

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No S-22 of 2017

Date of
Hearing
04.2.2019

ORDER WITH SIGNATURE OF JUDGE

For hearing of Case.

Syed Aijaz Ali Shah, advocate for the appellant, along with the appellant (on bail)

Mr. Aitbar Ali Bullo, DPG a/w complainant Sultan Ahmed Hajano

Complainant Sultan Ahmed Hajano, who was present before the Court, on 13.11.2017 as well as on 11.01.2019, made a categorical statement that he has no means to engage his Counsel and will prefer to argue the instant appeal at his own as well as with the assistance of learned DPG.

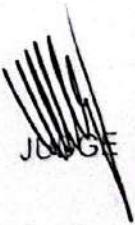
Syed Aijaz Ali Shah, learned Counsel for the appellant, while arguing the appeal, submits that there are major contradictions between the statements of alleged victim / injured Mst. Gulnaz as well as the complainant. He next submits that the complainant is not an eyewitness and his version is totally belied by the injured. He further submits that nothing incriminating was secured from the possession of the appellant or from his home to show that the alleged pesticide was brought by him or any inmates of his house and subsequently administered same to alleged victim and, therefore, basic evidence for constituting the offence of attempt to murder through poison is lacking in this case and thus the case against the appellant is full of doubts. He has also maintained that the alleged incident is said to have taken place on 08.9.2016, whereas report thereof was lodged by the complainant on 01.10.2016 i.e. after the delay of about 22 days and submits that there was matrimonial dispute between the couple as alleged victim did not

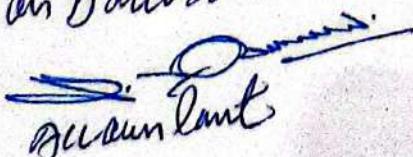
want to continue her marital status with the appellant and on refusal by the appellant she cooked up instant story.

Complainant present in person submits that the appellant had attempted to snatch the life of his daughter and the trial Court had rightly convicted him. He, therefore, prays that the appeal may be dismissed and conviction and sentence awarded to the appellant may be maintained.

Learned DPG appearing for the State, while endorsing the arguments of complainant, submits that the minor discrepancies cannot vitiate the evidence adduced by the prosecution.

For the detailed reasons to follow, instant appeal is allowed. Impugned judgment dated 22.2.2017 handed down by the learned III-Additional Sessions Judge, Shikarpur in Sessions Case No.620 of 2016 re-State v. Zahir Ali and others, being outcome of Crime No.79/2016 of Police Station Staurt Ganj, Shikarpur, registered under Sections 324, 337-J/34, PPC, is hereby set aside to the extent of conviction and sentence of present appellant. The appellant is present on bail in terms of order dated 07.7.2017; therefore, his bail bonds are cancelled and surety furnished by him is also hereby discharged.


JUDGE

Above order completed
on Date 25.03.2019

S. S. L.

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Criminal Appeal S. 22.2017
Zahir Ali Majroho vs. The State

SINDH HIGH COURT

Composition of Bench

Single D.R.

Before Mr. Justice Mohammad Saleem Jaffri

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 principle or decides a question of law which is of first impression / distinguishes / 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.

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANO

CRIMINAL APPEAL NO.S-22 of 2017

Appellant,	:	Zahir Ali Hajano, through Mr. Syed Aijaz Ali Shah, advocate.
State through:	:	Mr. Aitbar Ali Bullo, DPG, for the State.
Complainant:	:	Sultan Ahmed is present in person.
Date of hearing	:	04.02.2019
Date of announcement	:	04-02-2019

JUDGMENT

Muhammad Saleem Jessar, J.- Through instant criminal appeal, the appellant has assailed judgment dated 22.7.2017, passed by III-Additional Sessions Judge, Shikarpur in Sessions Case No. 620/2016, whereby the appellant Zahir Ali S/o Zakir Ali Hajano was convicted under Section 265-H(2) Cr.P.C and sentenced under section 324, PPC to undergo R.I. for five years and was also to pay fine of Rs.100000/- (One Lac Rupees Only) and in case of failure to pay the fine, to further suffer S.I. for one year. Co-accused Fida Hussain S/o Ghulam Akbar and Mushtaq Ahmed S/o Muhammad Ramzan, were; however, acquitted under S. 265-H(1) Cr.P.C.

2. Facts of the case, as narrated by the complainant and incorporated in the F.I.R., are that on 08.09.2016, he received information at about 2000/2015 hours from the house of his daughter Mst. Gulnaz that her family members had given her poison in her food. The complainant alongwith his wife and son Sadam went to her house at Allahabad Colony. They observed that Mst. Gulnaz was vomiting blood and she was writhing in pain. When they asked her about her condition she replied that her husband Zahir, Mushtaque Ahmed and Fida Hussain had poisoned her. Then they took Mst. Gulnaz to RBUT hospital Shikarpur for treatment. Complainant's son Sadam went to Stuart Ganj P.S and brought a letter for medical treatment. Then he secured the order from the court and got lodged the FIR.

