

**IN THE HIGH COURT OF SINDH, KARACHI**

**Criminal Appeals No. S-164 & S-180 of 2021**

Date of hearing : 20.01.2022

Date of judgment : 20.01.2022

Appellant Muhammad Asif @ Asho : through Mr. Umar Farooq, Adv.  
[Criminal Appeal No.S-164 of 2021]

Appellant Muhammad Nawab : through Mr. Muhammad Arif, Adv.  
[Criminal Appeal No.S-180 of 2021]

State : through Ms. Rubina Qadir, A.P.G.  
Sindh.

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**JUDGMENT**

**MUHAMMAD SALEEM JESSAR, J:-** By this single judgment I propose to dispose of above said two Criminal Appeals as both the appeals have arisen from one and the same common judgment passed by the trial Court.

2. Through these Criminal Appeals, appellants Muhammad Asif @ Asho and Muhammad Nawab have assailed judgment dated 08.03.2021 handed down by learned 1<sup>st</sup> Addl. Sessions Judge/MCTC, Karachi (South) in Sessions Case No.400 of 2017 (re: The State Vs. Muhammad Nawab and another) being outcome of FIR No.116/2016 registered at P.S. Napier Karachi, whereby both the accused have been convicted under Section 265-H(2) Cr.P.C and were sentenced to imprisonment for life and each of the accused was directed to pay a compensation to legal heirs of the deceased under Section 544-A Cr.P.C in the sum of Rs.3,00,000/- each and in default thereof, they were also directed to suffer S.I for six months

more. However, both the accused were extended benefit of Section 382-B Cr. P.C.

3. Succinctly facts of the FIR lodged by complainant Riaz son of Awwal Khan on 12.09.2016 through his statement under Section 154 Cr.P.C, recorded on 11.09.2016 are that he runs shop of LPG cylinders at Ghass Mandi, Jameela Street. On 11.09.2016, he closed half shutter of his stop and went to offer Isha prayer to nearby Masjid. One boy whom, they called "Mastaana" who was unable to speak properly, was sitting on footpath in front of his shop. When he returned after offering prayer at his shop at about 08:30 P.M, nearby people informed him that three unknown boys came on a motorcycle and one of them fired upon "Mastaana" sitting in front of his shop which hit at his chest and crossed from lower side of neck, due to which he expired, who was shifted to Civil Hospital through ambulance, therefore, the complainant came at Civil Hospital, where he saw dead body of "Mastaana" lying in mortuary and after completion of legal formalities his statement under Section 154 Cr.P.C was recorded, alleging therein against three unknown culprits who committed murder of "Mastaana". Hence, instant FIR was registered.

4. During investigation, accused Muhammad Nawab and Muhammad Asif were arrested and after completion of investigation, challan was submitted against them for their trial before the Court of law showing accused Hassan son of Chand as absconder under Section 512 Cr.P.C with red ink.

5. A formal Charge was framed against accused / appellants Muhammad Asif and Muhammad Nawab vide Ex.2, to which they pleaded not guilty and claimed to be tried.

6. In order to prove its case, prosecution examined PW-1 SIP Muhammad Israr Khan at Ex.3, who produced departure entry at Ex.3/A, attested copies of inquest report at Ex.3/B, memo of inspection of the dead body at Ex.3/C, letter moved to the MLO having the cause of death at Ex.3/D, 154 Cr.P.C statement of the complainant at Ex.3/E, receipt for depositing the dead body at Cheepa Cold Storage at Ex.3/F, memo for

