

For reporting

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

Before:

Mr. Justice Mohammad Karim Khan Aglia

Cr. Jail Appeal No.S-104 of 2004.

Ahmed Khan and others

Versus

The State

Appellants : Ahmed Khan and others	Through Syed Tarique Ahmed Shah, Advocate
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, A.P.G.
Complainant : Ismail	Through Mr. Nazeer Ahmed Bhatti, Advocate
Date of hearing :	24.04.2017 and 25.04.2017
Date of judgment	26.04.2017

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** Appellants Ahmed and others were tried by learned IIInd Additional Sessions Judge, Badin, in Sessions Case No.120 of 1995, arising out of Crime No.62 of 1995, registered at Police Station Matli, under section 302, 34 PPC. Accused/appellants were found guilty by judgment dated 27.05.2004 (the impugned judgment) and were convicted under section 302(b) read with section 34 PPC and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.50,000/- each as proof in either of the forms specified under section 304 PPC was not available. If the fine deposited, half of the amount be paid to the legal heirs of deceased Waroo alias Porho and Allah Dino Khaskheh. In case of default in payment of fine the accused / appellants were ordered to undergo R.I. for six months more. The benefit of section 382-B Cr.P.C. was also extended to the accused / appellants.

2. Briefly, the facts of the prosecution case as per FIR are that on 13.07.1995 at 0030 hours complainant Ismail son of Mevo Khaskheli

came to Police Station Matli and lodged report stating therein that he is zamindar and residing on the address mentioned in the F.I.R. He, his brothers deceased Waroo alias Porho and Allah Dino were residing in the same hedge wall alongwith their families. Adjacent to their houses, there were houses of Essar Meghwar on a plot owned by complainant. The said plot was vacated by occupants Meghwars on 12.07.1995 on which there was a dispute between the complainant party and accused. When the said plot was vacated, the complainant alongwith his brothers deceased Waroo alias Porho, Allahdino, his son Jan Muhammad was leveling the plot. It was about 11.45 pm, the complainant party saw on the light of moon accused Ahmed armed with lathi, Gulzar armed with lathi and accused Rasool Bukhsh armed with gun in the plot. The accused abused complainant party and asked the complainant party as to why they had come in the plot as it belonged to them, on which complainant party refused to vacate the plot. Resultantly, accused Ahmed caused lathi blow on the head of deceased Waroo who fell down. Accused Gulzar caused hatchet blow on the head of Allahdino, who also fell down. Thereafter complainant and his son Jan Muhammad scuffled with accused Rasool Bukhsh. Accused Ahmed took the licensed gun of complainant which was lying there on a cot and then accused Rasool Bukhsh made fire from his own gun at Allahdino but the complainant party raised cries on which neighbors came running and the accused persons ran away. The complainant party saw that Waroo alias Porho was dead and Allahdino was unconscious. The complainant left his son over dead body and injured and came to Police Station and lodged the report of the incident.

3. After usual investigation the accused were challoned and the case was sent up for trial. Charge was framed against accused / appellants, to which they pled not guilty and claimed for trial.

4. In order to substantiate its case the prosecution examined 12 prosecution witnesses (PW's) and thereafter prosecution closed its side.

5. Thereafter, statement of accused / appellants under Section 342 Cr.P.C were recorded wherein they denied the prosecution case claiming their innocence. They did not give evidence under oath but they examined three defence witnesses (DWs) in their defence.



6. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellants as stated above through the impugned judgment.
7. The facts of this case as well as evidence produced by both the parties before the trial Court find an elaborate mention in the judgment passed by the trial Court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.
8. During pendency of the instant appeal, appellant Ahmed Khan died on 31.05.2005 whilst he was on bail and the appeal against him was abated vide order dated 16.04.2015. Such death certificate issued by NADRA on 07.04.2015 is available on record.
9. The other appellants Gulzar and Rasool Bukhsh were granted bail by this court under S.426 Cr.PC on 28-05-2009 pending the decision on their appeals.
10. Learned counsel for the appellants contended that the appellants were innocent and that this was a false case which had been foisted upon them; that the complainant party deliberately made no attempt to save the life of Allah Dino who was the star witness and would have been able to give a truthful account of events; that the case of the prosecution was improved after filing the FIR as Allah Bux who later became a PW was not included in the FIR; that the eye witnesses lacked credibility; that there was major contradictions in the evidence of the PW's; that the ocular evidence of the eye witnesses did not accord with the medical evidence; that in a separate case u/s 13 (E) of the Arms Ordinance the prosecution had not been able to prove that the firearms were recovered on the pointation of the appellants; that there was a 5 month delay in sending the lathi and hatchet for chemical examination which was not explained and for all the above reasons the impugned judgment should be set aside and the appellants should be acquitted.
11. In support of his contentions, learned counsel for appellants has relied upon the cases of **Akhtar Ali and others v. The State** (2008 SCMR 6), **Bagh Ali v. Muhammad Anwar and another** (1983 SCMR 1292), **Siddique v. The State** (1977 P Cr. LJ 30), **Muhammad Aslam Khan v. The State** (1999 SCMR 172) and **Muhammad Akram v. The State** (2009 SCMR 230).



