

*Judgment sheet.*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD

Cr. Jail Appeal No. D- 110 of 2021  
Confirmation Case No.24 of 2021

**PRESENT**  
**Mr. Justice Muhammad Iqbal Kalhoro.**  
**Mr. Justice Khadim Hussain Soomro.**

Appellant : Raza Muhammad @ Razoo through Mr. Abdul Hameed Bajwa Advocate.  
Complainant : Nemo.  
Respondent : The State through Mr. Nazar Muhammad Memon Addl. P.G.  
Date of hearings : 31.05.2023  
Date of decision : 31.05.2023.

**J U D G M E N T**

**KHADIM HUSSAIN SOOMRO, J:-**By this judgment, we intend to dispose of captioned criminal appeal filed by the above-named appellant against the judgment dated 11.09.2021, passed by learned IInd. Additional Sessions Judge, Badin in Sessions Case No.04 of 2014 re: (State vs Raz Muhammad @ Raboo) in F.I.R being Crime No.307 of 2013, registered at Police Station, Badin for offences under sections 302 and 504, PPC whereby he convicted the appellant under section 302(b), PPC and sentenced to be hanged by his neck till his death, subject to confirmation of death sentence by Hon'ble High Court of Sindh under section 374 Cr.P.C with further direction to pay Rs.100,000/- to the legal heirs of the deceased Muhammad Rafique as envisaged under section 544-A, Cr.P.C. In default thereof, he shall suffer simple imprisonment for six months more.

2. Episode of the prosecution case is that on 11.12.2013 at 2000 hours, complainant Muhammad Ameen appeared at Police Station Badin and lodged FIR stating therein that he is a driver by profession. They are three brothers. Out of them, Muhammad Rafique aged about 35/36 years, was a laborer. Accused Raz Muhammad was a guard (Chowkidar) at the Bungalow of Syed Papoo Shah. Prior to one day of this incident, his brother Muhammad Rafique restrained accused Raz Muhammad Bhatti from standing in front of the entrance of his house, who asked him if he would see him again; he will be done to death, on eventful day, the

complainant, his nephew Rustam and his maternal uncle Muhammad Soomar were standing in front of the entrance of their house. In the meantime, his brother Muhammad Rafique came on a motorcycle. At 06:00 PM, the accused Razoo armed with a rifle came there and started abusing and asking his brother why he restrained him from standing in front of the entrance of the street of his house and exchanged hot words. On saying so, accused Razoo Bhatti made straight fires from his rifle upon Muhammad Rafique, which hit him on his forehead and chest. Due to firearm injuries, his brother fell down, and blood was oozing from the said injuries. After that, they arranged the vehicle and brought his brother Muhammad Rafique to Civil Hospital Badin, where he succumbed to the injuries. Then complainant, after leaving his relatives over the dead body for conducting post mortem at Civil Hospital Badin, came to the Police Station and lodged FIR as stated above.

3. After usual investigation, Challan was submitted before the competent Court of law against accused Raz Muhammad alias Razoo.

4. The learned trial Court framed charge against accused / appellant to which he pleaded not guilty and claimed trial.

5. In order to prove its case, prosecution examined PW-1 complainant Muhammad Ameen at Ex.5, who produced FIR at Ex.5/A and receipt at Ex.5/B, PW-2 Abdul Aziz at Ex.6, who produced mashirnama of dead body of Muhammad Rafique at Ex.6/A, mashirnama of place of wardat at Ex.6-B, mashirnama of securing of cloths of deceased Muhammad Rafique at Ex.6/C, mashirnama of arrest of accused Raz Muhammad alias Razoo at Ex.6/D, mashirnama of recovery of rifle SMG-762 alongwith license No.22662 dated 4.6.2009 and five live bullets vide Ex.6/E, PW-3 Imran, Tepedar of the beat at Ex.7, who produced four copies of sketch of the place of wardat at Ex.7/A to 7/E, PW-4 Muhammad Soomarat Ex.8, PW-5 Rustamat Ex.09. PW-6 Dr.Abdul Razzakat Ex.10, who produced letter vide Ex.10/A, Receipt at Ex.10/B, post mortem report at Ex.10/C, PW-7 SIP Rafique Ahmed at Ex.11, he produced entries Nos.23 & 27 of departure and arrival at Ex.11/A, checking form of dead body of Muhammad Rafique at Ex.11/B, entries Nos.12,13 and 14 at Ex.11/C, chemical report at Ex.11/D, ballistic Expert report at Ex.11/E, PW-8 GhulamQadirat Ex.12, who produced receipt vide Ex.12/A. Thereafter prosecution closed his side vide statement at Ex.13.

