ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Jail Appeal No. S-93 of 2017

Date	Order with signature of Judge

1. For order on office objection.
2. For hearing of main case.

04-02-2019

M/s Ghulam Shabeer Shar and Athar Abbas Solangi, advocates for the appellants.

Mr. Aftab Ahmed Channa, advocate for the complainant.

Mr. Aitbar Ali Bullo, D.P.G for the State.

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Admittedly the offence is unseen and had occurred in odd hours of night. Besides the appellants are not nominated in the F.I.R, however, their names were disclosed by the complainant through his application (page No.95 of the paper book) and his subsequent further statement (97 of paper book). Nothing incriminating has been shown to have been recovered from the appellants nor was produced by them during investigation.

Learned D.P.G. appearing for the State opposes the appeal and supports the impugned judgment. However, Mr. Aftab Ahmed Channa, learned counsel for the complainant, under instructions does not oppose the appeal.

For the detailed reasons recorded to be later-on, instant criminal appeal is allowed. Impugned judgment dated 19.10.2017, passed by I-Additional Sessions Judge, Kandhkot in Sessions Case No.178/2016, re: State V/S Asad alias Nazir and another being outcome of Crime No.47/2003 of P.S. B-Section Kandhkot, under Section 302 and 34 P.P.C is hereby set-aside. Consequently, the appellants Asad alias Nazir and Mushtaq Ahmed both sons of Abdul Nabi Noonari are hereby acquitted of all the charges. The appellants are in custody; therefore, they shall be released forthwith if their custody is not required to be detained in any other criminal custody case.

Judge

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SGP (Khp.) D. No. 238—5.2005—2000 L' F.

CERTIFICATE OF THE COURT IN REGARD TO REPORTNIG

Criminal Appeal S. 93. 2017
Asad @ Nazir Noonari Another — Appellants
vs
The State ——— Respondent.

SINDH HIGH COURT

Single/D.B.

Composition of Bench

Before Mr. Justice Muhammad Saleem Jessar

Dates of hearing: 04.02.2019

Decided on : 04.02.2019

(a) Judgement approved for reporting. YES / No

CERTIFICATE

Certified that the judgment • / Order is based upon or enunciates a princip le f law • / decides a question of law which is of first impression /distinguishes / ver-rules / reverses / explains a previous decision.

•Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

CRIMINAL APPEAL NO.S-93 of 2017

Appellants	:	Asad @ Nazeer Noonari and Mushtaque Ahmed, through M/S Ghulam Shabbir Shar and Mr. Athar Abbas Solangi, advocates.
Complainant	:	Mr. Aftab Ahmed Channa, advocate for the complainant.
State through	:	Mr. Aitbar Ali Bullo, DPG, for the State.
Date of hearing	:	04.02.2019
Date of announcement	:	04.02.2019

JUDGMENT

Muhammad Saleem Jessar, J.- The appellants are aggrieved by the judgment dated 19.10.2017 passed by I-Additional Sessions Judge, Kandhkot in Sessions Case No.178 of 2016 being out of come FIR No.47 of 2003 Under Section 302, 34PPC registered with PS B-Section, Kandhkot (State v. Asad alias Nazir and another) whereby they were convicted as under:

1. Asad alias Nazeer son of Abdul Nabi was convicted under sections 302, 337-H(ii) PPC and was sentenced to imprisonment for life as "Tazir" and to pay compensation of Rs. 100,000/- (one lac) to the heirs of the deceased, and in default thereof to undergo SI for six months.

2. Accused Mushtaque Ahmed was convicted under section 265-H(ii) Cr.P.C and sentenced to imprisonment for 10 years R.I and to pay compensation of Rs. 50000/- (fifty thousand) to the heirs of deceased, and in default thereof, to undergo S.I for three months.