12. On the other hand Learned A.P.G. with the assistance of learned counsel for the complainant fully supported the impugned judgment. He submitted that although there were some contradictions in the evidence of the PW's this was only minor in nature; that Allah Bux's omission from the FIR was not a deliberate improvement as the FIR had to be filed as soon as possible and therefore it was a bona fide omission; that there were 3 eye witnesses to the murders who corroborated each other; that the appellants had a motive for the murder which was a dispute over a plot; that the judgments referring to the recoveries of the firearms were not relevant as that had been part of a different case; that there was sufficient circumstantial evidence to corroborate the eye witness accounts and for all the above reasons the appeals should be dismissed and the impugned judgment upheld.

13. In support of his contentions, learned A.P.G. relied upon the cases of **Muhammad Imran and others v. The State** (2004 PCr.LJ 1697), **Arif v. The State and 2 others** (PLD 2006 Peshawar 5), **Abdul Mateen v. Sahib Khan and others** (PLD 2006 Supreme Court 538), **The State through Muhammad Afzal and others v. Waheed Iqbal and others** (2005 PCr.LJ 1384), **Anwar Shamim and another v. The State** (2010 SCMR 1791) and **Amal Sherin and another v. The State through A.-G., N.W.F.P.** (PLD 2004 Supreme Court 371).

14. I have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

15. Turning firstly to the eye witnesses. There are 3 in number all of whom claim to be present at the time of the incident. The first is the complainant PW 1 Muhammed Ismail, the second is PW 2 Jan Muhammed, and the third is PW 3 Allah Bux although these witnesses are corroborative of each other I do **not** find their evidence to be either credible, trust worthy or confidence inspiring for the following reasons when such reasons are read as a whole especially when added to the other prosecution and defense evidence:

(a) That the complainant is the father of PW 2 and 3 and as such are interested and related parties who would all be expected to corroborate each other.

(b) That an enmity existed between the deceased and PW 1 over the hand of Ms Latifa who was Allah Dino's wife and was



allegedly being held by the complainant against her will. That enmity also existed between the appellants and the complainant over a separate land dispute.

(c) That PW 3 Allah Bux was a key witness being an eye witness and it is not understandable that his name was omitted from the FIR especially when the name of the complainants other son PW 2 Jan Muhammed who was also present at the place of incident was named

(d) That all their evidence in chief appears to be too similar as if it has been tutored and in my view all of them were damaged during cross examination.

(e) That PW 1 stated that deceased Allah Dino sustained one gunshot injury, that PW 2 stated that two gun shot fires were made at deceased Allah Dino **both of which hit him on the head and he was fired upon from only 4 paces away** (which could not have missed due to the close range and the fact that shot gun cartridges contain numerous pellets which spray outward which would have been found during a medical examination), that PW 3 Allah Bux states that deceased Allah Dino received one gun shot injury to the head. **As per medical evidence however Allah Dino received no gun shot injuries at all.** In my view this is a **major contradiction between the ocular and medical evidence** which cannot be explained by the passage of time or otherwise. Even otherwise two cartridges were also allegedly recovered from the scene and sealed however they turned up at trial sealed in the same cloth as the gun belonging to the complainant and not the gun belonging to the accused Gulzar which was allegedly used. Although not a part of this case, but exhibited in this case, in a separate case arising out of this case u/s 13 (E) Arms Ordinance the trial court found that the prosecution could not prove its story that the police had made recoveries of the firearms based on being lead to them by the appellants Ahmed and Rasool Bukhsh. In particular it is noted that no entry or statement is made in the police dairy/log/roznamacha that the IO (PW 9 Dato Khan) is taking the appellants out of the police station in order to recover the firearms from a particular spot. It therefore cannot be ruled out that the firearms were foisted/planted on the appellants



especially as the complainants firearm was allegedly recovered from a hedge close to where the complainant was residing.

