure as 10:25 am on 12.07.2020 whereas time mentioned on memo of inspection of dead body Ex.9/A and inquest report Ex.9/B is 10:40 am. All this show that the incident was not occurred in the manner as projected by the prosecution.

19. To prove the ocular account besides complainant Kamran Ali, the prosecution has kept in its fold eye-witness, namely, Asghar Ali [PW.6 Ex.24]. Since this is a case of awarding capital punishment of death, therefore, it would be appropriate to reassess and reexamine the evidence adduced by complainant and eye-witness. Admittedly the complainant and eye-witness are real sons of deceased as such they seem to be interested witnesses particularly in the back ground of murderous enmity and scandalous delay of about 35 hours in lodgment of FIR, therefore, propriety of safe administration of justice demands to examine their evidence with care and caution. A detailed examination of their evidence reveals that they have not only contradicted each other on crucial points but also narrated conflicting story. The complainant in his examination-in-chief has deposed that the incident occurred at 10:15 am on 12.07.2020 when five persons came on two motorcycles, armed with pistols, out of them four were identified as Abid, Sikandar, Nadir and Habibullah whereas the fifth

one was unknown to him and out of five Nadir instigated rest four to kill his father Lal Bakhsh Magsi, who made direct fires and having sustained firearm injuries his father fell down on the ground and thereafter all five accused made their escape good on same motorcycles. According to complainant, soon after the incident he informed P.S. 'A' Section Shahdadkot and also shifted his father to Taluka Hospital Shahdadkot with the help of his brother Asghar Ali and cousin Badal and when they reached near the hospital his father succumbed to his injuries. On the other hand eye-witness Asghar Ali though has deposed same story in his evidence, but contradicted the complainant by deposing that his brother Kamran informed the incident to police and he with the help of others shifted his father to hospital in injured condition who on the way to hospital succumbed to his injuries. The complainant in his cross-examination has stated that he saw and identified four accused and the fifth one was unknown to him and he disclosed their names to police at the time of inspection of dead body in hospital. On the other hand, he changed his stance and stated that he disclosed the names of accused to police while recording his FIR at P.S. The complainant during his cross-examination has stated that blood-stained earth was lying at spot but it was not covered by police, however, few small stones were placed in circle around such material. On the other hand, eye-witness has stated in his cross-examination that blood-stained earth was lying at katcha side of road and did not state a single word as to placing stones by police around such material. Both complainant and eye-witness in their cross-examination have admitted that while shifting their father to hospital their hands and clothes were stained with blood, but they have not handed over the same to Investigating Officer during investigation.

20. PW.2 SIP Gulsher [Ex.20) is the Investigating Officer who on receipt of information with regard to commission of murder immediately rushed to Taluka Hospital Shahdadkot and completed necessary proceedings under Section 174, Cr.P.C. A bare perusal of his evidence reveals that after completing relevant proceedings at hospital, he returned back to P.S. leaving PC Arif Hussain at hospital, who after getting post-mortem of the deceased handed over the dead body to complainant party under a receipt, and then came back at P.S.

and handed over the receipt as well as blood-stained clothes of deceased to him and he recorded his statement under Section 161, Cr.P.C. According to him, on 13.07.2020 at 9:00 pm complainant appeared at P.S. and lodged FIR and thereafter he visited the place of incident and conducted site inspection on the pointation of complainant. Per him, they reached the place of incident at 9:40 pm and during site inspection he secured blood-stained earth and four empties of 30 bore pistol and sealed the same in separate parcels under a mashirnama prepared by him at spot in standing position in the light of torch. On the other hand, the complainant has not deposed a single word as to availability of torch at the time of site inspection. In his cross-examination, the investigating Officer has stated that having incorporated the contents of complaint in FIR book he left P.S. at 9:30 pm for site inspection, which is at a distance of half kilometer from P.S. Per him, they went to the place of incident on motorcycles whereas the complainant has not deposed so in his evidence. According to complainant and Investigating Officer besides blood-stained earth four empties of 30 bore pistol were also secured during site inspection, but they have been contradicted by mashir Ashique Ali [PW.7 Ex.25], who while appearing before the learned trial Court has stated in his cross-examination that besides blood-stained earth there were five empties of 30 bore pistol lying at the spot, which were secured and sealed at spot. Per him, he and co-mashir Muhammad Jaffar were already present at the crime scene when police, accompanied by complainant, reached there for site inspection. On the other hand, the complainant and Investigating Officer did not utter a single word as to their availability at the crime scene before their arrival.

