IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.233 of 2017

Dates of hearing	:	23.09.2019
Date of Judgment	:	23.09.2019
Pauper Appellant Noor Mustafa Son of Ghulam Mustafa	:	through Ms. Abida Parveen Channer, Advocate.
State	:	through Ms. Rubina Qadir, Asst. Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- By means of instant criminal appeal, the appellant has assailed judgment dated 24.03.2017 passed by learned VI-Additional District & Sessions Judge, Karachi East in Sessions Case No.147/2011, (re: State v. Mohammad Asif & another), arising out of F.I.R No.410/2010 registered at P.S Brigade Karachi under Sections 393/302/34 PPC, whereby appellant Noor Mustafa and co-accused Mohammad Asif son of Zahid Hussain have been convicted for an offence punishable under section 393 PPC and awarded sentence to undergo R.I. for 07 years and to pay fine of Rs.5,000/- (Rupees five thousand only) each and in case of default in payment of fine, each of them was to undergo SI seven (7) days more. However, both the accused / were extended benefit of Section 382-B Cr. P.C.

In addition to above, appellant Noor Mustafa was also convicted for an offence punishable under section 302-B PPC and was sentenced to undergo R.I. for life and to pay compensation of Rs.100,000/- (Rupees One Lac only) which amount, if recovered, was ordered to be paid to the legal heirs of deceased Abdul Rasheed and in case of default in payment of compensation amount, the appellant was to undergo SI six (6) months more. However, the appellant was extended benefit of Section 382-B Cr. P.C. on this count also and the sentences awarded to him were ordered to run concurrently.

The crux of the prosecution case is that complainant Abdul Hameed reported at police station that on 22-09-2010 at about 1000 hours he was

available in his house and was taking breakfast when he received a message from Pervaiz that his (complainant's) brother, Abdul Rasheed has sustained firearm injury. He went to the Jank Shop of his brother near Madina Bakery situated at Sector 1-A, Jacob Line, Karachi, where he came to know that his brother was shifted to Civil Hospital. He reached at Civil Hospital where he came to know that his brother had succumbed to the injuries and expired. Complainant's nephew Mohammad Shafiq son of Abdul Rasheed aged about 14/15 years told him that on that date at about 10.00 am`, he and his deceased father Abdul Rasheed were present at their shop, meanwhile two boys came there on a black coloured motorcycle bearing No. KEC/4202 maker Super Star 70-CC and asked the deceased to handover to them whatever he had. Upon this, deceased made resistance and tried to apprehend one of the culprits. In the meantime, his another accomplice who was holding pistol in his hand opened fire from his pistol upon the deceased due to which the deceased sustained injury and fell down, while his accomplice who was scuffling with the deceased also received bullet shot over his head and he also fell down, whereas the accused who made fires fled away from the spot by making fires. Mohammad Shafiq also told the complainant that said injured dacoit was also admitted in the Emergency Ward of Civil Hospital and he is the same person who had sustained bullet injury from the firing of his accomplice during scuffle with his father and the name of injured accused came to his knowledge to be Mohammad Asif son of Zahid Hussain, whereas the name of his accomplice who made his escape good was disclosed by Mohalla people as Noor Mustafa alias Raja son of Ghulam Mustafa.

At that time ASI Muhammad Asif, who was available in the hospital, recorded the statement under Section 154 Cr. P.C. of the complainant Abdul Hameed inside the Civil Hospital Karachi. He also prepared memo of inspection of dead body as well as inquest report of deceased under Section 174 Cr. P.C. and handed over letter to MLO for conducting postmortem. Thereafter, he came back at Police Station and incorporated the statement of complainant in 154 Cr. P.C. Book and registered F.I.R. No. 410/2010, under Sections 393/302/34 PPC and then he handed over the case papers and property to the SIP Chaudhry Tariq Mehmood for further investigation.

SIP Chaudhry Tariq Mehmood after receipt of papers and property, carried out further investigation. He visited place of incident and collected 04 empty shells, one Sikka of the bullet and bloodstained earth. Accused Muhammad Asif was already arrested, whereas accused Noor Mustafa was

shown as absconder. After completing usual investigation, challan was submitted against both the accused in the Court of law. The concerned Magistrate after fulfillment of legal formalities, declared accused Noor Mustafa as absconder vide Ex.3. The case being exclusively triable by Court of Sessions, was accordingly sent there.

