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ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. S- 10 of 2018.

Date of hearing	Order with signature of Judge
18.02.2019.	

1. For orders on M.A. No. 656/2019.
2. For orders on M.A. No. 361/2018.
3. For hearing of main case.

Mr. Inayatullah G. Morio, Advocate for appellants.
Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

1. This application has been filed by complainant, praying therein for cancellation of bail alleged granted to accused/ appellants No.1 to 6, vide judgment dated 13.1.2018. Perusal of record reflects that, neither trial Court nor this Court has granted bail to appellants, as such instant application being misconceived is hereby dismissed.

2. Learned counsel for appellants does not press instant application, as he intends to proceed with the main appeal. Accordingly, this application dismissed as not pressed.

3. On 31.01.2019, the complainant had put his appearance and stated that he being poor cannot engage a private counsel and that he has full confidence in Prosecutor to proceed with the case.

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

Per prosecution case, appellant Bashir Chandio has been assigned role of causing kalashnikov fire on head of P.W Allah-dad and entire case of prosecution is based upon this evidence. However, the Medico Legal Officer has clearly deposed that injury allegedly sustained by P.W Allah-dad was result of hard and blunt substance and not firearm. In such a situation, case of prosecution has become of two versions and out of two, which version is to be believed, is the question, which make case of prosecution to be doubtful.



For reasons, to be recorded later-on, the instant appeal stands allowed. The conviction and sentence awarded to appellants Badal alias Shahzado, 2. Souz Ali alias Ilyas Atto, 3. Bashir, 4. Sangi, 5. Muhammad Hassan and 6. Manzoor Ali, vide impugned judgment dated 13.01.2018, passed by learned 2nd Additional Sessions Judge, Mehar, in Sessions case No. 609/2016, Re; State v. Badal alias Shahzado, arisen out of F.I.R No.61/2016 of P.S Radhan Station under Sections 324, 337-A (iii), 504, 337-H (2) and 148 P.P.C , is hereby set-aside. Consequently, by extending benefit of doubt to the appellants, they are hereby acquitted of the charge(s).

The appellants are reportedly confined in jail; they shall be released forthwith, if their custody is not required in any other case.

JUDGE

Ansari/*

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**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANO**

CRIMINAL APPEAL NO.S-10 of 2018

Appellants : Badal @ Shahzado Chandio and others, through
Mr.Inayatullah G. Morio, Advocate.

State through : Mr. Aitbar Ali Bullo, DPG, Sindh.

Date of hearing : 18-02-2019

Date of judgment : 18-02-2019

JUDGMENT

MUHAMMAD SALEEM JESSAR, J:- The appellants are aggrieved by judgment dated 13th January, 2018, passed by II-Additional Sessions Judge, Mehar, in Sessions Case No.609 of 2016, whereby they were convicted and sentenced as under:

1. For offence u/s 324 PPC all accused are convicted and sentenced R.I for 07 years with fine of Rs.5000/- on each accused, in case of default of fine, each accused shall suffer S.I for one month further.
2. For offence u/s 337-Aiii PPC all accused are convicted and sentenced R.I for 05 years as Tazir and each accused shall be jointly liable to Arsh which shall be 10 per cent of Diyat amount.
3. For offence u/s 504 PPC all accused are convicted and sentenced R.I for 01 year.
4. For offence u/s 337-Hii PPC all accused are convicted and sentenced S.I for 01 month.
5. For offence u/s 148 PPC all accused are convicted and sentenced for 01 year.

However, benefit of section 382-B, Cr.P.C. was allowed to all the appellants and the sentences were to run concurrently.

2. Facts of the case, as narrated in the impugned Judgment, are that on 03.07.2016 Complainant Sikandar Ali Chandio lodged FIR No.61 of 2016 at P.S. Radhan Station, about an incident which allegedly occurred on 29.06.2016, to the effect that he has grocery shop in Village Essa Khan Thebo, being run by his brother Allah Dad. There was previous dispute pending between one Bashir Chandio party with complainant side. On 29.06.2016 the complainant, his brother Allah Dad and his cousin Riaz Ali s/o Gulsher Chandio were available at shop of complainant, and at about 3-00 p.m. the shop was closed and they left for their house to take lunch. As soon as they departed from the shop and came in street, they noticed that accused Bashir, armed with KK rifle; Badal and Souz Ali both armed with pistols; Muhammad Hassan, armed with repeater gun; Sangi, armed with pistol and Manzoor Ali, armed with gun; all by caste Chandio r/o village Essa Khan Thebo Taluka KN Shah, had arrived there, accused Bashir hurled abuses at the complainant asking him that from that day they should not come on the shop in their village and ordered him to close the shop, to which Allah Dad replied that he has his

