

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Present:

MR. JUSTICE NAIMATULLAH PHULPOTO
MR. JUSTICE SHAMSUDDIN ABBASI

Cr. Appeal No.D-258 of 2012
Confirmation Case No.D-13 of 2012

Date of hearing: 26.04.2018.
Date of Announcement of Judgment: 22.05.2018

Appellant : Bux Ali alias Dodo.
Through M/s Muhammad Yousuf Laghari and
Muhammad Hashim Laghari, Advocates.

Complainant: Wali Muhammad
Through Mr. Muzafar Ali Laghari, Advocate.

Respondent: Shahzado Salim Nahyoon, D.P.G.

J U D G M E N T

SHAMSUDDIN ABBASI, J: Appellant Bux Ali alias Dodo has assailed the judgment dated 25.08.2012, passed by learned Sessions Judge, Umerkot in Sessions Case No.99 of 2009 (Re: State Versus Bux Ali alias Dodo and others) arising out of Crime No.24 of 2009 u/s. 302 PPC of P.S Boder Farm, whereby the appellant was convicted u/s. 302(b) PPC and sentenced to death as Tazir to be hanged by neck till death and to pay compensation of Rs.2,00,000/- to be paid to the legal heirs of deceased as provided u/s. 544-A, Cr.P.C and in case of default in payment, the accused was ordered to further undergo R.I for one year. Learned trial court has also made a reference for confirmation of death sentence in compliance of Section 374, Cr.P.C.

2. The brief facts of the prosecution case are that on 03.10.2009 at 11:45 p.m. complainant Wali Muhammad appeared at Police Station

Boder Farm and lodged complaint alleging therein that on 03.10.2009 he was coming towards his village. At about 07 p.m. Bux Ali armed with double barrel gun came on motorcycle behind him and stopped his motorcycle beside complainant and alighted from the motorcycle and caught him hold from his neck and used filthy language by laying him on ground and gave kicks and fists blows to complainant. He saved himself by requesting; on that accused went away. Complainant came to the Otaq of Lal Muhammad Nukhrich situated in village Sohrab Nukhrich where his son Sehatio, Mir Muhammad and Kanbhoo were present to whom he narrated the facts of the incident. It is further alleged that at about 07:30 p.m. Bux Ali Nukhrich came back on motorcycle being armed with gun and gave call from the street to complainant party. They came out in the street where accused Bux Ali Nukhrich was available on his motorcycle. Son of complainant namely Sehatio, Mir Hassan and Kanbhoo proceeded towards Bux Ali. Complainant also went behind them. In the meanwhile, it is alleged that accused Bux Ali made straight firing from his gun on Sehatio (son of complainant), which hit on his chest and he fell down on the ground while raising cries. Thereafter, Bux Ali Nukhrich drove away on his motorcycle. Sehatio succumbed to the injuries at the spot. Thereafter, complainant went to Police Station where he lodged F.I.R. against accused being Crime No.24/2009 u/s. 302 PPC.

3. After registration of F.I.R. police started investigation. Police could not arrest accused during investigation. After usual investigation challan was submitted showing the accused Bux Ali as absconder. Trial court after receiving challan declared the accused Bux Ali as proclaimed offender and case was ordered to be proceeded u/s. 512, Cr.P.C. Thereafter, the prosecution examined P.W-1 complainant Wali

Muhammad at Ex.3, who produced F.I.R. at Ex.4, P.W-2 Mir Hassan examined at Ex.5, P.W-3 Kanbhoo examined at Ex.6, P.W-4 Syed Javed Hussain Shah (Tapedar) examined at Ex.7, who produced Sketch of place of incident at Ex.7/A to 7/D and P.W-5 Dr. Chehno Mal (Medical Officer) examined at Ex.8, who produced letter of police, form of inspection of dead body and postmortem report at Ex.9 to 11.

