IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Jail Appeal No. S-20 of 2019

Pauper Appellant Allahdito Chandio	:	through Mr. Rafique Ahmed K. Abro Advocate
Complainant Muhammad Aslam	:	Absent
State	:	through Mr. Ali Anwar Kandhro, Addl. Prosecutor General, Sindh
Dates of hearing	:	22.02.2024
Date of Judgment	:	14.03.2024

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By means of instant Criminal Jail Appeal, the appellant has assailed the Judgment dated 05.03.2019 passed by learned Additional Sessions Judge-III, Dadu vide Sessions Case No. 308 of 2007, being outcome of FIR No. 32 of 2007, registered at P.S. Fareedabad, for offence under Sections 302, 324, 147, 148, 149, & 504, PPC, whereby the appellant was convicted under section 302(b), PPC and sentenced to undergo imprisonment for life as Tazir and to pay Rs. 2,00,000/- (Rupees Two Lacs) as compensation to the legal heirs of deceased in terms of Section 544-A Cr.P.C and in case of default in payment thereof, the appellant was ordered to suffer SI for 6 months more. However, benefit under Section 382-B, Cr.P.C. was extended to him.

2. Brief facts of the prosecution case are that on 29.6.2007, complainant Muhammad Aslam Chandio lodged FIR at PS Fareedabad, stating therein that he had murderous dispute with Allahdito Chandio. On 28.6.2007 he along with his father Habibullah, brother Altaf Hussain and cousin Rafique Ahmed, were returning from Village Dato Khan Chandio to their village and at about

1.00 p.m. when they reached near the land of Mir Chandio, they saw accused Allahdito, Ronaq, Anwar, Rafique, all armed with guns and accused Zulfiqar, armed with hatchet. It is further alleged that accused Allahdito abused the complainant party and fired from his gun upon complainant party with intention to commit their murder, which hit his father Habibullah, who fell down by raising cries and accused, while raising slogans, went away on their motorcycles. Thereafter, complainant saw that his father had received firearm injuries near the ear through and through and within their sight, he succumbed to the injuries. Consequently, complainant after postmortem examination and funeral of the deceased Habibullah, appeared at concerned police station and registered instant FIR, in above terms.

3. The concerned police after usual investigation submitted challan in the Court having jurisdiction showing accused Anwar in custody and accused Allahdito, Rafique and Zulfiqar as absconders, while accused Ronaq was shown to have been released under Section 497, Cr.P.C. Later on, let-off accused Ronaq was joined in the case in pursuance of order passed by learned 3rd Civil Judge & JM, Mehar. Thereafter, the Judicial Magistrate sent up the case to the Court of Sessions Judge, Dadu and finally the same was received by the trial Court for disposal according to law. Thereafter, accused Rafique and Ronaq were granted bail before arrest and accordingly, they joined the trial while accused Allahdito and Zulfiqar were still not arrested and they were declared proclaimed offenders after initiating proceedings under Sections 87 & 88, Cr.P.C. Thereafter, accused/ appellant Allahdito was arrested and sent up for trial through subsequent challan. After supplying the relevant documents to the accused vide receipts Exs.3 & 4, a formal charge was framed against them at Ex.5, to which they pleaded 'not guilty' and claimed for trial vide their respective pleas recorded at Exs.5-A to 5-D.

4. In order to prove its case, prosecution examined PW-1, M/O Dr.Imamudin at Ex.6, who produced attested photocopy of postmortem report, police letter and receipt of dead body as Exs.6/A to 6/C. PW-2, ASI Mazhar Ali was examined at Ex.7, who produced attested photocopies of memo of dead body, memo of Danistnama and FIR as Ex.7-A to 7-C respectively, while PW-3, complainant Muhammad Aslam Chandio, was examined at Ex.8. PW-4, Altaf Hussain, was examined at Ex.9, whereas PW-5, mashir Nawab Khan, was examined at Ex.10, who produced attested

photocopy of memo of arrest of accused Anwar at EX.10-A. PW-6, I/O ASI Ghulam Mustafa, was examined at Ex.11, who produced attested photocopy of memo of place of incident as Ex.11-A and PW-7 Muhammad Hashim was examined at Ex.13, who produced attested photocopy of receipt of last-worn clothes of deceased as Ex.13-A. Thereafter, learned DDPP, appearing for the State, produced chemical report along with statement at Ex.14 and then the prosecution closed its side vide statement Ex.15.

