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

Criminal Appeal No. S- **96** of **2017**.

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| Appellants: | (1) Ghulam Muhammad s/o Guddu<br>(2) Bakrat s/o Fouj Ali<br>(3) Shoukat s/o Fouj Ali<br>(4) Shahbaz s/o Suhrab<br>Through Mr.Athar Abbas Solangi, Advocate. |
| Complainant: | Eidan s/o Ghulam Qadir Bhutto<br>Through Mr.Altaf Hussain Surhio & Mr.Safdar Ali Bhutto, Advocate(s) |
| State: | Through Mr.Sharafuddin Kanhar, A.P.G. |
| Dates of hearings: | 14.05.2018 &21.05.2018. |
| Date of decision: | .05.2018. |

## J U D G M E N T

***AMJAD ALI SAHITO, J-.*** The above named appellants were tried by learned 1st Additional Sessions Judge, Kandhkot, in Sessions Case No.92 of 2016, St.Vs.Ghulam Muhammad & others, for offence punishable u/s.302, 362, 114, 506/2, 148, 149 PPC, vide Crime No.34/2011, registered with Police Station, Miani @ Badani, whereby they were convicted and sentenced as follows;-

> To imprisonment for life as Tazir for an offence punishable u/s.302(b) PPC and to pay compensation of Rs.100,000/-(one lac) each to the heirs of person killed, in case of failure of payment of compensation, all the accused shall undergo S.I for six months.
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> The present accused are also convicted for an offence punishable u/s 364 and sentenced them R.I for seven years with fine of Rs.25,000/- each, in case of failure of payment of fine to suffer S.I for six months more.
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> The present accused are also convicted for an offence punishable u/s.506/2 PPC and sentenced them R.I for five years and fine of Rs.10,000/-each, in case of failure of payment of fine to suffer S.I for three months more.

However, all the above sentences awarded to the accused were ordered to run concurrently. The benefit of Section 382-B Cr.PC was also extended to them.

2. The concise facts of the case as narrated by complainant Eidan son of Ghulam Qadir Bhutto in his FIR lodged on 22.06.2011, at about 1500 hours, are that his nephew Rafiq Ahmed aged about 22/23 years dealt with business of milk and he after collecting the milk used to proceed to Kashmore. Yesterday i.e 21.06.2011, his nephew Rafiq Ahmed left on his motorcycle with milk for Kashmore via-link road Badani Shakh, while complainant, his brother Abdul Sattar and nephew Ali Muhammad went after him on their motorcycles for their own work by adopting link road Badani Shakh. When at about 09.00 a.m, they reached at link road leading to village Yaro Khan Mazari, they saw and identified accused namely Bachal son of Mitho, 2).Yousif son of Abdul Khaliq, both by caste Mazari, resident of Adiyo Wah, Taluka Kashmore, duly armed with T.T Pistols, 3).Ghulam Muhammad son of Guddu, 4). Dodo son of Hashim, resident of Village Sadiq Mazari, Taluka Kashmore, 5).Barkat, 6).Shoukat, both sons of Fouj Ali, 7).Shahbaz son of Suhrab, by caste Mazari, resident of village Fouj Ali Mazari, Taluka Kashmore, and two unknown culprits, who if seen again will be identified. Of them, accused Barkat and Shoukat were armed with guns, while the remaining had K.Ks in their hands. Accused signaled the complainant party to stop whereupon they stopped their motorcycles. Accused Shahbaz and Shoukat instigated rest of the accused to abduct Rafiq Ahmed, whereupon the remaining accused on point of weapons after de-boarding his nephew Rafiq Ahmed from his motorcycle took him towards northern side, on which the complainant asked the accused that as to why they are abducting his nephew Rafiq Ahmed, whereupon all the accused asked the complainant party to