21. As to the medical evidence, adduced by PW.1 Dr. Dileep Kumar [Ex.19] is concerned, the complainant and eye-witness while appearing before the learned trial Court have stated that all four accused have made direct fires at deceased, who sustained firearm injuries on his neck, right side of back scapular region through and through, right side of elbow [crossed from inner side through and through] and left side of armpit [crossed from right side of bosom/ breast near right armpit through and through. On the other hand, the Medical Officer in his cross-examination showed his inability as

to exact direction from which fires were made. This witness has also admitted that he did not find exit wound of Injury No.1 and that neck was not dissected, hence he cannot say about any internal injury. He admitted that per post-mortem and his findings Injury No.2 was caused on right scapular region with exit would at Axilla. He further admitted that he has not clearly mentioned exit would of Injury No.2 and that he is not a ballistic expert. Per complainant and eye-witness the incident took place at 10:15 am [morning] and they took their father to Taluka Hospital Shahdadkot in a chingchi rickshaw and when they reached outside the hospital their father succumbed to his injuries. It means that the deceased was alive while shifting to hospital and he died on the way outside the hospital. This statement of the complainant and eye-witness has been belied by the Medical Officer, who in his cross-examination has rendered his opinion that the deceased died soon after sustaining injuries may be within seconds or minutes. Apart from above, the time of occurrence written in FIR [Ex.6/A] is half past 10' clock [morning], meaning thereby the incident took place at 10:30 am whereas the time of death of deceased mentioned in inquest report [Ex.9/B] as quarter to 10' clock [morning] i.e. 9:45 am, which is beyond imagination.

22. Reviewing the evidence of ocular account furnished by complainant Kamran Ali and eye-witness Asghar Ali, Medical Officer Dr. Dileep Kumar and other witnesses including Investigating Officer, referred to above, it is established that they have not only contradicted each other, but altogether narrated a conflicting story. It is, thus, difficult for a prudent mind to ascertain that who was deposing true facts, when otherwise under the facts and circumstances of the case they are the star witnesses of the prosecution and being the central figures, the entire prosecution case revolves around their testimony, but due to glaring contradictions and discrepancies, noted above, their testimony cannot be termed to be worth credence and give rise to an adverse inference that the ocular account furnished by the prosecution did not finds support the medical evidence brought on record by the prosecution. Thus, in no way their statements are helpful to the prosecution rather caused a big and irreparable dent to the prosecution case.

23. Per prosecution case, the four accused, armed with pistols, shot direct fires at deceased. A keen look at the evidence of complainant and eye-witness reveal that they have not specifically pin pointed any accused responsible for commission of the murder of deceased, hence it can also not be said with certainty as to from whose firing the deceased was done to death. The site-plan, medical evidence and motive do not corroborate the version of prosecution, leaving much room of doubt for holding the appellants guilty of the charge.

24. Parties are known to each other previously in the background of murderous enmity. Deceased Lal Bakhsh Magsi was done to death in presence of complainant Kamran Ali, Asghar Ali and Badal Khan, who are real sons and nephew of deceased and they all were empty handed when the accused party came at the scene of offence, armed with weapons. The question arises why the complainant and two eye-witnesses were let-off unhurt by the accused party more particularly when none of them could escape alive and the accused party was well within knowledge that they would became witnesses against them in time to come. Such a behavior of accused party in the background of admitted enmity does not appeal to a prudent mind that when they could easily wipe out the entire evidence against them why they have not done so. Reliance in this behalf may well be made to the case of *Mst. Rukhsana Begum & others v Sajjad & others* (2017 SCMR 596).

