IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-Ul-Karim Memon

1. Cr. Appeal No.S- 281 of 2019

Khalil-ur-Rehman alias Bholoo

Versus

The State

---

2. Cr. Acquittal Appeal No.D- 117 of 2019

Sher Muhammad Jogi

Versus

Liaquat Ali and others

Khalil-ur-Rehman : Appellant in Cr. Appeal No.S- 281 of 2019	Through Mr. Javaid Ahmed Chhatari, Advocate
Sher Muhammad Jogi : Appellant in Cr. Acquittal Appeal No.D- 117 of 2019 and complainant in Cr. Appeal No.S-281 of 2019	Through Mr. Muhammad Hashim Laghari, Advocate
State	Through Ms. Rameshan Oad, A.P.G. Sindh
Dates of hearing	26.08.2020, 02.09.2020, 08.09.2020 and 24.09.2020
Date of judgment	24.09.2020

JUDGMENT

ABDUL MAALIK GADDI.- By this common judgment, we intend to dispose of the aforementioned criminal appeal and criminal acquittal appeal filed by the parties, respectively, as they arise out as a result of same F.I.R and involve common question of law and facts as well as the same judgment passed by the learned Additional Sessions Judge-I / Model Criminal Trial Court, Mirpurkhas on 24.09.2019.

2. The facts and prayers as made by the appellants in the said acquittal as well as the criminal appeal are that:-

i. Through Cr. Appeal No.S-281 of 2019, appellant Khalil-ur-Rehman alias Bholoo has assailed the legality and propriety of the judgment dated 24.09.2019, passed by the learned Additional Sessions Judge-I / Model Criminal Trial Court, Mirpurkhas in Sessions Case No.108 of 2016 (Crime No.56 of 2012, registered at Police Station Tando Allahyar, under sections 302, 324, 34 PPC), whereby the learned trial Court after full-fledged trial, convicted the appellant and sentenced him under section 302(b) PPC to undergo life imprisonment as Ta'zir and to pay Rs.5,00,000/- (Rupees five lac only) as compensation to the legal heirs of deceased Ali Muhammad under section 544(a) Cr.P.C. and in default thereof he shall suffer S.I for one (01) year more.

ii. Through Cr. Acquittal Appeal No.D- 117/2019, appellant / complainant Sher Muhammad Jogi has assailed the legality and propriety of the judgment dated 24.09.2019, passed by the learned Additional Sessions Judge-I / Model Criminal Trial Court, Mirpurkhas in Sessions Case No.108 of 2016 (Crime No.56 of 2012, registered at Police Station Tando Allahyar, under sections 302, 324, 34 PPC) whereby the learned Trial Court after full dressed trial, acquitted the private respondents (Liaquat Ali and others) by giving them benefit of doubt; and, prayed that private respondents may be convicted.

3. The facts of the prosecution case as stated in the F.I.Rs are as under:-

> " The brief facts of the prosecution case as per FIR lodged by the complainant Sher Muhammad Jogi at Police Station Tando Allah Yar on 29-3-2012 at 1700 hours are that he and his brother Ali Muhammad Jogi run business of "kabari material". Muhammad Zareef Rajput is their friend, who has dispute over the plot with one Liaquat Ali Khilji. On 28-3-2012, he and his brother Ali Muhammad Jogi, after finishing their work parked their rickshaw at pump and were going to their house by foot and when they reached in the street of Kashmiri Colony near the house of Tasleem Khanzada at about 2-00 P.M, they saw accused Khalil-ur-Rehman alias Bholoo having Kalashnikov in his hand, Arsalan having pistol in his hand, Liaquat Ali having repeater in his hand and Imran having T.T pistol in his hand, who on seeing them gave hakals that today they will not spare them because they are the party of Muhammad Zareef Rajput and saying so, accused Khalil-ur-Rehman alias Bholoo with his Kalashnikov made straight fire on his brother Ali Muhammad Jogi, which hit on his head, who raised cries and fell down on the ground and he (complainant) while laying on the ground saved his life. Thereafter all accused persons started straight firing. Meanwhile Khuddan son of Sher Muhammad Bhatti and Mehboob Samoon came there and gave hakals and then on seeing them the accused persons while abusing and making firing in the air went away towards Nasar Pur road Sabzi Mandi. Thereafter he, Khuddan Bhatti and Mehboob Samoon saw Ali Muhammad Jogi, who was injured and blood was oozing form his injuries and then they arranged the vehicle and shifted the injured to Civil Hospital Tando Allah Yar, where police was already available at the hospital, where police gave letter to M.O for treatment of his brother and then M.O after providing first aid referred his injured brother to Civil Hospital Hyderabad, where they reached at about 4-00 P.M, where Doctor after checking informed them that Ali Muhammad has been expired. Thereafter they came back alongwith dead body at Civil Hospital Tando Allah Yar, where police conducted legal formalities and then after postmortem the dead body was handed over to them for burial purpose and thereafter they took the dead body to their house and after burial ceremony the complainant went at P.S Tando Allah Yar and lodged the FIR.

