

ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA
Crl. Jail Appeal No. D- 32 of 2013
Crl. Rev. Application No. D- 25 of 2013

DATE	ORDER WITH SIGNATURE OF JUDGE
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For Hearing/Case

1. For Hearing of main Case.

2. For Hearing of M.A No. 2814/2014 (U/S 426, Cr.PC)

22.01.2019

Mr. Rafique Ahmed K. Abro, Advocate for the appellant.

Mr. Sharafuddin Kanhar, A.P.G for the State.

Mr. Naushad Ali Tagar, Advocate for PW Shahmeer the L.R of deceased
Abdul Hakeem Morio.

Admittedly, the appellant Muhammad Sachal, co-accused Bachal Fakeer and Abdul Rasool Shah (since acquitted) were not nominated in F.I.R nor their marks of identification as well as features were given by the complainant in his F.I.R. Co-accused Bachal Fakeer and Abdul Rasool Shah having similar role had already been acquitted by the trial Court on same set of evidence and their acquittal has not been challenged by the State. As argued by A.P.G the appellant had remained fugitive from the law for about a noticeable period nor he did surrender before the trial Court is sufficient to maintain conviction against him carries no weight. We are of our considered view that one cannot be convicted upon the basis of absconscion particularly when merits of the case are favouring to an accused, beside co-accused namely Bachal Faqeer Tunio and Abdul Rasool Junejo with identical role have already been acquitted by the trial Court vide judgment dated 14.09.2002. Vide old special case No. 42 of 1994 and new special case No. 288 of 1997 Re: the states VS Bachal Faqeer and others. In the instant case evidence of the prosecution witnesses has already been disbelieved by the trial Court against co-accused, therefore, same cannot be believed against the present appellant. Reference can be had from the case of Muhammad Asif v.

State (2017 SCMR 486). However, at the time of his arrest he was having an unlicensed gun in his possession. As admitted by the P.Ws they were not known to each other yet the appellant after his arrest was not subjected to identification parade which, in our view, was necessary. It has been transpired/proved through medical evidence; available on record, all the four deceased died due to their un-natural death, we have to see whether present appellant together with co-accused had committed their murder. Complainant PC Qurban Ali had not identified him during trial; however, he admitted and supported the contents of FIR to the effect and extent of occurrence of the incident. Some of P.Ws have also not implicated him. Per their evidence, some of P.Ws had deposed that appellant at the time of incident was having KK, at the time of his arrest he was found in possession of the Gun, which is not an offensive weapon. No specific role is assigned to him. In such eventuality, it can safely be said that case of prosecution is not free from doubt. The doubt, as has been observed by superior courts, ever goes in favour of the accused.

We have heard the counsel for the parties and have gone through the material made available before us on record. We are of the view that prosecution has miserably failed to gather concrete material and tangible evidence to connect the appellant with the chain of offence. For the detailed reasons to be recorded later on, instant appeal is allowed. Impugned judgment dated 27.04.2013 passed by learned Sessions /Special Judge STA, Larkana is hereby set aside. Consequently, we by extending benefit of doubt, acquit appellant Muhammad Sachal son of Muhammad Umar Tunio from all the charges. The appellant is in custody; therefore, he shall be released

forthwith if his custody is no more required for any other case/crime. For the foregoing reasons, Criminal Revision Application filed by legal heir of deceased Abdul Haleem, has become infructuous, which is also hereby dismissed.


Judge


Judge

IN THE HIGH COURT OF SINDH CIRCUIT COURT
LARKANO

CRIMINAL JAIL APPEAL NO.D-32 OF 2013
&
CRIMINAL REVISION APPLICATION NO.D-25 OF 2013

PRESENT:

MR. JUSTICE MUHAMMAD SALEEM JESSAR
MR. JUSTICE ADNAN IQBAQL CHAUDHRY

Appellant Mohammad Sachal Tunio, in Jail Appeal No.D-32/2013 and respondent No.2 in Criminal Revision Application No.D-25/2013 through Mr. Rafiq Ahmed Abro, advocate.

Applicant/injured PW Shahmeer (through his legal heirs) in Criminal Revision Application No. D-25/2013 and respondent in Criminal Jail Appeal No. D-32/2013 through Mr. Naushad Ali Tagar, advocate.

Mr. Sharafuddin Kanhar, APG for the State.

Date of hearing: 22.01.2019.

Date of Judgment: 22.01.2019.