Initially, charge was framed against accused Muhammad Asif vid Ex.4 on 10.05.2011; however, consequent upon arrest of present appellant Noor Mustafa, amended charge was framed on 03.05.2012 vide Ex.07 against both the accused to which they pleaded not guilty and claimed to be tried.

In order to prove its case prosecution examined PW Muhammad Riaz at Ex.5, who produced memo of inspection of dead body of deceased Abdul Rasheed as Ex.5/A, inquest report of deceased in Civil Hospital Karachi as Ex.5/B and memo of arrest as Ex.5/C.

Thereafter, on 23.04.2012, CID police arrested accused/appellant Noor Mustafa, hence on 03.05.2012 amended charge was framed against accused Muhammad Asif and Noor Mustafa vide Ex-7, and their pleas were recorded vide Ex.7/A and 7/B in which they pleaded not guilty and claimed for trial.

The prosecution further examined PW-02 complainant Abdul Hameed at Ex-8, who produced his statement under Section 154 Cr. P.C. recorded in the hospital as Ex.8/A, memo of place of incident as Ex.8/B, receipt of receiving dead body of his brother as Ex.8/C. PW-3 Muhammad Shafiq was examined at Ex.9, whereas PW-4 SIP Muhammad Asif was examined at Ex.10, who produced departure entry as Ex.10/A, letter given to MLO Civil Hospital Karachi regarding proceeding under Section 174 Cr. P.C. as Ex.10/B, letter issued to MLO for postmortem of the deceased as Ex.10/C, F.I.R. as Ex.10/D. ADPP for the State gave up PW Muhammad Ramzan vide statement Ex.11. PW-5 MLO Dr. Abdul Haleem Memon was examined at Ex.12, who produced letter given to him by SIO Police Station Brigade regarding conducting postmortem of the deceased as Ex.12/A, postmortem report as Ex.12/B, death certificate as Ex.12/C, MLC of deceased as Ex.12/D, MLC of accused Muhammad Asif as Ex.12/E and Order of Addl. MS Civil Karachi as Ex.12/F. PW-6 SIP Choudhry Tariq Mehmood was examined at Ex.13, who produced daily diary entry No.33 as Ex.13/A, arrival DD entry No. 53 as Ex.13/B, letter sent to FSL examiner as Ex.13/C, letter for permission from SPO to send the property for chemical examination as Ex.13/D, letter for depositing the case property with chemical examiner as Ex.13/E, FSL report as Ex.13/F, report of

chemical examiner as Ex.13/G and CRO record of accused Muhammad Asif as Ex.13/H. Thereafter, learned ADPP for the State filed statement for closing side of prosecution vide Ex.14.

Statements of accused under section 342 Cr. P.C. were recorded vide Ex.15 and Ex.16 wherein they denied the allegations of prosecution. The accused persons however declined to be examined on oath as provided under section 340(2) Cr.P.C. They also declined to produce any witness in their defence.

After formulating points for determination, recording evidence of the prosecution witnesses and hearing learned counsel for the accused and the ADPP appearing for the State, trial Court convicted and sentenced the accused, as stated above, hence instant criminal appeal has been filed by the present appellant.

I have heard learned counsel for the appellant and learned APG appearing for the State and perused the material available on the record.

Learned counsel for pauper accused / appellant Noor Mustafa submitted that the accused is innocent and has been falsely implicated by the prosecution / complainant. She further contended that the complainant of the case namely Abdul Hameed is the brother of deceased and he was not the eye witness of alleged incident. According to her, as per prosecution case as well as evidence of first Investigating Officer namely Muhammad Asif, deceased Abdul Rasheed sustained firearm as well as Churri (cutter) injuries on his person though his evidence is belied by other prosecution witnesses as well as medical evidence. She further submitted that it is also matter of record that motorcycle allegedly driven by the accused was secured by the Investigating Officer but was not produced before the trial Court in evidence. The empties allegedly secured by the Investigating Officer were sent to FSL Laboratory on 18.10.2010 after a delay of about 16 days. She further contended that name of the appellant as per evidence of prosecution witnesses, was disclosed by the Mohalla people; however, none from the said Mohalla people has been cited as a witness in the case even the offensive weapon from the appellant has not been shown to have been recovered, nor the same was produced by him at the time of his arrest. She further submitted that per impugned judgment, the appellant as well as co-accused Muhammad Asif have been convicted in terms of Section 393 PPC whereas co-accused Mohammad Asif has been acquitted from the charge of section 302 PPC. She next submitted that acquittal of co-

accused from murder charge has not been assailed by the Complainant or the prosecution, therefore, present appellant is also entitled to be extended same concession. In support of her contentions, she placed reliance upon the case-law reported in 2016 SCMR 1763. She further submitted that circumstances existing in the case create lot of doubts in the prosecution case which, as per settled law, is required to be extended to the accused. She, therefore, prayed for allowing instant appeal and acquitting the appellant/convict.

