JUDGMENT SHEET.
IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT.
Conf.Case No.06/2006
Cr.Appeal No.D-148/2006

Present:
Mr. Justice Syed Mahmood Alam Rizvi.
Mr. Justice Maqbool Ahmed Awan.

For Regular Hearing.

Umar s/o Abdullah Panhwar……..……..Appellant.

Versus.

The State ……..…Respondent.

Date of hearing: **25. 03.2009**

Date of Judgment:

Appellant **Through Mr. Noorul Haq Qureshi, Advocate.**

Respondent: **Through Mr. Mumtaz Alam Leghari, Assistant A.G.**

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J U D G M E N T

MAQBOOL AHMED AWAN, J- **The appeal is directed against the judgment dated 9.8.2006 passed by learned IInd Additional Sessions Judge, Badin whereby the appellant was convicted and sentenced to death U/s 302(B) PPC. He was also ordered to pay fine of Rs.200,000/-, out of which if realized, an amount of Rs.1,50,000/- be paid to the legal heirs of deceased in equal shares as compensation. In case of default, the appellant, to suffer R.I for 02 years. The learned trial Court has also made reference U/s 374 Cr.P.C.**

The case against appellant is based on FIR for offence Under Section 302/34 PPC of Police Station Matli, lodged by

complainant Nazar Muhammad Shaikh on 6.6.1995, stating therein that he resides with his family in village Saeedpur Taluka Matli and his land is situated in Deh Doomani; that on the day of occurrence, he alongwith his son Ghulam Shah and Abbas Shah came on their lands. The lands of present appellant and co-accused Ahmed are also situated adjacent to the lands of complainant party and there was dispute between the parties over the land; That on the fateful day at about 4-00 p.m, when the complainant party were working in their lands, Ghulam Shah and Ahsan Shah had gone to the Otaq of Muhammad Wadho for drinking water, where accused Umar armed with gun alongwith co-accused Ahmed came; The complainant suspected their presence and proceeded towards Otaq when he was near to the Otaq, he witnessed Wadhal Shah and Mehmood were also present there. At about 4-30 p.m, appellant Muhammad Umar fired from his gun at Ghulam Shah and also made another fire upon Ahsan Shah, both on receipt of injuries fell down; that co-accused Ahmed Shah abused and issued threats to the complainant party on the point of pistol; hence due to fear of weapons, the complainant party did not go near to them. Thereafter, accused went away towards their house. Complainant found Ghulam Shah and Ahsan Shah succumbed to their injuries at the spot. Thereafter, leaving Mehmood and Wadhat Shah over the dead bodies, he came at Police Station and lodged the FIR as stated above.

The learned trial Court on 5.7.1997 framed the charge against the appellant and co-accused Ahmed (both brothers), the accused pleaded not guilty and claimed to be tried.

The prosecution in support of their case, examined PW-1 Medical Officer Dr. Ghazi Amanullah who produced the Post Mortem Report of deceased Ghulam Shah and of deceased Ahsan Shah, PW-2/Complainant Nazar Muhammad Shah who produced FIR, PW-3 Mehmood who produced his 164 Cr.P.C statement, PW-4 Wadhal Shah who produced his 164 Cr.P.C statement, PW-5/Mashir Nawaz Ali Shah

who produced the mashirnama of place of wardat, Inquest report of deceased Ghulam Shah and Ahsan Shah, mashirnama of arrest of accused Umar, mashirnama of recovery of gun from accused Umar, mashirnama of arrest of accused Ahmed, PW-6 Tapedar Sain Bakhsh who produced the site sketch and PW-7 ASI Dost Muhammad, the author of FIR and well conversant with the signature of deceased I.O Dato Khan Soho.

