JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Jail Appeal No.S-82 of 2014

Date of hearing:	**23.04.2021.**
Date of Decision:	**23.04.2021.**
Appellant:	**Yousaf and Muhammad Irfan through M/s. Muhammad Waris Khyber and Waqar Ahmed Memon, Advocates.**
Respondent:	**The State through Ms. Rameshan Oad, Assistant Prosecutor General Sindh.**
Complainant:	**Through Mr. Ghulamullah Chang, Advocate.**

J U D G M E N T

MUHAMMAD SALEEM JESSAR, J,- Through this Criminal Jail Appeal, the appellants have challenged the judgment dated 23.07.2014, passed by learned VIIth Additional Sessions Judge, Hyderabad in S.C No.72 / 2009 'Re-The State v. Yousaf and others', Crime No.267 of 2008 of Police Station Hatri, u/s 302, 34 PPC. The appellant was convicted and sentenced to suffer R.I. for life under section 302(b) PPC and to pay compensation of Rs.100,000/- jointly to the legal heirs of deceased Noor Hakeem in compliance of Section 544-A Cr.P.C. In default whereof, to suffer S.I for six months more. However, appellant was extended benefit of section 382-B Cr.P.C.

2. Brief facts of prosecution case are that on 22.11.2008 complainant Haji Nasrullah Khan lodged FIR stating therein that he is on dispute with Ramzan Jatoi who kept a cabin on his plot situated near Anwari Pump Hala Naka in order to usurp the said plot. On 15.11.2008, in the evening Ramzan Jatoi, Deen Muhammad alias Fouji Jatoi, Hajjan Jatoi and others had come to his office situated in Nasrullah Market for amicable settlement where complainant, Rehmatullah Chandio and others were available. Settlement was not held and Ramzan Jatoi and others went away annoyed. On 17.11.2008 complainant, his son Noor Hakeem and others were available in the office of complainant when at about 9-00 p.m. Noor Hakeem left office in Staircases when the complainant

party heard fire shot. Complainant came down and found Muhammad Hussain Tasleem Jan and Muhammad Ajmal were trying to pick Noor Hakeem and disclosed complainant within their sight two persons suddenly came, who captured Noor Hakeem from his arms and their third companion fired from pistol upon Noor Hakeem, who receiving injury fell down. Thereafter, all three culprits fled away on a motorcycle. Complainant then found bullet injury through and through beneath ear and immediately shifted him to civil Hospital where Noor Hakeem was found dead. Thereafter, complainant informed the incident to Hatri police, who after conducting the legal formalities handed over dead body for burial and then he lodged FIR that due to dispute over plot, Hajjan Jatoi, Deen Muhammad alias Fouji Jatoi and Ramzan Jatoi might have got committed murder of Noor Hakeem and that the witnesses informed the complainant that they have clearly seen the culprits and can identify them if seen again subsequently complainant lodged the FIR.

3. After completion of investigation, case was challaned showing accused Naveed as absconder, whereas accused Yousaf and Muhammad Irfan in custody.

4. Charge was framed against accused and in order to substantiate the charge, prosecution has examined PW-01 Nasrullah Khan as Ex. 11, who is complainant and produced FIR as Ex. 11/A; PW-02 Muhammad Hussain as Ex. 12, who is eye witness; PW-03 Dr. S. Muhammad Khalid as Ex. 13, who produced postmortem report, police letter, lash chakas form as Ex. 13/A to 13/C; PW-04 Gul Hakeem as Ex. 14, who produced Danistnama memos of surzamin, cloths and dead body; PW-05 SIP Muhammad Chuttal as Ex. 15; PW-06 ASI Ghulam Nabi Panhwar as Ex. 17, who is I.O and produced letter of SHO, memo, entry and mashirnama of accused Muhammad Irfan as Ex. 17/A to Ex. 17/D and PW-07 Naveed Ahmed Soomro, Civil Judge & Judicial Magistrate was examined at Ex. 18, who conducted identification parade of accused and produced it as Ex. 18/A. Thereafter, prosecution closed its side vide statement at Ex. 21.

5. Statements of accused were recorded under Section 342, Cr.P.C. at Ex.8, in which they denied the prosecution allegations and professed their

innocence by stating that the police has falsely implicated them in the present case at the instance of complainant party and prayed for justice. Appellants neither examined themselves on oath nor led evidence in their defence in disproof of prosecution allegation.

