

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

PRESENT:

**Mr. Justice Khadim Hussain M. Shaikh
Mr. Justice Amjad Ali Sahito**

Criminal Appeal No.D-05 of 2012.

Appellant : Muhammad Waris son of Usman
Through Mr.Safdar Ali Bhutto, Advocate.

Complainant : Nazir Ahmed son of Ghulam Hyder Gadehi
Through Mr.Habibullah Ghouri, Advocate

Criminal Acquittal Appeal No.D-15 of 2011.

Appellant/complainant : Nazir Ahmed son of Ghulam Hyder
Gadehi
Through Mr.Habibullah Ghouri, Advocate

Respondent/accused : Ramzan son of Usman Gadehi
Through Mr.Abdul Rasool Abbasi,
Advocate

Criminal Revision Application No.D-33 of 2011.

Appellant/complainant : Nazir Ahmed son of Ghulam Hyder
Gadehi
Through Mr.Habibullah Ghouri, Advocate

Respondent/accused : Muhammad Waris son of Usman Gadehi
Through Mr.Safdar Ali Bhutto, Advocate

State : Through Mr.Abdul Waheed Bijarani,
Assistant Prosecutor General.

Date of hearing : **10.05.2018.**

Date of decision : **10.05.2018.**

J U D G M E N T

AMJAD ALI SAHITO, J. This single judgment shall dispose of the captioned Criminal Appeal/Cr.Acquittal Appeal and Crl.Revision Application, which are directed against the impugned judgment dated **14.04.2011**, passed by learned III-Additional Sessions Judge, Dadu, in Sessions Case No.285 of 2006, Re.St.Vs.Muhammad Waris and others, for offence punishable

u/s.302, 324, 504, 147, 148, 149 PPC, arisen out of Crime No.139 of 2006, registered with Police Station, K.N.Shah, whereby appellant Muhammad Waris son of Usman Gadehi was convicted for an offence punishable u/s.302 (b) PPC and sentenced to suffer imprisonment for life and to pay compensation of Rs.50,000/- to the legal heirs of deceased Ghulam Hyder and in case of default of payment of compensation, to suffer S.I for six months more. However, the benefit of Section 382-B Cr.PC was also extended to him, while appellants Ramzan and Kouro were acquitted by extending them benefit of doubt.

2. The brief facts of the prosecution case as depicted in the FIR are that on 11.06.2006, complainant Nazir Ahmed son of Ghulam Hyder Gadehi lodged FIR with P.S, K.N.Shah, in which he mentioned that he owns a husk-machine which was being plied by him. They had matrimonial dispute with their relative Muhammad Waris Gadehi and they had not speaking terms with him, and he used to ask them that he would commit murder one of them. Today, i.e 11.06.2006, he alongwith his father Ghulam Hyder and brother Wazir Ahmed came at K.N.Shah and were available whole the day at their husk-machine. At evening time, after closing the said husk-machine, they were returning to their village on motorcycle driven by his father Ghulam Hyder. When they reached at fish pond of one Sultan Khan Gadehi on link road leading from K.N.Shah to Ghozo, they noticed accused namely Muhammad Waris, 2). Ramzan, 3).Kouro, armed with guns, 4). Ali Nawaz armed with pistol, all sons of Usman Gadehi, r/o Chapar Khan Gadehi, and 5).Awais son of Muhammad Pannah Gadehi, r/o Bero Khan Gadehi, Taluka K.N.Shah, armed with pistols were standing,

who signaled them to stop. As soon as, his father Ghulam Hyder stopped the motorcycle, accused Muhammad Waris Gadehi while abusing asked him that they have disputed with them over matrimonial affairs therefore today he will be done to death, whereupon the complainant party asked him not to use filthy language against them. On their saying so, accused Muhammad Waris made gun-shot fire at his father Ghulam Hyder with intention to commit his murder, which hit him and he fell down raising cry, the other accused while abusing straightly fired upon them but they fell down by missing the said fires. Thereafter, the complainant party raised cries which attracted their relative Bashir Gadehi who came while raising hakals and noticing the accused. All the accused after abusing went away towards northern side. The complainant then saw his father Ghulam Hyder having fire arm injuries on left and right side of his abdomen, the blood was oozing and he went unconscious. After arranging the conveyance, the complainant took his father to Taluka Hospital K.N.Shah, who during course of treatment succumbed to injuries and died. Leaving the above named witnesses over his dead body, the complainant came at police station reported the incident with police. The investigation officer after observance of legal formalities submitted the report u/s.173 Cr.PC before the competent court of law.

