

IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH

JAIL CRIMINAL APPEAL NO.01/I OF 2018

Mashooque Ali son of Muhammad Haroon Abro,
R/o village Sher Muhammad Abro, Taulka Bhiria City.
District Nausharo Feroze.

..... Appellant

Versus

The State.

Respondent

For the appellant

...

Syed Muhammad Tayyab,
Advocate

For the Respondent/State

...

Mr.Zafar Ahmed Khan,
Addl: Prosecutor General
Sindh.

No.& date of FIR

...

FIR No.183, dated 18.8.2011
Police Station Bhiria Road,
District Naushehro Feroze

Date of judgment
of trial court

...

04.01.2018

Date of Institution
in this Court

...

11.01.2018

Date of hearing

...

10.04.2018


Date of decision

...

10.04.2018


13/4/2018

SYED MUHAMMAD FAROOQ SHAH J:- Mashooque Ali, the appellant by invoking appellate jurisdiction of this Court has preferred the captioned appeal through Senior Superintendent Central Prison at Sukkur, praying therein to set-aside the impugned judgment dated 04.01.2018, recorded and pronounced by the learned Ist Addl; Distt: and Sessions Judge, Naushahro Feroze, at Sindh, thereby the appellant/accused was convicted under section 265-H(II) Cr.P.C and sentenced for an offence punishable under section 302(b) PPC read with section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to suffer rigorous imprisonment for life as *Tazir*, in addition to pay fine of Rs.50,000/- (Rupees Fifty Thousand only) or in default of payment of fine to undergo simple imprisonment for six months more. He was also convicted and sentenced under section 392 PPC, to suffer rigorous imprisonment for seven years and to pay fine of Rs.50,000 (Rupees Fifty Thousand only), in default of payment of fine to undergo rigorous imprisonment of six months more. Benefit as provided under section 382-B, Cr.P.C was extended to the appellant. While dilating upon mitigating circumstances for awarding lesser punishment to the appellant, the learned trial Judge has observed that the appellant along with three unidentified culprits has been booked for committing the murder of the deceased Abdul Razzaq, as well as looking to the circumstances of the case and keeping in view delay of three days in lodging FIR; moreso, the prosecution witnesses are closely related interse.


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2. By narrating the facts of incident, occurred on dated 15.8.2011, at 8.30 p.m, the complainant Tanveer in FIR No.183/2011 registered on 18.8.2011 (after three days) at Police Station *Bhiria* Road, District *Naushahro Feroze* averred that he owns fish pond adjacent to their village. On 15.1.2011, at sunset time, after having night meals, he and his relatives Abdul Razaque Arain, aged about 30 years and Abdul Jabbar Arain boarded on their motorcycle and went to fish pond for its looking after ; the motorcycle was being driven by him, when at about 8.30 p.m. they reached near the lands of Muhammad Yousif Arian, where on the headlight of motorcycle, they found accused Mashooque son of Muhammad Haroon Abro armed with pistol and three unidentified culprits, out of whom one was armed with pistol and remaining two had rifles, who were seen properly and can be identified, if seen again, all the accused persons on the force of weapons, got stopped complainant party. Appellant/accused Mashooque Abro tried to snatch motorcycle from the complainant, which he resisted and thereafter such resistance was raised by complainant party. In the meantime, the unidentified culprit having pistol made straight fire from his pistol upon complainant, which hit him on his finger of right hand and accused Mashooque Abro made straight fire from his pistol upon Abdul Razaq, which hit him on his neck, who fell down on the ground by raising cry. On cries of complainant party so many co-villagers came there and on seeing them coming, all the accused persons fled away. Thereafter, complainant party found that Abdul Razaq sustained bullet injury on left side of his neck which was throughout from head, blood was oozing, who within sight of complainant party expired on the spot. Thereafter, complainant and dead body of deceased Abdul Razaq

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were shifted to Rural Health Center, Bhiria City, where medical treatment was provided to complainant and post mortem examination of deceased was also conducted; subsequently, dead body of the deceased was brought at village and after observing funeral formalities, complainant appeared at Police Station, after three days of incident, where he lodged FIR of the incident.