(f) There is no independent corroboration of PW 1,2, and 3 about the plot dispute motive. Significantly Essar Meghwar who previously owned the plot who could have explained the position was not examined. The story of PW's 1, 2 and 3 clearing the spot leaving piles of material at the place of incident also went unnoticed by both the original IO PW 11 Mohammed Bachal and later IO PW 9 Dato Khan. It is not even clear from the evidence whether the incident took place behind a hedged plot with a single passageway or on a veranda by the complainant's house as there are contradictory statements on this point from numerous PW's.

(g) unnatural conduct/actions which do not seem to appeal to reason are also present on the part of PW 1, 2, and 3. For example, if Allah Dino (who was the brother of the complainant) had been injured why did the complainant or one of his sons not immediately take him to hospital for treatment which could have saved his life. Instead of taking such action the complainant first of all went to the house of PW 5 Muhammed Zaman who lived 1 and a half KM's from him for no explained or plausible reason. If he was able to be dropped at Mr.Zaman's house then he could easily have arranged to be dropped at a hospital with the injured Allah Dino (who was his brother).The complainant then proceeds to register the FIR before finally returning to the place of incident when after the police arrive the injured Allah Dino is finally and belatedly taken alive to civil hospital Matli. At the Matli civil hospital he is sent for specialized treatment to Hyderabad hospital where he expired on account of his injuries. Such conduct, in my view, by the complainant is completely not understandable and does not appeal to reason. Likewise his two sons PW 1 Jan Muhammed and PW 2 Allah Bux also left their seriously injured uncle (Allah Dino) to lay unattended for hours rather than attempt to take him to hospital. Again this does not appeal to reason. Surely the action of any reasonable brother/relative would have been to try and save that brother/relative's life rather than to wander off to see Muhammed Zaman and then file an FIR before returning with the police in order to attend to the injured brother? An early



intervention may have lead to saving the complainant's brother's life (Allah Ditto)

(h) another unnatural conduct which in my view does not appeal to reason is that when the deceased were attacked by the appellants why did not PW 1, 2 or 3 move to get the shot gun which the complainant had brought with him in order to protect themselves. Instead they let appellant Ahmed seize it after the attack started. If the dispute was over the plot why did not the appellants kill PW 1, 2 and 3 as well? They had time to do so. Why would they leave eye witnesses alive to later implicate them? Interestingly PW 1, 2 and 3 all knew that the complainants shot gun had 8 cartridges with it. Why did Rasool Bukhsh fire Gulzar's gun? Gulzar should have been carrying his own gun. None of the above in my view tends to ring true or appeal to reason. As was recently held by the Hon'ble Supreme Court in the case of **Muhammad Asif v. The State** (2017 S C M R 486) which found as under in respect of such incidents at Para's 7 and 10.

"Para 7.....This lady was aged about 50/51 years, while her husband was 70 years of age and when the two eye-witnesses not produced at the trial namely Iftikhar and Tajammal, were close friends of the deceased then why she being an aged lady and her husband, who was at the advanced age of his life followed them. If they were apprehending something abnormal, they would have conveniently told the above two friends of the deceased that being late dark night time, it was not advisable to take the deceased outside. **No convincing and plausible reason has been advanced as to why they both followed the deceased and his two friends and what was the object behind it. The conduct of both these alleged eye-witnesses runs counter to normal human behaviour and habit in the given circumstances and in the absence of plausible explanation, no prudent mind would believe such fantastic story which appears to be the hand-Art of the local police because in a night occurrence of this nature, remaining un-witnessed, the police imprudently indulges in such like tactics to mislead the court of law and justice.** (bold added)

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10. **We fail to understand that in the presence of the two close friends accompanying the deceased and parents, how such tragedy with a son could happen without any intervention on their part to come to rescue of the deceased when they were not far away as shown in the site plan.**" (bold added)



(i) According to PW 3 Allah Bux the police recovered a hatchet from the wardat. However according to PW 3 Lakadino appellant Gulzar produced a bloody hatchet in the presence of the police which was recovered. Bearing in mind that appellant Gulzar had already left the crime scene does it appeal to reason that after committing a cold blooded murder he would keep a bloodied hatchet being one of the murder weapons in his possession and surrender it to the police. In my view again this action does not appeal to reason. Again as was held in the case of **Muhammad Asif** (Supra) at Para 17

"17. It is, normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to cancel their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police."

#### 16. **Turning to the other evidence.**

17. **PW 4 Dr. Ghazi** who was the Dr who carried out the post mortem on deceased Waroo. Her medical evidence does not support/match the injuries allegedly inflicted on Waroo by the appellant's as per Statements of PW 1, 2 and 3 who were the eye witnesses. There also appears to be an overwriting in the time of the post mortem report of Warro changing the start time from 10.30pm to 3.30 pm which would tie in with Dr. Ghazi's statement that Warro's death might have occurred between 8-9 pm which would have put the time of incident as narrated by the complainant in doubt.