Ms. Rubina Qadir, Assistant Prosecutor General, Sindh, appearing for the State, opposed the appeal on the ground that mere acquittal of co-accused from the murder charge does not entitle the appellant to be acquitted as, according to her, both the accused viz. appellant as well as co-accused, have been convicted for an offence under Section 393 PPC. With regard to non-recovery of the offensive weapon, she submitted that such non-recovery is immaterial; more particularly, when ocular version supports the case of prosecution. In support of her contentions, she placed reliance upon the case-law reported as 2013 P Cr. L.J. 692, 2013 YLR 2620 and PLD 2004 SC 371.

As per prosecution case, on 22.09.2010 two motorcyclists came on motorcycle bearing No. KEC-4202 at the spot and asked owner of the shop namely Abdul Rasheed to handover whatever he had. The accused were resisted by deceased Abdul Rasheed and he allegedly caught hold of one of the accused namely Muhammad Asif, while other one, who had pistol in his hand, fired upon the deceased and then decamped from the scene; however, admittedly nothing was robbed away. One of the assailants, who later on was exposed as Muhammad Asif, also sustained injury on his person. Injured Abdul Rasheed as well as accused Muhammad Asif were shifted to hospital; however injured Abdul Rasheed succumbed to his injuries while accused Muhammad Asif was survived and was arrested by the police in the hospital.

From the perusal of the evidence of prosecution witnesses, it appears that there are various contradictions as well as admissions made by them which disclose discrepancies and legal flaws in the prosecution case. Complainant Abdul Hameed in his cross-examination to the counsel for accused Mohammad Asif made following admissions:

> *"PW Shafiq has informed me about the incident that accused Asif has* ***caught hold of his father*** *from the behind and co-accused tried to took out some money but when he resisted he fired upon.....It is fact that in my examination in chief I had not stated about Shafiq. Shopkeepers who disclosed about the incident and names of accused were knowing to accused very*

well because accused belongs to same mohallah but accused were not known to my brother. I do not know the names of those shopkeepers but Shafiq has got the names of witnesses viz. shopkeepers. It is fact that I am not witness of incident ***but FIR was registered on the basis of information received from others****.....In my presence police has not recorded the statement of neighborers whether incident took place. At the time of vising the place of incident Shafiq was also with me. It is fact that statement of other shopkeepers were not recorded by the police."*

In his cross-examination to the counsel for appellant Noor Mustafa, he admitted as under:

"I had left the house at about 10.30 am and within 5 to 10 minutes arrived at the shop. .....I had arrived at the hospital at about 11:00 am. At that time Riaz, Ramzan and Nazar were also with me.....Postmortem of the dead body was conducted by the doctor ***before my arrival****. .....After my arrival from Pujab my statement was recorded by the police. It is fact that in the FIR I had not given the name of witness who had seen the occurrence. It is fact that I was informed by the mohallah people about the apprehended accused and co-accused when I went at the place of incident alongwith police for inspection...."*

P.W.2 Mohammad Shafiq, who claims to be eye-witness of the alleged incident, in his examination-in-cheif, *interalia*, deposed as under:

"The name of the person who was holding pistol was ***disclosed by the people of vicinity as Noor Mustafa*** *and he escaped from the scene by making firing.....while the other accused* ***whose name was declared as Asif*** *was admitted in the hospital. My uncle namely* ***Abdul Majeed*** *got registered an FIR....."*

In his cross-examination to the counsel for accused Mohammad Asif this witness made following admissions:

*"It is correct to suggest that there is residential area near my shop.....It is correct to suggest that the prosecution witness Ramzan, Mohammad Riaz, Abdul Majeed and Nazar are my relatives.....It is correct to suggest that I was in jail in crime No.526/2013, under sections 392,353,324,34 PPC of Ferozabad, police station Karachi. It is correct to suggest that I had sent my affidavit dated 03.9.2014 from jail to this court where it is mentioned that "****I have been cited as a witness of the incident which is totally wrong as such I was not present at the time of incident at my father's shop and the accused Asif son f Zahid Hussain was not my culprit and he is an innocent person."*** *Voluntarily says that the accused Noor Mustafa alias Raja forced me in jail to send this affidavit to the court. I was released from the jail on 05.5.2015 after 8 months of sending the aforesaid affidavit....."*

