ORDER SHEET

IN THE HIGH COURT OF SINDH CIRCUIT COURT AT LARKANA

Cr. Rev. Appln. No. D-05 of 2013

Cr. Jail Appeal No. S-03 of 2013

Date	Order with signature of Judge
	For hearing of main case.

26-02-2020

Mr. Soofan Shah, advocate for the appellant Cr. Jail Appeal No. S-03/2013.

Mr. Riaz Hussain Khoso, advocate for the applicant/complainant in Cr. Rev. Appln. No. D-05 of 2013.

Mr. Ali Anwar Kandhro, Additional Prosecutor General.

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Heard arguments of learned counsel for the respective parties. Judgment is reserved.

Abdul Salam/P.A

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

PRESENT:-
MR. JUSTICE ZAFAR AHMED RAJPUT
MR. JUSTICE SHAMSUDDIN ABBASI.

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Criminal Jail Appeal No. S- 03 of 2013

Appellant:	Ali Hassan son of Muhammad Paryal Lashari, through Mr. Soofan Shah, Advocate.
Complainant:	Liaquat Ali son of Muhammad Paryal Lashari, through Mr. Riaz Hussain Khoso, Advocate.
Respondent:	The State, through Mr. Ali Anwar Kandhro, Addl. P.G.

Criminal Revision No D- 05 of 2013

Applicant/Complainant	Liaquat Ali son of Abdul Kareem through Mr. Riaz Hussain Khoso, Advocate.
Respondent No.1	Ali Hassan son of Muhammad Paryal Lashari through Mr. Soofan Shah, Advocate.
Respondent No.2	The State. through Mr. Ali Anwar Kandhro, Addl. P.G.
Date of hearing	19.02.2020 and 26.02.2020.
Date of Judgment	18.03.2020.

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JUDGMENT

SHAMSUDDIN ABBASI, J. Through captioned appeal, appellant Ali Hassan has challenged the vires of the judgment dated 20.12.2012, handed down by the learned Additional Sessions Judge-III, Dadu, in Sessions Case No.245 of 2006, arising out of FIR No.124 of 2006 registered at Police Station Mehar, District Dadu, for the offences punishable under Sections 302, 504, 506, 337-H{2} and 34, PPC, through which he was convicted under Section 302(b) P.P.C. and sentenced to undergo life imprisonment for committing murder of Abdul Wahab. The appellant was also ordered to pay compensation of Rs.50,000/- (Rupees fifty thousand only) to the heirs of deceased Abdul Wahab under section 544-A, Cr.P.C. and in default thereof he was ordered to suffer simple imprisonment for six months more, however, benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the appellant.

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2. The appellant has preferred the present appeal against his conviction and sentence, referred to above, whereas the applicant/complainant Liaquat Ali has filed Criminal Revision No.05 of 2013 seeking enhancement of sentence from life imprisonment to death, hence we deem it appropriate to decide the same together through this single judgment.

3. FIR in this case has been lodged on 03.06.2006 at 3.30 am whereas the incident is shown to have taken place on the same day at 1.00 am. Complainant Liaquat Ali son of Abdul Kareem has stated that on the fateful day he, his brothers Abdul Wahab, Abdul Razzaq and cousin Shah Muhammad went to sleep in courtyard of their Otaq on separate cots where electric bulbs were glowing in the courtyard and outside of Otaq. It was about 1.00 am when Abdul Wahab was sleeping while they were awakening. They saw accused Ali Hassan armed with gun, Muhib armed with gun and Ishaq armed with hatched in the courtyard of Otaq and within their sight accused Ali Hassan fired from his gun straightly on Abdul Wahab, who sustained injuries and blood started oozing. The complainant party tried to stand up but accused persons raised Hakal not to come near them by firing in the air and then decamped away from the scene. After their departure, the complainant saw his brother dead. On hearing fire shots and their cries, complainant's brother Akbar, paternal cousin {Marot} Ghulam Nabi and other villagers arrived there to whom he narrated the story and then appeared at Police Station Mehar, District Dadu for registration of FIR leaving the witnesses at the scene of offence. On his complaint, police registered a case under Section 302, 506, 504, 337-H{2} and 34, PPC for committing murder of his brother Abdul Wahab due to personal grudge and previous enmity as in the past accused Ali Hasan misbehaved with deceased Abdul Wahab and others to which they slapped Ali Hassan and his father Muhammad Paryal and based on this the accused party become annoyed and used to say that they will take revenge of it and finally they succeeded in committing murder of deceased Abdul Wahab.

4. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the

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Court of competent jurisdiction under the above referred sections, whereby the appellant was sent up to face the trial.

