IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Present:-

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Zulfiqar Ali Sangi

Cr. Jail Appeal No.D-347 of 2011
Confirmation Case No.D-22 of 2011

Meeral Mangrio. . . . . .Appellant

Versus

The State. . . . . .Respondent

Appellant Meeral Mangrio	:	Through Mr. Sajjad Ahmed Chandio Advocate
Respondent the State	:	Through Ms. Sana Memon, A.P.G, Sindh
Date of hearing	:	19.09.2019 & 26.09.2019

J U D G M E N T

Zulfiqar Ali Sangi, J.- Through this criminal jail appeal, the appellant named above has assailed the legality and propriety of the judgment dated 15.11.2011, passed by the learned IInd Additional Sessions Judge, Hyderabad in Sessions Case No.676 of 2010 re: State v. Meeral Mangrio arising out of Crime No.480 of 2008 of PS: Dadu, registered under section 302 and 458 PPC, whereby the learned trial Court after full dressed trial, convicted and sentenced the appellant for offence punishable under section 302(b) PPC to death as Ta'zir and to pay compensation of Rs.2,00,000/- to the legal heirs of the deceased. In default to pay compensation, the accused / appellant was ordered to suffer simple imprisonment for six months. Reference was also sent by trial Court in compliance of section 374 Cr.P.C.

2. The facts of the prosecution case in brief, are that on 12.10.2008 at 0200 hours, when complainant Ali Akbar, his brother deceased Imdad Ali, cousin Noor Muhammad, uncle Abdul Ghafoor and other family members were sleeping in their house situated in village Pakka Taluka Dadu, they woke up on hearing of barking of dogs and some knocking / noise and saw accused Meeral with carbine standing there. He made a direct fire shot with his carbine at Imdad Ali which hit him on his head. Then accused fled away and complainant party went near to Imdad Ali and found him dead due to said fire shot injury. As per F.I.R, the motive behind the

commission of said offence was matrimonial dispute between the parties over marriage of sister of Noor Muhammad with accused.

3. On conclusion of the investigation, challan in the aforesaid crime was submitted against the accused. At trial, the learned trial Court framed charge against the appellant, to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution examined complainant PW.1 Dr. Talib Hussain at Ex.3, who produced letter issued by police for post-mortem examination of the dead body of deceased and such report at Exs.3/A and 3/B. The next witness of the prosecution was P.W-2 ASI Qutabuddin at Ex.04, who produced Roznamcha entry, F.I.R, memo of inspection of dead body of deceased, inquest report, letter for post-mortem examination report, receipt of delivery of the dead body and memo of seizure of clothes of the deceased at Ex.4/A to 4/F respectively. Then prosecution examined P.W-3 PC Liaquat Ali at Ex.6, who produced memo of arrest of accused at Ex.7, P.W-4 PC Nazir Ahmed at Ex.8, P.W-5 ASI Abdul Wahab at Ex.9, who produced memo of inspection of place of offence, memo of recovery of crime weapon/carbine and letter to Mukhtiarkar at Ex.10 to 12 respectively, P.W-6 Tapedar Ghulam Shabbir at Ex.13, who produced sketch of place of vardat at Ex.14 and P.W-7 Noor Muhammad at Ex.15, thereafter learned ADPP vide his statement Ex.17 had closed the prosecution side.

4. Thereafter, statement of accused u/s 342 Cr.P.C. was recorded at Ex.18, in which he has denied the prosecution allegations and claimed his false implication in the crime; however, neither he examined himself on oath nor led any evidence in defense.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record, through impugned judgment convicted and sentenced the appellant, as stated above.

