IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Jail Appeal No.D-30 of 2021
Crl. Conf: Case No.D-34 of 2021

Present:
Mr.Justice Shamsuddin Abbasi
Mr.Justice Khadim Hussain Soomro

Appellant(s)	:	Ali Akbar son of Rahimdad Naich, Through Mr.Asif Ali Abdul Razzak Soomro, Advocate, Ghulam Mustafa and Ali Hassan, both sons of Haji Safar, and Haji Safar and Rajib Ali, both sons of Haji Soomar Naich Through Messrs Wazir Ali Khoso and Riaz Hussain Khoso, Advocate(s)
Complainant	:	Muhammad Khan Naich Through Syed Tahir Abbas Shah, Advocate.
The State	:	Through Mr. Aitbar Ali Bullo, Deputy Prosecutor General, Sindh.
Date of hearing	:	13.06.2023
Date of decision	:	26.07.2023

JUDGMENT

KHADIM HUSSAINN SOOMRO, J;- The listed Criminal Jail Appeal is directed against judgment dated 10.09.2021, passed by learned Additional Sessions Judge-I/MCTC, Dadu, in Sessions Case No.192/2011 *(Re. The State V/s. Ghulam Mustafa and others)*, emanating from FIR bearing Crime No.357/2010, offence punishable under Section 302, 324, 337-F(ii), 337-H(ii), 114, 504, 147, 148 & 149 PPC, registered with Police Station, K.N.Shah, whereby the present appellants were convicted as under:-

Under Section 302 PPC r/w Section 114, 149 PPC

Accused Rajib Ali, son of Haji Soomar Naich, is sentenced to death as Tazir for committing offence U/S.302 (b) PPC. He shall be hanged by his neck till he is dead. Accused Ghulam Mustafa, son of Haji Safar Naich, Ali Hassan, son of Haji Safar Naich, Haji Safar, son of Haji Soomar Naich and Ali Akbar, son of

Rahimdad Naich, are sentenced to suffer imprisonment for life as tazir as provided under section 302(b) Cr.P.C.

All accused are further directed to pay compensation of Rs.100,000/- (Rupees one Lac) each to the legal heirs of the deceased in terms of Section 544-A Cr.PC. In default thereof, they shall suffer simple imprisonment for six months more.

Under section 324 read with section 114, 149 PPC.

All accused shall suffer rigorous imprisonment for seven years and shall pay a fine of Rs.30,000/- each; in default thereof, they shall suffer S.I for three months more.

Under section 337-F(ii) read with Section 114, 149 PPC.

All accused shall pay Daman to the tune of Rs.25000/- to injured Ghulam Abbas; in default thereof, they shall be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the Daman amount is paid in full.

Under section 337-H(2) read with section 114, 149 PPC.

All accused shall suffer rigorous imprisonment for three months and shall pay a fine of Rs.5000/- each; in default thereof, they shall suffer S.I for one month more.

Under section 504 read with section 114, 149 PPC.

All accused shall suffer rigorous imprisonment for two years and shall pay fine of Rs.10,000/- each, in default thereof, they shall suffer S.I for two months more.

Under section 148 PPC read with section 149 PPC.

Accused Ghulam Mustafa, Ali Hassan, Haji Safar and Rajib Ali shall undergo R.I for two (02) years and to pay a fine of Rs.10,000/- each; in case of default of payment of a fine amount, they shall suffer S.I for one month more.

Under section 147 PPC read with section 149 PPC.

Accused Ali Akbar shall undergo R.I. for two (02) years and to pay a fine of Rs.10,000/-; in case of default of payment of the fine amount, he shall suffer S.I for one month more.

All the sentences awarded to the accused shall run concurrently, with benefits under section 382-B Cr.PC.

Besides this, a reference for confirmation of the death sentence against appellant Rajib Ali has also been made by the learned trial Court.