4. During proceeding, the accused Bux Ali was arrested on 03.03.2010 and learned trial court after receiving supplementary challan framed charge against accused at Ex.13, to which accused pleaded not guilty and claimed to be tried. Thereafter, learned advocate for accused had moved an application for re-examination of P.Ws at Ex.15 and on the same day learned trial court allowed the application and P.Ws who were earlier examined were re-called. Learned Counsel for accused Bux Ali had also moved an application u/s. 465, Cr.P.C regarding medical examination and treatment of accused Ali Bux on the ground that accused was suffering from mental disorder. Learned trial court had referred the accused to Sir CJ Institute of Psychiatry Hyderabad for examination and report. Learned trial court had received report issued by Dr. Jamal Junejo Psychiatrist Incharge Forensic Psychiatry Ward Sir, C.J Institute of Psychiatry Hyderabad dated 05.11.2010, which revealed that the accused was capable to understand the Court proceeding. But, we have examined the report issued by Dr. Jamil Junejo, which reveals that *"during his stay in this Institute his medical history and mental status examination reveals that, he is suffering from MAJIR DEPERASSIVE DISORDER, his illness is treatmentable and manageable. At present he is capable to understand the proceedings of the Honourable Court, he may be shifted back from this Institute to Central Prison Hyderabad with following advised treatment.*

-	<i>Tab: Estar.....10 mg.....</i>	<i>0+0+1</i>
-	<i>Tab: Rivotril..... 0.5 mg.</i>	<i>0+0+1”</i>

After receiving such report, learned trial court had examined P.W-1 Wali Muhammad at Ex.17, PW-2 Mir Hassan at Ex.18, P.W-3 Kanbhoo at Ex.19, P.W-4 Syed Javed Hussain at Ex.20, P.W-5 Dr. Chehno Mal at Ex.21, P.W-6 Vahiyoan at Ex.22, P.W-7 ASI Muhammad Ramzan at Ex.25. Thereafter, prosecution had closed its side.

5. The prosecution had moved an application u/s. 540, Cr.P.C for recalling P.Ws SIP Khuda Bux Mangrio (first I.O of the case), SIP Muhammad Azeem Alyani (second I.O of the case) and P.C Abdul Sattar (first mashir of arrest of accused Bux Ali alias Dodo. Learned trial court vide order dated 11.07.2011 had allowed said application and recalled the P.Ws SIP Khuda Bux, H.C Abdul Sattar and SIP Muhammad Azeem. Thereafter, again prosecution had closed its side.

6. Trial court had recorded the statement of accused Bux Ali alias Dodo under sections 342, Cr.P.C, in accused denied all the allegations and pleaded his innocence. However, he neither had examined himself on oath nor led any evidence in his defence.

7. After hearing the parties and assessment of the evidence, learned trial court had convicted and sentenced the accused Bux Ali alias Dodo as stated above.

8. Learned Counsel for Appellant contended that all the P.Ws were interested, set up and inimical to accused. He further contended that the incident had taken place in the dark hours of night but prosecution witnesses have not disclosed source of identification. He further contended that there was delay of 4 hours in lodging the F.I.R. and no plausible explanation has been furnished for this inordinate delay. He

further contended that it is a case of prosecution that in the F.I.R. motive has been disclosed that due to exchange of harsh words and beating to complainant, accused had killed his son, whereas, during recording of evidence prosecution witnesses have deviated from this version and disclosed that accused had demanded bhatta from the complainant. He further contended that motive has not been established by the prosecution at trial. He contended that gun has been foisted upon the accused Bux Ali alias Dodo and separate case has been registered by police wherein the learned Magistrate had acquitted the accused Bux Ali from the charge of recovery of gun from his possession. He further contended that there was delay in dispatching the gun and prosecution has not established its case in respect of safe custody of recovered gun. Neither prosecution had produced any entry of Malkhana nor examined the person who deposited the gun to the office of Ballistic Expert / Chemical Examiner after one month of its recovery. He further contended that it is a case of prosecution that motive of accused was against the complainant and he met with the complainant and had beaten the complainant and at that time he was armed with gun why he did not use the gun when the complainant met with accused alone outside the village and there was no justification that accused after beating the complainant again went at the village of complainant party and killed the son of complainant with whom he had no motive for killing. He further contended that there is inconsistency between the ocular version and medical evidence as according to the postmortem report deceased had expired about 5/6 hours prior to postmortem and postmortem was started on 04.10.2009 at 03:00 a.m and as per the postmortem report time between death and postmortem was 6 to 8 hours. He further contended that pellets were recovered from the dead

