IN THE HIGH COURT OF SINDH AT KARACHI

CR. JAIL APPEAL NO.222/2016

Appellants	:	Abbas Ali and another, through Mr. Mubashir Ahmed Mirza, advocate.
Respondent	:	The State, through Mr. Abrar Ali Khichi, APG.

Date of hearing	:	23rd April and 16th May 2018.
Date of announcement	:	31st August, 2018.

JUDGMENT

Salahuddin Panhwar, J: Appellants have assailed judgment dated 17.12.2015 passed by the Court below in Sessions Case No.973/2011 whereby appellants/accused were convicted and sentenced u/s 302 PPC to undergo R.I. for life in respect of commission of Qatl-e-Amd of Muneer Ahmed, and were directed to pay Rs.200,000/- each as compensation to legal heirs of the deceased; in default of payment to suffer S.I. for 3 months each; they were further sentenced u/s 397 PPC to undergo R.I. for 7 years and to pay fine of Rs.5,000/- each and in default of payment to suffer S.I. for one month each however benefit of section 382-B Cr.P.C was extended to them. Alongwith the appeal, appellants have also filed an application for condonation of delay in filing the appeal.

2. Brief facts of the case per FIR No.163/2011, u/s 394/397/302/34 registered at PS Al-Falah are that complainant Muhammad

Aamir reported that on 06.06.2011 at about 1700 hours that he alongwith his brother Munir Ahmed was selling milk; meanwhile accused persons, duly armed with weapons, committed robbery and his brother Munir Ahmed (now deceased) caught hold one of the accused namely Abbas Ali on which absconding accused Aamir Peush made firing upon Munir Ahmed in order to rescue the other accused Abbas Ali; due to said firing Munir Ahmed received four bullet injuries, while Abbas Ali received one injury; injured Muneer Ahmed later on died at the hospital. The absconding accused Aamir fled away from the scene by taking away cash of Rs.70,000/-. Meanwhile police reached at the spot and arrested the accused Abbas Ali, hence FIR was registered. At trial, charge was framed against accused persons on 28.09.2011 to which they pleaded not guilty and claimed trial.

3. Prosecution examined PW-1 complainant Muhammad Aamir at Exhibit 4 who produced his statement u/s 154 Cr.P.C, memo of site inspection as Exhibits 4/A and 4/B; PW-2 Razzak Ahmed at Exhibit 5 who produced memo of inspection of dead body and inquest report as Exhibits 5/A & 5/B; PW-3 Shabbir Ahmed at Exhibit 7; PW-4 SIP Muhammad Ashraf at Exhibit 9 who produced memo of arrest and recovery and roznamcha entry as Exhibits 9/A and 9/B; PW-5 PC Haider Zaman at Exhibit 10 who produced roznamcha entry as Exhibit 10/A; PW-6 ASI Anjum Saeed at Exhibit 11 who produced sketch of place of incident, roznamcha entry, letter to MLO, cause of death, receipt of dead body and subsequent roznamcha entry as Exhibits 11/A to 11/F respectively; PW-7 SIP Ahmed Ali at Exhibit 12 who produced letter addressed to Incharge FSL, Report, roznamcha entry, memo of arrest, three other roznamcha entries as

Exhibits l2/A to 12/G respectively; PW-8 Dr. S. Farhat Abbas at Exhibit 13 who produced two MLCs and two letters as Exhibits 13/A to 13/D respectively; thereafter learned DDPP closed the side of the prosecution vide statement dated 07.l1.2015 at Exhibit 14. On 23.11.2015 statements of accused persons under section 342 Cr.P.C were recorded at Exhibits 15 and 16 wherein they denied the allegations of the prosecution and claimed that they were innocent and have falsely been implicated, however, they did not examine themselves on oath u/s 340(2) Cr.P.C. nor produced any witness in their defence.

4. Learned counsel for appellants/accused persons has argued that there is no eye witness of the alleged incident; that appellants were not arrested at the spot nor any incriminating or robbed articles were recovered from their possession; that accused Abbas Ali was shown arrested at the spot however no incriminating articles has been recovered from his possession which shows that he had come for robbery empty handed; that accused Aamir Peush was not arrested at the spot nor any identification parade was held before learned Judicial Magistrate; that no crime weapon or robbed amount was recovered from the possession of appellants or on their pointation; that accused Aamir was arrested at PS Malir City in some other case and on his admission he was arrested in the instant case; that no confessional statement of accused Amir was recorded before learned Judicial Magistrate; that there are material contradictions in the evidence of prosecution witnesses which create serious doubt in the prosecution case hence the same has no evidentiary value; the case of the prosecution is not free from doubt and the benefit of doubt is to be extended to the

appellants/accused by acquitting them from the charge; that impugned judgment was passed without taking into consideration the entire material available on record and without application of judicial mind as prosecution witnesses were interested witnesses and their evidence could not have been relied upon. Learned counsel placed reliance on 2002 P.Cr.L.J 1240, 2015 YLR 2413, 1996 SCMR 308, 1990 SCMR 158 and 2010 SCMR 939.