In his cross-examination to the counsel for accused Noor Mustafa he admitted as under:

> *"During resistance I also received injuries on the right knee. It is correct to suggest that I did not get medically examined my knee injury.....It is correct to suggest that I did not tell the name of mohallah people to police who disclosed the name of accused Noor Mustafa. .....It is correct to suggest that the affidavit sent by me from the jail is about accused Asif but not for accused Noor Mustafa. It is correct to suggest that accused Noor Mustafa did not get signed any affidavit by pressure for him. .....It is correct to suggest that the people of vicinity disclosed the name of accused Noor Mustafa. Voluntarily says that I had seen the accused myself on spot.*

P.W. 3 SI Mohammad Asif in his examination-in-chief, *interalia*, deposed as under:

> *"At about **11:05 a.m.** I received message from MLO Civil Hospital through police control-room that the dead body of a person brought at civil Hospital, Karachi. .....Thereafter, I submitted a letter to MLO for postmortem of the deceased.....I recorded the statement of the brother of deceased namely **Abdul Majeed** under Section 154 Cr. P.C.....The **complainant Abdul Majeed**, the brother of deceased in his statement recoded under section 154 Cr. P.C. nominated the injured Mohammad Asif who was available in the emergency ward of Civil Hospital Karachi....."*

In his cross-examination to the counsel for accused Mohammad Asif he made following admissions:

> *"I reached Civil Hospital Karachi within 20 to 25 minutes **after receiving information at 11:05 a.m..... I made the inquest report and report of inspection of dead body before conduction of postmortem of the deceased.....**On the pointation of **Abdul Majeed**, I arrested accused Asif. I recorded the statement of **Abdul Majeed** under section 154 Cr. P.C. and **not the statement of Abdul Hameed son of Azam Sarwar**. .....At the time of his arrest accused Asif was unconscious. It is correct to suggest that on the page No.4 of the inquest report, Ex.5/B it is mentioned that the deceased was **killed with churri and due to receiving bullet injury**. It is correct to suggest that I did not visit the place of occurrence. It is correct to suggest that PWs Shafique and Pervaiz did not appear before me....."*

P.W. 5 SIP Ch. Tariq Mehmood, I.O. of the case, in the end of his examination-in-chief by deposing as under, inflicted a fatal blow to the prosecution case:

> *"I had deposited the case property of this case the IO with in charge Malkhana city Court Karachi under Mad No.09 in the year 2010 but now the present incharge Malkhana city Court has submitted the report before this Court in writing that **presently the case property to this Court is not available with him which has been missed."***

In his cross-examination to the counsel for accused Mohammad Asif, he made following admissions:

> *"....It is correct to suggest that the Lab-e-Sheeren is not a place of incident..... I see the Ex.5/C. It is correct to suggest that the place of arrest of accused is mentioned in the same memo as* ***Lab-e-Sheeren....****The name of complainant is* ***Abdul Hameed****.....I see 154 Cr. P.C. statement at Ex.8/A and say that the name of complainant is mentioned as* ***Abdul Hameed*** *and I see F.I.R. at Ex.10/D the name of complainant is mentioned as* ***Abdul Majeed****.....It is correct to suggest that the doctor had given the information to the duty officer that the injured received the injuries by* ***Churi*** *and bullet injuries.....Voluntarily says that says that the actual name of complainant is* ***Abdul Majeed*** *but due to span of time I could not remember his correct name. .....It is correct that I had got recorded my examination in chief on dated 30.11.2016 and name of the complainant was given as* ***Abdul Hameed*** *at about four five place.....It is correct that it is mentioned in the last column of the inquest report at page No.4 that the Abdul Rasheed received injuries* ***by Churi*** *and bullets. It is correct to suggest that the place of incident is shown in the same inquest report as* ***Lab-e-Sheeren****. It is correct to suggest that the incident occurred on 22.09.2010. I sent the four empties and one Sikka to the FSL on 23.09.2010.....It is correct that the property deposited to the FSL on 08.10.2010. I called the complainant on 22.09.2010 at Police Station.....It is incorrect to suggest that on 22.09.2010 the complainant alongwith witnesses went to the Punjab with the dead body.....It is correct to suggest that I completed the formalities and then complainant went to the Punjab with the dead body....."*