securing one bullet empty of 30 bore at Ex.3/G and FIR at Ex.3/H along with its entry at Ex.3/I. PW-2 PC Asif Baloch was examined at Ex.4, who produced memo of arrest of both accused effected in this case at Ex.4/A and memo for pointing out the place of incident by them at Ex.4/B. PW-3 MLO Dr. Abdul Ghaffar was examined at Ex.6, who produced post mortem report at Ex.6/A, medico legal certificate at Ex.6/B and certificate of cause of death of the deceased at Ex.6/C. PW-4 Muhammad Irshad was examined at Ex.7, who being eye-witness of the incident produced copy of his CNIC at Ex.7/A and copy of identification parade of the accused at Ex.7/B. PW-5 Ahmed Shah was examined at Ex.8, who produced testified memo of dead body inspection at Ex.8/A, memo for securing one bullet empty from place of the incident at Ex.8/B, an attested copy of memo of site inspection at Ex.8/C. PW-6 Judicial Magistrate Mr. Furqan Karim was examined at Ex.10, who produced carbon copy of letter moved by the I.O for identification parade at Ex.10/A, memo of identification parade at Ex.10/B, copy of CNIC of PW Irshad at Ex.10/C and an envelope at Ex.10/D. PW-7 Inspector Arshad Mahmood was examined at Ex.11, who being IO of the case produced entry No.44 at Ex.11/A, sketch of place of the incident at Ex.11/B, entry No.48 at Ex.11/C, newspaper clip alongwith photographs of the deceased at Ex.11/D & 11/E, carbon copies of two letters moved to the chemical examiner and FSL at Ex.11/F and 11/G, two FLS reports at Ex.11/H & 11/I, chemical report at Ex.11/J, two entries at Ex.11/K and 11/L, letter moved to the CRO at Ex.11/M along with its record for accused Nawab at Ex.11/N and 11/O, copy of FIR No.76/2016 registered against accused Nawab under Section 23(1) (a) of Sindh Arms Act, 2013 at Ex.11/P, CRO report of accused Asif at Ex.11/Q, copy of FIR No.149/2016 under Section 23 (1) (a) of Sindh Arms Act, 2013 against accused Asif at Ex.11/R, entry No.47 at Ex.11/S, copies of FIR along with its entry regarding fire incident occurred at Malkhana of City Court at Ex.11/T & 11/U. Thereafter, learned DDPP appearing for the State closed the side of prosecution vide his Statement Ex.12.

7. Statements under section 342 Cr.P.C. of accused Muhammad Asif and Muhammad Nawab were recorded vide Ex.13 & 14 respectively, where they denied the allegations of prosecution and claimed to be innocent. It is

pertinent to mention here that accused Muhammad Nawab during recording his statement under Section 342 Cr.P.C had not opted to examine himself on oath under Section 340(2) Cr.P.C; however, he had given name of his defence witness Sohail to be examined as defence witness in his favor. However, accused Muhammad Asif had opted to examine himself on oath under Section 340(2) Cr.P.C and denied to examine any witness in his defence, during his statement recorded under Section 342 Cr.P.C, but later on they both filed a statement through their counsel wherein accused Muhammad Nawab had stated that he did not want to examine his defence witness, whereas, accused Muhammad Asif also refused to examine himself on oath under Section 340(2) Cr.P.C.

8. After formulating the points for determination, recording evidence of prosecution witnesses and hearing counsel for the parties, learned trial Court, vide impugned judgment, convicted and sentenced the accused / appellants, as stated above. Against said judgment instant appeals have been preferred by the convicted accused.

9. I have heard learned counsel for the parties and perused the material available on the record.

10. Learned counsel for appellants submitted that names of the appellants do not find place in the FIR; besides, they were not claimed to be known to the complainant party. As per available record, both the appellants were arrested by the police of Napier police station on 02.03.2017 under Section 23 (a) (i) of Sindh Arms Act, 2013 under FIRs No.37 & 38 of 2017; however, were produced before the Judicial Magistrate, Karachi (South) on 06.03.2017 for holding their identification. Learned counsel further submitted that features, character and the color of the appellants were not mentioned under the FIR and even at the time of their identification parade, they simply were picked up by the PWs; however, such identification could not be based for maintaining conviction against them. Both learned counsel had reiterated that nothing incriminating was shown to have been recovered from their possession connecting them with the commission of instant crime. As far as recovery