body but the same were not sent to Forensic Expert. He further contended that complainant was sitting in the Otaq of Lal Muhammad Nukhrich when accused came at the place of incident and called the complainant party but prosecution had not examined said Lal Muhammad Nukhrich. He further contended that the complainant stated that accused prior to the incident had beaten him by giving kicks and fists blows but the complainant had not lodged any F.I.R. or N.C report against the accused regarding such incident even he was not examined by doctor in order to ascertain the injuries sustained by him. He further contended that no empties were recovered from the place of incident. He further contended that statements u/s. 161, Cr.P.C of P.Ws were recording after a delay of 10 days. He also contended that no case property was produced during evidence. He further contended that one of the P.Ws had admitted this fact that at the time of incident it was darkness. He further contended that trial court has not considered the contradictions, discrepancies and lacunas in prosecution case and conviction awarded by the learned trial court is result of misreading or non-reading of evidence. In support of his contentions, learned Counsel for the Appellant has relied upon the cases of (1) MURAD ALI and another vs. THE STATE (2011 P.Cr.L.J 1133), (2) SHAHBAZ vs. The STATE (2015 MLD 1061), (3) ULFAT HUSAIN vs. The STATE (2018 SCMR 313), (4) INAYATULLAH and another vs. The STATE and 2 others (2016 YLR 2020), (5) ASHIQ HUSSAIN vs. The STATE and others (2014 YLR 2554), (6) AKMAL VS. The STATE and others (2017 YLR 1138), (7) ZAFAR vs. The STATE and others (2018 SCMR 326), (8) MEHMOOD AHMED and 3 others vs. THE STATE and another (1995 SCMR 127), (9) SAJJAD AHMED vs. The STATE and 3 others (2015 P.Cr.L.J 585), (10) MUHAMMAD ARIF vs. The STATE (2013

MLD 1743), (11) REHMATULLAH vs. MUHAMMAD IQBAL and others (2006 SCMR 1517), (12) MUHAMMAD SALEEM and another vs. THE STATE (2012 YLR 812), (13) ARSHAD HUSSAIN alias ARSHI vs. The STATE (2015 MLD 431), (14) ABDUL HADI vs. WALI MUHAMMAD and 3 others (2000 YLR 509), (15) ALI MUHAMMAD vs. THE STATE (1995 MLD 1407), (16) CHAKAR JAFFARI and 2 others vs. THE STATE (2011 MLD 524), (17) MUDASSAR HANIF vs. The STATE (2016 MLD 502), and (18) NAWAZ and 4 others vs. THE STATE (2002 P.Cr.L.J 915).

9. On the other hand, learned counsel for complainant contended that the appellant has been nominated in the F.I.R. with specific role that he was armed with gun and fired at deceased. He further contended that the ocular testimony was corroborated by medical evidence as well as evidence of recovery of gun and circumstantial evidence. He further contended that it was sunset time and both parties are residing in the same vicinity, therefore, question of mistaken identity did not arise. He further contended that the accused was involved in several criminal cases and was previously convict in a murder case even the present accused had killed his own brother on the issue of Karap. He further contended that mere relationship between the P.Ws is no ground to discard their evidence. He next contended that all the P.Ws have fully supported the case of prosecution. The complainant has well explained the delay in lodging the F.I.R. as distance between place of incident and Police Station is 18 kilometers, which is far away from the place of incident. He further contended that the accused did not join investigation and was declared proclaimed offender, which itself showed the intention of accused. He further contended that the incident had taken place in the street in front of houses of complainant party so they are natural

eye-witnesses of the incident and finally he prayed for dismissal of appeal.

10. Learned Deputy Prosecutor General Sindh contended that the delay has been well explained and no question of source of identification arose as the incident had taken place at 07:30 p.m which was sunset time in the month of March and both the parties are residing in same vicinity and well-known to each other. He further contended that there is single accused and single fire has been attributed to accused, which was supported by medical evidence and prosecution has established its case on the point of circumstantial evidence as well as on the point of Chemical Examiner report.

11. However, D.P.G admitted this fact that the prosecution had failed to prove motive against appellant at trial and further stated that motive shrouded in mystery, however, he supported the judgment passed by the learned trial court.

