

IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE DR. SYED MUHAMMAD ANWER

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

JAIL CRIMINAL APPEAL NO.04-I OF 2020

L/W

1. IRFAN ALI SON OF MUHAMMAD ILYAS, MUSLIM, ADULT, BY CASTE JAT, RESIDENT OF DEH 161, TALUKA DIGRI, DISTRICT MIRPURKHAS.
2. IMRAN ALI SON OF KHALID HUSSAIN, MUSLIM, ADULT, BY CASTE JAT, RESIDENT OF DEH 154-B, TALUKA DIGRI, DISTRICT MIRPURKHAS.

Appellants

VERSUS

THE STATE

Respondent

JAIL CRIMINAL APPEAL NO.06-I OF 2020

1. WANJARO SON OF SACHOO
2. RAJOO SON OF SACHOO
3. SONO ALIAS SAJAN SON OF PREMCHAND
ALL HINDU, ADULT, BY-CASTE, BHEEL, RESIDENT OF DEH 149, TALUKA DIGRI, DISTRICT MIRPURKHAS.

Appellants

VERSUS

THE STATE

Respondent

Counsel for the Appellants	:	Mrs. Aftab Bano, Advocate
Counsel for the Complainant/ Respondent	:	Mr. Hussain Bux Saryo, Advocate
Counsel for the State	:	Ms. Seema Zaidi, Deputy, Prosecutor General, Sindh.
FIR No., Date and Police Station	:	93/2017, 21.07.2017 Digri, Mirpurkhas.
Date of Impugned Judgment	:	14.11.2019
Date of Institution of Jail.Crl. Appeal No.04-I of 2020 and J.Crl.Appeal No.06-I of 2020	:	05.05.2020 & 17.06.2020
Date of Hearing	:	31.03.2021
Date of Judgment	:	11.06.2021

J U D G M E N T

KHADIM HUSSAIN M. SHAIKH –J. This judgment will dispose of both the captioned appeals, which are directed against the single judgment dated 14.11.2019, passed by the learned Additional Sessions Judge-I/Model Criminal Trial Court Mirpurkhas, in Sessions Case No.276 of 2017 re-The State v. Irfan Ali and others, emanating from Crime No.93 of 2017 registered at P.S Digri, whereby appellants Irfan Ali Jat son of Muhammad Ilyas, Imran Ali Jat son of Khalid Hussain, Wanjaro son of Sachoo, Rajoo son of Sachoo and Sono alias Sajan son of Premchand were convicted and sentenced as under:-

- i). *"For offence punishable under section 302(b) PPC for the murder of deceased Irfan Ali Otho to undergo Life Imprisonment as Tazir and to pay Rs.100,000/- each as compensation under Section 544-A, Cr.P.C to the legal heirs of deceased Irfan Ali Otho and in case of default of payment, to suffer S.I for the period of six (06) months more each."*
- ii). *"For offence punishable under Section 337-A(i) PPC to suffer R.I for one (01) year each as Tazir and to pay Rs.10,000/- each as Daman to P.W/injured Imran Ali Sodhar."*
- iii). *"For offence punishable under Section 337-L(2) PPC to pay Rs.5,000/- each as Daman to P.W/injured Imran Ali Sodhar."*
- iv). *"For offence punishable under Section 337-F(vi) PPC to suffer R.I for two (02) years each as Tazir and to pay Rs.25000/- each as Daman to P.W/injured Imran Ali Sodhar."*

All the sentences awarded to the appellants were ordered to run concurrently and they were also extended benefit of Section 382-B, Cr.P.C.

2. Briefly, the facts of the prosecution case are that on 21.07.2017 at 1430 hours, complainant Ahmed Ali son of Buxial Sodhar lodged his

F.I.R. at police station Digri mainly contending therein that he is doing his job as labour at Jio Mehran rent a car situated at Sohrab Goth, Karachi, while his brother Imran Sodhar is serving as a driver on an XLI Car bearing Registration No.BEK-875 and whereas one Jawaid Magsi is also doing job at the said Adda with the complainant. On 09.07.2017 Jawaid received a phone call on cell phone Number 0302-3045909 from cell phone number 0306-8355655 that a car was required for Digri. It is alleged that Jawaid Magsi had given the aforesaid cell phone number to the complainant's brother Imran Sodhar, who carried the passenger, who hired his car on rent towards Digri. It is alleged that at 11.29. p.m, the complainant's brother Imran Sodhar sent a message from his mobile phone to his another brother Muhammad Hassan Sodhar that he is in Digri and two persons one Sindhi and the other one Punjabi are with him. Of them one is named Irfan, while the name of other person is not known. In the morning, Muhammad Hassan showed that message of his brother Imran Sodhar to the complainant, who tried to contact his brother Imran Sodhar on cell phone, but it was found switched off. On obtaining the information regarding location of the car through tracker department he came to know that the said car is located in Digri city. Then he contacted SHO P.S. Digri, who informed him that during patrolling he received information about an abandoned car and two persons were found lying in its dikki, who were taken to Taluka Hospital, Digri, where one person had expired, whose dead body was lying in mortuary of hospital while the other person being seriously injured was referred to Civil Hospital Hyderabad. Then the complainant along with Jawaid Magsi and Hafiz Ali Gohar reached at the Civil Hospital,

Hyderabad where the SHO showed him the injured person, who was identified to be his brother Imran Sodhar. The complainant allegedly took his injured brother Imran to Liaquat National Hospital, Karachi for his further treatment. On 11.07.2017 SHO, Digri informed the complainant on cell phone about the arrival of relatives of deceased person, who was identified to be Irfan Otho and their taking away his dead body to Sukkur. The complainant then contacted one Imran Otho, the brother of the deceased. On their personal inquiry they came to know that accused Irfan Jat, Imran Jat, Wanjaro Bheel, Rajoo Bheel and Sono alias Sajjan Bheel have committed murder of deceased Irfan Otho and caused injuries to the complainant's brother Imran Sodhar and then the complainant lodged his F.I.R on 21.07.2017 as discussed *Supra*. After usual investigation final report under Section 173 Cr.P.C was submitted by the police whereupon the learned trial Court took cognizance of the case.