5. The statements under Section 342 Cr.P.C. of accused Rafique Ahmed, Ronaq Ali, Allahdito and Anwar were recorded at Exs.16 to 19, wherein they denied the allegations leveled by the prosecution and stated that complainant and PWs are interested, inimical and hostile and being related *inter se*, have falsely deposed against them. They further stated that they are innocent and prayed for justice. However, neither they examined themselves on oath under Section 340(2), Cr.P.C. to disprove the charge, nor led any evidence in their defense.

6. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing the counsel for the parties, trial Court vide judgment dated 31.12.2012 convicted accused Allahdito, while co-accused Ronaq, Rafique and Anwar were acquitted of the charge, whereas, the case against absconding accused Zulfqiar was kept on dormant file.

7. Record further shows that convicted accused Allahdito filed Criminal Appeal No.S-21/2013 before this Court (Circuit Court Larkana) which in terms of Judgment dated 05.11.2018 was allowed by remanding the case to the trial Court, with directions to examine PW Tapedar, provide fair opportunity of hearing to accused / appellant to cross-examine said witness and record statement of accused under Section 342, Cr.P.C. afresh and, thereafter, pass fresh judgment by affording opportunity of hearing to both parties.

8. Accordingly, after remand of the case, the trial Court examined Tapedar Abu Bakar at Ex.22, who produced sketch of wardat as Ex.22-A. Thereafter, learned DDPP for the State closed the prosecution side vide his statement Ex.23. Thereafter, statement of accused under Section 342 Cr.P.C. was recorded at Ex.24, wherein he denied the allegations leveled against him by the prosecution and stated that some near relatives of the complainant were involved in the murder case of his relative, hence due to that grudge the

complainant had falsely involved him in this case. He further stated that he was not present at the spot at the time of incident, therefore, he cannot say about any injury or postmortem report, which is also false, and the doctor as well as I/O have given false evidence. He further stated that he does not know about the cloths of the deceased, blood-stained earth and that report of chemical examiner was also managed, nothing was recovered from him, but police had foisted the empty cartridges upon him at the instance of complainant. He lastly stated that he is innocent and prayed for justice. However, he neither examined himself on oath nor led any evidence in his defence.

9. The trial Court after hearing the arguments advanced by the counsel for the parties, convicted accused / appellant Allah Ditto and sentenced him to suffer imprisonment for life as Tazir U/S 302(b) PPC and also to pay fine / compensation of Rs.2,00,000/ (Rupees two lacs) to be paid to the LRs of the deceased, as required by section 544-A, Cr. P.C. and in case of default of payment of fine / compensation, he was ordered to suffer S.I. for six months more, however, benefit of section 382(B) Cr.P.C. was extended to the accused / appellant. However, in order to justify in not awarding death penalty to the accused / appellant, the trial Court observed as under:

> ***"It is worth to mention here that the complainant in his FIR has clearly mentioned that the motive behind the occurrence is previous enmity, as such when the previous enmity is by itself admitted by the prosecution, in view of the same, it is settled principle of law that where any previous dispute exists between the parties would create mitigating circumstance in the case. Accordingly, in presence of mitigating circumstance capital punishment can- not be awarded hence under the attending circumstances awarding of sentence of death as Qisas is not made out, therefore, case of accused Allahdito comes within the purview of section 302(b) PPC,..."***

10. The accused / appellant Allah Ditto has assailed his conviction and sentence through instant appeal.

11. I have heard the arguments advanced by learned counsel for the pauper appellant and learned Additional Prosecutor General, appearing for the State, and have perused the material made available before me on the record.

