

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Criminal Appeal No.S-210of 2019
Criminal Appeal No.S-214 of 2019

Appellants: 1) Ghulam Mustafa @ Naban son of Muhammad Sharif, through Mr. Shabeer Hussain Memon, advocate in Criminal Appeal No.S-210 of 2019.

2) Akbar and Gul Hassan both sons of Walidad, through Mr. Wazeer Hussain Khoso, advocate in Criminal Appeal No.S-214 of 2019.

Complainant: NEMO.

Respondent: The State through Mr. Imran Ahmed Abbasi, Assistant Prosecutor General, Sindh.

Date of hearings: 18.04.2023, 10.05.2023 & 18.05.2023.

Date of judgment: 30.05.2023.

J U D G M E N T

AMJAD ALI SAHITO, J:- This single judgment shall dispose of listed Criminal Appeals filed separately by the present appellants/accused, assailing the judgment dated 29.07.2019, passed by learned Additional Sessions Judge-I(MCTC) Dadu, in Sessions Case No.676 of 2014 (*Re.The State Vs. Akbar and others*), outcome of FIR bearing No.80 of 2014, offence under sections 302, 337-A(i), 337-H(ii), 504, 148 and 149 P.P.Cregistered with Police Station Johi, whereby they have been convicted as under:

“43. Whereas, the prosecution has proved its case against accused Akbar Leghari, Gul Hassan Leghari and Ghulam Mustafa @ Naban Leghari beyond shadow of reasonable doubt. Simultaneously, it is the case of lesser punishment, as weak motive cumulatively makes out a case for mitigation, deserves punishment for life imprisonment instead of death sentence.

44. Therefore, under section 265-H(2) Cr.P.C, accused Akbar S/o Walidad, Gul Hassan S/o Walidad and Ghulam Mustafa @ Naban S/o Muhammad Sharif, all by Caste Leghari are convicted and sentenced under section 302(b) PPC r/w section 149 PPC to suffer rigorous imprisonment for life, as Tazir. U/S 544-A Cr.P.C r/w the judgment of Honourable Supreme Court, reported as 1995 SCMR 1776, accused are directed to pay compensation of Rs.100,000/- (Rupees one lac) each to the legal heirs of deceased. In default thereof, they shall suffer simple imprisonment for six months.

45. *The accused Akbar S/o Walidad, Gul Hassan S/o Walidad and Ghulam Mustafa @Naban S/o Muhammad Sharif, all by Caste Leghari are also convicted U/S.265-H(2) Cr.P.C and sentenced for offence punishable U/S. 148 PPC r/w section 149 PPC, to suffer Rigorous Imprisonment for two (02) years.*

46. *The accused Akbar S/o Walidad, Gul Hassan S/o Walidad and Ghulam Mustafa @Naban S/o Muhammad Sharif, all by Caste Leghari are also convicted U/S.265-h(2) Cr.P.C for causing hurt to injured Abid Ali in the nature of Shajjah-i-khafifah and sentenced for offence punishable under section 337-A(i) PPC r/w section 149 PPC, to suffer rigorous imprisonment for one year and each accused is liable to pay Daman to the tune of Rs.5000/- to the injured.*

47. *The sentences, are ordered to run concurrently with benefit of under section 382-B Cr.P.C.”*

2. Complainant Abid Ali Leghari in his F.I.R alleged that there is ongoing dispute between him and Gul Hassan Leghari over landed property for this reason they were not on talking terms with each other. He further alleged that on 16.06.2014 he along-with his father Abdul Karim alias Shaman aged about 45/46 years came at Chandan Mori for some work and after completing the same when they were returning to their houses at about 08:00 p.m. (night) reached near the house of Sajjan Gopang and found five persons duly armed with guns were identified on the light of headlight of motorcycle and electric bulb were each one Gul Hassan, Akbar, Imdad, Ghulam Mustafa @ Naban and one unidentified having armed with guns who signaled complainant party and gave hakals to stop, on which complainant party stopped motorcycle and got down from it. Out of them, accused Gul Hassan abused and disclosed that since complainant party had quarreled with them over the land so they would be murdered today, meanwhile co-accused Imdad and appellant Ghulam Mustafa @ Naban caught hold the arms of complainant's father Abdul Karim alias Shaman while appellants Gul Hassan and Akbar made straight fires from their respective guns upon him, hitting him on his upper side of left eye then co-accused Imdad and Ghulam Mustafa @ Naban left the complainant's father who fell down and blood was oozing. The complainant made cries whereupon appellant Ghulam Mustafa alias Naban inflicted butt blow upon his head resultantly blood started to ooze from his injury. In the