3. On 28.10.2009, the learned trial Court after observing all the legal formalities, framed the charge against all the accused at Exh.04, to which they pleaded not guilty and claimed trial.

4. In order to establish the accusation against all the accused, the prosecution then led its' evidence and examined PW-01 Dr.Abdul Hameed at Exh.05, he produced letter of treatment

issued by police at Exh.05/A, provisional medical certificate at Exh.05/B. PW-02 Dr.Syed Arbab Ali Shah at Exh.06, he produced postmortem report of deceased Ghulam Hyder at Exh.06/A and letter to SHO at Exh.06/B. PW-03 Complainant Nazir Ahmed at Exh.08, he produced FIR at Exh.08/A. PW-04 Wazir Ahmed at Exh.09, he produced photo stat copy of his 164 Cr.PC statement at Exh.09/A. PW-05 ASI Muhammad Ayoob at Exh.11. PW-06 Intisar Ali C.J & J.M, at Exh.12, he produced 164 Cr.PC statement of Bashir Ahmed at Exh.12/A. PW-07 Muharram Ali at Exh.13, he produced carbon copies of danistnama, mashirnama of inspection of dead body, mashirnama of place of vardat, mashirnama of clothes of deceased, mashirnama of arrest of accused Awais, mashirnama of recovery and mashirnama of arrest of accused Muhammad Waris at Exh.13/A to G respectively. PW-08 SHO Adam Khan at Exh.14, he produced photo stat copy of letter to MLO, inquest report, chemical report, letter to Mukhtiarkar and sketch of place of incident at Exh.14/A to D respectively. Thereafter the side of prosecution was closed by learned DDPP for the State vide statement at Ex.15.

5. Statements of all the accused were recorded under Section 342 Cr.PC at Ex.16 to 18 respectively, wherein they denied the prosecution allegations leveled against them by pleading their innocence. However, they did not examine themselves on Oath in terms of Section 340(2) Cr.PC nor produced any witness in their defence.

6. The learned Trial Court, after hearing the counsel for the parties and going through the material brought on record, awarded conviction and sentence against accused/appellant

Muhammad Wairs while acquitted accused Ramzan and Kouro, as stated above, vide judgment dated 14.04.2011, which the present appellants have impugned before this Court by way of filing separate appeals as detailed above.

7. Mr.Safdar Ali Bhutto, learned counsel for appellant Muhammad Waris contended that the impugned judgment is against the law and facts of the case; that the present appellant is innocent and has falsely been implicated in this case by the complainant party; according to the prosecution case complainant Nazir Ahmed, his brother PW Wazir Ahmed and one independent witness namely Bashir Ahmed had witnessed the incident but PW Bashir Ahmed was not examined; though the complainant has given the names of co-accused Ali Nawaz and Awais duly armed with respective weapons and assigned the role of firing at the complainant party but during course of trial he did not identify accused Ali Nawaz and Awais, hence the presence of complainant and his witness at the place of incident is doubtful, no recovery of any sort has been effected from appellant Muhammad Wairs, nor was any blood stained earth secured by the investigation officer from the place of vardat, the learned trial Court acquitted all accused persons except appellant Muhammad Waris while relying the same set of evidence; that all the witnesses are related inter-se; that there is conflict between the ocular and medical evidence; that there are several other material contradictions in the evidence of witnesses, which are fatal to the prosecution case. He lastly contended that the prosecution has miserably failed to prove the case against the present appellant and thus, according to him, under the above mentioned facts and circumstances, the appellant is entitled for his acquittal.

