IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No.S-226 of 2018
Criminal Jail Appeal No.S-229 of 2018

Appellants:	1)	Jhando son of Muhammad Ramzan in Criminal Jail Appeal No.S-226 of 2018 through Mr. Omparkash H. Karmani, Advocate.
	2)	Mst. Fatima widow of Khan Muhammad Nohani in Criminal Jail Appeal No.S-229 of 2018 through Mr. Abdullah Soomro, Advocate.
The State:		Through Ms. Rameshan Oad, Assistant Prosecutor General Sindh.

Date of hearing: 04.10.2021
Date of announcement: 15.10.2021

JUDGMENT

KHADIM HUSSAIN TUNIO, J:- By this common order, I intent to dispose of the captioned criminal jail appeals as they challenge the legality of impugned judgment dated 02.10.2018 in Sessions Case No. 260 of 2015 which was passed by the learned 1st Additional Sessions Judge Mirpurkhas, emanating from one crime No. 91 of 2015 u/s 302 and 34 PPC registered at Police Station Kot Ghulam Muhammad for an offence under Section 302 and 34 PPC, whereby they were convicted for an offence punishable u/s 302(b) read with section 34 P.P.C to suffer R.I imprisonment for life as Ta'zir and to pay fine of Rs.300,000/- each as compensation under section 544-A Cr.P.C to the legal heirs of deceased and in case of default in payment of fine, to

suffer R.I for four months more. However, benefit of Section 382-B Cr.P.C was extended to them.

2. Precisely, on 25.07.2015 the complainant accompanied by his nephew Saeed Khan went to visit his other nephews Khan Muhammad and Jhando and after having dinner, they slept in the house of complainant's cousin Yaqoob which was near the house of appellant Jhando and deceased Khan Muhammad. On the night of 26.07.2015 at 0230 hours, the complainant heard cries coming from Khan Muhammad's house and then he along with witnesses Saeed Khan and Yaqoob rushed there and on torch light, they saw that his nephew Khan Muhammad was lying in the courtyard and his wife-appellant Mst. Fatima was sitting on his chest and was stifling him by his neck while the appellant Jhando was causing backside hatchet blows on his face and shoulders. The appellants, after seeing the complainant party, went away with the hatchet thereafter complainant party found Khan Muhammad dead and informed the police and the dead body of deceased Khan Muhammad was shifted to Taluka Hospital Kot Ghulam Muhammad for post-mortem. Thereafter, the complainant appeared at the police station and got the present F.I.R registered.

3. On completion of investigation, challan was submitted before the Court against the appellants/accused. After compliance of 265-C Cr.P.C, a formal charge was framed against the appellants/accused, to which they pleaded not guilty and claimed to be tried. In order to substantiate the charge, prosecution examined PW-1 complainant Bhagio at Ex-3, PW-2 eye witness Muhammad Yaqoob at Ex-4, PW-3 eye witness Saeed Khan at Ex-5, PW-4 Tapedar Imdad Ali at Ex-6, PW-5 Dr. Mir Fahad Hussain at Ex-7, PW-6 Mashir Mehboobat Ex-9 and lastly PW-7 I.O of the case namely SIP Miran

Khan at Ex-10. Thereafter, prosecution side was closed; videstatement at Ex-11.

4. Statements of the appellants under Section 342 Cr.P.C. were recorded in which they denied all the allegations levelled against them by the prosecution and claimed to be innocent. Appellant Mst. Fatima did not examine herself on oath in terms of section 340(2), nor produced any witness in her defence while appellant Jhando further stated in his statement under section 342 Cr.P.C that since he appeared as witness in murder case against the nephews of complainant in F.I.R No.67 of 2013 under section 302 P.P.C at P.S. Digri, the complainant arranged this murder case against him by involving him in the murder of his own brother; appellant Jhando produced certified copy of charge sheet as Ex-12/A, however he declined to examine himself on oath in terms of section 340(2) but in his defence examined his mother Mst. Razia as D.W-1 and thereafter the defence side was closed vide statement at Ex-15.

