IN THE FEDERAL SHARIAT COURT

(Appellate/RevisionalJurisdiction)

PRESENT

Mr. JUSTICE SYED MUHAMMAD FAROOQ SHAH

CRIMINAL APPEAL NO.17/I/2017

Qutib son of Muhammad Hayat Mahar .... Appellant.

Versus

The State .... Respondent.

For the Applicant	...	Mr. Siraj Ali Chandio, Advocate.
For the State	...	Ms.RahatAhsan, Additional Prosecutor General Sindh
FIR NO., date & Police Station	...	14/2010 dated 24.07.2010, Police Station Daim Malik
Date of the Judgment of Trial Court		28.02.2011, 1st. Additional Sessions Judge, Shikarpur.
Date of Institution	...	10.07.2017
Date of Hearing	...	08.08.2018
Date of Decision	...	08.08.2018

JUDGMENT

SYED MUHAMMAD FAROOQ SHAH, J :- Through this appeal, the appellant has impugned the judgment pronounced on 28.02.2011 by the learned 1st Additional Sessions Judge, Shikarpur, in Session Case No.332/2010, arising out of crime No.14/2010, registered at P.S Daim Malik, for offences punishable under Section 17(1) Offence Against Property (Enforcement of Hudood) Ordinance, 1979 and 324, 353 PPC .

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2. Prosecution story in nutshell, narrated in the FIR, lodged by complainant SIP Jumma Khan Bhutto, posted at Police Station Daim Malik is that on 24.07.2010 @ 1600 hours, he was available at Police Station, when received spy information through mobile phone that some offenders are available near *Gabbar Jonejo* Link Road leading from *Rajo Labano* to village *Gabbar Jonejo* in order to commit robbery. On receipt of such information, he proceeded at the pointed place alongwith police party and saw firing between culprits/appellant and villagers. It is alleged by the complainant that on his interception, the culprits started firing upon police party. The encounter lasted after 15 minutes. Two culprits succumbed firearm injuries at the spot and third one namely Qutib son of Muhammad Hayat Mahar (the appellant) was apprehended in injured condition; illicit weapons used by the dead and injured culprits were secured under proper Mushirnama and different FIRs of said incident were lodged at police station against dead and present appellant/accused. On completion of usual investigation, Challan was submitted under Section 173 Cr.P.C.

3. Trial commenced after framing of charge (Ex-2); to which the appellant pleaded not guilty and claimed to be tried (Ex-3). To substantiate its case, the prosecution examined PW-1 Complainant SIP Jumma Khan (Ex-4), who produced Memo of arrest of body search, recovery of weapons (Ex-4/A), FIR (Ex-4/B). PW-2 Police Constable Mir Muhammad (Ex-5).PW-3 SIP/CRO Ghulam Nabi Chang (Ex-6) produced Mushirnama of Injury of appellant Qutib (Ex-6/A), Mushirnama of Inspection of deceased Lakhmir alias Lakhoo Mehar (Ex-6/B), Memo in respect of dead body of deceased Laloo (Ex-6/C), Memo of Place of Vardat (Ex-6/D). PW-4, Dr. Ghulam Asghar (Ex-7) produced inquest report of deceased (Ex-7/A), Post Mortem Report of deceased Laloo (Ex-7/C). PW-5/ Doctor Najmuddin produced inquest report of deceased accused Lakhmir alias Lakhoo (Ex-8/A) and Post Mortem report (Ex-8/B). PW-6 Dr.Shakil Ahmed

produced Medical Certificate (Ex-9/A). Thereafter, learned DDPP for the State closed the side of Prosecution (Ex-10). Statement of accused/appellant under section 342 Cr.P.C (Ex-11) was recorded. He vehemently denied the allegations of the Prosecution, however, neither he examined himself on oath nor led evidence in defense. However, he produced copy of FIR of Crime No.18/2010 and 19/2010, lodged at Police Station Daim Malik.

