

other. On the fateful night, when complainant alongwith his brother Dil Sher and father Bhooro were irrigating their land, at about 09:00 p.m, accused Ali Dino, Ali Muard and others came to them and asked the complainant's father that Muhammad Ali and Ghulam Haider and others are sitting in the house and in order to settle the dispute of payment (detti-letti), complainant` father should accompany them. Thereafter, Bhooro went alongwith Ali Murad and Ali Dino; but, he did not turn up. In the morning, complainant alongwith his brother went to the house of Ali Dino and about 07:30 a.m they saw that none was present there, but dead body of their father was lying there having sharp side of hatchet injuries on different parts of his body. Thereafter, complainant lodged such F.I.R.

3. At trial, the trial Court framed charge against the accused persons at Ex.04, to which they pleaded not guilty and claimed to be tried vide their respective pleas. Thereafter, prosecution in order to substantiate the charge against the accused, examined as many as 07 witnesses and brought certain documents on record through them. Thereafter, prosecution side was closed as per statement of learned ADPP at Ex.23.

4. Later on, statement of accused were recorded u/s 342 Cr.P.C at Exs.24 and 25, in which they denied the prosecution allegations and claimed their innocence. However, they did not examine themselves on oath nor produced any evidence in their defence.

5. After conclusion of the trial, learned trial Court passed the impugned judgment thereby convicted and sentenced the present appellant in the manner as stated in the introductory para; however, acquitted co-accused Ghulam Haider through same judgment.

6. Learned counsel for the appellant has contended that the appellant has been involved in this case malafidely by the complainant party due to admitted enmity; that the impugned judgment passed by the learned trial Court is opposed to law and facts and is also against the principles of natural justice; that entire prosecution story is unbelievable; that the entire incident has remained unseen and un-witnessed; that no recovery was affected from the possession of present appellant and the alleged crime weapon / hatchet was not even recovered from him; that the said crime weapon recovered from co-accused has even not been sent to Chemical Examiner for its examination and report; that prosecution has miserably failed to establish the guilt of the

appellant beyond any reasonable shadow of doubt; that the eye-witnesses are near relatives of the deceased as well as complainant and no private / independent person has been picked up to act as witnesses / mashir, hence there is violation of Section 103 Cr.P.C, as such, false implication of the appellant in this case cannot be ruled out; that on the same set of evidence learned trial Court acquitted the co-accused Ghulam Haider however, disbelieved the same set of evidence with regard to present appellant. Lastly he prayed that instant appeal may be allowed and appellant may be acquitted of the charge. In support of his contentions, learned counsel has placed reliance on the cases reported as Safdar Abbas and others v. The State and others (2020 SCMR 219), Asad Rehmat v, The State and others (2019 SCMR 1156), Wajahat v. Gul Daraz and another (2019 SCMR 1451), Ibrar Hussain and others v. The State and another (2007 SCMR 605) and Muhammad Riaz v. Muhammad Zaman and another (PLD 2005 Supreme Court 484).

7. Conversely, learned Deputy Prosecutor General Sindh appearing on behalf of State has fully supported the impugned judgment by submitting that prosecution has fully established the guilt of the appellant beyond any reasonable shadow of doubt; that all prosecution witnesses have fully supported the case of prosecution and there is no major contradiction in their version on material particulars of the case hence, the impugned judgment does not call for any interference.

8. The complainant Gulsher though was present on the last date of hearing and sought time but thereafter, choose to remain absent without any intimation.

9. I have heard the learned counsel and D.P.G at considerable length and gone through the documents and evidence so brought on record.

10. A meticulous examination of the prosecution evidence as well as the record shows that in fact there were no eye witnesses of the incident and the entire incident remained unseen. No doubt a person has lost his life but it is to be determined who caused him fatal injuries and committed his murder. According to the case of prosecution father of complainant namely Bhooro Mehkani (deceased) was lastly seen alongwith Ali Murad and Ali Dino, who went to their house to settle the dispute but did not turn up. Apparently, there is not a single eye witness of the incident who had seen the alleged incident and the complainant Gulsher himself has stated in his evidence during cross

examination that **“It is a fact that neither us, nor any body in our village had seen the accused person while committing the offence.”** Another witness namely Ghazi Khan deposed that deceased was his father-in-law and he received telephone from complainant Gulsher that accused Ali Dino and Ali Murad has committed the murder of his father but in cross examination this witness has also admitted that he has not seen the incident. PW/mashir Khuda Dino deposed that complainant is his uncle. All the witnesses apparently are near relatives of the complainant as well as deceased hence false implication of the appellant cannot be ruled out.