The appellant Umar who was examined U/s 342 Cr.P.C, denied the allegation of murder and stated that he had been falsely implicated in the case. He also stated that PWs were related to the complainant and deceased, therefore, they deposed against him at the instance of the complainant. In reply to the question "Why the PWs have deposed against you", he replied that he is a crippled and disabled person and even at the time of arrest was lying on the cot in his house. He also stated that in the year 1993 he was attacked by the sons of complainant namely Ameer Shah and Shafi Muhammad Shah with hatchets and both were convicted on the report lodged by him. He produced the certified true copy of the judgment dated 28.9.1999 passed by the Ist Additional Sessions Judge, Badin. He also produced the certified true copies of the challan, FIR and another judgment dated 8.12.1982 passed by the Sessions Judge, Badin in respect of injuries and conviction of accused Anwar Shah and Ghulam Shah mainly to prove the enmity with the complainant party who falsely implicated him in the case in hand. He also stated that PW Wadhal and Mehmood were not the independent witnesses and were the best friends of the complainant, therefore, deposed against him. So far the recovery of gun was concerned, he stated that the same was licensed gun and in order to strengthen the case, has been foisted upon him just to corroborate the case of the prosecution. The appellant neither examined himself on Oath in terms of Section 340(2) Cr.P.C nor led any evidence in defence.

The prosecution in order to establish their case against the appellant recorded the evidence of the following witnesses:-

PW-1 Dr. Ghazi Amanullah. He has deposed that on 6.6.1995 he was posted as Medical legal Officer at Taluka Hospital Matli. On the same date he received the dead bodies of deceased Sayed Ghulam Shah and Ahsan Ali Shah for Post Mortem Examination and certificate through P.C Muhammad Ismail. First of all, he conducted post mortem of deceased Syed Ghulam Shah at 8-00 p.m and finished the same at 12-00 p.m. and gave his opinion that cause of death was due to fire arm injury. Then he started post mortem of the deceased Ahsan Ali Shah at about 12-00 p.m and found one fire arm gun injury. He completed the post mortem of the deceased Ahsan Ali Shah at about 3-40 a.m on the next date.

PW-2/Complainant Nazar Muhammad. According to him at the time of the incident at about 4-00 he was available in his land alongwith other PWs Mehmood Wadho and Wadhal Shah when accused Ahmed and appellant Umar gave hakals not to come near. Accused Umar was armed with pistol and accused Ahmed with DBBL gun. Accused Umer made gun fire upon Ghulam Shah who fell down and accused Umar also made another fire upon Ahsan Shah. Accused Ahmed also caused pistol fire injury to Ahsan Shah, as such both the accused made pistol as well as gun fires upon Ghulam Shah and Ahsan Shah, respectively and ran away. The injured Ghulam Shah before his death, told the complainant that accused Umar had caused him injuries. He then left the above named PWs over the dead bodies and went to P.S for lodging report.

PW-3 Mehmood disclosed the same facts as narrated above while stating that at about 4-00 or 4-30 p.m, the deceased Ghulam Shah, Ahsan Shah and PW Wadhal Shah had come to his otaq for drinking water. The PW Wadhal Shah was sitting on one cot whereas the deceased Ghulam Shah and Ahsan Shah on other cot.

Meanwhile, accused Umar and Ahmed entered in his otaq and accused Umar issued hakal to the deceased that he has come to take revenge of his injuries caused by the deceased to him. Accused Umar was armed with DBBL gun while co-accused Ahmed was armed with pistol. Accused Umar had made gun fire which hit to the deceased Ghulam Shah and also made another fire which hit to the deceased Ahsan Shah. The deceased Ahsan Shah tried to run away but at little distance in the Waranda of the otaq, he fell down. Meanwhile, the complainant Nazar Hussain came there and gave hakal to both accused not to repeat the fire, thereafter, both the accused ran away. He was examined 6/7 days after the incident U/s 161 and 164 Cr.P.C.

PW-4 Wadhal Shah deposed that the complainant was his uncle. Deceased Ahsan Shah was also his uncle whereas deceased Ghulam Shah was his "Masat". His evidence is that at the time of incident he was working in the land of the complainant and thereafter, he went to the otaq of Mehmood Wadho for drinking water. Before his arrival PW Mehmood Wadho, the deceased Ghulam Shah and Ahsan Shah were already sitting in the otaq, meanwhile, accused Umar armed with gun and co-accused Ahmed arrived there. Accused Umar made fires from his gun upon the deceased Ghulam Shah. The deceased Ahsan Shah tried to run away when he was sitting on the cot, to whom accused Umar also caused gun fire. The co-accused Ahmed also took out the pistol and threatened the complainant not to come near to him. Thereafter, both the accused went away. The complainant made them to sit over the dead bodies and himself went to P.S for report.