remain mum, else they would be done to death. Due to fear of weapons, the complainant party remained silent. Thereafter, his nephew Rafique Ahmed offered resistance with the accused at distance of about 10 paces, on which accused Bachal Mazari made pistol shot straightly upon his nephew Rafiq Ahmed with intention to commit his murder which hit him on his chest while accused Yousif Mazari also made pistol shot at him which hit him on his left arm muscle, and he fell down, all the accused then fled way towards eastern side. The complainant party saw Rafiq Ahmed having fire arm injuries on his chest and left arm, was bleeding and died. Thereafter, his dead body was taken to police station, wherefrom after obtaining inquest report, it was shifted to Taluka Hospital, Kashmore for postmortem examination, which was then was brought at village for burial purpose. The complainant after getting free from there, came at police station Miani alias Badani and lodged the FIR against the accused to the above effect for offence punishable u/s.364,302,506/2,114,148,149 PPC. The investigation officer after observance of legal formalities submitted the report u/s.173 Cr.PC before Civil Judge & Judicial Magistrate, Kashmore, for offence punishable u/s.362, 302, 506/2, 114, 148, 149 PPC, by showing accused/appellant Ghulam Muhammad in custody, co-accused Bachal, Yousif and Dodo as absconders while the names of accused/appellants Barkat, Shoukat and Shahbaz were placed in column No.2, who were subsequently joined to face the trial.

3. On 08.12.2015, the learned trial Court after observing all the legal formalities, framed the amended charge against all the accused/appellants(Exh.11), for offence punishable u/s.302, 362, 114, 506/2, 148, 149 PPC, to which they pleaded not guilty and claimed trial.

4. In order to establish the accusation against all the accused/appellants, the prosecution then led its' evidence and

examined PW-01 Complainant Eidan Bhutto at Exh.12, he as per record produced FIR of the present case at Exh.11/A. PW-02 Abdul Sattar at Exh.13. PW-03 Jan Muhammad at Exh.14, he as per record produced mashirnama of inspection of dead body at Ex.13/A, Danistnama at Exh.13/B, and mashirnama of place of incident at Exh.13/C respectively. PW/Eye-witness Ali Muhammad and first mashir Dhani Bux were given-up by the learned ADPP for the State vide statement at Exh.15. PW-04 ASI/SIO Akbar Ali at Exh.16, he as per record produced departure entry, mashirnama of arrest of accused and recovery so also entry of arrival at P.S at Exh.15/A to D respectively. PW-05 ASI Khan Muhammad at Exh.17, he produced receipt of delivery of dead body to its legal heirs with statement of PC Murad Ali stating therein that he handed over the dead body to complainant after postmortem examination. PW-06 PC Shabir Ahmed at Exh.18. PW-07 PC/Process Server Sadaruddin at Exh.19, he produced the copy of summon with his endorsement disclosing therein that SIP/SIO Bashir Ahmed Khoso died naturally at Exh.19/A & B respectively. PW-08 Dr.Mushtaq Ahmed at Exh.20, he produced postmortem report of deceased at Exh.20/A, inquest report at Exh.20/B. PW-09 Tapedar Mir Hazar at Exh.21,he produced sketch of vardat at Exh.21/A. The side of prosecution was then closed by learned ADPP for the State vide statement at Ex.22.

5. Statements of all the accused/appellants were recorded under Section 342 Cr.PC at Ex.23 to 26 respectively, wherein they denied the prosecution allegations leveled against them by pleading their innocence. However, they did not examine themselves on Oath in terms of Section 340(2) Cr.PC nor produced any witness in their defence.

6. The learned Trial Court, after hearing the learned counsel for the parties and going through the material brought on record, awarded conviction and sentence against the present

accused/appellants as stated above, vide judgment dated 26.10.2017, which the present appellants have impugned before this Court by way of filing instant appeal.