12. We have heard learned Counsel for the parties and scanned the prosecution evidence. We have examined the evidence of P.W-1 Wali Muhammad, who is complainant of the case and father of deceased Sehatio. He has stated that on the day of incident it was about 07:00 p.m. when he was coming from village Mureed Khan Nukhrich to his village Sohrab Nukhrich and when he reached at Katcha Rasti near his village, accused Bux Ali alias Dodo came behind him on motorcycle armed with double barrel gun and abused and wanted to kill him. Complainant requested him not to kill him, on this accused Ali Bux returned back. Thereafter, complainant reached at the Otaq of Lal Muhammad Nukhrich situated in his village where he met with his son Sehatio, brother in law Kanbhoo and Mir Hassan, son of his brother-in-

law, to whom he narrated the facts of the incident. After about 20 minutes when they were sitting in the Otaq, accused Bux Ali came outside the Otaq and called him, on that son of complainant namely Sehatio, Kanbhoo and Mir Hassan went outside the Otaq and within their sight accused Bux Ali alias Dodo fired gunshot upon his son Sehatio which hit him and he died at the spot. On the fire shot son of complainant namely Iqbal, Vahiyoan and other villagers attracted at the scene of offence. He further stated that leaving the P.Ws over the dead body of the deceased, he went to P.S Boder Farm wherefrom he brought the police headed by ASI Muhammad Ramzan Khaskheli at the place of incident. Police inspected the scene of offence and secured blood stained earth and shifted the dead body to District Headquarter Hospital Umerkot for postmortem. Thereafter, again complainant went to Police Station Boder Farm where he lodged the F.I.R. of the incident. He was cross examined at length by the defence Counsel. During cross examination he stated that accused gave him kicks and fists blows when he was on the way to his village near Katcha Rasti. He further stated in his cross-examination that motorcycle of the accused was CD-70 Company black coloured but he did not know its registration number. He further stated that while reaching at the Otaq of Lal Muhammad about 20 minutes were consumed. He further admitted the relation with P.Ws and stated that P.W Kanbhoo has agricultural land while P.W Mir Hassan is working as Primary School Teacher in Government Primary School. He further stated that at the time of incident it was sunset time and accused had fired two shots from his gun on his son deceased Sehatio. He further stated that SIP Khuda Bux Mangrio was accompanied with ASI Muhammad Ramzan while inspecting the scene of offence. He denied in his cross-examination that there was ill-will

between his son Sehatio and Iqbal (son of complainant). He further denied that deceased Sehatio had illicit terms with the wife of his son Iqbal and Iqbal forced his son Sehatio to leave his house and reside at Umerkot. He further denied the suggestion that on the day of incident Sehatio returned to his village and Iqbal had committed his murder. He further denied that there was dispute in between Lal Muhammad and accused Bux Ali alias Dodo over the payment of money and at the instance of Lal Muhammad he had implicated accused Bux Ali alias Dodo in order to save Iqbal and got punishment to accused Bux Ali alias Dodo at the instance of Nasrullah and Lal Muhammad Nukhrich.

13. We have also examined the evidence of P.W-2 Mir Hassan who also admitted the relation with complainant. He further stated that on the day of incident he alongwith deceased Sehatio and P.W Kanbhoo was sitting in Otaq of Lal Muhammad situated in village Sohrab Nukhrich when complainant Wali Muhammad came at the Otaq and disclosed that while returning from village Mureed Nukhrich when he reached at Katcha Rasti of village Sohrab Nukhrich, accused Bux Ali alias Dodo had come on motorcycle and caused kicks and fists blows to him and on his request the accused allowed him to go to village. Soon after that he heard that a person made call to P.W Wali Muhammad outside of the Otaq, on this he alongwith Sehatio and P.W Kanbhoo came out from the Otaq and saw that accused Bux Ali alias Dodo fired from his gun at Sehatio which hit on his chest and resultantly he fell down on the ground and died on the spot. P.W Kanbhoo brought the cot at the place of occurrence and he kept the dead body of deceased on it. On hearing of fire arm shots, Iqbal, the son of complainant, and Vahiyoan, brother of complainant, came there. He further stated that they left Iqbal and Vahiyoan over the dead body of deceased. He alongwith complainant