3. However benefit of section 382-B Cr.P.C was extended to the accused.

2. The facts of prosecution case, as narrated in the FIR, bearing Crime No. 47/2003 of PS B/Section Kandhkot, lodged by complainant Mengal Chachar on 17-07-2003, are that he [the complainant] along with PWs Ahmed, Biland and Ali Goher Chachar, reside in the same village. On the fateful day they heard commotion of firearms from the house of Ahmed at 0100 hours of the night. Upon the fire reports he went to the house of Ahmed Chachar when PWs Biland and Ali Gohar also went to the house of Ahmed Chachar where they saw that four persons were going out from the house of Ahmed whose faces were open. Out of them one was having K.K while rest were carrying guns to whom they saw carefully in the light of electric bulbs and would recognize them if shown again, who by seeing them accosted the complainant party not to come near and by saying so they ran away towards eastern side. The complainant party went inside the house of Ahmed Chachar and saw that he has sustained firearm injuries at his left side chest which was through and through, backside neck and other fire was on his left arm which too was through and through and blood was oozing from the wounds. His wife Mst. Gul Naz had also received firearms injury on elbow of her right arm which too was through and through; blood was oozing from it. On enquiry Ahmed Chachar (deceased) disclosed that four unidentified persons had got him injured by making fires. Complainant party without loss of time shifted the injured Ahmed and his wife Mst. Gul Naz to Taluka Hospital Kandhkot where Ahmed succumbed to his injuries and died at 2.00 a.m (night). Complainant went to his nekmards and disclosed the facts and on return he went to police station where he lodged present F.I.R against four unknown accused person, who had committed murder of Ahmed and caused injuries to Mst. Gul Naz with intention to commit Qatl-i-Amd. To this effect present F.I.R was lodged.

3. After usual investigation, police submitted challan and the Magistrate sent-up the case to the Court of Honourable Sessions Judge Kashmore at Kandhkot

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after completing the legal formalities against the absconding accused, later on the R & Ps were sent to the trial Court by transfer for its disposal according to law.

4. The necessary documents were supplied to the accused, Nazeer Ahmed & Mushtaque Ahmed vide receipt at Ex. 1, and charge was framed against them at Ex. 2, to which they pleaded not guilty and claimed to be tried vide their pleas at Ex. 2-A to Ex. 2-B.

5. Prosecution in order to prove its case examined complainant Mengal at Ex. 04, who produced FIR, and further statements at Ex. 4-A and Ex.4-B respectively. P.W Biland was examined at Ex.5, he produced further statement recorded under section 161 Cr.P.C at Ex. 5-A. P.W-3 Abdul Haque was examined at Ex.6, he produced mashirnama of seeing the dead body, mashirnama of injuries of injured Mst. Gulnaz at Ex.6-B, Danishnama at Ex.6-C, place of vardat at Ex..6-D P.W-4/injured Mst. Gul Naz was examined at Ex.7, P.W- 5, SIP Mir Hassan Golo was examined at EX.8, he produced the letter for sending the dead body to the M.O Kandhkot, and letter for examination of the injuries of injured addressed to the concerned M.O at Ex.8-B, receipt of dead body at Bull-C. P.W-6 /DSP Abdul Wahid at Ex.9, Process server/well conversant with the signature of Tapedar Shahnawaz was examined at Ex.10, P.W-7 Medical Officer Dr. Amanullah Channa at Ex. 11, he produced the medical certificate of injured Mst. Gul Naz at Ex. 11/A and post mortem of deceased Ahmed at Ex..11/B, P.W.8 Mir Hazar was examined at Ex.12, P.W.9, 1.O Ali Beg Bijarani was examined at Ex.13, he produced the letter addressed to SP Kashmore at Ex:13-A, relevant entry at Ex.13-, P.W. 10 Tapedar Gul Hassan was examined at Ex.14, he produced the sketch of vardat at EX.14-A. Thereafter Prosecution side was closed by learned ADPP for the state, vide his statement Ex. 15. Thereafter application under section 540 Cr.P.C submitted by learned advocate for the accused for calling the witnesses namely Inspector Rafique Ahmed, Inspector Gul Hassan Jatoi, Inspector Sanaullah Sarki, inspector

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Shamussud Magsi and inspector Abdul Qudoos Kalhoro. The said application was dismissed vide order dated 07.05.2017 with the observation that the accused are at liberty to produce the witnesses as their defence witnesses at the time of recording their statement under section 342 Cr.P.C. Thereafter ADPP for the state submitted statement stating therein that evidence of PW Insp: Gul Hasan Jatoi is formal in nature at Ex. 03.