In this cross-examination to the counsel for accused Noor Mustafa, he admitted as under:

> *"It is correct to suggest that the complainant has stated in the F.I.R. that he received information from Mohallah people that the absconding accused was Noor Mustafa. It is correct to suggest that the complainant had not given the name of those mohallah people in the F.I.R. It is correct to suggest that the witnesses namely Ramzan, Nazar, Shafiq and Riaqz has given their 161 Cr. P.C. statement before me and they stated that the name of accused Noor Mustafa was given by some mohallah people. The mohallah people were not ready to give statement in respect of the incident. I have not given notice U/S 160 Cr. P.C. to any person. It is correct to suggest that whatever I investigated the matter and submitted the charge sheet except this I had not made efforts to collect the* ***independent evidence.*** *It is correct to suggest that the crime weapon used in the offence was not recovered from the accused....."*

From above certain very important discrepancies emerge which put dents and create serious doubts in the prosecution case. The complainant in the F.I.R. stated that he was told by his nephew P.W. Mohammad Shafique that at the time of incident deceased made resistance and tried to apprehend one of the culprits, however, meanwhile his another accomplice who was holding pistol in his hand opened fire from his pistol upon the deceased due to which the deceased sustained injury and fell down, while his accomplice who was

scuffling with the deceased also received bullet shot over his head and he also fell down. However, in his cross-examination he categorically stated, "*PW Shafiq has informed me about the incident that accused Asif has **caught hold of his father** from the behind and co-accused tried to took out some money but when he resisted he fired upon."* Thus there is mark difference between his two statements i.e. in the FIR he stated that deceased had caught hold of accused Mohammad Asif, whereas in his evidence he deposed that accused Mohammad Asif had caught hold of the deceased. Besides, the complainant deposed that upon receiving message about the incident he left the house at about 10.30 am and within 5 to 10 minutes he reached at the place of incident and thereafter he had reached at the hospital at about 11:00 am. In his cross-examination, he categorically admitted, "*Postmortem of the dead body was conducted by the doctor **before my arrival"*** Now, according to him he reached the hospital at about 11.00 and before that postmortem had been conducted. This statement is totally belied / contradicted by P.W.4, MLO / Dr. Abdul Haleem Memon, who in his examination-in-chief deposed that **Post mortem started 12.30 to 1.30 pm**, whereas the complainant had deposed that when he reached the civil hospital at 11.00 postmortem had already been conducted. Likewise, P.W. SIP Mohammad Asif deposed in his examination-in-chief that at 11.00 a.m. he received message from MLO Civil Hospital Karachi that the dead body of the deceased had been brought to the hospital whereupon he reached the hospital after 20 to 25 minutes after receiving the said message i.e. at about 11.25 a.m. Thereafter, he prepared inquest report, made inspection of dead body and prepared report of inspection and thereafter he submitted letter to the MLO for conducting postmortem on the deadbody meaning thereby that if it is presumed that only half an hour would have been consumed in completing aforesaid formalities of inspection of dead body and preparing memos etc., even then he could not have requested the MLO for conducting postmortem at least before 12.00 noon and the MLO started the postmortem at 12.30 as per his own admission and completed the same at about 1.30 p.m. Thus, they both have clearly belied the statement of the complainant that the postmortem had been conducted before 11.00 a.m. when he reached at the civil hospital.

Another significant contradiction seems to be that the complainant in his cross-examination admitted, *"**From civil hospital we directly took dead body to the Punjab"*** . Prior to that, he had admitted, *"My statement was recorded in the hospital at about 2:45 pm. At that time dead body was **received by me."*** It shows that he had received the dead body at least by 2.45 pm and straight away they proceeded for Punjab, as admitted by himself. On the other hand, P.W.

Tariq Mehmood, I.O. of the case, has belied such statement of the complainant by deposing in his cross-examination, "*It is **incorrect** to suggest that on 22.09.2010 the complainant alongwith witnesses **went to the Punjab** with the dead body."*

The complainant also admitted that he is not a witness of the incident but FIR was lodged by him on the basis of information received from others. On the other hand, P.W. Mohammad Shafique, son of the deceased, claims to be present at the spot at the time of incident and to have witnessed the incident, as such he should have been made complainant but instead Abdul Hameed whose evidence is *'hearsay'* has himself acted as complainant. In this view of the matter, complainants' statement has got no evidentiary value by virtue of the provisions of Article 71 of Qanoon-e-Shahadat Order, 1984. This is also fatal to the prosecution case.

