

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 01-K OF 2017

Haji Abdul Jabbar Thebo son of Muhammad Usman, caste Thebo,
R/o Village Molvi Abdul Latif Thebo, Taluka Jhando Mari, District
Tando Allahyar.

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Appellant

Versus

1. Imdad Ali son of Allah Bux, caste Jamali,
resident of Village Jaffar Jamali, Taluka Jhando Mari,
District Tando Allahyar.
2. Mir Hassan son of Sain Bux, caste Brohi,
Village Mir Muhammad Brohi, Taluka Jhando Mari,
District Tando Allahyar.
3. Aijaz son of Abdul Karim Brohi, caste Brohi,
Village Mir Muhammad Brohi, Taluka Jhando Mari,
District Tando Allahyar.
4. Suleman son of Nim, caste Lund,
Village Ismail Khan Lund, Taluka Jhando Mari,
District Tando Allahyar.
5. Ali Madad son of Rasool Bux, caste Lund
Village Allahyar Khan Lund, Taluka Jhando Mari,
District Tando Allahyar.
6. Kaloo son of Lakhi, caste Khaskheli,
Village Soomar Khaskheli, Taluka Jhando Mari,
District Tando Allahyar.
7. The State.

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Respondents

For the appellant	...	Mr.Aijaz Shaikh, Advocate
For the State	...	Mr. Saleem Akhtar Buriro, Additional Prosecutor General, Sindh.
No.& date of FIR & Police Station	...	No.31 of 2010, dt.21.5.2010, P.S Umar Saand, District Tando Allahyar.
Date of judgment of trial court	...	23.11.2016
Date of Institution in this Court	...	14.01.2017
Date of hearing	...	10.05.2018
Date of decision	...	10.05.2018
Date of judgment	...	14.05.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- This is an appeal, against the judgment dated 23.11.2016, handed down by learned Additional Sessions Judge ,Tando Allahyar in Sessions Case No.85 of 2012, pertaining to FIR No.31/2010 (Ex.6/B) registered with police station Umar Saand, whereby the respondents Imdad Ali, Mir Hassan, Aijaz, Suleman, Ali Madad and Kaloo have been acquitted of the charge under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with sections 302, 324 and 337(i) of Pakistan Penal Code, while giving them benefit of doubt.

3. In precise, the facts of the case are that on 21.05.2010 at 01.00 p.m the appellant(complainant) Haji Abdul Jabbar Thebo lodged an FIR bearing crime No.31of 2010 (Ex.6/13) at police station Umar Saand, with the averment that on 19.5.2010, after attending a ceremony at village Ali Muhammad Thebo, while he alongwith his brother Haji Abdul Wahid (deceased), relatives Muhammad Saleh Thebo and Mohammad Yousaf in the car bear No.AEM-736 driven by his driver Atta Muhammad Khashkeli were returning home and when they reached near link road Muhat Shah Rahoondani, Thebo village, at about 8.00 p.m, he saw Sajid alias Sajoo with Kalashnikov, Kaloo with Double Barrel Gun, Imdad Jamali and Mir Hassan with T.T pistol, Aijaz Brohi with country made pistol and two unknown persons having guns, who were identified in the head lights of the car. He added, that the said persons alighted all of them from the car and on refusal by his brother Haji Abdul Wahid Thebo, he was forcibly boarded from the car, whereafter the felons snatched the licensed pistol of his brother, Nokia mobile set, a Rado wrist watch and cash of Rs.12000/- from him and further stated that Sajid alias Sajoo fired upon his brother, who fell down, whereafter the culprits snatched Rs.1500/- from the complainant, Rs.2000/- from Mohammad Saleh Thebo, Rs.1000/- from Muhammad Yousaf and Nokia mobile set and then made straight firing upon them in order to kill them, but luckily they remained safe. Thereafter, the dacoits made their escape good from the place of

occurrence. According to the complainant his brother Haji Abdul Wahid Thebo had received a head injury, whereas driver Atta Muhammad Khashkeli received injuries on his face, as such, the police contingent was called which arrived in a very short time, secured the crime scene and after completion of due formalities on the spot, the dead body of his brother and injured Atta Muhammad Khashkheli were taken to Taluka Hospital Tando Allahyar for conducting post-mortem and treatment of injured. After burial of his brother, the appellant on 21.5.2010 (next day of the occurrence) lodged the FIR (Ex.6/B).