meantime, cousins of complainant namely Sartaj and Mehboob came there, while raising hakals and they also saw the incident then accused left the scene of occurrence while making aerial firing. Thereafter complainant found that his father had received firearm injuries at upper side of his left eye which injury was through and through and died. The complainant party informed the police who reached there and made legal proceedings of dead body which was brought at Taluka Hospital Johi where complainant got treated himself and after completing post-mortem of his father's dead body same was handed over to him who after burial appeared at police station and reported the above incident.

3. After registration of FIR investigation was started wherein the police submitted report (Challan) under section 173 Cr.P.C before competent Court of law showing co-accused Imdad Leghari in custody while appellants Akbar, Gul Hassan and Ghulam Mustafa alias Naban along-with Lal Bux as absconders and then after completing legal formalities declared proclaimed offenders. Out of five accused one Imdad Leghari jumped from his bail hence he was declared proclaimed offender and lastly amended charge was framed against present appellants and one Lal Bux to which they did not plead guilty and claimed for trial.

4. In support of its case prosecution examined P.W.1 Dr. Haji Khan at Ex.21, who produced police letter for post-mortem of deceased, lash chaks form, police letter for examination and treatment of injured Abid Ali, provisional and final medico-legal certificates and post-mortem report as Ex.21/A to 21/F; P.W-2 Tapedar Muhammad Ayoub at Ex.22, who produced police letter and sketch of place of incident at Ex.22/A & Ex.22/B; P.W-3 complainant Abid Ali Leghari at Ex.23, who produced receipt of receiving dead body and FIR at Ex.23/A & Ex.23/B and also filed application at Ex.24 in order to give-up PW Mehboob whereupon learned DDPP given-up evidence of said Mehboob vide his statement at Ex.25; P.W-4 eyewitness Sartaj at Ex.26; P.W-5 mashir Amjad Ali at Ex.28, who produced mashirnama of place of incident and of dead body, Danistnama and mashirnama of clothes of deceased at Ex.28/A to Ex.28/C. Learned DDPP moved application under section 540 Cr.P.C for

recalling said mashir but later on same was not pressed and was dismissed accordingly; P.W-6 Investigating Officer Rehmatullah at Ex.32, who produced entries No.25 and 27, mashirnama of injuries of injured Abid Ali, mashirnama of arrest of accused Imdad, mashirnama of recovery of gun from accused Imdad, entries No.7 and 12 and chemical examiner's report at Ex.32/A to Ex.32/G. Thereafter learned State prosecutor filed statement and closed his side of the evidence at Ex.33.

5. Thereafter statement of accused under section 342 Cr.P.C were recorded at Ex.34 to Ex.37, wherein they denied allegations leveled against them by the prosecution by claiming their innocence however neither they examined themselves on oath nor led any person in their defence.

6. The learned trial Court after hearing the learned counsel for the respective parties, and appraisal of the evidence, convicted and sentenced the appellants in a manner as stated above. The conviction and sentence, recorded by the learned Trial Court, have been impugned by the appellants before this Court by way of filing the instant captioned appeals.

7. Learned counsel for the respective appellants submit that the impugned judgment passed by learned Trial Court is against the law and facts of the case; that ocular evidence is inconsistent with the medical evidence same does not inspire confidence hence could not be relied upon against the appellants; that there are contradictions in between the evidence of prosecution witnesses; that impugned judgment passed by the learned Trial Court is a result of misreading and non-reading of the evidence available on record; that as per entry No.25 complainant Abid Ali called to police and informed about incident at 0300 hours however the incident took place on 16.06.2014 at 08:00 p.m. such delayed information creates doubt regarding the presence of complainant at place of incident; that source of identification of accused shown in the FIR is/was motorcycle light and bulb installed on the house of Sajjan Gopang but neither motorcycle nor bulb were made case property of this case and site plan prepared by Tapedar does not show the presence of bulb at the house of Sajjan Gopang so