5. A formal charge in respect of offences punishable under Section 302, 504, 505/2, 337-H(2) and 34, PPC was framed at Ex.2, to which the appellant pleaded not guilty and claimed trial.

6. To prove its case, the prosecution has examined as many as ten witnesses namely, complainant Liaquat Ali as PW.1 Ex.4, Dr. Hidayat Ali as PW.2 Ex.7, Ghulam Nabi as PW.3 at Ex.8, Shah Muhammad as PW.4 Ex.9, Abdul Razzaq as PW.5 Ex.10, ASI Muhammad Usman as PW.6 Ex.11, SIP (Retd) Ali Mardan as PW.7 Ex.12, Meer Muhammad as PW.8 Ex.13, Ayaz Ali as PW.9 Ex.14, Ghulam Hyder as PW.10 Ex.15 and then closed its side of evidence vide statement Ex.16.

7. In his statement recorded under section 342, Cr.P.C. at Ex.17, the appellant has controverted the allegations leveled against him by the prosecution and also professed his innocence. The appellant opted not to make a statement on oath under section 340(2), Cr.P.C. and did not produce any witness in his defence.

8. Upon completion of the trial, the learned trial Court found the case against the appellant to have been proved beyond shadow of any reasonable doubt and, thus, convicted and sentenced him as mentioned and detailed above. Hence, the above said appeal and revision before this Court.

9. Learned trial Court in the impugned judgment has discussed the evidence in detail, hence there is no need to repeat the same here so as to avoid duplication and unnecessary repetition.

10. It is contended by the learned counsel for the appellant that the appellant has been roped in this case by the complainant after joining hands with the local police whereas he has no nexus with the occurrence at all. No independent witness has been produced by the prosecution in support of its case and the witnesses who have been examined are related, interested and inimical to the appellant as such no reliance can be given to their testimony. The ocular account has been furnished by related, interested and chance

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witnesses who while appearing before the learned trial Court failed to prove their presence at the scene of offence at relevant time. The medical evidence is meager enough to explain the real cause of death. The alleged recovery is also useless to connect the appellant with the commission of alleged offence. The prosecution has failed to produce any independent witness to prove that the deceased has been done to death by the appellant. The material available on record does not justify the conviction and sentence awarded to the appellant and the same is not sustainable in the eyes of the law. The statements of the prosecution witnesses are full of discrepancies and contradictions made therein are fatal to the case of the prosecution. Admittedly, the appellant has not been apprehended at spot nor any incriminating evidence has been brought on record so as to establish his guilt. The FIR has been lodged with due deliberations and consultations and the motive set-therein has not been proved through cogent and reliable evidence. The appellant while summing up his submissions has emphasized that the impugned judgment is the result of misreading and non-reading of evidence and without application of a judicial mind, hence the conviction and sentence awarded to the appellant, based on such findings, is not sustainable in law and liable to be set-aside and he may be acquitted of the charge.

11. On the other hand, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant, contends that the FIR has been lodged with sufficient promptitude wherein the appellant has duly been nominated. The occurrence has been witnessed by two eye-witnesses who while appearing before the learned trial Court remained consistent on each and every material point. They were subjected to lengthy cross-examination but nothing adverse to the prosecution story has been extracted which can provide any help to the appellant. Mere relationship is not sufficient to discard the evidence of prosecution witnesses. The medical evidence in this case is in line with the ocular account which fully corroborates the story of the FIR. The role of the appellant is borne out from the post-mortem examination report of the deceased. The recoveries have also been proved through reliable evidence adduced by the recovery witnesses. The appellant has brutally murdered the deceased by making straight firing on him. The plea taken by the

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defence has no nexus with the occurrence hence it does not carry weight vis-à-vis providing help to the defence. The prosecution has successfully proved its case against the appellant beyond shadow of any reasonable doubt, thus, the appeal filed by the appellant be dismissed and the conviction and sentence recorded by the learned trial Court may be maintained. The learned counsel for the complainant further adds that the sentence awarded to the appellant should be enhanced from life imprisonment to death in view of the peculiar facts and circumstances of the present case. In support of the above submissions, reliance has been placed on PLD 2000 SC 12, 2008 SCMR 917, PLD 1995 Quetta 83 and 1991 P.Cr.L.J. 202.

12. We have heard the learned counsel for the parties at length, given our anxious consideration to their submissions and have also scanned the record carefully with their able assistance.