3. SIP Saif-ur-Rehman (PW.5) took up the investigation, arrested the appellant on 21.8.2011 and on pointation of accused, he secured the crime weapon viz unlicensed pistol on 04.9.2011 and on completion of usual investigation submitted the final report under section 173 Cr.P.C before the concerned Magistrate, who took the cognizance and sent up the case papers to the sessions judge for trial.

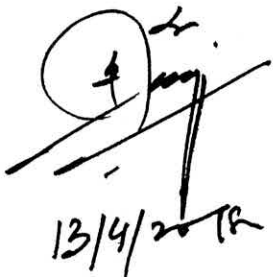
4. On commencement of trial, the appellant was charged for offences punishable under Article 17(4), 17(2) and 17(1) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Ex.2), who vehemently denied his culpability and claimed to be tried (Ex.3). Prosecution, in order to substantiate the accusations, produced all material witnesses and on conclusion of prosecution evidence, statement of accused under section 342 Cr.P.C was recorded by the trial court, who once again denied the charges and allegations put to him; however, he did not opt to make his statement on oath and adduce evidence in his defense.

5. Ocular account of prosecution evidence hinges on the evidence of complainant/PW .1 Tanveer Ahmed and PW.2 Abdul Jabbar. It shall be advantageous to briefly discuss the evidence which has been brought by the prosecution on record, on the basis of which the learned

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trial court recorded the conviction. Cursory examination of prosecution evidence reveals that in support of charge/allegations, the complainant/PW.1 namely Tanveer Ahmad has supported the contents of FIR to some extent and stated that at force of fire arm weapons, the appellant and three other unidentified culprits attempted to snatch their motorcycle. It is further alleged that on their resistance the unidentified culprit made fire from pistol which hit on his right first finger, while the appellant made straight fire at Abdul Razzaq who sustained fire arm injury on the left side of neck, had fallen down by raising cries. On their cries, some neighbourers were attracted and on seeing them the culprits made their escape good. Thereafter, the concerned police was informed; police came at the hospital and handed over the dead body of Abdul Razzaq to the complainant after autopsy. The complainant was also referred to the hospital for treatment and examination of injury on his finger; he was medically examined and after funeral ceremony of deceased Abdul Razzaq, the complainant lodged the FIR. Thereafter, on pointation of complainant, the Investigation Officer visited the place of occurrence and secured blood stained earth along two empty shells of pistol/ crime weapon.

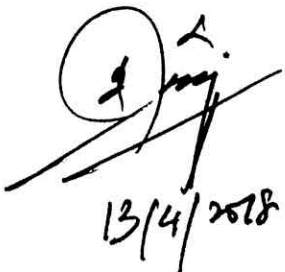
6. In cross examination, the complainant has admitted that necessary detail, such as registration number and colour of motor cycle has not been mentioned in the FIR and that it was purchased by his cousin Ramzan on an open letter. He further stated that PWs Anwar and Asghar are his brothers while PW Abdul Jabbar is son of his maternal uncle. He admitted that they had seen the culprits from the distance of

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20/25 feet on the light of Motor bike and further admitted that in the FIR as well as in examination in chief he did not state that on which side of Katcha path accused were available and stated that the village of Mashooque (appellant) is at a distance of about one kilometer from their village. He admitted that accused at the time of incident did not snatch/rob any article from them and voluntarily stated that the culprits only attempted to rob the motorcycle from them but could not succeed. He further admitted that about 20/25 villagers came at their cries and he has given the names of some villagers; those have not been cited as witnesses of incident. Complainant has further stated in cross examination that during shifting of deceased to the hospital, in the way, they informed the police about the incident. He has admitted in cross examination that the foot prints were tracked through foot trackers Haji Brohi and Ghulam Muhammad Sadar, those were arranged by their *Nek Mard* (elder) Ghulam Ali and at the time of tracking foot prints dogs were also with the foot trackers. He has also admitted the fact of lodging FIR on third day of incident, after post mortem examination of Abdul Razzaq. He stated in cross examination that being an injured he remained at hospital under treatment for a night (*though such fact has vehemently been denied by the Medical Officer in his evidence by declaring him: LAMA "Left Against Medical Advice"*). He again appeared before the Medical Officer after more than two years, who issued final medical certificate without X-rays reports.