25. The conduct of the complainant and eye-witnesses of ocular account also deserves some attention. According to complainant and eye-witness when they were on the way to their shop, the moment appellant alongwith his four companions, armed with weapons, intercepted them and soon thereafter Nadir Ali instigated other four to kill complainant's father Lal Bakhsh Magsi, who made straight fire from their respective pistols, which hit to Lal Bakhsh Magsi on different parts of his body, who fell down on the ground and thereafter the accused party made their escape good. It is against the normal human conduct that in presence of two sons and a nephew a man was done to death and despite having sufficient opportunity and space of time, they did not make even an abortive attempt to catch hold any of the accused. Had they been present at the relevant time,

they would not have waited for the murder of deceased and would have raised commotion the moment they saw the accused. This conduct of the two sons and a nephew is itself creating doubt in the case of prosecution. It does not appeal to the logic that how such an incident could happen without any intervention on the part of complainant and two eye-witnesses to come to rescue the deceased when they were at a little distance from the accused. In such a situation, the explanation furnished by the prosecution that the complainant party was empty handed and made no resistance due to fear of weapons. Reliance in this behalf may well be made to the case of *Sardar Ali v Hameedullah and others* (2019 P.Cr.L.J. 186) and *Mst. Rukhsana Begum & others v Sajjad & others* (2017 SCMR 596).

26. The meticulous examination of record gives a lead that the acclaimed presence of complainant and eye-witnesses is a sheer coincidence. It needs no elaboration that presence of complainant and eye-witnesses at the spot is not to be inferred rather is to be proved by prosecution beyond scintilla of doubt. We have also taken note of the fact that in an occurrence, wherein a man lost his life in the background of admitted murderous enmity, the complainant and eye-witnesses remained unhurt. In absence of any confidence inspiring explanation regarding their presence at crime scene, both complainant and eye-witness are seems to be interested and chance witnesses and their testimony can safely be termed as suspect evidence. Reliance may well be made to the case of *Mst. Sughra Begum and another v. Qaiser Pervez and others* (2015 SCMR 1142).

27. Record demonstrates that prosecution has failed to associate an independent person to provide an independent support to the evidence of interested witnesses. There is no denial of the fact that Ashique Ali and Muhammad Jaffar, who are mashirs of all memos viz inspection of dead body, inquest report, site inspection and memo of arrest of appellant and recovery of crime weapon are related to complainant, out of them the prosecution has only examined Ashique Ali, who too has not supported the case of the prosecution with regard to recovery of empties from the scene of occurrence whereas the second mashir Muhammad Jaffar has not

been examined by the prosecution without furnishing any plausible explanation. It is noteworthy that the incident took place in broad day light at a busy road and usually there is rush of public transport as admitted by the complainant and eye-witness in their cross-examination despite no independent person has been associated to substantiate the case of the prosecution. We are conscious of the fact that there should some plausible explanation that actually attempts were made to associate an independent witness from the locality, when otherwise under the circumstances of the present case the appellant has pleaded his false implication in the background of previous enmity and even denied his arrest as well as recovery of crime weapon on his pointation, hence association of an independent witness was necessary to attest the whole proceedings, but admittedly no such efforts were made either by the complainant or the Investigating Officer. In this way, the best piece of evidence, independent in nature, was withheld from the Court for obvious reasons and this fact by itself is sufficient to discard the evidence of the interested and related witnesses because their evidence is of second degree. It is well settled that ocular account, if not qualifying the parameters of evidentiary value, same requires independent corroboration. We are, thus, in agreement with the learned counsel for the appellant that ocular account has been furnished by interested and related witnesses, who could not prove the story narrated in the FIR and remained unable to bring the guilt of the appellant home rather they miserably failed to justify truthfulness of their depositions before the learned trial Court.