4. P.W.6 Ghulam Shabbir, ASI being posted at police station Umar Saand on 19.5.2010 at about 9.00 p.m, he received telephonic message about the occurrence and on arrival on the crime scene prepared memo of site inspection (Ex.10/A) and took into possession blood stained earth, secured two empties of Kalashnikov, four empties of TT pistol, two white color empty cartridges, prepared Inquest Report (Ex.8/B) and sent the dead body for postmortem and injured Atta Muhammad Khashkheli for treatment with letter of reference (Ex.12/A and 12/B), respectively.

After examination of the dead body P.W.4 Dr.Abdul Latif observed a lacerated wound involving occipito frontal region, part of occipital and frontal bones missing, brain matter (part of) out, all the structures within these parts damaged. Remaining parts of occipito

frontal bones seen in pieces. Injured Atta Muhammad Khashkheli on examination was found to receive a muscle deep lacerated wound $1\frac{1}{4} \times \frac{1}{4}$ inch on the right side of nose, as well as swelling of the right eye brow with right conjunctival inflammation. He produced medical certificate of injured as (Ex.9/A) and post mortem report of the deceased as (Ex.9/B).

The Investigating Officer of the case P.W.7 Ghulam Nabi, after receipt of the said memos prepared by P.W.6 Shabbir proceeded with the investigation. On 22.05.2010, he recorded supplementary statement of the appellant Haji Abdul Jabbar Thebo (Ex.13/A), whereby respondents Ali Madad and Suleman were nominated as culprits, who were not named in the FIR earlier. P.W.7 Ghulam Nabi SIP/SHO prepared memo of blood stained clothes (Ex.10/B) in the presence of recovery witness P.W.5 Abdul Salam, land lord of the village. On 27.05.2010, Miskeen Ghello, SIP, after handed over the custody of respondents Sajid, Imdad, Mir Hassan and Aijaz through memo (Ex.13/B). On 29.05.2010 P.W.10 Abdul Aziz Chutto SIP arrested Suleman Lund armed with 7 MM rifle with three live rounds, and Ali Madad, a T.T pistol .30 bore alongwith two live rounds whereof memo (Ex.10/C) was prepared . On 02.06.2010, during course of investigation of the case respondent Suleman Lund got recovered snatched TT pistol of .30 bore along with magazine through recovery memo (Ex.10/D) in the presence of recovery witness P.W.5 Abdul Salam

Thebo, landlord of the village, whereas on 2.6.2010 Ali Madad got recovered snatched Nokia mobile set from his house through recovery memo (Ex.10/E) in the presence of said P.W.5 Abdul Salam Thebo.

It is suffice to add here that one of the respondent namely Kaloo could not be arrested, therefore, on conclusion of the investigation police report under section 173 of the Cr.P.C was submitted, wherein the said respondent Kaloo was placed in column No.2 of the challan, regarding whom, proceedings under sections 87 and 88 of the Cr.P.C were initiated. However, subsequently on his arrest a complete challan was submitted before the learned Additional Sessions Judge. Before commencement of the trial one of the accused namely Sajid alias Sajoo on 13.07.2012 died natural death, against whom proceedings stood abated on 05.12.2012.

The learned Additional Sessions Judge Tando Allahyar, on receipt of the challan and fulfillment of the codal formalities, commenced with the trial by framing charge against respondents, to which they denied the allegations and asked for trial.

5. The prosecution in order to establish the crime as alleged in the charge produced as many as 10 (ten) witnesses. After closure of the prosecution side the respondents were examined under section 342 Cr.P.C, wherein the evidence and accusation put to them were categorically denied by also professing their innocence. However,

neither they opted to make statement on oath as envisaged under section 340(2) of the Cr.P.C nor produced any witness in their defence.

