IN THE HIGH COURT OF SINDH AT KARACHI

CRIMINAL APPEAL NO.259/2017

Appellant : Khatim Khan,
through Mr. Muhammad Qasim Niazi advocate.

Respondent : The state,
through Mr. Faheem Ahmed, A.P.G.

Date of hearing : 30.01.2019.

Date of order : 30.01.2019.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellant assailed judgment dated 24.05.2017 passed by trial Court in Sessions Case No.1066/2014 arising out of FIR No.244/2014, u/s 295-A, P.S. Sohrab Goth, whereby appellant was convicted u/s 295-B PPC and sentenced to undergo R.I. for life.

2. Brief facts of prosecution case are that Muhammad Amjad s/o Manzoor Ahmed, Azizulah S/o Shah Nawaz and Liaquat Qadri s/o Haji Sulleman informed complainant that two persons have been seen setting pages of Holy Quran on fire in the street which has infuriated sentiments of Muslims; the complainant reached at pointed place at 1745 hours and saw that Khatim Khan s/o Shah Wali Khan (appellant) and Sher Bahadur s/o Hazrat Khan, having match boxes in their hands had burnt pages of the Holy Quran on ground. The police was informed and accused were apprehended. On arrival of police the apprehended accused along with burnt pages of Holy Quran were handed over to police, investigation was conducted, challan was submitted; police papers u/s 265-C Cr.P.C were supplied to the accused and thereafter formal charge was framed, to which accused pleaded not guilty and claimed trial.

3. Prosecution examined four witnesses namely complainant Ghulam Mustafa was recorded at exhibit who produced mashirnama of arrest of accused, seizure of burnt pages of the Holy Quran and ash, FIR, mashirnama of place of incident at exhibit 3/A to 3/C respectively; PW-2 Azizullah at exhibit 4; PW-3 ASI Ali Akbar at exhibit 6; PW-4 SIP Ali Muhammad (I/O) at exhibit 7 who produced daily diary vide entry No.7 dated 10.08.2014 at exhibit 7/A; thereafter prosecution side for evidence was closed. Statements of appellant/accused Khatim Khan and co-accused Sher Bahadur, u/s 342 Cr.P.C were recorded at exhibits 9 & 10 respectively. In his statement appellant/accused denied the case of prosecution and claimed that he has been falsely involved in this case however did not examine himself on oath u/s 340(2) Cr.P.C nor produced any evidence in defense.

4. Trial court framed and answered the points for determination as under:-

Point No.1: Whether on 06.08.2014 at 1745 hours in street No.9, Noor Khan Goth Scheme No. 33 Sohrab Goth Karachi accused Khatim Khan and Sher Bahadur willfully defiled pages of Holy Quran by burn the same in derogatory manner ?	Accordingly.
Point No.2: What should the verdict be ?	Accused Sher Bahadur is acquitted of charge U/S 265-H(1) Cr.P.C by extending him benefit of doubt. However accused Khatim Khan is convicted under section 265-H(2) Cr.P.C for committing an offence punishable u/s 295-B PPC and sentenced to undergo R.I for life.

5. I have heard learned counsel for appellant and learned A.P.G. and gone through the record.

6. The perusal of the record has compelled me to refer the relevant portion of the case of *Asia Bibi v. State* PLD 2019 SC 64, wherein the

basic principles of Safe Criminal Administration of Justice have been reaffirmed on finding departure thereof by Court (s) while recording judgment of *convictions.* The same reads as:-