13. Admittedly all the prosecution witnesses are related, interested and inimical to the accused in background of enmity between them. It is settled proposition of law that evidence of interested witnesses neither can be considered as gospel truth nor it can be discarded merely on the ground of relationship but propriety of safe administration of justice demands to examine their evidence with care and caution. In the present case, eyewitnesses of the incident PW/ Complainant Liaquat Ali and PW Abdul Razzak are brothers of deceased, whereas PW Shah Muhammad is cousin of the deceased. It is pertinent to mention here that, alleged incident had occurred in the dark hours of the night at 1.00 a.m. and the place of incident is courtyard of the Otaq, whereas the source of identification is electric bulb, which is treated as weak source of identification. Per mashirnama of place of incident single bulb was installed on the wall of room in the courtyard of Otaq, during trial neither it was produced before learned trial Court nor it was secured by investigating officer.

14. There is no denial of the fact that the FIR has been lodged after two and half hour of the incident without furnishing any plausible explanation particularly when the distance in between place of incident and police station is 4/5 kilometers. It is pertinent to mention here that, PW/ Mashir Mir Muhammad stated in his examination-in-chief that he reached the place of incident at 1.20

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a.m. when complainant Liaquat Ali had already left to Police Station for registration of FIR. It is matter of record that FIR has been lodged by complainant at 3.30 a.m. and there is no clarification on the record to justify that where complainant consumed more than two hours in reaching to Police Station except presumption that time might be consumed in deliberation and consultation before registration of FIR. The Hon'ble apex Court, in absence of any plausible explanation, has always considered the delay in lodging of FIR to be fatal and casts a suspicion on the prosecution story, extending the benefit of doubt to the accused. It has been held by Hon'ble apex Court that a FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime; thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Reliance in this behalf may be made to the case of *Zeeshan @ Shani v The State* {2012 SCMR 428} wherein it has been held that delay of more than one hour in lodging the FIR give rise to the inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful. In the case in hand, the delay is even more fatal when the police station, besides being connected with the scene of occurrence, was admittedly at a distance of 4 /5 kilometers from the place of incident more particularly when the complainant himself stated in FIR that he immediately rushed to police station directly from the place of incident for registration of the FIR.

15. The crime in this case has shown to be reported within two and half hour yet the fact remains that post-mortem examination on the dead body was conducted with a delay of more than five hours which fact shows that the occurrence has not taken place at the time mentioned in the FIR because while appearing as PW.2 {Ex.7} Dr. Hidayat Ali has categorically stated in his examination-in-chief that duration of death and post-mortem examination was about 5 to 6 hours. All this shows that the FIR was not registered in this case at the time mentioned therein but the same has been registered after due deliberations and consultations. Reliance may well be made to

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the case of *Irshad Ahmed v The State* {2011 SCMR 1190} wherein it has been held as under:-

> *"We have further observed that the post-mortem examination of the dead body of Shehzad Ahmed deceased had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the dead body conducted."*

16. To prove the ocular account besides complainant Liaquat Ali {PW.1}, the prosecution has kept in its fold two eye-witnesses, namely, Shah Muhammad {PW.4 Ex.9} and Abdul Razak {PW.5 Ex.10}}. Before analyzing their evidence it is pertinent to mention here that the case of the prosecution against the appellant is that he alongwith his companions committed murder of deceased within sight of complainant and two eye witnesses, who at the relevant point of time were present at the scene of offence and identified the accused in the light of bulb. The question arises why they were let off unhurt by the accused party particularly when none of them could escape alive and the accused party was well within knowledge that they would become witness against them in time to come. Such a behavior of accused party does not appeal to a prudent mind that when they could easily wipe out the entire evidence against them why they have not done so. Reliance may well be made to the case of *Mst. Rukhsana Begum & others v Sajjad & others* reported as 2017 SCMR 596, wherein it has been held that:-

> *"Another intriguing aspect of the matter is that, according to the FIR, all the accused encircled the complainant, the PWs and the two deceased thus, the apparent object was that none could escape alive. The complainant being father of the two deceased and the head of the family was supposed to be the prime target. In fact he has vigorously pursued the case against the accused and also deposed against them as an eye-witness. The site plan positions would show that, he and the other PWs were at the mercy of the assailants but being the prime target even no threat was extended to him. Blessing him with unbelievable courtesy and mercy shown to him by the accused knowing well that he and the witnesses would depose against them by leaving them unhurt, is absolutely unbelievable story. Such behavior, on*

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> *the part of the accused runs counter to natural human conduct and behavior explained in the provisions of Article 129 of the Qanun-e-Shahadat, Order 1984, therefore, the court is unable to accept such unbelievable proposition".*