12. Learned counsel for the appellant argued that alleged incident occurred on 28.6.2007, at 1300 hours; however, the F.I.R. was lodged on 29.6.2007 at 0200 hours (midnight) and no explanation has been furnished by the

prosecution for such delay. He further argued that appellant was allegedly shown to be armed with gun at the time of alleged offence; however, nothing has been recovered from him to corroborate the allegation. As per role attributed to the appellant, learned counsel drew attention of the Court towards evidence of Medico Legal Officer, Dr. Imamuddin, who deposed that the injury sustained by the deceased was through and through, whereas the appellant was shown to have had gun, which allegedly was fired from a distance of about ten feet and the pellet or cartridge cannot be so powerful to go through and through hence, according to him, the ocular version has not been corroborated by the medical evidence, which raises a presumption that either offence was unseen or the same had not taken place in a manner as reported. He further contended that at the time of recording evidence, some of the accused including present appellant had no counsel, even then the trial Court recorded examination-in-chief of the witnesses, though the alleged offence carries capital punishment and this illegality is sufficient to discard the evidence of prosecution witnesses. Learned counsel added that, investigation proceedings in instant case were conducted before the registration of the F.I.R. He further contended that complainant party had enmity and in view of the background of such enmity, the appellant cannot be convicted for the alleged offence, for which prosecution has failed to adduce sufficient evidence. Learned counsel, therefore, prayed that by allowing instant appeal, the appellant may be acquitted from the charge by extending him benefit of doubt. In support of his contentions, he placed reliance upon an unreported judgment dated 09.2.2021 passed by this Court in Crl. Appeal No.D-39 of 2017 and the case of ***Qamar-uz-Zaman alias Kala*** v. ***The State***, reported in 2011 SCMR 856 and ***Irshad Ahmad and others*** v. ***The State***, reported in PLD 1996 Supreme Court 138.

13. On the other hand, learned Addl. P.G. opposed the appeal on the grounds that all the prosecution witnesses have specifically implicated the appellant and their evidence is consistent with the contents of the F.I.R. As regards medical discrepancy pointed out by learned counsel for the appellant, he submitted that the same cannot vitiate the evidence of prosecution witnesses. As far as contradictions, as pointed out by the appellant's counsel, allegedly made by Medico legal officer, are concerned, he contended that per settled law, the ocular version is to be given preference over medical evidence,

as the doctor was not an eye witnesses, hence, plea taken by the appellant is without force, therefore, the appeal being meritless is liable to be dismissed.

14. Before touching the merits of the case, it may be observed that Superior Courts have time and again held that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In this context, reference may be made to the case reported as ***Shamoon alias Shamma*** Vs. ***The State*** (1995 SCMR 1377), wherein it was held by Honourable Supreme Court as under:

> ***"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal."***

15. In the case of ***Pir Mazharul-Haq*** v. The State {PLD 2005 SC 63}, The Hon'ble Supreme Court has held as under:

> ***"In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution."***

16. In the case reported as ***Rehmat v. State*** {PLD 1977 SC 515} it was held as under:-

> ***"Needless to emphasize that in spite of section 106 of the Evidence Act in a criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the liability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve the prosecution of the burden to bring the guilt home to the accused."***

17. In the case of ***Wazir Mohammad*** Vs. ***The State*** reported in 1992 SCMR 1134, it was held by Honourable Supreme Court as under:

> ***"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution."***

18. Now, in the light of above guidelines, I proceed to examine instant case. From perusal of contents of the FIR it seems that the alleged incident had taken place on 28.06.2007, at 1300 hours i.e. 01:00 p.m., whereas the FIR was lodged on 29.06.2007, at 0200 hours i.e. 02:00 a.m. (night). From this, it seems that there is a delay of 13 hours in lodging the FIR. According to complainant, his father Habibullah, after receiving injuries at the hands of accused/ appellant Allah Dito, succumbed to his injuries immediately i.e. at 01:00 p.m. (daytime). It is also an admitted position that PW Rafiq Ahmed and Altaf Hussain were also present along with the complainant. It is also an admitted position that PW Altaf Hussain was the brother of the complainant and son of the deceased whereas PW Rafiq Ahmed was the cousin of the complainant. In this view of the matter, it was not necessary that all the persons should have taken the dead body to home and any one of the above said three persons could have proceeded to the Police Station for lodging of the FIR, more particularly when all of them claim to be the eyewitnesses of the incident, therefore under the relevant law any one of the above said three persons could have lodged the FIR.