3. After completing all the formalities, a formal charge was framed against accused Irfan Ali son of Muhammad Ilyas, Imran Ali son of Khalid Hussain, Wanjaro son of Sachoo, Rajoo son of Sachoo and Sono alias Sajjan son of Premchand [**"the appellants"**], to which they pleaded 'not guilty' and claimed their trial.

4. In order to prove its case, the prosecution examined PW-1 MO Dr. Ehtesham-ul-Haque at Ex.4, who produced police letter for examination, treatment and certificate of injured, provisional medico-legal certificate of injured, report of Radiologist, final medical legal certificate of injured, the police letter for post-mortem of deceased Irfan Ali, post-mortem report of deceased Irfan Ali, two receipts, letter

dated 24.07.2017, issued by him for correction of date from 12.07.2017 to 11.07.2017 in the post-mortem report and the police letter No.933 dated 10.07.2017 at Exs.4/A, 4/B, 4/C,4/D, 4/E, 4/F, 4/G, 4/H, 4/I, 4/J and 4/K respectively; PW-2 Tapedar Naveed Ahmed at Ex.5, who produced police letter and sketch/map of vardhat at Exs. 5/A and 5/B respectively; PW-3 complainant Ahmed Ali Sodhar at Ex.6, who produced F.I.R at Ex.6/A; PW-4 eye-witness/injured Imran Ali Sodhar at Ex.7, who produced his statement under Section 161 Cr.P.C on non-judicial stamp paper at Ex.7/A; PW-5 mashir Imran Otho at Ex.8, who produced mashirnama of identification of dead body of deceased Irfan Ali, mashirnama of recovery of Towel and izarband, lash chakas form, danistnama, mashirnama of clothes of deceased Irfan, mashirnama of place of incident and recovery of chapel of deceased Irfan Ali, mashirnama of place of recovery of the car and mashirnama of recovery of motorcycle at Exs.8/A, 8/B, 8/C, 8/D, 8/E, 8/F, 8/G and 8/H respectively; PW-6 witness Jawaid Magsi at Ex.9; PW-7 Mashir PC Arif Ali at Ex.10, who produced mashirnama of arrest of accused Irfan and Imran and mashirnama of arrest of accused Wanjaro, Rajoo and Sono alias Sajan at Exs.10/A 10/B respectively; PW-8 first investigating officer SIP Hothchand at Ex.12, who produced copy of entry No.25 of roznamcha, police letter for treatment of injured, mashirnama of inspection of injuries of injured, mashirnama of clothes of injured, mashirnama of recovery of izarband, mashirnama of inspection of dead body of deceased, lash chaks form of dead body of deceased, receipt for handing over dead body to one Nadeem Ahmed and copies of entries No.26 and 29 of roznamcha at Exs.12/A, 12/B, 12/C, 12/D,

12/E, 12/F, 12/G, 12/H, 12/I and 12/J respectively; PW-9 IInd I.O SIP Muhammacc Aslam at Ex.13, who produced copy of entries No.20 and 23 of roznamcha, mashirnama of place of the incident, report of chemical examiner, copies of roznamcha entries, copy of letter to Civil Judge and JM-1, Digri for recording confessional statements of accused persons and copy of notice given to the accused persons for recording their confessional statements at Ex.13/A, 13/B, 13/C, 13/D, 13/E and 13/F respectively. PW-10 Mashir PC Roshan Ali at Ex.14; and PW-11 Amir Latif Civil Judge and JM Digri at Ex.15, who produced confessional statements of accused and copy of order dated 02.08.2017 at Exs.15/A, 15/B, 15/C, 15/D, 15/E and 15/F respectively. Then the prosecution closed its side vide statement of the learned ADPP at Ex.16. Thereafter, the statements of all the appellants under Section 342, Cr.P.C were recorded, wherein they denying the prosecution allegations professed their innocence and their false implication. Appellants Irfan Ali and Imran Ali have further stated that they have old enmity with Chaudhry Wajahat, who has occupied their land and he has got them falsely implicated in this case through the police as he is an influential person. Appellant, Wanjaro, Rajoc and Sano alias Sajan, besides having denied the allegations of the prosecution, have further stated that they worked in the land of their landlord Chaudhry Wajahat, who did not pay their labour charges, due to which there was exchange of hot words between them, therefore, landlord Chaudhry Wajahat being influential person, has got them involved this false case. The appellants neither examined themselves on oath nor did they produce any person as their defence witness. At the conclusion of the trial and after hearing the learned

Counsel for the parties and learned ADPP for the State, the learned trial Court has convicted and sentenced the appellants, as discussed in paragraph-1 *supra* vide impugned judgment dated 14.11.2019.

5. Having felt aggrieved by the said judgment dated 14.11.2019; the appellants have preferred the captioned Criminal Appeals.