also memo of place of incident is silent about light source; that the complainant and witness Sartaj both admitted in their cross examination that the FIR lodged after consultation due to enmity, as such, false implication of the appellants cannot be ruled out; that per prosecution's story co-accused Imdad and appellant Ghulam Mustafa both had caught hold deceased from shoulders while appellants Gul Hassan and Akbar fired from their respective weapons upon the deceased hitting him on his left eye but as per medico-legal certificate deceased sustained only one injury such fact is beyond one's imagination that why two accused would have been held the deceased from his arms when other two persons free to fire upon him hence took risk of being hit themselves such version is creating doubt to a prudent mind. They lastly prayed for acquittal of the appellants from the charge. Mr. Shabeer Hussain Memon, counsel appearing in Criminal Appeal No.S-210 of 2019 has relied upon the cases of *Zafar Vs. The State and others* [**2018 SCMR 326**], *Abdul Razzaq and 3 others Vs. The State* [**2014YLR 1479**], *Muhammad Asif Vs. The State* [**2017 SCMR 486**], *Nazir Ahmad Vs. The State* [**2018 SCMR 787**], *Sardar Bibi and another Vs. Munir Ahmed and others* [**2017SCMR 344**], *Mehmood Ahmad and 3 others Vs. The State and another* [**1995SCMR 127**], *Azhar Ali Vs. The State* [**2017 YLR Note 168**] and *Abdul Sattar and others Vs. The State* [**2002 P Cr. L J 51**]. Likewise, Mr. Wazeer Hussain Khoso counsel for appellants in Criminal Appeal No.S-214 of 2010 in support of his contentions has made reliance upon the cases of *Sajjad alias Sajju and others vs. The State* [**2018 P Cr. L J 1064**], *Muhammad Farooq and another vs. The State* [**2006SCMR 1707**], *Saddam Hussain and another vs. The State and others* [**2018 P Cr. L J 1443**], *Altaf Hussain vs. The State* [**2019SCMR 274**], *Pervaiz Khan and another vs. The State* [**2022SCMR 393**], and *Gulfam and another vs. The State* [**2017SCMR 1189**].

8. While refuting the above contentions, the learned Assistant Prosecutor General, Sindh for the State argued that the appellants were specifically nominated in the FIR and for their act one person has lost his life. He further argued that no material contradiction and the discrepancy is pointed out by the

learned defence counsel to show the appellants' false implication in this case, therefore, in such circumstances, the learned Trial Court has rightly awarded the conviction and sentence to the appellants following the law, hence appellants deserve no leniency. He lastly prayed for the dismissal of the instant appeals. In support of his contention, he has relied upon the cases of *Qasim Shahzad and another vs. The State and others* [**2023SCMR 117**], and *Sajid Mehmood vs. The State* [**2022SCMR 1882**].

9. The complainant was called absent, the record reflects that on 07.12.2020 Mr. Mushtaq Ahmed Rind Advocate effected his appearance and undertook to file Vakalatnama on behalf of the complainant. On 10.05.2023 when the case was called neither Vakalatnana was filed nor the complainant Abid Ali was present, hence notice was issued to the complainant and intimation notice was also issued to Mr. Mushtaque Ahmed Rind through Sindh Bar Council. But at the time of hearings of appeals, both were called absent.

10. I have heard the learned counsel for the respective parties and have gone through the evidence with their able assistance.