5. On condonation of delay, learned counsel has contended that as appeal was time barred, appellants have submitted an Application for condonation of delay; that appellants are poor, helpless and were confined in the prison; their families could not engage a counsel to prepare and submit their appeals in Court due to their poverty; that in ordinary course of law a prisoner would not be held responsible for delay in filing of appeal due to confinement; that this Court is empowered to condone the delay even *suo moto;* learned counsel relied upon PLD 2005 SC 153 and 2001 SCMR 1405.

6. Learned A.P.G contended that ocular and circumstantial evidence available on record have remained unchallenged, unshattered and fully corroborative to each other; that accused Abbas Ali was arrested at the spot while accused Aamir Peush made firing upon Munir Ahmed and robbed away cash amount; that the allegations leveled by complainant against the appellants have been supported by eye witnesses produced; that per medical record Munir Ahmed died due to fire arm injuries; that there appears no malice on the part of prosecution for falsely implicating the appellants in the crime when more particularly medical evidence has fully supported the version of the complainant; that prosecution has therefore

discharged the burden beyond any reasonable doubt as such the judgment impugned herein is in accordance with law.

7. I have heard the respective sides and have also gone through the available record *carefully.*

8. As regard filing of appeal with delay, I would insist that right of *appeal* is a ***substantial right*** which *normally* should not be denied on *technical counts / reasons* particularly when it comes to ***Criminal Administration of Justice.*** I would also insist that *normally* condonation of delay would do nothing with merits of the case but would only require the Court to decide the *lis* on merits. This has been the reason that condonation of delay is *normally* subject to giving a **'reasonable explanation which might have prevented party in approaching the Court'.** Thus, while examining the question of *limitation,* the circumstances claimed to have prevented one in approaching the Court in time, would always be a *decisive*. I would further add that if the *circumstances* pleaded appear to be justified or *even* likely to be *believable* though no *proof* is offered then the delay must always be condoned. This is for simple reason that even condonation of delay would not absolve the appellant (*party)* from establishing his case on merits. Guidance is obtained from the case of *Fazli Hakeem & another v. Secretary, State & Frontier Regions Division & Ors* (2015 SCMR 795) wherein it is observed as:-

> "7. Even otherwise, the Courts of law are not supposed to perpetuate what is unjust and unfair by exploring explanation for an act which is *prima facie* against law and thus void. They should rather explore ways and means for undoing what is unfair and unjust. **Even the question of limitation, if at all, created any impediment in the fair adjudication of the case, has to be looked from such angle of vision**…..

In the instant matter, it is not a matter of dispute that during *legal* period of filing of appeal the appellants were confined in *jail* and their *plea* of being not at liberty to approach the court with their *free* will cannot be ignored straight-away. The status of the appellants to be *pauper* was / is also evident from the order dated 07.04.2017 available on the chest of this file which reads as:-

> *"Appellants produced in custody submit that being pauper, they cannot afford to pay the fee of counsel, hence some counsel on State expenses may be provided to them; they say that in this respect they have already submitted an application addressed to Hon'ble Chief Justice of this court available in the file (Flag 'B'). Lifer convicts are entitled to defend their case / appeal, therefore, learned Prosecutor General Sindh is directed to provide them a counsel on State expenses at an earliest so that* this appeal be heard and decided without further delay. *Office is also directed to tag the paper book and if the same is not prepared, then prepare the same at an earliest preferably within a period of fifteen days. To come up on 27.4.2017."*

Their *plea* of being poor / pauper and not in a position to have access to counsel for filing appeal also appears to be believable. In my view, it would be *unfair* to deny a *substantial right* to appellants while holding that *blood-relation* of the appellants could have arranged filing of appeal in time. Such attempt would be in negation to principle, enunciated in case of *Fazli Hakeem* (supra) but would also be in negation to provision of Section 420 of the *Code* whereby the convicts, confined in *jail,* have been given a right to prefer appeal in following manner:-

> "420. Procedure when appellant in jail**: If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer incharge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court."**

This provision is in affirmation to the fact that acts and omissions of *relations* of confined appellants should not be taken to penalize the *convicts,* particularly when such blood-relations are not the direct ***consequences bearer*** of their failure or success in filing appeal in time.