6. The statement of the appellant / accused was recorded under section 342 Cr. P.C (Exh.14), in which he denied the allegations levelled by the prosecution and claimed to be innocent. He further stated that , at

the time of the incident, Syed Ali Bux Shah alias Papoo Shah was contesting the election against PPP; therefore to defame his respect, this false case has been registered against him; however, he neither examined himself on oath nor produced any witness in his defence.

7. In the first round of proceedings, the appellant was convicted and sentenced to death vide judgement dated 28-02-2017, along with a fine amount of Rs.100,000/- .to be paid to the legal heirs of deceased Muhammad Rafique as envisaged under section 544-A Cr.P.C. In case of failure, he shall further suffer S.I. for six months more. The appellant preferred Criminal Appeal No.D-17 of 2017, Confirmation Case No.07/2017, which was disposed of vide Judgment dated 17.06.2021, whereby the matter was remanded back to the trial Court to record the evidence of P.W-2 Abdul Aziz in the presence of his counsel for his cross-examination. After that, section 342 Cr. P.C statement of the appellant would be recorded afresh, and then decide the matter afresh, the learned trial court made the compliance of above directions. However, the appellant was again convicted and sentenced to death, vide impugned Judgment dated 11.09.2021.

8. After hearing the learned counsel for the respective parties, learned trial Court convicted and sentenced the appellant as stated (supra).

9. Learned counsel for the appellant has contended that the prosecution has failed to prove its case beyond a reasonable doubt, and the learned trial court did not appreciate the major contradictions in the evidence of pws. He further contended that the impugned judgment is against the law, facts, and principles of natural justice and equity; therefore, the same is liable to be set aside. He urged that there is a delay of 12 hours in registration of FIR, whereas the distance between the place of the incident and the Police Station is about 3/4 furlong. He submitted that there is a conflict between the medical and ocular testimonies. The learned counsel has referred the examination-in-chief of the complainant, who stated that the accused made three or four fires shot from the rifle whereby one fire shot hit at the forehead of the deceased and three or four fires were hit at the chest of the deceased. He further submitted that on the same line, witness Rustam (PW-5 stated the same narration. He urged that as the complainant and eyewitnesses have jointly stated that the deceased sustained injury and they shifted him to the hospital, where he passed away, whereas P.C Qalander Bux stated that he had collected the dead body of the deceased from the house of the complainant and shifted the same in a police mobile to the hospital for post mortem. He

urged that during the course of an investigation, the I.O. collected blood-stained earth and five empties from the place of the incident, and both were sealed at the spot. The recovered rifle, as well as empties, was sent to the Ballistic expert for analysis purposes. According to him, four empties were similar, whereas the five empties were dissimilar.

**10.** The learned Addl. P.G appearing on behalf of the state as well as the complainant present in person have supported the impugned judgment and contended that the prosecution had proved its case against the appellant beyond any reasonable shadow of a doubt by producing oral as well as documentary evidence; that the learned trial court has rightly convicted the appellant, and he does not deserve any leniency; and that there appears to be no illegality or irregularity in the impugned judgment, which is well reasoned and does not require any interference, therefore, prayed that the same may be dismissed.

**11.** We have heard learned counsel for the parties and have gone through the evidence available on record with their able assistance.

**12.** Reassessment of the entire prosecution case manifestly demonstrates that there is a conflict between ocular and medical evidence, complainant at Ex-5, who in his examination-in-chief, deposed that on 11.12.2013, he along with Soomar and Rustam were present in the street in front of the Bangalow of Papu Shah, where accused Razo armed with Rifle came in the street and fired upon Muhammad Rafique, which hit at his forehead and he also made 3/4 fires which hit his chest, P.W-9 Rustam, has also deposed on the same line, meaning thereby as per evidence of above P.Ws, there should be either 3 or 4 wounds of entry on chest of the deceased whereas Dr. Abdul Razzaque, who conducted the post mortem of the deceased stated that there was a single firearm, being wound of entry at the left side of chest and there are five exist wounds. There is no explanation for why the exit wounds are five when the wound entrance is just one. Moreover, the eyewitnesses of the incident have not stated a single word about the wound of exist; even otherwise, It is impossible for there to be one entering wound and five exit wounds. Furthermore, P.W, Muhammad Soomar, who was examined at Ex.8, had not stated how many fires were made by the appellant/accused upon the deceased. We have asked a specific question from the learned Additional Prosecutor General about the conflict between ocular and medical evidence as discussed above, on which he gently admitted that there is no reasonable explanation available on the record to justify the nature of the injuries as cited above. The ocular testimonies contradict the

