IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Criminal Appeal No. S-202 of 2012

Appellant	:	Mehmood Chang through Mr. Altaf Sachal Awan, advocate.
Respondent	:	The State through Mr. Imran Ahmed Abbasi, Assistant Prosecutor General Sindh.
Date of hearing	:	24.07.2023
Date of decision	:	24.07.2023

J U D G M E N T

KHADIM HUSSAIN TUNIO, J,- Through captioned criminal appeal, the appellant Mehmood Chang has impugned the judgment dated 24.05.2012 passed by learned Sessions Judge, Badin in S.C No. 153 of 2011 *[Re- State v. Mehmood]* emanating from Crime No. 121/2011 registered at PS Shaheed Fazil Rahu, whereby he was convicted for the offence punishable under section 302(b) PPC and sentenced to suffer rigorous imprisonment for life as Tazir with direction to pay Rs.200,000/- as compensation to the legal heirs of the deceased Ibrahim in terms of section 544-A Cr.P.C. and in default whereof to further undergo simple imprisonment for two years more. The appellant was extended benefit of section 382-B Cr.P.C.

2. Briefly put, facts of the prosecution case are that on the intervening night of 25th and 26th of June 2011, the appellant Mehmood was allegedly seen by the complainant with a hatchet in his hand after the complainant's son Ibrahim had just left the house having had dinner. Not thinking much of it at the time, the complainant went to sleep and in the morning on his way to work, he saw the dead body of his son Ibrahim lying over some crops with his legs in the water. The complainant saw multiple injuries on the deceased Ibrahim's head, took

the dead body to the hospital and appeared at the police station where he got the FIR pertaining to the incident lodged.

3. After registration of the case, usual investigation was conducted by the Investigating Officer who then submitted challan before competent Court of law against the present appellant showing him in custody. Thereafter, a formal charge was framed against the appellant to which he pleaded not guilty and claimed to be tried. The prosecution started the evidence by first examining Dr. Abdul Karim who had examined the dead body and conducted the post-mortem, then the complainant Achar was examined, followed by one Pir Bux, Ahmed Khan who was a mashir, the Tapedar Karooji, ASI Fazil Ali, PC Ghulam Shabir and lastly ASI Muhammad Salim Khoso. All the prosecution witnesses produced various documents and artefacts in their evidence which were duly exhibited.

4. Statement of appellant u/s 342 Cr.P.C was recorded, in which he denied the case of prosecution, claimed his false implication due to enmity and pleaded his innocence. However, he neither examined himself on oath nor examined any witnesses in his defence.

5. After hearing the learned counsel for the respective parties, learned trial Court convicted and sentenced the appellant as stated above.

6. Learned counsel for the appellant has mainly contended that there is not an ounce of evidence against the appellant; that the alleged murder is unwitnessed; that the recovery of the hatchet has been foisted upon the appellant; that the witnesses are related to the deceased and highly interested; that it was alleged in the FIR that the injuries were caused by a sharp sided hatchet blow whereas medical evidence suggests that the injuries were caused by a hard, blunt substance; that the recovery of the hatchet was made after three days of the arrest of the appellant; that motive has not been proved by the prosecution and as such he prayed for the acquittal of the appellant. In support of his contentions, he cited the case of Niaz Ali alias Naz Ali v Abizar and 2 others (2020 PCrLJ Note 112).

7. Conversely, learned Assistant Prosecutor General has supported the impugned judgment while arguing that despite the absence of ocular account, sufficient circumstantial evidence is available on the record to connect the appellant to the murder of deceased Ibrahim.

8. I have heard the learned counsel for the respective parties and perused the record with their able assistance.

9. It is the prosecution's case that the incident took place in the intervening night of 25th and 26th June 2011. The complainant claimed to have found the dead body on the morning of the 26th of June 2011 and the post-mortem for the same was conducted at 11:30 a.m. The complainant noted an injury on the head of the deceased which he claimed was from a sharp sided hatchet blow and other injuries all over the body. As per medical records of the injuries on the deceased, it was caused by a hard blunt substance and not a sharp edged weapon which is why the nature of the injury on the head was determined as:-

> A lacerated wound measuring 2.5 cm x skin deep over the left tempero-parietal region of skull.

