

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
Crl. Appeal No. 5-43 of 2004.

Date of hearing	Order with signature of Judge
18.10.2017.	

For hearing of case.

Mr. Asif Ali Abdul Razzak Soomro, Advocate for appellant.

Mr. Sardar Ali Rizvi, D.P.G.

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Appellant Sikander Noonari is present (on bail) alongwith his counsel. The complainant, who was present on 02.10.2017 before the Court had stated that he has no means to engage a counsel; however he had shown his full faith upon prosecutor. Today, he is called absent.

Heard learned counsel for the appellant, as well as learned D.P.G.

Per prosecution case, the appellant has been assigned role of causing fire shot injury to P.W Rustam, who was given up by the prosecution vide statement of D.D.A at Ex.6, available at page 109 of the paper book; whereas two mashirs namely, Shahid Hussain and Haji Ali Nawaz were declared as hostile before the trial Court and out of four accused, three accused namely Haji Misri, Sarwar and Qaddan were let off by the police during investigation and no application was moved for arraying/ joining them as accused in this case. The instant case was registered long ago in the year 1997, and the appellant has suffered agony of protracted trial for many years. Learned D.P.G. also conceded to grant of appeal.

Accordingly, for the reasons to be recorded later on instant appeal stands allowed. The impugned judgment dated 08.04.2004 passed by learned 1<sup>st</sup> Additional Sessions Judge, Dadu in Sessions case No.728/1997, arisen out of F.I.R No.124/1997 of P.S Mehar, is hereby set aside and the appellant Sikander Noonari stands acquitted of the charge. The appellant is present on bail, his bail stands cancelled and surety discharged.

JUDGE

18.10.2017

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO 61

Criminal Appeal No.S-43 of 2004

| Date | Order with signature of Judge |
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Present: Mr. Justice Muhammad Saleem Jessar

Appellants/Convict : Sikandar son of Latif Noonari,  
Through Mr. Asif Abdul Razzak  
Soomro, advocate.

Respondent : The State  
Through Mr. Syed Sardar Ali Rizvi,  
DPG.

Date of hearing : 18.10.2017

Date of Judgment : 18.10.2017

**JUDGMENT**

**MUHAMMAD SALEEM JESSAR; J**-Through instant Criminal Appeal No.S-43 of 2004, Appellant Sikandar Ali has challenged the impugned judgment dated 08.06.2004 delivered by learned Additional Sessions Judge-I Dadu, vide Sessions Case No.728 of 1997 re-The State Vs Sikandar Ali & others arising out of FIR No.124/1997, U/S 324, 427, 504 PPC registered at P.S Mehar, (District Dadu) whereby the learned trial court after full dressed trial has convicted and sentenced the appellant under Section 265-H(ii) Cr.P.C and sentenced the appellant Sikandar Ali to imprisonment for five years R.I under Section 324 PPC and further directing him to pay fine of Rs.10,000/- (Ten Thousand) and in default of payment of fine to undergo further imprisonment for three months more. Learned trial court has also awarded benefit of Section 382-B Cr.P.C to appellant.

2. Succinctly, the facts of the prosecution case are that complainant Muhammad Qasim lodged FIR with PS Mehar on 29.08.1997 alleging therein that about 5/6 years back his maternal

cousin Rustam and others had committed the murder of Haji Ishaque, brother of Haji Misri as "Karo" (adventurous), therefore, <sup>87</sup> such case is pending in Larkana Court. On 29.08.1997, he alongwith his son Javed, his maternal cousin Rustam and relative Haji Bilawal had gone in Taxi No.J4842 Karachi to village Thorha to attend the "Khairat" of Haji Umed Ali. They were returning in the same Taxi after taking meals of Khairat to their own village, when they reached at link road of Bettu at the stop of Thorha at 1-00 p.m, accused Haji Misri armed with gun, Sarwar with Gun, Sikandar armed with Gun, Qadan and two unidentified persons emerged out. They abused and told them that they would take the revenge. Saying so, accused Haji Misri, Sikandar and Sarwar fired at Car which hit Javed and Rustam. They raised cries on which Haji Umed Ali, Parial and other village people came there. The accused persons then ran away by abusing, Javed had sustained injuries on right side of his head while Rustam has sustained injuries on left side of his chest and back of neck and lips. The front glass of the car was also broken. Thereafter complainant went to police station and lodged the FIR.