4. Arguments heard. Record perused.

5. A perusal of record transpires that initially the captioned appeal was instituted in the High Court of Sindh, Circuit Bench @ Larkana but was transferred to this Court on account of lack of jurisdiction of Hon'ble High Court. The appellant / accused was charged and tried for offences punishable under Section 17(1) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and under section 324, 353 PPC but convicted and sentenced under Section 398, 324 and 353 PPC. It is an admitted position that on evaluation of examined material witnesses of prosecution, the case was neither falling within the ambit of Section 17(1) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, nor Section 398 PPC is attracting in the peculiar facts and circumstances of the case. The impugned judgment has been thoroughly scanned with the able assistance provided by Mr. Siraj Ali Khan Chandio, learned counsel representing the appellant and Ms.Rahat Ahsan, learned Additional Prosecutor General, Sindh for the State. From perusal of prosecution evidence, it appears that while recording the impugned judgment, the learned trial Court ignored the cross-examination, wherein eye-witnesses of the prosecution neither supported the prosecution version, narrated in the FIR nor in their examination-in–chief. To ascertain the factual as well as legal aspects of the case, it may be appropriate to reproduce hereinbelow the relevant portion of cross-examination of PW-1 SIP/SHO

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of Police Station Daim Malik, namely Jumma Khan, PW-2 Police Constable Mir Muhammad and PW-3 investigating SIP/CRO Shirkarpur namely GhulamNabi.

CROSS-EXAMINATION OF PW-1 JUMMA KHAN OF P.S DAIM MALIK (EX-4).

"*I received spy information at P.S at about 01:30 p.m.It is correct that I did not take any private person with me towards the Place of Vardat. It is correct during encounter none from our Party sustained any injury. It is a fact I have not mentioned the particulars of the private car in my FIR. It is correct that I have not mentioned the name of the Driver.* ***It is correct that nothing was robbed by culprits from the place of Vardat.*** *It is correct that there is old tribal dispute between Mehar and Jatoi communities. It is correct that the relatives of deceased accused Lakhoo @ Lakhmir and Laloo have lodged their respective FIRs Crime No.18/2010 and Crime No.19/2010 at P.S Diam Malik against accused Rahmaullah and others on the orders of Courts.* ***It is correct that both the accused were killed in the firing of*** **villagers** ***so also injured sustained injuries at the hands of*** **villagers.** *I cannot specifically say that both accused were murdered by Mehar tribe People*".

CROSS-EXAMINATION OF PW-2 P.C-1902 MIR MUHAMMAD OF P.S. DAIM MALIK (EX-5)

"*It is correct that except official weapons there was no anything with us. It is correct that complainant did not try to associate any private person to act as a Mashir. It is correct that during encounter none from our police party sustained any injury. It is correct that there is tribal dispute between Mehar and Jatoi communities.* ***It is correct that accused were murdered / injured in the firing of*** **villagers**".

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CROSS-EXAMINATION OF I/O SIP/CRO SHIKARPUR NAMELY GHULAM NABI (EX-6)

> ***"It is correct that driver of car had not acted as Mashir. I consumed half an hour at the place of incident. It is correct that I did not record or statement of any private person.*** *It is correct that I did not find any injured from police side. It is correct that FIRs viz Crime No.18/2010 and 19/2010 were registered at P.S Daim Malik in respect of murders of accused Lakhmir and Laloo. It is correct that there was murderous Tribal dispute between Mehar and Jatoi communities. Accused Qutub had received one fire arm injury on his leg*".