2. The facts, in brief, are that on 01.11.2010, complainant Muhammad Khan lodged FIR with Police Station, K.N.Shah, alleging therein that there was an old dispute between them and Haji Rajib

Naich and others; such Faisla/private settlement was held. On 31.10.2010, he and his brother Sheral Niach and cousins Ghulam Abbas and Roshan Ali, after taking tea from Dubai hotel, were going towards Johi barrage to their house; they were having searchlights when at about 07.00 p.m, reached curve of Katcha peechra (path) of Johi Barrage, they saw accused Haji Rajib armed with gun, Haji Safar armed with repeater, Ghulam Mustafa with gun, Ali Hassan armed with repeater, Ali Akbar Naich and three unidentified persons, if seen again would be identified, armed with guns. Out of them, accused Ali Akbar Naich instigated other accused not to spare the complainant party and to kill them, on his instigation, accused Haji Rajib fired from his gun upon Sheral Niach, which hit him on backside of his body and he while raising cries fell down, accused Ghulam Mustafa Naich fired from his gun at Ghulam Abbas with intention to commit his murder, which hit him at his left shoulder and left wrist and he fell down. The complainant party entreated the accused in the name of "Almighty Allah", and then all accused, while firing in the air and insulting the complainant party, went away. After the departure of the accused, the complainant saw his brother Sheral having sustained a gunshot and was lying dead, and Ghulam Abbas was lying injured. The complainant informed the police through cell phone, then took the corpse and injured to Civil Hospital, Dadu, where the police of Police Station Kakar came, issued a letter for examination of the injured and for conducting a postmortem of the deceased. After completion of the postmortem of the deceased, the dead body was handed over to the complainant party and after observing the burial and funeral rituals, the complainant came to Police Station and lodged the F.I.R.

3. After completing a usual investigation, the police submitted a challan before the Court of Learned Judicial Magistrates. The case on being sent up before the Court of learned Sessions Judge, Dadu, was then made over to learned trial Court, for its disposal in accordance with the law.

4. The present appellants pleaded not guilty to the charge framed against them which was subsequently amended.

5. At trial, the prosecution examined PW-1 Ghulam Mustafa, PW-2 Dr. Muhammad Ishaque, PW-3 eye-witness Roshan Ali, PW-4 SIP

Faiz Muhammad, PW-5 Mashir Mukhtiar Ali, PW-6 HC Khadim Hussain, while PW/SIP Ghulam Mustafa Tunio was given up by learned State Counsel.

6. The present appellants, in their statements recorded under Section 342 Cr.PC denied the allegations levelled against them by pleading their innocence. They, however, did not examine themselves on oath in disproof of the charge nor led any evidence in their defence.

7. The learned trial Court after appreciation of the evidence and hearing counsel for the parties convicted and sentenced the present appellants, as detailed above.

8. Per learned defence counsel, the instant case is false and fabricated against the present appellants; the evidence of all the prosecution witnesses being contradictory has no credibility and thus cannot be relied upon without independent corroboration. Summing up his contentions, the learned defence counsel submitted that the present accused had been arraigned in this case falsely, which is discernible from the averments of the FIR; as such, the case of the prosecution is doubtful and has no foundation against the appellants; therefore, they deserve to be acquitted in the circumstances of the case.

9. Learned Deputy Prosecutor General for the State, who is assisted by learned counsel for the complainant, contended that all the witnesses have fully supported the case of the prosecution and no major contradiction is noticed in their evidence; that the ocular account is fully consistent with medical and circumstantial evidence; that an innocent person has been done to death while the other has been injured; therefore, learned trial Court finding the appellants/accused guilty of the offence has rightly convicted and sentenced them by way of impugned judgment which calls for no interference by this Court, therefore, they prayed for dismissal of instant appeal. In support of contentions, learned counsel for the complainant relied upon case laws reported as PLD 1992 SC-2011, PLD 2007 SC-539, PLD 2005 SC-288, 2014 PCr.LJ-88, 2011 SCMR-872, 2004 SCMR-447 and 1990 PLD-116.