28. The prosecution has also claimed that appellant was arrested on 13.06.2021 by ASI Zahoor Ahmed, who on receipt of information went to P.S. Hub City, District Lasbella [Balochistan] and arrested appellant, who was confined in the lock up in some other case, in presence of mashirs Ashique Ali and Muhammad Jaffar. He took one day remand from the Court and interrogated the appellant, who confessed his guilt and agreed to recover crime weapon on his pointation and on 16.06.2021 he voluntarily led the police party towards Government Food Godown, located at Dost Ali Road and produced an unlicensed pistol after removing earth lying beneath the wall, loaded with magazine, used in the commission of murder of

deceased, which was sealed under a mashirnama prepared in presence of same mashirs for which a separate case vide FIR No.129 of 2021 under Section 24 of Sindh Arms Act, 2013 was registered against him at P.S. 'A' Section Shahdadkot. Worth to mention here that the recovery officer had a prior information about arrest of appellant at P.S. Hub City, District Lasbella [Balochistan] in other case, despite he did not bother to associate an independent person either from the way leading to P.S. Hub City for arrest of appellant or from the place of recovery of crime weapon on the pointation of appellant, which is located in a populated and commercial area as admitted by ASI Zahoor Ahmed in his cross-examination. Admittedly, the mashirs of memos of arrest as well as recovery of crime weapon are Mashooque Ali and Muhammad Jaffar, who are relatives of the complainant and also acting as mashirs of all memos in the main case.

29. It is noteworthy that the appellant has been arrested on 13.06.2021 after more than 11 months of murder of deceased Lal Bakhsh Magsi and recovery of crime weapon has been effected on his pointation on 16.06.2021 after three days of his alleged arrest and the same has been sent to ballistic expert for matching with the crime empties allegedly secured from the place of occurrence on 13.07.2020 and the same have been received in the office of Incharge Forensic Science Laboratory, Forensic Division, Larkano, on 24.06.2021 i.e. after eight days of recovery. Delay in dispatch of the case property viz pistol and empties to the office of Forensic Division has not been explained. Neither the name of police official, who took the case property to the office of Forensic Division, has been mentioned nor examined by the prosecution at trial in order to prove safe transit of the case property to the expert. Even no entry of Register No.19 has been placed on record to substantiate the safe custody of case property. In view of this background of the matter, two interpretations are possible, one that the alleged case property has not been tampered and the other that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive FSL report qua the crime empties and weapon being delayed without

furnishing any plausible explanation, would not advance the prosecution case, therefore, has wrongly been relied upon by the learned trial Court while awarding capital punishment of death. Even otherwise the prosecution has failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence and the alleged recovery of crime weapon, on the face of it, seems to be doubtful. Guidance is taken from the case of *Ikramullah & others v The State (*2015 SCMR 1002).

30. The prosecution has also relied on blood-stained earth secured from the place and incident, which was sent to the office of Sindh Forensic DNA and Serology Laboratory, University of Karachi, and reported to be stained with human blood, however, the clothes of the deceased, which alleged to have been taken into custody during investigation, have not been sent for chemical analysis without furnishing any plausible explanation and this fact has also been admitted by PW.2 SIP Gulsher [Ex.20]. The positive report qua earth material and clothes of deceased etc can only prove the factum of unnatural death of deceased at the place of occurrence and cannot be used against an accused connecting him in the commission of crime. Even otherwise, the recovery of weapons, empties and blood-stained earth etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against an accused especially when the direct evidence and other material put-forward by the prosecution in respect of his guilt has been disbelieved. Guidance is taken from the cases of *Imran Ashraf and 7 others v The State* (2001 SCMR 424) and *Dr. Israr-ul-Haq v Muhammad Fayyaz and another* (2007 SCMR 1427).