Now adverting to the evidence of P.W. 2 Mohammad Shafique, who has been shown to be the only eye-witness of the incident, it seems that he has also made some very significant admissions which also give fatal blow to the prosecution case. Most important of such admissions is the one in which he has admitted that he had sent his affidavit dated 03.9.2014 from jail to the trial court wherein he had categorically stated that although *he has been cited as a witness of the incident but that is totally wrong because he was not present at the time of incident at his father's shop and the accused Asif son of Zahid Hussain was not the culprit in that case and that he is an **innocent person***. Although trial Court in the impugned judgment has discarded this piece of evidence on the ground that after release from the jail he backed out from such statement saying that the same was the result of pressure having been exerted upon him by accused / appellant Mustafa Noor who was also with him in the jail. I am afraid I am not satisfied with such reasoning given by the trial Court for the simple reason that when accused/appellant Mustafa Noor had allegedly exerted pressure upon P.W. Mohammad Shafiq to swear such affidavit thereby exonerating accused Mohammad Asif, then as to why he did not pressurized him to swear such affidavit thereby exonerating him (Mustafa Noor) too. It does not appeal to mind / common sense that if a person could successfully pressurize any person to extend certain benefit to some other person, then as to why he could not pressurize said person to gain similar benefit for himself. Even in his cross-examination P.W. Mohammad Shafique categorically admitted, "*It is correct to suggest that the affidavit sent by me from the jail **is about accused Asif but not for accused Noor Mustafa**. It is correct to suggest*

that accused Noor Mustafa ***did not get signed any affidavit by pressure for him."***

Yet there is another significant contradiction in the evidence of prosecution witnesses. P.W. SI Mohammad Asif deposed in his evidence that at about 11.05 a.m. he received a message from MLO Civil Hospital through control room that the dead body of a person had been brought at the hospital, therefore vide departure entry Ex.10/A, he left the police station and departed for civil hospital. From the perusal of such departure entry Ex.10/A it reveals that it was mentioned in the said entry, *"one person Abdul Rasheed S/o Ghulam Sarwar aged about 35/40 years R/o Labe Shireen, Lines Area Karachi who died* ***due to knife blow*** *and received of bullet shot....."* Even in his cross-examination, P.W. SI Mohammad Asif admitted, "*It is correct to suggest that the doctor had given the information to the duty officer that the* ***injured received the injuries by Churi*** *and bullet injuries."* He also admitted, "*It is correct that it is mentioned in the last column of the* ***inquest report*** *at page No.4 that the* ***Abdul Rasheed received injuries by Churi*** *and bullets"* Such statement regarding receiving **churi blow** is totally contradictory to the statements made in the F.I.R., depositions of the complainant and the alleged eye-witness namely, Mohammad Shafiq, so also the medical evidence wherein there is, at all, no mention of receiving **churri blow** by the deceased. P.W. Dr. Abdul Haleem Memo in his examination-in-chief deposed, *"As police said died* ***due to fire injuries*** *in the jurisdiction of Police Station Brigade....."* In his cross-examination he admitted, *"It is correct to suggest that I have not mentioned the kind of weapon through which the injuries received by the injured Mohammad Asif Voluntarily says that I have mentioned the* ***fire arm injuries.....I do not remember*** *that Dr. Noor Ahmed made entry at the Police Station that injured Mohammad Asif and deceased Mohammad Rasheed were brought in injured condition received through the weapon* ***pistol and churi."***

Another contradiction is that in the memo of arrest of accused Mohammad Asif, the place of incident has been shown as **Lab-e-Sheeren** which is totally a different place from the actual place of incident. Even the I.O. of the case namely, SIP Ch. Tariq Mehmood in his cross-examination himself admitted, "*the place of incident is away about some distance from* ***Lab-e-Sheeren.****"* This also develops suspicion in the prosecution case.