6. Learned advocate for appellant has contended that the case registered against the appellant is false and has been registered due to enmity on matrimonial dispute; that prosecution case is highly doubtful; that no incident as alleged in the F.I.R. has taken place; that the evidence so brought on record is contradictory on material particulars of the case, therefore, the same cannot be safely relied upon for maintaining conviction. He further contended that the learned trial Court has passed the impugned judgment on the basis of surmises, conjectures, same is perverse and against the natural norms of justice so also against the principles of criminal justice; that learned trial court while passing impugned judgment has failed to apply the judicial and prudent mind; that impugned judgment is against the law, facts and as such cannot be upheld; that it was the case of acquittal but learned trial court wrongly convicted the appellant; that material points and issues involved in the case

were not discussed by learned trial court; that all the PWs are interested and false implication of the appellant cannot be ruled out; that the learned trial court has misread and non-read the evidence of witnesses and as such has not appreciated the same and passed impugned judgment in a hasty manner; that prosecution evidence is not trustworthy; that the learned trial Court while passing the impugned judgment has ignored the material contradictions in the prosecution evidence which have made entire prosecution case as doubtful. He prayed that the appeal may be allowed and appellant may be acquitted.

7. Conversely, Ms. Sana Memon, the learned A.P.G, Sindh while supporting the impugned judgment and opposing the aforesaid contentions submitted that the prosecution has fully established its case against the appellant beyond reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentence awarded to the appellant is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, she prayed that the appeal may be dismissed.

8. We have heard the arguments and perused the entire record and evidence as available before us with the assistance of learned counsel.

9. The incident took place on 12.10.2008 as alleged by the prosecution, all the witnesses are shown close relatives of the complainant but their statements under section 161 Cr.P.C. were recorded on 05.11.2008 after delay of 23 days of the incident. Such fact is admitted by the Investigating Officer in his examination-in-chief wherein he has stated that "**On 05.11.2008 I recorded statements of P.Ws.**" However, such delay has not been explained.

10. The motive as set up by the prosecution in the F.I.R. is annoyance of appellant with P.W Noor Muhammad over marriage of his sister and it was not directly linked with the deceased. It was P.W Noor Muhammad's sister hand demanded by the appellant and refused by said Noor Muhammad. The F.I.R. shows that deceased had allegedly only objected giving her hand to appellant by saying that Meeral (appellant) is a "Loafer" and involved in several criminal cases on which appellant got annoyed with deceased and issued threats of murder to him by saying that he (deceased) is the person who was creating hurdles. However, in support of such facts, except a word a P.W Noor Muhammad nothing is available. P.W Noor Muhammad in examination-in-chief has stated that "Accused Meeral is his cousin. His father had died away, who had not given the hand of Shabbiran to accused due to illegal and criminal activities. The accused requested him for giving hand of his sister but he failed to mend his ways. Accused disclosed to him that Imdad is creating hurdle in his marriage to which he replied that Imdad had nothing to do with

such affairs" It is clear that the motive as set-up by the prosecution was annoyance of the appellant with P.W Noor Muhammad and not with the deceased but surprisingly appellant did not cause any harm to him though he was available in the house of deceased at the time of occurrence. No other independent evidence has been produced by the prosecution to prove the said motive for committing murder of deceased Imdad. It is therefore established that prosecution has not proved the motive against appellant by producing cogent, reliable and trustworthy evidence.

11. The incident took place on 12.10.2008 at 0200 hours and it is stated that dead body was immediately taken to hospital for post-mortem and after funeral ceremony, F.I.R. was lodged. Post-mortem however shows time of arrival of dead body at hospital on 12.10.2008 at 06.30 a.m. which is after four and half hour. The distance between police station and place of incident was 10/12 kms and can be covered within half hour. Therefore such delay in conducting post-mortem examination of the dead body indicates that time was consumed by the complainant party in procuring and planting eye-witnesses in the case and further it is against the claim made in the F.I.R. In the trial the other eye-witnesses were not examined by the prosecution except P.W Noor Muhammad who is a chance and interested witness as admittedly he is not a resident of same place. Even the complainant who is also the brother of deceased was not examined in the trial. Such omission on the part of prosecution has dealt a serious blow to prosecution case. Reliance in this regard can be placed on the case of ***Asad Khan v. The State*** **(PLD 2017 Supreme Court 681)**.