3. The case was marked to ASI Iqbal Ahmed Noon for investigation, who after usual investigation, submitted final report in compliance of Section 173 Cr.P.C. and preferred challan. Police papers were supplied to the accused at Ex.1, thereafter, charge was framed against the accused at Ex. 2 to which they pleaded not guilty and claimed to be tried vide their pleas recorded at Ex. 3 to 5.

4. To prove the charge, the prosecution examined PW-1/Complainant Sultan Ahmed at Ex.6. He produced FIR and order dated. 28-09-2016 at Ex.06/A and Ex.06/B. Prosecution also examined PW-2/Mst. Gulnaz at Ex.07 and also examined PW-3/Saddam

Hussain at Ex.08. He produced letter of PS along with memo of site inspection at Ex.08/A and Ex.08/B. Prosecution also examined PW-4/Dr. Farah Naz at Ex.10. She produced provisional medical certificate, letter issued by PS Stuart Ganj, first aid report, laboratory report, and final medical certificate at Ex.10/A to Ex.10/H. PW-05/IO/ASI Iqbal Ahmed was examined at Ex.11 and finally P.W-6/author of FIR, ASI Ali Hassan Shah, was examined at Ex.12. Thereafter, prosecution side was closed vide order at Ex.13.

5. After conclusion of prosecution evidence, the appellant was examined under 342 Cr.P.C at Ex.14, who denied the prosecution story. According to the accused/appellant, Zahir Ali Hajano, he was innocent and has been entrapped in this false case due to matrimonial dispute with his wife. However, he did not examine himself on Oath nor produced any witness in his defense.

6. Thereafter, the learned trial Court framed two points for determination, and after hearing the learned counsel for the parties, convicted and sentenced the appellant as above and acquitted the other two-accused as named above. Hence, instant appeal by the convicted accused / appellant Zahir Ali Hajano.

7. I have heard learned counsel for the appellant and learned DPG for the State as well as the complainant who appeared in person.

8. Syed Ejaz Ali Shah, learned counsel appearing on behalf of the accused/appellant, argued that there is no eye witness of incident including the victim Gulnaz, as none has seen the appellant mixing poison in the food of victim, no motive for the attempt to murder is alleged, admittedly two accused persons namely Fida Hussain and Mushtaque Ahmed have been acquitted of the charge on the same set of evidence. He next submitted that complainant is not an eye witness of the incident and further that version of the complainant has been belied by the victim Gulnaz. It was also argued that nothing incriminating has been recovered from the appellant or his home. He contended that the learned trial Court has wrongly appreciated the evidence on record and, as such, the impugned Judgment suffers from non-reading and misreading of the evidence. Learned counsel also submitted that even in the F.I.R. no person has been nominated to mix the poison in the food of the victim Mst. Gulnaz. He also submitted that all the witnesses are related inter se and there is also admitted dispute between the spouses. He further argued that defense got examined DW-1 Dr. Fayaz Ahmed, who was an independent witness, and according to his evidence the victim herself disclosed that she had taken diazepam tablets. Dr. Farah Naz also admitted that symptoms might be similar if patient had taken diazepam tablets. He prayed that the impugned judgment may be set aside and the appellant may be acquitted.

9. Learned DPG along with the complainant vehemently opposed the appeal and submitted that prosecution has proved its case beyond a shadow of doubt as all PWs have supported the prosecution case and their deposition was consistent, whereas, medical evidence also corroborates the version of the prosecution inasmuch as insecticide poison

was detected in the victim, namely, Mst. Gulanz, which is not available in life saving drugs including diazepam tablet as defense is taken by the accused. He contended that oral evidence is fully supported by documentary evidence and the victim has specifically implicated the appellant. Hence, learned DPG prayed, that instant criminal appeal may be dismissed and the conviction and sentence may be maintained. The learned DPG submitted that minor contradiction in the evidence cannot vitiate the entire evidence deduced by the prosecution. The complainant also fully supported the impugned judgment and stated that the appellant has tried to deprive his daughter Gulnaz of her life.