It is also of worth-importance to point out here that in the F.I.R. name of the complainant has been mentioned as **'Abdul Hameed'**. However, the only

alleged eye-witness Mohammad Shafiq in his examination-in-chief deposed, "*My uncle namely **Abdul Majeed** got registered an FIR"* Not only this, but P.W. SI Mohammad Asif in his cross-examination stated, "*I recorded the statement of the brother of deceased namely **Abdul Majeed** under Section 154 Cr. P.C.....The **complainant Abdul Majeed**, the brother of deceased in his statement....."*. He also admitted in his cross-examination, "*On the pointation of **Abdul Majeed**, I arrested accused Asif. I recorded the statement of **Abdul Majeed** under section 154 Cr. P.C. and **not the statement of Abdul Hameed son of Azam Sarwar."*** Likewise, I.O. of the case namely SI Tariq Mehmood also made admissions to the effect, "*The name of complainant is **Abdul Hameed**.....I see 154 Cr. P.C. statement at Ex.8/A and say that the name of complainant is mentioned as **Abdul Hameed** and I see F.I.R. at Ex.10/D the name of complainant is mentioned as **Abdul Majeed**.....Voluntarily says that says that (sic) the actual name of complainant is **Abdul Majeed** but due to span of time I could not remember his correct name. .....It is correct that I had got recorded my examination in chief on dated 30.11.2016 and name of the complainant was given as **Abdul Hameed** at about four five place."* Such a glaring contradiction / admission on the part of the prosecution witnesses has surety inflicted a severe blow to the prosecution case, thus serious doubts have been created therein.

It is also noteworthy that the complainant in his cross-examination admitted that Shopkeepers had disclosed to him about the incident, so also about the names of accused He further admitted that he did not know the names of those shopkeepers but P.W. Mohammad Shafiq was aware of the names of those shopkeepers. He also admitted that statements of shopkeepers were not recorded by the police. He further admitted that he was informed by the mohallah people about the apprehended accused and co-accused when he went at the place of incident alongwith police for inspection. Likewise, P.W. Mohammad Shafiq admitted in his cross-examination that the name of the person who was holding pistol was disclosed by the people of vicinity as Noor Mustafa, while name other accused was declared as Asif. He further admitted that he did not tell the name of mohallah people to police who disclosed the name of accused Noor Mustafa. The Investigating Officer namely, P.W. Tariq Mehmood in his cross-examination also categorically admitted that the complainant has stated in the F.I.R. that he received information from **Mohallah people** that the absconding accused was Noor Mustafa and that the complainant had not given the name of those mohallah people in the F.I.R. He further admitted that the witnesses namely, Ramzan, Nazar, Shafiq and Riaqz

in their 161 Cr. P.C. statement stated that the name of accused Noor Mustafa was given by some **mohallah people.** He tried to justify non-examination of those mohalla people by saying that the mohallah people were not ready to give statement in respect of the incident; however, in the same breath he also admitted that he had not given notice under Section 160 Cr. P.C. to any person and that besides whatever he had made investigation, he did not make efforts to collect the **independent evidence.** From above admissions of the prosecution witnesses, it is crystal clear that although independent / material witnesses were available, rather, in fact, it was those independent witnesses who had disclosed the names of the accused persons to the complainant as well as to the alleged eye-witness Mohammad Shafique, despite that none of the said persons of the mohallah people / shopkeepers has been examined by the prosecution. This is also injurious to the prosecution case as it is settled principle of law that despite availability of disinterested / material witnesses, non-examination of such witnesses in the case gives inference that in case such witnesses had been examined, they would have deposed against the prosecution, as envisaged under Article 129(g) of Qanoon-e-Shahadat Order, 1984. In the case of Bashir Ahmed alias Manu vs. the State reported in 1996 SCMR 308 it was held by Honourable Supreme Court that despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that had they been examined, they would not have supported the prosecution version. In another case reported as Mohammad Shafi vs. Tahirur Rehman (1972 SCMR 144) it was held that large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, therefore no implicit reliance could be placed on evidence of interested eye-witnesses. In the case reported in 1980 SCMR 708, it was observed that no witness of locality nor owner of hotel was produced in support of prosecution case nor any independent evidence to corroborate testimony of the three eye-witnesses was produced, as such, the acquittal was upheld by the Honourable Supreme Court.

P.W. 5 SIP Ch. Tariq Mehmood, I.O. of the case, in his examination-in-chief deposed that he had deposited the case property of this case with incharge of Malkhana, City Court, Karachi under Mad No.09 in the year 2010 but, according to him, at the time of recording of his deposition, the incharge Malkhana City Court submitted the report before trial Court in writing that the case property was not available with him and the same had been missed. Without case property, the trial Court could not properly adjudicate upon /

determine the points involved in the case; however, the trial Court has not taken any serious notice of such legal flaw in the prosecution case.