own shop and he would not close it, he will continue his business in that shop, on which accused were annoyed and accused Bashir fired direct shot from KK Rifle with intention to commit murder of Allah Dad, which hit him on his skull, hence he fell down. Thereafter, all accused caused beating to complainant and PW Riaz Ali, later while firing in the air, they fled away towards their houses. Injured Allah Dad was brought at police post Sindhi Buttra and a letter was obtained for treatment from hospital and thereafter FIR had been lodged accordingly.

3. After usual investigation by the I.O., challan was submitted in the Court of Sessions Judge, Dadu, who transferred the same to II-Additional Sessions Judge, Mehar for disposal according to law on 25.11.2016.

4. Necessary documents were supplied to the accused under receipt at Ex.1 and 1/A. A charge was framed against the accused for offence u/s 324, 504, 337-H(ii), 148 PPC at Ex.2, to which they pleaded not guilty and claimed trial, vide plea of accused Ex.3 to 8.

5. In support of the charge framed against the appellants, prosecution examined complainant Sikandar Ali at Ex.9, he produced FIR as Ex.9/A, injured PW Allah Dad at Ex.10, PW- Muhammad Sharif at Ex.11, he produced mashirnama of place of wardat and mashirnama of injuries Ex.11/A and 11/B respectively. PW-SIP Muhammad Afzal Solangi at Ex.12, he produced police letter issued to the injured for medical treatment and roznamcha entry No.4 dated 29.06.2016 recorded when complainant arrived at police post Sindhi Buttra for issuance of letter for medical treatment. PW Bashir Ahmed, Head Constable at Ex.13, medical officer Dr. Santosh Kumar at Ex.14, he produced provisional medical certificate at Ex.14/A, final certificate at Ex.14/B and radiologist report at Ex.14/C and 14/D respectively, police letter for treatment Ex.14/E, and X-ray film Ex.14/F. Thereafter, the prosecution side was closed by the prosecutor through statement Ex.15.

6. The statements of accused were recorded section 342, Cr.P.C. at Ex.16 to 21 respectively, thereby they denied allegations of prosecution in evidence, they pleaded innocence; however, no accused led evidence in their defence nor examined themselves on oath, in terms of section 340(2) Cr.P.C.

7. The learned trial Court, after setting forth points for determination and deciding them against the appellants, convicted and sentenced the appellants as above, hence this criminal appeal challenging the impugned Judgment.

8. I have heard learned counsel for the appellants as well as learned DPG for the State. The complainant appeared before this Court on 31.01.2019 and stated that he was not in a position to engage a counsel and showed his full faith and confidence in the

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Deputy Prosecutor General. Therefore, he was not present when the case was proceeded on 18.02.2019.

9. Learned counsel for the appellant submitted that the trial Court has passed the impugned judgment without considering the evidence on record and, therefore, the same suffers from misreading and non-reading of evidence. He submitted that, admittedly, there is previous enmity between the parties, therefore, the appellants were falsely implicated in the instant case. He submitted that the ocular evidence is not supported by medical evidence. It was further stated by learned counsel for the appellants that there was four days' unexplained delay in lodging the FIR which tarnishes the credibility of the F.I.R. and creates a doubt in the prosecution case the benefit whereof has to be extended to the appellants. He submitted that no independent witness has come forward to support the evidence of the PWs who are all interested witnesses. He also submitted that there are material contradictions in depositions of witnesses which goes against the prosecution case and benefit of such contradiction is to be extended to the appellants. Learned counsel also submitted that in view of the contradiction in the evidence, prosecution has failed to prove the case against appellants beyond all reasonable doubts. He, therefore, prayed that instant criminal appeal may be allowed and the impugned judgment, as well as the conviction and sentence awarded to the appellants may be set aside.