10. The allegation against the appellant is that he gave poison to his wife Mst. Gulanz in food. However, not a single witness produced by the prosecution has stated that he / she saw the appellant while mixing insecticide in the food of the victim Gulnaz. The onus would be on the prosecution to prove that the appellant first arranged / bought the insecticide and then mixed the same in the food of the victim Gulnaz. In this case no effort was made to take any sample of the food which was consumed by the victim Gulnaz immediately before her condition worsened. In our culture, particularly, in villages entire women folk usually take their dinner together, therefore, it is also a question to be answered as to why no other member of the family suffered the same consequences. As per deposition of the complainant, Sultan Ahmed, who is father of the victim Gulnaz, he inquired from his daughter about her condition and she replied "...my husband Zahir, Mushtaque and Fida Hussain had poisoned me in food." *Despite the clear information given by the victim Gulnaz to her father that she has been poisoned by her husband in food, no effort was made to secure the food or the plate in which she took her dinner for chemical examination.* Thus, there has been no proof to establish that any poisoned food was given to the victim Gulnaz by her husband or anybody else. One cannot lose sight of the fact that there is no possibility that the food was brought from the kitchen by the appellant or any other male member of the family and the food must be brought by some women of the house, and most probably, by Mst. Gulnaz herself. Therefore, it is not clear as to at which stage or time the food was poisoned by the appellant. There is no possibility that the entire pot in which the food was cooked for the whole family was poisoned as in that case each family member would have suffered the same fate. Therefore, there is doubt as to how the poison entered the body of the victim Gulnaz. Therefore, in view of the fact that there is no evidence on record to indicate as to who mixed poison in the food of Mst. Gul Naz, it can be safely held that the prosecution has not been able to prove the appellant has mixed poison in the food of the victim Gulnaz.

11. Apart from the above, there are numerous contradictions in the evidence of the prosecution witnesses which clearly create doubt in the prosecution case. In this regard reference may be made to the deposition of PW-1, the complainant, who states as under:

"We observed that my daughter was vomiting by blood and she was writhing. We asked her about her condition and she replied that my husband Zahir, Mushtaque Ahmed and Fida Hussain had poisoned me in food."

12. However, PW-2, Mst. Gulnaz, the victim, in her deposition stated as under:

"... I became partly unconscious that I could only hear but could not speak. After that my mother and my brother came at my husband's house and they enquired from family members regarding my conditions they replied that all is satisfactory but I was not in good conscious as vomiting was continue. My mother brought me to hospital at rikshaw. I received first aid from hospital and became conscious good to disclose the facts to them..."

13. From the evidence of PW-1 – the complainant, it transpires that he asked his daughter at the house of her husband about her health and she stated that she was poisoned by her husband Zahir, Mushtaque and Fida Hussain. However, the evidence of his daughter, the victim – Mst. Gulnaz, completely belies the complainant as she states that she was unconscious at her home and regained conscious at the hospital where she informed her mother that she was poisoned by her husband and his relatives. She states that at the home, her mother enquired from family members regarding her condition. She does not say that her father enquired from her about her health at home or that she informed her father that her husband Zahir Ali, Mushtaque and Fida Hussain have poisoned her. This is a clear and material contradiction in the evidence of two prosecution witnesses.

14. Although both the complainant and his son Sadam, (PW-1 and PW-3 respectively), have stated that the victim Gulnaz was vomiting blood, however, victim Gulnaz did not say in her deposition at all that she was vomiting blood. Even PW-4, Dr. Farha Naz, only said that Mst. Gulnaz was brought to her at 2315 hours on 08.09.2016 and she was vomiting. She does not say that she was vomiting blood. Thus, this is also a clear contradiction as one set of witnesses say that the victim was vomiting blood while the other did not say so.

15. There is also contradiction between the evidence of PW-1 and PW-2 with regard to presence of Zahir Ali at the time of incident. PW-1 state that appellant Zahir Ali was not present at home, while PW-2, stated that appellant Zahir Ali was present at home.

16. PW-4, Dr. Farah Naz states in her examination in chief that she secured samples on the next day for laboratory examination including stomach sample, blood and urine, while in her cross examination she states that *"It is correct that samples of vomiting were not secured."* Then she states *"I received four samples which I mentioned in my report, I received such samples from Dr. Khadim Hussain."* Thus, there is a clear contradiction as to who collected samples and when. Since Dr. Khadim Bhatti was not examined therefore it cannot be confirmed whether he collected such samples or not.

17. Apart from the above contradictions, there are two versions of the incident. It is alleged by the complainant that the victim was given insecticide in food and thus an attempt was made on her life, while the appellant denies the same and states that the victim Gulnaz has taken some Diazepam tablets.

18. The victim was first checked by Dr. Fayyaz Ahmed, who was examined by the appellant in his defence at Exh.18 (page 57 of the paper book). He stated that when he was returning from Isha prayer one baby girl came to him and asked him to go to her house as her sister-in-law was not well. Dr. Fayyaz Ahmed went to her house and examined the victim Gulnaz and found that she was drowsy, pulse was low and blood pressure was also low. On the query made by the said doctor, the victim Gulnaz stated that she has taken Diazepam tablets. She was given first aid by Dr. Fayyaz Ahmed. He stated that according to his opinion, the victim has taken 2 - 4 diazepam tablets. However, it was denied by the victim that she was examined by Dr. Fayyaz. Since, Dr. Fayyaz Ahmed is an independent witness, therefore, there is no reason to doubt his deposition *without any corroboration*; however, to be on the safe side, it would be advisable to see whether there is any corroboration in support of his deposition.