7. Mr.Athar Abbas Solangi, Learned counsel for the appellants contended that the impugned judgment is against the law and facts of the case; that the present appellants are innocent and have falsely been involved in this case by the complainant party; that the FIR has been lodged with considerable delay without furnishing any plausible explanation which reflects consultation, that there is conflict between the ocular and medical evidence, all the witnesses cited in the case are closely related inter-se and are hostile against the appellants; that there are several other material contradictions in the evidence of witnesses, which are fatal to the prosecution case; that the deceased and witnesses were proceeding on their separate motorcycles, which neither were secured by the police, nor were shown by the Tapedar in sketch of vardat; that appellants Barkat, Shoukat and Shahbaz were found innocent by police during course of investigation and their names were placed in column No.2, who were joined subsequently by learned Magistrate; that initially the FIR was registered for offence punishable u/s.364 PPC which meant for kidnapping the abductee for murder but no motive has been shown in the FIR by the complainant; that the complainant party already knew the accused party with their names, parentage and residential address but there was no mention that how the complainant party knew them previously and presently; that complainant Eidan being a teacher and eye witness of the occurrence has failed to produce his leave account when the alleged date and time of the incident was shown by him on 21.06.2011, at 09.00 a.m(morning); that appellant Ghulam Muhammad has been acquitted from the case relating to recovery of crime weapon from him under Arms Ordinance. He lastly

contended that the prosecution has miserably failed to prove the case against the appellants and thus, according to him, under the above mentioned facts and circumstances, the appellants are entitled for their acquittal. In support of his contention, he relied upon the case laws reported as 2006 PCr.LJ-1826, (2).1995 SCMR-127, (3).1982SCMR-178, (4).1997SCMR-25, (5).1999SCMR-697, (6).2005 YLR-2301, (7).2005 YLR-1757, (8).2005 YLR-1629, (9).2005 YLR-1490, (10).2005 YLR-2192, (11).2000YLR-1307, (12).2000 YLR-862, (13).2005 YLR-86, (14).PLD 1994 SC-368, (15)PLD 2000 Karachi-94, (16).2006 MLD-1104, (17).2000YLR-2123, (18).2004 YLR-2787, (19).2000 YLR-3166, (20).2003MLD-820, (21).2004YLR-2343,(22).PLD2005SC-63),(23).2005YLR-627, (24).2001 SCMR-41, (25).2005 YLR-1226, (26).2005 YLR- 1240, (27).2003 SCMR-457, (28).PLD 1998 Karachi-502,(29).1969 SCMR-461, (30).2005 YLR-2972, (31).2005 YLR-3174,(32).2005 PCr.LJ-1442, (33).2005 PCr.LJ-1384, (34).2011 YLR-2238, and (35).2018 MLD-394.

8. Mr.Altaf Hussain Surhio and Mr.Safdar Ali Bhutto, learned counsel(s) for the complainant on the other hand argued that the appellants are named in the FIR with specific role of causing fire shot injuries to the deceased; that the ocular version is consistent with medical evidence; that the FIR has been lodged promptly; all the witnesses have supported the version of the complainant; that on 21.06.2011, it was month of June, and the Government of Sindh usually declares June and July as Summer holidays, hence question of taking leave does not arise, that there is no enmity between the parties, therefore, the false implication of the present appellants does not arise; that there was no material contradiction in the evidence of prosecution witnesses, in such situation, the learned trial Court has rightly appreciated the evidence for recording the conviction and sentence of the appellants in

accordance with law and thus lastly prayed for dismissal of the instant appeal. In support of their contentions, they relied upon case law reported as 2018 PCr.LJ-55 Note-46, (2).2009 SCMR-523, (3).2009 SCMR-1133), (4).2006 PDL SC-109, (5).2015 YLR-2642, (6) 2005 SCMR-49, (7).2005 SCMR-1568, (8).2007 SCMR-1519, (9).2007 SCMR-518, (10).2011 SCMR-429, (11).2011 SCMR-725, (12).2003 SCMR-884, (13).2015 MLD-92, (14).2010 SCMR-1020, (15).2008 SCMR-222, (16).2015 YLR-150, (17).2015 YLR-2018, (18).2002 PLD SC-52, (19). 2015 YLR-1015, (20.2015 SC-424 (a)Lahore, (21). Cr.LJ-265 Lahore, (22). 2015 SCJ-368 (e)SCAJK, (23).2008 YLR-2496, (24).2004 PLD-SC-663, (25).2004 PLDSC-271, (26).2001 SCMR-199, (27).1971 SCMR-659, (28).1971SCMR-530, (29).2007 MLD-1511, (30).2012 SCMR-1869, (31).2015 PLD Lahore-426, and (32).2016 MLD-730.