of certain weapons made by the Napier police is concerned, said weapons could not be said to be the same as the weapons allegedly used in alleged commission of this crime. Moreover, the complainant, who got recorded his statement under Section 154 Cr.P.C was not an eye-witness even the persons who claimed to be available at the time of alleged incident nearby the shop were not associated by the I.O as witnesses. They further pointed out that it had not been brought on record that who shifted the injured from place of incident towards the hospital even post mortem notes are lacking name of said person through which the dead body was shifted. Lastly submitted that the appellants in order to get shield from their superiors had filled in the blanks by implicating the appellants in this case and no independent evidence connecting them with this crime has ever been collected. Hence, the prosecution has miserably failed to prove its charge against them. Further submitted that there is no confession or any statement before the competent forum made by the appellants through which it could be deduced that they had committed the offence. In support of their contention, they have placed reliance upon cases of (i) *MUHAMMAD ASIF Versus The STATE (2017 SCMR 486)*, (ii) *KHALID MEHMOOD and another Versus The STATE and others (2021 SCMR 810)*, (iii) *ABDUL KHALIQ Versus THE STATE (1996 SCMR 1553)*, (iv) *NOOR MUHAMMAD Versus The STATE and another (2020 SCMR 1049)*.

11. On the other hand, learned Deputy P.G, Sindh appearing for the State, has opposed the appeals and submitted that the appellants were rightly identified and picked up by the PWs before Judicial Magistrate; hence, appeals merit no consideration and the judgment passed by the trial Court does not suffer from any illegality or infirmity. She; however, could not controvert the fact that no motive was assigned and nothing was robbed away by the police from the shop as claimed and the motorcycle on which appellants had allegedly come was also not recovered by the police during investigation. She also did not controvert the fact that place of incident was not shown by the complainant to I.O. She while going through the cross made by counsel for the appellants from I.O/Inspector Arshad Mahmood (*Exh.11 available at page-185 of the paper book*) that per

post mortem note, name of the police official is mentioned as Muhammad Israr (previous I.O); however, she was still arrogant to oppose the appeals.

12. PW/PC Asif Baloch (*Exh.4 available at page-109 of the paper book*) deposed before the trial Court that both the accused at the time of interrogation were not able to point out place of incident; however, police / I.O Raja Arshad took them in police van towards the place of incident and prepared memo of incident. It may be observed that place of incident is always used to be shown or visited in presence of complainant of the case but in instant case complainant was not shown to be available at the time of inspection of place of the incident. Both the appellants were arrested by Napier police on 02.03.2017 and later on were shown arrested in this case and subsequently were produced before the Judicial Magistrate for holding their identification parade on 06.03.2017, therefore, presumption could be drawn that the appellants were shown to the PWs before producing them in an identification parade. The first I.O namely SIP Israr Khan was examined before the trial Court as PW-1 (as Exh.3). In his statement, the first I.O Israr Khan deposed, on 11.09.2016 he was posted at P.S Napier where he received wireless message from MLO Abdul Ghafar that a person who sustained fire arm injury at Jameela Street, near Ghas Mandi, opposite LPG shop and was brought at Civil Hospital, has succumbed to injuries, therefore, he left the P.S and met to MLO Abdul Ghaffar at mortuary where he prepared report under Section 174 Cr.P.C in presence of one Riaz Ahmed son of Awwal Khan and Ahmed Shah son of Akbar. Later, he got recorded 154 Cr.P.C statement of Riaz Ahmed, owner of the LPG shop and then dead body was handed over by him to Cheepa Ambulance, FTC for three days for keeping it under safe custody. Later, he along with complainant Riaz Ahmed as well as PW Ahmed Shah went to place of incident and inspected it while making recovery of one empty in presence of complainant as well as witness Ahmed Shah. Later, he got registered FIR No.116/2016 under Section 302/34 PPC.

