Cr:Jail: Appeal No. D- 42 of 2002& Confirmation Case.No.3 of 2002.

Mr. Justice: Ahmed Ali M. Shaikh.

Mr. Justice: Salahuddin Panhwar.

Appellant: Abdul Hakeem Malah through M/s. Maqbool Ahmed Awan and Mahfooz Awan Advocates.

Respondent: Complainant Hussain Bux through M/s.S.Mushtaque Hussain Shah and, Miss.Rizwana Jabeen Siddiqui Advocates.

The State: through Mr.Abdul Rehman Kolachi APG.

Date of Hearing: 14th February, 2013.

JUDGMENT

SALAHUDDIN PANHWAR, J- The appellant has assailed the Judgment dated 23rd May, 2002, passed by Anti Terrorism Court-III, Sukkur and Larkana Division at Sukkur, in Special Case No.66 of 2000(Re-The state v. Abdul Hakeem), arising out of Crime No. 71/2000 registered at Police Station, Bhirya City registered for an offence under Section 302, 324, 337-F(v), PPC 17/4 Offences Against Property (Enforcement of Hudood) Ordinance, 1979, whereby the appellant was

convicted and sentenced: u/s 302(b) for death as Tazir and to pay fine of Rs.1,00,000/- and in case of default in payment of fine, he shall suffer RI for six months more; the appellant shall also pay compensation of Rs.1,00,000/- to the L.Rs of the deceased and in case of default in payment of compensation, he shall suffer RI for three years more. Under Section 324, PPC read with section 34, PPC to suffer RI for 10 years and to pay fine of Rs.50,000/- and in case of default in payment of fine, he shall suffer RI for six months more, under Section 337F (v), PPC to suffer RI for 3 years and to pay fine of Rs.20, 000/- as Daman. Under Section 17(4) Offences against Property (Enforcement of Hudood) Ordinance, 1979 for death as Hadd with fine of Rs.100000/-, u/s 7(a) Anti Terrorism Act, 1997 in case of default to suffer RI for six months more. Under Section 13(e) Arms Ordinance 1965 to suffer RI for three years and to pay fine of Rs.10, 000/- and in case of default in payment of fine he shall suffer SI for six months more. All the sentences were ordered to run concurrently.

2. Facts, of the prosecution case as set-out in the FIR are that on 23.8.2000 at 0730 a.m complainant Hussain Bux lodged report, alleging therein, that deceased Muhammad Wadhal was his elder brother and he was Project Director in WAPDA. At that time, he was posted at Chishstian Province Punjab and deceased had come to his village Ghulam Muhammad Keerio Taluka Bhirya City to avail of his holidays. On the day of incident viz: 23.8.2000 at 5-45 a.m. early in the morning complainant alongwith his brother Muhammad Wadhal left house on the Motorcycle for Nawabshah, when they reached at link road, Bhiria at a Katcha street, near Railway line, where two unidentified persons appeared on road, whose, faces were open. Out of them, one was armed with country made pistol. They came in front of the Motorcycle and directed the complainant to stop it. As soon as Motorcycle was stopped by the complainant; the accused,

who was armed with pistol, fired at the complainant which hit him on right side below his chest. Another accused fired upon the brother of complainant namely Muhammad Wadhal which hit him on right side of his chest and both fell down. While snatching motorcycle and opening fire in the air, the accused went away. Complainant raised cries, which attracted PWs Muhammad Mithal and Haji Muhammad Sajjan so also other persons of the locality. Injured Muhammad Mithal had gone unconscious at the place of wardat. Thereafter both injured persons were brought to the hospital, where Muhammad Wadhal succumbed to injuries. Complainant left PWs over the dead body of his brother Muhammad Wadhal in the hospital and went to Police Station, where he lodged such report.

3. After usual investigation of the case, the appellant/accused was sent up for trial in the Court of law to face the charge; which was framed on 23.05.2002; he pleaded not guilty and claimed trial. Whereas co-accused Gulzar Ahmed was declared absconder

04. To substantiate charge, the prosecution examined 1.Complainant Hussain Bux PW.1, Muhammad Mithal PW 2, Haji Sajjan PW 3, Dr. Nafees Ahmed Memon PW 4, Muhammad Yakoob PW 5, Munawar Hussain PW 6, Ali Akber Assistant Mukhtiarkar PW 7, Sikandar Amir Pahore Judicial Magistrate PW 8, Tapedar Hamzo Khan Abbassi PW 9 and SIP/IO Nazar Ali Soomro PW 10. Thereafter prosecution side was closed.

05. The statement of appellant under Section 342 CR.P.C was recorded, wherein; he denied the allegations by claiming false implication in the instant case on the ground that PWs have deposed against him due to enmity with one

Wadero Allah Wadhayo Rajper, who is influential person of the locality. The appellant did not lead any defence and declined to record statement on oath.