7. PW.2/ Abdul Jabbar, being next eye witness of the incident stated in his examination in chief that complainant is son of his

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maternal uncle. He supported the complainant, however, in cross examination he stated that complainant is his maternal uncle while PWs Anwar and Asghar are his father and uncle; the said motor cycle was of complainant Tanveer; (*though the complainant has not claimed ownership of said motor cycle and stated in his evidence that it was purchased by his cousin Ramzan on an open letter*). With regard to information of incident to police, PW.2 Abdul Jabbar stated in cross examination that complainant did not inform the police in his presence and that the police came on next day of incident to visit the scene of occurrence. This witness has also stated that foot tracking dogs were arranged by the complainant on next day of incident but he did not accompany the complainant and others.

8. Admittedly, tracking foot prints of culprits through foot trackers as well as through sniffer dogs is a new invention which is not the case of prosecution as no such evidence was collected by the Investigation Officer during investigation, which creates a serious doubt on the case of prosecution, more particularly, in the latest authoritative pronouncement of Hon'ble Supreme Scourt, reported as **2017 SCMR 986** (*Hashim Qasim vs The State*) use of sniffer dogs has been held contrary to the provisions of *Qanoon-e Shahadat Order 1984*. It is also an admitted fact that the Investigating Agency started the investigation just after fifteen minutes of the incident by referring the injured to the hospital for examination and treatment and dead body for post mortem. No sufficient reason and plausible cause of lodging FIR at belated stage, i.e. after three days, has shown by the prosecution.

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9. PW.3/ Anwar Ali is a formal witness, who by producing the memo of inspection of dead body as Ex.6/A and inquest report as Ex.6/B; memo of recovery of blood stained earth and two empties of pistol as Ex.6/C; certificate of the same to be true and correct; stated in cross examination that, Co-Mashir Asghar is his real brother and used to live with him. He admitted that when police visited the place of *vardhat*, about 10/15 villagers appeared at that time. Further admitted that neither he stated about specific date nor time of preparation of memo of injury on the person of complainant Tanveer. He stated in cross examination that when police saw the injury on finger of complainant, it was bandaged and some other persons of vicinity were also available.

10. PW.4/ Head Constable Muhammad Nawaz, who conducted the initial investigation till lodgment of FIR, stated in the beginning of his examination in chief that on 15.8.2011 being duty officer he lodged the FIR in verbatim but in later part of examination in chief he resiled from his earlier stance and stated that FIR in this case was registered on 18.8.2011 *i.e.* . three days after observing all legal formalities. He stated that when complainant approached him to inform the incident he was all alone and on the day of lodging FIR, the complainant appeared with PW Asghar. He further stated that on 18.8.2011 *i.e.* after three days of incident, he handed over all case papers to the Investigating Officer of the case.

11. PW-5 SIP Saif-ur-Rehman, being Investigating Officer of the case stated that on 19.8.2011 *i.e.* after four days of the incident, he received the case papers and conducted usual investigation. He arrested

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the appellant on 21.8.2011 in presence of two police constables and during investigation the appellant admitted the commission of offence and on 04.09.2011 the crime weapon i.e. illicit pistol was recovered on pointation of accused in presence of two police constables and thereafter on completion of investigation he submitted the challan. In cross examination, the investigation officer admitted non-production of entry number regarding receipt of case papers. He admitted preparation of certain material documents prior to lodging the FIR. He has also admitted gathering of inhabitants of locality at the time of preparation of memo of injury on the person of complainant and that the complainant and mashir came along with complainant. He further stated that many persons gathered at the place of occurrence but neither he recorded their statement nor they were cited marginal witnesses of memo of place of incident. He has also admitted that memo of arrest do not reveal that accused was arrested on pointation of any person and that memo of arrest was prepared in presence of two police mashirs. He admitted that no map of crime weapon was drawn by him.