PW-5 Nawaz Ali Shah acted as mashir of wardat, injuries on the person of deceased and inquest report, arrest of accused Umer, recovery of gun, arrest of co-accused Ahmed. The co-mashir was Bakhshal Shah. He also disclosed in his deposition about the injuries sustained by both the deceased. He deposed that I.O secured two empty cartridges and blood stained earth from the wardat.

PW-6 Sain Bux, Tapedar of Matli Tapo. He deposed that he prepared the sketch of place of wardat accompanying with PC Mir Muhammad and inspected the wardat on 9.9.2003. He has indicated the directions of place of wardat in the sketch which he has produced in the Court.

PW-7 Dost Muhammad has only been examined on behalf of SHO Dato Khan being well conversant with his signature and handwriting as the said SHO expired during the trial of this case.

On 27.3.2007, the prosecution submitted the report of Chemical Examiner dated 1.8.1996, Ballistic Report dated. 30.3.1996.

The learned counsel appearing on behalf of the appellant argued that the case of the prosecution was doubtful and the evidence of eye witnesses was not inspiring confidence. The evidence of witnesses was neither consistent nor corroborated by the medical evidence. He argued that on the basis of same evidence, the co-accused Ahmed had been acquitted. According to him, it is well settled principle of law that appellant was also entitled for the same benefit under the rule of consistency. He also argued that in view of the dictum laid down by the Honourable Apex Court in the case of ASHIQ HUSSAIN alias MUHAMMAD ASHRAF Vs THE STATE, reported in PLD 1994 SC 879, that when slight possible doubt creates in the case of prosecution, the statement of accused U/s 342 Cr.P.C shall be believed in totality. He also relied upon the case of AKHTAR ALI and others Vs THE STATE, reported in 2008 SCMR 6.

On the other hand, Mr. Mumtaz Alam Leghari, Assistant A.G argued that prosecution has established the case against the appellant and the contradictions pointed out by the learned counsel for the appellant are minor in nature which can not brush aside the case of the prosecution. He therefore, supported the judgment of the learned trial Court.

We have heard the learned counsel for the respective parties and perused the material available on record with their kind assistance.

It is, well settled law that even a slightest possible doubt is created in the case of prosecution, that must go in favour of the accused. It is, also well settled that when the prosecution failed to establish the case against the accused, then for dispensation of justice, the statement of accused recorded u/s 342 Cr.P.C is to be looked into and to be believed in totality as observed by the Honourable Apex Court in the case of Ashiq Hussain alias Muhammad Ashraf (Supra). The case of the prosecution was full of contradictions on various points particularly the manner in which the incident witnessed by the PWs.

No doubt, the complainant on account of admitted enmity made improvements in the case with malafide intention and ulterior motive and also implicated co-accused Ahmed and in his evidence deposed that accused Umer was armed with pistol whereas accused Ahmed had armed with DBBL. The accused Umer made gun fire upon Ghulam Shah who fell down and accused Umer also made another fire upon Ahsan Shah. The accused Ahmed also caused pistol fire injury to Ahsan Shah. He also contradicted the FIR in which he has stated that accused Ahmed was armed with pistol but did not make any fire upon the deceased. He further contradicted the FIR by deposing in his evidence that accused Ahmed was armed with DBBL while in FIR he stated that the accused Ahmed was armed with pistol. The PW-Mehmood had deposed that at the time of the incident, the deceased Ahsan Shah, Ghulam Shah and PW Wadhal Shah were sitting with him in his Otak. The PW-Nazar Mohammad had deposed that it was about 4-00 p.m he was available in his land and the other PWs Mehmood Wadho, Wadhal Shah were already available in his land. Accused gave him hakal not to come near them as well as accused Umer. He further deposed that Wadhal Shah was working in his land at the time of

incident. The PW-Wadhal Shah had deposed that at the time of incident he was working in the land of complainant Nazar Shah and thereafter he went to the otaq of Mehmood Wadho for drinking water, before his arrival at the Otaq PW Mehmood Wadho, Ghulam Shah, Ahsan Shah were already available in the Otaq. While in fact the PW Mehmood has not shown the presence of the complainant Nazar Shah while the complainant had deposed that since they were present at their land accused came and give him hakal that do not come near to them and accused Umer fired upon the deceased with pistol.