8. Mr.Habibullah Ghouri, learned counsel appearing for complainant Nazir Ahmed contended that the accused/appellant Muhammad Waris is named in the FIR with specific role of causing fire shot injuries to the deceased while co-accused/respondent Ramzan has fired upon the complainant party; that no mitigating circumstances have been shown by learned trial Court while awarding lesser punishment to appellant Muhammad Waris and acquittal of accused/respondent Ramzan by extending him benefit of doubt; that the direct evidence is supported with recovery of crime weapon, that the ocular version is consistent with medical evidence; that all the witnesses being closely related inter-se have supported the version of the complainant, thus their relationship is not enough to disbelieve them; that the strong motive against accused/appellant Muhammad Waris has been established; that there was no material contradiction in the evidence of prosecution witnesses, in such situation, the learned trial Court rather to award death sentence to accused/appellant Muhammad Waris, recorded lesser sentence of imprisonment for life, he lastly prayed for enhancement of punishment awarded to him and dismissal of appeal of accused/appellant Muhammad Waris, while further prayed for recording conviction to accused/respondent Ramzan.

9. Mr.Abdul Rasool Abbasi, learned counsel for accused/respondent Ramzan contended that the presence of complainant and his witnesses at the time of incident is highly doubtful from their evidence; that no independent person has been cited as witness in this case and those cited are closely related to the complainant; that there are material contradictions in the

evidence of prosecution witnesses, which created doubt, in these circumstances, the learned trial Court has rightly appraised the evidence for recording his acquittal by extending him benefit of doubt. He thus lastly prayed for dismissal of acquittal appeal of the appellant/complainant.

10. Mr. Abdul Waheed Bijarani, Assistant Prosecutor General for the State supported the arguments advanced by learned counsel for the complainant and prayed for disposal of captioned appeals in accordance with law.

11. I have heard learned counsel for the parties and have minutely perused the record with their able assistance.

12. It is worthwhile to mention here that the charge was framed against four accused persons namely Muhammad Awais, Muhammad Waris, Ramzan and Kouro, while the role attributed to co-accused Muhammad Awais, Ramzan and Kouro was of directly firing at the complainant party but the evidence of complainant and his witness was disbelieved by the learned trial Court, which concluded in acquittal of two of them namely Ramzan and Kouro. The law is settled that if the eye-witnesses have been disbelieved against some accused persons who have been attributed effective roles then the same eye-witnesses cannot be believed against other accused person, in such situation, it requires strong independent corroboration for recording conviction. In this context, the reliance is placed upon case of **Imtiaz alias Taj vs. the State (2018 SCMR-344)**, wherein the Hon'ble Supreme of Pakistan has held that;

“3. It is not disputed that four co-accused of the appellant attributed effective firing at and specific injuries to Rustam Ali deceased had been acquitted by the trial Court. The law is

settled that if the eye witnesses have been disbelieved against some accused persons attributed effective roles then the same eye witnesses cannot be believed against another accused persons attributed a similar role unless such eye witnesses receive independent corroboration qua the other accused person and a reference in this respect may be made to the cases of Ghulam Sikandar v. Mamaraz Khan(PLD 1985 SC-11), Sarfraz alias Sapp v., The state(2000 SCMR-1758), Iftikhar Hussain and others v. The state(2004 SCMR-1185) and Akhtar Ali v. The State(2008 SCMR-06)”.