18. Nor does Dr. Ghazi's initial examination of Allah Dino support/match the injuries allegedly inflicted on Allah Dino by the appellant's as per Statements of PW 1, 2 and 3 who were the eye witnesses. No where on Allah Dino's body are gun shot wounds found.

19. **PW 10 Dr. Irshad** did the final post mortem on deceased Allah Dino which again does not support/match the injuries allegedly inflicted on Allah Dino by the appellant's as per Statements of PW 1, 2



and 3 who were the eye witnesses. No where on Allah Dino's body are gun shot wounds found.

20. **PW 5 Mohamed Zamin.** He is a hearsay witness who corroborated the complainant's story about the incident. However there is no reason why the complainant went and immediately told him the story rather than seek medical assistance for his brother. There is also no logical reason why he came to the wardat.

21. All the other PW's in my view were damaged in cross examination and their evidence is riddled with inconsistencies and contradictions with other PW's. PW 8 Mushir Lakhadino, who was mashir, has little if any credibility as he himself is involved in criminal cases as he admitted during his cross examination. PW 7 Karim Bux's sketch of the vardat is of little assistance as it was carried out over 3 years after the incident on the pointation of the complainant.

22. Despite others being present at the place of wardat no independent Mushir was associated throughout the investigation. The lathi and hatchet were sent for chemical examination after a delay of 5 months which delay has not been explained.

23. In their 342 statements when the appellants were asked if they had to say anything else all adopted the statement of appellant Ahmed which reads as under:

**"I am innocent. I, my son Rasool Bukhsb and my daughter's son Gulzar Ali have got enmity with present complainant and his witnesses Jan Muhammad and Allah Bukhsb, real sons of complainant. Mashir Lakhadino Notkani is inimical with us over lands and the elections.** The land where we reside and in surrounding was given by Government to Mr. Jamshed Marker, the then Ambassador of Pakistan, the matter was contested by co-villagers under my supervision, ultimately the allotment of Mr. Jamshed Marker was cancelled by the High Court of Sindh. I produce certified true copy of Judgment as Ex.59/B. Thereafter I held press conference which was published in the Newspapers daily "JASARAT". I produce the cutting as Ex.59/C. **Complainant has got enmity with me and co-accused over the lands. He intends to dispossess us from the lands. Mashir Lakhadino Notkani is well known criminal. He was arrested by Badin police along with robbed motorcycle.** Such news were published in daily "KAWISH" I produce it as Ex.59/D so also produce the daily "Ibrat". I also produce the true copy of the FIR lodged against Lakhadino as Ex.59/E. **He is fast friend of complainant. Complainant and his sons had a fight with deceased Waroo and Allahdino over the hands of Mst. Latifan wife of deceased Allahdino as Ismail did not allow deceased Allahdino to take away his wife and Allahdino and Waroo sustained injuries at the hand**



**of complainant and his sons at the house in presence of D.Ws. Muhammad Hashim, Manoo and Khaliqdino, the sons-in-law of complainant Ismail. Waroo died on the spot and Allahdino died in the Hospital. At that time, I was in mosque of our village where DWs Qadir Bukhsh and Malikdino were also present. The said widow of deceased Allahdino Mst. Latifan is still confined by complainant in his house and I have come to know that complainant has performed nikah with Mst. Latifan. Police Inspector Talpur is fast friend of complainant. They have involved us falsely in this case. I am innocent. (bold added)**

24. Thus, as can be seen from the above S.342 statements there was enmity between the appellants and PW 1, 2, 3 and other witnesses over land. Furthermore, it would appear that the defense put up by the appellants was that there was ill will between the complainant and his sons (PW1, 2 and 3) with the deceased Allah Dino and Warro over the complainant confining Allah Dino's wife to the house which lead to a fight between PW 1, 2 and 3 and the deceased which lead to the death of the deceased.

25. It is observed that this line of defense was consistently put to all the relevant PW's and was supported by all the DW's who all stated that there was no plot dispute and 2 of the DW's (DW 1 Khaliq Dino and DW 3 Manoo) had been eye witnesses to the complainant murdering Waroo and injuring Allah Dino at his house in the presence of his sons (PW 1 and 2) over this marital dispute. In cross examination it was only suggested to these 2 DW's that they were deposing falsely. No suggestion was put to them that there was no marital dispute between the complainant and the deceased or that they did not witness the murder of Waroo and the injury to Allah Dino by the complainant. It is also interesting that the complainant has now married Allah Dino's wife who the dispute was allegedly over.

