JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Cr.Jail.Appeal.No.S- 402 of 2010

For hearing of MA 7448/2016.

Date of hearing: 08.06.2017.
Date of judgment: 08.06.2017.

Appellants: Anoopo and Nangar, both sons of Magho Bheel
Through Mr. Ghulam Abbas Dalwani, Advocate.

Respondent: The State
Through Mr. Shahid Ahmed Shaikh, A.P.G.

JUDGMENT

SALAHUDDIN PANHWAR, J: Through instant appeal, appellants have challenged the judgment dated 27.10.2010 passed by the learned 2nd Additional Sessions Judge, Badin in Sessions Case No.147 of 2009, emanating from crime No.63 of 2009 registered at P.S Pangrio for offences u/s 17(4) Offence against Property (Enforcement of Hudood) Ordinance, 1979 and Section 302 r/w Section 34 PPC.

2. Precisely, relevant facts of the case are that complainant alongwith deceased Din Muhammad were on the way to their village; on middle of the road they were waylaid by three persons, their faces were opened who were armed with hatchets. Two of them were identified as Anopo and Nangar; with intention to commit robbery they caused lathi injury as well accused Anopo caused sharp side blow of hatchet on the head of Din Muhammad and second blow on the right eye whereas

accused Nangar caught hold of Din Muhammad. Subsequently they escaped away. Appellants were arrested. In the identification parade accused Karo was identified.

3. Trial Court framed the charge against them and examined all PWs as produced by the prosecution who supported the version of the complainant.

4. In Section 342 Cr.P.C. statement accused persons professed their innocence and claimed that they have been implicated due to enmity with their Zamindar.

5. At the outset learned counsel for the appellants contends that although at the first instance witnesses have stated before the Investigation Officer that while committing the robbery accused persons committed murder but during their examination in chief specifically not stated any single word about the robbery and such fact is also stamped by the trial court. He further contends that the benefit of doubt is a golden role and even any single doubt shall come in favour of the accused. He further contended that accused Karo was acquitted by the trial court as none deposed against him with regard to specific role though he was identified in the identification parade. He has also contended that appellants have been involved in this case falsely due to enmity by their Zamindar. He relies upon the cases reported as 2008 SCMR 707, 2005 P.Cr.L.J 1135, 2013 YLR 1619, 2016 P.Cr.L.J 549, 2006 MLD 1301, PLD 2008 Islamabad 21 and 2013 YLR 1527.

6. In contra learned A.P.G. contends that there are no material contradictions and the minor contradictions grasped by the passage of time and the court is required to shift the grain from chuff. Defence counsel has failed to cause any dent in the prosecution case and all links are established by the prosecution. He further contends that role of Nangar is catching hold of the deceased. He further admits that during evidence specific plea of robbery has not been substantiated.

7. At this juncture, it would be conducive to state that the death of deceased is un-natural and caused by the sharp cutting weapon which is not disputed hence the prosecution claim to extent of death of deceased, having been *un-natural* and in consequence of sharp-cutting weapon, is not open to an *exception* and so was rightly opined by trial court as '**affirmative'**.

8. It is also a matter of *record* that out of three sent-up accused persons, including the present appellants, one namely **Karo** was acquitted by the learned trial Court. I am quite conscious that principle of *falsus in uno falsus in omnibus* is no more applicable rather developed prevailing circumstances have made the Courts to follow the principle of ***sifting of grain out of chaff.*** Worth to add here that difference between these two *principles* is that in *former* the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting while in later the Court while *sifting the grain from chuff* seeks independent corroboration on material particulars while departing from a *normal* principle of law. The reference may be made to the case of <u>*Iftikhar Hussain v. State*</u> 2004 SCMR 1185 wherein it is explained as:

> "It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e sifting of grain out of chaff i.e if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz

alias Sappi and 2 others v. The State 2000 SCMR 1758, relevant para therefrom is reproduced hereinbelow thus:-

> *'The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition.* ***Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case.*** *This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that* **the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning that to find out credible evidence principle of appreciation of evidence** *i.s sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others …..*

Now, I would take up the *ocular* account from impugned *judgment* of trial court so as to see whether it is same set of evidence against all accused persons i.e present appellants and acquitted accused Karo or *otherwise.*

Complainant Noor Muhammad

It has been deposed by complainant in his examination in chief that this incident took place on 28.05.2009. on the day of incident he along with Mooso went to Pangrio town from our village on motorcycle. In the evening time at about 6.15 p.m Din Muhammad and Alam also left Pangrio for village. After then they were going on motorcycle towards their village through Pangrio-Naoon-Kot road. The complainant has deposed that at about 6.30 p.m they reached near the lands of Mir Muhammad Bukhsh, they heard the cries of Din Muhammad and Alam. When they reached near to them, they saw motorcycle was lying on road. It has been deposed by complainant that **accused**