31. The another intriguing aspect of the matter which is an immense importance is that Badal Khan, who alleged to be one of the eye-witnesses of the incident, has not been examined rather given-up by the prosecution. Thus, the prosecution withheld a best piece of available evidence and in view of Article 129(g) of Qanun-e-Shahadat Order, 1984, adverse inference, that had this witness been produced before the learned trial Court, he would not have

supported the prosecution case, can safely be drawn against the prosecution. Guidance to that extent is taken from the cases of *Lal Khan v The State* (2006 SCMR 1846), *Muhammad Rafique and others v The State and others* (2010 SCMR 385) and *Muhammad Asif v The State* (2017 SCMR 486). In the recent case of *Muhammad Asif* (supra), the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> *"9. In our considered opinion these two independent witnesses could provide the first degree of evidence of reliable nature, thus, adverse inference has been drawn that because they were not supporting the prosecution so set up, therefore, they were dropped at the trial. In this way, the best evidence, independent in nature, was withheld from the Court for obvious reasons. This fact by itself is sufficient to discard the evidence of the interested and related witnesses because their evidence is not only of the second degree but also for the reason given above due to their unnatural conduct."*

32. In like cases, the evidence produced by the prosecution should be so strong or solid that it should start right from the toe of the deceased on one hand and the same should encircle a dense grip around the neck of the accused on the other hand and if the chain is not complete or any doubt which occurred in the prosecution's case that is sufficient to demolish the structure of evidence the benefit thereof must go to the accused especially when the same has been built up on the basis of feeble or shaky evidence.

33. A specific motive has been alleged, which became cause of murder of Lal Bakhsh Magsi. The prosecution has claimed that deceased was done to death because of murderous enmity as nephew of Habibullah Magsi [accused party] was killed in police encounter, but Habibullah blamed complainant’s cousin Riaz Magsi for his killing and for this reason the accused party was annoyed and in order to take revenge of Habibullah’s nephew committed murder of deceased. The complainant and sole eye-witness in their respective evidence though supported the motive but failed to produce any strong evidence or any other material to substantiate such a motive. Mere words of the prosecution witnesses are not sufficient to prove the motive. Thus, the motive set-forth by the prosecution remained far from being proved. No doubt, the

prosecution is not required to disclose/ setup a motive, but once it chooses to do so, then it becomes its obligation to prove it by cogent evidence and failure to do so shall not only damage the credibility of the prosecution case beyond repair, but it would also be fatal to the prosecution case.

34. It is a well-settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial. All that may be necessary for the accused is to offer some explanation of the prosecution evidence against him and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of accused, he should be given the benefit of it. The proof of the case against accused must depend for its support not upon the absence or want of any explanation on the part of the accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. Here in this case, the prosecution has not been able to bring on record any convincing evidence. Rather, there are so many circumstances, discussed above creating serious doubts in the prosecution case, which cut the roots of the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim *"it is better that ten guilty persons be acquitted rather than one innocent person be convicted"* which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the ***Holy Prophet (PBUH)*** that the *"mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".*

35. The epitome of whole discussion gives rise to a situation that the appellant has been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a

benefit of doubt to be extended in favour of the appellant not as a matter of grace but as a matter of right. Accordingly, the convictions and sentences awarded to the appellant through impugned judgments dated 04.09.2021 in the cases of commission of murder of deceased Lal Bakhsh Magsi and recovery of unlicensed pistol, are set-aside and the appellant is acquitted of the charges by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in connection with any other case.

36. The Criminal Jail Appeal No.D-28 of 2021 and Criminal Jail Appeal No.S-45 of 2021 are allowed in the foregoing terms. Consequently, Confirmation Case No.D-25 of 2021 is answered in "Negative".

JUDGE

JUDGE

NAK/PA