19. Needless to emphasize that due to inordinate and unexplained delay in lodging the FIR, the possibility of consultation and deliberation for false implication of the accused cannot be ruled out.

20. On the point of delay in lodging FIR, the Hon'ble Supreme Court in the case of *Ayub Masih v. The State* **(PLD 2002 SC 1048)** held as under:-

> ***"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."***

21. In the case of *Sabir Hussain V. The State* **(2022 YLR 173)**, it was held as under:

> ***"9. The complainant has knowledge about missing of the deceased on 13.07.2019,but despite that, the complainant did not lodge the report,***

> ***and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the reportof missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at10:30 a.m., with a delay of four hours from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant create reasonable doubt in the prosecution case. Reliance in this behalf is placed in the case of Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127).”***

22. Apart from above, there are certain admissions made by the prosecution witnesses, which also damaged the case of the prosecution and go in favour of the accused / appellant.

23. PW Dr. Imamuddin, Medical Officer, who conducted the postmortem examination of the deceased, in his cross-examination admitted, “***The injury to the deceased is bullet injury”,*** whereas the complainant and other alleged eye-witnesses claimed that the accused/ appellant was armed with shotgun, in the circumstances when the accused was armed with a shotgun, then how the deceased sustained **bullet injury** and how said injury could be through and through, as opined by the Medical Officer, because the cartridge / pellets fired from the gun could not be so powerful so as to cause through and through injury. From this, it is crystal clear that there is material contradiction between the ocular version and medical evidence, which creates doubt in the prosecution case. In this connection, learned counsel for the appellant has placed reliance upon (i) unreported Judgments passed in the case of ***Bajhi and others*** vs. ***The State*** (Crl. Appeal No. S-44 of 2020) and ***Ghulam Fareed and others*** vs. ***The State*** (Crl. Appeal No. S-45 of 2020), (ii) ***Muhammad Ali*** Vs. ***The State*** reported in **2015 SCMR 137** and (iii) ***Nadeem alias Kala*** Vs. ***The State*** reported in **2018 SCMR 153**. The *ratio decidendi* of all the above cited cases is that where contradiction between the ocular testimony and the medical evidence occurs, benefit thereof should be given to the accused.

24. Besides, PW Ghulam Mustafa, Investigating Officer, in his examination-in-chief deposed, “***I visited the place of incident on the pointation of complainant in presence of mashirs namely Muhammad Hashim and Muhammad Haneef at about 8: am time, but not secured anything, and prepared such mashirnama….”.*** This witness was declared hostile and was cross-examined by learned DDPP for the State, so also by the defence counsel. Even in his cross-examination he admitted, ***“The blood-***

stained earth was secured in a Tin, which was produced by the complainant", meaning thereby that he did not secure said blood-stained earth from the spot himself, but it was the complainant who produced the same before him, thus creating serious doubt as to whether said blood-stained earth lying in the tin was, in fact, the blood-stained earth of the place of incident or not. He also admitted, ***"Mashirs were produced by the complainant."*** He also admitted in his cross-examination, ***"I kept entry of my departure for place of incident in the Roznamcha and so also kept entry of arrival. It is correct to suggest that I have not produced copy of both the entries before this court."*** Needless to emphasize that now it is well settled that non-production of such entry creates doubt in respect of the action, for which such entry was allegedly recorded, itself comes under the cloud.

25. Another discrepancy in the prosecution case is that Medical Officer deposed, ***"I also handed over the last worn clothes of deceased to same ASI Mazhar Ali Butt…."*** whereas, mashir, Muhammad Hashim, made a contradictory statement by deposing, ***"on 28.06.2007, the complainant also produced last worn clothes of deceased to the ASI Mazhar of P.S. Fareedabad in my presence and co-mashir was Muhammad Ali."*** Said witness in his cross-examination also admitted, ***"The memo of last worn clothes was prepared at about 2:00 pm. The memo of last worn clothes was prepared by police at P.S. Again says in house."*** From this, there appears to be material contradiction in the evidence of the prosecution witnesses as, on the one hand, Medical Officer deposed that he had handed over the last worn clothes to ASI Mazhar Ali whereas, according to Mashir Muhammad Hashim, said clothes were handed over to ASI Mazhar Ali by the complainant. Again, there is contradiction on the point of time of preparation of mashirnama / memo of last worn clothes, inasmuch as; according to the mashirnama of last worn cloths, the same was prepared after the postmortem examination and as per evidence of Medical Officer, the postmortem examination ended at 6:00 pm, it means that the time of preparation of said Memo would certainly be after 6:00 pm on 28.06.2007, whereas, according to mashir Muhammad Hashim, the Memo of last worn clothes was prepared at 2:00 p.m. i.e. even before the conduct of postmortem examination.