10. Learned DPG fully supported the impugned Judgment and submitted that all the appellants are named in F.I.R. and proper role has been assigned to them. He also submitted that the incident occurred in broad day light wherein the appellants tried to take the life of injured PW Allah Dad by firing at him with Kalashnikov rifle. He referred to the evidence of PWs and submitted that there is no material contradiction in the same while minor contradiction have no impact on the impugned judgment. It was also argued by learned DPG that there is ocular evidence of the eye witnesses which is fully supported and corroborated by medical evidence. It was further argued on behalf of State that charge was proved against the appellant, therefore, the appeal merits dismissal and it was prayed that the conviction and sentence may be maintained.

11. Complainant Sikandar Ali in his examination-in-chief deposed that on 29.06.2016 he left his shop situated in village Essa Khan Theba at 3:00 pm and at that time Allah Dad and Riaz Ali were with him and as they came in the street to proceed towards their house, they saw accused Bashir Chandio with KK rifle, Badal with pistol, Souz Ali with DBBL pistol, Sangi Chandio with pistol, Hassan with repeater gun, Manzoor Ali with DBBL gun. Thus, the complainant states that six persons armed with deadly fire arm weapons and with intention to attack them came at the place of wardat. However, there is only one fire arm injury to Allah Dad that too not a fatal one. It is very strange and also improbable that six persons fully armed with fire deadly weapons came to attack three

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persons and only one was slightly injured. From the FIR it transpires that the two parties were so close to each other that they were talking to each other but still all the six assailants could not do any better than slightly injuring one person of the opposing party.

12. The next point which catches attention is that the complainant stated in the FIR as well as in his deposition that the accused party beat them (i.e. complainant and his cousin Riaz Ali) with butts of the weapons. However, there is no medical report produced by any witness in this regard. There is no explanation as to why the complainant and his cousin Riaz Ali did not report to police in respect of their injuries because if they were also beaten by the complainant party then after obtaining letter from the police they should also have gone for medical treatment.

13. After discussing the evidence of the witnesses, the learned trial Court gave the following observations / findings:

"From the above evidence brought on record it appears that a rift/quarrel between both parties was already going on which is itself explained by the complainant in FIR and admitted in his deposition. The accused persons armed with deadly weapons had arrived at place of wardat, definitely with one common object to teach lesson to complainant party, occurrence does not appear at the spur of moment, but it appears with pre-concert, that's why the accused had equipped themselves with firearm weapons and jointly arrived at place of wardat, where accused Bashir had initiated talk with complainant party to close the shop, which was refused, on which he had directly fired KK rifle shot at PW Allah Dad which hit him on his skull on parietal region of right side which fact is supported by injured himself as well as complainant being eye witness and medical officer. The intention of the accused Bashir could be gathered from the seat of injury, he has fired direct shot from KK rifle from close range which had caused injury on the right parietal region of skull as testified by the medical officer resulting the bone was visible. It is really a miracle that injured Allah Dad remained safe and the bone of skull did not fracture or the bullet one can say did not cross from the skull causing damage to the brain material, but the intention of assailant is quite visible that he had fired shot directly at the skull of PW Allah Dad which definitely could have resulted the death of Allah Dad, had the bullet fractured skull bone causing damage to the brain material. The accused persons appear to be in common object, when they all were armed with firearm weapons and jointly arrived at place of wardat, after causing bullet shot to PW Allah Dad, complainant and PW Riaz were also given beating by the all accused and while firing in the air to my considered view as a token of success or to cause harassment to everyone not to come near to the accused so that they would leave the place of wardat safely, this all suggests the steps by accused to one and same object with their pre planning, therefore, each accused is responsible for the acts done by the accused Bashir Chandio who caused fatal shot to PW Allah Dad in terms of section 149 PPC. Accordingly I am of the considered view that prosecution has proved its case against all accused beyond all reasonable doubts, point No.1 and point No.2 are answered as proved."

14. The crucial observation made by the trial Court in the above passage is to the effect that "*The intention of the accused Bashir could be gathered from the seat of injury, he has fired direct shot from KK rifle from close range which had caused injury on the*

right parietal region of skull as testified by the medical officer resulting the bone was visible." However, I am constraint to observe that the trial Court misdirected itself when it jumped to the conclusion that accused Bashir has fired direct shot from KK from close range at Allah Dad and, on the basis of such firing, gathered their intention. The proper course would have been to first establish that the injury sustained by injured Allah Dad was caused by some fire arm through some credible ocular evidence as well as medico-legal report. Thereafter, the next step should have been to connect the accused with the shot. This very crucial and important exercise was not done by the trial Court and it tried to establish the "intention" of the accused Bashir by referring to the seat of the injury.