11. The presumption of innocence remains throughout the case until and unless the prosecution on the basis of the evidence available satisfies the Court beyond a shadow of a reasonable doubt that the accused is guilty of the charged offence. It is one of the principles which seek to ensure that no innocent person should be convicted. On the evaluation of the material brought on the record, it appears that the case of prosecution solely depends upon the ocular testimony adduced in the shape of statements of complainant Abid Ali (PW-03) and his cousin/eye-witness Sartaj (PW-04). The case of the prosecution is that the complainant party had a dispute with Gul Hassan and others over the land and there were no talking terms with them. On 16.06.2014 after completing work, the complainant along with his father were returning on their motorcycle towards the house it was 08:00 p.m. when they reached at the house of Sajjan Khan Gopang, in the light of the motorcycle and electric bulb installed at said Sajjan's house they identified appellants Gul Hassan, Akbar, Ghulam Mustafa

alias Naban along-with co-accused Imdad all are holding DBBL Guns and one unidentified person they signaled complainant party to stop motorcycle then appellant Gul Hassan abused them and threatened for committing murder. In the meantime, appellant Ghulam Mustafa and co-accused Imdad caught hold the complainant's father from his shoulder while appellants Gul Hassan and Akbar fired from their respective weapons upon him which hit at his left eye. Appellant Ghulam Mustafa alias Naban inflicted butt blow over the complainant's head and blood started oozing meanwhile witnesses Siraj and Mehboob arrived at the place of occurrence on seeing them accused after making aerial firing and made their escape good towards their houses. Thereafter prosecution witnesses saw that complainant's father received injury upon his left eye through and through was bleeding and brain was also visible and was died. The complainant informed the police about the incident and the police arrived at the place of the incident inspected the same and made paper proceedings and removed the dead body in police mobile towards Taluka Hospital Johi. In his cross-examination, the aforesaid complainant admitted that ***"It is fact that with the consultation I lodged the FIR because of enmity over land"***.

12. It has been noticed by me that the occurrence in this case as per prosecution took place on 16.06.2014 at 08:00 p.m. and the matter was reported to the police station on 18.06.2014 with a delay of about 44 hours though the distance between the place incident and P.S was about 13kilometers, as such, there is no explanation whatsoever has been given by the complainant Abid Ali (PW-3) and eyewitness Sartaj Ali (PW-4) in the FIR or while appearing before the learned trial Court. Reliance is placed upon the case of *ZAFAR v. The STATE (2018 SCMR 326)* so also on the case of *Muhammad Asif vs. The State (2008 SCMR 1001)*, it has been held by Hon'ble apex Court that;

"..... The F.I.Rs. which are not recorded at the police station suffer from the inherent presumption that the same were recorded after due deliberations....."

13. Further, the information was given to police about the incident with a delay of 4 and half hours. The complainant

disclosed in his evidence that after the incident he informed to police. Whereas inquest report Ex.28/B and Memo of examination of dead body tells that on 17.06.2014 at 0030 hours complainant Abid Ali informed the police about the murder/incident through mobile phone. PW-4/Sartaj deposed that he did not remember but someone informed the police about the incident then the police arrived at the place of the incident and dispatched the dead body towards the hospital. The postmortem on the dead body of the deceased was conducted on 17.06.2014 at 03:00 a.m. whereas the dead body of the deceased was received at 2.15 a.m. with a delay of about 7 hours. No explanation was furnished by the complainant and prosecution witnesses while appearing before the trial Court qua for such a long delay in lodging the FIR or for that matter the belated postmortem of the deceased.

14. The complainant and PW-Sartaj deposed that they have identified the accused persons on the source of the motorcycle light and electric bulb which was glowing outside the house of SajjanKhan but investigating officer has failed to collect such piece of evidence to corroborate with the evidence of the eyewitnesses. PW ASI Rehmatullah was duty officer, on 17.06.2014 at about 12:30 a.m. left the police station and inspected the dead body and on the torchlight, he has collected the empties. PW-2 Tapedar (Patwari) produced a sketch of the place of incident Ex.22/B, it reflects that house of Sajjan Gopang was situated at a distance of 6 feet. In the said sketch nowhere it is written that the electric pole was installed or bulb was installed outside the house. The sketch further denotes that the eyewitness Sartaj was present at a distance of 32 feet from the place of the incident at southern side and Mehboob was also present at a distance of 52 feet towards the southern side. In cross-examination, PW Sartaj admits that *“The accused were away from us at the distance of 02/03 feet...We were standing with the deceased just near distance. It is fact that except deceased Abdul Karim none sustained a single scratch of the firing”*. It is important to note here that as alleged by the complainant all accused

were armed with double barrel guns (DBBG) and if a fire is made from a cartridge then the palettes shall spread. Further, the PWs deposed that at the same time both the accused Gul Hassan and Akbar did fire from their DBBGs upon the deceased which inflicted at the left eye, but pallets were not spread and as per the postmortem report the deceased had received injury No.1 on left front-parietal region measuring about 10x10 cm tissue deep and injury No.2 was on mid occipital region, brain tissue out measuring about 10x10 cm tissue deep. ASI Rehmatullah Ex.32 inspected the dead body of the deceased and find that the deceased had firearm injury above his left eye.