4. Perusal of record reveals that after completing the usual investigation, police submitted challan against the above named accused persons before the competent Court of law.

5. It is noted that initially this case was pending in the Court of learned Additional Sessions Judge Tando Allah Yar; however, on the orders passed by this Court dated 09.05.2016 on application moved by the complainant Sher Muhammad being Criminal Transfer Application No.S-70 of 2015, this case was made over to the Court of Additional Sessions Judge-II, Mirpurkhas by way of transfer; thereafter, it was transferred to the trial Court (Additional

Sessions Judge-I / Model Criminal Trial Court, Mirpurkhas) for its disposal according to law.

6. At trial, formal charge against the accused was framed at Ex.2, to which they pleaded not guilty and claimed to be tried vide their respective pleas at Exs.2/A to 2/D, respectively. Thereafter, in order to prove its case, prosecution examined as many as 09 witnesses. P.W-1 complainant Sher Muhammad was examined at Ex.5, who produced F.I.R. at Ex.5/A and receipt at Ex.5/B; P.W-2 Mehboob Ali examined at Ex.6; P.W / mashir Maqsood Ali was examined at Ex.7, who produced Danishnama at Ex.7/A, mashirnama of securing clothes of deceased at Ex.7/B and mashirnama of place of incident at Ex.7/C; P.W-4 / first I.O ASI Ali Hassan was examined at Ex.8, who produced copy of entries of Roznamcha of P.S at Ex.8/A, photocopy of letter for medical treatment of injured at Ex.8/B, lash chakas form at Ex.8/C, letter for postmortem at Ex.8/D and receipt at Ex.8/E; P.W-5 /MO Dr. Ghulam Muhammad was examined at Ex.10, who produced copy of letter for medical treatment of injured at Ex.10/A, provisional medico-legal certificate of injured at Ex.10/B, outdoor patient Ticket at Ex.10/C, copy of police letter for postmortem at Ex.10/D, postmortem report at Ex.10/E and receipt at Ex.10/E; P.W-6 Khuda Bux was examined at Ex.11; P.W-7 / IInd I.O namely Inspector Muhammad Ameen Qureshi was examined at Ex.13, who produced copy of letter addressed to Mukhtiarkar for preparation of map through Tapedar at Ex.13/A; P.W-8 Tapedar Allahdino was examined at Ex.15, who produced map/sketch of vardat at Ex.15-A and P.W-9 / IIIrd I.O namely Inspector Muhammad Usman was examined at Ex.16, who produced copy of letter dated 31.03.2012 regarding conducting investigation at Ex.16/A, report of Chemical Examiner at Ex.16/B and copies of entries of Roznamcha of P.S at Ex. 16/C to Ex.16/G, respectively. Thereafter, prosecution side was closed by learned ADPP vide his statement at Ex.17. It is noted that an application u/s 540 Cr.P.C. (Ex.18 of the R&Ps), filed by learned counsel for accused for recalling / re-summoning Investigating Officer Muhammad Usman for cross-examining him, but that application was dismissed on 05.09.2019.

7. Then statements of the accused under section 342 Cr.P.C were recorded at Ex.19 to 22, in which they have denied the allegations of prosecution while professing their innocence. Further, appellant Khalil-ur-Rehman in his