Even otherwise, the office note dated 23.05.2016 reflects that present appeal of appellants confined at Central Prison Karachi was sent by Superintendent of the Prison vide letter dated 03.05.2016 received on 04.05.2016. The superintendent *however* never claimed that appellants had submitted appeal in time or it was moved *late.* Here, I would say that since the provision of section 420 of the *Code* is an exception therefore, the *superintendent* of jail (s) *normally* must also ask the *lifer,* in particular, about such *exception* if they have not preferred in ordinary course. The record further shows that vide order dated 01.7.2016, the appeal was admitted to regular hearing while leaving the question of *limitation* to be decided at time of hearing of appeal. The operative part whereof reads as:-

> "Appellants have sent this jail appeal through superintendent central prison, Karachi on **04.5.2016, which is admitted to regular hearing**. Notice to P.G. and complainant for 14.7.2016. Call R&P. Office is directed to prepare paper book as early as possible. Office is also directed to send the copy of this Order to the superintendent, central prison, Karachi, **informing the appellants about the admission of this appeal for regular hearing**. Issue PO for appellants with direction to superintendent, central prison, Karachi, to produce appellants before this Court in a strong squad."

The above order is self-indicative of the fact that appeal was ***admitted*** although question of *limitation* was left open to be decided at time of hearing of appeal but *prima facie* the appeal was found to be not liable to *summary* dismissal (Under Section 421 of the *Code)* hence such *admitted* appeal was / is always to be decided within meaning of Section 423 of the *Code* when , procedure as provided by Section 422 of the *Code,* is followed by appellate Court. Thus, I would insist that in such like situation it would be *unfair* to knock the appellants out *technically* when the appeal was **admitted** to regular hearing. In view of above legal and factual position, I found no substance in

plea of appeal, being time barred and hold the *delay* , if any, to have been beyond control of appellants hence same is condoned.

9. Now, I would revert to the merits of the case. The appellants *though* claimed that there is no *eye-witness* to occurrence but *prima facie* never denied *least* disputed the following *specific* claims of the prosecution i.e:-

i) *date & time of incident;*

ii) *place of incident to be THIA (place for selling milk) outside cattle-farm of complainant party;*

iii) *death of deceased to be* **un-natural;**

iv) *arrest of appellant Abbass from place of incident in injured condition;*

Therefore, it is *hard* to disbelieve the presence of the claimed *eye-witnesses* i.e complainant PW-1 Muhammad Amir (*real brother of deceased);* PW-3 Shabbir Ahmed *(father of deceased)* as well PW-2 Razzak Ahmed (*cousin of deceased).* It may be added that PW-1 and 3 claimed to be residents of *first-floor* of dairy-farm while PW-2 to be residing in *neighbourhood.* Such claims were never denied or *disputed* by the defence. Thus, by no stretch of imagination, these witnesses cannot be said to be ***chance witnesses*** who stood defined in the case of <u>*Mst. Rukhsana Begum & Ors v. Sajjad & Ors*</u> (2017 SCMR 596) as:-

> "17. ……. a chance witness is one who, **<u>in the normal course is not supposed to be present on the crime spot</u>** unless he offers cogent, convincing and believable explanation, justifying his presence there."

The *criterion* for examining the evidence of *natural* witness is different from that of *chance witness.* For former, the *presence* is never disputed while for *later* the witness *first* has to satisfactory establish his presence. I would also add

here that *normally* the evidence of *blood-relation* gets more strength in absence of any *mala fide* or *enmity* because *normally* a blood-relation would not spare the real culprit by substituting it (*real culprit)* with an innocent person. Reference may be made to the case of Zahoor Ahmed v. State (2007 SCMR 1519) wherein it is held as:-

> "6. …. The petitioner is a maternal-cousin of the deceased, so also the first cousin of the deceased through paternal line of relationship and thus, in the light of the entire evidence it has correctly been concluded by the learned High Court that the blood relation would not spare the real culprit and instead would involve an innocent person in the case. Further it has rightly been observed that it was not essential for the prosecution to produce each of the cited witnesses at the trial."