12. PW-6 Dr. Ghulam Sarwar who conducted autopsy of dead body of deceased and examined the injury on the finger of the complainant stated that after examination of injury, the injured/complainant Tanveer left the hospital premises against medical advice and after more than two years period, final medical certificate of injured was issued on appearance of the Appellant. However, medical officer has denied issuance of medical certificate after receiving bribe from injured Tanveer.

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13. PW-7/ Police Constable Mujahid Shah admitted the contents of the memo of the arrest of appellant (Exh.8/B) to be true and correct. He stated in cross-examination that they left the police station to arrest the accused in a private car though investigating officer stated in his evidence that he along with mashirs proceeded to arrest the accused in a police vehicle.

14. PW-8 Ghulam Shabir is also formal witness who produced sketch of site prepared by him as Exh.11/A. He admitted in cross-examination that he did not mention date in the site plan and that two empty shells were lying at the distance of six feet.

15. The impugned judgment and the evidence put forth from both sides has thoroughly been analyzed and scanned by us with the able assistance provided by Mr. Syed Muhammad Tayyab, learned counsel for pauper appellant and Mr. Zafar Ahmed Khan, Ist Additional Prosecutor General Sindh representing the State. We have also been benefited with the case law cited at bar.

16. In support of formal averments made in the memo of instant jail appeal by the Appellant, learned counsel for the appellant has formulated the following contentions:-

- i. That there is no plausible explanation or sufficient reasons for three days delay in lodging the FIR, though admittedly, the investigation commenced before lodging the FIR, therefore, per learned counsel deliberation and consultation of lodging the FIR cannot be ruled out.

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- ii. Learned counsel argued that the case of prosecution is that the appellant Mashooque Ali was identified at the time of incident and inspite of such facts both eye-witnesses admitted in cross-examination that foot trackers along with sniffer dogs were arranged to locate the dwelling of culprits. Per learned counsel, astonishingly, such fact has been suppressed by the complainant side as well as the investigating agency in final report submitted under section 173 Cr.P.C.
- iii. That material contradictions and inconsistencies among the prosecution witnesses are fatal which shatters the entire prosecution case which have been ignored by the trial court by treating the same to be "mitigating circumstances".
- iv. That motive of the incident has not been established by not producing ownership document of motorcycle which was allegedly attempted to snatch by the accused and his accomplices, so much so that colour or registration number besides other description have not been mentioned though it is the case of prosecution that the appellant was identified in the headlights of said motorcycle.
- v. That the appellant/accused was not confronted to the recovery of illicit crime weapon while recording his statement under section 342 Cr.P.C which is fatal to the prosecution as held by the Hon'ble superior courts.
- vi. Learned counsel contended that during cross-examination, the prosecution witnesses admitted being closely related interse. Despite presence of independent persons of the locality, the Investigation Officer did not bother to record their statements. It is argued that no legal sanctity is attached to the foot-trackers or sniffer dogs used to trace the houses of culprits. In support of his contention learned counsel placed his reliance on **2017 SCMR 986**.

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- vii. It is next argued that the Head Constable Muhammad Nawaz posted at police station *Bhiria city, Naushehro Feroze*, who initiated the investigation without lodging the FIR till funeral of deceased has given different version. Learned counsel submitted that what necessitated the Investigating Officer to arrange foot-trackers or the sniffer dogs though the appellant allegedly identified by both the eye-witnesses at the scene of occurrence.
- viii. By challenging the medical account of prosecution evidence, learned counsel argued that PWs have given contradictory evidence with regard to fatal injury on the person of deceased as PW-1 stated that the bullet hit on the left side of neck of the deceased; however, PW-2 stated that the injury sustained by the deceased was on right side of neck and the Medical Officer has given a different statement, more particularly, with regard to the injury on the person of complainant, as above.
- ix. By pleading the innocence of the appellant, Syed Muhammad Tayyib Advocate argued that the appellant has been falsely implicated in this case by the complainant, as few days prior to said incident a quarrel had taken place in between complainant and appellant over crop and being antagonized on such dispute, the appellant has falsely been involved in this case by the complainant.
- x. Lastly, learned counsel contended that there are sufficient circumstances which creates reasonable doubt in a prudent mind about the guilt of the accused, therefore, the appellant is entitled to such benefit as a matter of right as held by the Hon'ble Apex Court. To support his contention, learned counsel placed his reliance on relevant case law.