6. It is an admitted position that whole structure of the prosecution case hinges on ocular testimony of three police officials named-above. All three examined eye witnesses, in their cross-examination, reproduced above, stated that inhabitants of the locality or any private person did not examine by the Complainant or Investigation Officer to act as a witness or *Masheer*. It has come in the evidence that though two accused were killed in the firing of villagers and injured (appellant) sustained injuries at the hands of villagers but villagers did not participate to act as witness of occurrence, though it was a day time incident, occurred at populated area, therefore, by no stretch of imagination, the appellant can be held liable for an offence punishable under section 398, 324, 353 PPC, more particularly, prosecution has miserably failed to prove the ingredients of attempts to commit robbery or dacoity as no villager with whom the alleged encounter of the accused persons during robbery had taken place was examined; moreso, to substantiate its case prosecution has miserably failed to bring on record convincing evidence that the accused persons deterred the police party from discharging their duty, as neither single empty shell was secured from the place of occurrence nor the police party or their vehicle sustained any kind of injury or bullet mark. Suffice to say that

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ingredients of section 324 PPC are not attracting in peculiar facts and circumstances of the case. It was a day time incident, and the Investigation Officer has also seen the place of occurrence during noon time but neither the complainant being SHO of concerned Police Station nor the Investigation Officer examined any inhabitant of the locality or independent person to act as a witness / Mushir, though they had spent sufficient time at the place of incident.

7. Cross-Examination of all three eye-witnesses reflects that the concerned police conducted the investigation in a manner which creates reasonable doubts; such as lodgment of FIR by not associating villagers, who allegedly had fought with the culprits / accused. More so, preparation of memo of recovery of incriminating fire arm weapons and arrest during investigation of crime by not associating any independent respectable inhabitant of the locality in order to ensure proper investigation creates plausible dent in the case of the prosecution .Putting present case to the test laid down by the superior courts including this Court, it is clear that in view of the discrepancies in the prosecution evidence as supra, the case of prosecution is doubtful.

8. A careful perusal of impugned judgment reveals that learned trial court acted in oblivion of principles of appreciation of evidence in criminal trial to evaluate it and discovered the probabilities with regard to the conviction of the accused. From material on record, the version of prosecution adversely affects the credibility of prosecution witnesses testimony. There are so many circumstances, discussed above, creating serious doubts in the prosecution case which go to the roots of the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused.

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9. Suffice it to say that cross-examination is the great legal engine invented for the discovery of truth. It is well settled principal of law that opportunity to cross-examine contemplated by the law must be real, fair and reasonable as the cross-examination is not an empty formality but a valuable right and best method for ascertaining the truth. The right of cross-examination has from times immemorial been held to be particularly in criminal cases a valuable right to the accused. It is a weapon which an accused person or an Advocate on his behalf can wield for the purpose of testing the veracity of the statement made by a witness. In such view of the matter, I am constrained to make observation that the learned trial court judge while recording the impugned judgment has seriously erred not to consider the cross-examination of prosecution witnesses, reproduced as supra.

10. It is not out of context to mention here that the concept of benefit of doubt to an accused person is deep routed in our country. The prosecution is duty bound to prove its case beyond the shadow of reasonable doubt and if any single or slightest doubt is created, benefit of same must go to the accused and it would be sufficient to disbelieve the prosecution story. Benefit of doubt would go to the accused, regardless of fact whether he had taken such plea or not. If need arises, reliance may conveniently be placed on the case of ***Tariq Pervaiz vs. The State 1995 SCMR 1345***; ***Muhammad Akram's case 2009 SCMR 230*** and ***Faryad Ali case 2008 SCMR 1086.*** Keeping in view the aforestated peculiar facts and circumstances; more particularly, the cross examination of prosecution witnesses reproduced in paragraph-5/ante creates reasonable doubts in a prudent mind about the guilt of the accused. Moreso, the appellant being an injured person has been convicted and sentenced for offences, ingredients of which are not attracting in

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the circumstances of present case, therefore, it is a fit case in which the accused is entitled to the benefit of doubt not as a matter of grace but as a matter of right as there being no satisfactory basis for upholding the conviction and sentence of the appellant.

11. In view of foregoing reasons, I reached at the irresistible conclusion that the prosecution has miserably failed to prove the charges against the appellant beyond the shadow of reasonable doubt. In the result, the impugned judgment, being not sustainable in law, is set-aside. Appeal is allowed.

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JUSTICE SYED MUHAMMAD FAROOQ SHAH

Karachi
Dated,08.08.2018
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Approved for Reporting

08/8/2018