JUDGEMENT

MUHAMMAD SALEEM JESSAR, J:- By this single judgment, we intend to decide Criminal Revision Application No.D-25 of 2013 filed by injured PW Shahmeer Morio (through his legal heirs) seeking enhancement of the sentence of convict/appellant/accused Muhammad Sachal Tunio, and Criminal Jail Appeal No.D-32 of 2013 filed by the appellant Mohammad Sachal Tunio against the conviction and sentence awarded to him by the trial court/learned Sessions /Special Judge, suppression of Terrorism Activities (STA) of 1975 as both arise out of one and same judgment vide impugned judgment dated 27.04.2013.

Through jail appeal, the appellant has assailed the Judgment dated 27.04.2013 passed by Sessions / Special Judge, STA, Larkana in Special Case No. 288 of 1997, whereby appellant Muhammad Sachal Tunio was convicted under section 302(b), 324 and 395.

PPC and was sentenced to undergo imprisonment for life under section 302(b), PPC, and R.I. for seven years for offence under section 395, PPC and to pay fine of Rs.200,000/- and in case of default in payment of fine, to further suffer S.I. for two years more. However, benefit of section 382-B, Cr.P.C. was extended to him.

2. The brief facts of the case are that on 09.04.1994, at about 2145 hours, complainant, PC Qurban Ali Solangi, lodged FIR on behalf of the state at Police Station, Naudero, stating therein that he along with PC Hakim Ali, duly armed with official weapons, left Police Station under entry 17, at about 1700 hours for patrolling in village Pir-Jo-Goth and when he was patrolling the area, at about 2045 hours, PC Hakim Ali stayed at the shop of Ghulam Murtaza Abbasi where Ghulam Murtaza son of Ghulam Rasool Kalhoro, Moula Bux son of Muhammad Usman Kookari, Rasool Bux son of Lal Bux, Muhammad Haleem son of Muhammad Rajal Morio, Muhammad Murad son of Kalu Khokhar, all resident of Pir-Jo-Goth, Taluka Ratodero, were sitting in the shop and he went for patrolling towards the town from its main street, in the meantime he heard shots of Kalashnikov burst whereupon he returned back and after taking side of the street, also fired 4/5 rounds upon accused and also noticed three persons duly armed with K.Ks who were running towards western side. On hearing the fire shot reports and noise, Abdul Rasool Shah and other villagers also rushed towards the place of vardat, where they saw PC Hakim Ali, Ghulam Murtaza, Mola Bux, Rasool Bux, Muhammad Haleem and Muhammad Murad, all lying on the ground in injured condition, out of whom PC Hakim and Moula Bux succumbed to their injuries at the spot. On enquiry from injured Ghulam Murtaza, he [complainant] was informed that three culprits duly armed with K.Ks entered the Shop, overpowered PC Hakim Ali and after robbing K.K and bullets from him, fired a burst upon them. He further stated that due to the firing, they received injuries and PC Hakim Ali and Moula Bux succumbed to their injuries. Some of the culprits standing outside the tea shop robbed the customers of their cash etc.; and also took away two dish receivers from the hotel and went away towards west. In the meantime, the SHO along with his staff arrived at the place of vardat and he narrated the above facts to him (the SHO) who directed him to report the incident. After registration of the FIR, the dead bodies and injured were referred to Hospital.

3. During investigation, accused Abdul Rasool Shah and Bachal Fakir were arrested by the Police and were challaned showing accused Sachal, Sheron, Abdul Karim, Abdul Rasool Junejo and Mushtaq as absconders, who were ultimately declared proclaimed offenders after publication in newspaper. The charge against accused Abdul Rasool Shah and Bachal Fakir was framed to which they pleaded not guilty and claimed trial. By a separate judgment dated 14.9.2002 passed by Special Judge (for STA), Larkana, in Special Case No. 42/1994 (new No. 288/1997), these accused were acquitted.

4. After completing the investigation, challan was submitted in the competent court of law against the present appellant. A formal charge was framed against the accused to which they pleaded not guilty and claimed to be tried.