and P.W Kanbhoo went to Police Station Boder Farm for lodging of the report wherefrom they brought SIP Khuda Bux Mangrio and ASI Muhammad Ramzan and other police officials at the scene of occurrence where police inspected the scene of occurrence and secured blood stand earth. Police inspected the dead body of the deceased. Thereafter, they shifted the dead body to District Headquarter Hospital Umerkot for postmortem. He further stated that it was 02:30 a.m. (04.10.2009) when they had brought the dead body of deceased to their village and buried the dead body. He further stated that police had recorded their statements on 14.10.2009. He was also cross examined at length and he stated that accused came at the scene of offence on black coloured motorcycle. He further stated that soon after when they came out from the Otaq, accused Bux Ali alias Dodo fired gunshot upon Sehatio.

14. P.W-3 Kanbhoo has also admitted relation with complainant. He has deposed that it was 07:30 p.m. when he alongwith deceased Sehatio, complainant Wali Muhammad and P.W Mir Hassan were sitting in the Otaq of Lal Muhammad Nukhrich situated in village Sohrab Nukhrich, Taluka Samaro. At that time, P.W Wali Muhammad came at the Otaq and disclosed to them that when he was returning from village Mureed Nukhrich and reached at Katchi Rasti of village Sohrab Nukhrich where accused Bux Ali alias Dodo came on motorcycle and caused kicks and fists blows to him. After about 10 to 15 minutes accused Bux Ali alias Dodo made call to P.W Wali Muhammad from the street of his house, on that all of them four left the Otaq and went there and within their sight accused Bux Ali alias Dodo fired gunshot from his gun upon Sehatio which hit on his chest with the result he died at the spot. He further stated that he, complainant and Mir Hassan left P.Ws

Iqbal and Vahiyoan over the dead body of deceased Sehatio and went to Police Station Boder Farm for lodgment of F.I.R against accused wherefrom they brought police. Police inspected the scene of offence and secured blood stained earth. P.Ws Iqbal and Vahiyoan took the dead body of the deceased to District Headquarter Hospital Umerkot for postmortem examination and on the same night at about 11:15 p.m they brought the dead body of deceased Sehatio in their village and buried it. He further stated that after 10 days of incident his statement u/s. 161, Cr.P.C was recorded by the police.

15. P.W-5 Dr. Chehno Mal deposed that on 04.10.2009 at about 02:30 a.m he received the dead body of deceased Sehatio through P.C Ali Nawaz. Thereafter, he conducted postmortem and found following injuries:-

“INJURES:- (i) A bunch of fire arm injuries of entry below right clavicle directed towards left side of chest rupturing major blood vessels (2) Multiple fire arm injuries of entry on left side of chest wall and right shoulder joint directed towards left side (3) Multiple linear horizontal abrasion of fire arm on front of upper chest wall. Profuse bleeding all injuries. No wound of exit seen. Two pellets are taken out, rest of pellets lying inside body cavity. Weapons used most probably shot gun. Fired from far distance (more than 10 feet).

HEAD:- Not opened.

NECK:- Healthy.

THORAX :- right and left Lungs ruptured full of blood, heart healthy, major blood vessels healthy, Ribs intact and healthy.

ABDOMEN:- liver, spleen and both kidneys healthy. Small intestine contains semi digest food particles, large intestine contains faeces. Urinary bladder empty.

SPINE AND SPINAR CARD:- Intact and healthy.”

He had given final opinion, which is reproduced as under:-

“OPINION:- From external as well as internal post mortem examination of deceased Seehntio, I am of the opinion that the cause of death is cardio- respiratory fracture due to hemorrhage and shock which caused by fire arm injuries at chest and major

blood vessels (Aorta blood vessels). Injury to major blood vessel is sufficient enough to cause death.

Learned counsel for accused had put a questions to this witness which were replied as under:-

“It is incorrect to suggest that these two articles were not the pellets but the same were bullets. It is incorrect to suggest that fires were made from the distance of 5 to 6 feet. It is incorrect to suggest that at the time of performing postmortem blackening and tattooing were found on the body of the deceased.”