12. On appraisal of evidence available on record we also found major dent in the prosecution case as to arrival of accused at place of wardat and his escaping from there. Complainant (not examined before the trial Court) has stated in F.I.R. that accused after committing murder of deceased escaped away while climbing the wall. P.W-7 Noor Muhammad in his examination-in-chief has stated that "on the same night when they were asleep accused Meeral entered their house by climbing wall." Again in examination-in-chief he stated that "they raised cries on which accused Meeral left the place while climbing the wall towards western side." He in cross-examination stated that "the height of the wall was normal one" The mashirnama of inspection of place of wardat however shows that there was "**hedge**" around the house for protection having a door of entrance which creates very serious doubt in the prosecution case.

13. According to prosecution case, the incident had been witnessed by Ali Akbar (complainant / brother of deceased), Abdul Ghafoor (uncle of deceased) and Noor Muhammad (brother-in-law of deceased) who being resident of the house are natural witnesses. Noor Muhammad is not resident of the area where incident took

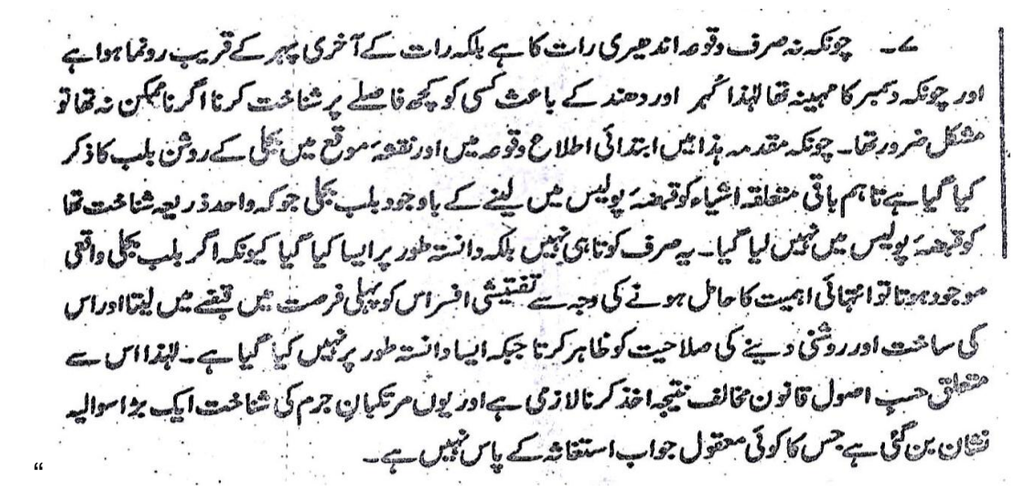
place, but during the trial only he was examined and not the natural witnesses, which suggests that they were not supporting the case. The evidence of a chance witness in absence of other natural evidence is not reliable. In this context, reliance can be placed on the case of ***Asad Khan v. The State*** **(PLD 2017 Supreme Court 681)**.

14. Further P.Ws Gul Muhammad and Ghulam Qadir were shown as mashirs of place of wardat, inspection of dead body, Danishnama, bloodstained clothes, recovery of Carbine (Desi Pistol), but none of them was produced before the trial Court.

15. The identification of the accused / appellant as disclosed by the prosecution was electric bulbs at the place of incident. As per F.I.R. the P.Ws were sleeping in the "Ewan", whereas deceased was sleeping in "Chappar" where electric bulbs were on. P.Ws and deceased were awakened due to barking of dogs and noise, and saw the accused. But during investigation, no bulbs were produced / secured by the investigation officer and even in the sketch their presence has not been marked. Therefore, identification of appellant in the light of bulbs has become doubtful. Honourable Supreme Court of Pakistan in the case ***Sardar Bibi and others v. Munir Ahmed and other*** **(2017 SCMR 344)** has held as under:-

> "From the above discussion, it is quite clear that in this case FIR was chalked out after consultation and deliberation. The delay in the FIR and postmortem examination further confirms that FIR and documents i.e. inquest report etc. were prepared much after the given time. **The source of light i.e. bulbs etc. was not taken into possession during investigation to establish that the witnesses who were allegedly at the distance of more than 100 feet could identify the assailants. So the identification of the assailants was also doubtful in such circumstances of the case**. (Bold is made by us).