5. The prosecution, in order to prove its case, examined injured PW Ghulam Murtaza at Ex.7, who produced his 164 Cr.P.C statement at Ex.7/A; PW Abdullah was examined at Ex.8. Thereafter the state counsel moved application to give up the PW Asadullah vide statement at Ex.9. PW Shahmir was examined at Ex.10 who produced his 164 Cr.P.C statement at Ex.10/A. PW Muhammad Murad was examined at Ex.11, while PW Gulab Khan was examined at Ex.12. Thereafter accused Abdul Rasool Junejo was arrested and produced under subsequent report whereupon the amended charge was framed against the accused Abdul Rasool Shah, Bachal Fakir and Abdul Rasool Junejo to which they pleaded not guilty and claimed trial. Thereafter the prosecution examined PW Wahid Bux at Ex.17 who produced his 164 Cr.P.C statement at Ex.17/A. PW Gulab Khan was examined at Ex. 18, while complainant, PC Qurban Ali, was examined at Ex.19 who produced FIR at Ex.19/A. PW Ghulam Murtaza was again examined at Ex.20 while PW Abdullah was examined at Ex.21 and thereafter learned state counsel filed statement to give up PW Noor Muhammad vide statement at Ex.22. Mashir LNC Abdul Ghani was examined at Ex.23, who produced mashimama of arrest of accused Bachal at Ex.23/A while PW Shahmir was again examined at Ex.24. Dr.Amjad Ali Shah was examined at Ex.26 who produced postmortem report in respect of deceased Abdul Haleem at Ex.26/A while Dr.Rahim Bux Baloch was examined at Ex.27 who produced provisional as well as final medical certificates in respect of injured Muhammad Murad and Ghulam Murtaza and postmortem report in respect of deceased Rasool Bux at



EX.27/A to E. Thereafter PW Rehmatullah was examined at Ex.28 who produced mashiramas of inspection of dead bodies at Ex.28/A to 28/D respectively. The state counsel then filed Statement giving up PW Muhammad Murad vide statement at Ex.30. Thereafter Civil Judge & FCM Dad Muhammad was examined at Ex.31, who produced memo of identification at Ex.31/A. Inspector Niaz Ahmed Abbasi was examined at Ex.32 while Civil Judge & FCM Aftab Ahmed Arain was examined at Ex.33. PW SIP Nazir Ahmed Waggan was reported to had been expired vide statement of process server HC Bashir Ahmed at Ex. 34 and his well conversant HC Abdul Sattar was examined at Ex. 35. PW PC Gul Bahar was examined at Ex.36 who produced receipts of delivery of dead bodies of Moula Bux and PC Hakim Ali at Ex.36/A and B. Dr. Muhammad Yaqoob was examined at Ex.37 who produced postmortem reports in respect of deceased Moula Bux and Hakim Ali at Ex.37/A and B. Thereafter the side of prosecution was closed vide statement at Ex.39. The case against accused Bachal Fakir and Abdul Rasool Junejo ended in acquittal and the case against absconding accused was kept on dormant file vide judgment dated 14.9.2002 at Ex.42. On 30.10.2011, present accused Sachal was arrested and the case was re-opened. The charge against present accused Sachal was framed to which he pleaded not guilty and claimed trial. The prosecution then examined PW ASI Nazar Muhammad Abro at Ex.4, who produced mashirnama of arrest of accused Sachal and recovery at Ex.4/A. Thereafter the learned state counsel moved application adopting the evidence of PWs Dr. Amjad Ali Shah, Dr. Rahim Bux, PC Gulbahar and the remaining PWs, earlier recorded by this court, subject to right of re-examination, vide statement at Ex.5. The process issued against witnesses Muhammad Murad, Gulab Khan, Wahid Bux and Rehmatullah bore no fruit and they were reported to be expired, vide statement of the process server ASI Nazar Muhammad Abro at Ex.6. ASI Munawar Ali was examined at Ex.7, HC Qurban Ali at Ex.8 while PW Shahmir, Abdullah and Ghulam Murtaza were examined at EX.9 to 11. Thereafter PW ASI Abdul Ghani Abro was given-up being examined in earlier round vide statement at Ex.12. PWs Dr. Syed Amjad Ali Shah and Dr. Rahim Bux Baloch were examined at Ex.13 and 14 who adopted their statements recorded earlier in case of co-accused. PW investigation officer/SDPO Niaz

Ahmed Abbasi was examined at Ex.14 and thereafter the side of prosecution was closed vide statement at Ex.15.

6. Accused Abdul Rasool Shah was reported to have expired during pendency of the trial hence proceedings against him were abated after complying with codal formalities.

