

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

Criminal Appeal No. D- 88 of 2016.

Confirmation Case No.17 of 2016.

Criminal Jail Appeal No.S-160 of 2016.

Present:

**Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Khadim Hussain Tunio.**

Appellants : A shique Ali and Amir Bux,
through Mr. Omparkash H. Karmani,
Advocate.

Appellant : Mehboob Ali, through Syed Shahzad Ali Shah,
Advocate for pauper appellant.

Respondent : The State, through Mr. Nazar Muhammad
Memon, Additional Prosecutor General
Sindh.

Date of Hearing : **09.04.2020.**

Date of Decision : **09.04.2020.**

JUDGMENT

Khadim Hussain Tunio, J.- By this common judgment, we intend to dispose of the above captioned Criminal Appeal No.D-88 of 2016 filed by appellants Ashique Ali and Amir Bux and Criminal Jail Appeal No.S-160 of 2016 filed by appellant Mehboob Ali against the judgment dated 11.08.2016, passed by learned Sessions Judge, Badin in Sessions Case No.02 of 2014 (Re: the State v. Ashique Ali & Others) arising out of Crime No.39 of 2013 for offences under Sections 302, 114 and 34, PPC, registered at Police Station, Khoski, whereby he convicted appellants Ashique Ali and Amir Bux under Section 302(b) PPC and sentenced them to death and to pay compensation of Rs.300,000/- each to the legal heirs of deceased Muhammad Hassan in terms of Section 544-A Cr.P.C., while appellant Mehboob Ali was convicted under Section 302(b) PPC and sentenced to suffer imprisonment for life and to pay compensation of Rs.300,000/- to the legal heirs of deceased Muhammad Hassan as provided under Section 544-A, Cr.P.C. Appellant

Mehboob Ali was juvenile at the time of commission of the offence, therefore, he was not awarded capital punishment in terms of Section 12 of the Juvenile Justice System Ordinance, 2000. However, he was extended benefit of Section 382-B, Cr.P.C. The learned trial Court has made reference for confirmation of the death sentences of appellants Ashique Ali and Amir Bux.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that on 24.11.2014 at 1550 hours, complainant Haji Mallah lodged F.I.R. at P.S Khoski, alleging therein that his brother Muhammad Hassan used to cultivate the agricultural land of Major Jaffar on *harap* and was residing there with his family members. On 23.11.2013, he along-with his brother Ghulam Mustafa were present in the house where his brother Muhammad Hassan came to them and told them that kamdar Amir Bux Noherio used to come with his sons (Muhammad Hassan) in his house and he was not a good man and if he restrains him, his sons get annoyed with him. He requested them to get him shifted from there. It is also alleged that complainant along-with his brother Muhammad Hassan came at his house at 7:30 p.m, where kamdar Amir Bux Noherio was sitting on a cot with the sons of Muhammad Hassan, who was armed with iron rod. Muhammad Hassan exclaimed that he has restrained him from coming into his house many times, even then he does not refrain. As Muhammad Hassan finished, accused Amir Bux caused iron rod blow to him on his head and he further asked to the nephews of complainant that he was fighting with him and still they were just seeing. Thereafter, the nephews of complainant caused lathi and hatchet blows to Muhammad Hassan and gave hakkal to complainant not to come near and to go away, then all the three accused persons caused hatchet blows to deceased Muhammad Hassan, who died and thereafter the accused persons went away. The complainant immediately informed his brothers Ghulam Mustafa and Ghulam Hussain on phone, who came, whom he disclosed the above facts. Thereafter, complainant informed the police on phone and police came there, then they brought the dead body of deceased Muhammad Hassan to the hospital, wherefrom the postmortem of

deceased was conducted and then after burial of dead body, complainant appeared at P.S and lodged F.I.R. against above named accused persons.

3. After registration of the case, I.O conducted usual investigation and during course of investigation, he arrested the accused persons, made recovery of hatchet used in the commission of offence from accused Ashique Ali and got his 164 Cr.P.C statement recorded from the Court of learned Magistrate and statements of inmates of the house, namely Mst. Sami and Mst. Noor Nisa were also recorded under Section 164 Cr.P.C. After completing the investigation, I.O. submitted challan against the accused persons while releasing appellant/accused Amir Bux under Section 497 Cr.P.C. Later on, accused Amir Bux was joined as accused in the case on the application of complainant by the learned trial Court vide order dated 18.04.2014.