6. At the end of the trial, the learned Additional Sessions Judge Tando Allahyar, extended benefit of doubt to all the respondents, thereby, acquitted them of the charge as mentioned in para supra.

The appellant being aggrieved has preferred the instant appeal, seeking annulment of the judgment impugned for the same being contrary to facts and law.

7. We have heard Mr.Aijaz Shaikh, Advocate, learned counsel for the appellant and Mr.Saleem Akhtar Buriro, learned Additional Prosecutor General, Sindh, to whom pre-admission notice was issued and have also gone through the entire record, cover to cover with their assistance

8. Learned counsel for the appellant interalia contended that the learned trial Judge has recorded the acquittal on flimsy and whimsical grounds, despite the fact that there was overwhelming incriminating evidence against the acquitted respondents. He maintained that the ocular evidence of P.W.1 Haji Abdul Jabbar Thebo, P.W.2 Muhammad Yousaf and P.W.3 Muhammad Saleh Thebo have not been appreciated in its true prospective and without any justifiable cause has disbelieved the recovery of snatched articles, recovered on the pointation of respondents, which by all means corroborate the ocular testimony furnished by the said prosecution witnesses.

Learned Additional Prosecutor General Sindh supported the arguments of the learned counsel for the appellant and reiterated that the learned trial court has erred in law by acquitting the respondents, inspite of the fact that sufficient evidence on record was available in the form of ocular evidence so, affirmed and corroborated by the recovery of snatched articles.

9. We are mindful of the legal scope of an appeal against acquittal, which has a restricted and narrow range of interference. Obviously, the approach of an appeal against conviction and the appeal against the acquittal have wide differences. In an appeal against conviction, the appellant assails his guilt, whereas through the later, the verdict of innocence is challenged, to which presumption of dual innocence is attached. It is now a settled principle of law that an appeal against acquittal, the impugned judgment would not be interfered for re-appraisal of evidence, even if, the court comes to the conclusion, different from that of the court acquitting the accused; unless the conclusion drawn by the court below is ridiculous, shocking and artificial resulting into a judgment, which is sheer conclusion of the perversity and illegality. Even so, if there are two different views, even then in ordinary course, inference has not been approved by the Apex Court provided an error of law apparent on the face of record, which leads to mis-carriage of justice. Regarding the touchstones, while, entertaining and dilating upon an appeal against acquittal, we are

guided with the principle expounded in the case of **Ghulam Sikandar and another Vs. Mumraiz Khan and others (PLD 1985 SC 11)**, **Azhar Ali Vs. State (PLD 2010 SC 632)**, **Zeeshan Afzal alias Shani Vs. State (2013 SCMR 1602)** and **Intizar Hussain Vs. Hamza Ameer etc (2017 SCMR 633)**.

10. The unfortunate incident has occurred as stated to have been witnessed by P.W.1 Haji Abdul Jabbar Thebo, P.W.2 Muhammad Yousaf and P.W.3 Muhammad Saleh Thebo in the dark night in the open fields, where admittedly there was no source of any light. As such, while scanning and re-appraisal of the evidence on record, we have analyzed the testimony of said prosecution witnesses with utmost care and caution. P.W.1 Haji Abdul Jabbar Thebo is the brother of the deceased Haji Abdul Wahid, who lodged the report on 21.05.2010, obviously with the delay of 39 hours without any plausible explanation, which give rise to question of premeditation, consultation and deliberation. In spite of the fact that he met P.W.6 Ghulam Shabbir, ASI and P.W.7 Ghulam Nabi SIP on the day of occurrence in the hospital and thereafter; but did not lodge the FIR promptly and failed to nominate Suleman and Ali Mad, subsequently, casting doubt. The dictum laid down in the case of **Farhan Ahmad and Muhammad Inayat (2007 SCMR 1825)**, persuades us, not to place reliance upon such after thought evidence, being outcome of consultation and deliberation.