6. Learned trial Court, after hearing learned ADPP on behalf of State, counsel for accused and assessment of the evidence, convicted and sentenced the appellants as stated above, hence, this appeal was preferred.

7. At the very outset, learned counsel for appellants have drawn attention of the Court towards page-49 of the paper book, it is an order dated 23.02.2009 whereby the Vth Additional Sessions Judge, Hyderabad / trial Court had released co-accused, who were nominated in the FIR by the complainant, namely Din Muhammad alias Fouji, Ramzan and Hajjan all by caste Jatoi. Learned counsel further submitted that names of appellants are not transpiring in FIR nor their Hulya marks / body description were mentioned. They further submitted that even no specific role was assigned to unknown culprits in the FIR and motive as is mentioned under the FIR was against co-accused Ramzan Jatoi and others, who have been released by the trial Court under section 497 Cr.P.C. They further pointed out that blood stained earth as well empties and last worn clothes of the deceased were secured on 17.11.2008; however, same were received by laboratory on 23.12.2008 i.e. after more than one month time. They further pointed out that evidence against appellants is that they were subjected to identification parade before the Judicial Magistrate concerned, which too was delayed for about 07 and 04 days respectively from their arrest. They further pointed out that the joint identification parade was held after three months of the incident. Learned counsel further added that there were eye witnesses namely Ajmal, Muhammad Hussain and Muhammad Tasleem; however, only Muhammad Hussain was examined before the trial Court whereas, Ajmal and Tasleem were given up by the prosecution vide statement of SPP dated 20.08.2013 (page-97 of paper book). They further pointed out that source of identification as shown was on bulbs; however, said bulbs were not shown by the complainant to the police at the time of incident nor were secured. In support of this contention, learned counsel has placed reliance upon the case of 'AZHAR MEHMOOD and others v. The STATE' (2017 SCMR 135)

and 'SAFDAR BIBI and another v. MUNIR AHMED and others' (2017 SCMR 344). They further pointed out from the evidence that PWs Muhammad Hussain and Tasleem had recognized the appellants before the Magistrate at the time of alleged identification test yet PW Tasleem was not examined before the trial Court to substantiate the evidence adduced by the prosecution. In support of its version, learned counsel for the appellants submits that the case against the appellants has not been established by the prosecution and therefore, they may be acquitted by extending them benefit of doubt. In support of their contention, learned counsel have placed reliance upon the cases of BACHA ZEB v. THE STATE (2010 SCMR 1189), BASAR v. ZULFIQAR ALI and others (2010 SCMR 1972), SABIR ALI alias FAUJI v. THE STATE (2011 SCMR 563), MUHAMMAD IRSHAD v. ALLAH DITTA and others (2017 SCMR 142), GULFAM and another v. The STATE (2017 SCMR 1189), HAKEEM and others v. The STATE (2017 SCMR 1546), KAMAL DIN alias KAMALA v. The STATE (2018 SCMR 577), HAROON SHAFIQUE v. The STATE and others (2018 SCMR 2118), Mst. MIR ZALAI v. GHAZI KHAN and others (2020 SCMR 319), MUHAMMAD IMRAN and others v. The STATE (2021 YLR 95), MUHAMMAD SALEEM v. MULLAN alias NOORUDDIN and 3 others (2019 MLD 1732) and SHAH IZZAT alias SHAHZAD v. ADNAN, CONSTABLE NO.5355 and another (2017 P Cr.L J 25).

8. On the other hand, learned A.P.G. appearing for the State has opposed the appeal on the ground that appellants were picked up by the PWS before the Magistrate at the time of their identification parade with specific role. The prosecution has fully established the case against the appellants; therefore, they do not deserve any leniency. She further added that for the fault, if any, on the part of prosecution, who committed any negligence in discharge of duties and functions, the complainant should not suffer. In support of her contentions, she has relied upon the case of 'ANSAR MEHMOOD v. ABDUL KHALIQ and another'(2011 SCMR 713).