6. The statements of accused Asad alias Nazeer and accused Mushtaque Ahmed were recorded at Ex.18 and Ex.19 respectively, in which they have denied the allegations leveled against them by the prosecution. Accused Asad alias Nazeer has further stated he is innocent and pray for justice and it is further submitted that due to dispute over robbery of buffaloes with one Rasool Bux alias Kuraro, who is near relative to the complainant party, he had been implicated in this case. Prior to this case an FIR bearing crime No.80/2010 was registered against said Rasool Bux alias Kuraro and others, in which his buffalo was robbed, thereafter, just to pressurize and to stop money worth Rs.6,00,000/-(six lac), he instigated the complainant party who have implicated him in this case after about 12 years of the incident. Accused Rasool Bux alias Kuraro lodged an FIR bearing crime No.11/2015 at PS B. Section Kandhkot against him in which he has been acquitted and imposed fine of Rs.24000/ against said Rasool Bux alias Kuraro to be paid to them as compensation for vexatious and false litigation against us. He produced attested copies of show cause notice and the order there on and judgment, attested copy of FIR bearing No.80/2010, and attested copy of criminal record of Rasool Bux alias Kuraro, he produced his original identity card issued by DRO, inner cordon pass for Prime Minister of Pakistan, Identity card of Dunya news, original card of Pakistan Federal Union of Journalists, Member Card of Internal Human Rights Los Angeles, authority letter of the daily newspapers, authority letter of Pakistan press foundation, Authority letter of daily Khabrain, appointment letter of independent news of Pakistan, authority letter Human

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rights foundation of Pakistan, authority letter of fox news International news services, Oath for office bearer of press club Kandhkot at Ex.18- A to Ex. 18-R respectively. Accused did not examine themselves on oath as contemplated U/S 340(2) but they examined their defence witnesses namely DSP Gul Hassan Jatoi at Ex.20 and Inspector Abdul Qudoos at Ex.22, he produced order of DIGP Larkana range Larkana at Ex.22-A, thereafter the side of defence counsel closed suo motu by the court vide order dated 22.09.2017 at Ex.34. Thereafter, the learned trial Court formulated points for determination as under:-

01. Whether on 16.07.2003 at about 01:00 a.m (night) at the court yard of house of deceased Ahmed, situated in deh wakaro deceased Ahmed died due to his un-natural death due to fire arm injuries and injured Mst. GulNaz had also received the fire arm injuries at the hands of accused?

02. Whether on 16.07.2003 at about 01:00 a.m (night) at the Court yard of house of deceased Ahmed, situated in deh wakaro alongwith two unidentified accused persons duly armed with deadly weapons i.e KK and guns in furtherance of their common intention committed house trespass by entering into the house of deceased Ahmed made straight fires with intention to kill him and caused the death of deceased Ahmed by means of fire arm injuries and also caused fire arm injury to Mst. Gul Naz as alleged by the prosecution?

03. What offence, if has been proved against accused?

7. The trial Court, after holding that Points No. 1 and 2 stood proved, convicted and sentenced the appellants as above. Hence this criminal appeal.

8. Since there is no dispute with regard to the unnatural death of the deceased and sustaining of injury by Mst. Gul Naz, therefore, the same does not need any deliberation. However, Point No.2 is the disputed point which needs deliberation to ascertain whether the appellants were rightly convicted and sentenced by the trial Court or otherwise?,

9. The trial Court while evaluating the evidence of the PWs, has made following observations:

"First of all I would like to discuss the evidence of alleged eye witnesses namely complainant Mengal and eye witnesses PW

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Billand and injured PW Mst. Gulnaz and Mashir Abdul Haque."

10. It is material to make it clear here that the factual position is that none of the above PWs have seen the incident by their own eyes except wife of deceased Ahmed, namely, Mst. Gul Naz hence learned trial Court judge seriously erred while including the above persons in the list of **'eye-witnesses'**. Here, I must add that no person shall be clothed as **'eye-witness'** unless he or she, as the case may be, claims to have seen the incident or *least* his/her claimed evidence falls within meaning of **'oral evidence'**, as defined by Article 71 of Qanun-e-Shahadat Order, 1984 regarding incident. The person, if claims, not to have seen incident but only points out presence of accused near / around place of incident should be taken to such fact, which, however shall qualify being a circumstantial one. The PW Gul Naz, being wife of deceased, was natural person whose presence at spot at relevant time was stamped by injuries on her person, hence she was qualifying as an **'eye-witness.** It is a matter of record that none of the said persons, including the injured, had not named the appellants nor the deceased *himself* who, per prosecution, was alive and did talk with complainant party while saying that **'four unknown persons'** did such act. Complainant, in his evidence, admitted such position while saying :