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17. Conversely, Mr. Zafar Ahmed Khan, learned Additional Prosecutor General Sindh supported the impugned judgment and contended that irregularity in investigation, conducted before lodging the FIR is not fatal to the prosecution case. Moreso, the impugned judgment is based on sound and cogent reasons does not warrant any interference. He argued that the investigation conducted by the Head Constable being duty officer, before lodging the FIR and three days delay in lodging the FIR at the most can be termed an irregularity. To support his contention learned prosecutor placed his reliance on *1995 SCMR 1365* and *1972 P.Cr.L.J 400*. Insofar as use of sniffer dogs for tracking foot prints is concerned, Mr. Zafar Ahmed Khan, Additional Prosecutor General admitted that nowhere use of foot trackers by using sniffer dogs has been mentioned in documents prepared during investigation; however, admitted that both eye-witnesses have stated in their cross examinations about use of those dogs to trace the culprits. The learned prosecutor has further clarified that on 21.8.2011, the appellant was arrested and on 04.09.2011, i.e. after 13 days of his arrest, on his pointation, the crime weapon was secured; moreso, the contradictions and inconsistencies in depositions of PWs are not material. Per learned prosecutor, sufficient evidence has brought by the prosecution to connect the appellant in commission of alleged offence who duly armed with deadly weapon along with his accomplices attempted to commit robbery and inflicted fatal fire arm injury to the deceased Abdul Razzaq.

18. Facts as derived from the case of *Shaman v. the State* reported as *1972 P.Cr.L.J 400*, relied upon by the learned Prosecutor are

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that *“the matter was reported at the Police Station without any avoidable delay (peregaph 7).* In another case of *Sheroz Asghar v. the State,* reported as **1995 SCMR 1365** relied by learned prosecutor, facts were that incident had taken place at 12 mid-day and complainant lodged the FIR at 2.15 p.m. with plausible explanation of short span of delay (paragraph 17) however, in the case in hand the prosecution has miserably failed to explain inordinate delay of three days as well as the investigation by the H.C Muhammad Nawaz (PW.4) before lodging the FIR; therefore, both these citations relied upon by the learned Addl: Prosecutor General are of no help to him, having been not attracting in peculiar facts and circumstances of the case.

19. To sift grain from the chaff, we have carefully scanned the evidence. A perusal of record transpires that admittedly the concerned police conducted the initial investigation of an incident of cognizable offence three days prior to lodging the FIR. PW.4/(Exh.7) Head Constable Muhammad Nawaz who took up the investigation stated in early part of examination in chief that *“on the very day of incident he lodged the FIR (Exh.4/A)”* but in later part of his examination-in-chief he stated that, *‘the FIR of instant case was lodged after observing all legal formalities of the dead body on 18.8.2011’.* He stated that he referred the injured/complainant to the hospital, proceeded at the hospital and prepared inquest report as Ex.6/A and Ex.6/B and handed over the dead body to the complainant on 16.8.2011, i.e. next day of the incident and handed over all case papers to the Investigating Officer on 18.5.2011 though Investigating Officer stated that he received the case papers on

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19.8.2011. There is no explanation of lodging the FIR even after two days of burial of deceased Abdul Razzaq. Suffice it to say that PW H.C. Muhammad Nawaz has totally failed to furnish the circumstances beyond his control or any sound justification for not lodging the FIR on date of occurrence, i.e. 15.8.2011 till handing over the case papers to another Investigating Officer on 18.8.2011 for further investigation. However, PW.1/ Complainant namely Tanveer Ahmad stated that on third day of the incident, FIR was lodged by him at police station *Bhiria* Road. PW Abdul Jabbar, being second eye witness stated that complainant lodged the FIR on 18.8.2011. PW.6 Medical Officer, Dr. Ghulam Sarwar, who produced the provisional medical certificate (Ex.9/C) of injured/complainant Tanveer Ahmed stated that injured had left the hospital against his advice and injury on his person was reserved for X-ray and re-examination, who again appeared on 30.3.2013, after about two and a half years and without going through X-ray report he declared the reserved injury on his fingers to be "*Ghayr Jaifa Mudhia*" and "*Ghayr Jaifa Munqalla*". To our surprise, the Medical Officer has issued final medical certificate without going through the X-ray or any other test report, that too after lapse of more than two years.