13. On evaluation of material brought on the record, it appears that the case of prosecution rests upon the ocular testimony produced by way of statements of complainant Nazir Ahmed and his brother eye-witness Wazir Ahmed, who both have tried to support the case of prosecution but on deeper analysis, their testimony was found inconsistent. In that the bare perusal of the FIR reflects that accused/appellant Muhammad Waris alongwith acquitted co-accused Ramzan, Ali Nawaz, Kouro and accused Awais(died during course of trial) were armed with their respective weapons, of them, accused Muhammad Waris fired at deceased Ghulam Hyder with intention to commit his murder, who fell down on receipt of fire-arm injuries, while the remaining accused fired at complainant party with intention to commit their murder but the complainant in his examination-in-chief deposed that father of the complainant after receipt of fire-arm injuries became unconscious and was shifted to Taluka Hospital K.N.Shah through a Rickshaw, he then went to police station for obtaining letter but his father died during treatment at hospital, thereafter by leaving his brother PW Wazir Ahmed and relative PW Bashir

Ahmed over the dead body, he went for lodging the FIR. He identified all the accused persons present in Court to be same except accused Ali Nawaz and Awais but the FIR reflects their names with specific role of directly firing at the complainant party except the deceased. In his cross examination, he admitted that he is matriculate, he had not disclosed the registration number and color of the motorcycle in the FIR but on signal they stopped motorcycle at distance of 2/3 feet from accused, accused fired from the side of his father, there was no distance between his father and accused when he fired at his father, the remaining accused were standing in front of them, when accused Waris fired at his father the remaining accused fired upon them at distance of about 2/3 feet. He further admitted that he and his brother Wazir Ahmed neither received any injury nor bullet or pallet marks hit to the motorcycle and that he cannot say that how many fires were made by accused upon them, they fell down on left side of the road, he did not know the registration number of Rickshaw on which they shifted Ghulam Hyder to K.N.Shah hospital, he himself went to police station for obtaining letter, his father died 15/20 minutes after his reaching at hospital, his FIR was lodged by ASI Muhammad Ayoob. He denied the suggestion of learned defense counsel that his father Ghulam Hyder was declared "Karo" by Khosa, the place of incident was a link road and not a busy way. The version of complainant was belied his brother PW/eye witness Wazir Ahmed, who in his examination-in-chief deposed that his father died during treatment, his brother Nazir Ahmed went to police station for lodging the FIR by leaving me and PW Bashir. However, he identified all the accused present in Court except accused Ali Nawaz and Awais. In cross

examination, he admitted that he is graduate, the motorcycle was driven by his father while he was at mid of them and the complainant was seated behind, accused fired at his father at distance of about 05 feet after stoppage of their motorcycle, at the time of fire they all were sitting on the motorcycle, he admitted that he and complainant did not receive any injury nor bullet and pallet marks hit to the motorcycle, he admitted that the place of incident was busy road, the remaining accused fired about five fires and they also went away by firing, they consumed 10/20 minutes, during firing no person came at place of incident and further disclosed that 2/3 persons passed through them on motorcycles, accused directly fired at his father, they took father on a Qingqi/Rickshaw but he did not know its registration number, PW Bashir Ahmed was with them while taking his father to hospital, his father died at hospital after 30/35 minutes on their reaching, he admitted that the police station was situated near Taluka Hospital K.N.Shah, when his father was in injured condition they informed the police and police also came. However, he denied suggestion that his father was declared by Khosa community. The version of both these eye witnessed is conflicted by PW/author of FIR ASI Muhammad Ayoob, who in his cross examination deposed that the complainant came at police station alongwith his 4/5 relatives for lodging the FIR, he admitted that complainant came at police station alongwith deceased Ghulam Hyder, he inspected his injuries and then recorded the FIR. It is quite clear that complainant and other eye-witness have not successfully established themselves to be **natural witnesses**. Thus, it is always requirement of safe administration of justice that before believing evidence of such a witness, the witness must

offer cogent, convincing and believable explanation justifying his presence at a place where **normally** he is believed to be not **present**. Reference in this regard may well be made to the case of **Mst.Rukhsana Begum & Ors v. Sajjad & Ors(2017 SCMR-596)** wherein it is observed as:

“17. In ordinary parlance, a chance witness is the one who, in the normal course is not supposed to be present on the crime spot unless he offers cogent, convincing and believable explanation, justifying his presence there”.

