

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

SYED MUHAMMAD FAROOQ SHAH, JUDGE

CRIMINAL APPEAL NO.23-I OF 2019

ALI GHULAM SON OF UMED ALI, MUSLIM, ADULT, BY CASTE
KAPRI RESIDENT OF VILLAGE MOCHAR KAPRI TALUKA SAMARO
DISTRICT UMERKOT. ...APPELLANT

VERSUS

THE STATE ...RESPONDENT

CRIMINAL APPEAL NO.24-I OF 2019

SALEEM SON OF ABDUL KAREEM ADULT, MUSLIM, BANGLANI BY
CASTE, RESIDENT OF VILLAGE SAEED KHAN BANGLANI, TALUKA
SAMARO DISTRICT UMERKOT. ...APPELLANT

VERSUS

THE STATE RESPONDENT

COUNSEL FOR THE APPELLANTS : BARRISTER RAJA MUHAMMAD
IN APPEALS NO.23-I AND 24-I ARSLAN, ADVOCATE FOR
OF 2019 BOTH THE APPELLANTS.

COUNSEL FOR THE STATE : MR. FARMAN ALI KANSARO,
ADDITIONAL PROSECUTOR
GENERAL, SINDH.

FIR NO, DATE : FIR NO.56/2009, 08.07.2009
& POLICE STATION : SAMARO UMERKOT.

DATE OF IMPUGNED : 06.11.2010.
JUDGMENT OF TRIAL
COURT

DATE OF INSTITUTION OF : 30.11.2010 & 03.12.2010,
APPEALS BEFORE HIGH COURT RESPECTIVELY
OF SINDH

DATE OF INSTITUTION : 25.11.2019.
OF CRL. APPEALS IN FSC

DATE OF HEARING : 16.01.2020.

DATE OF DECISION : 16.01.2020.

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**JUDGMENT:**

**SYED MUHAMMAD FAROOQ SHAH, J.-** The captioned appeals  
have been directed against the common judgment, dated  
06.11.2010 passed by the learned Additional Sessions Judge,  
Umerkot, whereby the appellants have been convicted under  
Section 392 of the Pakistan Penal Code, 1860 and sentenced to

undergo ten years rigorous imprisonment each with fine of Rs.50,000/- each, in default whereof to further suffer three years simple imprisonment. Both the appellants were also convicted under Section 324 of the Pakistan Penal Code and sentenced to undergo ten years rigorous imprisonment each with fine of Rs.50,000/- each, in default whereof to further suffer three years simple imprisonment each. The benefit of Section 382-B of the Code of Criminal Procedure, 1898 has been extended to the convict/appellants. The appellants through their appeals, have called in question the legality and validity of impugned judgment regarding conviction and awarding sentence.

2. The prosecution story as narrated in Crime-Report No.56 of 2009 (Ex.3-A) registered on 08.07.2009 at Police Station Samaro, District Umerkot is that on 08.07.2009 at about 3:30 p.m., the complainant Abdul Wahab, a student of Sindh University, Jamshoro was on his way to Samaro Town on his black motorcycle CD-70, when he reached Ch. Amanullah Boundary at about 3:45 p.m., he saw two persons armed with cartridge-pistols, who signaled to stop him, whereupon the complainant stopped the motorcycle and identified the accused persons to be Saleem Banglani and Ali Ghulam Kapri, convict/appellants. Accused-Ali Ghulam Kapri took Rs.400/- from his pocket and got him down from the motorcycle and rode towards eastern side; meanwhile, Kaloo Khan Bhortani and Muhammad Raheem Khaskheli reached there to whom the complainant narrated the incident. He also informed the villagers and police about the occurrence through his mobile phone. Thereafter, complainant along with villagers chased the robbers, whereupon accused Saleem Banglani made fires. The

complainant party also retaliated with firing in their defence. At that time, accused Saleem Banglani fell down from the motorcycle and got injured. Meanwhile, complainant party and police reached there and apprehended the accused Saleem Banglani along with cartridge-pistol and took into possession snatched motorcycle while accused Ali Ghulam managed to escape.

3. Investigation ensued, as a result of which accused Ali Ghulam was arrested on 10.07.2009. After completing investigation, police submitted report under Section 173 Cr.P.C. before the court.

4. The charge was framed against the accused under Sections 324 of the Pakistan Penal Code, 1860 and 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to which they pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined as many as five witnesses. The gist of prosecution witnesses is given below:

- (i) PW-1 Abdul Wahab is complainant. He narrated the story as contained in the FIR.
- (ii) PW-2 Kale Khan stated that after snatching bike he along with other villagers and police chased the accused. In his presence police caught accused Saleem Banglani and recovered snatched bike.
- (iii) PW-3 Ghulam Hussain was witness of memo of arrest of accused Saleem Banglani (Ex.5-A), memo of pointation to place of incident (Ex.5-B) and memo of arrest of accused Ali Ghulam (Ex.5-C).