17. There is abnormal behavior on the part of complainant and eye witnesses. Admittedly, complainant is brother of deceased Abdul Wahab while PW Abdul Razak is brother of complainant and PW Shah Muhammad is his cousin and in their presence accused party killed deceased Abdul Wahab. No doubt both parties are known to each other and accused party was shown armed with guns and hatched but none from the eye witnesses made any attempt to save the deceased; even complainant being brother of deceased neither attempted nor tried to save his brother or to catch hold any of the accused particularly when they were at a distance of few paces from him. Such a conduct of complainant and blood relation eye-witnesses does not appeal to a prudent mind while in their presence the accused party challenged the deceased and started firing on him and despite their presence none of them resisted or tried their level best to save the deceased from the accused party, but no such action/reaction has arisen from the circumstances of the case to believe their statements as such the conduct of complainant and eye-witnesses is itself creating doubt in the case of prosecution. It does not appeal to the logic that by killing a person in presence of his two brothers and closed relative, they did not attempt to save the deceased from the accused. This position caused a big dent to the prosecution case and also question marked the presence of complainant and eye witnesses at the scene of offence. Reliance may well be made to the case of *Sardar Ali v Hameedullah and others* reported as 2019 P.Cr.L.J. 186, wherein it has been held as under:-

> *"The conduct of the complainant is also worth of to be looked into as it is story of the prosecution that the deceased Ahmad Khan was done to death through fire shots by the accused, yet at the relevant time no signs of resistance have been shown by the complainant in order to at least save his father from the grasp of assailants, rather he became a mere spectator, so, such kind of attitude of the complainant being sole eyewitness and real son of the deceased is beyond understanding of natural human conduct".*

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18. Likewise, in the case of *Zafar v The State and others* reported as 2018 SCMR 326, wherein it has been held as under:-

> *"The conduct of the witnesses of ocular account also deserves some attention. According to complainant, he along with Umer Daraz and Riaz (given up PW) witnessed the whole occurrence when their father was being murdered. It is against the normal human conduct that the complainant, Umer Daraz and Riaz (PW since given up) did not make even an abortive attempt to catch hold of the appellant and his co-accused particularly when the complainant himself has stated in the FIR and before the learned trial Court that when they raised alarm, the accused fled away. Had they been present at the relevant time, they would not have waited for the murder of their deceased father and would have raised alarm the moment they saw the appellant and his co-accused standing near the cot of their father".*

19. We have noticed contradictions in the evidence of prosecution witnesses. It is case of prosecution that all the PWs: stated that they were awakened at the time of incident but P.W Shah Muhammad stated in his cross-examination that we all were sleeping in the courtyard of the Otaq. There is also contradiction in between the statements of witnesses and mashirnama of place of incident. According to their statements bulbs were glowing in the courtyard, but this fact denied by mashirnama of place of incident, which shows that single bulb was installed in the Otaq, which too was not secured by investigating officer during investigation. There is also contradictions in between their statements, as complainant in FIR, deposition and P.W Abdul Razzak in his statement under Section 164 Cr.P.C. have stated that accused put his gun on the chest of deceased and fired, but both complainant Liaquat Ali and P.W Abdul Razzak have stated in their cross-examination that accused fired at deceased from the distance of two feet. All these facts cannot be ignored, which created serious dent in the prosecution case.

20. It is also significant to note here that the incident is shown to have taken place in the house of the complainant surrounded by other houses and was a thickly populated area but intriguingly no independent person has been produced by the prosecution to provide an independent support to the evidence of interested witnesses. All the witnesses produced by the prosecution

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are interested, related and chance witnesses who could not prove the story mentioned in the FIR by the complainant. All this shows that the case of the prosecution has been presented by related, interested and chance witnesses who all remained unable to bring the guilt of the appellant home rather they miserably failed to justify truthfulness of their depositions before the learned trial Court.