10. The prosecution case rests upon the frail ocular account of the complainant alone since it was admitted by the other 'witnesses' that they had not seen the murder nor the appellant and only came to the place on hearing cries of the complainant who disclosed to them of the involvement of the appellant, making them secondary witnesses; not having any information about how the crime was committed or what actually happened. According to the complainant, he saw the appellant on the night prior to the incident with a hatchet in his hand. However, this testimony of the appellant is shattered by his own deposition where he stated that he then asked the person he *thought* was Mehmood if it was in fact him. To this effect, he deposed that *"I saw accused Mehmood proceeding hurriedly, having a hatchet in his hand from whom I inquired 'Are you Mehmood"*. This coupled with the fact that the prosecution also failed to establish a source of light in the dark hours of night destroys

any evidentiary value of the complainant's testimony who even doubted himself about the identity of the person he saw and the fact that he is in his mid-forties and may not have the perfect eye-sight. It is undeniable at this point that the entire incident was unwitnessed, the identity of the person the complainant saw is shrouded in mystery, the type of injury he claims to have seen on the head of the deceased is contradicted by the medical evidence. The recovery of the hatchet was made from the house of the appellant, after three days of his arrest, from within some straw walls. This recovery was after three days of the arrest of the appellant during interrogation by the police. Not much relevance can be attributed to the same.

11. Not only this, the complainant at many instances has attempted to improve his case and has also contradicted his own version of events. In his examination-in-chief, the complainant deposed that his son had left to meet Mehmood, but in the FIR no such event has been mentioned. The complainant also did not disclose regarding the matrimonial dispute between the parties. To justify this, the complainant stated that the FIR was not recorded as per his verbatim, but despite this fact he chose to sign the same which ascertained that he had read it over and had found no discrepancies. These dishonest improvements strike at the core of the prosecution case, further diminishing the value of the depositions of the complainant. These deliberate and dishonest improvements, taken with the assumption that they are to strengthen the prosecution case, cast serious doubts on the said witness' veracity which ultimately makes him unreliable–***(Naveed Asghar and two others v. The State)***[1].

12. The incident was unwitnessed and nothing besides the word of the complainant and the recovery of a hatchet is present to connect the appellant with the crime. When relying on circumstantial evidence, much like the unbroken link for chain of custody, each circumstance must be a link forming an unbroken chain with not one link missing or there is a serious underlying risk of the entire chain

[1] PLD 2021 SC 600

being compromised as held in the seminal case of ***Ali Khan v. The State***.[2] That was not the case here as what was presented before the trial Court was by no means sufficient to send the appellant to prison.

13. In a seminal case reported as ***Muhammad Luqman v. The State***[3], the Hon'ble Supreme Court held that a case could not be based on probabilities and this decision was also ratified by the Hon'ble Supreme Court in ***Naveed Asghar's*** case (supra) while observing 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."

14. Where prosecution does not prove its case beyond reasonable shadow of doubt, it becomes quintessential for the Court to exercise its discretion in favour of an accused to promote safe administration of justice than to err in judgment merely based on humanitarian affection. The principle of benefit of doubt has been entrenched in not just our legal system or common law, but since the inception of Islam jurisprudence. This benefit is also the right of any accused and not just the Court giving him a concession[4] and the appellant in the present case is fully deserving of this benefit as well. There can always be reparations of a guilty person being let go by a Court, but the time of an innocent person wasted behind bars is something beyond repair, not just physically or monetarily, but also mentally. This seems to have been the necessity for chalking out the

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[2] 1999 SCMR 955
[3] PLD 1970 SC 10
[4] See Tariq Pervez v The State, 1995 SCMR 1345

common law maxim *'It is better that ten guilty persons be acquitted rather than one innocent person be convicted'.*

15. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellant. Therefore, captioned criminal appeal was allowed, the impugned judgment passed in SC No. 153/2011 was set aside along with the conviction and sentence awarded to the appellant and he was acquitted of the charge vide short order dated 24.07.2023. These are the reasons for the same.

JUDGE