20. In view of foregoing discussions, we arrived at the irresistible conclusion that the investigation has been conducted in a manner which creates reasonable doubt; such as, lodgment of FIR after three days of the incident without any plausible explanation and initiation of investigation prior to lodging the FIR, which may be presumed result of deliberation, consultation, discussion and after thought and would

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derive an ulterior motive to get the accused convicted. It needs to be reiterated that under section 154 of Code of Criminal Procedure any information relating to the commission of cognizable offence shall be reduced in writing as argued by the learned counsel. If need arises, reliance may conveniently be placed on the following citations, fully attracting in the circumstances of the case: (i) **2012 P.Cr.L.J 452 SC AJ&K**, (ii) **2003 P.Cr.L.J 1778**, (iii) **2003 YLR 1834**, (iv) **2004 YLR 684**, (v) **2002 P.Cr.L.J 1541**.

21. In **2004 SCMR 1185**, the Hon'ble Apex Court held that any doubt in lodging the FIR and commencement of investigation gives rise to a doubt in favour of accused. It has been further held in the following rulings that every information of cognizable offence shall manifest the intention of the legislation to make such provisions as mandatory in nature as to set the law into motion information of cognizable offence should be incorporated in FIR; (i) **PLD 2014 Islamabad High Court page 71**, (ii) **PLD 2007 SC 539**, (iii) **2010 P. Cr.L.J 231** (iv) **2002 P.Cr.L.J 2007**, (v) **PLD 2012 Lahore 188**.

22. In **2011 P.Cr.L.J 1826**, it has been held that proceedings by the police without registering the case is against the canon of law as well as settled principal on the subject.

23. From the above discussion and on perusal of the evidence recorded by the learned trial court, material discrepancies can be noted in the prosecution case, more particularly it is an admitted position that PWs and Mashirs are closely related to each other and to ascertain legal authenticity of prosecution version, certain material irregularities

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and illegalities pointed above have been committed, more particularly, no inhabitants of the locality associated at the time of preparation of different memos, though it has come in evidence that many inhabitants of the locality were found present, which is a clear violation of section 103 Cr.P.C and fatal to the prosecution case. As held in the cases of (i) *Muhammad Khanb..Vs..Dost Muhammad* (PLD 1975 SC 607, (ii) *Afzal..Vs..The State* reported in 1983 SCMR 1, (iii) *Niaz Ahmad..Vs.. The State* reported as PLD 1983 SC AJ&K page 211, (iv) *Billa and others..Vs.. The State* (1985 SCMR 854), (v) *Malik Aman and others..Vs..The State* (1986 SCMR 17), (vi) *Sultan and other..Vs..The State* (1987 SCMR 1177), (vii) *Faqir Gul..Vs..The State* (1989 SCMR 491, (viii) PLD 1975 Karachi 92, (ix) PLD 1990 SC 1083, (x) PLD 1991 SC 447, (xi) PLD 1988 Karachi 409, (xii) PLD 1990 Karachi 314.

24. We have considered all aspects of the case after re-appraisal of evidence. The appellant by claiming his innocence has shown malafide intention and ulterior motive of his implication in this case by the complainant side. Moreso, prosecution witnesses are closely related to each other. The aforesaid statement of the appellant/accused if kept in juxtaposition with the prosecution case, it was incumbent upon the complainant party as well as investigation agency to collect and adduce evidence of independent respectable inhabitants of the locality.

25. It is not out of context to mention here that to make recovery, search and arrest during investigation of crime has already been laid down in detail in the case of **Yameen Kumhar...Vs..The State**

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(PLD 1990 Karachi 275). For the sake of convenience, second part of *placitum* A, relevant page 283, is reproduced as under:-

“ The Provision of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a playground, field or garden from where recovery can be made for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr.P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. The rules of justice enunciated by section 103 are so embedded in criminal jurisprudence of Pakistan and to universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the mashirs becomes relevant depending on the facts of the case. The emphasis should be on respectability, independence and impartiality. If the recovery is to be made on public thoroughfare, a bus stand or similar public places the witnesses picked up by the police from the road can be proper witnesses of recovery depending upon the facts and circumstance of the case. However, I order to ensure proper investigation and clear proof preference should be given to the witnesses of the locality, particularly witness who are respectable. Witnesses procured by the police though respectable lose credibility. Where witnesses are not of the locality the Court should cautiously examine their statement.