14. It is a matter of record that though the complainant claimed to have gone with his father as well as brother where this unfortunate incident took place. The role assigned to accused/appellant Muhammad Waris of firing at his father from his gun and there was no distance between his father and accused then it is seems to be that appellant Muhammad Waris allegedly fired from his gun by contacting gun with body of the deceased and if any fire is made from such a distance then burning, blackening and charring occurs with its gun powder, therefore, his presence at the venue of occurrence creates doubt when the rest of accused per him were standing in front of them and they fired upon them but they did not receive a single bullet or pallet injury. Further, the complainant admitted that he went to police station for obtaining letter but his father died during treatment within 15/20 minutes, he did not identify accused Ali Nawaz and Awais present in the Court when he nominated himself the accused in the FIR with specific role of firing at the complainant with their respective weapons then his presence at

the venue of occurrence is under a cloud. PW/Eye witness Wazir Ahmed in his evidence though has implicated Awais and Ali Nawaz in his 164 Cr.PC that he they duly armed with respective weapons were present at the place of incident with specific role but he did not identify both of them in the Court and in his cross examination admitted that accused Muhammad Waris fired upon his father at the distance of about 05 feet when they were sitting on the same motorcycle but they did not receive any pallet injury. It is also admitted that when any person fires from gun then the pallets spread. He further admitted in his cross examination that rest of the accused fired from their respective weapons upon the complainant party except deceased form distance of 05 feet but they did not receive pallet injuries, his father died at hospital after about 30/35 minutes on their reaching, hence his presence at the venue of occurrence is also under cloud. PW/ASI Muhammad Ayoob who lodged the FIR negated the version of both the eye-witnesses by deposing that the complainant came at police station alongwith 4/5 witnesses and he came there alongwith deceased, where after inspection of the injuries, his FIR was lodged.

15. In this case, though PW Bashir Ahmed is said to be eye witness of the incident, yet he was not examined by the prosecution for no obvious reason, then the presumption will be drawn under illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984, that if he had been produced and examined in this case, then the same would have been unfavorable to the prosecution case. The prima facie failure of the complainant and his eye witness in giving any reasonable explanation for accompanying the deceased was always sufficient to bring his

claim of an **eye-witness** as **doubtful**. In the case Rukhsana Begum supra, it is held as:-

18. In the instant case, this witness has shown no work or definite purpose of visit to crime spot, therefore, his presence on the crime spot is not believable **and his testimony, for this reason alone is rejected**. More so, when for reaching the spot, he had confronted surging waves of fast flowing water of the river.

A single doubt reasonably showing that a witness / witnesses' presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/ their testimony as a whole. ...

16. Medical officer Dr.Abdul Hameed Shaikh in evidence deposed that on 11.06.2006, while posted as medical officer at Taluka Hospital K.N.Shah, injured Ghulam Hyder was brought before him at 07.15 p.m in serious condition under a police letter No.1706, dated 11.06.2006, for treatment and report. He found the following injuries on his person;

01. Entry wound fire-arm injury measuring 4 c.m in diameter on right hypochondrial region of abdomen laterally.

02. Exit wound fire-arm injury 8 in numbers each measuring 1.5 c.m in diameter on anterior lateral side of abdomen in a left side.

Both the injuries were caused with fire-arm, the injured expired in hospital after its 15 minutes. In cross examination, he admitted that both the injuries were sustained by him receiving the single fire shot at the distance of about 25/30 feet.

17. Dr.Syed Arbab Ali Syed in his evidence deposed that on the same day, he received the dead body of deceased Ghulam Hyder for postmortem, who had expired at hospital, and his dead body was identified by Wazir Ahmed and Muharram Ali(son and brother of deceased). He started its postmortem at 09.15 p.m and finished it at 10.00 p.m. On external examination of dead body, he found the following injuries;

01. Entry wound fire-arm injury measuring 4 c.m in diameter on right hypochondrial region of abdomen laterally.

02. Exit wound fire-arm injury 8 in numbers each measuring 1.5 c.m in diameter on anterior lateral side of abdomen in a left side.

