

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

Criminal Appeal No.S 127 of 2019

Appellant: Mashooque Ali Chandio son of Muhammad Soomar Chandio through Mr Wazir Hussain Khoso, advocate for appellant

Respondent[s]: The State through Mr. Nazar Muhammad Memon, Addl.P.G.

Date of hearing: 28.04.2023

Date of judgment: 19.05.2023

J U D G M E N T

KHADIM HUSSAIN SOOMRO J.---Through this appeal, appellant Mashooque Ali, has challenged the Judgment dated 08.05.2019 passed by learned 1st Additional Sessions Judge/ MCTC, Badin, in Sessions Case No.09/2006 re: "The State v. Allah Jurio and other", arising out of Crime No.13/2006, registered at Police Station Kadhan under sections 302,337-H(ii), 114, 504, 34, P.P.C., whereby the appellant was convicted for the offence under section 302(b) P.P.C. and sentenced to suffer Rigorous Imprisonment for life as Tazir and fine Rs.600,000/- (six hundred thousands) as fine to be paid to the legal heirs of the deceased, in case of default in payment of fine, he shall undergo SI for six months more. However, the benefit of Section 382 Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as gathered from the FIR lodged by complainant Muhammad Essa son of Haji Abdullah Khore are that about 5/6 months before this incident, a buffalo belonging to Soomar Chandio was stolen, and such allegations were levelled against the deceased Moula Bux alias Abloo. Such Faisla was made between the parties by Haji Sher Jamali, therefore, the accused were annoyed with him, and hot

words were also exchanged between them. On 16.05.2006, at 3:30 PM, the complainant's nephew, Moula Bux alias Abloo, Amb son of Ghulam Hussain Khore came to Kadhan town on a motorcycle. Jumoon son of Ahmed Khoso was also standing with him. The deceased Moula Bukhsh alias Abloo, Amb and Jumoon left on a motorcycle by asking that they were going to purchase commodities from the northern Bus Stand. In the meantime, it was about 4.30 p.m., Amb Khore came and informed him that they, after taking tea at the hotel of Rafique Marho came out on the road, and saw accused Soomar, s/o Miro Chandio, Allah Jurio alias Jurio son of Abdul Sattar Chandio armed with a pistol, Mashooque son of Soomar Chandio armed with a TT pistol, and on the instigation of accused Soomar, the accused Allah Jurio fired upon Moula Bux alias Abloo which hit him on the left temple forehead near the ear. The accused Mashooque/appellant fired upon Moula Bux, which hit him on his left side lumber region, He fell down on the road, and the blood was oozing. On seeing the accused after abusing him, they fired in the air and went away with weapons. On hearing such a fact from Amb, the complainant rushed there and saw Moula Bux alias Abloo lying on the road in an unconscious condition. They took Moula Bux in a Datsun to the civil hospital in Badin but on the way he succumbed to his injuries near the Army Sugar Mill Badin. Thereafter, the complainant left the dead body of Moula Bux alias Abloo at the civil hospital in Badin and he went to the PS and lodged the FIR.

3. In the wake of completing the investigation of the case, a report in terms of section 173 Cr.P.C. (challan) was submitted by the Investigating Officer against accused person before the concerned Court, thereafter the charge was framed and all the accused did not plead guilty and claimed to be tried.

4. It is important to mentioned here that in the first round of the trial/proceeding, the accused (1) Allah Jurio alias Jurio (2) Mashooque Ali, were awarded death sentence, whereas the accused (3) Muhammad Soomar was awarded imprisonment

for life by way of the judgment dated 14-07-2010, passed by learned Ist Additional Session Judge Badain in Session Case No 99 of 2006, However, all the accused preferred an appeal being No D-256 of 2010 and confirmation case No 13 of 2010, which was allowed, and the matter was remanded back to the trial court. For the sake of convenience the direction so given in Para. 26 of the said judgment dated 19.04.2018 is reproduced hereunder:

“26. In view of what has been observed herein above and in view of the dictum laid down by the Honourable Apex Court in the cases referred to above, we are of the considered opinion that the learned trial Court while passing the judgment has committed illegality and violated the provisions of Section 342 Cr.P.C as well as Article 132 of Qanun-e-Shahadat Order, 1984. Consequently, the judgment dated 14.07.2010 passed by the learned trial Court is hereby set-aside and Reference for confirmation of death sentence is declined. Case is remanded back to the learned trial Court with direction to record statement of the accused under Section 342 Cr.P.C afresh by putting all incriminating pieces of evidence including the reports of chemical examiner as well as evidence of Tapedar. A fair opportunity shall be provided to the accused for explanation/reply as well as to the prosecution. Thereafter, the learned trial Court shall pass the judgment afresh within two months after hearing both the parties, in accordance with law. It may be mentioned here that appellant Muhammad Soomar was on bail prior to announcement of judgment, therefore, his enlargement on bail shall stand continued and the appellant shall appear before the trial Court on 30.04.20018.”