15. I would now examine the evidence in the light of above observations. The first link in the chain to connect the appellants with the injury caused to injured Allah Dad was recovery of empty and the second link in the chain was the recovery of the weapon which was used to fire the bullet that injured Allah Dad. Once the empty and weapon used in the crime were recovered, the same should have been sent to ballistic expert in order to determine whether the bullet was fired by the weapon recovered from the accused. The third link was medical report which narrates the nature of injury and how such injury was caused i.e. whether it was caused by fire arm or by some sharp or blunt substance.

16. In the present case, the prosecution has not been able to cross the initial hurdles in connecting the appellants with the injury as neither any empty was secured from the place of wardat nor the alleged crime weapon was recovered from any of the accused. In this regard, PW-3 Muhammad Sharif (Exh.11) deposed in his cross examination with regard to empty cartridge that "It is correct that police has not secured any spot of blood stained nor any empty cartridge was recovered from place of wardat." In case the reason for the same is stated to be delay in lodging the FIR which resulted in destruction of the evidence available at the place of incident, like empty cartridge, blood stained earth etc., the person responsible for such default would be the complainant himself as it was his duty to lodge the F.I.R. promptly. Therefore, there is no credible evidence to connect the accused with the injury sustained by Allah Dad. The finding of the trial court that he has fired direct shot from KK rifle from close range is based on surmises and conjecture.

17. The trial Court referred to the seat of the injury in order to determine the intention of the accused. However, the trial Court completely ignored the nature of the injury and the weapon with which such injury was caused. In this regard the medical report plays pivotal role in determining the nature of injury and the weapon used in inflicting such injury.

18. In this case provisional medico-legal certificate and final medico-legal certificate were issued by PW-6, Dr. Santosh Kumar, Senior Medical Officer, who examined as PW-6. He deposed that on 29.06.2016 he was on duty at Taluka Hospital Mehar as

Senior Medical Officer, where injured Allah Dad appeared before him along with police letter issued by Incharge PP Sindhi Butta, for medical treatment and certificate. He further deposed that he examined the injured and found one injury lacerated wound 8 cm x 1 cm into bone visible on right parietal region of the skull. He deposed that injured was provided necessary treatment, and was referred to CMC Larkana for X-ray and radiologist report and later on he received X-ray and radiologist reports on 15.07.2016, and after considering the same he issued final medical certificate on 16.07.2016. In the provisional Medico-Legal Certificate issued by Dr. Santosh Kumar dated 30.06.2016, under caption "Particulars of Injuries" it has been stated as under:

"(1) Lacerated wound 8 cm x 1 cm. Bone visible on right parietal region of skull."

19. The nature of injury and the weapon used were reserved till report by CMC, Larkana. On receipt of such reports from CMC, Larkana, Final Medico-Legal Certificate was issued by Dr. Santos Kumar on 16.7.2016. The salient features of this Certificate are that although the number of the letter issued by police for medical aid to the injured was mentioned as 84; however, the date of such letter has not been mentioned. What is most surprising is that although in the provisional medico-legal certificate the nature of injury and the weapon which caused the injury were reserved till receipt of report from CMC, Larkana; however, even after receipt of the report from CMC, Larkana, nothing was mentioned in the certificate regarding nature of injury and the weapon used for causing such injury. On the contrary the final medico-legal report states as under:

"After receipt of the reports from office of the Police Surgeon Larkana, vide his letter No.CMCHL/PS/Reg.2242 dted 12.7.2016. The injury No. (1) is declared as Shajjah-i-Mudhiha [section] 337 A(ii)."

20. Thus, it is not clear from the provisional medico-legal report (Exh.14/A) as well as from final medico-legal report (Exh. 14/B) whether the injury sustained by the injured Allah Dad was caused by a fire arm weapon or by any other substance. It is also strange that such a vague and inconclusive medical report has been relied by the trial Court in convicting the appellants.

21. PW-Dr. Santosh Kumar, during his cross examination was questioned as to how the injury may have been inflicted upon the injured Allah Dad, and he replied as under:

"The injury was result of hard and blunt substance. It is correct that if somebody while travelling hits with hard substance, the injury could be received as noted in the provisional medical certificate."

22. Thus, as per the medical report in respect of the injury sustained by Allah Dad, the same was caused by a hard and blunt substance and not by any fire arm. This leaves no doubt that the injury sustained by injured Allah Dad was not caused by appellant

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Bashir Chandio as the allegation against him was that he fired with Kalashnikov at Allah Dad due to which Allah Dad sustained head injury.

