IN THE HIGH COURT OF SINDH, SUKKUR BENCH, SUKKUR

Criminal Appeal No.S-144 of 2017

Appellant:	Asghar Chohan, through M/s Rizwana Jabeen Siddiqui and Sohail Ahmed Khoso, Advocates
Complainant/LRs:	Mst. Sahibi mother of deceased through Mr. Ghulam Murtaza Korai, Advocate
State:	Through Mr. Khalil Ahmed Maitlo, DPG
Date of hearing:	06.12.2021 and 20.12.2021
Date of decision:	20.12.2021

J U D G M E N T

Zulfiqar Ali Sangi, J: Through this criminal appeal, the appellant Asghar Chohan has assailed the judgment dated 04.10.2017, passed by learned Additional Sessions Judge, Pano Akil in Sessions Case No.752/2014 *re-*"***The State v. Asghar and others",*** arising out of Crime No.190/2014, registered at police station Pano Aqil, under Section 302, 452, 311, 34 PPC, whereby appellant was convicted for the offence punishable u/s 302(b) PPC and sentenced for life imprisonment as Tazir, however benefit of Section 382-B Cr.P.C was extended to him.

2. Briefly the facts of the case are that complainant ASI Muhammad Nawaz Korai lodged FIR at P.S Police Station Pano Aqil alleging therein that on 21.07.2014, he alongwith other staff PC Muhammad Ali, PC Naseer Ahmed and DPC Ahmed during patrolling when at about 2000 hours, reached at Bashir Abad near Gulsher Hotel Labano, they heard cries coming from Chohan Mohalla side, on which they rushed there and found that the cries was coming from the house of Qalandar Bux Labano. They entered into the house and saw accused Asghar with pistol, Mumtaz alias Mato with hatchet, Shahazado with lathi, Ghulam Rasool with lathi and one unknown person with hatchet. The accused were talking that Mst. Wazir Khatoon is Kari. In the meantime accused Asghar made fire from his pistol upon the lady which hit her and she fell down. The police party tried to capture the accused but they all climbing over the wall fled

away. The ladies gathered there who were talking that the deceased lady was Wazir Khatoon who was murdered by the accused on allegation of Karap. They found that deceased had sustained fire arm injury on right side of her chest below the shoulder. They shifted the dead body to taluka Hospital Pano Aqil. Complainant called ASI Zulfiqar Ali Chachar got conducted postmortem and leaving ASI Zulfiqar Ali Chachar and PC Muhammad Ali in the hospital proceeded to arrest the accused person but they could not be arrested then he came at Police Station and lodged such FIR.

3. After registration of FIR, police conducted investigation, and on completion of investigation submitted challan against the accused persons before the Court having jurisdiction. The trial court after completing all the legal formalities, framed charged against the accused persons to which they pleaded not guilty and claimed trial.

4. The prosecution in support of its case examined PW-01 complainant ASI Muhammad Nawaz Korai at Ex.10, who produced departure entry No.24 at Ex.10-A, FIR at Ex.10-B. PW-2 I.O Inspector Zulfiqar Ali Chacar was examined at Ex.11, who produced inquest report at Ex.11-A, memo at Ex11-B, receipt at Ex.11-C, memo of last wearing clothes at Ex.11-D, proceeded for visit of site inspection at Ex.11-E, memo of site inspection at Ex.11-F, letter to MO at Ex.11-G another letter at Ex.11-H, memo of arrest of accused Asghar at Exh.11-I, postmortem report at Ex.11-J, entry No.3 at Exh.11-K, entry No.5 at Ex.11-L, memo of recovery at Ex.11-M, arrival entry No.7 at Ex.11-N, duplicate copy of FIR at Exh.11-Q, memo of place of incident at Ex.11-R and FSL report 11-S. PW-3 PC Muhammad Ali was examined at Exh.12, PW-4 Dr. Shah Jahan at Exh.13 who produced letter at Exh.13-A and postmortem report at Exh.13-B. Thereafter learned prosecutor closed the side of prosecution vide his statement at Exh.14.

5. Statements of accused were recorded under Section 342 Cr.P.C at Ex-15 to 17 in which they have denied the allegations of the prosecution and claimed their innocence. However, neither they led evidence in their defence nor examined themselves on oath under Section 340(2) Cr.P.C. After recording evidence and hearing the parties, learned trial Court acquitted co-accused Shahzado and Mumtaz while convicted the appellant Asghar as stated above, hence the instant appeal.