statement under section 342 Cr.P.C. (Ex.19) has also stated that there was dispute between Shoukat Ali Khilji, accused Liaquat Ali Khilji and Zareef Rajput over the plot of accused Liaquat Ali Khilji with the complainant party and he was supporter of accused Liaquat Ali Khilji whose plot was illegally occupied by complainant party and on 28-3-2012 at 1130 hours the complainant party attacked upon the plot of accused Liaquat Ali, who also called him for help and when he reached there, the complainant party started firing, due to which he and accused Liaquat Ali became injured and so also 05 other persons sustained fire-arm injuries, from which brother of accused Liaquat Ali namely Shoukat Khilji lodged FIR No.58 of 2012 u/s 324 PPC at P.S Tando Allah Yar on 29-3-2012 at 2100 hours, from which all accused have been acquitted by compromise; he and accused Liaquat Ali being injured went to P.S Tando Allah Yar and after obtaining letter for treatment went to Civil Hospital Tando Allah Yar, from where they were referred to LUMHS Hyderabad, where they remained under medical treatment for about 02-03 hours; he and accused Liaquat were not present at the time of incident at the place of incident of this case. He has produced photo copies of medical record at Ex:19-A to Ex:19-C, photo copy of FIR No.58 of 2012, letter of SP Tando Allah Yar, report of SDPO and cutting of Newspapers at Ex:19-D to Ex:19-K in support of his version. In support of his said statement, he has produced photocopies of medical record at Ex.19/A to 19/C, photocopy of F.I.R. No.58/2012, letter of SP Tando Allahyar, report of SDPO and cutting of newspapers at Exs.19/D to 19/K. However, none of the accused has examined himself on oath nor led any defense.

8. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence on record convicted and sentenced the accused / appellant Khalil-ur-Rehman and acquitted the remaining accused / private respondents Liaquat Ali, Arsalan and Muhammad Imran, as mentioned above.

9. Mr. Javaid Ahmed Chhatari while arguing the case only to the extent of appellant Khalil-ur-Rehman in Cr. Appeal No.S-281 of 2019, has contended that the impugned judgment in respect of said accused, is perverse and illegal; that the appellant has been involved in this case falsely by the complainant party due to dispute over plot of co-accused Liaquat Khilji and his brother

Shoukat Ali Khilji with one Zareef Rajput, who was friend of complainant and deceased; that on the same day of incident viz 28-3-2012 at 1130 hours the complainant party duly armed with deadly weapons came at the plot of co-accused Liaquat Ali and started firing in which appellant Khalil-ur-Rehman and co-accused Liaquat Ali and other persons who were also present there became injured, for which Shoukat Khilji lodged FIR No.58 of 2012 u/s 324 PPC at P.S Tando Allah Yar and even appellant Khalil-ur-Rehman and co-accused Liaquat Ali being injured were referred to Civil Hospital, Hyderabad, hence the appellant has not committed the murder of deceased; that P.W Khuddan (Khuda Bux), who as per prosecution case was present at the scene and witnessed the incident, while recording his evidence before the trial Court has been declared as hostile, therefore, the entire prosecution case has become doubtful. He next contended that though the place of incident was a thickly populated area but no independent eye-witness of the alleged incident from the locality has been cited; besides, the complainant and eye-witness Mehboob Ali belonged to Sindh Taraqee Pasand party, hence their evidence is not reliable more particularly when eye-witness Khuda Bux has not supported the case of prosecution; that nothing was recovered from the possession of appellant and even no empty or blood-stained earth was recovered from the place of alleged incident and further there was delay of about 27 hours in lodgment of FIR, hence the consultation regarding involving the appellant falsely in this case by the complainant party cannot be ruled out. He next contended that the evidence of prosecution witnesses is full of contradictions and not confidence inspiring and even the prosecution witnesses are interested witnesses, hence the prosecution remained failed to prove/establish its case through solid, concrete and confidence inspiring evidence and the case of the prosecution is entirely doubtful, thus benefit of doubt may be given to the appellant and he may be acquitted from the charge of this case in the interest of justice, while the Doctor who has issued fake medical certificate may be punished. He also contended that same set of evidence has been disbelieved by the trail Court in respect of co-accused / private respondents in captioned Acquittal Appeal, who have been acquitted whereas it was believed only in respect of present appellant. He next submits that it is settled law when same set of evidence has been disbelieved by the trial Court to the extent of co-accused and has been believed in respect of appellant, propriety of law

demands that appellant should also be extended constant treatment. In support of his contentions he placed reliance on the case of **BAQAR SHAH versus THE STATE** (2018 YLR 1422).