26. I agree with the well settled legal proposition that an eye witness should not be disbelieved simply because he is related to the deceased, but in this case enmity has come on record between the appellants and the complainant side. Like wise as a rule minor contradictions are to be ignored but in this case I find the contradictions to be of a glaring and major nature: especially in respect of the discrepancy between the ocular evidence of all 3 PW eye witnesses that Allah Dino was shot in the head when in fact the medical evidence shows conclusively that he was not shot at all. The motive as alleged by the complainant i.e. dispute over a plot also seems to be weak based on the evidence especially as Essar Maghwar the former owner of the plot



was not examined who lived close by and DW's have denied that there was any dispute over that particular plot. The defense has also put up an alternative motive for the murder of Waroo and Allah Dino namely there was a marital dispute between Allah Dino and the complainant over Ms Latifia which has been corroborated by 3 DW's which also may explain why the complainant left Allah Dino without ensuring that he received immediate medical assistance for his serious injuries.

27. With regard to eye witnesses and their description of the types of injuries and how those injuries were caused on account of such inaccuracies doubt was placed on the prosecution case in the case of **Siddique V State** (1997 PCr.LJ 30) at Para 6 in the following terms:

"It means that these witnesses were quite attentive from the beginning. Their statements directly come in conflict with the medical evidence according to which three incised wounds were caused to the deceased by the hatchet. In case all these witnesses were so close to the appellant and the deceased that they had heard all what transpired between them and it was within their sight that the hatchet blows were given by the appellant to the deceased then they would be genuinely expected to be accurate about the number of the injuries also. But that is not so. The medical evidence gives an altogether different version of injuries, therefore in our estimation the statements of these eye-witnesses are not free from doubt. In the F.I.R. also the complainant has stated that it was within his sight and also within the sight of P.Ws. Lakhano and Mitho Junejo that two hatchet blows were given to the deceased on her back with sharp side of hatchet. These witnesses are quite certain about the number of injuries but the number of injuries given by them is wrong. We are not therefore inclined to accept the testimony of these eye-witnesses. This question was raised before the trial Court and while dealing with this point the learned II Additional Sessions Judge had given a general explanation saying that "where the people observe, under stress of emotions, an occurrence from a short space, from different angles, with different temperaments, capacity to observed, intelligence and memory discrepancies are bound to occur." We are unable to agree with this observation because whatever the temperaments or emotions the witnesses might be having and whatever the angles by which they were seeing the commission of offence might have been, **it is not possible that all of them would make similar mistake and that too of a very important nature.**" (bold added) i.e of a firearm injury in this case.

28. It is a well settled principle of criminal law that it is for the prosecution to prove its case against the accused beyond a shadow of a doubt and if there is any doubt in the prosecution's case the benefit of such doubt, as set out in the case of **Tariq Pervez v. The State** (1995 SCMR 1345) must go to the appellant as of right as opposed to concession. However in considering this aspect of the case I am also



guided by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

29. In the recent supreme Court case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12<sup>th</sup> April 2017 the Hon'ble supreme Court in respect of the benefit of doubt held as under at Para 20:

"Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of **Riaz Masih @ Mithoo v. The State (MLR 1995 CrI. 694).**"

30. In this case for the reasons discussed above primarily being the non confidence inspiring evidence of the eye witnesses PW 1,2 and 3 which is contrary to normal usual behaviour and does not appeal to reason as mentioned earlier and the major contradiction in their evidence vis a vis the shooting of Allah Dino and the medical evidence which conclusively shows that Allah Dino received no bullet wound, enmity between the parties, the possibility of an alternative motive, the lack of reliability and trustworthiness of the police witnesses and Mushirs and the prosecution evidence as a whole which appears to be riddled with contradictions, even the chemical report was delayed by over 5 months which went completely unexplained and the alleged scaled empties were found with the gun they did not come from tied in one parcel I am of the view that when the evidence is read and considered in totality there would be a reasonable doubt in a reasonable and prudent person's mind that the appellants were not guilty of the offenses for which they have been convicted by the trial court.

31. Thus, for the reasons discussed above I find that the prosecution has failed to prove its case beyond a reasonable doubt against the appellants and that the appellants are entitled to the



benefit of the doubt and as such set aside the impugned judgment and up hold the appeals of both appellants Gulzar and Rasool Bukhsh

32. As such the appellants Gulzar and Rasool Bukhsh are hereby acquitted in the above case.

Hyderabad:

Dated: 26-04-2017