9. Mr. Ghulamullah Chang, learned counsel for complainant by adopting the arguments advanced by learned A.P.G. Sindh also opposed the appeal and further submitted that appellants are target killers and were hired by co-accused who were nominated in FIR. He, however, could not controvert

the facts that through which source or the evidence she advanced such arguments and according to him they being target killers had committed murder of deceased at the instance of co-accused who have been released by the police as well trial Court then why said set of accused were not prosecuted. He further admits that no application against order dated 23.02.2009 was filed or said order was assailed before proper forum by the complainant which attained finality.

10. Heard arguments and perused record.

11. Admittedly complainant had shown motive of the incident against co-accused namely Ramzan Jatoi, Din Muhammad alias Fouji, Ramzan and Hajjan, all by caste Jatoi, over an issue of plot which arose in a private faisla allegedly held before one Rehmatullah Chandio where said accused had refused to accept the faisla and became annoyed and left the premises. It is further averred in the FIR that on 17.11.2008 the complainant together with his son Noor Hakeem (deceased) were sitting over the roof of their office when at about 09.00 p.m. (night) his deceased son went down for some work and as and when he down staired, a fire-shot was heard which attracted the complainant who rushed towards stairs down and saw that one Muhammad Ajmal (2) Muhammad Hussain and (3) Tasleem were trying to shift his injured son Noor Hakeem and told the complainant that they were chit-chatting over there and suddenly two unknown culprits caught hold of his son Noor Hakeem while one was meeting, he fired from his pistol upon him, which hit him and fell down and that all accused decamped from the scene on their already parked motorcycle towards Khadda market. The complainant went and noticed that bullet allegedly hit the deceased Noor Hakeem near under the beneath of ear and was through and through. They shifted the injured to civil hospital where he succumbed to his injuries. The perusal of FIR shows that there were three unknown culprits, out of them allegedly one caught hold of deceased and one fired but their body description was not given by the PWs to the complainant or even before the Magistrate as well to the trial Court.

12. Before proceeding further it will be appropriate to discuss investigation of the case, which was initiated upon the arrest of co-accused

Ramzan Jatoi and others and after completion of legal formalities the Investigating Officer found them to be innocent and therefore, disposed of their case under 'A' class (untraceable). Such report in terms of section 173 Cr.P.C. was filed by the police before the Judicial Magistrate seeking disposal of the case under 'A' class; however, the learned Civil Judge / Judicial Magistrate-VI, Hyderabad vide order dated 30.01.2009 did not agree with the opinion of I.O and directed to submit final report under section 173 Cr.P.C. on prescribed proforma together with list of witnesses within three days. Upon direction of learned Magistrate, the I.O submitted charge-sheet / challan. The learned Magistrate after accepting challan sent up the case papers to the Court of Sessions in terms of section 190 (2) Cr.P.C. where after institution, it was assigned to the court of Vth Additional Sessions Judge, Hyderabad being S.C No.72 / 2009 'Re- the State v. Deen Muhammad and others'. The complainant of this case filed an application before the trial Court in following terms:-

> "It is respectfully submitted that on 17.11.2008 at 2100 hours Noor Hakeem the son of complainant Haji Nasarullah Khan was murdered by unknown assailants who can be identified on seeing and in FIR it was mentioned that the dispute over the plot with Deen Muhammad Jatoi, Ramzan Jatoi and others is running and previous to the incident the hot words were exchanged between complainant and Deen Muhammad Jatoi and others and may be Noor Khan has been murdered on their instigation. The complainant has only shown his suspicion over Deen Muhammad and others. That after FIR Deen Muhammad Jatoi and others and their elders also assured on Holy Quran that they are not involved in murder, on which the complainant satisfied. That the police after thorough investigation also found the accused innocent and recommended the case under "A" class (not traceable) but the learned Civil Judge and Judicial Magistrate without justification did not agree with the report of I.O and ordered for submission of challan which is against the law and justice. That it is respectfully submitted that the complainant is satisfied from the report submitted by I.O. in the above case whereby he disposed of the case of the complainant under "A" class and the order passed by the learned Civil Judge and Judicial Magistrate No.VI Hyderabad is illegal and without jurisdiction. That the complainant will be satisfied if the case is remanded back for further investigation as recommended by I.O. and the accused be acquitted till final report of police. It is therefore, requested that the challan of the above case be returned to I.O. with direction to continue investigation till the arrest of culprits."