19. The victim was next checked by Dr. Farah Naz, who was examined by prosecution as PW-4 at Exh.10 (page 25 of paper book). She stated in her deposition that on examination of the victim Gulnaz she was found vomiting and was semi-conscious (i.e. drowsy). She also checked blood pressure of the victim Gulnaz and stated that it was low (as stated by Dr. Fayyaz Ahmed). In her cross examination, she stated "It is correct to suggest that if a person takes diazepam tablets the result will be very similar to present case." Thus, the opinion of Dr. Fayyaz Ahmed, that the victim Gulnaz has taken 2-4 diazepam tablets is corroborated by Dr. Farah Naz (PW-4) as she has confirmed that if a person takes diazepam tablets his condition will be similar to that of the victim Gulnaz.

20. In this regard reference may also be made to the deposition of the victim Gulnaz (PW-2 at page 15 of the paper book), wherein she stated that she finished the whole meal brought for her dinner and had not felt any suspected / foul smell from the food. It is not a secret that insecticides have a very foul smell and it is almost unbearable. It may also be noted that insecticides are not such strong poisons that only a drop of the same is enough to kill a person. Therefore, if it is presumed that insecticide was mixed in the food of the victim Gulnaz in such a quantity which would cause death of an adult person, then the question will arise: why she did not feel the bad smell of the insecticide, particularly when she allegedly heard her husband telling his family members to bring some poison or other injurious thing. PW-1, the complainant Sultan Ahmed and PW-3 Saddam Hussain, both have stated that neither they saw the food which was eaten by the victim Gulnaz nor they saw the plate in which she took her dinner. Therefore, there is no proof that poison was given to Mst. Gulnaz in her food by the appellant.

21. All the above facts and circumstances suggest that the prosecution has not been able to prove by cogent evidence that any insecticide was mixed in the food of the victim Gulnaz by the appellant.

22. The learned trial Court, while evaluating the evidence deduced by PW-Dr. Farah Naz and DW-Dr. Fayyaz Ahmed, has observed as under:

It is not understandable for me that I have rely on either of the evidence i.e Dr. Fayaz Ahmed defense witness or Dr. Farah Naz WMO who had duly examined victim in RBUT hospital Shikarpur, hence, in my opinion evidence of Dr. Farah Naz supported with circumstantial evidence that victim was examined by her, samples were secured and were sent to chemical laboratory and report was received which is available at Ex.10/H and very much supporting the evidence of Dr. Farah Naz, hence. I rely upon the evidence of Dr. Farah Naz by declaring that Dr. Fayaz Ahmed had misused his position and managed the medical certificate to favour the accused, hence, I hereby direct DHO Shikarpur to restrain him from working as medical officer and I also direct PMDC Islamabad for taking action against him, besides that I hereby order that show-cause be issued against him as he has managed such fictitious medical certificate and misused his powers, besides that, he falsely deposed the facts to favour the accused Zahir Ali under Section 193 PPC to submit his reply within (07) days from the date of receiving, in failure thereof it shall be assumed that he has nothing to say in his reply."

23. It is regrettable that the trial Court has ventured too far while evaluating the evidence of the above two doctors and was careless in taking such drastic action in haste against Dr. Fayyaz Ahmed. The trial Court has observed in the impugned judgment [para 19] that "Dr. Fayyaz Ahmed had misused his position and managed the medical certificate to favour the accused", which is incorrect for the reason that no medical certificate was issued by Dr. Fayyaz Ahmed and, therefore, he did not misuse his authority / position in any way. Dr. Fayyaz Ahmed stated that he examined the victim Gulnaz after Isha prayer and found her drowsy and the victim Gulnaz was confronted with the slip of the doctor which is not a medical certificate and carries the names of the medicine(s) prescribed by a doctor for his patient. In para 18 of the impugned judgment also it has been observed "From bare reading of the medical certificate issued by him shows the prescription given by him to the victim or the tablets at the top of the Exh.7/A have been crossed and again some syrups have been prescribed which are never been disclosed by him during evidence before this Court..." Once again it seems that the trial Court has mixed up prescription with certificate because both are totally different things. Certificate issued by a doctor to a patient does not contain names of the medicines prescribed by him. It is also worth mentioning that Ex.7/A, referred to above, is not available in the paper book. Ex. 7 is the deposition of PW-2 Mst. Gulnaz while Ex. 8 is deposition of PW-3, Saddam Hussain. In between these two documents there is no other document. However, in the cross examination of PW-2, Mst. Gulnaz, it is noted that "witness confronted with a slip of Dr. Fayyaz Ahmed which is taken on record at Exh.01/D". However, even this exhibit (Exh. 01/D) is also not available on record. Therefore, the first step of the trial Court towards evaluation of the evidence of Dr. Fayyaz Ahmed was in the wrong direction and, therefore, caused miscarriage of justice.