9. Mr.Sharafuddin Kanhar, Learned A.P.G for the State supported the arguments advanced by learned counsels for the complainant and prayed for dismissal of the instant appeal. In support of his contention, he also relied upon case law reported as 2011 YLR-2238 and 2018 MLD-394.

10. I have heard learned counsel for the parties and have minutely perused the record.

11. On evaluation of the material brought on the record, it appears that the case of prosecution depends upon the ocular testimony produced in shape of statements of complainant Eidan Bhutto(PW-01) and his brother eye-witness Abdul Sattar(PW-02), who both tried to support the case of prosecution but on proper scrutiny, their testimony was found inconsistent.

12. A bare perusal of the FIR would make it quite clear that complainant as well as other eye-witnesses never successfully established themselves to be **natural witnesses** rather admittedly were the **chance witnesses.** A **'chance witness'** is one who, in the

normal course, is not supposed to be present on the crime spot. Thus, it is always requirement of safe administration of justice that before believing evidence of such a witness, the witness must offer cogent, convincing and believable explanation justifying his presence at a place where **normally** he is believed to be not **present.** Reference in this regard may well be made to the case of **Mst.Rukhsana Begum & Ors v. Sajjad & Ors(2017 SCMR-596)** wherein it is observed as:

> "17. In ordinary parlance, a chance witness is the one who, in the normal course is not supposed to be present on the crime spot unless he offers cogent, convincing and believable explanation, justifying his presence there".

13. It is a matter of record that though the complainant claims to have gone after the deceased but never attempted to disclose the nature of the work for which he did so. On the other hand, complainant in his cross-examination admitted that he was serving as teacher but on the eventful day he admitted that he did not attend his duty and when the suggestion was put to him that he was present at the time of incident in his school, which was denied by him and he stated that he got leave for some personal work on the day of incident and admitted that he had not exhibited any proof of his leave on the day of incident. The admission of the complainant that on fateful day he otherwise would have been on duty but had taken the leave had brought prosecution under legal obligation to have produced such a **leave application** and in absence thereof the legal presumption within meaning of Article 129(g) of Qanun-e-Shahadat Order, 1984 would be nothing but otherwise. Though, during course of arguments a plea has been raised that since the incident took place in month of June when vacation of summer is observed in education department. This plea in existence of said admission of the complainant has lost its value. Even otherwise, it is surprise to note that complainant Eidan being teacher

having knowledge and experience of more than 28 years did not know that in the month of June and July, usually the Government of Sindh declares the summer holidays. In any way what legally can safely be concluded is that in ordinary course the complainant does not accompany the deceased, therefore, it was always obligatory to have placed a reasonable explanation for doing so. It is the claim of the complainant that he alongwith his witnesses including deceased were boarded on separate motorcycles and milk jars were carried by the deceased on his motorcycle but neither the investigation officer has recovered milk jar nor motorcycle of the deceased to justify the version of the complainant, even the availability of the motorcycle with milk jar has not been disclosed by the Tapedar in the sketch of vardat. The prima facie failure of the complainant in giving any reasonable explanation for accompanying the deceased to carry milk-jar which too after taking leave from his duties was always sufficient to bring his claim of an **eye-witness** as **doubtful.** In the case Rukhsana Begum supra, it is held as:-

> 18. In the instant case, this witness has shown no work or definite purpose of visit to crime spot, therefore, his presence on the crime spot is not believable **and his testimony, for this reason alone is rejected**. More so, when for reaching the spot, he had confronted surging waves of fast flowing water of the river.
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> **A single doubt reasonably showing that a witness / witnesses' presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/ their testimony as a whole.** …

In another case of **Muhammad Rafiq v. The State (2014 SCMR-1698),** it has been observed as:-

> '3. …Both the said eye witnesses had claimed that although they lived about one kilometer away from the scene of the crime yet they were present near the spot because they were working as labourers at a project regarding construction of the banks of Kanda

> Minor at the relevant time which project was being undertaken quite close to the place of occurrence. **Before the learned trial Court the said eye witnesses had utterly failed to establish the stated reason for their presence near the place of occurrence at the relevant time as much as they had failed to give any detail of the project in issue and they did not even know the name of the contractor who had hired them as labourers for the purpose**.