23. It was incumbent upon the medical officer to have mentioned in the medical report as to how the injury may have been caused to the injured so that the Court is in a position to reach a just conclusion in the case. It was failure on the part of Dr. Santosh Kumar that he did not mention in the medical certificate or at least in the final medical certificate that the injury was caused by some hard and blunt substance. It was also stated by PWs that the distance between the victim and the assailant was few paces, therefore, if a bullet was fired by the accused Bashir by his Kalashnikov from such a close range, there must be some gun power available at the injured spot. However, nothing was stated in this regard by the senior medical officer, Dr. Santosh Kumar. The inadequate report by a senior medical officer has resulted in miscarriage of justice in the instant case. However, the blame cannot be thrown at the door of the senior medical officer only as it was also the duty of the trial Court to have examined the medical report and to have dilated upon the cross-examination of Dr. Santosh Kumar before convicting the appellant.

24. The other important aspect of the instant case is the delay in registration of the F.I.R. The FIR was registered with delay of about four days. As per deposition of the complainant (Exh.9 at page 31 of the paper book), the incident took place on 29.06.2016 while the F.I.R. was lodged on 07.07.2016. There is no explanation for such delay. In column No.5 of the FIR, which is meant for recording any delay in registration of the FIR, it is stated that there is no delay on the part of the police in recording the FIR. This is a misleading statement in the FIR. The police officer recording the FIR should have clearly mentioned that there was delay of four days in registration of the FIR on the part of the complainant. The delay in recording the FIR also resulted in disappearance of any evidence that may be available at the place of wardat and for such destruction of evidence only complainant party is to be blamed as they did not report the matter to police promptly. In the case of *Ayub Masih v. The State* (PLD 2002 SC 1048) Honourable Supreme Court held as under:-

"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution

evidence and other circumstances of the case tend to tilt the balance in favour of the accused."

25. In view of unexplained delay of four days in lodging of the F.I.R. in the instant case, possibility of false implication of the accused could not be excluded from consideration as it appears that the FIR was lodged after consultation and deliberation. This conclusion finds further support from the fact that, as already stated above, six persons fully armed with deadly weapons allegedly came to attack three persons and inflicted only a minor injury on the head of one person and left. Although the complainant alleged that he and his cousin Riaz Ali were also beaten by the accused party by using butts of the weapon; however, corroborative evidence is not available on record to establish this fact.

26. Apart from the above, there is also another lacuna in the prosecution case and that with regard to Roznamcha entry. PW-Muhammad Afzal (Exh.12) during his cross examination admitted that Roznamcha entry was not recorded when he left the police station for inspection of place of wardat. This is also a lacuna in the prosecution for which there is no explanation.

27. As regards the plea taken on behalf of the accused that, in fact, due to old enmity prevailing between the parties, complainant party has falsely implicated the accused in the case, it may be observed that the Superior Courts have time and again held that enmity is a double-edged weapon which would cut both ways and where, on the one hand, it may be a motive for implicating the accused falsely, on the other hand it could also be termed as strong motive for committing offence by the accused.

28. The accumulative effect of the abovesaid 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 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 :-

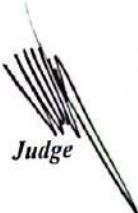
"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent

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."

29. For the aforesaid reasons, by a short order passed on 18.02.2019 instant appeal was allowed and conviction and sentences including imposition of Arsh awarded to the appellants, namely, Badal alias Shahzado, Souz Ali alias Ilyas, Bashir, Sangi, Muhammad Hassan and Manzoor Ali, vide impugned judgment dated 13.01.2018 passed by 2nd Additional Sessions Judge, Mehar in Sessions Case No.609 of 2016 (State v. Badal alias Shahzado and others) emanating from Crime No.61 of 2016 registered at PS Radhan Station under sections 324, 337-A(iii), 504, 337-H(2) and 148, PPC, was set aside. The appellants were reportedly in custody, they were directed to be released forthwith if not required in any other case.

30. Above are the reasons for the said short order.

Let the R&PS of Sessions Case No.609 of 2016 re-The State Vs Badal @ Shahzado Chandio & others be sent back to trial court/II-Additional Sessions Judge, Mehar, through Sessions Judge, Dadu alongwith copy of judgment.



Judge