11. It has been brought on record that there were also the houses of other villagers situated near the place of incident but not a single independent person was cited to witness the proceedings and all the witnesses seems to be closely relatives of the complainant and even otherwise no one from the witnesses had seen the alleged incident. It appears that specific time of occurrence is not mentioned in the FIR, ocular account does not have consistency with medical evidence. There is also no mention of the person who brought the dead body to the Civil Hospital before arrival of police. There is also no evidence with regard to water share list as according to complainant at the time of incident they were busy in irrigating the land. There is also conflict with regard to seat of the injuries as according to lash chakas form 08 injuries were noted but according to the Medical Officer 11 injuries were found on the person of the deceased. The ocular evidence contradicts the medical evidence as well as circumstantial evidence which create reasonable doubt in the case of prosecution. According to version of the complainant, other villagers rushed towards the place of incident but police failed to associate any single villager to act as mashir nor any attempt was made in this regard and only police took the interested and relatives of complainant as witnesses. There are also other material contradictions in the evidence of prosecution witnesses which even have not been taken into consideration by the trial Court hence the same cannot be brushed aside.

12. No recovery of crime weapon viz. hatchet has been affected from the present appellant and the recovery has only been affected from co-accused Ghulam Haider who on the basis of same set of evidence has already been acquitted by the trial Court through impugned judgment dated 23.05.2015. As stated above there is no ocular evidence in the case in hand and the entire prosecution case is unseen and un-witnessed.

13. There is also no evidence available on record that the alleged place of incident was / is the house of appellant as no proof in this regard has been given that the said house belonged to appellant neither any title document was produced that the deceased was murdered in the house of present appellant. However, according to concerned Tapedar who prepared the sketch regarding the place of incident has shown the fields where different crops were manifestly seen and also in sketch no clear surroundings of place of incident are shown which creates a reasonable doubt in the case of prosecution. According to the evidence of Tapedar at the time of incident there was cotton crop available but the question arises whether the house of appellant was situated. He further deposed that he has not put the seal on sketch and that owner of Survey No.337 was the father of complainant Bhooro (now deceased) and they are still in its possession. The individuals who acted as mashirs to the lash chakas form were not examined.

14. The quantum of sentence of appellant has engaged my serious consideration and I have looked at this aspect of the case from the divert angles. I have noticed that motive as set up in the FIR was that deceased asked the accused persons to vacate his land which was previously cultivated by them but it has not been proved at trial. Evidence of complainant and P.Ws on motive was generalized in nature. Evidence of the Investigation Officer reflects that no serious efforts were made by him to collect any evidence regarding the motive asserted by the complainant party. Upon my assessment of evidence available on record, I felt no hesitation in concluding that specific motive set up by prosecution had indeed remained far from being established on the record. Evidence of complainant regarding motive is not corroborated by some independent piece of evidence. Real cause of occurrence shrouded in mystery. Unfortunately, Investigation Officer had also failed to interrogate / investigate about motive for commission of the offence where the prosecution asserted a motive but failed to prove the same then failure on the part of prosecution may re-act against the sentence passed against the convict on the charge of murder. Motive cited in the crime is non-specific, investigative conclusions were inconsistent with the case set up by complainant. Recoveries are also inconsequential.

15. The worth-importance point in this case is that although similar type of allegations, rather stronger, were leveled against co-accused Ghulam Haider but the trial Court while disbelieving the evidence of prosecution witnesses

against said co-accused acquitted him whereas on the basis of same set of evidence, convicted the present appellant which is in clear violation of 'rule of consistency'. Needless to emphasize that rule of consistency demands that if prosecution has disbelieved the evidence in respect of a co-accused, the same cannot be relied upon for convicting other accused. On the point of rule of consistency, it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of **Muhammad Asif Vs. The State** reported in 2017 SCMR 486, wherein it was held as under:

"It is a trite 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."

In another case reported as **Umar Farooque v. State** (2006 SCMR 1605) Honourable Supreme Court of Pakistan 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."

In the case of **Muhammad Asif v. The State** reported in 2017 SCMR 486 it was held by Honourable Supreme Court of Pakistan that once prosecution witnesses were disbelieved with respect to a co-accused then, they could not be relied upon with regard to the other accused unless they were corroborated by corroboratory evidence which came from an independent source and was also unimpeachable in nature. In another case reported as **Muhammad 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. In view of this legal position, appellant should have also been extended same benefit as given to the acquitted accused which was not done.

16. In my considered view, prosecution has failed to prove its' case against the appellant. Circumstances mentioned above have created reasonable doubts in the prosecution case. It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single

circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard reliance can be placed upon the case of ***Muhammad Mansha v. The State*** (2018 SCMR 772), wherein the Honourable Supreme Court has observed as follows:-

“Needless 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 the accused, then the 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 guilty 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).”

17. Accordingly, instant appeal is hereby allowed. Impugned judgment dated 23.05.2015 handed down by learned Additional Sessions Judge, Tando Allahyar in Sessions Case No.44 of 2012 re: The State v. Ghulam Haider and another, emanating from Crime No.38 of 2009 of Police Station Umar Sand, for offence under sections 302, 34 PPC is hereby set aside to the extent and effect of conviction and sentence awarded to appellant Ali Dino only. Resultantly, appellant Ali Dino is hereby acquitted of all the charges. He is in custody. He shall be released forthwith if he is not required in any other custody case.

JUDGE