21. Now adverting to the recovery of crime weapon on the pointation of appellant is concerned, suffice it to say that the same has been recovered on 08.06.2006 i.e. after four days of the occurrence. As per prosecution case itself, appellant was arrested on 04.06.2006 and during interrogation he agreed to recover the crime weapon and voluntarily led the police party to the pointed place and got recovered a DBBL gun and four live cartridges of white colour in presence of mashirs Haji Ghulam Hyder and Niaz Hussain. Surprising to note that both the mashirs of recovery memo are co-villager and caste fellow to complainant and despite prior information about the recovery of crime weapon, the recovery officer SIP Ali Mardan has not associated any independent person either from the way leading to the pointed place or from the place of recovery to act as mashir, without assigning valid reasons. Even otherwise the record does not reveal that as to whether any effort was made to persuade any person from the locality or for that matter any one from the nearby houses was asked to act as witness. PW Ghulam Hyder {Ex.15} in his cross-examination admitted that so many people of other castes were available there but SIP Ali Mardan did not ask them to act as mashir. According to PW SIP Ali Mardan he left police station for recovery of crime weapon at 1515 hours through departure entry No.8 {Ex.12/C}, reached at the pointed place within 45 minutes, consumed 20/25 minutes in recovery proceedings and then came back to police station directly. The time mentioned on the recovery memo Ex.12/D is 1600 hours i.e. 4.00 pm whereas the mashir PW Ghulam Hyder has deposed in his examination-in-chief that it was 3.45 pm when SIP Ali Mardan came and asked him to act as recovery mashirs and within 2/3 minutes they reached at the place of recovery. According to mashir SIP Ali Mardan disclosed him the number of recovered gun as 6758 and it was sealed outside the room whereas according to recovery officer the recovered gun was

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sealed at spot. It is important to note that under entry No.8 the police party left police station for recovery of crime weapon on the pointation of appellant and after its recovery the police party returned back to police station but no arrival entry has been produced by the prosecution to substantiate the recovery and the entire record is silent to that extent. On the contrary, SIP Ali Mardan in his cross-examination has admitted that he has not produced roznamcha entry No.20. In view of this background of the matter, the entire recovery on the face of it seems to be managed one. Even otherwise, it is settled by now that the recovery of weapon and empties etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused. Apart, we have noticed material contradictions and discrepancies in the statements of witnesses as well lacunas and dents in the prosecution case, which have not only demolished the entire case of prosecution but also shattered the entire fabric of the testimony of prosecution witnesses.

22. Insofar as recording statements under Section 164, Cr.P.C. of eye witnesses Abdul Razzak and Shah Muhammad is concerned, suffice it to say that the same have been recorded on 16.06.2006 i.e. 13 days after the occurrence. The inordinate delay of thirteen days in recording their statements under section 164, Cr.P.C. create doubt as no satisfactory explanation of this delay has been furnished by the prosecution. Thus, considering in the light of the surrounding circumstances, explained herein above, the delay in recording the statements of the eye witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story and unsafe to rely upon.

23. A strong motive has been alleged against the accused. It is disclosed in the FIR that since deceased had slapped appellant and his father, therefore, to take revenge of that slap, the appellant with the help of his companions committed murder of deceased. The motive attributed to the accused is not only weak and feeble but also not satisfactorily established. Even otherwise the motive alone is not sufficient to lay foundation for conviction of an accused person facing charges of capital punishment.

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24. In a criminal case, the evidence produced by the prosecution should be so strong or solid that it should start right from the toe of the deceased on one hand and the same should encircle a dense grip around the neck of the accused on the other hand and if the chain is not complete or any doubt which occurred in the prosecution's case that is sufficient to demolish the structure of evidence the benefit thereof must go to the accused especially when the same has been built up on the basis of feeble or shaky evidence. The Hon'ble apex Court has settled the principle in a case of *Tariq Pervez v The State* {1995 SCMR 1345} on the point of benefit of doubt, which is reproduced as under:-

> *"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, 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 accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".*

25. It is also by now well settled that the accused must always be presumed to be innocent and the onus of proving the offence is on the prosecution. All that may be necessary for the accused is to offer some explanation of the prosecution evidence against him and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of accused, he should be given the benefit of it. The proof of the case against accused must depend for its support not upon the absence or want of any explanation on the part of the accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. There is no cavil with the proposition and judicial consensus that "if on the facts proved no hypothesis consistent with the innocence of the accused can be suggested, the conviction must be upheld. If however, such facts can be reconciled with any reasonable hypothesis compatible with the innocence of the accused the case will have to be treated as one of no evidence and the conviction and the sentence will in that case have to be quashed. Rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case* {PLD 2002 SC 1048}, wherein the apex Court ruled that:-

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> *"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused.* ***It was held in "The State v Mushtaq Ahmed (PLD 1973 SC 418)*** *that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent".*

26. The final and eventual outcome of the entire discussion is that the prosecution has failed to discharge its onus of proving the guilt of the appellant beyond shadow of reasonable doubt. Therefore, while extending the benefit of doubt in favour of the appellant, we hereby allow this appeal, set-aside the conviction and sentence recorded by the learned trial Court by impugned judgment dated 20.12.2012 and acquit the appellant of the charge. He shall be released forthwith if not required to be detained in connection with any other case.

27. In sequel to our discussions, made herein above, the Criminal Revision No. D -05 of 2013, filed by the complainant seeking enhancement of sentence of the appellant, is dismissed.

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