> '41. All these contradictions are sufficient to cast a shadow of doubt on the prosecution's version of facts, which itself entitles the appellant to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainity. **If a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused then he/she sall be entitled to such benefit not as a matter of grace and concession, but as of right**....
>
> 48. It is a well settled principle of law that one who makes an assertion has to prove it. Thus, the onu rests on the prosecution to prove guilt of the accused beyond reasonable doubt througut the trial. Presumption of innocence remains throughyout the case until such time the prosecution on the evidence satrisfies the Court beyond reasonale doubt that the accused is guilty of the offence alleged against him. **There cannot be a fair trial, which is itself the primary purpose of criminal jurisprudece, if the judges have not been able to clearly elucidate the rudimentary concept of standard of proof that prosecution must meet in order to obtain a conviction. Two concepts i.e 'proof beyond reasonable doubt' and 'presumption of innocence' are so closely linked toegher that the same must be presented as one unit.** If the presumption of innocence is a gold thread to crimina jurisdiction, then proof beyond reasonable dout is silver, and these two threatrs are forever interwined in the fabric of criminal justice system. **As such, the expression ' proof beyond reaonsbale doubt' is of fundamental importance to the criminal justice** : **it is one of the principles which seeks to ensure that no innocent person is convicted.** Where there is any doubt in the prosecution story, **benefit should be given to the accused, which is quite consistent with the safe administration of criminal justice**. Further, suspicion howsoever grave or strong can never be a proper substitue for the standard of proof required in a criminal case, i.e beyond reasonable doubt. ....

These *basic* principles should never be ignored / escaped merely for reason of severity of allegation nor severity of an allegation should divert the Court (s) from examining the case by putting ***' proof beyond reaonsbale doubt'*** and that ***'no innocent person is convicted'*** in each arm of a scale. Rerference can

well be made to the case of *"Azeem Khan & another v. Mujahid Khan & Ors* 2016 SCMR 274 wherein such responsibility was reaffirmed as:-

> "32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. **Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused**. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In the event the justice would be casualty.

Now, I would revert to merits of the case where I found a *departure* to basic principles of safe criminal administration of justice, including those detailed by honourable Apex Court in referred cases. The perusal of the record shows that out of the *listed* witnesses, complainant of the instant case was the only **eye-witness** of the alleged incident, as was admitted by I.O in his cross examination as:-

> *" **It is fact no PW except complainant was eyewitness of the incident"***

The complainant, *however,* did not claim himself to be an eye-witness rather stated in his examination-in-chief as:-

> "On 06.08.2014 I was available at my shop and one **Azizullah being my neighbourer took me to the place of incident at street No.9,** where **I saw the mob of public** and **one accused besides the burnt pages of Holy Quran**. We apprehended him and called the police and handed over his custody to them. Police arrested him by taking the pages of burnt Holy Quran in their custody …

By making such examination-in-chief the complainant painted a *picture* as:

i) he (*complainant)* was taken by PW Azizullah;

ii) he *(complainant)* did not see happening of alleged incident i.e act of setting pages of **'Holy Quran'** on fire by appellant and acquitted co-accused;

Thus, *prima facie,* the complainant, being the only eye-witness, did not support the allegation i.e *"appellant and co-accused setting pages of Holy Quran on fire"* which, *otherwise,* the charge of prosecution. This, *perhaps,* was the reason that prosecution declared the complainant as ***'hostile'*** and cross-examination was done by prosecution. However, during cross-examination by prosecution the complainant again reaffirmed as:

> "It is incorrect to suggest that **I also saw both accused having matches in their hands and were busy in setting fire on the Holy Quran."**

During cross examination by defence, the complainant further made it clear that:

> "The PW Azizullah informed me regarding incident at about 05:30 PM. **It is fact I have not seen the accused while setting fire on the pages of Holy Quran**

Failure of prosecution in proving the charge i.e act of setting pages of Holy Quran on fire, through only single **'eye-witness'** was always sufficient to be considered as a **reasonable doubt.**

7. Be that as it may, let's have a referral to examination –in-chief of the PW-2 Azizullah, claimed himself to be eye-witness. The relevant portion reads as:-

> At about 02 years back I was available at my house and attracted at street No.09, where I saw mob of public. **I also saw one accused was putting pages of Holy Quran in the fire.** In the meantime, police party in the mobile also attracted there, who arrested him. **The complainant was also present there…**.

From above, it is quite clear and obvious that even this witness did not support prosecution allegation rather made material changes to case of prosecution as well his 161 Cr.PC thereby attempted to confine the allegation

against one person i.e appellant though prosecution case / charge was so, as was framed in shape of point no.1 by the learned trial Court judge:

> "Whether on 06.08.2014 at 1745 hours in street No.9, Noor Khan Goth Scheme No. 33 Sohrab Goth Karachi accused Khatim Khan and Sher Bahadur willfully defiled pages of Holy Quran by burn the same in derogatory manner ?"

