

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD  
Criminal Appeal No.S-58 of 2018**

Appellants: Basar son of Hassan, 2) Uris son of Basar, 3) Ghulam Rasool son of Khabar and Dilawar son of Muhammad Bux through Mr. Ahsan Gul Dahri, Advocate.

Respondent: The State, through Ms. Sana Memon, A.P.G.

Complainant: Deen Muhammad through Mian Taj Muhammad Keerio, Advocate.

Date of hearing: 04-03-2021.

Date of decision: 04-03-2021.

**JUDGMENT**

**IRSHAD ALI SHAH, J:** The appellants by preferring instant appeal have impugned judgment dated 06.03.2018, passed by learned Ist Additional Sessions Judge, Dadu, whereby they have been convicted and sentenced as under;

*“i) accused Basar S/o Hassan Mallah is guilty of Charge U/s 302(b) PPC for causing death to deceased Muhammad Yousif. The accused Basar Mallah is convicted U/s 265-H(2) Cr.P.C and sentenced to suffer R.I for 25 years and he shall pay the fine of Rs.50,000/- (fifty thousand) and in default of payment he shall further under S.I for six months. However, if the fine recovered the same shall be paid to L.Rs of the deceased as compensation as provided u/s 544/A Cr.P.C.*

*ii) accused uris S/o Basar Mallah is convicted U/S 265-H(2) Cr.P.C for the offence under section 337-A(i) PPC and sentenced to undergo R.I for six months as ta'zir and to pay daman of Rs.15000/-The accused Ghulam Rasool S/o Khabar Mallah and Dilawar S/o Muhammad Bux Mallah are also convicted for the offence U/S 337-L(ii) PPC and sentenced to undergo R.I for six months as ta'zir and to pay daman of Rs.15000/-each. The daman amount shall be paid to injured Deen Muhammad.”*

2. The facts in brief necessary for disposal of instant Criminal Appeal are that the appellants with rest of the culprits in prosecution of their common object caused "*Danda*" blows to complainant Din Muhammad and his brother Muhammad Yousif and then went away. Muhammad Yousif died of such injuries, for that the present case was registered.

3. At trial, the appellants did not plead guilty to the charge and prosecution to prove it, examined complainant Deen Muhammad and his witnesses and then closed its side.

4. The appellants in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence. They did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

5. On conclusion of the trial, the appellants were convicted and sentenced as is detailed above by learned trial Court by way of impugned judgment.

6. It is contended by the learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party; the FIR of the incident has been lodged with delay of one day; the injuries sustained by the complainant and the deceased were on account of their fall from motorcycle; the time between death and post mortem is not corresponding with the time of the death of the deceased; the evidence of the prosecution being doubtful in its character has been believed by learned trial Court without justification and on the basis of same evidence co-accused Haji

has been acquitted while the appellants have been convicted. By contending so, he sought for acquittal of the appellants. In support of his contention he has relied upon cases of *Muhammad Asif vs The State (2017 SCMR 486)*, *Imtiaz alias Taj vs The State and others (2018 SCMR 344)*, *Faisal Mehmood vs The State (2016 SCMR 2138)*, *G.M. Niaz vs The State (2018 SCMR 506)* and *Safdar Abbas and others vs The State (2020 SCMR 219)*.

7. Learned A.P.G for the State and learned counsel for the complainant have sought for dismissal of the instant Criminal Appeal by supporting the impugned judgment by contending that the appellants have actively participated in commission of incident thereby they have not only caused injuries to the complainant but committed death of the deceased by causing them “*Danda*” blows only to settle their previous grudge with the complainant party. In support of their contentions they have relied upon cases of *Akbar Ali and others vs The State and others (2021 SCMR 104)* and *Muhammad Imran vs The State (2021 SCMR 69)*.

8. I have considered the above arguments and perused the record.

9. As per the complainant on 10.09.2012 when he, PW Muhammad Qasim, deceased Muhammad Yousif and PW Abbas were sitting at the hotel, there at about 03:00 pm time came the appellants and absconding accused Uris duly armed with “*Dandas*” and they caused “*Danda*” blows to him and the deceased on account of exchange of hard words between him and appellant Bassar. It was contrary to