24. According to the opinion of Dr. Fayyaz Ahmed, the victim Gulnaz has taken 2 – 4 tablets of diazepam. This statement of Dr. Fayyaz Ahmed has been corroborated by Dr. Farah Naz in her deposition wherein she stated "It is correct to suggest that if a person takes diazepam tablets the result will be very similar to present case." Thus, there is nothing on record to show Dr. Fayyaz Ahmed had falsely deposed in favour of the

appellant Zahir Ali and that the opinion of Dr. Fayyaz Ahmed that the victim Gulnaz has taken 2-4 diazepam tablets, was wrong or that he willfully lied before the Court on oath. Even otherwise, it was only an opinion based on physical examination of the patient and was not based on some laboratory tests. So far as the chemical examiner's report is concerned, it is very much doubtful for the reasons discussed above.

25. Although the victim, Mst. Gulnaz has denied that Dr. Fayyaz Ahmed has examined her. However, the veracity of the deposition of victim Gulnaz is tarnished by her statement that "...my husband was at home all day on the date of incident and he was gossiping with his family members that bring some poison or some other injurious thing. I suspect and believe that my husband Zahir Ali and my relative Mushtaque and Fida Hussain had poisoned me with intention to kill me." During her cross-examination, she admitted that "It is correct that on the date of incident accused Mushtaque and Fida Hussain were not available at my husband's house." Thus, while she states that her husband was present at home all day on the day of alleged incident, however, she admits in unequivocal terms that accused Mushtaque and Fida Hussain were not present at her husband's house on the date of the incident, nor any role is assigned to them in the F.I.R. like they brought the poison or insecticide or they brought the food for dinner of victim Gulnaz or any other such role which may connect them to the alleged offence but still they were named in the F.I.R. which shows that they were falsely implicated in the case for some other reasons and they were accordingly acquitted by the trial Court. None of the PWs, the victim herself included, has said a single word about the acquitted accused Mushtaque and Fida Hussain but still they were falsely implicated by the victim Gulnaz which shows that she is not to be relied without corroboration of her deposition and there is no corroboration from any independent. Although the legal maxim *Falsus in uno, falsus in omnibus* "false in one thing, false in everything" is not to be followed in letter and spirit, however, when it is shown that a person has falsely implicated one person, therefore, testimony of such person in respect of others is to be examined more minutely and carefully as false implication of other persons by such witness cannot be ruled out.

26. In the present case the complainant or the victim Gulnaz has not given any motive for the incident. On the contrary, the appellant has given a motive for his false implication to the effect that there are matrimonial disputes between him and his wife. Although the complainant or the victim Mst. Gulnaz do not speak about any enmity between the parties, the trial Court has tried to use the defence put up by the appellant against him. The trial Court also observed as under:

"There is other aspect of the Case regarding arguments of defense counsel that ingredients of Section 324 PPC is not attracted, which in my opinion are based on misconceptions and misunderstanding of law because if S.324 PPC is r/w 337-J PPC is clearly indicates to the motive of commission of offence as admittedly there was family dispute between the parties and this fact is confirmed by defense counsel by arguing that it is motive of false implication but in my opinion the same is motive of commission of offence because the previous history brought on record between the parties was of such nature that accused Zahir Ali was bent upon to get rid of his wife because there are other factors which adversely affect



the position of accused Zahir Ali which are i.e. why he did not report the incident to police that his wife had tried to commit suicide, why family members of Zahir Ali did not come forward to give evidence that victim had taken such type of tablets, no previous history of taking tablets as alleged by the defense brought on record and the evidence of defense witness Dr. Fayyaz Ahmed is apparently managed one because though he was a Medical Officer at Basic Health Unit Wazirabad (in Government Job) he was running private clinic, besides that he did not show that what type of first aid he had given to patient and during his evidence he deposed that as soon a girl came to him, he accompanied to her for examining patient without asking her about address, name of patient."

27. It is strange that in one paragraph the trial Court has mixed up so many things like whether ingredients of section 324, PPC are present, motive, and conduct of Dr. Fayyaz Ahmed. Whether ingredients of section 324, PPC are present or not is a separate topic, whether any motive was set up by the complainant is another and conduct of Dr. Fayyaz is entirely a different topic. It is an open secret that doctors working in government hospitals are running their own clinics in the evening, therefore, on account of running of a private clinic by Dr. Fayyaz Ahmed, no adverse inference could be made.