Honourable Supreme Court of Pakistan in the case of ***Khalil v. The State*** **(2017 SCMR 960)** has held as under:-



۷۔ چونکہ نہ صرف وقوعہ اندھیری رات کا ہے بلکہ رات کے آخری پہر کے قریب رونما ہوا ہے اور چونکہ دسمبر کا مہینہ تھا لہٰذا کہر اور دھند کے باعث کسی کو کچھ فاصلے پر شناخت کرنا اگر ناممکن نہ تھا تو مشکل ضرور تھا۔ چونکہ مقدمہ ہذا میں ابتدائی اطلاع وقوعہ میں اور نقشہ موقع میں بجلی کے روشن بلب کا ذکر کیا گیا ہے تاہم باقی متعلقہ اشیاء کو قبضہ پولیس میں لینے کے باوجود بلب بجلی جو کہ واحد ذریعہ شناخت تھا کو قبضہ پولیس میں نہیں لیا گیا۔ یہ صرف کوتاہی نہیں بلکہ دانستہ طور پر ایسا کیا گیا کیونکہ اگر بلب بجلی واقعی موجود ہوتا تو انتہائی اہمیت کا حامل ہونے کی وجہ سے تفتیشی افسر اس کو پہلی فرصت میں قبضے میں لیتا اور اس کی ساخت اور روشنی دینے کی صلاحیت کو ظاہر کرتا جبکہ ایسا دانستہ طور پر نہیں کیا گیا ہے۔ لہٰذا اس سے متعلق حسب اصول قانون مخالف نتیجہ اخذ کرنا لازمی ہے اور یوں مرتکبان جرم کی شناخت ایک بڑا سوالیہ نشان بن گئی ہے جس کا کوئی معقول جواب استغاثہ کے پاس نہیں ہے۔

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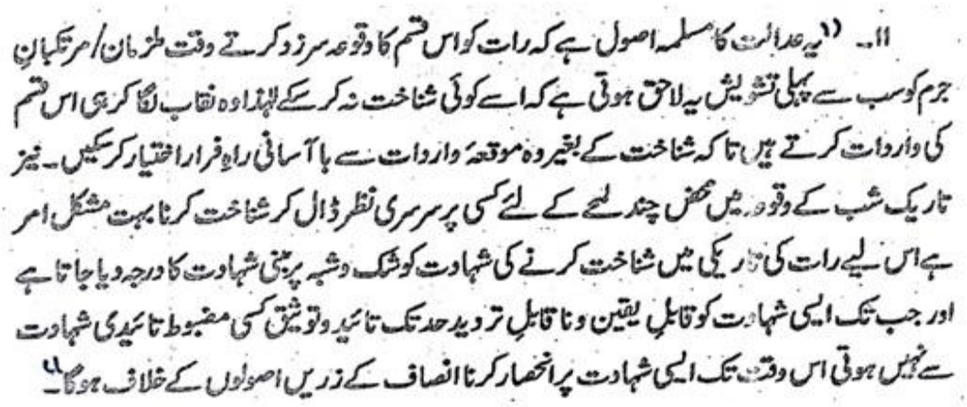
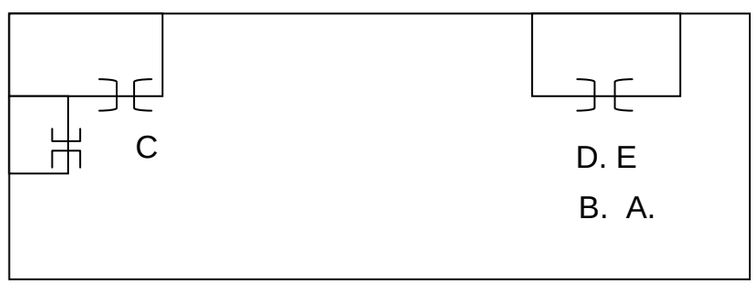