- Reference in this regard is made to the cases of *Abdul Rashid.v.State* PLD 1975 Kar .92; *Ballia and others v.State* 1985 SCMR 854; *Nasrullah and another v. State* 1977 PCrLJ 132; *Rahmat v. State* PLD 1976 Lah 1444; *Muhammad Shafi and others v. State* PLD 1967 SC 167; *Muhammad Khan v. Dost Muhammad* PLD 1975 SC 607; *Afzal V. State* 1983 SCMR 1; *Niaz Muhammad alias Jaja and another v. State* PLD 1983 SC (AJ&K) 211; *Malik Aman v. State* 1986 SCMR 17; *Sultan and others v.State* 1987 SCMR 1177; *Khair Gul V.State* 1989 SCMR 491 and *State V.Abba Ali Shah* PLD 1988 Kar. 409.

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26 . Another angle of legal proposition of the case in hand, much emphasized by the learned counsel for the Appellant was that the accused has not been questioned on alleged recovery of crime weapon therefore, in case of omission to confront the accused on alleged recovery under section 342 Cr.P.C, the conviction cannot be sustained as such illegality or gross irregularity cannot be cured in light of the dictum as laid down in the cases **2006 P.Cr.L.J 149** (*Muhammad Razakue VS the state*), **2010 SCMR 1009** (*Muhammad shah VS state*), **1999 SCMR 697** (*Sheral VS state*), **2017 SCMR 148** (*Qaddan and others VS the state*).

27. Putting the present case to the test laid down by the series of judgments of superior Courts, it is clear that in view of discrepancies in the evidence mentioned as above, besides initiating the investigation prior to lodging the FIR and non-association of the independent witnesses, we are of considered view that the appellant is not guilty. In view of the background of the facts and circumstances of the case and the evidence analyzed, we have to observe that the impugned judgment is result of complete misreading of evidence and/or it is due to incompetency resulting distorted conclusion as to produce a positive miscarriage of justice. It is well settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he shall be entitled to such benefit not as a matter of grace but as a matter of right as held in (i) **1995 SCMR 1345** (*Tariq Parvez ..Vs..The State*), (ii) **1997 SCMR 25** (*Muhammad Ilyas..Vs..The State*), (iii) **2008 SCMR page 1221** (*Ghulam Qadir..Vs..The State*). It needs to be clarified that from very first glance on prosecution evidence, the story as

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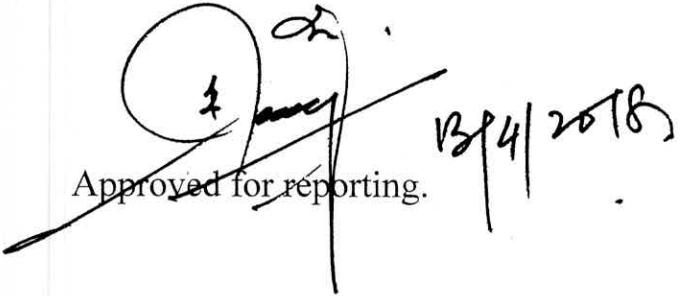
set up by the prosecution, appears to be concocted and cannot be considered trustworthy due to contradictions and inconsistencies in between the ocular account, medical and circumstantial evidence. Crux of the aforementioned discussion is that the prosecution has miserably failed to prove the case against the appellant beyond shadow of reasonable doubt.

These are the reasons of pronouncement of short order dated 10.4.2018, whereby the impugned judgment dated 04.01.2018 was set-aside and the appellant was acquitted of the charge.


JUSTICE SYED MUHAMMAD FAROOQ SHAH


JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN

Islamabad the
April, 13th, 2018
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Approved for reporting.