the FIR of the present case where it is stated that the incident took place on account of exchange of hard words with their kids over matter of cattle trespass. Change of motive could not be lost sight of. The specific role of causing "*Danda*" blows to the deceased is attributed to appellants Bassar, Ezzo and Haji while specific role of causing "*Danda*" blows to him (complainant) is attributed to appellants Dilawar, Ghulam Rasool and absconding accused Uris. It was further stated by the complainant that he took Muhammad Yousif to PS Johi in injured condition and then was referred to Taluka Hospital Johi, then to Civil Hospital Dadu and then to hospital at Nawabshah. Surprisingly, complainant and PW Muhammad Qasim put great emphasis on the point that the deceased was caused "*Danda*" blows by appellants Bassar, Uris and Dilawar. On medical examination deceased was found sustaining single blow on his fronto parital region. It obviously was attributed to appellant Bassar. Where the gone, the blows which allegedly were caused to the deceased by appellant Essa and acquitted accused Haji? No explanation to this is furnished by the prosecution. No "*Danda*" allegedly used by appellant Bassar has been recovered from him by the police during investigation, even after his arrest while "*Dandas*" allegedly secured from appellant Ghulam Rasool and absconding accused Uris as per SIO/SIP Safdar Ali on recovery were not sealed. Why those were not sealed? No explanation to it is offered by the prosecution. The final medical certificate in respect of injuries sustained by the complainant was issued prior to issuance of expert opinion, which appears to be significant. The injuries sustained by the complainant were declared by medical officer Dr. Ghulam Mustafa to

be simple in nature (Shaja-e-Khafifah and other hurts). PW Abbas obviously was the only independent witness to the incident. He has not been examined by the prosecution, for no obvious reason. The presumption which could be drawn of his non-examination would be that he was not going to support of case of prosecution. The incident allegedly has taken place at hotel, neither the hotel owner nor anyone else, who was found to be sitting there at the time of incident, has been examined by the prosecution, such omission could not be lost sight of. Dr. Ghulam Mustafa on asking was fair enough to say that the injuries sustained by the deceased and the complainant could be sustained on account of fall on earth. Perhaps, in this context it was contended by learned counsel for the appellants that the deceased and complainant have sustained injuries on account of their fall from motorcycle. The FIR of the incident has been lodged by the complainant with delay of more than one day, that too after discussion/consultation with his brothers. The FIR lodged after discussion/consultation with someone else could hardly be relied upon. The 161 Cr.P.C statement of PW Muhammad Qasim has been recorded on 12.09.2012. It was with further delay of one day even to FIR. No plausible explanation to such delay is offered by the prosecution. Appellant Dilawar on investigation as per SIO/SIP Safdar Ali was let-off by him. By doing so, he disbelieved the version of the complainant party even at the time of investigation at-least to the extent of appellant Dilawar. Co-accused Haji, has already been acquitted by learned trial Court and his acquittal has attained finality. Appellants Uris, Ghulam Rasool and Dilawar have been awarded lesser punishment only for causing injuries to the

complainant. By doing so, learned trial Court has excluded them from vicarious liability. No Revision for enhancement of their sentence is filed by the prosecution. The case of prosecution has been disbelieved while acquitting co-accused Haji while it is believed by learned trial Court while convicting the appellants. In these circumstances, it could be concluded safely that the prosecution has not been able to prove its case against the appellants beyond shadow of doubt and to such benefit they are also found entitled.

10. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it has been observed by the Hon'ble Apex Court that;

*“Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate”.*

11. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been observed by Hon'ble Apex Court that;

*“---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”*

12. In case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR-344), it has been observed by the Hon'ble Apex Court that;

*“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused”.*

13. *In case of Muhammad Masha vs The State (2018 SCMR 772), it was observed by the Hon'ble Apex Court that;*

*"4....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), GhulamQadir 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)."*

14. The case law which is relied upon by learned A.P.G for the State and learned counsel for the complainant is on distinguishable facts and circumstances. In case of *Muhammad Imran (supra)* the appellant committed three murders including his wife, which was witnessed by his father-in-law and a distant relative. They were found to be natural witnesses. In the instant matter, PW Abbas and Muhammad Siddique (Hotel owner) being independent witnesses have not been examined by the prosecution. In case of *Akber Ali and others (supra)* much importance was given to the evidence of injured witness. In the instant case, the deceased was found sustaining one injury while complainant insisted that atleast three person caused "Danda" blows to the deceased. Such inconsistency has made his version to be doubtful.

15. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellants by way of impugned judgment are set-aside and they are acquitted of the offence

for which they were charged, tried and convicted by learned trial Court. Appellants Uris, Ghulam Rasool and Dilawar are present in Court on bail, their bail bonds are cancelled and sureties are discharged. Appellant Bassar is in custody and shall be released forthwith in the present case.

16. Above are the reason of short order dated 04.02.2021 whereby the instant appeal was allowed.

JUDGE

Ahmed/Pa,