۱۱۔ "یہ عدالت کا مسلمہ اصول ہے کہ رات کو اس قسم کا وقوعہ سرزد کرتے وقت ملزمان/مرتکبانِ جرم کو سب سے پہلی تشویش یہ لاحق ہوتی ہے کہ اسے کوئی شناخت نہ کر سکے لہٰذا وہ نقاب لگا کر ہی اس قسم کی واردات کرتے ہیں تاکہ شناخت کے بغیر وہ موقعۂ واردات سے باآسانی راہِ فرار اختیار کر سکیں۔ نیز تاریک شب کے وقوعہ میں محض چند لمحے کے لئے کسی پر سرسری نظر ڈال کر شناخت کرنا بہت مشکل امر ہے اس لیے رات کی تاریکی میں شناخت کرنے کی شہادت کو شک و شبہ پر مبنی شہادت کا درجہ دیا جاتا ہے اور جب تک ایسی شہادت کو قابلِ یقین و ناقابلِ تردید حد تک تائید و توثیق کسی مضبوط تائیدی شہادت سے نہیں ہوتی اس وقت تک ایسی شہادت پر انحصار کرنا انصاف کے زریں اصولوں کے خلاف ہوگا۔"

16. Even recovery from the place of wardat and of Carbine (Desi Pistol) has not been proved by the prosecution through reliable, trustworthy and confidence inspiring evidence. The Mashirnama of place of wardat (Ex.10) shows that it was prepared on 13.10.2008 whereas the incident took place on 12.10.2008 and blood was taken from earth so also one empty cartridge, but said document does not speak about the sealing thereof. The Investigating Officer in his examination-in-chief has stated that "On 12.10.2008 he was ASI at P.S Dadu I.T. On that day he handed over Crime No.480/2008 of P.S Dadu u/s 302 PPC by ASI Qutabuddin for investigation. He handed over written proceedings duly conducted by ASI Qutabuddin. On next day he visited the place of wardat. It was the house of deceased situated in village Pucca Deh Khudabad Taluka and District Dadu. He collected an empty cartridge of 12.bore so also blood stained earth. On his demand the complainant handed over clothes of deceased. He sealed empty cartridge, bloodstained earth so also clothes of deceased" For bloodstained clothes ASI Qutabuddin P.W-2 in his examination-in-chief stated that " he received clothes of the deceased and handed over to I.T. Dadu. He produced mashirnama of received clothes as Ex.4/F." It is the case of prosecution that appellant had made only one fire shot, and from place of incident one empty cartridge was recovered but when Carbine (Desi Pistol) was recovered on 10.01.2009, it was found with one empty cartridge in its chamber which is strange. I/O Abdul Wahab to strengthen the case of prosecution concealed this fact at the time of recording of his examination-in-chief, and was declared hostile and in cross-examination he stated that an empty cartridge was lying in the Desi Pistol. He further stated that it is incorrect to suggest that he deliberately avoided giving the names of mashirs in order to extend favour to the accused for ulterior motives. Although he claims to have sent the pistol to Firearm Expert but his report is not available in the file.

17. The important evidence viz bloodstained earth, bloodstained clothes, empty cartridge recovered from the place of wardat and Carbine (Desi Pistol) alongwith one empty cartridge recovered during investigation though were available in the trial Court but were not exhibited by any witness in evidence.