10. Ms. Rameshan Oad, the learned D.P.G Sindh as well as Mr. Muhammad Hashim Laghari, learned counsel for complainant / appellant Sher Muhammad Jogi argued the matter almost on same line. They have contended that all accused have been nominated in the FIR with their specific role during the commission of offence of murder and they were fully identified by the eye-witnesses at the relevant time; that the eye-witnesses have completely supported the prosecution case; that there is no material / major contradiction in the evidence of prosecution witnesses, who have deposed straightaway without any ambiguity in support of the case of prosecution; that all the P.Ws have deposed consistently and supported each other on material facts of the case; hence the prosecution has succeeded to prove/establish its case against all accused beyond the shadow of any reasonable doubt, therefore, the impugned judgment with regard to conviction and sentence awarded to appellant Khalil-ur-Rehman may be maintained; however, it may be set aside as regard the acquittal of co-accused / private respondents Liaquat Ali, Arsalan and Muhammad Imran as mentioned in the acquittal appeal is concerned as they have also played active role in the commission of offence by making straight firing upon complainant party, hence they are vicariously liable for the commission of offence. Learned counsel for complainant has also reiterated the same facts and ground which he has urged in the memo of captioned acquittal appeal and prayed that acquitted accused / respondents may also be convicted viz-a-viz commission of the offence. In support of his arguments, he placed his reliance on the cases of (i) **Mir HAZAR KHAN vs. THE STATE** (2012 MLD 285 Balochistan), (ii) **GHULAM RAZZAQ vs. THE STATE** (1989 P. Cr. L.J 1426 Lahore), (iii) **MUHAMMAD QASIM alias QASU and 3 others vs. THE STATE** (2018 P. Cr.L.J Sindh Hyderabad), (iv) **WAQAR ALI and another vs. THE STATE** (PLD 2018 Lahore 139), (v) **MUNEER KHAN vs. THE STATE** (1988 MLD 892 Karachi), (vi) **NIAZ AHMAD vs. THE STATE** (PLD 2003 SC 635), (vii) **MUHAMMAD RAZZAQ vs. THE STATE** (2007 P. Cr.L.J 390 Lahore), (viii) **LIAQUAT ALI KHAN vs. THE STATE** (2020 P.Cr.L.J Note 8 Sindh), (ix) **MUHAMMAD NIAZ KHAN vs. THE**

STATE (2000 MLD 1419 Supreme Court of AJ&K), (x) **VAHULA BHUSHAN alias VEHUNA KRISHNAN vs. STATE OF TAMIR NADU** (1990 MLD 943 Supreme Court of India), (xi) **MUHAMMAD YOUSAF alias BABU vs. THE STATE** (1984 P. Cr.L.J 1992 Lahore), (xii) **RAB NAWAZ vs. THE STATE** (1986 P. Cr.L.J 2864 Lahore), (xiii) **MUKHTIAR vs. THE STATE** (2003 SCMR 1479), (xiv) **GHULAM RASUL vs. THE STATE** (1982 P. Cr.L.J 720 Lahore) & (xv) **ISLAM vs. THE STATE** (PLD 1962 (W.P) Lahore 1053. Whereas learned A.P.G Sindh has placed her reliance on the cases of (i) **BASHIR AHMED LEGHARI vs. THE STATE** (2020 SCMR 595) and (ii) **ANSAR MEHMOOD vs. ABDUL KHALIQ and another** (2011 SCMR 713).

11. We have heard the learned parties' counsel and gone through the entire evidence and documents so made available before us with their able assistance.

12. It is settled position of law that in criminal case burden to prove the guilt of the accused is always upon the prosecution, Court in the first instance has to discuss and assess the prosecution evidence in order to arrive at just conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of its evidence. Keeping in view the aforesaid proposition of law we have perused the entire case file which shows that case and claim of the prosecution is that on the relevant date and time present appellant alongwith acquitted co-accused duly armed with deadly weapons attacked upon complainant party and resultantly on the fire made by the appellant through his kalashnikov, Ali Muhammad, brother of the complainant, received injury on his head and fell down and subsequently succumbed to said injury; whereas other co-accused also made straight fire and then fled away; and, this entire episode was witnessed by complainant Sher Muhammad as well as P.Ws Khuda Bux and Mehboob. This fact has been denied by the appellant and acquitted accused in their statements recorded under section 342 Cr.P.C. The stance of the present appellant in his statement u/s 342 Cr.P.C, which is very relevant to reach at correct and just conclusion, is reproduced as under:-

> " There was dispute between Shoukal Ali Khalji, accused Liaquat Ali Khalji and Zareef Rajput over the plot of accused Liaquat Ali Khalji with the complainant party. I was supporter of accused Liaquat Ali

Khalji whose plot was illegally occupied by complainant party. On 28.03.2012 at 1130 hours the complainant party attacked upon the plot of accused Liaquat Ali, who also called me for help and when I reached there, the complainant party started firing due to which I and accused liaquat Ali became injured and so also 05 other persons sustained fire-arm injuries, from which brother of accused Liaquat Ali namely Shoukat Khalji lodged F.I.R No.58 of 2012 u/s 324 PPC at P.S Tando Allah Yar on 29.03.2012 at 2100 hours, from which all accused have been acquitted by compromise. I and accused Liaquat Ali being injured went to PS Tando Allah Yar and after obtaining letter for treatment went to Civil Hospital Tando Allah Yar, from where we were referred to LUMHS Hyderabad, where we remained under medical treatment for about 02-03 hours. I and accused Liaquat were not present at the time of incident at the place of incident of this case. I produce photo copies of medical record at Ex.19-A to Ex.19-C. I also produce photo copy of F.I.R No.58 of 2012, letter of SP Tando Allah Yar, report of SDPO, cutting of Newspapers at Ex.19-D to Ex.19-K. I am innocent and pray for justice."