Nangar had captured Din Muhammad while Anoopo was causing hatchet injuries to him. Accused Karo caused lathis blows to Alam. Thereafter accused ran away. ……

PW Muhammad Alam

"on the day of incident he along with Din Muhammad went to Pangrio town on motorcycle. After finishing their work in Pangrio town they left Pangrio at a about 6.15 p.m on motorcycle for their village. Mooso and Noor Muhammad were coming behind them on motorcycle. He has deposed that at 6.30 p.m they reached near Mir-Jee-Otak on Pangrio-Naoon-Kot road where they saw that one person emerged from jungle at the road and on seeing them against went inside the jungle. They reached at that place, all of sudden three persons came in-front of them. They identified them as **Anoopo, Nangar and Karo**. He has deposed that Karo gave lathi in front of their motorcycle on which Din Muhammad put break to the motorcycle which stopped and fell down. **Din Muhammad after placing his feet on the ground stood up and grappled with Nangar**. He has deposed that he also fell down on which **Karo gave him lathi blows to his back**. It has further been deposed by this witness that in the meantime, Mooso and Noor Muhammad also reached there. Thereafter **accused Anoopo caused harp sided hatchet blow to Din Muhammad** on his head who fell down. Thereafter accused ran away…

PW Mooso

"He stated that this incident took place on 28.05.2009 on that date he along with Noor Muhammad on return to their village on one motorcycle while Din Muhammad and lama were also going on motorcycle towards their village who were ahead of them. At about 6.30 p.m they reached near the lands of Mir Muhammad Bukhsh where they heard the cries of Alam and Din Muhammad. They reached near to them and saw accused **Karo was causing lathi blows to**

Alam. Nangar was catching hold of din Muhammad while accused

> **<u>Anoopo was causing hatchet injuries on his head</u>**. On their reaching accused left them and ran away…..

From above underlined portion of *ocular* account, it is evident that set of evidence is one and same whereby all accused persons were not only *claimed* to have been identified but were also given some role (s) *however* role of causing sharp-side hatchet injuries has been confined against the appellant Anoopo. Therefore, case against the appellant Nangar and Karo was almost *similar* hence Safe Administration of Justice always demands benefit of same *doubt* to appellant Nangar as was given to acquitted accused Karo and reasoning of later introduction of Karo through *identification parade* was not of much importance particularly when while deposing in Court all witnesses categorically had named all *three*. The trial Court had no *exception* to settled principle of law that while believing same set of evidence for *one* and disbelieving for *other* the view must be corroborated through independent *evidences.* Reference may be made to the case of <u>*Sughra Begum v. Qaiser Pervez*</u> 2015 SCMR 1142 wherein it is held as:

> 23. After the acquittal of Muhammad Ilyass co-accused, to whom same and similar role was attributed like the appellant and because some of the crime empties did not match with the pistol attributed to the appellant but he was given benefit of doubt along with Babu Muhammad Javed, the latter being a moving spirit behind the whole tragedy then how, in the absence of strong corroboratory evidence, the appellant could be convicted on the same quality of evidence, which was disbelieved qua the co-accused. In this regard this court in the case of ***<u>Ghulam Sikander v. Mamraz Khan (PLD 1985 SC 11)</u>*** , has laid down a guiding principle to the effect that when case of the convict is not distinguishable from that of the acquitted accused and the evidence is indivisible in nature then in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made or conviction qua the convict. This rule of law has been followed since long without any exception.

The above referred *ocular* would leave nothing ambiguous that it were PW-Alam and deceased who were waylaid by the *culprits* and complainant and PW Moosa had reached *later* at place of *incident* hence words of PW-Alam were always of *material* importance. The PW-Alam had deposed that *Karo gave lathi in front of their motorcycle on which Din Muhammad put break to the motorcycle which stopped and fell down.* ***Din Muhammad after placing his feet on the ground stood up and grappled with Nangar*** . This means that it was never *safe* to conclude that it was the present appellant Nangar who had caught deceased Din Muhammad for facilitating appellant Anoopo to kill therefore, appellant Nangar was / is also entitled for same benefit as was extended in favour of acquitted accused Karo who allegedly had used *lathi* while no such allegation is leveled against the appellant Nangar. Further, it is also a matter of record that no **'motive'** was *safely* established by prosecution in the instant case because prosecution did not stick with claim of *robbery*. Even otherwise, it does not stand to reasons and logic that the accused persons, being already known to *victims,* would dare to rob them without making an attempt to conceal their identity. Further, since it is a matter of record that witnesses of *ocular* account never alleged that appellant Nangar was armed with lathi hence recovery of the *lathi*, as claimed by the prosecution, during investigation, was / is of no legal value nor could help to satisfy the requirement of *strong independent* corroboration. In absence whereof the appellant Nangar cannot be acquitted on same set of evidence when same set of evidence has already resulted into *unchallenged* acquittal of accused Karo.