18. The place of incident where deceased was murdered is also doubtful as in F.I.R. it was stated that complainant and witnesses were sleeping in the "**Angan**" (courtyard) and deceased was sleeping in "**Chapra**" and in front of that **Chapra** one katcha room is constructed and at eastern side two katcha rooms are constructed but Tapedar who visited the place of wardat on pointation of wife of deceased has given totally a different view. The sketch shows that deceased at the time of his death was sleeping in open area away from the house, which place has been marked clearly. Tapedar also deposed in his examination-in-chief that he has visited place of wardat of the above crime on 12.04.2011, duly shown by the wife of deceased Mst. Qadeeran and HC Muhammad Moosa Leghari, which is situated inside the house of deceased in the Veranda (courtyard) situated in village Pakka Taluka Dadu. In the sketch, Point-A is the place where deceased Imdad Ali Mangrio was fired and his dead body was lying there. Point-B is the place from where a fire was made upon the deceased which place was at the distance of about two feet from point-A at western side. Point-C is the place where complainant and eye-witness Ali Akbar were available which place was at the distance of about 48 feet from Point-A at the corner of northern and western side. Point-D is the place where PW Noor Muhammad was sitting on the cot, which was at distance of 20 feet from point-A at northern side" For sake of convenience, the sketch prepared by the Tapedar is reproduced as under:-



19. All the incriminating piece of evidence available on record are required to be put to the accused, while recording his statement under section 342 Cr.P.C in which the words "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" appear which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are to be put to the accused but circumstances appearing in cross-examination or re-examination as well. From a careful perusal of statement of the appellant, under section 342 Cr.P.C. it reveals that the portion of examination-in-chief about recovery of empty cartridge and bloodstained earth from the place of wardat and recovery of bloodstained clothes was not put to the appellant in his statement under section 342 Cr.P.C. to enable him to explain the circumstances, as has been held by Honourable Supreme Court of Pakistan in the case of ***Muhammad Shah v. The State*** **(2010 SCMR**

1009). No piece of evidence about the motive was put to appellant in his statement u/s 342 Cr.P.C, therefore, the evidence about the motive though was not proved by prosecution as discussed above, cannot be used against the appellant on that account. It is well settled principle of law that if any incriminating piece of evidence is not put to accused while recording statement under section 342 Cr.P.C, for his explanation, then the same cannot be used against him for awarding conviction. In this context reliance can be placed on the case of (1) ***Imtiaz alias Taj v. The State and others*** **(2018 SCMR 344)**, (2) ***Qaddan and others v. The State*** (**2017 SCMR 148**) and (3) ***Mst. Anwar Begum v. Akhtar Hussain alias Kaka and 2 others*** (**2017 SCMR 1710**).

20. The recovery of Carbine (Desi Pistol) cannot be used against the appellant in absence of any report of Ballistic Expert. It has been held by Honourable Supreme Court of Pakistan in the case of ***Zafar Hayat v. The State*** (**1995 SCMR 896**) as under:-

> "7. We have observed that P.W. 8 is a chance witness and has not convincingly explained his presence at that odd hour. The explanation offered by him is not at all convincing. P.W. 7, as discussed above, cannot be believed without any strong corroborative evidence. The motive has been discarded by the High Court and we have no reason to disagree with it. **The recovery of gun cannot be relied upon as it was not sent for examination of the Fire Arms Expert.** We, therefore, allow the appeal and acquit the appellant. He shall be released forthwith unless required in any other case. For these reasons Cr. Petition No. 9-L of 1992 is dismissed." (Bold is made by us).

21. From the above discussion, it is evident that there are serious doubts in the case of prosecution. It is settled law that even a single doubt in the prosecution story is disastrous and its benefit must go to the accused. In this regard we would like to place reliance on the case of ***Tariq Pervez v. The State*** (**1995 SCMR 1345**) wherein Honourable Supreme Court of Pakistan held as under:-

> "The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, 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 the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

22. Above are the reasons of short order dated 26.09.2019, whereby captioned appeal was allowed, impugned judgment and conviction were set aside and the appellant was ordered to be released forthwith. As a result thereof the reference sent by the trial Court is answered in negative.

JUDGE

JUDGE

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