medical evidence. As a result, we observe that the deceased did not sustain the injuries in the way claimed by the prosecution, which creates doubt over presence of the eye-witnesses at the relevant time on the scene of incident. In this context we have been guided by the case of AMIN ALI and another V/S THE STATE (2011 SCMR 323), Supreme Court of Pakistan held as under :-

“ All the three witnesses deposed that the deceased had received three injuries, but the Medical Officer found six injuries on the person of the deceased. One of them had blackening. None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased. Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence. The Medical Officer did not show as to which of the injury was entry or exit wound on the person of the deceased. The medical officer stated that metallic projectile was recovered from wound No.1/B which was an exit wound. If it was an exit wound then the metallic projectile would have been out of the body. The presence of metallic projectile in the body clearly establishes the fact that it is not an exit wound but an entry wound. The medical officer has not shown that any of the injuries had inverted or averted margins so as to ascertain as to which of the injuries is entry or exit wound. Thus on this count there is a conflict between the medical and oral evidence. Furthermore, according to Medical Officer, the P.W.15 had four injuries out of them two were entry and two were exit wounds but the P.Ws. 13 and 14 deposed that the injured had received three injuries. Thus the P.Ws. have shown one exit wound as entry wound. With regard to the injured Tanveer Hussain, the Medical Officer showed two injuries one entry wound on the chest and one exit wound on the back but all the three eye-witnesses deposed that P.W.14 had received two injuries on his chest. As regards injuries on the person of Mst. Maqbool Bibi. The Medical Officer found one entry wound on her back with blackening, whereas P.Ws. 13, 14 and 15 deposed that the fire shot was fired from the roof of the shop. Entry wound with blackening marks cannot be caused from such a long distance. From the above position it is manifest that the ocular testimony is in conflict with the medical evidence. Thus, the deceased and injured did not receive the injuries in the manner, as alleged by the prosecution”.

13. The disparity in the ocular account unanimously provided by all witnesses, and its direct conflict with the medical evidence has cast shadow over the prosecution story. The reliance can be placed on the recent judgment in the case of ISHTIAQ HUSSAIN and another V/S Versus The STATE and others, 2021 S C M R 159.

“ it is hard to suspect his presence at the crime scene, nonetheless, discrepancy in the ocular account unanimously furnished by all the witnesses including

the injured himself is most intriguing; with one voice they blamed Hassan Raza, acquitted co-accused, for a dagger blow on the left thigh whereas according to the medical examination, the witness sustained a firearm injury on the stated locale; the accused is shown to have led to the recovery of a dagger, a circumstance further compounding the confusion; a witness discredited and disbelieved qua his own tormentor is of little relevance to sustain the remaining structure of the case. A confirmed presence by itself is not equivalence of truth”

14. All the eye-witnesses of the incident unanimously deposed that they had shifted Muhammad Rafique/ deceased, to the Civil Hospital, Badin, where he succumbed to the injuries and passed away. However, according to the postmortem report, P.W-8 Ghulam Qadir, who brought the dead body to the doctor for postmortem, stated that he brought the dead body of Muhammad Rafique from the complainant's house at sunset time and shifted the dead body to the Civil Hospital, Badin for postmortem. Furthermore, P.Ws Rustam and Soomar stated that the deceased, Muhammad Rafique, was riding a motorbike; both witnesses are crucial in determining whether the deceased fell down from the motorcycle after sustaining a bullet injury or remained on it, both the witnesses are silent on this point. Furthermore, the I.O. did not recover the purported motorbike in the investigation.

15. Any compromise on the truth is a compromise on the future of a civilized society, as just, fair, and fairness is the fundamental principle and bedrock of an educated civilization. A witness cannot be given permission to fabricate information or combine truth with deception. The complainant and his eyewitnesses' testimony plainly show that neither he nor the other alleged witnesses saw the occurrence; hence their presence at the scene of the incident at the relevant time is highly doubtful. In this context, reliance is placed upon the case of Zaffar v. The State (2018 SCMR 326), wherein the Hon'ble Supreme court Of Pakistan has held that;-

‘Having discussed all the aforesaid aspect of the case, it has been observed by us that, medical evidence, motive, recovery and for that matter absconding of appellant are merely supportive/corroborative piece of evidence and presence of eyewitnesses at the place of occurrence at the relevant time has been found by us to be doubtful, no reliance can be placed on the supportive/corroborative piece of evidence to convict the appellant on capital charge.’