> "They enquired from Ahmed about the incident who disclosed that **some unknown culprits had fired upon them."**

Further, it is also a matter of record that complainant party had claimed to have seen the *culprits* while coming out of the house of the deceased and further had claimed to have seen well to such an extent that if seen again can identify them (*culprits*). Such claim shall stand evident from referral to evidence of the complainant and PW Biland as:

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> "Complainant Mengal deposed that on 16.07.2003 at 1.00 a.m night he alongwith P.Ws Miami, Ali Gohar anal Abdul Haque were sleeping in their house. They woke up on the shot fire and went to the house of deceased Ahmed, his house was situated adjacent to their house where they saw four persons came out from the house of Ahmed, whose faces were open. Out of them one was with K.K and others having guns in their hands. **They identified them on the light of blubs**. [Pages 163 and 1675 of paper book]

While PW Biland deposed as:

> "...they [he] saw four persons came out from the house of deceased Ahmed, whose faces were open. Out of them one was with K.K and others having guns in their hands. **They identified the accused persons on the light of the bulbs."**

It is, however, matter of record that despite such claims none of them was in a position to have named the *culprits* (who, otherwise, were allegedly seen well) in the FIR which was recorded with due consultation which the complainant admits in his evidence as:-

> "He [complainant] further deposed that they informed such information to their nekmards, who advised them to lodge F.I.R. On the same date at 0600 hours he lodged the F.I.R. **against the unknown accused persons.** [Page 165 of paper book]

Thus, it was always easily deducible that the culprits were **'unknown'**. Needless to add that a *'familiar'* shall never fall within meaning of **'unknown'** hence in such eventuality such witnesses themselves close the door shut for introduction of *'familiar / known'* persons as **'culprits'**. However, it may be added that if such witnesses introduced *familiar / known* persons as **'culprits'** at later stage then the first burden shall be that of explaining reasons which prevented them from naming *familiar / known* persons in unchallenged FIR against **'unknown persons'**. This aspect, however, never received an answer *least* an explanation from prosecution which, *otherwise*, was a sufficient circumstance to tilt the case in favour of the accused persons.

11. Mst. Gul Naz is the only eye witness of the incident. Although there is nothing on record to show that she identified any of the accused at the time of

incident; however, in her deposition she stated that *"We identified two persons namely Nazeer and another accused, whose name I do not remember today."* However, still it is a mystery as to why she did not disclose the name of Nazeer to the complainant or anyone else at the time of incident so that their names should have been mentioned in the FIR and they should have been arrested immediately. Even the motive and the reason behind the murder was not mentioned by her or Ahmed to anyone, therefore, in the F.I.R. it was stated that the murder of Ahmed was committed for unknown reason. In her cross examination she stated that her marriage to Ahmed was solemnized three years before the incident and that she knew Nazeer one year before the incident. This means that appellant Nazeer was well known to Mst. Gul Naz but still she did not disclose his name to anyone. It is stated by her that on the barking of dogs they saw four persons in their house. However, she has not stated anything about the source of light as at 1-00 am in the night it would be pitch dark in a village. She also claims that she has disclosed the name of appellant Nazeer to police when police came to her after the incident; however, his name does not appear anywhere in the record. Surprisingly, the disclosure of names of *culprits* did not come on papers through such witness but through further statement of the complainant on 01.05.2015, while the incident took place on 16.7.2003, i.e after lapse of almost 12 years. If she had disclosed the name of Nazeer to the police why she did not disclose his name to the complainant who lodged the F.I.R. It is pertinent to note and is out of reach to understand, when the FIR was lodged after delay of about five hours and was got registered after due deliberation and consultation even the injured PW/who herself is an alleged eye witness had not disclosed the name of appellants to complainant at the time of registration of FIR or even she did not implicate them in her statement under section 161 CrPC. Such her silence and taking U-turn at the time of her recording her evidence before trial court creates lot of doubt as well it is an improvement which is not permitted by the law. It is well settled principle of law

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that the moment one makes improvements or omissions so as to bring the case in line then he agrees to own *'dishonesty'* which, alone, is sufficient to discard evidence of such *'dishonest person'* particularly when the case is one of capital punishment. Reference may be made to *Sardar Bibi & another v. Munir Ahmed & Ors* 2017 SCMR 344 that:-