The said witness, while lodging the FIR has nominated accused persons namely Sajid alias Sajoo,(who died naturally after arrest and before commencement of trial), Imdad Ali, Mir Hassan, Aijaz and Kaloo, regarding whom, the appellant(complainant) did not disclose as to how the said respondents were nominated by him with reference to the fact that whether they were friends, enemies, villagers or were in any other relation prior to their nomination in the FIR. The allegations reveals that they were not muffled, which again seems improbable as to why the dacoit would not muffle their faces, particularly, if they are known to each other and after dacoity would let go complainant as well as P.W.2 Muhammad Yousaf and P.W.3 Muhammad Saleh Thebo to become witness against them and take them to the hanging slot.

11. As far as, the nomination of Suleman and Ali Madad are concerned, they have been involved as culprits on a supplementary statement dated 22.05.2010, i.e, on the 4th day of the occurrence and that too, without any justifiably reason as to how they have known about them to be culprits, particularly, when nothing was stated in the FIR about them regarding their description or other details. Even otherwise, the deposition of P.W.1 Haji Abdul Jabbar Thebo, whereby respondents Suleman and Imdad Ali have been nominated in a supplementary statement, has never been approved by the Apex Court, rather, on the contrary, such statement has always been held to be an

after thought; a tool to subsequently involve as many persons as the complainant could, to victimize his opponents for the reasons best known to him. In this regard, reliance is placed upon the case of **Kashif Ali Vs. Judge A.T.A (PLD 2016 SC 951)** and **Noor Muhammad Vs. The (2008 SCMR)**.

12. Undeniably, the occurrence had taken place around 8.30 p.m and obviously, in the dark night as admitted by the prosecution witnesses. The testimony of P.W.2 Muhammad Yousaf and P.W.3 Muhammad Saleh Thebo were recorded on the 3rd day of the occurrence, without any explanation, despite the fact that they were available in the area and had accompanied P.W.1 Haji Abdul Jabbar Thebo (complainant) in the hospital but neither they named the respondents nor gave the description of the culprits, henceforth their statement recorded by police after a considerable delay cannot be seen without doubt and suspicious, as it would be unsafe to rely upon such testimony, particularly, when there was no source of light at the crime scene. The source of identification narrated by the eye witnesses is the car head lights, which source has mostly been discarded and disbelieved by the Hon'ble Supreme Court of Pakistan to be a strong reason for identifying the culprits in such like situations. Thus, we are also not convinced without any shadow of doubt that the respondents could have been identified in such light as stated by the said prosecution witnesses. Moreover, their deposition also suggests that,

deliberately they have only mentioned of snatching of money from them and not about snatching of their mobile sets, apprehending that their lie would be caught, if the call data record, is obtained and their location is traced out, not being present on the crime scene, thus it also make their presence in the crime scene highly doubtful.

It is imperative to make note of the fact that the witness namely Atta Muhammad Khashkheli, stated to be driver of the vehicle and an eye witness of the occurrence, has not been produced without any plausible and cogent reason. He is the only eye witness of the occurrence, stated to have received fire arm injury in the occurrence but no needful and serious efforts were made to procure his attendance to corroborate independently the stated occurrence. It is an utmost surprise for us that as to why such an important witness has not been produced by the prosecution in order to establish the version put-forth by the complainant and the said eye witness. In default, as provided under section 129(g) of the Qanun-e-Shahadat Order, 1984 and dictum laid down in the case of **Lal Khan Vs. State (2006 SCMR 1847)**, non-production of such an important and independent witness would cast adverse inference, which believes us to hold that if he had appeared before the Court, he would have not supported the prosecution version. Thus non-production of such a crucial and essential witness has created doubt in the case of the prosecution.