In instant matter, the witnesses of *ocular* account are not only *natural witnesses* but are also *blood-relations* hence their evidence was not only required to be shattered on material aspects but the defence was also required to bring something to establish *least* reasonably plead their false involvement. The perusal of the record *however* shows that all the witnesses of *ocular* account categorically supported each other with regard to manner of incident; number of accused persons as well arrest of appellant Abbas in *injured* condition while escape of other appellant. In the instant case, the appellants have pleaded no *enmity* or *mala fide* on part of the prosecution witnesses rather only had suggested that deceased died in incidents of political unrest in the city. However, no attempt was made to establish happening of such *political unrest* at relevant time. Such version *even* found strength from evidence of PW-4 SIP Muhammad Ashraf who in his *un-shattered* examination-in-chief stated as:-

> "On 06-06-2011 I was posted at PS Alfalah and my duty hours were '08:00 am to 08:00 pm. I was busy in patrolling in the area in Police mobile Second alongwith HC Ashique Hussain and HC Mushtaq for prevention of crime. During patrolling at about 17:15 hours we reached at the BAND of Malir Naddi situated in Azeem Pura where I saw many people gathered there. On my query **one Bashir disclosed that his brother Munir was shot four bullets by the robbers who came at their THALLA where he was busy in selling the milk**. One culprit was kept hold by such gathered people who disclosed his name to me as **Ghulam Abbas** and disclosed the name of his companion succeeded to escape as **Amir s/o Abul Bakar.**"

Further, the memo of *inspection of place of incident* not only establishes the place of occurrence but manner of happening of incident as well arrest of appellant Abbas as same states as:-

> *"…. On 06.6.2011 at 17:00 PM, elder brother of case of complainant Munir Ahmed s/o Bashir Ahmed alias Baboo who sold milk of Babo Milk shop. Two accused person duly armed with T.T. pistol came on motorcycle bearing No.KHV-3830 black colour and snatched Rs.70,000/- cash from the pocket of injured on the force of weapon. During resistance of injured, accused Abbas Ali made fire and accused was apprehended by injured and thereafter another accused Amir s/o Abu Baker made further four fires from same pistol which was hit on chest, abdomen, right side arm and hip. Accused Abbas Ali was appended on the spot, has been found and arrested. Recovered five empties of T.T. pistol was taken into police possession and sealed …"*

In addition to this, the appellants also never denied or *disputed* arrest of appellant Abbas in *injured* condition from place of incident. The appellants even failed to submit any *explanation* for such injuries although medical officer *categorically* stated in his evidence as:-

> "One accused Abbas Ali was brought by SIP Sajjad of PS Al-Falah **with the history of fire arm injury during dacoity.** I examined him and noted following injuries:-
>
> 1. lacerated penetrating wound 0.5 x 0.5 cm margins inverted on right thigh.
>
> 2. Two abrasion contusions 1 cm x 0.2 cm on the right side or face.

> 3. Abrasion contusion 5 cm x 3 cm on palmer of the right hand. Injury No:1 is fire arm injury and injuries No:2 and 3 caused with hard and blunt substance.
>
> I issued such MLC of accused which I produce as Ex:13/C, it is same correct and bears and my signature. I also produce police letter as Ex:13/D, it is same and correct."

The *injuries,* including firearm, on person of the appellant Abbas were always requiring him to explain the same particularly when the same were claimed to have been received ***'during dacoity'*** but it is a matter of record that there came no explanation at all nor the appellants ever attempted to take any exception to arrest, claimed on a particular date, time and place. Thus, *prima facie,* the ocular account found full and complete corroboration from medical evidence as well *circumstantial* evidence.

10. Though there had arrived number of persons at time of *dacoity* but the prosecution was never obliged to bring all persons on record and even otherwise *normally* the people always show reluctance in acting as witnesses against ***criminals*** therefore, if witnesses, so brought, are natural witnesses their testimonies cannot be disbelieved merely on count of their relationship. Such principle is by now settled for two counts i.e it is not the quantity but *quality* and that mere relationship never is a proof of one telling truth or *false.* Guidance is taken from the case (s) i.e

> *Niazuddin and another v. State* (2011 SCMR 725):
>
> > 11. The statement of Israeel (PW 9) the eye-witness of the occurrence is confidence inspiring, which stand substantiated from the circumstances and other evidence. **There is apt observations appearing in Allah Bakhsh v. Shammi and others (**PLD 1980 SC 225) **that "even in a murder case conviction can be based on the testimony of a single witness, if the Court is satisfied that he is reliable."** The reason being that it is the quality of evidence and not the quantity which matters. Therefore, we are left with no doubt whatsoever that conviction of Niaz-ud-Din was fully justified and has rightly been maintained by the High Court.