13. After considering the arguments advanced by the learned ADPP and learned counsel for accused as well complainant, the learned trial Court acceded to the contention of application moved by complainant and released the accused under section 497 (2) Cr.P.C. vide his order dated 23.02.2009 (page-49 of paper book). After release of co-accused, the appellant Yousaf was arrested on 05.03.2009 from the lock-up of PS A-Section and appellant Irfan was arrested on 08.03.2009. Later, the appellants were produced before the Magistrate for holding their identification test on 12.03.2009. The main piece of evidence against appellants is of an identification test which was objected by the appellants before the Magistrate at the time of their test, hence, the identification parade cannot be said to be according to the prescribed rules. On scrutiny of memo of identification test (Ex. 18/A), it appears that identification parade of appellants by witnesses was conducted by arranging eighteen dummies and in those dummies the appellants were mixed. In this regard, I am fortified with the observation given in the landmark judgment passed in the case of 'LAL PASAND v. THE STATE' reported in PLD 1981 Supreme Court 142, whereby Hon'ble Supreme Court of Pakistan has held as under:-

> "We now turn to the question of the evidentiary value of the identification parade conducted by the police and as we explained, the Sessions Judge had rejected it, because the number of other persons intermingled with the accused in the identification parade was not in the proportion of nine or ten to one as laid down in a series of judgments of the West Pakistan High Court. The attention of the learned Judges of the Peshawar High Court was drawn to these judgments, but the learned Chief Justice overruled the view of the learned Sessions Judge, because he was of the view that the judgments of the West Pakistan High Court did not lay down an inflexible rule as held or assumed by the Sessions Judge."

14. The identification parade was to be conducted as per instructions given in the criminal circular; however, such exercise has not been done so far. The learned Magistrate conducted joint identification parade in one go by making both the appellants to sit in two lines, whereas, as per rules it was obligatory for the supervisory Magistrate to conduct identification parade turn by turn by mixing them with dummies but in this case said procedure has not been followed. Reliance in this respect is placed

upon the decision of learned Divisional Bench of Lahore High Court in the case of MUHAMMAD ASIF alias RANA SAQIB and another v. The STATE and another (2019 P.Cr.LJ Note 49).

15. Not only the identification parade was conducted by not adopting the guidelines of Apex Court but even in the circumstances that any witness picks out an accused from dummies line or crowd, which even cannot prove that the accused, who is pointed out by witnesses, has committed the guilt or taken part in the commission of offence until and unless it is corroborated by other ocular or strong circumstantial evidence, however, in the instant case it is lacking. The prosecution has also not examined the witnesses of identification test to support it. Moreover, the delay of 4 and 7 days respectively in identification parade of the accused cannot be ignored because such delay has ever been considered to be illegal by the honourable Supreme Court in so many cases, one of which is the case of NAZIR AHMED v. MUHAMMAD IQBAL and another (2011 SCMR 527).

16. Further, the prosecution case is of two versions, firstly the accused namely Din Muhammad alias Fouji, Ramzan and Hajjan were released under section 497 Cr.P.C. by the Court who were nominated by the complainant in FIR and their release was not challenged; and, secondly if this first version of the complainant with regard to accused became over then the subsequent version entering the appellants as accused of the offence has no means and could not be believed until and unless the prosecution proves their involvement through a sequence and source of the implication, however, the prosecution has also failed on this important aspect of the case. As far as the identification of the accused on bulbs is concerned, I am fortified with the view expressed by the Hon'ble Supreme Court of Pakistan in the case of 'SARDAR BIB and another v. MUNIR AHMED and others' (2017 SCMR 344), which reads as under:-

> 4…….. 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.

17. Now coming towards the role of appellants, no offensive weapon was shown to have been recovered from the appellant, therefore, in absence of such weapon allegedly used in commission of the offence then how it would be possible to match it with the empties allegedly secured by the police from the place of incident, as such, it could not be deduced that appellants had committed the offence as alleged by the prosecution. The prosecution is mainly focusing that appellants were identified by PWs into identification parade. Mere putting them under identification test, which too is defective they (appellants) may not be held responsible for the charge of murder. No doubt, an innocent young person had lost his precious life yet it does not mean that another innocent be burdened with the charge of capital punishment without corroborative piece of evidence or tangible material. As far as the allegation leveled by the counsel for complainant that the appellants being target killers had committed the offence is concerned, neither prosecution nor learned counsel for complainant had produced single iota of evidence in this respect to believe that they had acted upon direction of someone else and then committed the offence. It is also worth to note, the complainant as well prosecution did not disclose the names of those persons mannered and hired the services of appellants for removing the deceased. Mere saying of word from mouth cannot be termed as evidence unless corroborated by concrete material. Out of three eye witnesses, two were not produced before the trial court and therefore, were not examined. Even PW Ajmal was not examined by the police as well trial Court. Non-examination of said material evidence before the trial court show that if they had been examined, they would not have supported the case of prosecution. It appears that the prosecution has purposely avoided to produce these important witnesses, which goes against the prosecution as per provision of Article 129(g) of the Qanun-e-Shahadat Order, 1984. In the case of BASHIR AHMED alias MANU v. The STATE reported in 1996 SCMR 308, it was held by the 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 the Order ibid could easily be drawn that had they been examined, they would not have supported the prosecution version.