13. After going through the above statement and record, it reveals that parties were already on dispute over a plot owned by one Liaquat Ali Khilji. It is noted that both parties i.e. complainant as well as the accused had lodged F.I.Rs regarding two separate incidents. Per F.I.R. No.58/2012, the incident occurred on 28.03.2012 at 1130 hours and this was lodged by the accused of the present case, whereas F.I.R. No.56/2012 lodged by the complainant of the present case, the incident occurred on 28.03.2012 at 1400 hours, which means that there were two separate transactions. This would only point to one conclusion that *prima facie* earlier the accused party of the present case was fired upon by the complainant party and later on the same day, the accused party returned and aggressed upon the complainant party. However, the dispute remains the same i.e. over the plot of land. In this backdrop it would be seen that so far the case of appellant Khalil-Ur-Rehman is concerned, *prima facie* it appears that he was available at Liaquat University Hospital, Hyderabad at 02:00 p.m. after having been injured in the earlier transaction and consequently his presence in the later incident (present crime) in Tando Allahyar at the same time seems improbable.

14. In order to further evaluate the version of the parties we have also noted that the whole prosecution case revolves around the evidence of complainant Sher Muhammad and two P.Ws namely Khuda Bux and Mehboob, who are said to be eye-witnesses of the incident. Needless to mention that P.W Khuda Bux whose evidence is available on record at Ex.11 in the R&Ps, by not

supporting the case of prosecution has deposed that he cannot say whether the accused present in Court (trial Court) were the same because he had seen the culprits from their backside. This witness has been declared by the prosecution as hostile and cross-examined by learned ADDP, but his stance could not be shaken, therefore, the evidence of this witness create doubt in the prosecution case.

15. Now we take the evidence of P.W. Mehboob Ali (Ex.6 in the R&Ps). Perusal of the same it appears that this P.W alongwith P.W Khuda Bux was going to Sabzi Mandi Nasarpur Road, Tando Allahyar, whereas this version has been contradicted by P.W Khuda Bux in his evidence by stating that on the relevant date and time he alongwith P.W Mehboob Ali was going to their homes. This contradiction in between these two eye-witnesses is very much relevant and led us towards the presumption that perhaps they were not present at the time of occurrence. We have further noted from record that P.W Mehboob Ali, who is shop keeper by profession, was R/o Gulshan-e-Hameed, Tando Soomro Road, Tando Allahyar; whereas P.W Khuda Bux who is labourer by profession, was R/o Abbas Bhai Colony, Tando Allahyar. Apparently, both P.Ws were resident of different places which are far away from each other as well as the place of incident, therefore question arise how and why both P.Ws were going together and available at the place of occurrence. On Court query, learned counsel for the complainant / appellant has failed to give any plausible justification for the presence of these witnesses at relevant time and place, which gives a serious jolt in the prosecution story.

16. Reverting to the contention of learned counsel for complainant that these two P.Ws are independent and chance witness and they have no enmity with the appellant, therefore, their evidence cannot be ignored or brushed aside lightly as they were available at the place of incident at relevant time, suffice it to say that in legal parlance a chance witness is one who claims that he was present at the crime spot 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. It is true that in rare cases, the testimony of chance witness(s) may be relied upon, provided some convincing explanations appealing to prudent mind for his / their presence at the crime scene are put forth, when the occurrence took place otherwise, his / their testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt. Under the circumstances (as discussed in preceding para), both P.Ws could not advance any plausible justification for their presence at the place of occurrence, hence the contention of learned counsel for complainant has no force.