3. After registration of FIR the investigation of case was entrusted to ASI/I.O Zulfiqar Ali who after completion of legal formalities, submitted the challan before the trial court while showing the accused Haji Misri, Sarwar and Qadan as let off under Section 497

Cr.P.C.

4. After taking cognizance and completion of codal formalities learned trial court had framed formal charge at Ex.02 against the appellant/convict on 07.08.1997 to which he pleaded not guilty and claimed to be tried vide his plea at Ex.03.



5. To substantiate its case, the prosecution had examined in all <sup>6</sup> seven witnesses namely PW-1 complainant Muhammad Qasim as Ex.06, PW-2 Javed as Ex.08, PW-03 Haji Bilawal as Ex.09, PW-04 Umed Ali as Ex.11, PW-05 Shahid Hussain as Ex.12, PW-06 Dr. Mohammad Ismail at Ex.13, PW-7 ASI Zulfiqar Ali as Ex.15, and then side of prosecution was closed vide statement of DDA at Ex.16. Thereafter, the appellant/convict was examined under Section 342 Cr.P.C vide Ex.17, whereby he had professed his innocence.

6. Learned Trial Court after hearing learned counsel for the parties, convicted and sentenced the appellants/accused as stated above.

7. I have heard Mr. Asif Abdul Razzak Soomro, Advocate for the appellant, Mr. Syed Sardar Ali Rizvi, DPG for the State and have scanned the record carefully and anxiously.

8. Mr. Asif Abdul Razzak Soomro, Learned counsel for the appellant has argued that case against the appellant is false one as the motive shown by the complainant and the prosecution version are belied to each other as the parties, as alleged, were on murderous enmity but the appellant & others had not caused any capital loss of the complainant party instead of causing them minor injuries do not attract the prudent mind. He next contended that in all four accused were nominated in FIR and out of four Haji Misri, Sarwar and Qadan were let off by the police during investigation and no application for joining them as an accused had ever been moved by the complainant throughout the proceedings. He argued that the allegation as per FIR co-accused Sarwar had allegedly fired from his gun upon PW Javed,



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co-accused Misri allegedly fired upon Rustam and the role attributed to appellant is that he also allegedly fired upon Rustam. He further argued that injured PW Rustam to whom the appellant had allegedly fired was not produced before trial court, though he was in custody and was confined at Central Prison, Sukkur but was not produced before the trial court for recording his evidence. Neither he was given up nor was produced by the prosecution thus side of prosecution was closed vide statement of DDA dated 05.03.2004 at Ex.16 available at page No.09 of paper book. He stated that PWs/Mashirs Shahid Hussain and Haji Ali Nawaz were declared hostile by the prosecution vide their deposition dated 21.08.2003 Ex.12 and 05.01.2004 Ex.14 available at pages 65 and 103 of the paper book. He lastly argued that prosecution has miserably failed to prove its case against the appellant which created lot of doubts in its evidence, therefore, appellant may be acquitted from the charge by extending benefit of doubt. In support of his contention he has placed reliance upon the case of Tariq Parvaiz VS the State 1995 SCMR 1345.

9. Syed Sardar Ali Rizvi, learned DPG appearing for the State on the other hand, after confronting with above legal flaws and discrepancies in the prosecution evidence could not controvert the same and, therefore, did not support the impugned judgment.

10. I have considered the arguments advanced by the respective parties and have gone through the record made available before me.