10. Heard arguments of learned counsel for the parties and have minutely gone through the material made available on record with their able assistance.

11. It needs most significance to mention here that the present case was remanded twice by this Court with two different directions; subsequently, it was tried in various rounds before the learned trial Court, and to clarify it at the most, each round requires a separate discussion. In the first round, the case proceeded against accused Ghulam Mustafa, Ali Akbar, Haji Saffar, and Ali Hassan, and when their statements under Section 342 Cr.PC were recorded, and one of the accused, namely Rajib Ali (appellant), was arrested by police; however, the learned trial Court instead of bifurcating his case from the rest of accused, amended the charge, and as such, the trial commenced again afresh.

12. In the second round, the prosecution, instead of recording the examination-in-chief of all the witnesses afresh, adopted the same which was recorded in the first round approximately of all Pws, and the defence also adopted their cross-examinations conducted in the first round of proceedings. Thereafter, learned trial Court awarded conviction and sentence through judgment dated 09.09.2017, the same on being assailed by preferring an appeal No.D-42 of 2017, together with Death Reference No.D-07 of 2017, and Criminal Appeal No-S-73 of 2017, was decided by this Court vide judgment dated 21.11.2017, setting aside the impugned judgment and remanded the case back to learned trial Court for its decision afresh, in accordance with the law, within a period of three months, after recalling the prosecution witnesses for recording their examination-in-chief and providing an opportunity to accused to cross-examine them and re-examination of accused under Section 342 Cr.PC and the accused were permitted to lead evidence in their defence or to get recorded their statements within the purview of Section 340 (2) Cr.PC, if they chose to do so. In the meanwhile, witnesses such as complainant Muhammad Khan, ASI Ghulam Mustafa Bughio, and PW/HC Muhammad Azam Babar died.

13. In the third round of trial, the prosecution re-examined PW-1 eye-witness Ghulam Abbas, PW-2 Dr Muhammad Ishaque Jatoi at

Ex.49, PW-3 eye-witness Roshan Ali at Ex.50, PW-4 Inspector Faiz Muhammad Kandhro at Ex.52, PW/Mashir Mukhtiar Ali at Ex.53, PW-6 HC Khadim Hussain at Ex.54. while learned ADPP gave up PW ASI Ghulam Mustafa Tunio, Thereafter, the side of prosecution was closed at Ex.55. Later-on, statements of accused under Section 342 Cr.PC was recorded. However, the learned trial Court awarded conviction and sentence to the appellants vide judgment dated 18.06.2019, which was assailed by the convicts before this Court through Criminal Appeal No.S-41 of 2019 and Criminal Appeal No.S-50 of 2019, which was again disposed of by this court vide judgment dated 20.8.2020, remanding the case back with directions to examine the possibility of consideration of evidence of complainant Muhammad Khan, PW/HC Muhammad Azam Babar and PW ASI Ghulam Mustafa which is available on record and then to re-write the judgment afresh in accordance with law. Such direction obviously has fulfilled the requirement of law and has excluded the possibility of filing the statement by learned State Counsel with regard to the adoption of evidence of witnesses who died subsequently.

14. In the fourth round of proceedings, the learned trial Court while considering the evidence of the above said dead witnesses as a valid piece of evidence, awarded conviction and sentence to the appellants vide judgment dated 10-09-2021, the quantum whereof is detailed above, hence the appellants preferred the instant appeal.