26. Yet, there is another *lacuna* in the prosecution case; i.e. as per the evidence adduced by the prosecution, bloodstained earth and last-worn cloths

were secured on the date of incident i.e. 28.06.2007 whereas, the Chemical Report shows that the said articles were received in the Laboratory on 08.10.2007 i.e. after the delay of more than three months, therefore, no sanctity could be attached to the report of Chemical Examiner.

27. Apart from above, Mashir Muhammad Hashim deposed that **empty cartridges** were secured from the spot; however, no report of the Ballistic Expert has been produced by the prosecution before the trial Court with regard to expert opinion in respect of said empty cartridges. This also creates doubt in the prosecution case.

28. Another noteworthy point in the case is that as per F.I.R. as well as evidence of complainant, Mohammad Aslam, when the complainant party reached near the land of Mir Chandio, they saw four accused persons, namely, appellant Allahdito as well as three acquitted accused, namely, Ronaq, Anwar and Rafique, so also absconding accused Zulfiqar, out of whom first four accused were armed with guns, whereas accused Zulfiqar had hatchet in his hand. However, the trial Court has convicted only accused Allah Ditto, whereas co-accused Ronaq, Rafique and Anwar have been acquitted, while the case of absconding accused was ordered to be kept on dormant file till his arrest. The reason for acquitting the above-said three accused given by the trial Court was that on the basis of mere presence of the acquitted accused at the place of incident, they cannot be convicted.

29. However, upon minute scrutiny of the evidence of complainant Mohammad Aslam, who claims to have seen the incident, it appears that in his cross-examination he has admitted, ***"Accused Allahditto fired <u>one</u> fire from his gun."*** He also deposed in his examination-in-chief, ***"We concealed ourselves in the bank of river/wah, and fell down and hence <u>fires</u> was missed."*** Now, if admittedly the appellant Allah Ditto had fired only **one** shot which hit deceased Habibullah, then which shots of gun missed, as alleged, because complainant Mohammad Aslam, P.W. Altaf and Rafique claim to have saved themselves from such shots by concealing in the bank of river / wah. From this, an inference could be drawn that other shots might have been fired by other accused persons. Likewise, the complainant in his examination-in-chief deposed, ***"...then accused persons <u>by raising slogans</u> went away towards southern side of the road and ran on the motorcycles."*** From this, it appears

that there is not mere presence of the acquitted accused at the place of incident, as observed in the judgment of the trial Court, but they, in fact, were accompanying the convicted accused Allah Ditto duly armed with deadly weapons. It also cannot be said that their presence at the spot was by chance, because it has come in the evidence that all the accused persons had come at the place of incident on motorcycles and after the alleged incident they ran away by **raising slogans**. This shows that arrival of all the accused at the place of incident was preplanned and particularly, raising of slogans by all the accused persons shows their common object and intention.

30. Having said so much, when the appellant has been convicted whereas other three accused persons, who were also armed with guns, like the present appellant, have been acquitted on the basis of same set of evidence, then certainly *rule of consistency* comes into play and, therefore, the present appellant should have also been meted out same treatment like acquitted accused persons.

31. On the point of '*rule of consistency*', it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of ***Muhammad Asif*** v. ***The State*** reported in 2017 SCMR 486 wherein it was held as under:

> ***"It is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case."***

32. In another case reported as ***Umar Farooque*** v. ***State*** (2006 SCMR 1605) Honourable Supreme Court held as under:

> ***"On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted."***

33. Yet, in another case reported as ***Muhammad Akram*** v. ***The State*** (2012 SCMR 440) the Apex Court, while holding that same set of evidence, which was disbelieved qua the involvement of co-accused, could not be relied upon to convict the accused on a capital charge, had acquitted the accused. In view of this legal position, appellant should also have been extended same benefit as given to the aforesaid three acquitted accused.