13. Although, the recovery of the spoils of dacoity and weapon used in the crime are corroborative in nature, but loses its worth, if the substantive evidence is found to be doubtful as in this case. However, while having scanned the evidence of the aforesaid recovery, keeping aside such flaw, we have found that the statement of recovery witnesses is contrary on material points, which has made the proceedings of recovery highly doubtful. P.W.5 Abdul Salam is the recovery witness and landlord of village Maulvi Abdul Latif Thebo, belonging to the same tribe of complainant and the said eye witnesses, as such, his testimony also needs to be analyzed with much care and caution. According to him, on 29.05.2010 police arrested respondents Suleman and Ali Madad Lund from a garden near Dasori Mori and the police official recovered a Kalashnikov, three live cartridges of KK and cash of Rs.60/- from Suleman and from personal search of Ali Madad a T.T pistol and two live bullets recovered from his fold of shalwar, whereas the recovery memo (Ex.10/C) shows that at the time of arrest 7 MM Rifle along with three live bullets was recovered from Suleman, which stance is contradictory and belies the said recovery. Even otherwise, since no empty of 7 MM rifle was recovered from the crime scene, therefore, the same is irrelevant to strengthen the prosecution case but has put a dent in the prosecution version. The recovery memo Ex.10/C shows that vide roznamcha entry No.16, the police official proceeded towards the Dasori Mori on the information of P.W.3

Muhammad Saleh Thebo and on arrival to the Dasori Mori the police contingent on the pointation of P.W.3 Muhammad Saleh Tehbo and P.W.5 Abdul Salam and one Ghulam Ullah, arrested respondents Suleman and Ali Madad, which narration transpires that the whole story of recovery is arranged and manipulated by the relative of the complainant belonging of the same tribe of P.W.1, Abdul Jabbar Thebo. P.W.5 Abdul Salam also stated that on 02.06.2010, he was called by police officials at police station and informed that the accused persons Suleman and Ali Madad are ready to produce the pistol and mobile phone. As such, respondent Suleman led them to his house and produced a Pistol along with magazine vide recovery memo (Ex.10/D) and thereafter respondent Ali Madad led them to his house and produced Nokia mobile phone being the plundered article vide recovery memo (Ex.10/E). Amongst, so many other villagers, once again, P.W.5 Abdul Salam has been made witness of the recovery memo in consequence of the pointation of respondents Suleman and Ali Madad suggests that it was manipulated and arranged by P.W.1 Haji Abdul Jabbar Thebo and aforesaid witnesses.

Believing the recovery to be a gospel truth, even then the recovery of mobile set is irrelevant to the crime as neither the call data report (CDR) has been collected nor at the time of lodging FIR any details of the mobile number including cell No and IMEI, design and colour etc. were furnished. Moreover, the recovery of alleged stolen

pistol is also worthless because the same as stated by P.W.1 Abdul Jabbar Thebo (complainant), was licensed one but neither license has been produced nor the number of the pistol was given in the FIR as well as in the deposition before the court. Furthermore, the alleged spoiled articles have not been put to in an identification to be identified by the appellant or any other eye witness. Henceforth no reliance explicit reliance can be placed on such recovery as the prosecution failed to establish the said recovery through independent witness and also beyond any reasonable doubt.

14. As far as the medical evidence is concerned, the same at the best has proved the unnatural death of Haji Abdul Wahid with fire arm but does not connect the respondents in any manner with the murder of the deceased. Regarding FSL report, which has been opined as positive, it may be observed, that after taking into possession the empties, the same were not sent and be kept in a safe custody, rather the same were lying with the police and after recovery of the alleged crime weapon the same were sent together and positive opinion has been obtained showing the empties to be fired by the alleged recovered weapon while FSL report in such like situations have been held to unworthy of credence. In this regard reference is made to the case of **Ali Sher and other Vs State (2008 SCMR 707)**.

15. After scanning the evidence from different angles as discussed hereinabove, we have not been persuaded with the

arguments advanced by the learned counsel for the appellant and learned Additional Prosecutor General Sindh, to interfere with the judgment impugned herein, as we have found the same not to be suffering from any illegality, perversity, misreading and non-reading of evidence.

These are the reasons for our short order dated 10.5.2018, whereby the instant appeal was dismissed in limine.

**SHAUKAT ALI RAKHSHANI
JUDGE**

**MEHMOOD MAQBOOL BAJWA
JUDGE**

**SYED MUHAMMAD FAROOQ SHAH
JUDGE**

Islamabad, 14.5.2018/
M.Akram/