15. The legal question of whether the testimony of PWs who were recorded in earlier rounds of the trial may be considered as admissible during the later rounds of the trial must be resolved before examining the evidence. In this regard, the provision of Article 47 of the Qanun-e-Shahadat Order, 1984, is very much evident, which is reproduced hereunder;

> *47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the*

> *circumstances of the case, the Court consider unreasonable;*
>
> *Provided that; the proceeding was between the same parties or their representatives-in-interest; the adverse party in the first proceeding had the right and opportunity to cross-examine; the question in issue were substantially the same in the first as in the second proceeding.*
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> ***Explanation.*** *A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.*

16. For a criminal trial or inquiry, the testimony of a witness died, untraceable or otherwise and/or is unable to testify may be admitted into evidence by a visual depiction of the circumstances under which the witness was called to testify as provided under Article 47 of Qanun-e-Shahadat Order, 1984, subject to the conditions set-forth in the proviso thereunder. The complainant and the accused party involved in both the proceedings are same; the adverse party in both proceedings had an opportunity to cross-examine complainant Muhammad Khan, PW/HC Muhammad Azam Babar and PW ASI Ghulam Mustafa and the issues in both proceedings were similar. The guidance in this regard is taken from a case of ***ARBAB TASLEEM V/ S THE STATE (P L D 2010 SC-642),*** wherein the Honourable Apex Court has held that;

> "*Similarly, Article 47 visualize relevancy and significance to the evidence of a witness in a judicial proceeding or before any person authorized by law to take evidence, when the said witness is dead or cannot be found or is incapable of giving evidence, subject to the conditions, provided in the proviso to the said Article, that the proceedings were between the same parties or their representative-in-interest, which for the purpose of criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the said Article; when the adverse party in the first proceedings had the right and opportunity to cross-examine; the questions in issue were substantially the same in the first as in the second proceeding". Another case law 2019, MLD Sindh Page No 740,*

17. In light of the above discussion, firstly, the re-assessment of the evidence of PW-01 complainant Muhammad Khan is to be made who was examined in the first round at Ex.5; he opened the case of prosecution and deposed that accused Rajab made fire at the deceased from the close range by putting on body of the deceased but the postmortem report does not reveal any blackening or charring

around the wound, despite the fact that only one pallet was secured from the dead body of the deceased. It is an admitted position that at least 6/7 pellets are available in the cartridges, and if any fire is made from a very close range of the gun, all pellets will discharge from the cartridges, and there must be 6/7 wounds of entry in the deceased's dead body.

18. In medical terminology, if a fire is made from close range or in contact with the body, then the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. Clothes covering the affected area of the body and nearby hairs are singed by the flame. According Modi's Medical Jurisprudence and Toxicology (21st Edition), page 354 blackening can occur if a fire is made at a distance of 0.1 to 0.2 feet.

19. It is also impossible that if any fire is made by putting a gun upon the deceased, it would be Contact or near-contact wounds, these happen when the gun's muzzle is held close to or forced against the victim's skin. They frequently display distinctive traits including heat damage, soot accumulation, and muzzle impression. As per doctor there was no sign of either position on the dead body of the deceased, as discussed above. The fire may be made from inches, one yard to ten yards; the pellet would scatter. It is very astonishing that only one pellet was secured from the dead body of the deceased. Had there been a close range fire from the gun at the deceased as alleged by the complainant, there would have been multiple holes in the dead body of the deceased. In this context, the reliance is placed upon a case of ***Muhammad Zaman v. The State (2014 SCMR-749),*** wherein the Hon'ble Supreme Court of Pakistan has held that:-

> ***"Blackening was found, if a firearm like a shotgun was discharged from a distance of not more than 3 feet".***

20. The prosecution examined two eye-witnesses namely PW-1 Ghulam Abbas and PW-3 Roshan Ali who had claimed that they have also witnesses the incident but they did support the version of the complainant. The complainant in cross examination stated that **"The accused fired upon the deceased by putting on his body as well as fired upon the injured in the same condition"**. Hence the

presence of the complainant Muhammad Khan and P.Ws namely Abbas and Roshan Ali at the place of incident is highly doubtful.

21. The things are not ended here the complainant in his cross examination admitted that the FIR was registered against accused after due deliberation and consultation with each other***"It is correct to suggest that the FIR was registered after discussion and consultation with each other against the accused person".*** Such stance of the complainant itself is sufficient to create the reasonable doubt in the story narrated by him in his FIR.