7. The present accused was examined under section 342 Cr.P.C. He claimed himself to be innocent and submitted that he was unaware about the registration of the case and was in Saudi Arabia and further added that he was implicated falsely at the instance of Ali Hyder Tunio, due to old rivalry. However, he did not examine himself on oath nor produced any witness in his defense.

8. We have heard learned counsel for the appellant as well as learned State Counsel and perused the material available on the record.

9. Learned counsel for the appellant contended that the appellant has been falsely involved in the present case at the behest of one Ali Hyder Tunio on account of old rivalry. He further contended that the trial Judge has passed the impugned judgment without properly appreciating the evidence brought on the record and without applying his judicious mind to the factual and legal aspects of the case. He further contended that there are material contradictions in the evidence of the prosecution witnesses which create serious doubts in the prosecution case. Learned counsel referring to the contents of the FIR, pointed out that the name of the appellant does not transpire in the FIR as the same was lodged against unknown persons. While referring to the deposition of PC Qurban Ali, learned counsel submitted that this witness did not identify the appellant who was present in Court at the time of his deposition. It was also submitted by the learned counsel that there are lacunas in the prosecution case and attempts have been made by the prosecution to improve its case. Learned counsel finally prayed that this appeal may be allowed and the appellant may be acquitted of the charge.

10. Conversely, learned APG fully supported the impugned Judgment and stated that the prosecution has been able to establish its case beyond any reasonable doubt. He submitted that the appellant was fugitive from law for a considerable long time and he did not surrender before the trial Court and this fact is sufficient to maintain his conviction and sentence. Learned APG also submitted that the prosecution witnesses



have fully implicated the present appellant in the commission of the crime. While concluding his arguments, learned APG contended that the impugned judgment has been passed in accordance with the law after considering each and every point involved in the case and, therefore, prayed that present appeal may be dismissed and the conviction and sentence awarded to the appellant may be maintained.

11. Learned counsel for the applicant in Criminal Revision Application No. D-25 of 2013, while adopting the arguments of the learned APG, further submitted that the sentence of life imprisonment awarded to the present appellant is not sufficient as four innocent persons lost their precious lives in the incident. In such view of the matter, according to the learned counsel for the applicant, the appellant does not deserve any leniency or concession as he was involved in a heinous crime. Learned counsel while referring to the deposition of PW Ghulam Murtaza, submitted that this witness has fully implicated the present appellant in the instant crime and the case stands proved against him. Therefore, the learned counsel prayed that since the prosecution has successfully proved the case against the present appellant, therefore, the sentence of life imprisonment awarded to the appellant may be enhanced to death.

12. At the very outset, it may be stated that the contention of the learned APG that since the appellant was fugitive from law for a long period and this fact is sufficient for maintaining his conviction and sentence, has no force as the fate of the appeal is to be decided on the basis of the evidence on record. Learned trial Court, on the point of absconsion of the appellant, held as under:

"Admittedly, the accused Sachal remained fugitive of law for about 17 years despite the fact that his real brother Bachal faced trial of his case as accused. Accused Sachal has no plausible and reasonable explanation for his long abscondance, thus is deliberate and willful abscondance will be treated as strong piece of corroborative evidence in prevailing circumstances of the present case. The reliance is placed on PLD 2008 SC 298, 2004 P.Cr.L.J. 1129, PLD 2005 Pesh. 243, 2005 SCMR 1906, 2009 SCMR 471, 2009 P.Cr.L.J. 421, 2010 MLD 1320 and 2011 P.Cr.L.J. 113."

13. In the case reported as *Rahimullah Jan v. Kashif and another* (PLD 2008 SC 298), relied upon by the learned trial Court, a Full Bench of the Hon'ble Supreme Court was pleased to hold mere absconsion is not conclusive proof of guilt of accused person. It is

only a suspicious circumstance against an accused that he was found guilty of offence. However, suspicions after all are suspicions. The same cannot take the place of proof. The value of abscondance, therefore, depends on the facts of each case. The abscondion of the accused may be consistent with the guilt or innocence of the accused, which is to be decided keeping in view overall facts of the case.