14. Further, from evidence of the complainant there also appears another aspect which remained unexplained the complainant. The complainant, claiming to be eye-witness, had taken the dead-body to police station where inquest and Danistnama were prepared by the duty officer ASI Khan Muhammad with advice to the complainant to lodge the FIR but he surprisingly preferred to obtain a letter for post-mortem only while saying to lodge the FIR later. Such conduct of the complainant is quite strange particularly when the complainant in FIR not only specifically named accused persons but also gave their parentage and address even. Here, a referral to case of **Wajahat Ahmed v. State(2016 SCMR-2073)**, being relevant to said position, is made hereunder:-

> "7. ….Rather in his cross-examination he has stated that he along with his injured wife visited PS Gogera at about 1.30/2 PM on 26.10.2010 i.e almost immediately after the occurrence but did not make any statement regarding the occurrence. **The failure of complainant (PW1) to report the incident to the police when he visited the police station along with his injured wife (deceased Mst. Surayya Bibi) casts serious doubt on the veracity of his statement made before the learned trial Court**.

15. It also appears from the record that PW Dr.Mushtaq Ahmed in his evidence revealed that he received the dead body on the same day and started its postmortem examination at about 11.30 a.m and

finished it at 12.30 p.m, thereafter, the dead body of deceased Rafiq Ahmed was handed over to the complainant under receipt but he instead to lodge the FIR returned to his village. As per available record the complainant came to lodge the FIR on the following day. Such deliberate delay in bringing the details of the incident (FIR), in absence of any plausible explanation, would always go against the prosecution. I would not hesitate that mere delay in lodgment of FIR is never fatal but the Court shall always require an explanation from prosecution for such delay particularly where the complainant did reach to police station yet avoided to record the FIR as such attitude will always leave a possibility of deliberation and consultation. **Muhammad Nadeem alias Deemi v. State(2011 SCMR-872)**, wherein it is observed as:-

> 6. So far as the F.I.R is concerned, it was, no doubt, delayed by 17 hours, yet seen in the light of attending circumstances of the case, the delay stands explained. **It is an established principle of law and practice that in criminal cases the delay, by itself, in lodging the F.I.R. is not material.** The factors to be considered by the Courts are firstly that such delay stands reasonably explained and secondly, that the prosecution has not derived any undue advantage through the delay involved. ..

In another case of **Muhammad Zubair v. State(2007 SCMR-437)**, it is observed as:

> .”4. … Generally delay in lodging F.I.R cannot in all cases lead to the inference that the case set up in the F.I.R. is necessarily true or false, however, it is relevant circumstance to be considered….

16. The prima facie failure on part of the complainant in not explaining the reason for not promptly recording the FIR was always bringing the veracity under clouds. It has also come on record that the complainant admitted that Badani Shakh road is a common public-road and he introduced Sain Dino the father of deceased, who

arranged the vehicle from Badani Town and about 15/20 private persons also gathered after the incident but his version is belied by his own FIR, which is totally silent about the presence of father of deceased as well as availability of said private persons at the venue of occurrence. The complainant further admitted that he arrived at police station alongwith Sain Dino the father of deceased, PW Abdul Sattar, Ali Muhammad, Jan Muhammad, Dhani Bux and other relatives of the vicinity and they spent half an hour at police station but his version is contradicted by PW/ASI Khan Muhammad who in his cross examination admitted that he consumed two hours in Karwai made by him on 21.06.2011 and on the very next day, the complainant came alone at police station and lodged the FIR. After lodging the FIR, the place of incident was shown by him to SHO on 22.06.2011 at about 1600 hours, who secured empties from the place of incident as well as blood stained earth when the place of incident as per complainant is a public road which is frequented by traffic but he found empties in undamaged condition, so also collected the blood from the place of incident. The recovery in such manner, being not logical one, leads to an adverse inference that when no such police official was deputed thereon to cover the blood stained earth as well as empties, till its inspection by the investigation officer then such recovery after lapse of 31 hours of registration of FIR has lost its sanctity. Even otherwise, it was obligatory upon the duty officer ASI Khan Muhammad to have attempted to visit the place of incident or could have lodged the FIR when the inquest report and Danistnama were prepared by him. This also casts serious doubt about claimed status of this witness as **eye-witness.** ASI in his evidence admitted that prior to registration of FIR, he prepared inquest report, Danistnama as well as mashirnama of inspection of dead body but the perusal of inquest report/Lash Chakas Form (Exh.20/B) reveals crime number thereon, which has also belied the ocular account. Dr.Mushtaq Ahmed in his evidence deposed that on 21.06.2011, he received the dead body of deceased Rafiq Ahmed