5. In the second round of the proceeding, the learned trial court, after recording the statements under section 342 Cr.P.C. and hearing the respective parties acquitted the accused, namely Allah Jurio alias Jurio, Muhammad Soomar, whereas convicted appellant/Mashooque Ali, for an offence under Section 302(b) P.P.C. and sentenced him to suffer rigorous imprisonment for life as Tazir and a fine of

Rs.600,000/- (six hundred thousand) to be paid to the legal heirs of the deceased, in case of default in payment of the fine, he shall undergo SI for six months more, and the benefit of Section 382 Cr.P.C was extended to the appellant, whereas the co-accused Allah Jurio alias Jurio and Muhammad Soomar were acquitted from the charge. The complainant being aggrieved from the impugned judgment filed Criminal Acquittal Appeal bearing No.D-34 of 2019 against accused Allah Jurio and Muhammad Soomar, so also filed Criminal Revision application bearing No. 15 of 2019, for enhancement of the sentence against the appellant Mashooque Ali, but both were dismissed in non-prosecution vide order dated 20-09-2022 by the divisional bench of this court. Per learned counsel for the appellant that about eight months have passed but the complainant has not filed the restoration application before the Division Bench of this court, hence, those proceedings have attained its finalities.

6. To substantiate the charge, prosecution examined complainant Muhammad Essa at Exh.13, who produced FIR vide Exh.13-A. PW-2 Amb examined at Exh.14. PW-3 Jumoon examined at Exh.15. PW-4 Mohammad Bux examined at Exh.16, who produced memo of dead body and injury vide Exh.6-A, Danishnama vide Exh.6-B, memo of place of vardat vide Exh.16-C, memo of cloth of the deceased vide Exh.16-D, memo of arrest of the accused Mashooque at Exh.16-E, memo of arrest of the accused Mohammad Soomar vide Exh.16-F. PW-5 Dr. Abdul Razzak examined at Exh.17, who produced letter vide Exh.17-A, Post mortem report vide Exh.17-B, PW-6 Rasool Bux examined vide Exh.18, who produced sketch of the vardat vide Exh.18-A. PW-7 Gul Hassan examined at Exh.19. PW Mashir Sulleman Mallah was called by learned ADPP for the State vide his statement Exh.20. PW mashir Hamzo was called by learned ADPP for the State vide his application under section 540 Cr.P.C vide Exh.21 and statement Exh.21-A. PW-8 Abdul Qadir (Sub-Inspector) examined at Exh.22, who produced the memo of arrest and recovery of accused Allah

Jurio vide Exh.22-A, PW-9 Sulleman was examined vide Exh.23. PW-10 Rasool Bux examined vide Exh.24, who produced letter of post mortem of the deceased Moula Bux alias Ablo vide Exh.24-A, receipt vide Exh.24-B, PW (DSP Head Quarter) Shah Nawaz examined vide Exh.25. PW SiP Saddik Khawaja (Sub-Inspector) vide Exh.26, who produced Chemical report vide Exh.26-A. Learned ADPP filed application under section 540 Cr.P.C to call SIP Saddique Ali to produce Ballistic Expert report vide Exh.27, subsequently, the same was not pressed. Learned ADPP produced the Ballistic Expert report and closed the side of the prosecution vide his statement Exh.28.

7. The statements of accused Allah Jurio alias Jurio, Mashooque Ali (present appellant) and Muhammad Soomar as provided under section 342, Cr.P.C. were recorded in which they have not only denied the prosecution allegations but also pleaded false implication, they not examined themselves on oath however, accused Allah Jurio produced his defence witnesses each namely Satram, being defence witness No.1 Budhoo Mal DW-2 in his defence.