6. Learned Advocate for appellants has mainly contended that the F.I.R was delayed by 12 days without proper explanation thereof, which is fatal to the prosecution case; that there are material contradictions in the evidence led by the prosecution; that the medical evidence is in conflict with the ocular evidence; that the prosecution witnesses during trial made dishonest improvements in the evidence; that the appellants are innocent and they have been falsely implicated in this case at the instance of Chaudhry Wajahat, who is a *zamindar* and an influential person of the locality, having dispute with appellants over the landed property and labour charges; that PW/injured Imran Ali Sodhar has not given the names of appellant Wanjaro, Rajoo, Sono alias Sajan in his statement under Section 161 Cr.P.C; that identification parade of the appellants through eye witness PW.4 injured Imran Sodhar has not been conducted before any Magistrate/Judge; that the confessional statements of the appellants, which are retracted ones, were recorded on 02.08.2017 with the delay of 7-8 days of arrest of the appellants, who were shown to have been arrested on 25.07.2017 and 26.07.2017, without adhering to the mandatory requirements as provided under the law and rules; per learned counsel the alleged confessional statements of the appellants are illegal, untrue and involuntary; and, that the prosecution has miserably failed to prove its case against the appellants

beyond reasonable doubt. The learned counsel prays that the appeal may be allowed and the appellants may be acquitted of the charge, extending them benefit of doubt.

7. The learned Advocate for the complainant has mainly contended that the prosecution by examining 11 (Eleven) PWs and producing necessary documents including post-mortem report, MLCs, mashirnamas, danistnama, inquest report and FSL report etc, has proved its case against the appellants beyond any shadow of doubt; that there are minor contradictions in the evidence led by the prosecution, and, that the learned trial Court has rightly convicted the appellants. The learned Deputy Prosecutor General, Sindh, adopting the arguments of the learned counsel for the complainant, prays for dismissal of the instant appeals.

8. We have considered the submissions of the learned counsel for the parties and have gone through the evidence brought on the record with their assistance.

9. From a perusal of the record, it would be seen that the incident was shown to have taken place on the night falling between 09.07.2017 and 10.07.2017 and whereas the FIR was lodged on 21.07.2017 and no proper explanation has been offered by the prosecution for such an inordinate delay of more than 11 days in lodgment of the FIR; the statement under Section 161 Cr.P.C of PW/injured Imran Ali, who per prosecution, was the sole eye witness of the occurrence, was recorded with further delay on 31.07.2017 i.e. after more than 21 days of incident and 10 days of the F.I.R without any plausible explanation thereof. It needs no reiteration that the delay in lodging F.I.R has been viewed with

grave suspicion, how much it throws clouds of suspicion on the seeds of prosecution, depends upon a variety of factors, it requires careful scrutiny when number of accused is large, when such delay has resulted in embellishment, which was a creation of afterthought, assuming importance going to the extent of being fatal to the prosecution case in absence of convincing explanation, which prima facie points out to fabrication of the prosecution story. In the wake of the afore-mentioned unexplained inordinate delay in lodgment of the F.I.R and in recording statement under Section 161 Cr.P.C of the alleged solitary eye witness P.W.4 injured Imran Ali Sodhar, the possibility of false implication of the appellants after consultations and deliberations could not be ruled out and that being significant could not be lost sight of, more particularly in a case like case one in hand, in which at the very outset the police was in motion and the complainant and witnesses, having already gone to the Police Station, met with the police, who instead of registering F.I.R, had started investigation as his evident from the statements of the two investigating officers namely PW.8 SIP Hootchand and PW.9 SIP Muhammad Aslam Jamali.. Reliance in this context is placed on the case of **AKHTAR ALI and others v. The State (2008-SCMR-6)**, wherein the Hon'ble Supreme Court of Pakistan has held that:-

"It is also an admitted fact that the FIR was lodged by the complainant after considerable delay of 10/11 hours without explaining said delay. The FIR was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of FIR provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the FIR."

In the case of **AYUB MASIH VS. THE STATE [PLD 2002 SC 1038]**, the Hon'ble Supreme Court of Pakistan has held that:

"Unexplained inordinate delay in lodging the FIR is an intriguing circumstance, which tarnishes the authenticity of the FIR, casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the FIR is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."

In case of **MUHAMMAD ASIF Vs. The STATE [2017 SCMR 486]**, the Hon'ble Supreme Court of Pakistan has held that:

"There is a long line of authorities/precedents of this Court and the High Courts that even one or two days unexplained delay in recording the statements of eye witnesses would be fatal and testimony of such witnesses cannot be safely relied upon."

10. PW.3 complainant Ahmed Ali in his F.I.R had stated that after their search and personal inquiry and the police's inquiry, they came to know that the appellants have committed this offence, but when he came into the witness box he did not say so and went on to depose that ***"I cannot say whether accused present in Court are the same or not"***, even otherwise no source of information about gaining such knowledge, has been disclosed by the prosecution either in the F.I.R and/or during the trial. And thus, manifestly, the appellants have been implicated in this case on the basis of suspicion, and it is well settled that the suspicion howsoever grave or strong may be, it can never be a proper substitute for the standard of proof required in a criminal case, which is to be proved by the prosecution against the accused beyond any shadow of doubt.