6. At the very outset, learned Counsel for the appellant has contended that the appellant is innocent and has falsely been implicated by the police in this case. He pointed out that on postmortem report of deceased Wazeer Khatoon crime number is mentioned as Crime No.851/2014 though the crime number of the present case is 190/2014 which totally vitiated the case of the prosecution. He next contended that there is serious and major inconsistency in between ocular and medical evidence and submitted that though as per FIR the accused had fired shot with pistol upon the deceased however, postmortem report shows that the pellets were recovered from the dead body of the deceased which also casts serious dent in the prosecution case. He also contended that the learned trial court without considering these aspects of the case has passed the impugned judgment in hasty manner; hence the impugned judgment is liable to be set-aside, therefore, by allowing instant appeal the accused may be acquitted of the charge by extending him benefit of doubt.

7. Learned counsel for the complainant has contended that the prosecution has proved its case against the appellant beyond any reasonable shadow of doubt by producing oral as well as medical evidence. He also contended that active role has been assigned to the appellant. He also contended that that the offence in which the appellant is involved is heinous one and the learned trial court has rightly convicted the appellant and he does not deserve any leniency. Lastly he prayed that the appeal of the appellant may be dismissed.

8. Learned D.P.G appearing for the state however has not supported the impugned judgment considering the above aspects of the case pointed out by the counsel for the appellant.

9. I have heard learned Counsel for the Appellant as well as learned Deputy Prosecutor General and have carefully examined the material available on record with their able assistance.

10. On reassessment of the entire evidence produced by the prosecution it is established that the prosecution had **not** proved the case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence.

11. In the present case, there are two versions of the incident one brought on record by the police officials by registering the FIR No. 190 of 2014 and the second version was brought on record by Mst. Sahibi the mother of the deceased by registering the FIR No. 281 of 2014 and she is contesting the case up to this court. The case of private complainant was disposed of by the police by declaring her version to be the false and was approved by the learned Magistrate. Mst. Sahibi filed direct complaint and the same was also dismissed. Therefore there remains only version of the police officials.

12. The complainant of this FIR namely ASI Muhammad Nawaz deposed that accused Asghar made fires from the pistol upon one lady who while receiving fire fallen down and complainant during his cross-examination stated that accused Asghar at the time of incident was armed with TT pistol. The prosecution examined another police official namely Muhammad Ali shown to be the eye-witness of the incident so also the mahsir of recoveries and arrest etc, who deposed in his chief-examination that accused Asghar at the time of incident was armed with pistol. He also deposed that the investigation officer Zulfiqar Ali Chachar recovered two empties of TT pistol beside other things from the place of wardat. This witness also deposed that during investigation accused Asghar produced the pistol to the investigation officer which was used by him in the incident and it was sealed by the investigation officer alongwith the live bullets. In the entire case only allegation against the accused Asghar is of causing firearm injuries to the deceased Mst. Wazeer Khaton. From the evidence of two prosecution witnesses as discussed it can easily be presumed that accused Asghar used 30 bore Pistol at the time of incident and the same was recovered so also two empties of 30 bore pistol were recovered from the place of wardat.

13. The above version of the police has no any support from the second version brought on record by the mother namely Mst. Sahibi of the deceased Mst. Wazeer Khatoon. She in her FIR stated that accused Asghar fired upon the deceased from Desi Pistol (Cartages Pistol) whereas version of police is that accused used 30 bore Pistol. Mst. Sahibi also not disclosed that at the time of incident police reached there or the incident took place in presence of the police. The same is the position in the version of police they not

deposed a single word that mother of deceased was present at the time of incident.

14. The version of police officials that accused Asghar caused firearm injuries to the deceased from 30 bore Pistol has also no support from the medical evidence. The doctor who conducted the dead body of deceased Mst. Wazeer Khatoon has deposed as under:-

> "On 21 .07.2014, I was serving as SWMO at Taluka Hospital Pano Akil, I received the dead body of Mst. Wazeer Khatoon w/o Qabool Chohan r/o Bashir Abad taluka Pano Akil aged about 28 years. Body was brought by PC 592 Muhammad Ali. I started postmortem at 9-30 p.m on same date and completed it at 10-30 p.m. I found the following injuries on her person:
>
> 1 Two lacerated punctured wound measuring 4 c.m x 4 c.mon left side of chest above left breast inverted margin wound entry.
>
> 2 Two lacerated punctured wound measuring 1 c.m x 1 c.m on back of left chest near to each other communicated to injury No. 1(wound of exit).
>
> 3 Chest wall lacerated, Pleura lacerated left lung and heart lacerated and other structures are healthy. Fracture of scapula on left side.
>
> OPIN1ON.
>
> From external as well as internal examination of deceased Mst. Wazeer Khatoon w/o Qabool Chohan I am of the opinion that death accrued due to haemrorhage and shock as result of injuries to the vital organs lung and heart. All injuries were anti mortem in nature caused by discharge from fire arm weapon. All injuries to sufficient to cause death in ordinary course of nature. Probable time between injuries and death immediate. Between death and postmortem about one to two hours. **Five pellets recovered from the body of deceased**. I produce letter at ex. 13A and I also issued postmortem report at ExII-J which is same correct and bears my signature."