4. After providing necessary documents as required under Section 265(C) Cr.P.C, accused Mehboob Ali was referred to Medical Board for determination of his age. The Medical Board opined that his age is about 14 to 15 years, therefore, his case was bifurcated by the learned trial Court as required by the provision of Section 5 of the Juvenile Justice System Ordinance, 2000 and assigned separate number vide order dated 23.09.2014. Thereafter, a formal charge was framed against them, to which they pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge against the appellants, learned trial Court examined PW-1 Haji at Ex.09. He produced F.I.R. at Ex.9/A, PW-2 Ghulam Hussain at Ex.10, who produced receipt of dead body at EX.10/A, PW-3 Muhammad Ibrahim at Ex.13, who produced police letter at Ex.13/A, dead body inspecting form at Ex.13/B, postmortem examination report at Ex.13/C, receipts at Ex.13/D and 13/E respectively, PW-4 Tapedar Zulfiqar Ali at Ex.14, who produced the sketch in quadruplicate at Ex.14/A to 14/D respectively, PW-5 PC Ghulam Mustafa at Ex.17, PW-6 mashir Allahdino at Ex.18, who produced memo of place of incident and dead body, memo of clothes of deceased, memo of arrest of accused Ashique Ali and Mehboob Ali, memo of arrest of accused Amir Bux

at Ex.18/A to 18/E respectively, PW-7 SIP Muhammad Essa Nizamani at Ex.19, who produced Danishitnama, letter issued to Mukhtiarkar, reports of chemical examiner, confessional statement of accused Ashique Ali, departure and arrival entries of investigation at Ex.19/A to 19/J respectively, PW-8 Muhammad Tahir Civil Judge and Judicial Magistrate at Ex.21, who produced police letters, statements of Mst. Noornissa and Mst. Sami at Ex.21/A to 21/D respectively and PW-9 SHO Haq Nawaz at Ex.22. Thereafter prosecution side was closed vide statement at Ex.24.

6. Statements of the accused under Section 342 Cr.P.C. were recorded at Ex.25 and 26 respectively, in which, they denied all the allegations leveled against them by the prosecution and pleaded their innocence. However, neither they examined themselves on oath in terms of Section 340(2) Cr.P.C, nor adduced any evidence in their defence.

7. After hearing the learned Counsel for the respective parties, learned trial Court convicted and sentenced the appellants as stated in paragraph-I (supra).

8. Learned Counsel for the appellants has contended that the learned trial Court has failed to consider the material aspects of the case while passing the impugned judgments; that the appellants were malafidely roped in the above case to extort money from them on account of family dispute; that the prosecution has failed to record the statement of the owner of Otaq from where both the accused were arrested; that there are material contradictions in the evidence of P.Ws and documentary evidence and the F.I.R; that the learned trial Court discarded the statements of witnesses recorded under Section 164 Cr.P.C; that the learned trial Court did not consider the fact that the Investigating Officer found accused Amir Bux innocent; that nothing was recovered from the exclusive possession of the accused; that the learned trial Court failed to give the appellants benefit of doubt; that the prosecution has improved its case at the trial through the statements of the PWs, which is not permissible under the law; that the impugned judgments are the result of misreading and non-reading of the evidence available on record; that the prosecution has failed to establish the

guilt of the accused as the prosecution evidence is full of contradictions and the impugned judgments are not sustainable under the law; that the impugned judgments are against the law, facts of the case, principles of criminal justice and material available on the record.

9. Conversely, learned Additional Prosecutor General for the State has vehemently opposed the acquittal of the appellants while supporting the impugned judgments.

10. The evidence of the prosecution witnesses finds an elaborate mention in the judgments of the trial Court, therefore, the same may not be reproduced hereunder for the sake of brevity and to avoid repetition.

11. We have heard the learned Counsel for the appellants and learned Additional Prosecutor General, Sindh and have perused the material available on the record.

12. After perusal of the record, several facts have surfaced. The prosecution has alleged that appellants Ashique Ali, Amir Bux and Mehboob Ali, with their respective weapons, caused iron rod, lathi and hatchet blows to deceased Muhammad Hassan. A point needing consideration is that appellant Amir Bux was let off by the police during investigation and was found innocent since nothing was recovered from his possession and not an iota of evidence was found by the police against him, hence, he was later rejoined as an accused through an application filed by the complainant party. The prosecution case hinges upon the depositions of the sole eye-witness of the case, who is the complainant. However, the conduct of the complainant is to be adjudged at the touch stone of Article 129 of the Qanun-e-Shahadat Order, 1984, which is reproduced below:-