14. The learned trial Court also relied on the case of Mst. Door Nazi and another v. Yusuf and another (2005 SCMR 1906) on the point of abscondance of the accused / appellant. However, the Hon'ble Supreme Court in this case also has held that abscondance of accused is not conclusive proof by itself to establish guilt of the accused and its probative value depends on the facts and circumstances of each case. In the cited case the incident took place on 29.11.1990 at 12.30 pm and FIR was lodged by the complainant on the same day at 1.00 p.m. which contained full details of the incident. However, this is not the position in the case in hand as there is clear contradiction in the FIR and the deposition of the witnesses. While the FIR was lodged against "**three unknown persons**" the deposition of the witness Ghulam Murtaza states that he identified the accused persons but did not disclose their names to the complainant due to injury. This statement is not believable for the simple reason that if PW Ghulam Murtaza informed the complainant that three persons overpowered them, he could have informed the complainant that the accused were identified by him and should have disclosed their names to the complainant.

15. In view of the above, the case law cited by the learned trial Court is of no help to the prosecution. It is surprising that the learned trial Court relied on these cases to hold that abscondance of the appellant was proof of his guilt as the cases clearly hold otherwise.

16. So far as merit of the case is concerned, learned trial Court formulated two points for determination: (i) whether deceased Hakim Ali, Moula Bux, Rasool Bux and Muhammad Haleem died unnatural death on the fateful date; and (ii) whether present accused (i.e. the appellant herein) alongwith absconding accused in prosecution of their common object during dacoity, committed Qatl-e-Amd of the above deceased by means of fire arms and caused injuries to PWs Muhammad Murad and Ghulam Murtaza and

snatched dish receivers, cash and official weapon of PC Hakim Ali. Out of the above two points, the first point is not in dispute as it has been established by evidence that the above deceased have died unnatural death due to fire arm injuries on the fateful date. However, the second point requires consideration to see whether the appellants and co-accused have caused their deaths.

17. The learned trial Court noted that prosecution has adduced ocular evidence of four persons, namely, complainant Qurban Ali Solangi, and PWs Shahmir, Abdullah and Ghulam Murtaza. Complainant Qurban Ali during his deposition produced the FIR which was lodged by him at PS Naudero. While lodging the FIR, the complainant stated as under:

"Now I am here at P.S. and lodging FIR that unknown accused persons by interfering in our legal duty and by making firing with Kalashnikov upon us with intention to kill, have committed murders of PC Hakim Ali and Moula Bux Korari and caused injuries to Ghulam Murtaza, Rasool Bux, Muhammad Haleem and Muhammad Murad. The faces of the accused were open, would be identified if seen again..."

18. It may be worth mentioning that the PC Qurban Ali, the complainant, is not eye-witness of the incident as he was not present at the place of vardat and the FIR was lodged by him on the basis of information gathered mainly from PW Ghulam Murtaza.

19. PC Qurban Ali, the complainant, in his deposition stated that "Gh. Murtaza told me that 3 persons overpowered him who were having open faces, they snatched KK of Hakim Ali and have caused them injuries as well as robbed Dish Receiver and have also robbed KK of PC Hakim Ali. He disclosed that he can identify the culprits if see them again." Now, if the said Ghulam Murtaza can inform PC Qurban Ali that three persons overpowered them, he could, and should, have informed him about the names of the those persons, if they were known to him, so that the same were incorporated in the FIR. Mention of the names of the accused in the FIR would have made the prosecution case on better footing compared to lodging of an FIR against unknown persons.

20. PW Ghulam Murtaza in his deposition (Page 101) stated as under:
"I identified the culprit who was armed with a shot gun and entered in my shop to be Abdul Karim Tunio r/o Village Hakra, while the culprits who caused us injuries were identified by me as Sachal Tunio and Mushtaque Morio. Both these accused were seen by me at the Otaq of Abdul Rasool Shah two days before this incident."

21. In this deposition he states that he identified one of the culprits as Abdul Karim Tunio who was armed with gun and rest of the culprits were armed with KKoves were identified by me as Sachal Tunio and Mushtaque Morio.