15. The version given by the two eye-witnesses (Police Officials) has not been supported by any independent evidence nor by the medical evidence as has been discussed above which create serious doubt in the case of prosecution. The Honourable Supreme Court of Pakistan in case of ***Muhammad Idrees and another v. The State and others (2021 SCMR 621)***, has observed as under:-

> "According to the case set up by the prosecution through ocular account, six fire shots

> were made on the two thighs of the deceased, three on the left thigh and three on the right thigh; however, according to the medical evidence, the right thigh has three entry wounds and one exit wound, while the left thigh has only two fire wounds. In the above facts and circumstances of the case, we are of the view that the prosecution has failed to establish its case against the petitioner beyond reasonable doubt. Hence, this petition is converted into appeal and allowed. Resultantly, the conviction and sentence of the petitioner Muhammad Idrees is set aside. He is acquitted of the charge and shall be released forthwith unless required to be detained in some other case."

16. After going through the above evidence, it is very much clear that the story in the FIR registered by the police was managed one. The presence of the police officials at the time of incident has not been established as they not stated a single word about the presence of mother of the deceased at her house where such incident took place and gave contradictory version in respect of weapon carried by the accused at the time of incident. Police officials while admitting, that they were posted at the same police station for considerable time after their FIR but they during cross-examination stated that they do not know as to whether the mother of deceased lodged any FIR in respect of the same incident at the same police station. The mother has given true weapon in the FIR used for the murder of her daughter which too has some support from the medical evidence but her version was discarded by the police and her direct complaint was also dismissed. She was even not examined before the trial court as court witness. The version given by the police has no any independent corroboration including the medical evidence as has discussed above.

17. After the above evidence only remains evidence of the investigation officer who was not an eye-witness of the incident nor recovered the weapon for which cause of death was declared by the doctor and the weapon allegedly recovered by the investigation officer is not helpful to the prosecution. The opinion of a Police Officer who had investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat Order, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat Order, 1984. Even the Criminal Procedure Code (Cr.P.C) does not authorize him to form such an opinion. To determine guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that

can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr.P.C, only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly on the basis of evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to a Magistrate under sections 169 and 170 of the Cr.P.C does not tantamount to opinion as to the guilt or innocence of the accused person. And despite such opinion of the investigating officer, the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record, and not on the basis of that opinion of the investigating officer. Since the evidence of the eye-witnesses of the case is not believed by this court as discussed above then the evidence of investigation officer only is not sufficient to maintain conviction. Reliance is placed on the case of ***Muhammad Idrees and another v. The State and others (2021 SCMR 621).***

18. It is well-settled principle of law that the prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a

reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession as has been held by Honourable Supreme Court of Pakistan in case of ***Tariq Pervez v. State (1995 SCMR 1345).***

19. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, *"It is better that ten guilty persons be acquitted rather than one innocent person be convicted".* The Honourable Supreme Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon him) in the case of **Ayub Masih v. State (PLD 2002 SC 1048)** *"Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."* Reliance also is place on the case of ***Naveed Asghar and 2 others v. The State (PLD 2021 SC 600).***

20. Thus based upon the said golden rule of giving benefit of doubt to an accused person for safe administration of criminal justice, I am firmly of the opinion that all the evidence discussed above is completely unreliable and utterly deficient to prove the charge against the appellant beyond reasonable doubt. Resultantly, the Criminal Appeal No.S-144 of 2017 is allowed and the Judgment dated: 04.10.2017 passed by the Court of Additional Session Judge Pano Akil, in Session case No. 752 of 2014, arising out of FIR No. 190 of 2014 registered at police station Pano Akil for offence under sections 302, 452, 311 and 34 PPC is set aside and the appellant is acquitted of the charges.

21. These are the reasons of my short order dated: 20-12-2021.

J U D G E