22. The complainant and his eye witnesses admitted that on the source of search lights/torch they have identified the appellants/ accused. But the same was not handed over to the investigation officer to believe that at the time of incident, the witnesses were having torch or search light in their hands. PW-6 Faiz Muhammad, who acted as Investigation officer of the case, admitted that at the place of incident, there was no electric poll or the source of light. He also admitted that the torch was neither produced nor recovered during the investigation. The prosecution was required to establish the source of light. However, about the source of light, the evidence of all the prosecution witnesses is not consistent and contradictory and the same cannot be relied upon. In this regard, I have been guided by a case of ***PERVAIZ KHAN and another* V/S. *The STATE (2022 SCMR-393).***

> "*.....Even otherwise according to prosecution the witnesses had seen the appellants and the other co-accused in the head light of the tractor but the investigating officer categorically stated that the said tractor was produced before him after six days of the occurrence and the same was not available at the spot when he visited the place of occurrence. Even there is nothing on record to say that even anyone had checked whether the head lights were in working order or not. So the source of light has not been established by the prosecution especially when the tractor was not available at the place of occurrence when police arrived and the same produced for the first time after six days of the occurrence*". ***Underline is for emphasis.***

23. Returning to the evidence of injured witness Ghulam Abbas, who claimed to have been there at the scene of the occurrence and witnessed it. In his cross examination, he admitted that the fires were made at the distance of 60/70 feet away from the place of incident where he sustained injury and he was hospitalized for the period of

5/6 days and he put his signature upon his statement on blank papers. However PW-6 Faiz Muhammad and PW-5 SIP Ghulam Mustafa who acted as Investigation officer of the case, have not supported the version of the injured that they have obtained the sign on the blank papers. Moreover, PW-7 Dr. Muhammad Ishtiaq who examined **[in the second round of proceedings]** in his cross examination admitted that injured Ghulam Abbas was not hospitalized; after first aid he was discharged. In cross examination P-W-7 admitted that the wound of entrance of injured Ghullam Abbas is also from his back side. It is also admitted position no provision medical certificate issued by the doctor which could confirm that the injury of the injured was inspected. The evidence of investigation officers as well as doctor falsified the stances taken by the injured witness in his evidence.

24. The complainant deposed that accused Haji Safar and Ali Hassan made fires which were missed, whereas PW-2 Ghulam Abbas stated that they did not make fire in air, while PW-3 Roshan Ali deposed that all the accused while making aerial firing went away. PW-1 Muhammad khan deposed that no one was there at the place of incident, whereas PW-2 stated that eight persons came at the place of incident. The witnesses deposed that accused Ali Akbar had got a Danda in his hand, whereas, in the FIR, accused Ali Akbar was shown to be empty handed. The complainant deposed in his examination-in-chief that he had taken the dead body and injured to hospital, where the police arrived and got a letter for treatment of injured and for postmortem of the deceased, whereas, PW Ghulam Abbas contradicted the complainant on this point by deposing that his cousin took them towards the hospital and they were on the way, the police also met them and gave letter for treatment and postmortem. However, PW-3 Roshan Ali deposed that his cousin Muhammad arranged the conveyance and they went to Kakar Police Station where his cousin Muhammad obtained letter from police for treatment and postmortem.

25. The complainant as well as PW Ghulam Abbas also contradicted each other with regard to sitting at Dubai hotel; the complainant stated that they were sitting on cot while PW Ghulam Abbas stated that they were sitting on bench. The complainant and PW Roshan Ali in their cross examination admitted that they saw

accused persons at the distance of 5 feet, whereas PW Ghulam Abbas stated in his cross examination that he saw accused from the distance of 100 feet. PW Ghulam Abbas in his cross examination stated that Dadu Hospital is at the distance of 300 feet from the place of incident while PW Roshan Ali deposed that the Dubai hotel is 200 paces away from the place of incident. PW-3 admitted that accused Haji Rajab fired at the deceased from distance of 5 feet, while the doctor who conducted the postmortem examination of the deceased stated that there was no burning or blackening around the injury sustained by the injured. This aspect of the case suggests that the prosecution witnesses have tried to prove the case by making dishonest improvements. The guidelines to this aspect of the case have been taken from a case of ***Muhammad Mansha v. The State (2018 SCMR-772),*** wherein it has been observed that;-