- (iv) PW-4 was Abdul Rasheed S.I. He, after receipt of information of the incident, chased and arrested the accused Saleem Banglani and recovered snatched bike and prepared memo of arrest of accused Saleem Banglani (Ex.5-A).
- (v) PW-5 Niaz Muhammad, ASI was entrusted investigation. During investigation, he prepared memo of pointation to place of incident (Ex.5-B) and arrested accused Ali Ghulam on 10.07.2009 and prepared memo of arrest of accused Ghulam Ali (Ex.5-C). After completing investigation submitted report under section 173 of the Code of Criminal Procedure, 1898 before the court.

6. After closing of prosecution evidence, accused were examined under Section 342 of the Code of Criminal Procedure, 1898. They neither opted to make their statement under section 340(2) of the Code of Criminal Procedure, 1898 nor produced evidence in their defence.

7. Arguments heard. Record and proceedings have carefully been scanned with the able assistance rendered by the learned counsel for the parties.

8. At the very outset, Barrister Raja Muhammad Arslan, Advocate, representing the pauper appellants, during lengthy arguments advanced the following points for consideration of this Court:

- i) The appellants have falsely been implicated in this as there are material contradictions in between the evidence of *mashir* (remained uncross-examined), complainant and the police officer who recorded the F.I.R. and prepared the memo of recovery of

arrest of accused Saleem Banglani in injured condition.

- ii) Next argued that the impugned judgment is not a judgment within the meanings of Section 367 Cr.P.C., hence, same is not sustainable in law.
- iii) Learned counsel submitted that P.W.2 Kale Khan did not identify the accused Saleem Banglani during his deposition and the evidence of remaining four witnesses is not inspiring confidence as P.Ws-3 and 5, were remained uncross-examined due to absence of their counsel.
- iv) That there is nothing on record that despite receiving grievous injuries on his person, the accused Saleem Banglani had been referred for medical examination, treatment and issuance of medical certificate.
- v) That the firearm weapon and one empty shell allegedly used in commission of offence have not been transmitted to the Ballistic expert for his examination and report. The trial court did not care to call the expert as a witness to obtain his opinion or to provide opportunity to the accused to cross-examine him. The learned Trial Court should have summoned the expert as a witness under provision of Section 510 Cr.P.C. as it was much necessary in the interest of justice.
- vi) Contended that to substantiate its case, prosecution did not examine even a single person from the mob who allegedly gathered at the place of recovery and

arrest, despite availability of hundreds or thousands persons.

vii) That to prove the guilt of accused for the offence punishable under Section 324 PPC, not a single person from mob/trackers has been examined by the prosecution. Therefore, evidence of prosecution witnesses appears to be unnatural / untrustworthy and creates doubt in the circumstances of the present case.

viii) That there are several ambiguities, contradictions and inconsistencies in the prosecution case, creating reasonable doubt, therefore, the appellants are entitled for acquittal. Lastly, the learned counsel made a request to allow the appeals.

9. After scanning the record and proceedings as well as the impugned judgment, learned State counsel did not specifically controvert the submissions made by Raja Arsalan, Advocate, representing the Appellants and contended that neither the injured accused was referred for medical examination nor recovered weapon and empty shell were sent to the Ballistic expert for examination and report.

10. As per prosecution version, a pistol and one empty shell were recovered from injured accused Saleem Banglani but neither the recovered unlicensed weapon along with empty shell were sent to the Ballistic expert nor injured was referred for medical treatment, examination and issuance of medical certificate. As per *mashirnama* of recovery and arrest, following injuries were found on the person of injured accused:

- "1. Accused has one injury on the leg above the knee of foot like scratch.
2. Accused has one injury on the arm near elbow like scratch.

3. *Accused has one scratch above the left eye."*

11. Obviously, the Courts are continuing to allow greater participation in the justice system by experts whenever there are matters or issues which require their expertise in terms of observations, analysis, description and resolution, etc. The importance of expert / scientific and medical evidence in criminal trials is well-recognized and accepted by the courts, such evidence is only called for being admitted in trials which demand experts to testify with regard to the scientific evidence that has been made part of the prosecution case. In order to establish the irrefutability of such evidence, experts are called upon to testify to that effect. The foundation of the modern rule governing the admissibility of experts/scientific and medical evidence is generally recognized in criminal cases. The part played by expert witnesses continues to be crucial to criminal trials in both common law as well as civil law jurisdictions. The advent of modern investigative tools used in crime detection has led to the further development of scientific evidence and expert opinion. Admittedly, in the instant case neither the injured accused namely, Saleem Banglani had been referred to the hospital for medical treatment, examination and issuance of medical certificate, to determine as to whether the injured accused sustained alleged injuries at the hands of chasers, mob or sustained self-inflicted firearm injury. As per prosecution version, one empty cartridge along with 03 live bullets and .12 bore local made pistol were recovered from the possession of injured accused. Surprisingly, to ascertain the working condition of recovered weapon and empty bullet fired from it were not sent to the firearm expert for his examination, opinion and report. Moreso, the registration book of snatched

motorbike had not been placed on record to ascertain its ownership. Admittedly, to establish the offence punishable under Section 324 PPC, during alleged encounter, none has received firearm injury.