In cross examination integrity and efficiency of Medical Officer were not questioned. As such, we hold that deceased died due to firearm injury as described by Medical Officer.

16. We have also examined the evidence of P.W-6 Vahiyoan, who has acted as mashir of the case. He has stated that on 04.10.2009 SIO-ASI Muhammad Ramzan Khaskheli of Police Station Boder Farm made him and Iqbal (the son of complainant) to act as mashir of inspection of scene of offence i.e. uncultivated agricultural land of his paternal uncle Muhammad Uris on the pointation of complainant Wali Muhammad. He further stated that it was 12:30 midnight the said Police Officer inspected the place of incident as well as dead body of the deceased in his presence wherefrom police secured blood stained earth and sealed the same in a parcel. He further stated that after conducting postmortem the blood stained clothes were also secured by police and such memo was prepared.

17. We have also examined the evidence of P.W-7 ASI Muhammad Ramzan, who stated that on 03.10.2009 he was posted as ASI at Police Station Boder Farm and at 11:45 p.m he received F.I.R. No.24/2009, u/s. 302 PPC from SIP Khuda Bux Mangrio, S.H.O P.S Boder Farm lodged by complainant Wali Muhammad against accused Bux Ali alias Dodo for investigation. After receiving copy of F.I.R., he left Police Station to the place of occurrence and on 04.10.2009 at 12:30 a.m he

reached at the place of incident and prepared mashirnama of inspection of place of occurrence where he found wheel marks of motorcycle. He secured blood stained earth and sealed the same in the parcel. He prepared inspection form of dead body and inquest report in presence of mashirs. Thereafter, he shifted the dead body of the deceased to District Headquarter Hospital, Umerkot for postmortem through P.C Ali Nawaz. He has also written a letter to Mukhtiarkar Revenue, Samaro to depute a Tapedar to inspect and prepare the sketch of place of occurrence. He also received clothes of deceased through P.C Ali Nawaz and sealed the same. He recorded the statements of P.Ws u/s. 161, Cr.P.C. He sent the blood stained earth and clothes of deceased to Chemical Examiner for examination and report on 27.10.2009. Thereafter, he had submitted challan of the case u/s. 512, Cr.P.C before the competent court of law showing the accused as absconder. He has produced report of Chemical Examiner regarding blood stained earth and clothes of deceased, which was found positive by the Chemical Examiner.

18. We have also examined the evidence of P.W SIP Khuda Bux, who recorded the F.I.R. of complainant. He produced roznamcha entry No.8 regarding departure from Police Station. He stated that the accused Bux Ali was arrested near village Faiz Muhammad Nukhrich alongwith double barrel gun and 18 live cartridges were also secured from the possession of accused. The gun was loaded with two live cartridges. Over all 20 cartridges were recovered. On inquiry, accused disclosed that gun was unlicensed. Police also recovered motorcycle from the possession of accused, which was used in the commission of crime. Due to non availability of private mashirs SIP Khuda Bux made the mashir of recovery and arrest to SIP Muhammad Azeem and PC Darya Khan and prepared such mashirnama in their presence. It has come on

the record through SIP Khuda Bux that accused was involved in Crime No.01/2007 u/s. 302 PPC registered at P.S Boder Farm and accused was also involved in 13 other criminal cases and he was also absconder in those cases. In reply to the question, this P.W SIP Khuda Bux stated that *"It is incorrect to suggest that I had lodged 13 F.I.R. against accused person"*. Though he was cross-examined at length but nothing came on record in favour of accused.

19. P.W-9 HC Abdul Sattar was cited as mashir of arrest and recovery of gun from the possession of accused Bux Ali and he has also stated in the same line as stated by SIP Khuda Bux.

20. SIP Muhammad Azeem was cited as mashir of recovery and arrest. He also stated in the same line as stated by SIP Khuda Bux that on 03.03.2010 S.H.O /SIP Khuda Bux Mangrio had arrested accused Bux Ali alias Dodo in his presence and recovered double barrel gun, live cartridges and motorcycle from the possession of accused Bux Ali. He has further stated that S.H.O had brought the case property and accused at P.S and registered separate F.I.R. against accused and conducted proceedings u/s. 550, Cr.P.C as accused failed to produce the documents of recovered motorcycle. He further stated that he interrogated the accused and recorded his statement. Accused was also required in another murder case bearing F.I.R. No.01/2007 U/s. 302 PPC of P.S Boder Farm. He further stated that he had submitted supplementary chalan of accused Bux Ali in the court of law and sent the gun to Forensic Laboratory for examination and report. He also produced Ballistic Expert Report of 12 bore DBBL short gun recovered from the possession of accused and received the same as positive and such report was produced in his evidence before the trial court.