> *"Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafique Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474)."*
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> *In that eventuality, the conviction upon the statements of the witnesses who, in the assessment of the High Court, made dishonest improvements and their divergent stances in the FIR and the private complaint made them doubtful then there was no legal justification to convict the appellant Muhammad Mansha on the same set of evidence without independent corroboration conspicuously lacking in the instant case, as held by this Court in the cases of Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 SC 11),*

> *Sarfraz alias Sappi v. The State (2000 SCMR 1758), Iftikhar Hussain and others v.The State (2004 SCMR 1185), Akhtar Ali and others v.The State (2008 SCMR 6), Muhammad Ali v.The State (2015 SCMR 137), Mst. Sughra Begum and another v. Qaiser Pervez and others (2015 SCMR 1142) and Shahbaz v. The State (2016 SCMR 1763). The above principle has been appreciated by the High Court in the instant case, but erroneously convicted the petitioner against the said settled principle."*

26. Returning to the medical account wherein PW-7 Dr. Muhammad Ishtiaq in his cross examination admitted that fire arm injures on the body of deceased was a bullet injury, however, appellant/accused Rajib Ali was shown to have been armed with gun. It is not yet ended here, the doctor in his examination-in-chief stated that he had secured a pallet from the body of deceased. Here, the doctor has given wavering stances which are contradictory to each other. PW-7 in cross examination admitted that "the injured might have either lied down facing the earth or bent facing towards earth as the injuries were sustained by him from backside". Whereas, the ocular account is contrary to it. In the first round of proceeding doctor had neither produced medical certificate of the injured nor the post mortem report of the deceased.

27. The postmortem report (Ex.14/E) and the testimony of the prosecution witnesses are in conflict with each other, and the medical evidence does not support the ocular account. In this context, the reliance is placed upon a case of ***Nazir Ahmed Vs. The State (2018 SCMR-787)*** wherein the Hon'ble Supreme Court of Pakistan has held that:-

> *4.....instead of providing support to the ocular account the medical evidence produced by the prosecution had gone a long way in creating dents in the case of the prosecution.....*

28. reverting to the circumstantial account, wherein the prosecution examined Mashir Mukhtiar Ahmed, who in first round of proceedings being witnesses No.4, in his cross examination admitted that his CNIC was obtained for the preparation of memos and all the memos were prepared at the police station, he further admitted that police had obtained his signatures on blank papers and the memos were prepared later-on but he in his second round had given totally

different version to that of his earlier version, which clearly shows dishonest improvement on his part.

29. PW-5 SIP Ghulam Mustafa examined at trial on 05.11.2010, he deposed that during interrogation in custody, accused Ghulam Mustafa confessed his guilt and became ready to produce SBBL gun, used by him in the crime, which was recovered on his pointation; since the gun was unlicensed, and he registered a separate FIR under Section 13 (e) Arms Ordinance. He further deposed that he had sealed the gun but in cross-examination he admitted that the gun was not sealed and the same was not sent to the ballistic expert for the report. Indeed, the acquittal of appellant Ghulam Mustafa in a case relating to Arms Ordinance, was not assailed either by the complainant or the State till the same attained its finality.

30. It is noteworthy that throughout the course of the investigation, no drawing of the scene of the event was made; nonetheless, the State's ADPP had given up Tapedar on the grounds that he had not prepared the sketch of the scene of the incident.

