

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

Criminal Appeal No. S – 13 of 2022

Criminal Appeal No. S – 14 of 2022

Appellant(s) : Muhammad Ayoub s/o Khamiso, through
M/s. Muhammad Sachal R. Awan and
Khair Muhammad Bajeer, Advocate.

The State : Through Mr. Siraj Ahmed Bejarani,
Assistant Prosecutor General, Sindh.

Date of hearing : **31.07.2023**

Date of decision : **04.08.2023**

JUDGMENT

ARBAB ALI HAKRO, J;- Appellant Muhammad Ayoub, son of Khamiso, has preferred the above-listed criminal appeals against the judgment dated 14.01.2022 passed by 1st Additional Sessions Judge / MCTC, Badin in Sessions Case No.479 of 2020 arising out of Crime No.52 of 2020 under Sections 324, 504, 109 PPC registered at Police Station Khoski and Sessions Case No.115 of 2020 arising out of Crime No.53 of 2020 under Section 25 of Sindh Arms Act, 2013 registered at Police Station Khoski, whereby the appellant was convicted under section 324 PPC for attempting at the lives of Ali Muhammad and minor Sughra and was sentenced to suffer R.I. for three (03) years with a fine of Rs.20,000/- or in default thereof to undergo three months. He was also convicted under Sections 337-A(i), 337-F(i), 337-F(ii), 337-F(iii) PPC and directed to pay Rs.100,000/- as Daman to injured Ali Muhammad and Rs.50,000/- to injured Sughra and in case of default of payment of Daman, he shall remain in jail till payment of the said amount. He was also convicted under Section 25 of the Sindh Arms Act and sentenced to suffer R.I. for one (01) year with a fine of Rs.10,000/- or in default thereof, to undergo S.I. for the period of one month. All the sentences were ordered to run concurrently. The benefit of Section 382-B, Cr.P.C. was also extended to the appellant.

2. The brief facts of the prosecution case as per FIR No.52 of 2020 lodged by complainant Jagan, son of Muhammad Raheem, are that on 21.10.2020 @ 1100 hours, at Pad land situated in village Baharo Khan Chandio, the appellant duly armed with a double barrel gun accompanied by acquitted co-accused Muhammad Saleem caused firearm injuries to PWs Ali Muhammad and minor Sughran. Thereafter, the complainant lodged the above FIR.

3. Following the formal registration of the First Information Report (FIR), the responsibility of the investigation was assigned to ASI Dildar Ahmed. ASI Ahmed diligently examined the injuries sustained by the victim and meticulously documented them in a memorandum. Additionally, he proceeded to the location of the incident to gather evidence and retrieved two empties, which were subsequently dispatched to the Forensic Science Laboratory for analysis. Furthermore, ASI Ahmed recorded 161 Cr.P.C statements of the witnesses involved in the case. Thereafter, on 27.10.2020, the apprehension of the appellant followed, culminating in the elicitation of crucial information during the subsequent interrogation, eventually facilitating the retrieval of the weapon implicated in the crime. The double-barrel firearm was retrieved from his residence. Finally, after completing legal formalities, I.O. submitted challan before the trial Court.

4. At the trial, the prosecution produced as many as seven (07) witnesses, where-after the appellant was examined under section 342 Cr. P.C. wherein he denied the allegations and professed innocence; however, neither he opted to be examined on oath in terms of section 340(2) Cr. P.C. nor produced evidence in his defence. At the conclusion of the trial and after hearing arguments of learned counsel for the parties, the trial Court convicted and sentenced the appellant as stated supra, whereas co-accused Muhammad Saleem was acquitted of the charges. Hence, these appeals have been filed by the appellant.

5. At the very outset, learned counsel for the appellant contends that there are glaring contradictions and dishonest improvements in the statements of the eyewitnesses; that the medical evidence contradicts the ocular account with regard to a number of injuries allegedly sustained by the injured; that the prosecution has failed to substantiate the charge against the appellant beyond the shadow of reasonable doubt and that the statements of interested

and related witnesses lack independent corroboration; that the appellant has been dragged in this false case due to previous enmity; that the alleged disclosure followed by the alleged recovery of the crime weapon has been foisted upon the appellant to strengthen the case of the prosecution; that the prosecution's case is replete with legal defects, discrepancies and infirmities, which has made the case of the prosecution doubtful, but while delivering the impugned judgment, the benefits of such doubts have not been extended to the appellant; that the appellant convicted and sentenced through the impugned judgment(s), which require the interference of this Court. In support of his contentions, he relied upon the cases reported as ***Ayub Masih v. The State* (PLD 2002 Supreme Court 1048)**, ***Hashim Qasim and another v. The State* (2017 SCMR 986)**, ***Ali Ahmad v. The State and others* (2020 P.Cr.L.J 693)**, and ***GORNO alias Governor and another v. The State* (2020 P.Cr.L.J Note 193)**.