18. It is also admitted position of record that PW Gul Hassan, who is brother of deceased and is mashir of the incident, clearly deposed that the offence was un-seen even one PW SIP Muhammad Chuttal Shaikh has also stated that the offence was un-seen. It is also worthwhile that mashir of arrest in respect of appellant Irfan, namely H.C. Muhammad Usman and P.C Imdad Ali were not examined before the trial Court. It is also essential to mention that complainant has deposed before the trial Court that dead body of deceased was handed over to one Ayoub Khan by the hospital authorities and said Ayoub Khan was not examined before the trial Court, even no bearer was examined by the I.O, therefore, the required chain of offence has not been connected; thus, it can safely be held that prosecution has miserable failed to bring at home the charge against the appellants. The outcome after meticulous assessment of prosecution evidence is that the testimony adduced by prosecution is not free from doubts and is not corroborative so that the conviction and sentence recorded against the appellants by the trial Court may be maintained.

19. It is a 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. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt and if any doubt is arising in the prosecution case, it must be resolved in favour of the accused. In the case reported as WAZIR MUHAMMAD v. The STATE (1992 SCMR 1134), it was held by the 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 v. 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."

In another case of MUHAMMAD MANSHA v. The STATE (2018 SCMR 772), wherein the Hon'ble Supreme Court of Pakistan has held that;

> "Needles to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim,"it is better that ten guilt persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR-1345), Ghulam Qadir and 2 others v. The State (2008 SCMR-1221), Muhammad Akram v.The State (2009 SCMR-230) and Muhammad Zaman v.The State(2014 SCMR-749)."

20. In view of above stated circumstances of the case, it can safely be held that prosecution has not succeeded in proving its case against the accused / appellants beyond any shadow of doubt, as such; the impugned judgment is liable to be set aside. Needless to emphasize the well settled principle of law that it is not necessary that there should be many circumstances which create doubt in the case of any accused, even if there creates a single circumstance in the case of any accused, then the benefit of which is to be extended to the accused as a matter of right but not as a matter of grace or concession. In the present case, there are various circumstances in the shape of contradictions, discrepancies and lacunas in the evidence of the prosecution witnesses, which too create reasonable doubts in the prosecution story, therefore, the benefit whereof is to be extended to the accused. Further, the accused cannot be deprived of benefit of doubt merely because there is only single circumstance, which creates doubt in the prosecution case as is observed by the honourable Supreme Court in the case reported as MUHAMMAD MANSHA v. The STATE *(supra).* It is wise and prudent saying that **"**miscarriage of justice always arises from conviction of the innocent but not from acquittal of a guilty**"**. Reference can be made to the case of MUHAMMAD ASLAM v. The STATE reported in 2011 SCMR 820.

21. For the foregoing reasons, by a short order passed on 23.04.2021, instant Criminal Jail Appeal was allowed. Consequently, Judgment dated 23.07.2014, passed by learned VIIth Additional Sessions Judge, Hyderabad in S.C No.72 / 2009 'Re-The State v. Yousaf and others', Crime No.267 of 2008 of

Police Station Hatri, u/s 302, 34 PPC. The appellant was convicted and sentenced to R.I. for life under section 302 (b) PPC, was set aside. Resultantly, appellants namely Yousaf and Muhammad Irfan were acquitted of the charges. They were in custody, therefore, ordered to be released forthwith if, their custody is no longer required by jail authorities.

22. Above are the reasons for the said short order.

JUDGE

Abdullah Channa/PS