21. We have also examined the statement of accused Bux Ali wherein questions regarding all incriminating pieces of evidence were put by the learned trial court to the accused but accused neither examined himself on oath nor led any evidence in his defence and simply replied that he had been falsely implicated in this case and even he was not aware about the murder of Sehatio. He further stated that first time he came to know when he was apprehended and implicated by the police in this case. He further stated that the police has foisted double barrel gun alongwith live cartridges and challaned him in this case alongwith separate case u/s 13(d) Arms Ordinance for recovery of gun. He further stated that he was acquitted from the charge of recovered of unlicensed gun by the learned trial court. He further stated that certified copy of the judgment passed by the learned Judicial Magistrate was available which he had filed alongwith his bail application. He further stated that he had been falsely implicated in this case at the instance of Nasrullah Nukhrich and Lal Muhammad Nukhrich with whom he had monetary dispute and complainant was closely related to Nasrullah Nukhrich and Lal Muhammad Nukhrich. We cannot consider the defence plea of accused that he had dispute with Lal Muhammad and Nasrullah Nukhrich over the monetary issues, who are close relatives of complainant as the Appellant had not established his defence plea and he had neither examined himself on oath nor led any defence evidence without taking any or producing any substance. For above reasons, we disbelieve defence plea, but we firmly believe that it is primary duty of prosecution to prove it's case against the accused.

22. No major contradiction has been noticed by us in it. It is a matter of record that the place of incident is situated in front of houses of

complainant party, therefore, presence of complainant and other eye-witnesses was natural.

23. As regards to contention of defence Counsel that incident had taken place in the dark hours of the night, incident had occurred at 07:30 p.m and in the month of March, at that time it is sunset time and question of misidentity did not arise. Moreover, both the parties are well-known to each and the accused Bux Ali was residing only at the distance of 2 kilometers from the village of complainant. This fact is also supported that at first episode of this incident quarrel took place between the complainant and accused Bux Ali while complainant was coming from village Mureed Khan Nukhrich to his village and complainant clearly stated that accused Bux Ali had come behind him and he was armed with DBBL Gun and gave kicks and fists blows to him on the way and such fact has been narrated by the complainant to deceased Sehatio and P.Ws Mir Hassan and Kanbhoo and soon after that again accused Bux Ali came back in their village duly armed with double barrel gun on motorcycle and called the complainant and killed son of complainant.

24. It is generally observed that usually people use to implicate so many persons even in a single murder case but in this case, complainant had only implicated accused Bux Ali and the ocular version of complainant was corroborated by the medical evidence, which clearly shows that deceased Sehatio had died unnatural death due to receiving firearm injuries at the hands of appellant / accused.

25. Appellant did not join investigation, his abscondence for pretty longtime was unexplained and was additional piece of evidence against him. It appears that the accused had taken plea in his statement u/s. 342, Cr.P.C that he was unaware of the murder of deceased Sehatio

and he further stated that after his arrest in this case he came to know about the murder of deceased. We cannot believe this defence plea on the ground that there is single accused and specific role of firing at the deceased has been attributed to him by the prosecution witnesses in their evidence. The accused is residing at the distance of 2 kilometer from the place of incident and complainant party as well as police how spared him for the period of five months even learned trial court had completed the whole process of abscondence and proceedings u/s 87 & 88 Cr.P.C were initiated against accused and after declaring him as proclaimed offender the learned trial court proceeded with the case and subsequently accused was arrested on 03.03.2010. The abscondence is always treated as a piece of evidence against the accused, who deliberately and intentionally avoided and failed to surrender. Trial court has already disbelieved recovery and appellant has been acquitted. Though admittedly no empty was recovered from the scene of offence which is also not possible if accused had not reloaded his gun at the place of incident and in a case of Gun after firing empty cartridge remained in the barrel of gun, it could not eject out until and unless it is re-loaded. Therefore, we are of the opinion that it is not necessary that in the present case empty cartridge was not recovered from the place of incident if accused had not reloaded his gun.