> "2.... According to doctor , there was only one fire-arm entry wound on the chest of the deceased Zafar Iqbal. In order to meet this situation, witnesses for the first time , during trial made omission and did not allege that the fire shot of Sultan hit at the chest of Zafar Iqbal, deceased. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they are not trustworthy witnesses. It is held in the case of *Amir Zaman v. Mehboob & Ors* (1985 SCMR 685) that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in *Akhtar Ali's case (2008 SCMR 6)* it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, caste serious doubt on the veracity of such witness. In *Khalid Javed's case (2003 SCMR 149)* such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of *Muhammad Shafique Ahmed v. The State (PLD 1981 SC 472), Syed Saeed Muhammad Shah and another v. The State 1993 SCMR 550) and Muhamamd Saleem v. Muhammad Azam (2011 SCMR 474).*

12. Let's examine the case from another angle. It is matter of record that as per FIR the incident took place on 16.7.2003 at about 1-00 a.m. in the night and the F.I.R. was lodged at 6-00 a.m. in the morning. It has also come on record that after the incident, the complainant went to the nekmards (elders) of the area, who advised him to file F.I.R. The distance of the PS from the place of incident is stated to be about 3-00 kms. All these claimed facts, if are summed up, make it clear that despite consultation; meeting with deceased (at time of incident); removal of injured and even gathering with **'nek-mards'** (elders) the complainant party *(people of area)* was not in a position to name any body as **'accused'**. Lodgment of

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FIR against unknown persons was quite believable because it is normal practice and conduct of culprits that when they select night time for commission of crimes, their first anxiety is always to conceal their identity. Reference is made to case of *Muhammad Asif v. State* 2017 SCMR 486 wherein it is observed as:-

> 17. It is , normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future, thus , human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed o because that was susceptible to recovery by the police.

Thus, logically lodgment of FIR with considerable delay and consultation had further tightened already closed door for introducing the *familiar / known* persons as culprit, therefore, disclosure of names of the present appellants after an abnormal period of **12 years** was always sufficient to be taken as reasonable dent in prosecution case particularly when there came no answers to:

i) why the complainant party remained silent for such long rather abnormal period?;

ii) if source of disclosure was some one / something else then why same was not brought to record?;

Here, it may well be added that touch-stone for an evidence to be natural and confidence inspiring is nothing but that narration must not only be acceptable to a prudent mind but must stand well to normal reactions of an ordinary person. In absence thereof, it would always be unsafe to believe such evidence for holding conviction on a capital charge. In the case of *Haq Nawaz & others v. State* 2018 SCMR 95 while appreciating conducts and behaviours the narration was held to be unsafe for conviction as:-

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"5. ... It does not appeal to a prudent mind that the appellants and their co-accused would allow a person to hear out the alleged conspiracy of committing the murder of Mst. Nooran and be a witness against them. If at all it is admitted that Mst. Husina Mai was allowed to hear out the conspiracy being hatched by the appellants and their co-accused, then as per her own stance (as reproduced above), after preparing meal for the appellants and their co-accused by 8.00 p.m, she slept by 8/9.00 p.m, how come she came to know of the alleged conspiracy being hatched by the appellants and their co-accused between 9.00 p.m to 12.00 midnight when she was already sleeping.

"6. .... It is hard to believe why the appellants and their co-accused would let Mst. Husin Bibi (PW5) go when she not only herd out the conspiracy but also witnessed the crime. Another important aspect of the matter is that **after the alleged occurrence, appellant No.2 Hayat took her to his parent's house where she remained for a period of 14 days but she did not tell anybody about the occurrence, that thereafter she was taken by her father to his house at Bhai Phairoo but even during her travel with her father or during her stay at her parent's house, she did not disclose the real facts of the case to anyone.** She admitted before the trial Court that her statement was recorded by the police after about two months of the occurrence.