8. Learned counsel for the appellant has contended that the prosecution has failed to prove its case beyond a reasonable doubt; that the learned trial court did not appreciate the major contradictions in the prosecution's case. The co-accused, namely Allah Jurio alias Jurio was acquitted by the trial court on the same set of evidence that had been believed qua role of the accused. The complainant preferred criminal acquittal appeal as well as revision for the enhancement of sentence, but the same were dismissed in non-prosecution vide order dated 20.09.2022. He further contented that the accused and co-accused with similar roles in the evidence were found doubtful by the learned trial court to the extent of acquitting co-accused Allah Jurio and Muhammad Soomar whereas the appellant was convicted by the trial court, which is not sustainable at law. The defence counsel submitted that the complainant Muhammad

Essa is not an eyewitness of the incident as per the contents of the FIR, however, there are two eyewitnesses of the incident, namely Amb being P.W-2 and Jumoon P.W-3 both witnesses directly implicated the appellant/accused and co-accused, Allah Jurio alias Jurio in their evidence, but the co-accused was acquitted, whereas the present appellant / accused was awarded imprisonment for life. Lastly, the defence counsel submitted that the recovery of the pistol was effected from co-accused Allah Jurio alias Jurio and the ballistic report of the pistol was positive, whereas nothing was recovered from the present appellant; besides, there are many lacunas and contradictions in the evidence of PWs; that the impugned judgement is against the law, facts, and principles of natural justice and equity; and that judgement is liable to be set-aside. The defence counsel further pointed out that since the last many dates of hearing, neither the complainant nor his counsel have been present, though various notices have been sent to them. Even the last notice was served to the complainant through the concerned SHO. But neither the complainant nor his counsel turned up to proceed with the case. Lastly, he prayed for the acquittal of the appellant

9. The learned DPG appearing on behalf of the state has supported the impugned judgement and contended that the prosecution has proved its case against the appellant beyond any reasonable shadow of doubt by producing oral as well as documentary evidence; that the learned trial court has rightly convicted the appellant and he does not deserve any leniency; and that there appears to be no illegality or irregularity in the impugned judgement, which is well reasoned and does not require any interference. However, he admits that on the basis of the same set of evidence, the co-accused, namely Allah Jurio alias Jurio, was acquitted by the trial court.

10. I have heard learned counsel for the parties and have gone through the material available on record with their able assistance.

11. Reassessment of the entire prosecution case manifestly demonstrates that **on the same set of evidence, the learned trial court has already acquitted the main accused Allah Jurio and convicted and sentenced the appellant, Mashooque Ali, vide judgement dated 08.05. 2019. Once prosecution witnesses were disbelieved concerning a co-accused then they could not be relied upon with regard to the other accused unless they were corroborated by corroboratory evidence which came from an independent source and was also unimpeachable in nature.** In the case of ***PERVAIZ KHAN and another V/S The STATE (2022 S C M R 393)*** the Supreme Court of Pakistan acquitted two accused on the ground that the prosecution case was disbelieved qua three accused who have been acquitted by the trial court and their acquittal remained unchallenged, hence benefit of doubt was extended to the rest of accused. In another case, ***Abdul Ghafoor V. the State (2022 SCMR 1527), Sajjad Hussain V. The State (2022 SCMR 1540)*** in similar circumstances, the Supreme Court of Pakistan extended the benefit of doubt to the appellant(s).

12 . In the instant case the learned counsel for the appellant submits that the complainant being aggrieved from the impugned judgment filed Criminal Acquittal Appeal bearing No.D-34 of 2019 against accused Allah Jurio and Muhammad Soomar, so also filed Criminal Revision application bearing No. 15 of 2019, for enhancement of the sentence against the appellant Mashooque Ali, but both the appeal/application were dismissed in non-prosecution vide order dated 20-09-2022 by the divisional bench of this court. Per learned counsel for the appellant that about eight months have passed but the complainant has not filed the restoration application before the D.B of this court, hence, those proceedings have attained its finalities. It is appropriate to reproduce the relevant Para of the judgment passed by Supreme Court cited supra (***2022 S C M R 393***);-

4. All the above mentioned circumstances create serious doubt upon the prosecution case and especially when the eye-witnesses have been disbelieved qua three co-accused who have been acquitted by the trial court although actively participated in the occurrence and their acquittal remained unchallenged before this court. Consequently, while extending the benefit of doubt to the appellants Pervaiz Khan and Muhammad Aslam Khan, these appeals are ALLOWED. The conviction and sentence passed against these two appellants by the Courts below is set aside and they are acquitted of the charge in the instant case. They shall be released from the jail forthwith if not required to be detained in any other case.