12. Evidence of expert witnesses continues to be crucial in criminal trials in criminal justice system. In the instant case, three witnesses were remained uncross-examined, so much so that not a single person from the chasers who allegedly tracked the culprits / accused has been examined on the point of alleged encounter firing. It is not attracting to a prudent mind that trackers in thousands or hundreds chased and intercepted both culprits, fired upon them, in result of counter firing, one culprit sustained injury, and was caught hold along with motorcycle and illicit weapon; however, co-accused succeeded to escape on feet. Undoubtedly, medical evidence or that of a ballistic expert is entirely in the nature of confirmatory or exculpatory to the direct or other circumstantial evidence. However, non-procuring such evidence shrouded the case of prosecution in mystery. In the instant case, the culprits had been fired upon by chasers / trackers. The appellant Saleem Banglani was caught hold in injured condition as per record and he was not referred for medical examination; besides the illicit weapon alongwith a shell of cartridge had also not been sent to the ballistic expert for his opinion and report. Therefore, it cannot be said with certainty that sole testimony of complainant is definite and trustworthy.

13. The presumptions of withholding ballistic expert or medical evidence under Article 129 of Qanun-e-Shahdat Order, 1984 would be that the evidence which could be and is not



produced would, if produced, be unfavourable to the person who withheld it.

14. A perusal of impugned judgment reflects that the learned Trial Judge by delivering the impugned judgment in slipshod manner acted in oblivion of principles of appreciation of evidence to evaluate it and discovered the probabilities with regard to the conviction of the appellants; so much so that three witnesses remained uncross-examined. The cross-examination under Article 133 of Qanun-e-Shahadat Order, 1984 in criminal trial is not an empty formality of law but a valuable right of an accused on his behalf, wield for the purpose of testing of reality of the statement made by a witness as held in the authoritative pronouncement of Hon'ble Supreme Court in the case of "MUHAMMAD JAMAL AND OTHERS V. THE STATE" reported as 2018 SCMR 141. In the cited ruling, the Hon'ble Apex Court, in paragraphs 18 and 19 held that under Article 161 of the Qanun-e-Shahadat Order, 1984, the Trial Court has unlimited powers to put question in order to discover or obtain proper proof of relevant facts. A Full Bench of the Federal Shariat Court in the case of "Imran Ashraf Vs. The State" reported as 2012 YLR 325 observed that "It was indeed miscarriage of justice in not invoking the legal provisions of Article 161 of Qanun-e-Shahadat Order, 1984 and Section 540 of the Code of Criminal Procedure in the demanding circumstances of the case." In paragraph 42 of aforesaid ruling, it has been held as under:

"The duty of a Court is to administer even handed justice. The Courts on the basis of judicial experience, legal expertise and knowledge make conscious effort to discover the truth whenever, they are called upon to decide a case. The courts are not required to act mechanically by confining themselves only to the evidence produced by the police officers along with the

report prepared under section 173 of the Code of Criminal Procedure. The Code also empowers the Courts to summon material witnesses and also examine such persons whose evidence appears to be essential to the just decision of a given case under section 540 *ibid*. It is not proper exercise of jurisdiction to decide a case without availing of the opportunity provided by section 540 *ibid* in given circumstances of a particular case. A perusal of section 540 *ibid* shows that the trial Court is under an obligation to summon and examine such persons whose evidence appears to be essential to the just decision of the case. Courts are not expected to be silent spectators or mute arbitrators. Reference may be made to the case of *Rehmat Ali v. The State* and another 2005 YLR 742; *Muhammad Niaz Khan v. The State* 2000 MLD 1419; *The State v. Iftikhar Hussain* 2002 P.Cr.L.J. 85; *Maqbool v. The State* 2006 P.Cr.L.J. 110; *Muhammad Murad Abro v. The State through A.G. Balochistan* 2004 SCMR 966."

15. Conclusion is irresistible that the prosecution has miserably failed to prove its case beyond shadow of reasonable doubt as the concept of benefit of doubt to an accused person is deep-rooted in our country. In view of non-availability of ballistic expert evidence, medical evidence and non-cross examination of three witnesses creates sufficient dent and doubt to disbelieve the prosecution story.

16. The upshot of the above discussion is that there is no satisfactory basis for upholding the conviction and sentence awarded to the appellants. The appeals are accordingly allowed, conviction and sentence of the appellants are set aside. They are present on bail, their bail bonds stand cancelled and sureties discharged.

(SYED MUHAMMAD FAROOQ SHAH)  
JUDGE

Karachi the  
16<sup>th</sup> January, 2020

~~APPROVED FOR REPORTING.~~  
~~JUDGE~~