06. During the pendency of instant appeal, counsel for the respondent, raised objection regarding the jurisdiction of this Court, which was answered by common order dated 1.6.2010, relevant paragraph no. 29 is as under:

> "***From a perusal of all the above cases we have reached the conclusion that all the above cases are distinguishable and are not applicable to the appeals argued before us. We are, therefore, of the opinion that it is now not necessary for us to peruse the Judgments relied upon by the learned Amicus Curiae and the learned counsel for the respondents as we have already reached a considered opinion that the present appeals do not fall within the ambit of clause 39-C (2) (e) of the Ordinance XXXIX of 2001 and therefore, the judgments finalized by the Anti-Terrorism Court have been passed under are within the ambit of their jurisdiction and authority and jurisdiction of the Anti-Terrorism Court to pass the impugned judgment is rejected. The counsel is directed to argue the case on merits***".

7. Learned counsel for the appellant inter alia contended that the identification parade as held in this case is not free from doubt as before identification the accused was shown to the complainant as well as witnesses and thus the identification is doubtful ; recovery and confessional statement is of no helpful to the prosecution case as the confessional statement was obtained by way of issuing threats, inducement and detaining the women folk of the accused, which is clear from the statement of accused recorded u/s 342, Cr.P.C; the confessional statement of appellant was recorded after the delay of 16 days of his arrest which has been admitted by the Magistrate and it is a settled principle of law that corroboration of confessional statement is necessary to be true; before recording 164 Cr.P.C statement, no notice u/s 265-J Cr.P.C was

served upon the appellant, which is the mandatory requirement; recovery is not free from doubt as the ingredients of Section 103, Cr.P.C are missing; the report of the Ballistic Expert is not clear as the recovery was sent to ballistic expert for its opinion with the delay of 01 month and 20 days and it is also a settled law that while deciding the case, the prosecution has to put its case in a juxta position with S.342 Cr.P.C statement; appellant's has been implicated in this case on account of enmity with Allah Wadhayo Rajper. In support of above contentions, he has relied upon case of Ghulam Rasool and ors v The State (1988 SCMR 557), Mehmood Ahmed and another v The State (1995 SCMR 127), Kirir v The State (1996 PLD Kar 246), The State v Sobharo (1993 SCMR 585(b)), Khuram Mushtaque and others v The State (2006 SBLR Sindh 1543), Muhammad Farooq and another v The State SCMR 2006 1707 (c)), Khalid Javed and another v The State (2003 SCMR 141, Hidayatullah and another v The State (1983 P.Cr.L.J 447), Israr Ali v The State 2007 SCMR 525), Muhammad Parvez and another v The State (2007 SCMR 670), Ch. Mohammad Yakoob and ors v The State (1992 SCMR 1983), Manjeet Singh v The State (2006 PLD 30).

8. Conversely, Learned APG for the State, argued that impugned Judgment is speaking one and does not call for any interference by this Court as the learned trial Court has rightly convicted and sentenced the appellant. He prayed for the dismissal of the appeal as the appellant does not deserve any concession. He has relied upon case of Mir Muhammad v The State (1995 SCMR 614) and Sheraz Khan v The State (2010 SCMR 1772).

9. Learned counsel for the complainant contended that minor conflict in medical and ocular evidence is not fatal to the prosecution case; the medical officer is not authorized under the law to give his opinion about the weapon

used in the crime; the confessional statement of the appellant itself has evidentiary value; the identification parade was not material in the case as it is not the legal requirement but the identification of an accused in the Court is valid; the delay in sending the articles to ballistic expert will not be fatal to the case of prosecution; trial Court has rightly convicted and sentenced the appellant. In support of above contention, he relied upon the case law reported as Mahboob Ali v The State (2000 SCMR 152), Mushtaq Ahmed v The State (PLD 2001 SC 107), State through Advocate General Sindh v Muhammad Shafique alias Pappu and another (2002 SCMR 620), Manjeet Singh v The State (PLD 2006 SC 30), and Dr.Javaid Akhter v The State (PLD 2007 SC 249).