11. From the evidence of PW.4 Imran Ali son of Buxial Sodhar Ex.7, it would be seen that he had lastly seen deceased Irfan Otho going with Irfan Jat and Wanjaro and he does not claim to have seen any person committing murder of Irfan Otho, stating that ***"Irfan Otho went with Irfan Jat and Wanjaro, while accused Imran Jat, Rajoo Bheel and Sono alias Sajjan stood with me and one of them caused blow of hard and blunt substance on my head, due to which I became unconscious and gain conscious (sic) after about 15 days at Liaquat National Hospital, Karachi"***, and in cross-examination he has stated that ***"it is correct that no accused caused any injury to the deceased in my presence; it is correct that after receiving blow on my head I remained conscious; I was not conscious at Taluka hospital Digri; I do not know that I was conscious at Taluka hospital Digri and Hyderabad hospital but was unable to speak"***, while PW.3 complainant Ahmed Ali, who is brother of PW.4 injured Imran Ali, has stated that ***"my brother became conscious after 10 to 15 days at Liaquat National Hospital Karachi"*** and whereas PW.1 Dr. Ehtesham-ul-Haque has stated that ***"the injured was conscious when brought at hospital"***; even otherwise nothing has been brought on the record by the prosecution to show that PW.4 injured Imran Ali Sodhar was ever admitted in Liaquat National Hospital, Karachi and the statement of PW.1 Dr. Ehtesham-ul-Haque Ex.4, Radiologist Report, provisional MLC and final MLC of PW.4 injured Imran Ali, produced by PW.1 Dr. Ehtesham-ul-Haque at Ex.4/B, 4/C and 4/D respectively, also do not reveal about PW.4 injured Imran Ali Sodhar's referral and/or his admission and treatment even for a single day in Liaquat National

Hospital, Karachi, meaning thereby he (injured Imran Ali Sodhar) had left Civil Hospital Hyderabad on the following day i.e. 11.07.2017 against the medical advice (LAMA), which also adversely reflects upon the prosecution case, furthermore PW.4 injured Imran Ali Sodhar claimed that he was caused one blow of hard and blunt substance, on back side of his head by one of the accused out of three accused namely Imran Jat Rajoo Bheel and Sono alias Sajjan, but PW.1 Dr. Ehtesham-ul-Haque, who initially examined PW.4 injured Imran Ali Sodhar, found four injuries on his person, out of which one injury on his chin was caused by sharp cutting substance, while remaining three injuries were caused by hard and blunt substance and such provisional MLC, showing four injuries on the person of injured PW.4 Imran Ali Sodhar, issued by PW.1 Dr. Ehtesham-ul-Haque, was produced at Ex.4/B and whereas in the final MLC five injuries were shown on the person of injured PW.4 Imran Ali, thereby fifth injury was added in the final MLC Ex.4/D without any explanation regarding the earlier omission, if any. And, thus the medical evidence is in direct conflict with the ocular account; PW. Dr. Ehtesham-ul-Haque has further deposed that ***"there were total four injuries on the dead body caused by hard and blunt substance. Duration of injuries and death was within 10 to 20 minutes and the duration between death and post-mortem was about 35 to 44 hours. The cause of death was cardiorespiratory failure and injury to the vital organ i.e. brain"***, while PW.5 mashir Imran Otho, who per prosecution identified the dead body of deceased to be his brother Irfan Ali Otho before conducting the post-mortem, in his cross-examination has stated that ***"when we saw the dead body its post-***

mortem had already been conducted. I cannot tell exact number, however, there were many injuries on the dead body with main injury of head. Maybe the deceased had 15/20 injuries”, even otherwise no reasonable explanation has been offered by the prosecution for delay of 35 to 44 hours in conducting post-mortem of deceased Irfan Ali Otho, despite the fact that in July there is always scorching heat in Digri and its surrounding and keeping the dead body in scorching heat for such a long period, when, per prosecution, the dead body of deceased Irfan Ali Otho at the very outset, was allegedly taken to the Taluka Hospital Digri on 10.07.2017 at 0215 hours (night), where all the required formalities such as giving letter for post-mortem of the deceased to the MLO Dr. Ehtesham-ul-Haque, preparing mashirnamas, danistnama and lash chakas form etc, is not understandable; moreover, per prosecution PW.9 Investigating Officer SIP Muhammad Aslam Jamali and PW.10 mashir PC Roshan Ali while they were on patrolling duty, received information from PC Asif by mobile phone at 0145 hours about the availability of two dead bodies in Dikki of an abandoned car and then he alongwith his staff on patrolling including PW.10 mashir PC Roshan Ali reached at the pointed place after covering a distance of 15 kilometers and found two unknown persons (deceased Irfan Ali Otho and injured Imran Ali Sodhar) in unconscious condition in the Dikki of the pointed car; he prepared mashirnama of the place of incident in presence of mashirs PW.10 PC Roshan Ali and PC Ashok Kumar Ex.13/B and then took both the unconscious persons and brought them at Civil Hospital Digri in the same car after covering the distance of 25 kilometers reached there and per him Dr. Ehtesham-ul-Haque on duty

had examined both the injured persons and one of the injured, who were subsequently identified to be Irfan Otho, had died after 10 minutes of his having been rushed to the hospital, but the medical evidence is also not in line with the prosecution case on this aspect.

12. It is worthwhile to mention here that no statement made by any person to a Police Officer in the course of an investigation under Section 161 Cr.P.C, if reduced into writing, be signed by the person making it; and it can also not be on oath or solemn affirmation, but it is strange enough that the purported statement under Section 161 Cr.P.C of the solitary ocular witness PW.4 injured Imran Ali is computerized and that too as an affidavit on non-judicial stamp paper of Rs.100/- at Ex.7-A, allegedly recorded on 31.07.2017, but its perusal would show that the aforesaid non-judicial stamp paper was purchased on 01.08.2017 i.e. after one day of the date of recording of the alleged statement of said PW.4 under Section 161 Cr.P.C that was also admitted by PW.4 injured Imran Ali Sodhar in his statement by deposing that ***"the police recorded my statement on 31.07.2017 at PS Digri; it is correct that my statement was recorded on affidavit also on 31.07.2017, I produce my statement on affidavit at Ex.7-A it is same, correct and bears my signature; it is correct that affidavit produced by me is purchased on my name on 01.08.2017"***, and it was also admitted by investigating officer SIP Muhammad Aslam PW.9 by deposing that ***"it is correct that the statement of injured Imran Sodhar produced at Ex.7-A is on stamp paper and signed by me"***. And, therefore, the so called statement under Section 161 Cr.P.C of solitary eye witness PW.4 injured Imran Ali, besides being alien to law, is