28. There is nothing on record to suggest that Dr. Fayyaz Ahmed lied to the Court while deposing on oath. He was an independent person, therefore, there was no reason for him to depose falsely. It was denied by the victim Gulnaz that she was examined by Dr. Fayyaz Ahmed; however, her statement is not trust worthy and credible due to the fact that she has already been proved wrong in respect of the co-accused Mushtaque and Fida Hussain, who, although as per the victim herself, were not present in her home at the time and date of incident, but still she falsely implicated them in the instant case.

29. In para 19 of the impugned judgment, quoted above, trial Court has directed for issuance of show cause notice to Dr. Fayyaz Ahmed and seven days' time was allowed to him to submit his reply, however, even before any reply could be submitted by Dr. Fayyaz, adverse action was initiated by the trial Court against him whereby DHO, Shikarpur was directed to stop him from working as medical officer while PMDC, Islamabad was directed to take action against him. Thus, the trial Court violated the basic maxim of law of *audi alteram partem* i.e. no one should be condemned unheard. For reasons best known to the trial Court (i.e. III-Additional Sessions Judge, Shikarpur, Mr. Nizakat Ali), it acted in such a haste that without waiting for reply of show cause notice such strict orders were passed by it. It is expected that a judicial officer should act with restrain and wisdom before taking any action against anybody and should strictly follow the rule of *audi alteram partem*.

30. So far as motive for the offence is concerned, it is clear from the F.I.R. as well as the depositions of the PWs that they have not mentioned any motive for the alleged attempt by the appellant on his wife's life. However, this lacuna, which was to be used to give benefit to the accused /appellant, has been contorted to be used in favour of the prosecution. There is no doubt that motive is not sine qua non for proving offence and mere absence of motive was no ground to doubt the truth of prosecution case. Reference

may be made to 2005 YLR 465. However, where the allegation is that a husband has tried to kill his wife, then at least some motive must be alleged. In the instant case, no motive was alleged for the poisoning of the victim Mst. Gulnaz by her own husband. On the contrary, the appellant has set up motive of matrimonial dispute between him and his wife Gulnaz for his false implication in the case.

31. The trial Court also referred to the evidence of the victim Gulnaz, who stated as under:

"I observed because my husband at home all the day on the date of incident and he was hosting [the correct word used is "gossiping"] with his family members that bring some poison or other injurious thing".

32. It is surprising to note that the trial Court has relied on a piece of evidence which has no corroboration by any other source. The trial Courts cannot treat the statement of every witness as gospel truth as the same is to be tested for veracity and credibility. It is not possible and indeed beyond comprehension that a person will plot to kill his wife without any reason or motive, as none has been disclosed either by the complainant or by the victim Gulnaz or by any other witness, and for such plot he will openly gossip with his family members. If this piece of evidence is to be believed by the trial Court then the entire family members should have been convicted and sentenced.

33. The trial Court also observed in para 16 of the impugned judgment as under:

"... why husband did not come forward after happening of incident to accompany his wife (victim) to the hospital or otherwise he did not bother to care of her which facts very much corroborate that accused Zahir Ali was involved in administering to his wife/victim."

34. The above observations / findings are based on surmises and conjectures as nothing concrete has been brought on record to prove that the appellant has poisoned his wife Gulnaz. Apart from the verbal allegation of the victim Gulnaz that she has been poisoned by her husband Zahir Ali, Mushtaque and Fida Hussain, there is no evidence to prove such allegation. The trial Court has acquitted accused Mushtaque and Fida Hussain on the same set of evidence; however, has convicted the present appellant on such flimsy circumstantial evidence as stated above. Can the appellant be convicted of the charge of attempt to murder simply because he did not take his wife to hospital although it has come on record that at the time of incident he was not at home. The answer will be an emphatic "NO". For convicting the appellant of the alleged crime it is to be shown by cogent reason that he arranged the poison, mixed the poison in the food of the victim Gulnaz and gave the poisoned food to her. There is nothing on record to prove any one of the above ingredients.

35. The trial Court, on the point as to who mixed poison in the food of victim Gulnaz, made the following observation:

It is well settled law that the evidence of witness who are close relative to the complainant shall not be discarded only to the due to the reason that they are

close relative and they shall not be declared as interested witnesses as defense claimed in present case because though the complainant and witnesses are not eyewitness of mixing any poisoning thing in the food but at the same time these are witness of consequence happened to the victim and none of the family member from accused Zahir come forward to help them which clearly indicates involvement of accused Zahir in present case, hence, in my opinion prosecution has proved the involvement of accused Zahir Ali in commission of offence."

36. The trial Court, in the above quoted passage from the impugned Judgment, clearly holds that there is no eye witness who has seen any one mixing poison in the food of the victim Gulnaz. After such an emphatic finding how the trial court can hold that it is appellant who poisoned the victim Gulnaz. The impugned judgment is thus based on surmises and conjecture and result of misreading and nonreading of the evidence. It is correct that evidence of witnesses who are close relative to the complainant cannot be discarded only due to the reason that they are close relatives. However, in the instant case, even if the evidence adduced by the complainant and other prosecution witnesses is believed even then the appellant cannot be convicted of the offence of poisoning as none of the witnesses stated that he/she saw the appellant mixing poison / insecticide in the food of the victim Gulnaz. Nor any pot/bottle or thing containing or showing the existence of poison or insecticide /pesticide has ever been recovered from the scene of offence.