through PC Ali Murad for postmortem under reference letter bearing No.648/2011, which was identified by Khan Muhammad and Maroof Ahmed(cousins of the deceased) whereas the complainant in his FIR has not shown the presence of PWs Khan Muhammad and Maroof at venue of occurrence and rather disclosed that he had taken the dead body of deceased to Taluka Hospital for postmortem examination, which after its postmortem was handed over to him for burial purpose, which create serious doubt about claim of the complainant to be an **'eye-witness'** and consequence thereof would be nothing but to reject such testimony.

17. The prosecution in order to prove the version of the complainant examined his brother eye- witness Abdul Sattar(PW-02), who in his evidence deposed that after the death of deceased, they arranged the conveyance and took the dead body at P.S Miani @ Badani, where SHO Khan Muhammad Brohi issued letter to them for postmortem of deceased and then they came at Hospital Kashmore for postmortem, and after the postmortem they took the dead body to village for its funeral ceremony. This witness though narrated on same line but had not supported the complainant's version regarding preparation of memo of inspection of dead body, inquest report and Danistnama by ASI Muhammad Khan. Had he been with the complainant, he would not have forgotten about such important Karwai which even had taken more or less two hours. In his cross examination, he admitted that his residential address written in NIC is village Biland Khan Bhutto which is at distance of 1 ½ to 2 kilometers from the village of Ghulam Qadir Bhutto. This also casts serious doubt about claimed status of this witness as **eye-witness.** Thus, except evidence of such chance witnesses, which too without explanation of their presence at the crime spot was always sufficient to prove their presence at the place of incident to be doubtful. Reference may well be made to case of **Muhammad Akram v. State(2012 SCMR-440)** wherein it is observed as:-

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

18. In this case, the FIR has been lodged with delay of more than 29 hours, when the police station is at distance of 07 kilometers from the place of incident hence, it is quite clear that the FIR was chalked out after consultation and deliberation. The reliance in this context is placed upon case of **Sardar Bibi and others v. Muneer Ahmed and others(2017 SCMR-344),** wherein the Hon'ble Supreme Court of Pakistan has held that;

> **"3. Although occurrence took place at 2.00 a.m and police station was at a distance of 9 kilometer but report had been lodged not at the police station rather at the spot at about 6.00 a.m, which gave inference that FIR had been lodged after deliberation and consultation."**

19. The complainant failed to disclose the motive of the incident when he has named the accused in the FIR/evidence alongwith their parentage and residential address. If there was any motive for abduction of deceased Rafiq Ahmed then the investigation officer must have collected any past antecedent of the accused to believe that they belonged to a gang of dacoits/kidnappers. The plea of complainant's party that since there was no motive for them to falsely involve the appellants hence their evidence is to be taken as correct. Such plea is entirely misconceived and a reference to operative part of the case of **Azeem Khan & another v. Mujahid Khan & Ors(2016 SCMR-274),** being sufficient is made hereunder:-

> 29. The plea of the learned ASC for the complainant and the learned Additional

> prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, is entirely misconceived one. It is a cardinal principle of justice and law that only **the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person**. **Even evidence of uninterested witness, not inimical to the accused may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon**. Reliance in this regard may be placed on the case of Waqar Zaheer v. The State (PLD 1991 SC-447).