patently maneuvered in antedate and such manipulation regarding statement of the alleged solitary eye witness of the occurrence namely PW.4 injured Imran Ali also adversely reflects upon the prosecution case in its entirety. It is also strange enough that at the very outset on 10.07.2017 at 02.00 a.m. PW.9 SIP Muhammad Aslam Jamali, the SHO, who is also investigating officer, had found two injured persons in unconscious condition in dikki of the subject car and then took them in the same car to Taluka hospital Digri, where one of them, who was subsequently identified to be Irfan Ali Otho, had died and other one to be PW.4 injured Imran Ali Sodhar, but the said car was not secured and it was on 27.07.2017 at 1400 hours when the recovery of the said car was shown to have been made as is evident from mashirnama of recovery produced at Ex.8/G, and no explanation about the preservation and whereabouts of the said car for 17 days from 10.07.2017 to 27.07.2017, has been offered by the prosecution. The prosecution case is that PWs came to know about the incident through cell phone calls and source of tracker, but neither the cell phone numbers on which the PWs and their relatives had repeatedly talked to each other were disclosed nor did the prosecution produce CDR and car tracker record to substantiate its case regarding receiving the alleged text message of PW.4 injured Imran Ali by the PWs and their telephonic talks with their relatives etc.

13. The prosecution case rests only on the statement of solitary witness PW.4 injured Imran Ali, but his statement being self-destructive and contradictory with dishonest improvements, cannot be relied upon as he named all the five appellants in his statement during the trial

before the learned trial Court, but when he was confronted to the contents of his alleged statement under Section 161 Cr.P.C, he conceded that names of the three appellants namely Wanjaro, Rajoo and Sono alias Sajan were not given by him in his statement under Section 161 Cr.P.C dated 31.07.2017, that was also confirmed by the investigating officer PW.9 SIP Muhammad Aslam Jamali in his evidence before the learned trial Court by stating that ***"it is correct that the injured Imran has not given names of accused Wanjaro, Rajoo and Sono in his statement produced by him at Ex.07-A"***, such evasive stances and dishonest and deliberate improvements made by PW.4 injured Imran Ali, rendered his evidence unreliable.

14. Apart from the above, there are also other material and glaring contradictions, discrepancies, dishonest and deliberate improvements, and admissions adverse to the prosecution case, in the evidence of the prosecution witnesses e.g. PW.4 injured Imran Ali Sodhar has stated that *after receiving injury of hard and blunt substance on his head, he became unconscious and gained his conscious after about 15 days at Liaquat National Hospital Karachi, but in cross-examination he has stated that after receiving blow on his head he remained conscious; that he was not conscious at Taluka hospital Digri; that he does not know that he was conscious at Taluka hospital Digri and Hyderabad hospital, but was unable to speak; that the police recorded his statement on 31.07.2017 at Liaquat National Hospital Karachi, but in cross-examination he stated that he does not know whether police visited the Karachi Hospital or not and the police recorded his statement on 31.07.2017 at PS Digri; while PW.3 complainant Ahmed Ali, who*

happened to be the brother of PW.4 injured Imran Ali Sodhar, stated that ***"his brother Imran remained admitted in Liaquat National Hospital Karachi for about 45 days,*** but in cross-examination he stated that ***"I lodged F.I.R on 21.07.2017; my brother became conscious after 10 to 15 days at Liaquat National Hospital Karachi; I, injured Imran Ali, Sikandar and Jawaid Magsi went together at PS Digri and lodged the F.I.R at about 02.00 P.M"***, which was lodged on 21.07.2017, while PW.6 Jawaid Magsi *did not state about his having gone to Police Station Digri alongwith PW.3 complainant Ahmed Ali and Sikandar* at the time of the lodgment of the F.I.R, but he went on to say that ***"I was brought by the SHO at PS Digri and after usual inquiry I was released"***, meaning thereby PW.6 Jawaid Magsi being suspect was arrested and then was released after inquiry and whereas Sikandar was neither cited as witness nor was examined by the police; PW.3 complainant Ahmed Ali stated that ***"on 11.07.2017 my brother Bashir Ahmed contacted with PW.5 Imran Otho brother of deceased Irfan Ali on mobile phone"*** while PW.5 Imran Otho has stated that ***"my brother Shah Jehan informed me on mobile phone at about 1430 hours about murder of my brother Irfan Ali on the very first day (10.07.2017); my brother Shah Jehan also told me on mobile phone that he was informed by DSP Abad PS about the murder of deceased"*** but Bashir Ahmed, the brother of injured Imran Ali, Shah Jehan, brother of PW.5 Imran Otho and deceased Irfan Ali, and DSP Abad PS were neither cited as witnesses nor were examined by the police and/or by the prosecution, PW.5 Imran Otho has stated that ***"on 11.07.2017 I and Nadeem Left Karachi through coach for Digri,***