It is also a matter of record that complainant in his evidence never attempted to give any explanation for such long silence rather stated as:-

*"....On the same date at 0600 hours I lodged the FIR against the unknown accused persons. I showed the place of Vardhat to police on 16.07.2000. The police examined the dead body of deceased and also noted the injuries of injured Mst. Gulzan (Gul Naz). **Thereafter, I submitted the applications to the SSP Kashmore at Kandhokot and lastly on 01.05.2015 my statement was recorded by the police in which I disclosed that names of accused Nazir Ahmed @ Asad, Mushtaque son of Ahmed and on 29.06.2015 my further statement was also recorded by the police in which I disclosed the same accused namely Nazir Ahmed @ Asad and Mushtaque. The incident took place that Asad @ Nazir son of Abdul Nabi demanded the hand of Mst. Gul Naz but the father of Mst. Gul Naz had refused to give the hand of Mst. Gul Naz to accused persons. I produce the FIR, statement recorded on 01.05.2015 and further statement recorded on 29.06.2015 at Ex.4/A, 4/B and 4/C respectively.** (The emphasis are extended by me).*

13. From above, it is quite evident that complainant, at no place, claimed that such persons (introduced as accused after 12 years) were not *familiar / known* to him rather attempted to come with stance that names were known and disclosed to police. If such, stance is accepted yet the complainant was always required to have shown that he had been making such complaints against police but it is a

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matter of record that he produced no such thing on record and even the application, claimed to be sent to SSP, was not brought on record. These floating facts were never appreciated by the learned trial Court judge while recording conviction to the appellants though settled principle of law has always been that which has recently been reiterated in the case of Asia Bibi v. State PLD 2018 SC 64 as:-

> 41. All these contradictions are sufficient to cast a shadow of doubt on the prosecution's version of facts, which itself entitles the appellant to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainity. If a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused then he/she sall be entitled to such benefit not as a matter of grace and concession, but as of right....

14. As far as further statement is concerned, any statement or further statement of the first informant recorded during investigation by police would neither be equated with FIR nor read as part of it and it is fake statement. I am fortified with the dictum laid down by the Honourable Supreme Court of Pakistan in case of MUHAMMAD RAFIQUE and others Versus THE STATE and others 2010 SCMR 385 whereby apex court while discussing the legal status of the further statement has discussed it in para 25 of the judgment as under:

> *"25. As regards supplementary statement, P.W. 17 took names of 10 more accused persons from the names he took in the F.I.R., the same can be treated as statement under section 161 Cr.P.C that can only be used by the accused to contradict the witness. It cannot be used by the prosecution for any purpose. This improvement clearly shows that supplementary statement was made after due consultation and deliberation to falsely involve the accused. This point was examined by this Court in the case of "Falak Sher v. State 1995 SCMR 1350" wherein it has been observed that, "any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report nor read as part of it and involvement of additional accused in such statement was fake improvement which made the basis for other eyewitnesses as well for false implication". The said rule was reiterated in subsequent decision of this court in the case of Khalid Javed v. State 2003 SCMR 1419 and further observed that such witness would be unreliable.*

15. After discussing legal status of the further statement, I would prefer to discuss the improvement brought by the complainant in his further statement stating

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therein that incident is outcome of the issue on demand of the hand of injured PW Gul Naz by the appellants; however, the injured PW Mst. Gul Naz had never disclosed this fact to complainant or herself shown in her statement under section 161 CrPC, this improved version of the prosecution which has been brought on record after about 12 years of the incident has got no sanctity thus cannot be relied upon to maintain the conviction against the appellants. SIP/SIP Meer Hassan who partly conducted the investigation of instant case and after examination of the dead body handed over the same to complainant vide receipt at Ex.8/C he also recorded statement of injured PW Mst. Gul Naz beside visited the place of incident, he did not depose regarding implication of present appellants; however, after conducting investigation partly handed over the case papers to Inspector Rafique Ahmed Abbasi for further investigation. It is astonishing to note that second I.O namely Rafique Ahmed Abbassi, during investigation the second I.O Rafique Ahmed Abbassi had learnt through spy information that one Hamal and Abdul Razaque Sabzoi were involved in present case and committed the murder of deceased Ahmed as well cause injuries to injured PW Mst. Gul Naz and then the investigation was handed over to Gul Hassan Jatoi who too was not examined by the prosecution. However, the DSP Gul Hassan was examined by appellant as his defence witness as Ex.20 available at page 137 of the paper book who in his examination in chief deposed as under:

> *"I conducted the investigation of crime No.47/2003 Police Station Kandhkot from 20.03.2004 to 05.04.2004. Prior to my investigation the case was inviestigated by Inpsector Rafique Ahmed Abbasi who had disclosed the names of Hamal and Abdul Razak Sabzoi as accused in the present crime. During my investigation I also come to the conclusion that both the persons namely Hamal and Abdul Razak are involved in the present case through spy information. I could not collect any piece of evidence against present accused namely Nazir @ Asad to be involved in the present case".*

DW-2 Ex.22 at page 141 of the paper book namely Inspector CGRO DIGP namely Abdul Qudoos Kalwar who conducted subsequent investigation/inquiry upon the direction of DIG Police Larkano and in his examination-in-chief he deposed in following words:-

> *".....then I completing the reinvestigation returned the case papers to the concerned police station by opining that accused Naizr Ahmed and Mushtaque are innocent in the present case/crime...."*

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16. After assessment of the entire prosecution evidence, it will be appropriate to discuss the defence evidence as well version of the appellants adduced by them through their respective statement under section 342 Cr.P.C. The appellant Asad @ Nazir while replying question No.3 of his statement deposed as under:

Q. No.3. Have you to say anything else?

Ans. I am innocent and pray for justice and it is further submitted that due to dispute over robbery of buffaloes with one Rasool Bux @ Kuraro who is nearest relative to complainant party I am implicated in this case. Prior to his case an FIR bearing Crime No.80 of 2010 was registered against said Rasool Bux alias Kuraro & others, in which my buffalo was robbed, thereafter, he just to pressurize and to stop money worth of Rs.600,000/- (Six lac), instigated the complainant party who have implicated me in this case after about 12 years of the incident. Accused Rasool Bux alias Kuraro lodged an FIR bearing Crime No.11 of 2015 at PS B-Section Kandhkot against me in which I have been acquitted and imposed fine of Rs.24000/- against said Rasool Bux alias Kuraro to be paid to us as compensation of vexatious and false litigation against us. I produce attested copy of show cause notice and order thereon and judgment, attested copy of FIR bearing No.80 /2010 and attested copy of criminal record of Rasool Bux @ Kuraro. I produce original my identity card issued by D.R.O , inner coordination pass for Prime Minister of Pakistan, identity card of Duniya News, Original card of Pakistan Federal Union of Journalists, member card of internal Human Rights Los Angels, authority letter of the Nation daily newspapers, authority letter of Pakistan Press Foundation, authority letter of daily Khabrain, appointment letter of independent news.

17. It is beyond reach to understand that the defence version adduced by the appellant in shape of documentary evidence before the trial court was not kept in juxtaposition nor was considered to balance the allegations levelled by the prosecution even no point for determination was framed in this regard by the trial court. Suffice to say the trial court did not bother even to discuss the defence version or to question the legality of further statement as well subsequent investigation/inquiry during pendency of the trial before the trial court whether the DIG police, during pendency of trial particular when the FIR was lodged 12 years back and even challan was filed against unknown persons, was competent to order for re-investigation. Even after the arrest of the appellants they were not subjected to identification parade.

18. As a result of the above said contradictions in the evidence of prosecution witnesses and infirmities / flaws 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

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defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. 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."*

19. In view of the above contradiction in the evidence of the prosecution witnesses coupled with delay in filing of the F.I.R. in the instant case, the prosecution has not been able to prove its case against the appellants beyond any reasonable doubt as doubts have crept in the evidence of the prosecution witnesses. Therefore, in my view, the impugned judgment is liable to be set aside and the appellants merit acquittal.

20. Vide my short order dated 04.02.2019, instant criminal appeal was allowed, the impugned judgment dated 19.10.2017, passed by I-Additional Sessions Judge, Kandhkot in Sessions Case No. 178 of 2016 (State v. Asad alias Nazir and another) was set aside and the appellants Asad alias Nazir and Mushtaque Ahmed were acquitted of all charges. The appellants were in custody and they were ordered to be released forth with if not required in any other case.

21. Above are the reasons for my short order dated 04.02.2019.

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Let R&PS of Sessions Case No.178 of 2016 re-the State Vs Asad @ Nazir & another being outcome of Crime No.47 of 2003, PS B-Section Kandhkot under section 302, 34 PPC may be sent back to the trial court alongwith copy of judgment through learned Sessions Judge Kashmore @ Kandhkot.

Judge

06/03/2018.