20. Further, if the accused were dacoits/kidnappers then they after killing the deceased would have kidnapped the complainant with rest of his witnesses, but here the accused after committing murder of deceased went away. Such conduct would never appear to be logical for a prudent mind particularly when such deliberation leaving of complainant and witnesses was sure to come as evidence against them when complainant and his witnesses knew them not only by their names but their parentages and addresses. Reference may well be made to the case of **Haq Nawaz & Ors V. State & Ors(2018 SCMR-95)**, wherein it is observed as:

> "5. … **It does not appeal to a prudent mind that the appellants and their co-accused would allow a person to hear out the alleged conspiracy of committing the murder of Mst. Nooran and be a witness against them**. …

21. In the present case, the investigation officer during course of investigation found the present appellants except appellant Ghulam Muhammad to be innocent and placed their names in column No.2, who were joined subsequently by the concerned

Magistrate. Thus, from the above evidence, the motive behind the murder of deceased remained shrouded, as nobody is speaking truth. The complainant in his evidence further averred that at the time of shifting the dead body to police station and its inspection thereon, the father of the complainant was available at police station but he did not lodge the FIR against the accused. The witnesses of the ocular account being closely related to the deceased were chance witnesses and their place of residence was far away from the spot, hence their presence at the venue of occurrence creates doubt. In cross examination of PW Abdul Sattar, he admitted that in CNIC his residence is village Biland Khan Bhutto which is at distance of 1 ½ to 2 kilometers from village of complainant. In this case, not a single independent person has been cited as witness/mashir despite the fact that number of private persons had gathered at the venue of occurrence. No overact has been attributed against the appellants when they were armed with deadly weapons but they neither caused any injury to the deceased nor the complainant party, but simply their presence was allegedly shown at the place of occurrence when it is customary practice to implicate many accused persons for the offence and for which the complainant party thrown wide net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the innocent, hence the false implication of the present appellants apparently cannot be lost of sight.

22. The medical officer Dr.Mushtaq Ahmed in his evidence has totally negated the version of complainant party. The complainant Eidan in his cross examination admitted that accused Bachal fired at deceased from the distance of one or two feet and accused Yousif made fire upon deceased from distance of one or half feet, while PW Abdul Sattar also supported the version of complainant

by stating that accused Bachal and Yousif fired from distance of 02 to 03 feet, but the medical officer Dr.Mushtaq Ahmed in his evidence deposed that he received the dead body of deceased Rafiq Ahmed on 21.06.2011 at Taluka Hospital Kashmore, through PC Murad Ali of P.S Miani @ Badani under letter bearing No.Cr.No.648/2011, and started its postmortem examination at about 11.30 a.m and finished it at 12.30 p.m. On external examination of dead body of deceased he found the following injures;-

01. A Lacerated punctured wound 1 c.m x 1 c.m x chest cavity deep on upper part of right chest front with margins inverted(wound of entrance).

02. A Lacerated punctured wound 2 c.m x 2 c.m x chest cavity deep on left axilla with margins everted(wound of exit).

03.A Lacerated punctured wound 1 c.m x 1 c.m x muscle deep on upper part of left upper arms medially with margins inverted (wound of entrance).

04.A Lacerated punctured wound 2 c.m x 2 c.m x muscle deep on upper part of left upper arm laterally with margins everted (wound of exist).

On examination of the dead body of deceased, he opined that the time between the injuries and death was instantaneously while the time between death and postmortem examination was within six hours. In his cross examination, he admitted that the deceased died at 09.00 a.m and he started postmortem at 11.30 a.m and completed it at 12.30 p.m. If it is true then from the death of deceased Rafiq Ahmed and completion of postmortem, the total time consumed would be about 03-30 hours. He also produced inquest report/Lash Chakas Form as (Exh.20/B), which contained crime number thereon. The medical officer during course of postmortem examination did not find any blackening or charring

on the injuries of the deceased, while the complainant and PWs have clearly disclosed that the accused fired at deceased from the distance of 01 to 02 feet, whereas Tapedar Mir Hazar in his evidence deposed at Point-B that the accused fired at deceased at distance of about 08 feet from Point-A(where deceased Rafiq Ahmed was said to be murdered). If any fire is made from the distance of 01 to 02 feet, then the blackening occurs as per Modi's Medical Jurisprudence and Toxicology (21st Edition) at page 354 ref. In this context, the reliance is placed upon case of **Muhammad Zaman vs. the State( 2014 SCMR-749)**, wherein the Hon'ble Supreme Court of Pakistan has held that;-