13. Since, one empty was shown to have been recovered from place of incident; whereas, three accused were arrayed in this case and out of three, whose fire went to hit and proved to be fatal for the deceased, had not

been thrashed out by the trial Court and mere considering a circumstantial indirect evidence, appellants have been convicted for a capital charge. None of the appellants had made confession before the competent forum or the trial Court that he allegedly made fire upon the deceased and that too for with a particular motive; hence, in such an eventuality when many discrepancies have been left by the prosecution itself, the conviction and sentences awarded to the appellants cannot be maintained. The empty allegedly shown to have been recovered from the scene of incident was not matched with the weapons allegedly shown to have been recovered from the appellants after about six months of the incident.

14. PW Muhammad Irshad had deposed before the trial Court that appellants were the same persons who committed murder of deceased Mastaana; however, had not assigned such specific role at the time of their identification parade. Moreover, the PWs were examined by the I.O under section 161 Cr.PC with sufficient delay.

15. Since no body structure and special features of the appellants were given under the FIR and subsequently were not pointed out by the PWs at the time of their identification to be the persons of same features, such identification parade cannot be taken into consideration more particularly when alleged eye-witnesses had a good look at the accused so as to rely on their testimony. Per evidence adduced before the trial Court, complainant as well as eye-witnesses had categorically deposed that there was darkness due to Maghrib prayers' time, therefore, he could not identify the accused. In case of Mian SOHAIL AHMED and others Versus The STATE and others (2019 SCMR 956) (supra), Hon'ble Supreme Court of Pakistan, has held in para-5 of the judgment as under;\_

*"5. The Test Identification Parade ("TIP") (Ex/PN) which was conducted by the Special Judicial Magistrate (PW-13) on 13.6.2006 is fraught with several infirmities diminishing its probative and evidentiary value. Brief description of the two unknown persons (later on identified as the appellants) in the first information report mentions their height, bodily size and colour of the skin. TIP proceedings are silent regarding the description of the unknown accused given by the complainant in the report. TIP can only commence, once suspects matching the description in the crime*

*report or in the statements of the witnesses under section 161, Cr.P.C. have been arrested. Matching the description in the first information report is the starting point towards identification of the unknown accused. It is, therefore, uncertain how the appellants were hurled and lined-up for the identification parade without the Magistrate first matching the description given by the complainant. Selection of the suspects, without any correlation with description of the accused in the first information report, raises doubts and makes the identification proceedings unsafe and doubtful rendering the identification evidence inconsequential. This is just a shade apart from cases where there is no description of the accused in the FIR, the effect being the same, casting doubts on the credibility of the test identification parade. See State/Government of Sindh v. Sobharo (1993 SCMR 585), Muhammad Afzal alias Abdullah v. State (2009 SCMR 436), Sabir Ali alias Foji v. State (2011 SCMR 563) and Muhammad Abdul Hafeez v. State of A.P. (AIR 1983 SC 367)."*

16. Needless to emphasize that it is a well settled principle of law that prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

*"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but **no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.**"*

In another case reported as Shamoona alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

*"The prosecution must prove its case against the accused beyond reasonable doubts **irrespective of any plea raised by the accused in his defence.** Failure of prosecution to prove the case against the accused, entitles the accused to an **acquittal.** The prosecution cannot fall back on the plea of an accused to prove its case.....**Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise.**"*

17. The accumulative effect of the above said admissions / contradictions as well as infirmities / legal flaws in the prosecution case is



that serious defects have emerged which not only creates doubt in the prosecution case but it resulted into implication of innocent persons. It is well settled principle of law that prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

*“The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.”*

18. For the foregoing reasons, by a short order passed on 20.01.2022 these appeals were allowed. Consequently, impugned judgment dated 08.03.2021 passed by learned 1<sup>st</sup> Additional Sessions Judge / MCTC, Karachi (South) in Sessions Case No.400 of 2017 (re: The State Vs. Muhammad Nawab and another) being outcome of FIR No.116/2016 registered at P.S. Napier, Karachi under Section 302 read with section 34 PPC, was set aside and the appellants were acquitted of the charges and were ordered to be released forthwith if their custody was no more required by jail authorities in any other criminal case.

19. Above are the reasons for said short order

JUDGE