37. Dr. Fayyaz Ahmed in his statement stated that no male member of the family was resent at home at the time of his visit. While, PW-1 Complainant Sultan Ahmed Hajano stated that "all the family members of accused Zahir Ali were present in house including Razia, Bakhtawar, and two others.". He further states "It is correct that I have not seen personally present accused persons when we went to the house of accused Zahir Ali on the date of incident." However, PW-2 Mst. Gulnaz in her deposition stated "*more than 07 persons including Razia, Bakhtawar, Hira, Fiza, Daman Ali, Soman and my husband Zahir Ali were available at the house at the time of incident.*" Thus, there is contradiction between the evidence of PW-1 and PW-3 who state that appellant Zahir Ali was not present at home, while PW-2, stated that appellant Zahir Ali was present at home. If the evidence of PW-1 and PW-3 is believed than it cannot be asked as to why Zahir Ali did not accompany his wife to the hospital. The other explanation for such act on the part of Zahir Ali may be that he was angry with his wife for taking diazepam tablets and as such did not accompany him to hospital. However, this is not a circumstantial evidence to connect the appellant with the offence.

38. In order to convict and sentence an accused on the basis of circumstantial evidence it is essential that courts should deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon. In the present case it has already been proved that accused Fida Hussain and Mushtaque were falsely implicated in the offence. Thus, very minute and deep examination of the evidence produced by the prosecution is necessary to secure the ends of justice. The Prosecution has to establish

the case beyond all reasonable doubts, resting on circumstantial evidence and there is no duty cast on the accused to disprove the case of the prosecution. If the evidence produced by the prosecution is short of such standard, it is better to discard such evidence so that an innocent person might not be sent behind bars. To draw an inference of guilt from circumstantial evidence, the Court has to apply its judicial mind with extra care and caution. To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in the chain of circumstances in an unbroken sequence. The present case is of such a nature where many links are missing in the chain. Thus, it was not advisable to base conviction on such evidence. In this regard reference may be made to the fact that there is no evidence on record that any insecticide or poison was purchased by the appellant; there is no ocular evidence to link the appellant with poisoning the food of the victim Gulnaz.

39. Now, I will divert my attention to the chemical examiner's report regarding poison being found in the samples. Although it has come on record that initially the victim Mst. Gulnaz was provided first aid by Dr. Khadim Bhatti and later on she was examined by Dr. Farah Naz. While Dr. Farah Naz was examined as PW-4, Dr. Khadim Bhatti was not examined at all.

40. Dr. Farha Naz, in her examination in chief, stated that "On 08.09.2016 I was posted at RBUT civil hospital Shikarpur and I received letter from P.S. Stuart Ganj to examine Mst. Gulnaz and it was reported poison to her and I examined her on same day at 2315 hours. She was admitted in casualty and first aid was given to her and her stomach was washed. She was admitted into ward as was semi conscious I also secured samples on next day for laboratory examination including stomach sample, blood and urine and same were sent to laboratory Rohri and also received the report from Rohri." However, in her cross-examination, she stated that "It is correct that samples from vomiting was not secured. Vol. says I received four samples which I mentioned in my report. I received such samples from Dr. Khadim Bhatti as he has given first aid to her." This is a very crucial piece of evidence which was not considered by the trial Court at all. In her examination in chief, Dr. Farah Naz stated that the victim Gulnaz was admitted in casualty and was given first aid and her stomach was washed. Then she states "I also secured samples on next day for laboratory examination including stomach sample, blood and urine..." Thus, it is very clear that when the victim Gulnaz was brought to hospital she was given first aid and her stomach was washed and on the next day samples of her stomach, blood and urine were secured and were sent for laboratory examination. There is no explanation as to why the samples were taken on the next day and why the same were not taken on the day she was brought to hospital.

41. There is yet another twist in the story. In her cross examination, this very witness, i.e. Dr. Farah Naz, states that "I also secured samples on next day for laboratory examination." Then she states "It is correct that samples of vomiting was not secured." Thereafter, she voluntarily states "I received four samples which I mentioned in my

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report, I received such samples from Dr. Khadim Bhatti as he has given first aid." This contradiction completely shatters the utility of the chemical examiners report as it is shrouded in mystery as to who drew the samples and when. Whether the statement of Dr. Farah Naz that she secured the samples on the next day is correct or whether her statement that Dr. Khadim Hussain collected the samples on the first day is correct. This is major contradiction in the case of the prosecution. If the statement of Dr. Farah Naz to the effect that samples were collected on the next day is correct, then the delay in securing the samples will tarnish the credibility of the chemical examiner's report. If the samples were secured by Dr. Khadim Bhatti then why he was not examined by the prosecution and why the samples were not sent to chemical examiner on the same day. It is very doubtful that Dr. Khadim Bhatti, while administering first aid in the casualty ward would have secured the samples as in the Casualty emphasis is only on first aid and as soon as the patient's condition improves he is sent to ward or is discharged. Be that as it may, there is nothing clear and specific on record to show as to who collected the samples and when.