17. As far as the evidence of complainant Sher Muhammad, who is the brother of the deceased, is concerned, though he has implicated the appellant in the commission of offence but in his cross-examination he has stated that I.O has secured bloodstained earth and empties from the place of occurrence, whereas the I.O in his evidence has denied this assertion by stating that he has not recovered any empty or bloodstained earth from the scene. Accordingly the evidence of complainant cannot be treated / accepted as gospel truth for the reasons that on one hand it is without any corroboration on material points and on other hand due to admitted enmity in between both parties, as stated supra, they have lodged F.I.Rs against each other bearing Crime Nos.56/2012 and 58/2012 on same date and at same police station as well as the fact that appellant Khalil-Ur-Rehman at the relevant time being injured in Crime No.58/2012 was available at Liaquat University Hospital, Hyderabad for his treatment. To support this aspect of the case, learned counsel for the appellant has referred to Exs.19/B to 19/C (pages-147 & 149 of the paper book) showing that on the relevant date and time the appellant was not available at place of occurrence of present F.I.R, but he was remained at Liaquat University Hospital at Hyderabad. These documents when confronted to learned counsel for the complainant for reply though he challenged the authenticity of the same but has not been able to controvert the same through valid reasons and stated that the appellant by relying on these documents has entirely taken the plea of alibi, therefore, burden lay upon him to prove this fact through cogent evidence. We are not impressed by these arguments for the reasons that initially burden to prove the guilt of the accused is lay on the prosecution and

if prosecution failed to prove its case / guilt against the accused then the accused is not responsible to prove his innocent. In this context we are fortified by the case of **Azhar Iqbal v. The State** (2013 SCMR 383), wherein it has been held as under:-

> "2. After hearing the learned counsel for the appellant and the learned Additional Prosecutor-General, Punjab appearing for the State and having gone through the record of the case with their assistance it has straightaway been observed by us that both the learned courts below had rejected the version of the prosecution in its entirety and had then proceeded to convict and sentence the appellant on the sole basis of his statement recorded under section 342, Cr.P.C. wherein he had advanced a plea of grave and sudden provocation. It had not been appreciated by the learned courts below that the law is quite settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. A reference in this respect may be made to the case of Waqar Ahmed v. Shaukat Ali and others (2006 SCMR 1139). The law is equally settled that the statement of an accused person recorded under section 342, Cr.P.C. is to be accepted or rejected in its entirety and where the prosecution's evidence is found to be reliable and the exculpatory part of the accused person's statement is established to be false and is to be excluded from consideration then the inculpatory part of the accused person's statement may be read in support of the evidence of the prosecution. This legal position stands amply demonstrated in the cases of Sultan Khan v. Sher Khan and others (PLD 1991 SC 520), Muhammad Tashfeen and others v. The State and others (2006 SCMR 577) and Faqir Muhammad and another v. The State (PLD 2011 SC 796). It is unfortunate that the Lahore High Court, Lahore had failed to apply the said settled law to the facts of the case in hand.
>
> 3. For what has been discussed above a conclusion is unavoidable and irresistible that the prosecution had failed to prove its case against the appellant beyond reasonable doubt. This appeal is, therefore, allowed, the convictions and sentences of the appellant recorded and upheld by the learned courts below are set aside and the appellant is acquitted of the charge. He shall be released from the jail forthwith if not required to be detained in connection with any other case."

18. We have also noted that alleged incident took place on 28.03.2012 at 02:00 p.m. whereas the same was registered by the complainant / brother of the deceased namely Sher Muhammad on 29.03.2012 at 05:00 p.m. after a delay of 27 hours for which no satisfactory explanation has been furnished, therefore, on this ground and in view of the admitted enmity between both parties over a plot, false implication of the appellant in this case with due deliberation and consultation could not be ruled out.

19. As observed above, the incident was happened on 28.03.2012 whereas the F.I.R. was registered on 29.03.2012 with a delay of 27 hours and we have noticed that the statements of prosecution witnessed under section 161 Cr.P.C. were also recorded with a delay of 04 days i.e on 01.04.2012. Further, the site sketch was also prepared after a delay of 04 days. No cogent explanation has been given for such delays. It has been held by the Honourable Supreme Court in a number of cases that delay in recording the statements of eye-witnesses of even one or two days without any explanation cannot be safely relied upon. In this context we are fortified by the case law reported as **Muhammad Asif v. The State** (2017 SCMR 486). Not only this we have also noticed some contradictions in between the statements of P.Ws recorded u/s 161 Cr.P.C. and the contents of F.I.R, which also gives jolt to the prosecution case.