6. Conversely, learned Assistant Prosecutor General Sindh, while supporting the impugned judgment(s), submits that the prosecution has fully established its case against the appellant beyond reasonable doubt by producing consistent / convincing and reliable evidence. The impugned conviction and sentence awarded to the appellant is a result of proper appreciation of evidence brought on record, which needs no interference. Lastly, he prayed that appeals may be dismissed.

7. I have considered the arguments put forth by the learned counsel representing the appellant(s), the learned Assistant Prosecutor General. Additionally, I have thoroughly examined the record contained within the case file.

8. After a thorough examination of the entirety of the evidence put forth by the prosecution, I am of the opinion that the prosecution has been unsuccessful in substantiating its claim against the appellant(s) to the extent required for a conviction based on the standard of proof beyond a reasonable doubt. The prosecution's case relies primarily on ocular evidence, medical evidence, and the alleged recovery of a double barrel gun guided by the appellant following his apprehension. During the trial, the prosecution produced individuals as witnesses, namely Jagan son of Muhammad Rahim, the complainant (PW-1); Muhammad Ali son of Jagan, who was injured (PW-2); and Sughra, daughter of Yousuf, who was also injured (PW-3). It is important to note that these witnesses

are closely related to one another. Complainant Jagan (PW-1) is the father of injured Ali Muhammad (PW-2) and grandfather of injured Sughra (PW-3), therefore, for safe dispensation of justice, their evidence will have to be appreciated with care and caution. Undoubtedly, the testimonies provided by closely related witnesses should not be dismissed solely based on their familial relationship. However, if it is determined that the testimony given by these related witnesses lacks substantiation from accompanying circumstances or conduct shown by them at the time of occurrence, which would be deemed inconsistent with the actions of a judicious individual, then under such conditions, the evidence presented by these related witnesses should not be readily disregarded. All the eye-witnesses gave contradictory evidence and made dishonest improvements. Among them, the notable ones were that PW-1 complainant Jagan during his examination-in-chief, deposed that "I was present in my house along with my family. I heard the voice of Tractor. Firstly, Ali Muhammad and Sughra came out from home. Thereafter, I left my house along with Murtaza". Whereas, PW-2 injured Ali Muhammad belied him and deposed that "I along with my father jointly came out from the house". To a question in the cross-examination, the complainant stated that "Injured received an injury at the distance of about 30 feet", but PW-2 injured stated that "I received injuries at the distance of about 15 paces". Further, the complainant, in his cross-examination, stated that "We reached Police Station Khoski at 01-00 PM and remained 20 minutes at Police Station," whereas PW-2, injured, again contradicted him and stated that "We reached at Police station after 30 minutes of the incident and remained at Police Station about 10 to 15 minutes". In his examination-in-chief, the complainant deposed that "Ayoob was present inside the land with gun. Ali Muhammad restrained him not to plough the land as the same is government land. Ayoob told him that Saleem (since acquitted) directed him to plough the land". PW-2 Ali Muhammad, in his evidence, has not deposed a single word to this effect. Similarly, the complainant deposed that the injured remained in the hospital for about one hour, whereas the injured / PW-2 deposed that "they remained there for 20 minutes". It is also noted that PW-2, in his evidence, deposed that no other co-villager was at the spot except his father, Ali Murtaza, Fateh Khan, Sadam and baby Sughra. However, surprisingly, the complainant neither in his FIR nor in his evidence mentioned the presence of Fateh Khan and Sadam at the time of the alleged occurrence. There is also conflict between the evidence of the eye-witnesses and the medical evidence on the point of a number of injuries which makes the case of

prosecution further doubtful. It was stated in the FIR that injured Muhammad Ali (PW-2) had received a total of three gunshots on his body, one at the arm, one on the back of the chest and one on the back of the body, *however*, per medical report, six injuries were found on the body of injured, one on right side of the face, two on left shoulder, one on left side of chest, one on left side of back of chest and one on right side of back lateral to spine. Further, per the memo of injuries, only four injuries on the person of injured Muhammad Ali have been shown. Besides, the Investigating Officer did not obtain the blood-stained earth from the place of incident. No blood-stained clothes of the injured were recovered and sent to the chemical examiner. All these glaring contradictions in the statement(s) of claimed eye-witnesses were always sufficient to doubt their claim of having seen the manner of the incident. Hence, it was never safe to have relied upon such an ocular account for awarding a conviction. Reliance in this context is placed on the case of ***Muhammad Akram v. State (2012 SCMR 440)***, wherein the Apex Court has held that:-

“Except for the oral statements of eye witnesses there is nothing on record which could establish the presence of both the eye witnesses at the spot and as their presence of both the eye witnesses at the spot and as their presence at the spot appears to be doubtful; no reliance could be placed on their testimonies to convict the appellant on a capital charge.”