15. The evidence of the complainant and his eye-witness clearly demonstrate that neither he nor his cited witness had witnessed the incident; hence their presence at the place of the incident at the relevant time is doubtful. In this context, reliance is placed upon the case of **Zaffar v. The State (2018 SCMR 326)**, wherein the Hon'ble Supreme court Of Pakistan has held that;-

11. 'Having discussed all the aforesaid aspect of the case, it has been observed by us that, medical evidence, motive, recovery and for that matter absconding of appellant are merely supportive/corroborative piece of evidence and presence of eyewitnesses at the place of occurrence at the relevant time has been found by us to be doubtful, no reliance can be placed on the supportive/corroborative piece of evidence to convict the appellant on capital charge.'

16. The mashir Amjad Ali PW-5 deposed that I.O secured 17 empties rounds of different weapons from the place of incident, whereas ASI Rehmatullah deposed that he has collected seven empties of 12 bore of different colours which were lying scattered position. The PW-5 Amjad Ali, who was mashir of all proceedings conducted by the police produce seven memos of different proceedings Ex.32-B to 32-D so also 28-C, 28-A, 28-B and 29-C, but in cross-examination he admits that "*I.O obtained three signatures from on the memos at P.S*". The aforesaid mashir Amjad Ali has given contradictory evidence from the case of prosecution wherein he made dent in the

prosecution story and such improvements cannot be ignored slightly. I am inclined to place reliance on the case of ***Muhammad Pervez and others Vs. The State and others [2007 SCMR 670]***, wherein the Hon'ble Supreme Court of Pakistan has held as under:

“6...It is pertinent to mention here that statement of eye-witnesses was not in consonance with each other. There are material contradictions and improvements in their statements which were not noted by the learned Federal Shariat Court in its true perspective. It is a settled law that person making contradictions and improvements cannot be held worthy of credence. See Muhammad Shafique Ahmad's case PLD 1981 SC 472; Roshin's case PLD 1977 SC 557 and Shahbaz Khan Jakhrani's case 1984 SCMR 42.

17. The role assigned by the complainant against the accused Ghulam Mustafa and Imdad was that they caught hold to his father from his shoulder when accused Gul Hassan and Akbar fired from their respective guns, which is not appealing to the prudent mind, because the time of the incident was night time and they have taken the risk. When the deceased was at their mercy. While passing the impinged judgment the learned trial Court has not believed the evidence of the complainant and PWSartaj to the extent of co-accused Lal Bux on the ground that the complainant has not nominated accused Lal Bux in FIR nor attributed any overact to him, when both the witnesses namely Sartaj and Meboob was with him. Further, at the belated stage, he has been implicated in this case; hence his presence on the spot is highly doubtful. Every person has the right to get justice but with clean hands. The complainant has not approached before the learned trial Court with clean hands.

18. Since the prosecution witnesses are not in line during their evidence thus, it appears that the learned Trial Court while scrutinizing the record/evidence has failed to appreciate the material contradictions, improvements and admissions of the prosecution's witnesses made at trial rendering its case highly doubtful. In this respect, reliance can be placed upon the case of ***MOHAMMAD MANSHA v. The STATE (2018 SCMR 772)***, wherein the Hon'ble Supreme Court of Pakistan has held as under:-

4. *“Needless 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 the 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 guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of Tariq Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v, The State (2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749).”*

19. The upshot of the above-detailed discussion is that the prosecution has failed to prove the charge against the appellants, hence instant Criminal Appeals are **allowed** and the appellants are **acquitted** from the charge. The appellants are confined in Jail. They shall be released forthwith if they are no more required in any other custody case/crime.

JUDGE