> Fire-arm entry wound---"**Blackening**"---Scope---Blackening was found, if a fire-arm like shot-gun was discharged from a distance of not more than 3 feet.

23. It is astonishing to note that third eye-witness namely Ali Muhammad and first mashir Dhani Bux were not examined by the prosecution for no obvious reason, therefore, the presumption will be drawn under illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984, that if they had been produced and examined in this case, then the same would have been unfavorable to the case of prosecution.

24. So far the evidence of second mashir Jan Muhammad is concerned, he produced mashirnama of inspection of dead body, danistnama as well as memo of place of incident (Exh.13/A to C), which reveal his presence at the police station at the time of preparation of memo of inspection of dead body as well as Danistnama, whereas complainant Eidan and eye-witness Abdul Sattar have not disclosed that the said mashir was with them at the time of shifting the dead body to police station. Besides this, the recovery of crime weapon is alleged to have been effected from appellant Ghulam Muhammad, for which a separate case under

Arms Ordinance was registered against him, and in that case he has been acquitted vide judgment dated 25.02.2012 as annexed with memo of appeal, which has also attained its finality.

25. Moreover, the incident is said to have taken place during broad hours of the day near link road leading to Kashmore near village Yaroo Mazari, where number of peoples gathered as admitted by the witnesses, yet no any independent person from the said area was cited as witness/mashir to prove the version of complainant party and all the witnesses cited in this case are closely related to the deceased and resided in one and same house. These all material contradictions noticed in the evidence of prosecution witnesses shattered the veracity of their evidence and demolished the whole case of prosecution. In this context, the reliance is placed upon case of **Mst.Shazia Parveen v. the State(2014 SCMR-1197),** wherein the Hon'ble Supreme Court of Pakistan has held that;

> **"4. Such related witnesses had failed to receive any independent corroboration inasmuch as there was no independent evidence produced regarding the alleged motive, alleged recovery of rope was legally inconsequential and the medical evidence had gone long away in contradicting the eye witnesses in many ways. The duration of the injuries and death recorded by the doctor in the postmortem examination report had rendered the time of death allegedly by the eye witness quite doubtful, the stomach contains belied the eye witnesses regarding the time of occurrence".**

26. The case laws relied upon by learned counsel for the parties are distinguishable from the facts and circumstances of the present case.

27. The over-all discussion involved a conclusion that the presence of eye-witnesses at the place of occurrence on relevant time has been found to be doubtful and the medical evidence coupled with recovery has also been belied by the ocular account furnished by the complainant party. Thus, I am of the considered view that the prosecution has failed to bring establish the guilt against the present appellants beyond any reasonable doubt and it is well settled principle of law that for creating shadow of doubt, it is not necessary that there should be many circumstances. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is to be extended in favour of the accused not as a matter of grace or concession, but as the matter of right. The reliance in that context is placed on the case of **Muhammad Masha v. The State** (**2018 SCMR-772**), wherein the Hon'ble Supreme Court of Pakistan has held that:

> **4.--- Needles to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim,"it is better that ten guilt persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State(1995 SCMR-1345), Ghulam Qadir and 2 others v. The State(2008 SCMR-1221), Muhammad Akram v. The State(2009 SCMR-230) and Muhammad Zaman v. The State(2014 SCMR-749).**

28. In this case, the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding the appellants guilty of the offence.

Consequently, the instant appeal is allowed. The conviction and sentences awarded to the present appellants are set-aside and they are acquitted of the charge by extending them benefit of doubt. The appellants shall be released forthwith if they are no more required in any other custody case.

**J U D G E**