"129. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

13. The complainant, though claimed to have witnessed the incident, has failed to make us understand the circumstances which

prevented him from rescuing his brother from the hands of the accused. We are not prepared to believe that he remained calm because the accused were armed with iron rod, lathi and hatchet. Nor is it the case of prosecution that he used to visit the deceased on a daily basis. In absence of such evidence and per the complainant's depositions, it is established that he was a chance witness. A chance witness, in legal parlance is the one who claims that he was present at the crime scene at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of a chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt. Nothing has been brought on record by the prosecution to suggest that it was daily routine for the complainant to be present along-with his brother at his residence. The complainant has deposed in his examination-in-chief that "*Thereafter, I accompanied my brother Muhammad Hassan deceased to his house where we saw that Amir Bux was already sitting on cot in his house.*" It is also nowhere deposed by him that he or his brother, the deceased, had any prior knowledge of the presence of the accused and his brother had merely come to inform him about his house being shifted due to accused Amir Bux. Therefore, there appears to be no reason for the complainant to have accompanied his brother back to his house and has therefore not been able to justify his presence at the place of incident. Reliance in this respect is placed on the case of "*Sughra Begum v. Qaisar Pervaiz*" (2015 SCMR 1142). In a more recent case reported as "*Mst. Mir Zalai v. Ghazi Khan and others*" (2020 SCMR 319), the Hon'ble Apex Court regarding veracity of chance witnesses has observed that:-

"2. The circumstances in which the FIR had been lodged in this case were quite suspicious and the eye-witnesses produced by the prosecution before the trial court were admittedly chance witnesses who had failed to establish the stated reason for their presence with the deceased at the relevant time. In these circumstances the High Court had concluded that the eye-witnesses produced by the prosecution were not reliable and in all likelihood they had not witnessed the murder in issue. In the above mentioned peculiar circumstances of this case we have not been able to take any legitimate exception to the said conclusion reached by the High Court. This appeal is, therefore, dismissed. The bail bonds and sureties of respondents Nos. 1 and 2 shall stand discharged."

14. As far as the retracted confession of accused Ashique Ali is concerned, the same has already been disbelieved by the learned trial Court. The learned Magistrate has failed to take reasonable care and caution while recording the confessional statement of the accused. It is a matter of record that the learned Magistrate has not written the Certificate in his handwriting as prescribed by Section 364 Cr.P.C nor has he shown the reasons thereof. At this juncture, our mind has build-up by the dictum laid down by the august Supreme Court in the case of SAJJAD ALI and 3 others v. The STATE (PLD 2005 Karachi 213). Moreso, the learned Magistrate has not put the series of questions as prescribed by the law and it is not even specifically mentioned in the confessional statement that through whom appellant Ashique Ali, after recording of his confessional statement, was remanded to judicial custody. In this respect, reliance may respectfully be placed upon the case of LIAQUAT BAHADUR etc. v. The STATE reported as PLD 1987 FSC 43. Keeping in view the dictum of the Superior Court, we have observed that the confessional statement of appellant Ashique Ali is patently illegal. The careless dispensation would considerably diminish the voluntariness of the confession, therefore, the confession of appellant has no legal sanctity and has been excluded from consideration by the learned trial Court. In this respect, reliance can be placed upon the case of AZEEM KHAN & another v. MUJAHID KHAN & another (2016 SCMR 274).

15. In our considered view, the confession of the appellant Ashique Ali for the above reasons is of no legal worth, to be relied upon and

is excluded from consideration more particularly when it was retracted at the trial. Confession of this nature, which was retracted by the appellant, cannot mutually corroborate each other on the principle that one tainted piece of evidence cannot corroborate the other tainted piece of evidence. Similar view was taken by this Court in the case of MUHAMMAD BAKHSH v. The State (PLD 1956 SC 420), while in the case of KHUDA BUX v. The CROWN (1969 SCMR 390) the confession was made which was held being not voluntary because the accused in that case was remanded back to the police after making confession.

16. Coming to the recovery of the crime weapon, one hatchet was recovered from an open place which could easily be accessed by anyone. Nothing was recovered from the exclusive possession of any of the appellants, which may connect them with the alleged offence. The alleged hatchet was recovered from the thorny hedges of accused Ashique Ali's house on 08.12.2013 on his pointation and the same was sent to the Chemical Examiner on 11.12.2013. Per depositions of SIP Muhammad Essa in his cross-examination, he voluntarily admitted that the rubber around the hatchet's handle was mentioned to be red, whereas the one presented before Court had a black rubber. Such specific and clear contradiction has come on record, which is fatal to the prosecution case and it can safely be assumed that the weapon present in Court in fact is not the same, nor was it ever used in the commission of the offence. Not only that, it can also be assumed that the same may have been foisted upon the accused to strengthen the case of the prosecution. Moreover, the prosecution has miserably failed to establish the safe custody of the crime weapon i.e. blood-stained hatchet, which was sent to the Chemical Examiner after the delay of three days. The prosecution has failed to produce entry from the extract of property register in order to show whether the said property was kept in safe custody in the Malkhana or otherwise, therefore, the recovery of the said weapon has become doubtful. Besides that, no other crime weapons were recovered.