20. In the similar circumstances, the Honourable Supreme Court in the case of **Rahat Ali v. The State** (2010 SCMR 584) has held as under:

> "9. ----------. Thus there is inordinate delay of silence of P.W.2 which creates doubt about his veracity. Delay of 24 hours, 4 days and 15/20 days in reporting the matter to the police or recording the statement of witnesses by the police has been found adversely affecting the veracity of witnesses as held in the cases of Muhammad Sadiq v. The State PLD 1960 SC 223, Sahib Gul v. Ziarat Gul 1976 SCMR 236 and Muhammad Iqbal v. State 1984 SCMR 930, respectively. It has also been observed by this Court that delay in recording the statement without furnishing any plausible explanation is also fatal to the prosecution case and the statement of such witness was not relied upon in the case of Syed Muhammad Shah v. State 1993 SCMR 550. Therefore, the evidence of P.W.2 is coming within the scope of above rules laid down by this Court. Hence, his statement cannot be safely relied upon in the peculiar facts and circumstances of the present case."

21. During the course of arguments, learned counsel for the appellant has referred to Ex.10/A to 10/E in the R&Ps, perusal of which shows that at first deceased was referred to hospital at Tando Allahyar and then to Liaquat University Hospital, Hyderabad, but all these documents appear to be dubious as these documents contain number of over-writing / manipulations in respect of the name of patient / deceased, injury received by him and when these over-writings were confronted to learned counsel for the complainant for reply he has no satisfactory answer with him but states that it was perhaps done due to oversight or shortage of ink. We have also noted that medical certificate (Ex.10/B of the R&Ps), does not contain that from which type of

weapon the deceased had received injury. This also caused dent in the prosecution case. In the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), it was observed as under:-

> "30. We have found that in the recovery, memo with regard to the bones, clothes of the deceased and pair of slippers, subsequently addition has been made at a later stage and for that reason alone, the same is liable to be discarded. In the case of Muhammad Sharif v. The State (1980 SCMR 231) interpolation/over-writings made in the inquest report, were considered seriously by this Court and it was held that in such a case the Court should be at guard and has to take extra care in making the appraisal of evidence, because once dishonesty in the course of investigation is discovered then Court would always seek strong corroboratory evidence before relying on the other evidence of the prosecution."

22. So far as the investigation carried out by Investigating Officer(s) is concerned, perusal of record reveals that during investigation they neither collected empties of the bullets fired by the accused at the time of commission of offence nor recovered crime weapon from the possession of any accused; even no bloodstained earth was collected / secured from the place of occurrence to prove that it was human blood or otherwise. It goes without saying that an Investigating Officer has supposed to make investigation honestly and impartially to dig out the truth. He / they were duty bound not only to investigate the matter to connect the accused with the commission of offence after collecting all incriminating material pieces of evidence, but also to bring the truth on the surface to save innocent person from endless agony of investigation as well as the trial; however, in the case in hand, Investigating Officer(s) miserably failed to discharge his / their duties in its true perspective.

23. It has vehemently been argued by learned counsel for complainant and learned A.P.G for State that ocular account furnished by complainant and PWs is in consistence with each other, therefore, merely non-recovery of empties from place of wardat and bloodstained earth is no ground to discard the evidence of prosecution witnesses. We have, however, not felt persuaded to agree with them for the reasons that there is no cavil with the proposition that when a crime / case is proved through convincing / cogent / confidence inspiring ocular account, the corroborative evidence in shape of recovery can be ignored, however, if Court reaches at the conclusion that the eye-witnesses

are interested and inimical towards accused then testimony of said witnesses cannot be relied upon safely without a strong corroboration through other pieces of evidence brought on record. Moreover, if ocular account is not confidence inspiring then strong corroboration is required as a matter of prudence to convict the accused. In the present case as discussed above, there is admitted enmity in between both parties and the ocular account remained un-corroborated and is not found intrinsically sound enough to be sufficient to warrant conviction and sentence of the accused.

24. Significantly, as we noted, while writing the certificate at the bottom of statements of accused under section 342 Cr.P.C, the learned trial Judge instead of writing the certificate in his own handwriting got the same typed, which is / was clear violation of Section 364(2) Cr.P.C. Accordingly, the trial Court did not perform it's function diligently and has taken the matter lightly and in a casual manner awarded life imprisonment to the appellant. As such, appellant was prejudiced in his trial and defence.

25. The aforesaid circumstances on the record would show that no satisfactory and believable positive evidence is available on record for convicting the appellant in the present case, rather the prosecution case is full of contradictions, doubts, lacunas, infirmities and illegalities on many counts. The concept of benefit of doubt to an accused person is deep rooted in every legal system including ours for giving benefit of doubt to appellant. Indeed, it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance which creates reasonable doubt for a prudent mind about guilt of the accused, then the accused is entitled to the benefit not as a matter of grace but as a right. The present is a case of almost no evidence and under the circumstances, as a matter of right the appellant is entitled to acquittal.