10. We have made re-appraisal of the entire incriminating material, available on the file, in the light of the arguments advanced by respective sides. Before thrashing the available evidence , it is pertinent to say that statement of sole eye witness, inspiring confidence, even in a murder case, if found sufficient can hold conviction as held in the case law, reported in Niaz-u-uddin and another v The State and another (2011 SCMR 725). Keeping in view the said proposition of law, we have scanned evidence of PW complainant Hussain Bux, the real brother of the deceased Mohammad Wadal. He also received injury during the incident at the hands of the accused persons therefore, presence of the PW Hussain Bux cannot be disbelieved ***because injury on the person of the witness is sufficient to establish his presence at the spot at least, but*** veracity and truthfulness of such witness has to be adjudged. The PW Hussain Bux in his deposition has categorically stated that he had seen the culprits and remained in senses during whole incident and his stand was also shouldered by other witnesses who reached at the spot. This makes us to say that status of the PW Hussain

Bux to be an eye witness is no more disputed couple with his blood-relation with the deceased Mohammad Wadal. No doubt the complainant Hussain Bux did not name the culprit (s) in his FIR but he has categorically claimed to be in a position to identify the culprits, if they are seen by him. It is a matter of record that the complainant Hussain Bux specifically picked the present appellant during the course of identification parade. The position, being so, made us to say that by now the prosecution succeeded in establishing the charge to extent that present appellant was picked / claimed as sole murderer by complainant Hussain Bux, who is not only real brother of the deceased but also the eye-witness of incident whose presence at spot stood established because of injury on his person. ***Since it is one of the established principles of criminal administration of justice that substitution by blood relations at the cost of real culprit is hard to be believed, more particularly, where it is a case of single accused and other witnesses have also identified the applicant in identification parade as well as in the Court.*** Having said so, we proceed further and find that the defence has strongly come forward with a plea that there was a delay in identification parade. Before responding to this plea, we would like to add here that the value of the identification parade is only corroborative in nature and it is the investigating authority which is legally obliged to ensure holding of identification parade properly and within lines and limitations so prescribed by the law but if there is any irregularity on part of the investigating authority in completing such process the same cannot be used against the complainant unless and until it is established and proved that witness was allowed to have an opportunity of seeing the accused before identification parade . It will be material to refer here the case law reported

as Muhammad Akram Rahi and others v The State and others (2011 SCMR 877), wherein honourable Supreme Court has held in paragraph No. 8:

> *"As mentioned hereinabove,* ***prosecution witness can even identify the accused in court and it is not the legal requirement that identification must be held in all case, if any reference is required cases titled Lal parsad v. The State (PLD 1981 SC 142), Abdul Sattar v. The Stat (1981 SCMR 678), Muhammad Yousif Zai v. The State (PLD 1988 Kar. 539), can be referred."***

This allows us to say in other words that ***any irregularity on part of investigating authority would not cause prejudice to outcome of the identification parade unless it is shown or proved that the witness had seen the accused before identification parade. Similarly the delay in conducting identification parade alone be not considered as fatal to identification parade because it is the prosecution which arranges identification parade and not the witnesses themselves unless it is shown or established that such delay was deliberate and tainted with malice .*** We may refer here the case law reported in Ansar Mahmood v Abdul Khaliq and another (2011 SCMR 713) wherein honourable Supreme Court has held that :-

> ***"Complainant should not suffer for fault of prosecution who was negligent in discharge of its duties and functions".***

11. We have scanned the ocular evidence, while Scanning of the cross-examination of the complainant Hussain Bux, which apears that, though he has admitted that he had gone to police station and has learnt about arrest of the appellant by the police but these admissions are not sufficient to have an inference that complainant Hussain Bux had seen the appellant before

identification parade. We can safely say that to pursue the case, is the legitimate right of the complainant party hence mere visit of the complainant party to police station cannot be used against them unless it is shown to have resulted in causing any prejudice to the appellant. Such evidence of the complainant PW Hussain Bux to extent of happening of the incident, injuries on person of injured and on deceased which at the hands of the appellant stood corroborated by two other eye witnesses of the incident i.e PW Mohammad Mithal and Haji Sajjan. It is settled principle of law that ***interested witness*** is defined as the witness who is partisan or inimical towards the accused or has a motive or cause of his own to falsely implicate the accused in the crime but in the instant case the defence has entirely failed in bring any thing alike on record which could least suggest that the witnesses were partisan or inimical towards the appellant or they had a motive or cause of their own to fit the appellant in place of real Murderer of their own blood-relation. Against such direct, confidence inspiring and logical evidence of the prosecution the appellant only came forward with a special defence plea that he was involved at instance of Wadero Allah Wadhayo Rajper but he failed to substantiate such special plea, in spite of lengthy cross examination. It is pertinent that there are certain contradictions but they are not grave in nature and can be ignored safely as minor contradictions do creep in with passage of time, reference can be made to the case of Muhammad Ilyas and others v The State (2011 SCMR 460) and case of Anwar Shamim and another v. The State (2010 SCMR 1791).