16. The prosecution witness Abdul Aziz was examined being P.W-2 at Ex.06; he is mashir of the place of incident, arrest and recovery. He stated that in his presence, five empty shells were recovered from the place of

the incident. SIP Rafique Ahmed, who is Investigating Officer of the case, stated that he issued a letter for conducting a postmortem, prepared Lash Chakas Form and collected blood-stained mud and five empties of 7.62 rifle from the place of incident and sealed the same in the presence of the mashir and he stated that on 16.12.2013, he recovered the rifle along with license, magazine containing five bullets, he sealed the same and sent to the ballistic expert for its examination, report of the ballistic expert being dated 24.12.2013 shows that the empties being marked as C2 to C5 were dissimilar, the relevant observation of the ballistic expert is as under:-

“ Four 7.62 mm bore crime empties now marked as “C2” to “C5” were not fired from the above mentioned 7.62 mm bore K.cove No.NY-3784P, in question, in view of the following major points i.e. striker pin marks, breech face marks and ejector marks etc are **Dissimilar**”

17. It is a well settled principle of law, it is not necessary that there be numerous circumstances creating ambiguity; if there is only one, an accused must be granted the benefit of which, not as a matter of grace but as matter of right. Supreme Court of Pakistan in the case of **Mst. Asia Bibi v. The State (PLD 2019 SC 64)** has held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and AyubMasih v.The State (PLD 2002 SC 1048)." The exact same reasoning was reiterated in the case of AbdulJabbar v. State (2019 SCMR 129) when the apex court held that once a single loophole is observed in a case presented by the prosecution, such as a discrepancy between the ocular account and medical evidence or the presence of doubtful eyewitnesses, the benefit of such loophole or lacuna in the prosecution's case automatically goes in favour of an accused.

18. In common law, there is very famous saying , "Ten guilty persons should be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is founded on the tall authority of sayings of the Holy Prophet of Islam (peace be upon him): "Avert punishments [hudood] when there are doubts" and "Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way because the leader's mistake in pardon is better than his mistake in punishment". Reliance is placed on cases reported as "**Muhammad Luqman v. State**" **PLD 1970 SC 10**, **MOHAMMAD MANSHA V. THE STATE (2018 SCMR 772)**, **SAJJAD HUSSAIN v. The STATE (2022 SCMR 1540)**, **ABDUL GHAFOOR v.The**

**STATE (2022 SCMR 1527) and PERVAIZ KHAN v.The STATE (2022 SCMR 393). Musnad Abi Huthayfa, Hadith No.4. Kitab ul Hadood, p. 32**, relied upon by the Federal Shariat Court in **Kazim Hussain v. State, 2008 P.Cr.L.J 971, Mishkat ul Masabili (English Translation by Fazl ul Karim) Vol. II, p. 544**, relied upon by the Federal Shariat Court in **State v. Tariq Mahmood, 1987 PCrLJ 2173; SunnanTarimzi, Hadith No. 1344, Kitab ul Hadood. Jail Petition No.147 of 2016 30) in Ayub Masih v. State**<sup>37</sup> in the English translation thus: "Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent." As the prominent English jurist has also stated, an accused person may be acquitted, but the innocent person should not be convicted. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the distinguished English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the foremost figures of early American history, says "it is better a hundred guilty persons should escape than one innocent person should suffer."

19. It is a fundamental tenet of criminal justice that no accused person may be found guilty unless and until the prosecution produces reliable, trustworthy, and unimpeachable evidence and there are no inconsistencies casting doubt on the veracity of the prosecution story. In the present matter, we observe that the prosecution's story is shrouded in thick mists of doubt and that the learned trial court erred by failing to consider the material in its proper context and finding the appellant guilty of the charge. Therefore, the aforesaid appeal is allowed by extending him the benefit of the doubt. The appellant Raz Muhammad alias Razoo is acquitted. Resultantly, the reference no 24 of 2021 is replied in negative and disposed of. The above are the reasons of our short order dated 01.06.2023 allowing the appeals and acquitting the appellants.

The appeals in hand are accordingly disposed of.

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