On external as well as internal examination on the dead body of deceased, he opined that death of the deceased had occurred due to hemorrhage on receipt of injuries No.1 and 2, caused by discharge from fire-arm, which were anti-mortem in nature and were sufficient to cause death in ordinary course of law. One pallet was also recovered from spleen and was handed over to I.O in sealed condition. The probable time between injuries and death was about one hour. In his cross examination, he deposed that the injury as per his opinion was caused by discharge from fire-arm behind 03 feet.

18. The medical officer Dr.Abdul Hameed Shaikh in his evidence has totally negated the version of complainant party. The complainant Nazir Ahmed in his cross examination admitted that “there was no distance between my father and accused when he fired upon my father”, while PW/Eye witness Wazir Ahmed in his cross examination deposed that “accused fired upon my

father at the distance of about 05 feet after stopping of our motorcycle. At the time of fire we all were sitting on the motorcycle". The medical officer Dr.Abdul Hameed in his evidence deposed that injured Ghulam Hyder received single fire-shot at distance of 25/30 feet, while second medical officer Dr.Syed Arbab Ali Shah in his evidence deposed that deceased had received entry wound caused by discharge from fire-arm behind 03 feet. Both of the medical officers have not found any burning, blackening and charring including gun-powder on the wounds of injured/deceased Ghulam Hyder. If any fire is made from the distance of 01 to 03 feet, then the blackening occurs as per Modi's Medical Jurisprudence and Toxicology (21st Edition) at page 354 ref. In this context, the reliance is placed upon case of **Muhammad Zaman vs. the State(2014 SCMR-749)**, wherein the Hon'ble Supreme Court of Pakistan has held that;-

Fire-arm entry wound---"**Blackening**"--Scope---Blackening was found, if a fire-arm like shot-gun was discharged from a distance of not more than 3 feet.

19. Though the complainant has disclosed the motive of matrimonial affairs in his FIR but no tangible substance was brought on record by him to justify his version that any deep root enmity existed between the parties, which resulted this unfortunate incident.

20. In the present case, the investigation officer has not collected the blood stained earth from the place of incident, though appellant Muhammad Waris was arrested on 15.01.2007, but no recovery of crime weapon was effected to connect him with commission of alleged offence. Whereas, co-accused Muhammad

Awais was arrested by the police and crime weapon viz. pistol was secured on his own lead but neither the complainant nor his eye-witness had identified him in the Court despite implicating him with specific role in the FIR as well as 164 Cr.PC statement.

21. The over-all discussion involved a conclusion that the presence of eye-witnesses at the place of occurrence on relevant time has been found to be doubtful and the medical evidence has also been belied by the ocular account furnished by the complainant party. Thus, we are of the considered view that the prosecution has miserably failed to establish the guilt against appellant Muhammad Waris beyond shadow of any reasonable doubt and it is well settled principle of law that for creating shadow of doubt, it is not necessary that there should be many circumstances. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is to be extended in favour of the accused not as a matter of grace or concession, but as the matter of right. The reliance in that context is placed on the case of **Muhammad Masha v. The State (2018 SCMR-772)**, wherein the Hon'ble Supreme Court of Pakistan has held that:

4.--- Needles to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim, "it is better that ten guilt persons be acquitted rather than one innocent

person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State(1995 SCMR-1345), Ghulam Qadir and 2 others v. The State(2008 SCMR-1221), Muhammad Akram v. The State(2009 SCMR-230) and Muhammad Zaman v. The State(2014 SCMR-749).

22. In this case, the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding appellant Muhammad Waris guilty of the alleged offence. Consequently, the instant appeal is allowed. The conviction and sentence awarded to the appellant are set-aside and he is acquitted of the charge by extending him benefit of doubt. Thus, the Criminal Acquittal Appeal No.D-15 of 2011 and Criminal Revision Application No.33 of 2011 filed against the impugned judgment are dismissed accordingly.

23. These are the detailed reasons of short order **dated 10.05.2018**, announced by us.

J U D G E

J U D G E