13. The prosecution witnesses unanimously blamed Allah Jurio acquitted co-accused to have targeted Moula Bux alias Ablo deceased with a straight fire shot landing on the right temple. Whereas role assigned against appellant was that he has also made straight fire upon deceased Mola Bux alias ablo which hit him on his left side lumber region. The learned trial court while acquitting the co-accused Allah Jurio has given reasons that *“if, evidence of P.W Amb is read in the line of P.W No 5 Dr Abdul Razaque then this possibility cannot be ruled out that the alleged incident was taken place prior to 4:30 PM as doctor received dead body at 5:30 and he has opined that the probable time between death and post mortem was about two hours. It means the incident was taken place prior to 4 pm.”* Further while acquitting co-accused Muhammad Soomar the learned trial court observed that accused Soomar is an old man and there is deliberation and consultation in the FIR and he was empty handed so this possibility cannot be ruled out that his name was given after deliberations and consultations.

14. The claim of PWs Amb (Pw.2, Ex.14) and Jumoon/Pw-3 was that they were the eye witness of the incident. The PW Amb deposed that it was 4.30 PM they saw all accused person came at place of incident, whereas PW Jumoon claims that it was 4.00 PM. Even both the witnesses were not sure that whether the incident has taken place at

4.00 PM or 4.30 PM. The complainant deposed that he lodged FIR on 16.05.2006 at about 6.00 PM. whereas the inquest report disclosed that the time of incident was 1650hrs. The PW-05 Dr Abdul Razzaq deposed that he started post mortem at 3-00 PM and finished the same at 9.00 PM. But from perusal of post mortem report reveals that he has started post mortem at about 7.00 PM and finished the same at 9.00 PM. Even doctor was not sure that whether he has started post mortem on 3.00 PM or 7.00 PM. The things are not ended here, the claim of the complainant was that he along with eye witnesses brought the dead body of the deceased in civil Hospital Badin. He left Jumoon and Amb near the dead body and came back to PS Kadhan where he lodged FIR. Dr. Abdul Razzaq PW-05 deposed that the dead body of the deceased was brought by H/C Rasool Bux through letter No. Cr; 13/06 and was identified by one Mohammad Bux and Mohammad Essa the complainant.

15. The conduct of both the eye-witnesses are not appealing to the prudent mind. From the perusal of their evidence it appears that when the deceased received fire arm injuries, they did not tried to shift the deceased/injured to hospital to save his life but they try to locate the complainant Muhammad Essa and informed him about the incident. After receiving information from Amb, the complaint went to place of incident on the motor cycle along with him/Amb. Thereafter the deceased Moula Bux was shifted to civil hospital Badin for treatment but he succumbed to his injuries. The learned trial court rightly pointed out that the possibility cannot be ruled out that the alleged incident was taken place prior to 4:30 PM. Truth is the foundation of justice and justice is the core and bedrock of a civilized society, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. A Court of law cannot grant a license to a witness to tell lies or to mix truth with falsehood.

16. The evidence of the complainant and his eye-witnesses clearly demonstrate that neither he nor other cited witnesses had witness the incident, hence their presence at the place of 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;-

‘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.’

17. The prosecution examined SHO Abdul Qadir/PW-08 of police Station Kadhan, who has arrested co-accused/acquitted accused Allah Jurio along with TT pistol. The prosecution lastly examined SIP Saddik Khawaja SIO of the case. He has perpaired Memo of dead body Exh. 16.A, Danishnama Exh. 16.B. He has also visited the place of incident and secured blood staind earth, two crime empty shells of TT pistol from the place of incident and prepared such memo and same was produced as Exh 16.C. On 21.05.2006 he has arrested appellant Mashooque, but nothing was recovered from his possession. He produced memo of arrest as Exh. 16.E. He sent the property including empty shells along with TT pistol recovered from accused Allah Jurio and produced report as eExh 26-A. The TT pistol was sent to the office of Forensic Science Laboratory and found that two 30 bore crime empties marked as **“C1 & C2” were fired from the above mentioned 30 bore pistol in question**, in view of the major points i.e. striker pin, marks, breech face marks and chamber marks etc. are similar. It is important to note here that the TT pistol was recovered from co-accused/acquitted accused Allah Jurio.

18. The place of incident was thickly populated area. As per prosecution story the incident took place in broad light of the day. According to the Tapedar Rasool Bux PW-06 report, there is a hotel of Rafi Marho, shops of Karyana shop of Juman Waharo and Kishwar Meghwar, but no sincere efforts have been made by the SHO or SIO to record the statements of independent person or collect the evidence to believe that the incident had taken place in a manner, which was disclosed by the eye-witnesses Amb and Jumoon.