Another worth-importance point which is also fatal to the prosecution case is; that by same impugned judgment trial Court has acquitted accused Mohammad Asif from the charge of section 302(b) PPC. The reason given by the trial Court for such acquittal of accused Mohammad Asif is; that prosecution has failed to prove any common intention of the accused in committing murder of deceased Abdul Rasheed. It would be advantageous to reproduce hereunder relevant observations of the trial Court :

> "Now it is to be decided whether there was common intention of both accused while committing the murder of deceased but the prosecution has brought evidence on record which transpired that **the accused came to the place of incident with common intention to commit the robbery from the complainant and there is nothing on the record there is any common intention of the accused for committing the murder of deceased Abdul Rasheed**. I rely on the case law reported in PLD 2007 Supreme Court of Pakistan 93. The Hon'ble apex Court has observed that it is necessary that intention of each one of the accused persons was known to the rest of them and shared by them, if the person not cognizant of intention of his companion to commit murder was not liable though his companion indulged in unlawful act. The accused Noor Mustafa made fire from his weapon upon the deceased at spur of movement while attempting to commit robbery therefore, he indulged with such unlawful act and is responsible for committing the murder of deceased Abdul Rasheed hence, this point answers in affirmative.
>
> **POINT NO.4:**
>
> I have already discussed and decided in point No.3 that there was no common intention or preconcert mind of the present accused Muhammad Asif with the co-accused Noor Mustafa, while making fire upon the deceased Abdul Rasheed and committing his murder therefore, this point answers as negative."

I am not convinced with aforesaid reasoning given by the trial Court for exonerating accused Mohammad Asif from the charge of section 302 (b) PPC. It seems that the trial Court has observed that the prosecution has brought evidence on record which transpired that the accused came to the place of incident **with common intention to commit the robbery** from the complainant. Now admittedly, the accused / appellant was duly armed with firearm weapon which he used for committing murder of deceased Abdul Rasheed and such fact must have been in the knowledge of accused Mohammad Asif. There is nothing on the record or even in the statement of accused Mohammad Asif that he prevented accused Noor Mustafa from using such firearm weapon or that he did not have any knowledge that accused Noor Mustafa was duly armed with gun. Now it is to be seen that when the culprits had come at the place of incident admittedly with common intention to commit

robbery, then what was the fun in bringing the firearm weapon with him by accused Noor Mustafa at the place of incident. Certainly, strong presumption / inference could be gathered that it was with an intention that in case the accused would face any difficult situation and/or if there would have been any apprehension of their capture while committing the offence of robbery, accused Noor Mustafa would use the firearm weapon for saving their skins. In such an eventuality, accused Mohammad Asif could not be totally exonerated from the charge of sharing common intention in the commission of offence under section 302(b) PPC.

'*Rule of consistency'* demands that if an accused has been extended certain benefit, other accused charged with similar allegations is also entitled to the same concession / treatment. In this connection it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of Mohammad Asif Vs. The State reported in 2017 SCMR 486 wherein it was held as under:

> *"It is a trite rule 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 held as under:

> *"On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted."*

Yet in another case reported as Mohammad Akram vs. The State (2012 SCMR 440) the Apex Court acquitted the accused in the said case, 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. In this view of the matter, I am of the firm opinion that '*rule of consistency'* would be applicable to the instant case.

Needless to emphasize that it is a well settled principle of law that prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be

resolved in favour of the accused. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

> *"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but* ***no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution****."*

In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

> *"The prosecution must prove its case against the accused beyond reasonable doubts* ***irrespective of any plea raised by the accused in his defence.*** *Failure of prosecution to prove the case against the accused, entitles the accused to an* ***acquittal****. The prosecution cannot fall back on the plea of an accused to prove its case……****Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."***

The accumulative effect of the above said admissions / contradictions as well as infirmities / legal flaws in the prosecution case is that severe dents have been put and serious doubts have been created in the prosecution case. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court 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 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."***

For the foregoing reasons, by short order dated 23.09.2019 instant appeal was allowed and the impugned judgment dated 24.03.2017 passed by learned VI-Additional Sessions Judge, Karachi East in Sessions Case

No.147/2011, (re: State v. Mohammad Asif & another), arising out of F.I.R No.410/2010 registered at P.S Brigade Karachi under Sections 393/302/34 PPC was set aside to the extent of conviction and sentence of appellant Noor Mustafa only. Consequently, appellant was ordered to be released forthwith, if his custody was not required in any other criminal case by the jail authorities.

Above are the reasons for the said short order.

JUDGE