The PW-Nazar Shah had deposed that accused Umar was armed with Pistol, whereas accused Ahmed had armed with DBBL gun. The PW-8 Mehmood Wadho had deposed that accused Umer was armed with DBBL gun while co-accused Ahmed was armed with Pistol. Infact both the PWs Nazar Shah and Mehmood Wadho were contradicting to each other over the crime weapon.

The PW-Mehmood had deposed that accused Umer had given hakal to the deceased that he had come to take revenge from them of his injuries caused by them to him. The PW-Wadhal Shah had deposed that meanwhile, accused Umer armed with gun and co-accused armed arrived there, the accused Umer made fires from his gun upon the deceased Ghulam Shah and Ahsan Shah. While infact Complainant and PW Wadhal Shah are silent about the Hakal that accused Umer gave Hakal and then fired upon the deceased.

The PW-Mehmood Wadho had deposed that at the time of incident, the deceased Ahsan Shah, Ghulam Shah and the PW Wadhal Shah were sitting with him in his Otaq. The PW-Wadhal Shah had deposed that before his arrival at the Otaq, the PW Mehmood Wadho and the deceased Ghulam Shah and Ahsan Shah were available in the Otaq, meanwhile, accused Umer armed with gun and co-accused Ahmed arrived there. While both the above eye witnesses have not shown the presence of complainant at the time of incident.

The PW-Nazar Shah had deposed that the PW Mehmood gone to village where he brought water in the pot. The PW-Wadhal Shah had deposed that he had come to the Otaq only at the time when the water was brought by the PW Mehmood in the Jug. It shows that both are conflicting to each other that the water was brought in Jug or in Dila.

Further more, the enmity between the parties was available on record. It also appears from the evidence that there has been exaggeration made by the complainant and the eye witnesses in their evidence. It has also come in evidence that other persons were also available at the place of wardat but they were not made as witness by the police and only interested witnesses were taken as witnesses. The learned trial Court had committed illegality while acquitting co-accused Ahmed on the basis of same evidence, but convicted the present appellant. Therefore, on the ground of rule of consistency the present appellant is also entitled for same treatment. Under these circumstances, we find that case of prosecution is suffering from the latches.

As stated earlier, the prosecution case is full of glaring defects, legal infirmities and material irregularities. A very weak motive set up by the prosecution during the trial but could not be proved and the co-accused allegedly involved with the appellant had been acquitted. The prosecution did not discharge its basic duty to prove its case beyond reasonable doubt but the trial Court misdirected itself while reaching the conclusion that the prosecution story stands proved against the appellant. The impugned judgment is vague, arbitrary and fanciful. It has not been recorded after a careful and proper consideration of the attendant relevant facts and circumstances, therefore, has to be reversed. In the similar circumstances, in the case of AKHTAR ALI and others (Supra), the Honourable Apex Court had not

believed the evidence of such nature and extended the benefit of doubt to the accused.

From the above detailed discussion, we are of the view that prosecution has miserably failed to bring charge home to the appellant beyond any reasonable doubt, therefore the benefit of slightest doubt must be extended to the accused without any reservation. The reliance is placed upon the case reported in 2005 YLR 2279. It is well settled doctrine of criminal jurisprudence that to give benefit of doubt to an accused is much more than a mere rule of law. It is the rule of "prudence" which no man ought to and no judge, acting in accordance with the provisions of Evidence Act, can ignore and this rule was vigorously enforced by Islam. It is one of the foundations of all good and civilized societies. The reliance is placed upon the case reported in PLD 199 Lah. 56. We also observe that learned trial Court had failed to extend the benefit of doubt in favour of the appellant when on the basis of same evidence, the same was given to co-accused Ahmed.

From the above detailed discussions, we have come to the conclusion that prosecution has miserably failed to prove their case beyond any reasonable shadow of doubt, therefore, we allow this appeal and set aside the impugned Judgment dated 9.8.2006 passed by learned lind Additional Sessions Judge, Badin.

The above are the reasons of our short order dated 25.3.2009.

Judge

Judge

Tufail