17. Furthermore, it is alleged by the prosecution that the appellants became angry and under such fit and displeasure, the accused

Amir Bux attacked upon the deceased and was joined by the sons of the deceased. However, we find it surprising that the appellants did not harm the complainant, who was also present alongside the deceased at the place of the incident or even tried to attack him nor did he show any signs of fear of being attacked by the hands of accused in his depositions, which also casts doubt in the prosecution case. We have also found that the incident has not taken place in a manner as stated by the prosecution. There are strong circumstances in the prosecution case which expose reasonable doubt and led us to hold that the prosecution has not proved its case against the appellants for the offences charged beyond a reasonable doubt keeping the assertion of the FIR in juxtaposition of the evidence adduced by the prosecution. Undoubtedly, there was no settled enmity between the parties, but two different motives have come on record. It is also surprising that although the statements under Section 164 Cr.P.C. of the wife and daughter of the deceased were recorded, they were given-up at the trial by the prosecution. Here, it can safely be assumed that if these two witnesses would have been examined, they could not have supported the case of the prosecution, therefore, the prosecution preferred to keep them away from the witness box, which creates further doubt in the prosecution story.

18. As far as the motive behind the alleged incident is concerned, the prosecution has miserably failed to establish the motive. According to the prosecution case, the complainant party had remained annoyed with accused Amir Bux for his frequent visits at the house of deceased and his meeting with the sons of deceased, due to which the complainant party had asked the accused to stop visiting deceased's house several times. Following the annoyance, on the incidental day, the accused Amir Bux attacked upon the deceased along-with sons of the deceased when he was asked to leave. A second version to this story was presented by accused Ashique Ali through his confessional statement. Although the same was retracted later on, it presents very contradictory version to that present in the F.I.R and furnishes different motive as well. Per confessional statement of the accused, he was informed by his brother that their father, the deceased, was attempting to commit rape of his own daughter, i.e. the sister of the accused

and upon running back he witnessed his father forcefully undressing his sister and due to such anger and annoyance, the accused caused hatchet blows to the deceased and ditched the hatchet in the thorny hedge. After examination of the material available for establishment of motive, we are of the view that the prosecution has failed to establish a unanimous motive of the incident as the evidence of the witnesses is not in the same line to this respect and the contradictory picture has also come into the picture, as such, the motive in the instant case is uncertain and is not specific. The motive is an essential piece of evidence, which always provides support to the prosecution case as to the involvement of the accused in the offence alleged to have been made against him. The motive alleged against the appellants so far has not been clearly narrated through the evidence of independent witnesses so as to corroborate the testimony of eye-witness. In this respect, we are fortified by the decision made in the case of SAFDAR ABBAS & others v. The STATE & others (2020 SCMR 219), wherein the Hon'ble Apex Court has held as under:-

"Motive cited in the crime report is non-specific; investigative conclusions were inconsistent with the case set up by the complainant. Recoveries are inconsequential. Prosecution evidence, substantially found flawed, it would be unsafe to maintain the conviction without potential risk of error. Criminal Petition No.955-L/2016 is converted into appeal and allowed, impugned judgment is set aside, the petitioners/appellants shall be released forthwith, if not required to be detained in any other case."

19. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defences as he likes to the allegations against him as the onus rests upon the prosecution to prove its case beyond a reasonable doubt as was held in the case of MUHAMMAD SHAH v. The STATE (2010 SCMR 1009) and if there is any doubt in the prosecution case, the benefit must go to the accused. As was held in the case of TARIQ PERVEZ v. The STATE (1995 SCMR 1345) that if there is a single circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused

will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Such principle was recently reiterated by the Supreme court in the cases of MUHAMMAD AZHAR HUSSAIN and another v. The State and another (PLD 2019 SC 595), ABDUL JABBAR v. The State (2019 SCMR 129) and ABDUL HAQ and others v. The State (2020 SCMR 116).

20. For what has been discussed above, we are of the humble view that the prosecution has miserably failed to prove its case against the appellants beyond reasonable shadow of doubt. Consequently, by our short order dated 09.04.2020 instant appeals were allowed and impugned judgments dated 11.08.2016 were set aside. The death reference was also answered in negative and appellants were acquitted of the charge and were ordered to be released forthwith if not required in any other custody case. These are the reasons for the said short order.

JUDGE

JUDGE

Shahid