5. Learned counsel for the appellants have collectively argued that the appellants have been involved in this case falsely by the complainant party; that the impugned judgment is opposed to the law and facts and is against the principle of natural justice; that there are contradictions in the evidence of the prosecution witnesses which have not been considered by the trial Court; that identification on torch light is weak type of evidence; that the mother of the deceased has deposed in favour of the present appellants; that the complainant has managed the instant case due to personal grudge and with malafide intentions.

6. Conversely, learned Assistant Prosecutor General appearing for the State supported the conviction and sentence recorded by the trial Court while submitting that there may be minor

contradictions and discrepancies in the evidence of PWs, but the same can be ignored by the Court while deciding the appeal.

7. I have given due consideration to the arguments made by learned counsel for the parties and have perused the material available on record.

8. Even a brief perusal of the examination-in-chief of PW-1, the complainant, and his cross-examination reveals multitudes of contradictions and improvements in his own version that create serious doubts in the prosecution case. However, before addressing the contradictions themselves, it would be pertinent to examine the relevance of the identification on torch light in the present case. The Court believes that it is needless to even add that by now it is a long standing and established principle of law that identification on torch light is the weakest type of evidence, which itself cannot be relied upon for the identification of an accused at odd hours of the night. Such identification is also met with scepticism when viewed with the angle that there was enmity between the complainant and the appellant on accord of a previous case that was registered against the nephews of the complainant which has been produced by the appellant Jhando at Ex-12/A. In this regard, reference is made to the case of **The State v. Hakim Ali and 3 others (1996 PCr.LJ 231)** wherein it has been observed that:-

> "**Evidence relating to identification of accused in the torch light has always been treated as weak piece of evidence by superior Courts**. It was held by a Division Bench of this Court in the case of Muhammad and others v. The State 1968 PCr.LJ 590 that the identification of the assailants by witness on dark night through his torch may lead to the possibility of mistaken identity and particularly in view of the previous enmity existing between the parties. **In Suwali v. The State 1982 PCr.LJ 808, a Division Bench of this Court declared identification by flash of torch as highly suspicious. In the case of the State v. Fazal Muhammad and another 1970 PCr.LJ 633 it was**

> **held that the identification of the accused in the light of torch was never considered as sufficient piece of evidence.**"
>
> **(emphasis supplied)**

The complainant deposed in his cross-examination that he saw the appellant Jhando fleeing from the scene from a distance of 3 to 4 acres and this distance is roughly 30 feet when converted. The incident was said to have taken place at 2:30 AM whereas the complainant himself admitted that the night was dark. Even if we ignore the contradictory version provided by PW-2 stating the distance to be only 1 acre, it appears quite hard for this Court to believe that the appellant was caught running away on the light of a torch from the distance of 30 feet in a dark night. The torch itself was also not handed to the police, therefore creating further doubt as to whether the same was at the complainant's disposal or not.

9. Now coming to the contradictions and improvements in the evidence of the prosecution witnesses. However, it would be beneficial to refer to the recent case of ***Naveed Asghar and 2 others v. The State (PLD 2021 SC 600)*** wherein the Hon'ble Apex Court has been pleased to observe that:-

> "17. **Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives corroboration from some other independent piece of reliable evidence.**[17] In the case of Shahzada v. Hamidullah,[18] a five-member Bench of this Court, on appraising the evidence of a witness, found that he had improved upon the version he had earlier given to the police while making statement in Court, and upon such finding held that the improvement had affected his veracity rendering it unsafe to rely upon his evidence *(…)* A four-member Bench of this Court, which heard the case, noted with concern that improvement made by the complaint even

> during investigation and discarded his testimony making the observations that **when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful.**"
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> **(emphasis supplied)**