31. PW-6 Faiz Muhammad who is Investigation officer of the case, deposed that he inspected the place of incident on the pointation of complainant and secured blood stained earth as well as two empties of 12 bore and the same were sealed and he admitted that at the place of incident, there was no electric poll or the source of light. He also admitted that the torch was neither produced nor recovered during the investigation. ASI Ghulam Mustafa Tunio, to whom the FIR and Memo of site inspection, danistnama and other papers were handed over for investigation, however, on 02.11.2010, he was transferred and he handed over the case papers to ASI Ghulam Mustafa Bughio and he produced the memo of injures, danistnama and place of incident. He further stated that he prepared memo of last worn clothes of the deceased and sealed in bottle the blood stained earth of deceased and two empty cartridges in the sealed condition. In cross examination, he admitted that the empty cartridges and clothes which were sealed do not bear the signature of mashir. Furthermore, there was no single word about the crime number, case number of the present case on the sealed parcel. He also admitted that in the sealed parcel containing blood, name of injured PW Ghulam Abbas is not mentioned and he further deposed

that as per mashirnama, PW Ghulam Abbas sustained three injuries, whereas as per FIR as well as evidence of the injured, he sustained two injuries, one is on left shoulder and other on left wrist; such inconsistency in his evidence creates serious doubt.

32. The prosecution is responsible for proving its case against the accused at the standard of proof required in criminal cases, namely, beyond reasonable doubt, and cannot be said to have satisfied this obligation by producing evidence that only meets the preponderance of the evidence standard used in civil cases. If the prosecution fails to discharge, the accused person is entitled to the benefit of the doubt, not as a concession but as matter of right. The rule of giving the accused the benefit of the doubt is essentially a rule of forethought and foresight, and it is deeply rooted in jurisprudence for the safe administration of criminal justice. It is well settled principle of law of Honourable Apex Court that a single fact casting doubt on the prosecution's story is sufficient to acquit the accused. In a case of ***Tariq Pervez Vs. The State, 1995 SCMR 1345***, for giving the benefit of doubt it is unnecessary that there should be numerous doubt-raising from circumstances. If the single circumstance that generates a reasonable doubt about the guilt of an accused then the accused is entitled to its benefit, not as a matter of grace and concession but as a matter of right. In this regard, the reliance is placed upon the cases of ***"Muhammad Adnan and another v. The State and others" (2021 SCMR-16), "Ghulam Abbas and another v.The State and another" (2021 SCMR-23), and "Zulfiqar Ali v.The State" (2021 SCMR-1373).***

33. 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 upon 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. Kitabul Hadood, p. 32, relied upon by the Federal Shariat Court in Kazim Hussain v. State, 2008 P.Cr.L.J 971, Mishkatul Masabili (English Translation by Fazlul Karim) Vol. II, p. 544, relied upon by the Federal Shariat Court in State v. Tariq Mahmood, 1987 P.Cr.L.J 2173; Sunnan Tarimzi, Hadith No. 1344, Kitabul Hadood. Jail Petition No.147 of 2016 30 him) in Ayub Masih v. State 37 in the English translation thus: "Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent.'

34. It is a well-established principle of administration of criminal justice that a person cannot be found guilty until and unless the prosecution presents evidence, both conclusive and free of any inconsistency which casts doubt on their story. For the instance, we believe the prosecution's account is shrouded in fog, and the learned trial Court by making a mistake has failed to properly weight the evidence before reaching final verdict of guilt against the appellants.

35. The case law which is relied upon by learned counsel for the complainant being on distinguishable facts and circumstances is not helpful to his case.

36. The over-all discussion involved a judicious conclusion that the learned trial Court has committed illegality while recording conviction/sentence erroneously, holding the present appellants guilty of the alleged offence. Consequently, the instant Criminal Jail Appeal is **allowed**; the conviction and sentence awarded to the present appellants by learned trial Court vide impugned judgment dated 10.09.2021 is set-aside and they are acquitted of the charged offence. Office is directed to issue release writ, directing the concerned jail authority to release the appellants forthwith in the present case, if they are no more required in any other custody case.

37. The Criminal Reference for Confirmation of Death Sentence to appellant Rajib Ali is answered in "***Negative***".

JUDGE

JUDGE