11. After examining the evidence and material adduced by the prosecution during evidence before trial court it appears that four persons were nominated by the complainant in his FIR. The allegations as leveled by the prosecution against the appellant and



others are that co-accused Qadan (since let off) was having hatchet and has instigated to others. On his instigation co-accused Sarwar (since let off) had fired from his gun at injured PW Javed while appellant Sikandar allegedly fired upon injured PW Rustam. Co-accused Misri (since let off) had also fired from his gun upon Rustam. The injured PW Rustam was not produced before the trial court nor was given up by the prosecution and injured PW Rustam who was victim and star witness of the prosecution, therefore, the best piece of evidence of the prosecution was not brought on record. (*Injured PW Javed in his evidence has categorically deposed that on the instigation of co-accused Qadan, co-accused Sarwar fired from his gun at him which landed on his head and the windscreen of car had gone into pieces. He further deposed that side mirror of the car has also broken and some pallets had also hit to the car, even the co-accused who were let off by the police were not joined by the trial court.*) No reason has been assigned, why this prosecution witness has been kept away from the witness box. No efforts have also been made for calling him in witness box. The evidence which was available with prosecution was not adduced, consequently hit by the article 129(g) of Qanoon-e-Shahadat Order, 1984.

12. Article 129(g) of Qanun-e-Shahadat Order 1984, which says that if any party withholds the best evidence, then it can fairly be presumed that the party had some sinister motive behind it and presumption would be drawn that if P.W would have been examined, his evidence would have been un-favorable to the prosecution. Reliance in this respect can be placed on the case of *Lal Khan vs. The State reported in 2006 S.C.M.R 1846.*

13. On further examination of the evidence it appears that complainant party had went to participate in Khairat (bounty feast) on a Taxi Car driven by driver Liaquat Manganhar, the Taxi Driver Liaquat Manganhar was natural and independent witness was not examined by the prosecution nor the Taxi Car was made as case property though the said car had allegedly sustained bullet/pistol blows thereby its windscreen and other side mirrors were smashed. The I.O/ASI Haji Khan was examined before the trial court had deposed that while visiting the place of incident nothing was secured from the scene of offence and he had also examined PW Parial and Driver Liaquat. He further deposed that nothing was found against co-accused Sarwar, Qadan and Misri, therefore, they were released during investigation. However, he had recovered the licensed gun of the appellant and in his cross examination he admitted that he did not produce the car on which firing was made.

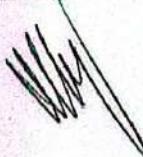
14. Further, co-accused, who were not only nominated in FIR but were assigned specific role of instigation and causing injuries to PW Javed and Rustam, have been let off and no application was ever moved by the complainant throughout the proceedings since beginning to conclusion of trial. One mashir and PW has been declared hostile by the prosecution yet the trial court without appreciation of evidence had convicted the appellant and sentenced him. In view of above discrepancies which are major in nature. The case of prosecution has become highly doubtful and no tangible evidence was available on record to sustain conviction against the appellant.

15. In view of what has been discussed above, I am of the considered view that the manner of the incident, as claimed by the prosecution, does not stand well to the test of reasons and logics as there are number of dents in the prosecution case, thus it would not be safe to hold conviction in such circumstances because the Safe Criminal Administration of Justice always demands that '*even a single doubt if found reasonable is sufficient to warrant acquittal of the accused*' as held in the *case of Muhammad Zaman vs. the State (2014 SCMR 749)*.

16. It is well settled principle of law that even if single circumstance arises out of the prosecution case is sufficient to discard the prosecution evidence and accused is entitled to be acquitted by extending benefit of doubt to him. In the case of *Tarique Parvaiz VS the State 1995 SCMR 1345* the Hon'ble Supreme Court of Pakistan has held as under:-

*"The concept of benefit of doubt to an accused person 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."*

17. The upshot of above discussion is that there being no unimpeachable and inspiring confidence evidence is available upon which basis the conviction and sentence of the appellant can be sustained and while giving him benefit of doubt he is liable to be acquitted of the charge. Consequently, instant appeal is allowed and the impugned judgment of conviction and sentence dated 08.06.2004 passed by the I-Additional Sessions Judge Dadu in Session Case



No.728 of 1997 re-State Vs Sikandar emanated from Crime No.124 of 1997 PS Mehar under Section 324, 427, 504 PPC is hereby set aside. The appellant Sikandar Ali is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety stand is discharged. By short order dated 18.10.2017 instant appeal was allowed and these are the reasons for same.

J U D G E  
21/12/2017

Dated: 11.12.2017