34. It also appears that in the F.I.R. as well as in the evidence of the complainant and that of P.W. Altaf Hussain, both of whom claim to be the eye-witnesses of the alleged incident, it has been stated that at the time of alleged incident along with the complainant and P.W Altaf Hussain, one Rafique Ahmed, cousin of the complainant, was also present and he also witnessed the alleged incident. However, said Rafique Ahmed has not been examined by the prosecution although his evidence was very material, he being an eye-witness of the incident, as claimed by the prosecution. From perusal of the record it seems that no explanation has been furnished by the prosecution for not examining this material witness. In this view of the matter, in the light of Article 129(g) of the Qanoon-e-Shahadat Order, 1984, strong inference / presumption could be gathered that had the said witness Rafique been examined, he would not have supported the case of prosecution.

35. In this connection, reference may be made to a decision of Honourable Supreme Court given in the case of ***Abdul Ghani*** Vs. ***The State*** reported in **2022 SCMR 2121**, wherein a Full Bench of Honourable Supreme Court held as under:

> ***"Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned State Counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case."***

36. There also seems to be violation of the provision of Section 103, Cr.P.C. From perusal of the evidence of PW/Complainant Muhammad Aslam, it seems that he has admitted, "***On our cries villagers came running there. It is correct to suggest that I had not cited any person of nearby village as witness in this case…….It is correct to suggest that on noise of firing the persons of nearby village also came running at the place of incident".*** Likewise, PW Altaf Hussain also admitted, "***The other persons came at place of incident on our cries……About 50/60 persons were gathered at place of incident who were of nearby houses and labourers who were working in the land."***.

37. Needless to emphasize that in view of provisions of section 103, Cr. P.C the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which presence of private persons is admitted, so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception. Only cursory efforts are not enough merely in order to fulfill casual formality, rather serious and genuine attempts should be made to associate private mashirs of the locality. In this connection, reference may be made to cases reported as ***State*** Vs. ***Bashir and others*** (PLD 1997 S.C. 408), ***Sarmad Ali*** Vs. ***The State***(2019 MLD 670), ***Yameen Kumhar*** Vs. ***The State*** (PLD 1990 Karachi 275).

38. Since nothing incriminating was secured from the appellant nor he had produced before the police at the time of his arrest showing his nexus with the commission of alleged offence; besides, injury allegedly sustained by the deceased has been opined by the Medico Legal Officer to have occurred by a bullet and not from the shotgun, the doubt with regard to presence of the alleged eye-witnesses exists which shows either the incident was unseen and was not witnessed by the PWs as claimed or it had not occurred in a manner, as has been reported. Such dilemma was also not thrashed out or discussed by the trial Court under the impugned Judgment; hence, in my humble opinion, prosecution has failed to prove its charge against the appellant beyond any shadow of reasonable doubt.

39. In view of above, it is clear that the case of prosecution is not free from doubts, benefit whereof is to be extended to the accused. Needless to emphasize the well-settled principle of law is that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as ***Tariq Pervaiz vs. The State*** **(1995 SCMR 1345),** the Honourable Supreme Court held as under :-

> ***"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."***

40. It is also note-worthy that the accused / appellant has already served out substantive period of sentence and the unserved portion of sentence is only about one year and five months.

41. For the forgoing reasons, instant Criminal Jail Appeal is hereby allowed. Consequently, impugned Judgment dated 05.03.2019 passed by learned Additional Sessions Judge-III, Dadu in Sessions Case No. 308 of 2007, being outcome of FIR No. 32 of 2007 under Sections 302, 324, 147, 148, 149, & 504 PPC registered at P.S. Fareedabad, is set aside. Resultantly, appellant Allah Ditto is acquitted of the charges by extending him benefit of doubt. Appellant shall be released forthwith, if his custody is not required in any other custody case. However, the order of trial Court in respect of keeping the case against absconding accused Zulfiqar on dormant file, shall remain intact.

JUDGE