12. We then revert to judicial confession recorded by appellant Abdul Hakeem before P.W. Sikandar Amir, judicial Magistrate. In his evidence the Magistrate has testified that on production of appellant, handcuffs were removed and he explained to the appellant that he is not bound to make confessional statement, the same shall be used against him , in evidence, in spite of that appellant was willing to record his confession, thus, two hours reflection time was given to him, after allowing two hours, appellant was again warned that, such statement will be used against him, but he recorded his confession. It is surfaced that before recording confessional statement, all precautionary steps were taken to ensure that the confession was recorded voluntarily and free from any threat, coercion or inducement, further it appears that same is inculpatory, appellant has categorically stated that he caused fire shot injury to the deceased, though subsequently challenged to be result of coercion. It is well-settled law that if a judicial confession is truly and voluntarily made and on the face of it could be relied upon. This aspect also strengthens the charge against the appellant.

13. As regard to the recovery, needless to say that recovery at the pointation of the accused does not necessarily require association of two persons but the same has to be proved per Article-40 of the Qanun-e-shahdat Order, 1984. Moreover, where the prosecution establishes its case through direct, natural and confidence inspiring evidence the need of corroborative pieces of evidence is not of much significance. Further, the ocular account is duly supported with medical evidence as the medical evidence has confirmed that injuries on person of the deceased were with fire arm injury and even there has been effected recovery of the crime

weapon which further corroborates the case of the prosecution against the appellant. Thus it is quite safe to say that all pieces of evidence i.e ocular, medical and recovery are in one line and make out a chain of unbroken links.

14. While parting we feel it quite justified and within spirit of Safe Criminal Administration of Justice to see room of mitigating circumstance, if any, but before going any further, we would like to refer the meaning of ***'mitigating circumstance'*** per Black's Law Dictionary which reads as follows:-

> ***"A fact or situation that does not justify or excuse a wrongful act or offence but that reduces the degree of culpability and thus may reduce the damages (in a civil case) or the punishment (in a criminal case). 2. A fact or situation that does not bear on the question of a defendant's guilt but that is considered by the Court in imposing punishment and esp. in lessening the severity of a sentence. 3. Contracts. An unusual or unpredictable event that prevents performance, such as a labor strike—Also termed extenuating circumstance".***

In view of above we can say that despite successful discharge of duties by prosecution the Criminal Administration of Justice has left a room for ***mitigating circumstance.*** This makes us to say further that applicability of ***mitigating circumstance*** does not mean to doubt about guilt of accused but allows legal justification for anything arrived on record which does not disturb the guilt yet demands inflicting lesser punishment against proven guilty person. we conclude to say that this also allows benefit of such a doubt or circumstance, came on record, which though does not help accused in getting acquittal but does justify consideration whereof as

mitigating circumstance. Thus **e**xistence of a two pleas is not always mean to disbelieve the prosecution

15. We have examined instant case on above touch stone, it is matter of record that per FIR and examination in chief, the complainant categorically narrated that one culprit caused fire arm injury to him, while other culprit caused fire shot injury to his brother (deceased) but mashirnama of identification parade reflects that complainant has claimed the appellant to be the person, who caused injury to him so also fatal shot to deceased. This seems that complainant has attempted to improve his version, by attributing both shots to appellant but since prosecution, otherwise, proved guilt against appellant in commission of offence hence such improvement by complainant alone is not sufficient to bring principle of benefit of doubt but does demand its consideration as ***mitigating circumstance***. It is worth to add here that in similar position in case of Muhammad Yakoob v The State reported in 2008 SCMR 1082, Hon'ble Supreme Court has held:

> ***"10. While considering the question of sentence, we feel that as it is not certain from the evidence on record that it was the shot of the appellant which resulted in the death, of Asghar Nadeem, deceased, it constitutes a mitigating or extenuating circumstance justifying lesser punishment, as held by this Court in cases of Allah Dad and another v The State 1995 SCMR 142 and Saeed and others v The State 1984 SCMR 1069. We are inclined to party allow the appeal and while maintaining the conviction, we reduce the sentence of the appellant from death to imprisonment for life with benefit of section 392-B, Cr.P.C. Other sentences shall remain intact and run concurrently".***

The record further shows that appellant, per mashirnama of his arrest and recovery, was of a young age. He has been in continuous incarceration

since 12 and half years and had no criminal record, which is indicating that appellant has not been previously involved in such like cases, or any other criminal cases therefore, we feel it quite justified to allow benefit of mitigating circumstance to appellant, while maintaining the conviction of the appellant under Section 302(b) PPC and 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, we alter sentence of death awarded to him into imprisonment for life. The other sentences and order with regard to the payment of fine and compensation is also maintained. Benefit of Section 382-B, Cr.P.C shall be extended to the appellant.

16. Since there are extenuating circumstances in this case, not calling for confirmation of death sentence, as such Murder Reference No.D-03 of 2002 is answered in negative and death sentence is not confirmed as supra.

Announced, 09.04.2013.

JUDGE

JUDGE

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