we came to Hyderabad by coach and then from Hyderabad we went through van to PS Digri and reached at PS Digri at about 1445 hours, we first went to PS Digri and then alongwith police went to hospital, Doctor and SHO showed the dead body of deceased to us at hospital for identification", while PW.9 SHO SIP Muhammad Aslam Jamali has stated that "I contacted Imran Otho, brother of deceased (Irfan Ali), the relatives of the deceased came at PS, I was at PS when the dead body was identified by the relatives of the deceased at hospital", lash chakas form and danistnama produced at Ex.8/C and 8/D, reveal that the same were prepared at 02.30 P.M (1430 hours) and at 1445 hours respectively with the signatures of PW.5 Imran Otho and Nadeem Otho, who acted as mashirs; PW.10 mashir PC Roshan Ali Noohani, who alongwith SIP Muhammad Aslam Jamali and other staff reached at the pointed place on 10.07.2017 at 02.00 a.m night, has stated that "no person was available near the car; the doors of the car were not locked, the doors of the car were opened; the Dighi (sic) of the car was not locked; the blood was lying in the Dighi there were two doctors at the hospital; both the doctors checked both the injured at the same time; clothes of injured were received by SIP Hootchand at 0225 hours and there were blood stains on front and back side of the clothes; while PW.9 SIP Muhammad Aslam Jamali has stated that "we saw the car, doors of the car were closed about 15-20 persons were standing near the car and Dighi of the car was also locked; I myself inspected the car by opening the Dighi; there were no blood marks in the Dighi of the car; the doctor first checked deceased and then injured", PW.3 complainant Ahmed

Ali stated that *"I, injured Imran Ali, Sikandar and Jawaid Magsi went together at PS Digri and lodged the F.I.R"*, while PW.9 SIP Muhammad Aslam Jamali has stated that *"complainant Ahmed Ali and Imran Otho, brother of deceased had come to lodge F.I.R by car on 21.07.2017 at about 1430 hours"*; PW.4 injured Imran Ali has deposed that *"I do not know that there were houses/cabins near the place of incident"* while PW.9 SIP Muhammad Aslam Jamali has stated that *"there are houses near the place of incident"* and whereas PW.5 mashir Imran Otho, who happened to be the brother of deceased Irfan Ali Otho, has stated that *"the place of vardhat is surrounded by the houses; SHO PS Digri showed the place of vardhat to us; some private persons gathered at the place of vardhat on seeing the police; the police did not ask any private person to act as mashir; there were no foot prints and blood marks at the place of incident; I do not remember the date of preparation of mashirnama of clothes of the deceased; all the mashirnamas were prepared by the police at PS and police obtained our signatures also on mashirnamas at PS; when we first came at PS Digri SHO Muhammad Aslam Jamali met us who went to us to hospital and conducted all karwai; the police obtained my signature and signature of co-mashir on 2-3 blank papers for preparation of mashirnamas; the police did not record my statement under Section 161 Cr.P.C; accused Imran Jat was with us at the time of visiting the place of vardhat; I, Nadeem, Sikandar and Ahmed Ali went to the place of incident by our taxi car, while police reached at the place of incident by police mobile at 1300*

hours", (shown to have been inspected on 27.07.2017), while PW.3 complainant Ahmed Ali has stated that ***after 24.07.2017 he never went to Digri***, and whereas PW.9 SHO SIP Muhammad Aslam Jamali did not depose about complainant Ahmed Ali's and Sikandar's presence alongwith mashirs PW.5 Imran Otho and PW Nadeem (not examined) at the time of inspection of the place of vardhat; PW.8 SIP Hootchand has stated that ***"about 1 ½ hours was consumed by the doctor to examine the injured; I do not know which injured was examined first by the doctor; I do not remember as to how many injures were seen on the body of the deceased and injured"***; while PW.1 Dr. Ehtisham-ul Haque has stated that ***"I first examined the injured on 10.07.2017 at 03.00 a.m, I consumed about 30 minutes in examination of injured, the injured was conscious when brought at hospital; the relatives of injured and deceased came at hospital on the next day but I do not know their names"***; there are also material admissions adverse to the prosecution case made during the trial such as PW.5 mashir Imran Otho, who happened to be the real brother of deceased Irfan Ali Otho and acted as mashir of the place of vardhat, identification of his deceased brother Irfan Ali Otho, securing clothes of deceased and preparation of lash chakas form, danistnama etc, has stated that ***"mashirnamas were written by WHC, but I do not remember his name; I do not remember the date of preparation of mashirnama of clothes of the deceased; all mashirnamas were prepared by the police at PS and obtained our signatures also on mashirnamas at PS; the police obtained my signature and signature of co-mashir on 02-03 blank papers for preparation of***

mashirnamas; police did not record my statement under Section 161 Cr.P.C; accused Imran Jat was with us at the time of visiting the place of vardhat"; PW.9 IO SIP Muhammad Aslam Jamali has stated that "accused were not known to the injured and relatives of the deceased and we disclose the accused as their real culprits for registration of F.I.R against them and then they lodged the F.I.R as told by us; I did not lodge F.I.R on behalf of the State in this case; I directed SIP Hootchand verbally to complete the formality"; while PW.8 SIP Hootchand has stated that "I do not know that the accused are falsely involved in this case; I do not know why SHO Muhammad Aslam Jamali directed me for preparation of mashirnamas etc".

15. So far the alleged confessional statements of the appellants is concerned, all the appellants had retracted the alleged confessional statements by pleading not their guilty to the charge and then in their statements recorded under Section 342 Cr.P.C by denying to have confessed their guilt. The confessional statements of the appellants would reveal that the same are more or less in the same sequence and contained almost the same words and phrases, which in ordinary course was not possible unless copied from each other or referred to at the time of their recording, diminishing their evidentiary value on this score too.