19. The motive of the incident as shown in the FIR is that there is an allegation against the deceased Moula Bux that he had stolen the buffalo of Muhammad Soomar about five to six months before the incident, but there is neither an FIR nor a criminal proceeding between the parties. However, the matter was referred to Haji Sheral Jamali for Fiasla but he was neither examined by the investigation officer during the course of the investigation nor during the trial, hence the motive of the present case, which is highly doubtful.

20. Now spinning to the statements of the accused recorded under section 342 Cr.PC by the learned trial court. The appellant claimed that he is innocent has falsely implicated in present case. However the appellant Allah Jurio examined two defence witnesses (DW) in support of his contentions. DW-Satram deposed that he is shop keeper, it was about 2:30 PM or 3.00 PM he was present at his shop, he heard two noise of fire and then he came out from the shop and saw one person was lying on the road. The other persons also gathered there and some person telling that one person who is going towards southern side but I did not see him. Likewise the DW-2 Budhoo Mal almost disclosed the same facts, However he states that he has cloth shops. All the DWs have not implicated the present appellant in the case.

21. The prosecution is under responsibility to prove its case against the accused person at the standard of proof

obligatory in criminal cases, namely, beyond reasonable doubt, and cannot be said to have cleared this obligation by producing evidence that merely meets the preponderance of prospect standard applied in civil cases. If the prosecution fails to discharge, the benefit of that doubt is to be given to the accused person as of right, not as of concession. The rule of giving benefit of doubt to the accused person is basically a rule of thoughtfulness and farsightedness and is deep-seated in jurisprudence for safe administration of criminal justice. The Supreme Court of Pakistan has firmly established that a single circumstance that casts doubt on the prosecution's narrative is sufficient to acquit the accused. **In** the case of Tariq Pervez v. The State, 1995 SCMR 1345, for giving the benefit of doubt it is unnecessary that there should be numerous doubt-raising from circumstances. If the single circumstance that generate a reasonable doubt about the guilt of a accused then the accused is entitled to the benefit of doubt, not as a matter of grace and concession but as a matter of right. In this context the reliance can be placed in the case of "Muhammad Adnan and another v. The State and others" (2021 SCMR 16), "Ghulam Abbas and another v. The State and another" (2021 SCMR 23), and "Zulfiqar Ali v. The State" (2021 SCMR 1373).

22. In common law, there is very famous saying , "Ten guilty persons should be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is founded on the tall authority of sayings of the Holy Prophet of Islam (peace be upon him): ***“Avert punishments [hudood] when there are doubts” 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”***. Reliance is placed on cases reported as ***“Muhammad Luqman v. State”*** PLD 1970 SC 10, ***MOHAMMAD MANSHA V. THE STATE (2018 SCMR 772)***, ***SAJJAD HUSSAIN v. The STATE (2022 SCMR 1540)***, ***ABDUL GHAFUOR v. The***

STATE (2018 SCMR 772), SAJJAD HUSSAIN v. The STATE (2022 SCMR 1540), ABDUL GHAFOR v. The STATE (2022 SCMR 1527) and PERVAIZ KHAN v. The STATE (2022 SCMR 393). Musnad Abi Huthayfa, Hadith No.4. Kitab ul Hadood, p. 32, relied upon by the Federal Shariat Court in *Kazim Hussain v. State*, 2008 P.Cr.L.J 971, *Mishkatul Masabili (English Translation by Fazlul Karim) Vol. II, p. 544*, relied upon by the Federal Shariat Court in *State v. Tariq Mahmood*, 1987 PCrLJ 2173; *Sunnan Tarimzi, Hadith No. 1344, Kitab ul Hadood. Jail Petition No.147 of 2016 30 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.**"

23. It is well-settled principles of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of the prosecution story is adduced by the prosecution. I am of the view that in the present case, the prosecution story is surrounded under the dense smokes of doubt and the learned trial Court has not assessed the evidence in its true perspective and thus arrived at an inaccurate decision by holding the appellant guilty of the offence. Resultantly, instant appeal is allowed. The conviction and sentence awarded to the appellant Mashooque Ali is hereby set aside and he is **acquitted** of the charge by extending him the benefit of the doubt. The appellant is confined in Jail. He shall be released forthwith if he is no more required in any other custody case.

JUDGE