10. Initially, before the police, the complainant stated that he had seen the appellant Jhando hitting the deceased with blunt side of his hatchet and he stuck with this statement in his examination-in-chief, however when it came to his cross-examination, he switched his story and stated that *"whereas accused Jhando was running from the place of incident. Deceased Khan Muhammad was lying on the ground. I saw the running accused Jhando from the distance of about 03-04 acres."* Such an improvement is doubtful in itself and it can safely be assumed that the complainant improved his earlier statement to match that of the other witnesses as the other alleged eye-witness namely Muhammad Yakoob (PW-2) in his examination-in-chief deposed in the same line as deposed by the complainant in his examination-in-chief however in his cross-examination he switched his story to show the appellant Jhando to have been running away on their arrival by saying that *"When we reached we saw that the lady accused was present there, whereas the accused Khando was running at the distance of about one and half acre away"*. These improvements were made so as to match the version provided by either of the witnesses, though they still failed and contradicted each other on the distance the appellant Jhando had ran off to. Initially, the complainant in the FIR disclosed that he reached at the house of the deceased after hearing his cries along with the PW-2 Yakoob and PW-3 Saeed Khan, but PW-2 deposed that only him and PW-3 had went to the house of the deceased, however PW-3 in his examination in chief deposed that he never saw the incident with his own eyes and was only informed by the complainant and the PW. To

match the said statement, PW-2 improved his version in his cross-examination by stating that only he and the complainant went to the house of the deceased on his cries. This Court also observed that the PW-2 Yakoob in his cross-examination deposed that *"inmates of house including mother of accused disclosed that accused Jhando and lady accused Mst. Fatima both committed the murder of the deceased Khan Muhammad"*, but before the trial Court, the mother of the deceased Mst. Razia appeared in support of the appellants and stated that they were innocent. Another notable contradiction in the version provided by the complainant in the FIR and then the examination-in-chief of PW-1 and 2 is that the complainant stated in the FIR that both the accused (appellant Jhando and appellant Mst. Fatima) tried to run away after seeing the complainant party and then continued with the said statement in his examination-in-chief, however this version was contradicted by PW-2 Yakoob who stated that the lady accused Mst. Fatima was present at the place and did not try to run away. The motive as set out in the FIR was that the appellants had illicit relations with each other, however not only was this suggestion controverted by the mother of the deceased, but also the weakened by the prosecution itself. All the witnesses, at one time or the other, deposed that only a mere exchange of hot words had occurred between the appellant Jhando and deceased Muhammad Khan on the date of the incident and that no other fights had taken place, neither between the two brothers nor between the deceased and his wife. Therefore, it appears quite doubtful that on the mere exchange of hot words, the appellant Jhando murdered his brother and appellant Mst. Fatima murdered her husband, with whom she had spent 20 years of her life and had five children. This coupled with the fact that none of the actual inmates of the house who were said to be present at the time of the incident were examined raises further doubts in the prosecution case.

11. All the above circumstances lead this Court to the irresistible conclusion that the presence of the PWs is doubtful and the chance of them actually witnessing the incident is slim. The Hon'ble Apex Court, in a recent case titled ***Khalid Mehmood and another v. The State and others (2021 SCMR 810)*** observed that:-

> "8. All the circumstances highlighted above lead us to a definite conclusion that the presence of eye-witnesses at the place of occurrence at the relevant time is not above board and prosecution has failed to prove its case against the petitioner beyond reasonable doubt. Therefore, the instant jail petition is converted into an appeal and the same is hereby allowed. The conviction and sentence of appellant Khalid Mehmood is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case."

12. The Hon'ble Apex Court, in the case of ***Naveed Asghar and 2 others (supra)***, while re-iterating the long standing principle of benefit of doubt has observed that:-

> "33. **It is a well-established principle of administration of justice in criminal cases that finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case is decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Constitutional Courts, will be reduced to a naught.**[33] The prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. **If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or**

> **artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession.[34] The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice.** In common law, it is based on the maxim, "It is better that ten guilty persons be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (peace be upon him): "Avert punishments [hudood] when there are doubts";[35]and" Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment".[36] A three-member Bench of this Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon him) in Ayub Masih v. State[37] in the English translation thus: Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

13. For what has been discussed above, the prosecution has miserably failed to prove the charge against the appellants and prove its case beyond reasonable shadow of doubt. Resultantly, instant criminal jail appeals are allowed and the appellants are acquitted of the charge. They are currently confined in jail, therefore are ordered to be released forthwith if not required in any other custody case.

JUDGE

*Muhammad Danish**