22. The same version finds mention in the FIR (page 153 of the paper book) as follows: **"Ghulam Murtaza stated that we were sitting in the shop, then three persons armed with Kalashnikovs came into the shop, while coming they overpowered PC Hakim Ali and snatched his Kalashnikov and bullets and fired burst of Kalashnikov upon us, to which we received injuries and PC Hakim Ali and Moula Bux Kokari died on the spot."** The incident narrated by Qurban Ali in his deposition as well as in the FIR is almost the same and it clearly demonstrates that the names of the accused were not known to any one and the statement of Qurban Ali in the FIR, that unknown accused persons committed the crime is based on the information supplied by PW Ghulam Murtaza. In his 164, Cr.P.C. statement, PW Ghulam Murtaza tried to cover up this lacuna by stating *"I could not tell their names first due to receiving injuries. When I returned back from Hospital Syed Abdul Rasool Shah has visited me severally and I said [to] him that namely Sachal Tunio, Mustoo @ Mushtaq Morio who were available sitting in his otaq two days before the incident, they have committed the offence and I have identified them well and you are involved in this offence."* This statement of PW Ghulam Murtaza is in direct conflict with his statement made to complainant Qurban Ali wherein he states that "3 persons overpowered him..." and does not disclose name of any one of them. The reason given by the PW Ghulam Murtaza for not giving the name of the accused earlier is that he could not do so due to receiving injuries. This is hardly acceptable justification as in case the accused were known to him and he had identified them at the spot, then he should have mentioned their names to Qurban Ali who could have incorporated the same in the FIR. This statement is also belied by the deposition of Qurban Ali (Page 149 of paper book) who stated that Ghulam Murtaza told him that he can identify the culprits if he sees them again. This clearly means that Ghulam Murtaza, at the time of the incident, was not aware as to who were the culprits, however, afterwards he tried to improve the case and named the appellant as one of the accused / culprit and also stated that he saw him two days before at the otaq of

Abdul Rasool Shah. This is not only contradiction in the statements of the two PWs but also a case of improvement.

23. It is also worth mentioning that though it does not transpire from the FIR that the appellant was known to any of the PWs, still his identification parade was not conducted by the trial Court. This is also a legal infirmity in the case of the prosecution.

24. The learned trial Court, while believing the evidence of Ghulam Murtaza, relied, inter alia, on the case of Mushtaq Ahmed. The State (2000 P.Cr.L.J. 1136), wherein a learned single Judge of the Lahore High Court held as under:

“Implicit reliance can be placed on a solitary eye-witness if nothing inherently improbable or contradictory is found in his statement and he has no ample motive, grudge or grouse to give false evidence against the accused.”

25. In our opinion the above cited case does not support the finding of the learned single Judge as the cited judgment clearly holds that reliance can be placed on a solitary eye-witness if there is nothing inherently improbable or contradictory in his statement. In the present case there is contradiction in the evidence of the PW Ghulam Murtaza and the contents of FIR. Therefore, in the absence of any corroboration by some other evidence, the deposition of Ghulam Murtaza cannot be believed.

26. PW Muhammad Murad has stated in his deposition that: “I had not identified any culprit. I was examined by police. I cannot say whether the present two accused were amongst the culprits.” Thus he clearly absolves the present appellant of the charge.

27. PW-5, Abdullah son of Mohammad Chuttal Kokari, during his examination in chief stated that “All the accused were with muffled faces, therefore, I(not legible) any of them. I was not examined by police but examined at time of trial earlier before trial court.” This is also a contradiction in the evidence of the PWs as PW Ghulam Murtaza stated that only one of the accused was with muffled face while this PW states that all of them were with muffled faces.

28. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

29. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution."

30. In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case.....Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."

31. So far identification parade is concerned, that too, is not free from doubt as PW-7, Shahmir, stated in his deposition (Page 169 back) that after about one year of the incident, I had identified accused Abdul Rasool Junejo before the Civil Judge & FCM, Ratodero, in a test identification parade. However, this very witness stated that Abdul Rasool Junejo was not among the dacoits. He further deposed that "It is correct that at the time of identification parade, accused Abdul Rasool Junejo had complained to the Civil Judge & FCM, Ratodero that he (the accused) had been shown to the witness [Shahmir]." Thus, on the one hand he identified the accused Abdul Rasool Junejo in identification test parade and on the other hand he stated that said Abdul Rasool Junejo was not amongst the dacoits and that the identification parade was not free from doubt as the said Abdul Rasool Junejo objected to it by complaining to the Civil Judge & FCM that he was shown to the witness before the identification test.

32. Learned trial Court, while discussing point No.,2, observed as under:

“He [PW Ghulam Murtaza] identified the culprit who was armed with a shot gun and entered in his shop to be Abdul Karim Tunio, resident of village Hakra, while the culprits who caused them injuries were identified by him as Sachal Tunio and Mushtaque Morio. Both these accused were seen by him at the otaq of Abdul Rasool Shah two days before this incident.”