16. In order to ascertain the veracity of the alleged confessional statements of the appellants, the circumstances under which they are recorded are to be examined carefully, as for placing reliance on the confessional statement it is well settled principle of law that it should not

only be true, voluntary and believable, but it should be without fear, favour or any inducement and it must be consistent and coherent to the facts and the circumstances of the prosecution case; the statement of accused becomes confession only when it is recorded in compliance of provisions of Section 164 and 364 Cr.P.C and necessary precautions and formalities are observed; the conviction can be based on sole confessional statement of accused provided the same is voluntary and true and necessary precautions and formalities are adhered to; the Court can accept a retracted confession after making inquiry into all the material points and surrounding circumstances and satisfying itself fully that the confession cannot be, but be true, and it is corroborated by clear, cogent and independent evidence; the corroboration of material particulars of the retracted confession with the other pieces of independent evidence in the case would mean the corroboration of those parts of retracted confession with the other pieces of evidence in the case which would establish the link of accused with the commission of offence with which he is charged; mere delay in recording confession, in principle, is not fatal to the prosecution when the Court is satisfied that the confession is true and voluntary, but if there are circumstances which would cast shadow of doubt on its genuineness then it should be excluded from consideration and long delay in recording judicial confession in such a case would be fatal. Per prosecution appellants Irfan Ali and Imran Ali Jat were arrested on 25.07.2017 and appellants Wanjaro, Rajoo and Sono alias Sajan were arrested on 26.07.2017, and according to PW.9 IO SIP Muhammad Aslam Jamali (the SHO) the appellants confessed their guilt on the date of their arrest; they were

produced before the learned Civil Judge and Judicial Magistrate Digri for the purpose of their remand, but admittedly neither the appellants confessed their guilt nor did the police make a request to the learned Judicial Magistrate for recording their confessional statements and it was 02.08.2017 when their alleged confessional statements were shown to have been recorded as is evident from the evidence of PW.9 SIP Muhammad Aslam Jamali and PW.11 Mr. Aamir Latif learned Civil Judge & Judicial Magistrate, for, PW.9 SIP Muhammad Aslam has stated that during interrogation all the accused admitted their guilt and were ready to confess before the Magistrate and in cross-examination he stated that the accused had admitted their guilt on the day of their arrests while PW.11 Mr. Amir Latif learned Civil Judge and Judicial Magistrate-I Digri has stated *that "all accused were produced before me for their remand also prior to the date of their confessional statements; no accused had confessed at the time of their remand"*, while PW.3 complainant Ahmed Ali has stated that the police called us at PS on 24.07.2017 to identify the arrested accused, therefore, *I, my brother Bashir and Hafiz Ali Gohar came from Karachi to PS Digri and identified the accused at PS and that I never visited PS Digri after 24.07.2017*, meaning thereby the appellants were already arrested and were shown to PWs on 24.07.2017 even prior to their alleged dates of arrests viz 25.07.2017 and 26.07.2017; moreover, the alleged confessional statements of the appellants cannot be used as a substantive piece of fact, for, there is unexplained and un-warranted delay of four days in recording such confessional statements as the appellants were produced before the

same Magistrate for remand purpose, but the appellants had not shown their willingness to record their confessional statements as was admitted by PW.11 learned Civil Judge and Judicial Magistrate by deposing that ***"it is correct that all accused were produced before me for their remand also prior to the date of their confessional statement; it is correct that no accused had confessed at the time of their remand; no accused had shown willingness to confess when they produced for remand; I do not remember as to for how many times the accused were produced before me for remand"***; PW.9 SIP Muhammad Aslam Jamali has also admitted, stating that ***"the accused had admitted their guilt on the day of their arrest, all the accused admitted their guilt and were ready to confess before the Magistrate"***, if the appellants, who were shown arrested on 25.07.2017 and 26.07.2017, had voluntarily confessed their guilt and became ready to record their confessional statements before the learned Magistrate on their dates of arrests, then why their alleged confessional statements were recorded after 7-8 days of their arrests on 02.08.2017?, although they were undeniably produced before the same Judicial Magistrate for the purpose of remand prior to the date of recording their alleged confessional statements. And thus it is quite unbelievable as to what prompted the appellants to confess their guilt leaving serious doubt to their being voluntary, genuine, true or believable.

17. Moreover the alleged confessional statements of appellants produced at Exs.5/A to 5/E would reveal that they are not only vague in nature, lacking in material particulars relating to the alleged incident and self-destructive and contradictory to the prosecution case, but are also

not in conformity with the requirement of law and rules meant for recording of the confessional statement of an accused, for, question as to why they are confessing their guilt for commission of the alleged offence, was asked from any of the appellants, and the ages of the appellants are also not mentioned in the alleged confessional statements, which is even admitted by PW.11 learned Judicial Magistrate stating that **"It is correct that age of any accused is not mentioned in the confessional statement"**, in his alleged confessional statement, produced at Ex.15/A, appellant Irfan Ali Jat is shown to have stated that **"I and Rajoo Bheel strangled the neck of Irfan Otho and strangled his neck with Nara (string) so that he should die; finally, we murdered him"**, while in his alleged confessional statement, produced at Ex.15/D, appellant Rajoo is shown to have stated that **"sir, I tied the hands of Irfan Otho, Irfan Jat gave him blows and I also gave him blows together and in the last Irfan Jat murdered Irfan Otho by strangulation"** in his alleged confessional statement, produced at Ex.15/B, appellant Imran Ali Jat is shown to have stated that **"I caught hold of Imran Sodhar, Sono and Wanjaro gave him blows due to that Imran was seriously injured"** while in his alleged confessional statement, produced at Ex.15/C, appellant Wanjaro is shown to have stated that **"sir, I strangled Imran Sodhar and Irfan Jat also strangled Sodhar, sir we have committed the crime. Imran and Irfan both are relatives; they joined us in this crime"**, and whereas in his alleged confessional statement, produced at Ex.15/E, appellant Sono alias Sajjan is shown to have stated that **"sir I have committed this offence. I caught hold of Imran Sodhar, who was**

driver, Wanjaro and Imran Jat strangulated the driver with nara (string)".