There is another aspect of the case which was not appreciated by learned trial Court Judge while *sifting the grain from chuff.* It is also not *disputed* that witnesses of *ocular* account did not depose a single word with regard to *robbery* nor they *pleaded* any other motive for *murder* hence this case prima facie was / is

without any established *motive.* Thus, in such eventuality the prosecution was *first* required to establish the *common intention/object* of all accused persons before insisting sustaining of conviction against both the appellants. Reference may be made to the case of *Muhammad Altaf v. State* 2002 SCMR 189 wherein it is held as:

> 9. In the light of the arguments addressed and in view of the factual aspect of the case it is proper and necessary to first determine whether in the circumstances of this case the prosecution has been able to prove the ingredients of section 149 P.P.C, and its application to the facts of the case. As this section stands, its ingredients have to be established by the prosecution. **The liability of each accused involved in a case can only be fixed if the common object of the assembly is first ascertained.** In this case the motive which allegedly prompted the accused to launch their attack was a dispute between the deceased Ghulam Murtaza and P.W Asghar Ali on one hand and accused Mujahid Nawaz on the other over the pigeons.
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> The word 'knew' occurring in the second part of section 149 PPC requires that this must be proved by tangible and sufficient evidence and not from conjectures and speculations that the offence was committed in prosecution of the common object of the assembly. It would, therefore, not be sufficient to show that the accused ought to have known or might have known and that they had reason to believe that the common object of the unlawful assembly was to commit murder. In this back ground it is not just and proper to hold that to avenge a trivial and insignificant incident over pigeon, the grand-father, their son and their grand son would form an unlawful assembly with the only object to commit murder. Therefore, in these circumstances section 149 PPC cannot be made applicable and so every accused would be liable to punishment for the act committed by him during the attack.

The allegation of *robbery* was not insisted by prosecution during course of trial and when as per most *natural* witness of occurrence (PW Alam, who was allegedly riding with deceased Din Muhammad on a single motorcycle) it was not the appellant Nangar but deceased Din Muhammad who had grappled with him hence in such *eventuality* the prosecution was required to bring some thing *more* strong against appellant Nangar to hold him liable for act of appellant Anoopo

which is *prima facie* lacking. Further, the present appellant was not *categorically* alleged during *trial* to be armed with any lethal weapon and even allegation of being armed with *lath* was not seriously pressed during trial. It would also not safe to conclude that an *unarmed* person even if had joined two persons, armed with lath and hatchet, knew happening of *murder* in case of resistance hence application of *common intention* cannot be seriously pressed in such like case. Thus, I would conclude that it was / is not safe to hold the appellant Nangar guilty of act of appellant Anoopo.

Reverting to the case of appellant Anoopo, the *ocular* account has left nothing to doubt that all the witnesses *categorically* deposed that it was the appellant Anoopo who had caused sharp-side hatchet injuries to *deceased* Din Muhammad which also stood affirmed from medical evidence. There is also recovery of hatchet on pointation of the appellant Anoopo which is legally admissible in law with reference to Article 40 of Qanun-e-Shahadat Order, 1984. Therefore, the case against the appellant Anoopo was / is *divisible* from that of other accused persons hence acquittal of co-accused Karo and even *failure* of prosecution to establish case against appellant Nangar through *other* corroborative evidence would not prejudice the case of prosecution against the appellant Anoopo. Reference may be made to the case of <u>*Muhammad Raheel @ Shafique v. State*</u> PLD 2015 SC 145 wherein it is held as:

> '….and , thus, their acquittal may not by itself be sufficient to cast a cloud of doubt upon the veracity of the prosecution's case against the appellant who was attributed the fatal injuries to both the deceased. Apart from that the principle of *falsus in uno falsus in omnibus* is not applicable in this country on account of various judgments rendered by this Court in the past and for this reason too acquittal of the five co-accused of the appellant has not been found by us to be having any bearing upon the case against the appellant.

Accordingly, the appellant Nangar is acquitted of the charge. He is in custody and shall be released forthwith if not required in some other case. Whereas appeal of appellant Anoopo is hereby dismissed being without merits.

Appeal stands disposed of in the above terms.

JUDGE

Tufail