Zulfiqar Ahmed & another v. Stat (2011 SCMR 492):

> "7. … It is worth mentioning that minor contradictions do creep in with the passage of time and can be ignored.
>
> …. It is well settled by now that merely on the ground of inter se relationship the statement of a witness cannot be brushed aside. The concept of 'interested witness' was discussed elaborately in case titled Iqbal alias Bala v. The State (1994 SCMR 1) and it was held that 'friendship or relationship with the deceased will not be sufficient to discredit a witness particularly when there is no motive to falsely involve the accused."

I also find no strength in plea of non-recovery of robbed articles or weapon from possession of the appellant Abbas because it was never claimed by the witnesses of *ocular* account that robbed articles were received by appellant Abbas or that he (*appellant Abbas)* was armed with any weapon therefore, such *plea* is entirely misconceived. I would also add here that appellant Ameer Peush was , *from very beginning,* claimed to be main culprit. Such appellant was not claimed to be muffled faces nor the time of incident was claimed to *dark-hours* rather the witnesses during confinement (under weapons) as well during resistance period had sufficient time to properly see the accused persons. Therefore, *prima facie* it was never a case of *mistaken* identity. Further, the name and parentage of such appellant was disclosed by apprehended accused so was detailed by PW-4 SIP Muhammad Ashraf in his examination-in-chief (referred *above).* It has never been the claim of the appellant that he (appellant Aamir Peush) is not **'Aamir Peush'** therefore, mere failure of *holding* identification parade is not sufficient to doubt specifically raised fingers by all witnesses of *ocular* account towards this appellant Aamir Peush as doubtful. I may add here that *identification* even during course of trial, if appears to be confidence inspiring and there appears

no reasons for false implication then mere non-holding of *identification* parade is not fatal. Reference may be made to the case of *Ghazanfar Ali @ Pappu & another v. State* (2012 SCMR 215) wherein it is held as:-

> **"(b) Qanun-e-Shahadat (10 of 1984)---**
>
> ----Art. 22--- Criminal trial--- Identity of accused--- Identification parade--- Scope--- Holding of identification parade is not mandatory and it is merely a corroborative piece of evidence---If statement of a witness qua identity of accused even in court inspires confidence and the witness is consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, absence of holding of identification parade would not be fatal to prosecution case."

Prima facie, in the instant case the name of the appellant Aamir Peush was disclosed at very *first* opportunity with *specific* reference of apprehended appellant Abbas. This appellant also has brought nothing on record to justify claim of *false* involvement. Worth to remind that *blood-relations* i.e real father and brother categorically claimed that this was the person who caused fire-shots upon deceased. Therefore, mere non-holding of *identification* parade in such circumstances, facts and available evidence, is of no significance.

11. As regard the plea of non-recovery of incriminating material, it would suffice to say that recovery or absence thereof would be *immaterial* if ocular account otherwise is confidence inspiring and finds support from *medical* evidence.

12. In view of what has been discussed above, I am of the clear view that findings of the learned trial court in finding the appellants *guilty* are not open to any exception and even are in line with settled principles of

law as well *latest* view of honourable Supreme Court, so recorded in case of *Ali Bux v. State* (2018 SCMR 354), wherein facts were *identification*:-

> "3. The occurrence in this case had taken place in broad daylight and at a place where-at the same could have been seen by many persons available around the place of occurrence. An information about the said occurrence had been provided to the police on telephone within fifteen minutes of the occurrence. In the FIR lodged in respect of the incident in question the present appellants had been nominated and specific roles had been attributed to them therein. The ocular account of the incident had been furnished before the trial court by three eye witnesses namely…… who had made consistent statements and had pointed their accusing fingers towards the present appellants as the main perpetrators of the murder in issue. The said eye-witnesses had no reason to falsely implicate the appellants in a case of this nature and the medical evidence had provided sufficient support to the ocular account furnished by them. …."
>
> "5. As a result of the discussion made above this appeal is dismissed to the extent of the appellants' convictions for the offence under section 302(b) PPC read with section 34 PPC but the same is partly allowed to the extent of the sentences of death passed against the appellants which sentences are reduced to imprisonment for life each. ..…"

Accordingly, the appeal is dismissed. While parting, the office is directed to send a copy of this judgment to Inspector General of *Prisons,* Sindh so as to ask all Jail Superintendent (s) to adopt *mechanism* regarding remedy of preferring appeal within meaning of Section 420 of the *Code.*

Imran-PA. **J U D G E**