Such material changes and omissions were always sufficient for holding the witness as **'dishonest'.** I would add here that before believing testimony of a witness, the Court must *necessarily* find the same as trustworthy else it shall never be safe to place reliance on any such testimony. The moment a witness proves himself to be **dishonest** then necessary truthfulness required for believing / relying upon a testimony shall not available with evidence of such a witness. Reference is made to the case of *Sardar Bibi and another v. Munir Ahmed & others* 2017 SCMR 344 wherein it is held as:-

> "2. ….. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical . ….. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them **unreliable and they are not trustworthy witnesses.** It is held in the case of *Amir Zaman v. Mahboob and others (1985 SCMR 685)* that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in *Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case …*

Here, I would also add that though said witness PW Azizullah claims to have handed over the appellant to police but his statement under section 161 Cr.PC, surprisingly, was recorded after considerable delay. Here, an answr to a question, posed to I.O, being relevant is made hereunder:-

> "It is fact I recorded 161 Cr.P.C statements of PWs with the delay of 5/6 days".

The learned trial Court while relying upon evidence of such witness seems to have ignored the settled position that "**there is a long line of authorities / precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses cannot be safely relied upon'.** Reference is made to case of *Muhammad Asif v. State* 2017 SCMR 486.

8. Be that as it may, it is also a matter of record that no matchbox or any such thing was recovered from possession of the appellant or acquitted co-accused. This was categorically admitted by PW Azizullah as:-

> "It is incorrect to suggest that we saw 02 accused while setting pages of Holy Quran on fire. **It is fact no match was recovered from the possession of accused.**

I am quite surprising that in absence of matchbox or like nature thing, *how* the prosecution can claim to have successfully established the charge i.e setting of pages of Holy Quran on fire when necessary instrument to have fire was never recovered from possession of the accused who undeniably never had an opportunity to slip / escape. Further, here a referral to cross-examination of I.O, being relevant is made hereunder:-

> "It is fact place of incident was under the bunch of trees. **It is fact if there was fire then marks of the same would be on the trees. It is fact I have not produced any proof to show that there were marks of fire on the tree.**

From above, it appears that the prosecution *even* during course of investigation never bothered to prove root of allegation i.e setting of pages of Holy Quran on fire at particular place. All the circumstances, if are viewed, the accumulative effect thereof could be nothing but that prosecution never succeeded in proving the charge beyond reasonable doubt.

Be that as it may, the perusal of the impugned judgment shows that there was identical charge against *two* persons i.e present appellant and acquitted co-accused. To show this, a referral to point no.1, framed by the learned trial Court judge, is referred here *again* which reads as:-

> "Whether on 06.08.2014 at 1745 hours in street No.9, Noor Khan Goth Scheme No. 33 Sohrab Goth Karachi accused Khatim Khan and Sher Bahadur willfully defiled pages of Holy Quran by burn the same in derogatory manner ?"

Thus, it was responsibility of the prosecution to prove such allegation i.e against both accused persons. If, the prosecution fails to prove the charge, as was levelled, i.e against both sent up accused persons, then normal principle to extend benefit of such failure to other accused be not departed unless there are some other *independent* and *strong* supportive evidences permitting such *departure.* Reference is made to the case of *Sardar Bibi* 2017 SCMR 344, where at relevant page-350, this principle was reiterated as:-

> … This Court had already settled the law on the point that if the eye-witnesses produced by the prosecution are disbelieved to the extent of some accused person attributed effective role, then the said eye witnesses cannot be relied upon for the purpose of convicting another accused person attributed a similar role, without availability of independent corroboration to the extent of such other person. Reference in this respect may be made to the cases of *Ghulam Sikandar v. Mamaraz Khsan (PLD 1985 SC 11) , Sarfraz alias Sappi v. The State (2000 SCMR 1758), Iftikhar Hussain and others v. The State (2004 SCMR 1185), Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825), Irfan Ali v. The State (2015 SCMR 840) and Shahbaz v. The State (2016 SCMR 1763) and Akhtar Ali and others V. The State (2008 SCMR 6).*