9. It is also noted that the complainant, as well as injured/PWs-2 & 3, in their evidence, deposed that on hearing the voice of the tractor, they came out from the house and saw that the land was being ploughed by the tractor, and Ali Muhammad restrained the appellant not to plough the land as the same is government land, however, the colour, registration number or name of the person who was driving the tractor at the land at the time of the alleged incident, is neither mentioned in the FIR nor in the evidence of eye-witnesses. In my view, non-mentioning of colour, registration number or name of the driver of the tractor puts the claim of ploughing of the land on the day of the alleged incident shrouded in doubts.

10. Moving to the circumstantial evidence. In the present case, the only incriminating material as a circumstance was the alleged recovery of empties from the place of incident and a double-barrel gun from the possession of the appellant. The perusal of the record shows that crime empties were allegedly recovered on 22.10.2020 and crime weapon was allegedly recovered on 28.10.2020,

but sent to the Ballistic Expert on 04.11.2020 with a delay of 13 and 07 days, respectively, without any explanation for it, however, the record is silent regarding its safe custody in the intervening period. Even the official who took the same to the Laboratory for its analysis was not examined. Hence, the evidentiary value of such circumstantial evidence is of no help to the prosecution case. The situation has further been clarified by the Apex Court in the case of **Ghulam Akbar and another v. The State (2008 SCMR 1064)** as under:-

(3) The Forensic Science Laboratory Exh.20/B report, available on page 171 of the paper book, reveals that the empty was received along with the pistol on 12-4-1999, i.e., after three months. Such a long delay has not been explained at all. The requirement of the law is that the empty recovered from the spot should be sent to the Laboratory without any delay. To top it, the report reveals that the empty and the recovered pistol were received together on the same date, i.e. the pistol was also sent after more than two months of its recovery."

11. On perusal of the record, I have also noted that the empties secured from the place of occurrence were sent to the Forensic Laboratory after the recovery of the gun. Therefore, the possibility cannot be ruled out consideration that the same had been managed and maneuvered by making fire shots from the weapon recovered after the arrest of the appellant in order to get a favourable report of Ballistic Expert. Reliance is placed on the case titled "**Nazeer Ahmed v. The State (2016 SCMR 1628)**", wherein it has been held by the Apex Court as under:--

"the crime-empty secured from the place of occurrence was sent to the office of Forensic Science Agency after recovery of the gun rendering such recovery to be legally unacceptable----"

12. Adverting to the last piece of prosecution evidence in the shape of motive, I have observed that the motive which led to the present tragedy was stated to be a dispute over land, which though admitted to one and the same being a double-edged weapon, alone is not sufficient to maintain the conviction, in the absence of confidence inspiring ocular account and corroboration from another independent source of evidence. If it may be the reason for the appellant to commit the offence, it is equally a reason for his false implication in the case.

13. The requirement of criminal law is that the prosecution is duty bound to prove its case beyond a reasonable doubt, and if any single and slightest doubt is created, the benefit of same must go to the accused. It would be sufficient to disbelieve the prosecution story and acquit the accused. It is settled law that the conviction must be

found on unimpeachable, trustworthy and reliable evidence and certainty of guilt. Reliance is placed on the case of **Safdar Baloch alias Ali v. The State (2019 SCMR 1412)** wherein it was held that:-

"---Criminal liability is to be essentially settled on evidentiary certainty and not on moral satisfaction or factualities incompatible with the evidence based upon truth. Prosecution's case against the appellants cannot be viewed as beyond reasonable doubt and thus conviction cannot be maintained without potential risk of error. Resultantly, criminal appeals are allowed, impugned judgment is set aside. The appellants shall be released forthwith, if not required in any other case."

14. The upshot of the aforementioned reasoning, deliberations and wisdom obtained from the cited judgments of the Apex Court, the prosecution has failed to prove its case against the appellant(s) beyond a reasonable doubt. Consequently, the instant appeals are **allowed**. The impugned judgment(s) dated 14.01.2022, passed by 1st Additional Sessions Judge / MCTC Badin, are set aside, and while extending the benefit of the doubt, the appellant Muhammad Ayoub son of Khamiso, is acquitted of the charge(s) framed against him. He is on bail, his bail bond stands cancelled and surety discharged.

JUDGE

Hafiz Fahad