42. Apart from above contradiction with regard to the samples collected for laboratory examination, the chemical examiner's report itself leaves much to be desired. A glance at the report (Exh. 10/H at page 41 of the paper book), shows that four samples in four different bottles were sent to the chemical examiner marked A, B, C and D. The test report is as follows:

TEST PERFORMED

1. Insecticide group:	Positive
2. Chlorpromazine group.....	Negative
3. Amphetamine group.....	Negative
4. Mandrex.....	Negative
5. Diazepam.....	Negative

43. This report does not say in clear terms as to what chemical was found in the test. The term "Insecticide group" carries no significance. The chemical examiner should have stated what chemical was found in the samples and then it should have been ascertained that any insecticide available in the local market is based on such chemical ingredient and whether any such insecticide was brought by appellant to home. All these links in the chain are missing to connect the appellant with the alleged offence. Therefore, even the circumstantial evidence is also not in favour of the prosecution.

44. In the present case, the bone of contention was not whether victim Gulnaz has consumed some injurious substance like diazepam / insecticide or not. The important point for consideration, was as to how the injurious material found its way to the stomach of the victim Gulnaz. The victim Gulnaz stated in her deposition that the food for dinner was prepared by Mst. Bakhtawar and Mst. Hira, thus the appellant is not

responsible for preparation of contaminated food as per the deposition of the victim Gulnaz herself. It is not mentioned in the deposition of Mst. Gulnaz as to who brought the food which was taken by her in dinner. On the contrary, it is admitted by Mst. Gulnaz that "It is correct that I could not specify that which person had mixed the poisonous thing in dinner." Therefore, it can safely be held that the allegation that the appellant poisoned the food of the victim Gulnaz with intention to kill her has not been proved.

45. The trial Court while dealing with the argument of the defense counsel that complainant mala fide implicated the accused Zahir and other accused persons, held that it has no force because if, the complainant had any ill-will or mala fide he could have implicated all the family members of the accused Zahir. However, this finding is based on figment of imagination as no one would alleged that 10 or 15 persons mixed some drops of insecticide in her food.

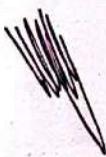
46. Even the trial Court itself did not believe the prosecution story in respect of the acquitted accused Mushtaque and Fida Hussain and acquitted them on the same set of evidence while the appellant was convicted. 'Rule of consistency as well propriety of law' demands that if an accused has been acquitted from the charge by disbelieving evidence of certain witness, other accused charged with similar allegations is also entitled to the same concession / treatment and the evidence of that particular witness cannot be made basis for convicting other accused. In this connection it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of Mohammad Asif Vs. The State reported in 2017 SCMR 486 wherein it was held as under:

"It is a trite rule 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."

47. 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."

48 Yet in another case reported as Mohammad 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, acquitted the accused.



(30)

49 In the present case, position is the same as on the same set of evidence co-accused Mushtaque and Fida Hussain were acquitted while the appellant was convicted and sentenced.

50 Trial court further observed that "evidence of victim and complainant is very much inspiring confidence and there is nothing adverse to discard their version, hence in my view the prosecution have proved the point No.1 against accused Zahir Ali." However, it has not been shown anywhere in the evidence of these two persons i.e. the victim and the complainant, that they have said that they saw the appellant mixing poison in the food of the victim. There is a vast difference between alleging something and proving the same. No one is to be convicted on the basis of allegation unless it is proved by cogent and unimpeachable evidence. Then it also needs clarification that when the evidence of these witnesses is confidence inspiring then why the other co-accused were acquitted on the basis of same evidence.

51 In view of the above grave illegalities, contradictions and misreading / nonreading of the evidence, the impugned judgment is not sustainable and is liable to be set aside.

52 Vide short order dated 04.02.2019, this appeal was allowed, the impugned judgment dated 22.2.2017 passed by III-Additional Judge, Shikarpur in Sessions Case No.620 of 2016 (State v. Zahir Ali and others) was set aside to the extent of the present appellant and the appellant was acquitted of the charge(s).

53 Above are the reasons for the short order dated 04.02.2019.

Let R&Ps of Sessions Case No.62/2016 re-The State Vs Zahir Ali & others be sent back to trial court alongwith copy of this judgment.