In another case of *Munir Ahmed v. State* 2019 SCMR 79, at Rel. P-83, it is held as:-

> "4. …The question which requires consideration by this Court is as to whether the evidence which has been disbelieved to the extent of three co-accused of the appellant who have

> been acquitted by the learned courts below can be believed to the extent of the appellant? By now it is well settled that principle of *falsus in uno falsus in omnibus* is not applicable in our system designed for dispensation of justice in criminal cases and courts are required to sift the grain from chaff in order to reach a just conclusion. **If some independent and strong corroboration is available then set of witnesses which has been disbelieved to the extent of acquitted co-accused of the appellant can be believed to the extent of appellant**..

Prima facie, no independent evident, whatsoever may be, came onto surface rather the I.O and PW-3 stuck with prosecution case which, starts from allegation of setting of holy Quran's pages on fire by two persons (**appellant & acquitted co-accused);** arresting both of them with burnt pages and lodgment of FIR by complainant with such *categorical* story. Thus, I can safely conclude that in such eventuality the benefit of doubt must have been extended to both sent up accused and not to acquitted co-accused *only* for reason that his name was not taken by such witnesses because, such act, *otherwise,* was sufficient to take away truthfulness from words of such persons.

Be that as it may, even on examining the defence *plea* , the appellant was entitled to be given benefit of doubt. During his examination under section 342 Cr.PC, the appellant came forward with claim as:-

> "Ans: Sir I am innocent and have been falsely implicated in this case by the Police. Due to shifting of Madrsa the old pages of Holy Quran were lying in the street and the students of the said Madarsa burnt the said pages of Holy Quran, I stopped the children in the meantime police came there and arrested me in this case. I pray for justice."

The said claim, if placed in juxta position, while following the guidelines provided in the case of *Muhammad Akram v. State* 2012 SCMR 440 that:

> "It is cardinal principle of law that in such like cases of two versions, one is to be believed in toto and not in piecemeal. This proposition of law is well settled by now

> as reflected in the case of Safdar Ali v Crown (PLD 1953 FC 93) wherein it has been held that in a criminal case it is duty of the court to review the entire evidence that has been produced by the prosecution and the defence. **If, after examination of whole evidence the, court is of the opinion that there is reasonable possibility that the defence put forth by the accused might be true, it is clear that such a view reacts on the whole prosecution case.** In these circumstances, the accused is entitled to the benefit of doubt not as a matter of grace but as of right because the prosecution has not provided is case beyond reasonable doubt. The aforesaid principle has been further elaborated in the case of 'Nadeem-ul- Haq Khan & others v The State (1985 SCMR 510)."

the appellant was, *yet,* entitled for benefit of doubt because all the prosecution witnesses, including police officials, admitted that:

Complainant

> It is fact accused Khatim is resident of my Mohalla. **I have not observed him while given sermon against Injunction of Islam**.

PW-2 Azizullah.

> It is fact accused is resident of our mohalla. **It is fact I have not observed him while given sermon against Injunction of Islam.**

Evidence of PW-3 ASIP Ali Akbar

> **It is fact I had not received previous his complaint regarding his suspicious activities or his sermon against Islam.**

Evidence of PW-4 SIP Ali Muhammad

> **It is fact I have not received any complaint that accused was previously involved in such type of activities or to sermon against the Islam.**

If said claim is viewed by considering the *undeniable* facts i.e :-

i) why the appellant, being sane, chose to set pages of holy Quran on fire at public place?;

ii) why mob did not prevent the setting of pages of Holy Quran on fire?

iii) why any of the members of such mob was not asked to act as witness, who was easy to be believed as eye-witness?

iv) why mob did not arrest the appellant and acquitted co-accused?

v) why any match-box etc was recovered from appellant?

9. All the above principles and circumstances were completely ignored by the learned trial Court judge while recording conviction to the appellant. These are the reasons of the short order dated 30.01.2019 whereby appeal was allowed and impugned judgment was set aside and appellant was acquitted.

J U D G E

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