26. As regards the acquittal of the private respondents in Cr. Acq. A. No.D-117 of 2019 is concerned, significantly in view of the lacunas, contradictions and illegalities as discussed in the foregoing paras in respect of the case of appellant Khalil-Ur-Rehman, from perusal of evidence as well as the impugned judgment passed by the trial Court it appears that the impugned judgment in respect of the accused / private respondents Liaquat Ali, Arsalan

and Muhammad Imran is based upon sound reasons. The said respondents were acquitted by the trial court mainly on the ground that evidence of the prosecution witnesses on material particulars of the case in respect of those respondents is contradictory and untrustworthy. During the course of arguments, we have specifically asked the question from learned Counsel for appellant / complainant to point out / show any piece of evidence, which is not supportable from the evidence on record, no satisfactory answer was available with him.

27. It is a settled principle of law that after acquittal the private respondents / accused have acquired double presumption of innocence and this Court would interfere only if the impugned judgment was arbitrary, capricious or against the record. But in this case, as mentioned above, there are number of lacunas, contradictions and infirmities in the prosecution evidence / case and impugned judgment with regard to acquittal of the private respondents in our considered view does not suffer from any misreading and non-reading of documents and evidence on record. As regard to the consideration warranting the interference in the appeal against acquittal and appeal against conviction, principle has been laid down by the Hon'ble Supreme Court in various judgments. In the case of ***State/Government of Sindh through Advocate General Sindh, Karachi versus Sobharo*** reported as ***1993 SCMR 585,*** Hon'ble Supreme Court of Pakistan has laid down the principle that in the case of appeal against acquittal while evaluating the evidence distinction is to be made in appeal against conviction and appeal against acquittal. Interference in the latter case is to be made when there is only gross misreading of evidence, resulting in miscarriage of justice. Relevant portion is reproduced as under:-

> *"14. We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view that evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal appeal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed."*

28. We have perused the impugned judgment in respect of private respondents and come to the conclusion that the learned trial Court has dealt with all aspects of the matter quite comprehensively in the light of all relevant laws dealing with the matter and the learned counsel for the complainant was

unable to point out that the impugned judgment by any means suffers from any illegality or miscomprehension or non-appreciation of evidence by way of documents and evidence available on record. We are also not satisfied with any of the grounds agitated by the complainant in the memo of acquittal appeal for indulgence of this Court in the matter.

29. As observed above, the respondents have been acquitted by the competent Court of law therefore, under the law once an accused was acquitted by the competent Court of law after facing the agonies of the protracted trial then he would earn the presumption of double innocence which could not be disturbed by the appellate Court lightly. We have perusal the impugned judgment passed by trial Court in respect of the acquittal of private respondents and found that it is perfect in law and facts and needs no interference by this Court. Resultantly, the instant Criminal Acquittal Appeal is devoid of merits.

30. So far as the case law cited by learned counsel for the complainant / appellant Sher Muhammad, in support of his contentions is concerned, in the first place, is of no consequence as the facts and circumstances of cited cases are varied from that of the case in hand and secondly it is a settled proposition of law that each and every criminal case has to be decided on its own merits. Accordingly, it does not find to be helpful to the complainant in any way. In this context we are fortified by the case of **MUHAMMAD FAIZ alias BHOORA** versus **The STATE and another** (2015 S C M R 655).

31. In view of what has been discussed above, after hearing the arguments of all parties' counsel, vide short order passed in Court on 24.09.2020, we had allowed the captioned Cr. Appeal No.S-281 of 2019, set aside the impugned judgment dated 24.09.2019 with regard to appellant Khalil-Ur-Rehman and acquitted him of the charge; whereas the Cr. Acq. Appeal No.D-117 of 2019, filed against the said judgment with regard to acquittal of private respondents / co-accused Liaquat Ali, Arsalan, and Muhammad Imran was dismissed; and above are the detailed reasons for said short order.

32. In this case, since the Investigating Officer(s) have failed to conduct investigation in proper way and according to law and they have left so many lacunas while investigating the case in hand, therefore, they are liable to be

dealt with in accordance with law. Accordingly, the SSP concerned is directed to take action against the I.Os of this case and submit compliance report before this Court through Additional Registrar.

33. Office is directed to fax a copy of this judgment to the SSP Tando Allahyar for information and compliance.

JUDGE

JUDGE

S