26. As far the contention of learned Counsel for appellant that the motive is not proved, we have also observed that the prosecution witnesses had not clearly disclosed the motive on the ground that in the F.I.R. complainant stated that quarrel had taken place between the accused and him on the way when he was coming towards his village and after about 20 minutes accused Bux Ali again came in their village and without disclosing any motive accused had fired on deceased

Sehatio, the son of complainant. This fact is also not proved on the ground that when accused had grievance against complainant then why accused had killed the son of complainant though he was available at the scene of offence. Complainant disclosed in F.I.R. that motive was quarrel between them but during recording of evidence, complainant had deviated from this version and had disclosed in his deposition that accused had demanded extortion money (bhatta) of Rs.10,000/- from complainant and on that ground he had committed murder of his son. We are of the opinion that the prosecution have miserably failed to prove the motive against appellant for commission of offence.

27. At the cost of repetition we reiterate that ocular testimony of all three eye-witnesses with regarding to appearance of accused at the scene of offence armed with gun and firing from his gun at deceased Sehatio with intention to kill him goes un-shattered. Evidence of P.Ws is reliable, trust worthy and confidence inspiring. It is proved that appellant Bux Ali alias Dodo has committed murder of deceased Sehatio. No doubt eye-witnesses are related to each other and their evidence cannot be discarded merely on the ground that they have relationship with deceased will not be sufficient to discredit a witness particularly when there is no motive to falsely involve the accused. The principle for accepting the testimony of even an interested witness is set out in the case of NAZIR vs. State (PLD 1962 S.C 269). In present case nothing has been brought on record to show that complainant had motive for falsely implicating the appellant.

28. We have come to conclusion that prosecution has proved it's case against appellant but there are a number of mitigating circumstances to convert death sentence to imprisonment for life for following reasons:-

- i. The motive has not been proved by the prosecution even complainant has taken different version regarding motive.
- ii. From the perusal of record, it appears that during trial an application u/s 465, Cr.P.C had been moved by the learned Counsel for appellant for examination and treatment regarding the mental health of appellant. Learned trial court had referred the appellant to mental hospital for examination and treatment where appellant was admitted and found to be suffering from **major depressive disorder and treatment was also advised to him by the Psychiatrist / Incharge Forensic Psychiatry Ward Sir C.J Institute of Psychiatry Hyderabad.** The said Psychiatrist had also given his opinion that at present he is capable to understand the proceedings of the Honourable court. He advised that accused may be shifted from the Institute to Central Prison Hyderabad with advised treatment. This shows that appellant was suffering from mental disorder. Due to the mental health of Appellant we can hold that it could a reason that in first episode of this incident when quarrel between complainant and accused Bux Ali had taken place and accused had spared the complainant and thereafter again he came back in the village of complainant and while seeing all the four P.Ws coming towards him he made fires to deceased, who was leading all the P.Ws. We can also hold here that deceased Sehatio was young boy aged about 20 years and while he heard that the accused Bux Ali had quarreled with his father and gave him kicks and fists blows, he straight away went to accused and accused had made firing at him and thereafter accused fled away from the scene of offence on motorcycle.
- iii. Appellant had not repeated the fires to deceased or other prosecution witness.
- iv. Appellant's prime target was complainant not his deceased son.

29. Looking to the peculiar circumstances of this case, we are of the opinion that this is not a case of death sentence awarded to the Appellant by the learned trial court. Therefore, we maintain conviction but convert the sentence awarded to the appellant from death sentence to imprisonment for life. However, remaining conviction, sentence and fine shall remain intact with slight modification, in case of default in payment of compensation, appellant shall suffer S.I for six months instead of R.I for one year. Appellant shall be entitled to benefit of section 382-B Cr.P.C.

With the above modification, the Criminal Appeal No.258/2012 is partly allowed. Consequently, Reference made by trial court for confirmation of death sentence is answered in negative.

JUDGE

JUDGE

A.H.