18. Apparently the learned Judicial Magistrate did not record the alleged confessional statements of the appellants in accordance with the High Court Rules and Law so much so that he was not confident as to whether the same were recorded on oath or not; the repeated time for reflection for recording confessional statements was to be given to the appellants before recording their confessional statements as required under the rules and law, but no such reflection time was given to the appellants; per PW.9 SIP Muhammad Aslam Jamali he produced all the accused together before the concerned Magistrate, who recorded their statements separately by consuming about 20 minutes in each; under these circumstances, the alleged confessional statements of the appellants besides being involuntary, untrue and unbelievable are also not in accordance with the law and rules and thus are of no help to the prosecution and are liable to be excluded from consideration.

19. It is pertinent to note that the appellants were not known to the solitary eye witness PW.4 injured Imran Ali as was even admitted by him by deposing that: ***"the passenger was not known to me; Jawaid Magsi did not know the passenger"***, and PW.9 Investigating Officer SIP Muhammad Aslam Jamali has also deposed that ***"accused were not known to the injured and relatives of the deceased"***. Under the given circumstances, identification of the appellants through PW.4 injured Imran Ali Sodhar was essential, but no such identification parade was held which has also created doubt in the prosecution case. It is further added that PW.9 SIP Muhammad Aslam Jamali (SHO) in his

cross-examination has admitted that "***accused were not known to the injured and relatives of the deceased and we disclose the accused as their real culprits for registration of F.I.R against them and then they lodged the F.I.R as told by us***", and in such view of the matter, the defence plea about the implication of the appellants in this case by the police at the instance of an influential person due to their enmity with him, carries weight.

20. The aforementioned infirmities; material and glaring contradictions; admissions adverse to the prosecution case; and dishonest and deliberate improvements to strengthen the prosecution case during the trial in the statements by the PWs qua the contents of the F.I.R, and their statements under Section 161 Cr.P.C, rendered the credibility of the prosecution witnesses doubtful and their evidence unreliable and no explicit reliance can be placed upon their evidence and the entire case of the prosecution is shrouded in mystery. Reliance in this context is placed on the case of ***AKHTAR ALI and others V. The State (2008 SCMR 6)***, wherein the Hon'ble Supreme Court of Pakistan has held that:-

"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness had improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805."

In case of MUHAMMAD MANSHA Vs. The STATE [2018 SCMR 772], the Hon'ble Supreme Court of Pakistan has held that:

Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that when ever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafiq Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).

In the case of **MUHAMMAD ILYAS V. THE STATE (1997 SCMR 25)**, the Hon'ble Supreme Court of Pakistan has held that:-

"It is well-settled principle of law that where evidence creates doubt about the truthfulness of prosecution story, benefit of such a doubt had to be given to the accused without any reservation. In the result, there is no alternative but to acquit the appellant by giving him benefit of doubt".

21. In view of what has been stated above, it is crystal clear that there is absolutely no evidence worth consideration against the appellants to connect them with the offence alleged against them and the prosecution case is full of doubts. And, thus, the prosecution has miserably failed to prove its case against the appellants beyond a reasonable doubt; it needs no reiteration that a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, benefit thereof is to be extended to the accused not as a matter of grace or concession, but as matter of right. Reliance in this context is placed on the case of **GHULAM QADIR and 2 others V. THE STATE (2008 SCMR 1221)**, wherein the Hon'ble Supreme Court of Pakistan has held that:-

"16. It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge-makers the whole case doubtful. Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt and this duty does not change or vary in the case. A finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. Mere conjectures and probabilities cannot take the place of proof. Muhammad Luqman v. The State PLD 1970 SC 10."

In the case of **MUHAMMAD MANSHA** *supra*, the Hon'ble Supreme Court of Pakistan has observed that:

"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).

In the case of **MUHAMMAD AKRAM v. THE STATE** (2009 SCMR 230), the Hon'ble Supreme Court of Pakistan has held that:

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

22. Patently, the aforesaid material and glaring contradictions, infirmities; admissions adverse to the prosecution case; and, dishonest and deliberate improvements in the statements of the prosecution witnesses during the trial to strengthen the prosecution case, which did

go to the root of the case, rendering it highly doubtful, were not at all attended to by the trial Court while passing the impugned judgment, convicting and sentencing the appellants, although the learned Trial Court was obliged to take into consideration the material placed before it for arriving at the conclusion as to whether a fact was proved or not, because the proof of a fact depends upon the probability of its having existed. In such view of the matter, the impugned judgment dated 14.11.2019, suffers from mis-reading and non-reading of the evidence. And, thus, the conviction and sentence awarded to the appellants cannot sustain. therefore, the two captioned Jail Criminal Appeals are allowed and conviction and sentence awarded to appellants **Irfan Ali, Imran Ali, Wanjaro, Rajoo and Sono alias Sajjan** vide impugned judgment dated 14.11.2019 are set-aside and the appellants are acquitted of the charge and they are directed to be released forthwith, if their custody is not required in any other case.

sd/c

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

sd/c

(JUSTICE DR. SYED MUHAMMAD ANWER)
JUDGE

Announced on 11.06.2021
Khurram*

sd/c

Approved for Reporting

Judge

Announced by us.

11-06-2021
11/6/2021