33. Learned trial court, while relying on the cases reported as 1985 SCMR 1834, 1994 SCMR 204 and PLD 2001 SC 181, observed that Ghulam Murtaza was only person who had grappled with one of the culprits and snatched weapon from him and he has seen the accused from close distance and had an opportunity to recognize the assailant, this witness has convincingly explained that he had seen accused Sachal at the otaq of Abdul Rasool Shah prior to this occurrence. Thus, the identification of accused Sachal is free from mistake. This finding is result of mis-reading and non-reading of evidence. If the learned trial Court had seen the FIR in juxtaposition with the deposition of Ghulam Murtaza, it would have observed the contradiction in these two important pieces of evidence. While the FIR states that Ghulam Murtaza stated to the complainant PC Qurban Ali that three culprits duly armed with K.Ks entered the Shop, overpowered PC Hakim Ali and after robbing K.K and bullets from him, fired a burst upon them. He further stated that due to the firing, they received injuries and PC Hakim Ali and Moula Bux succumbed to their injuries. If he had seen accused Sachal in the otaq of Abdul Rasool Shah two days before the incident and he recognized him to be same person, then why he did not name him and why he stated that “three persons” instead of stating that “Sachal, Abdul Karim and Mushtaque Morio” have committed the crime.

34. However, very surprisingly, when he narrated the incident to complainant Qurban Ali, who lodged the FIR based on information gathered from Ghulam Murtaza, he stated that “three persons armed with Kalashnikovs came into the shop, ...”. In case he had seen the accused persons two days before at the otaq of Abdul Rasool Shah and he identified them during the incident, then what prevented him from identifying them by name to complainant PC Qurban Ali so that their names should have been mentioned in the FIR.

35. There is another aspect of the case also which requires consideration. Earlier Special Case No.42 of 1994 (new No.288 of 1997) was filed in the Court of Special

Judge (STA), Larkana, which was decided vide judgment dated 14.9.2002 and co-accused Bachal Fakir and Abdul Rasool were acquitted. The learned trial court in that case made following observations:

"From the perusal of the evidence on record it is clear that there is no doubt against the present accused that they have committed an offence neither any of the PWs have deposed that the present accused have fired at the deceased. After going through the evidence on record, I am of the opinion that since PWs examined by the prosecution have not implicated the accused Bachal Fakir Tunio and Abdul Rasool in all, I, therefore, hold that prosecution has failed to prove the case against the accused beyond shadow of doubt. I, therefore, give benefit of doubt to accused Bachal Fakir Tunio and Abdul Rasool Junejo and acquit the accused U/s 245(1), Cr.P.C. Both the accused are present on bail, their bail bond stand cancelled and surety discharged."

36. Thus, it is worth examination whether there would be any justification in acquitting one set of accused and convicting another set of accused on the basis of the same evidence.

37. The 'rule of consistency' demands that if an accused has been acquitted from the charge by disbelieving evidence of certain witness(es), other co-accused charged with similar allegations is also entitled to the same concession / treatment. In this connection it would be advantageous to refer to a judgment of Honourable Supreme Court in the case of Mohammad Asif Vs. The State reported in 2017 SCMR 486 wherein it was held as under:

"It is a trite principle of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case."

In another case reported as Umar Farooque v. State (2006 SCMR 1605) Honourable Supreme Court held as under:

"On exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted"

In another case reported as Mohamad Akram vs. The State (2012 SCMR 440) the Apex Court while holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge, and acquitted the accused.



38. The accumulative effect of the above-noted contradictions, discrepancies, infirmities, legal flaws and lacunas in the prosecution case is that serious dents have been put and doubts have been created in the prosecution case. It is well settled principle of

law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part.

39. In view of the above discussion, we are not inclined to agree with the conclusion reached by the learned trial Court that the ocular testimony of the PWs proved involvement of accused Sachal to connect with the commission of the offence beyond any shadow of doubt as the same is result of misreading and non-reading of the evidence.

40. Vide our short order dated 22.1.2019, we had allowed instant appeal and set aside the impugned judgment dated 27.4.2013 passed by the learned Sessions / Special Judge, STA, Larkana and acquitted the appellant of the charge. Consequently, Criminal Revision Application No.D-25 of 2013 was dismissed having become infructuous.

41. Above are the reasons for our short order dated 22.1.2019.


Judge

Judge
04/02/2019

Larkana, the 04th February, 2019.