IN THE FEDERAL SHARIAT COURT
(APPELLATE/REVISIONAL JURISDICTION)

PRESENT
MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

JAIL CRIMINAL APPEAL NO.3-I OF 2021

SHOLO ALIAS RASOOL BUX SON OF MANGLO SHAR, RESIDENT OF GEEHALPUR, TALUKA KASHMORE.

APPELLANT

VERSUS

THE STATE.

RESPONDENT

LINKED WITH

CRIMINAL MURDER REFERENCE NO.2-I OF 2021

THE STATE.

APPELLANT

VERSUS

SHOLO ALIAS RASOOL BUX SON OF MANGLO SHAR, RESIDENT OF GEEHALPUR, TALUKA KASHMORE.

RESPONDENT

COUNSEL FOR THE APPELLANT	…	MRS. SALEHA NAEEM GHAZALA, ADVOCATE.
COUNSEL FOR THE COMPLAINANT	…	SYED SIKANDAR ALI SHAH, ADVOCATE.
COUNSEL FOR THE STATE	…	SYED ZAHOOR SHAH, ADDITIONAL PROSECUTOR GENERAL, SINDH.
FIR NO. DATE AND POLICE STATION	…	18 OF 2006, 27.09.2006 GEEHALPUR, DISTRICT KASHMORE.
DATE OF JUDGMENT OF TRIAL COURT	…	24.02.2021
DATE OF RECEIPT OF APPEAL	…	02.03.2021
DATE OF HEARING	…	22.12.2021
DATE OF JUDGMENT	…	14.05.2022

JUDGMENT:

MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE: At the very outset, it is pertinent to mention that appellant Sholo alias Rasool Bux for the second time is before this Court, previously he had filed Jail Cr. Appeal No. 15/I/2019 before this Court against judgment dated 29.06.2019. This Court, after hearing the learned Counsel for the parties allowed the appeal and remanded the case vide judgment dated 30.10.2019, relevant portion is reproduced as under:-

> *"For what has been discussed above and with the consent of the parties, we are inclined to accept the appeal and set aside the conviction recorded vide judgment dated 29.06.2019 and remand the case to the trial Court with direction to further examine the accused under section 342 Cr.P.C by putting all the relevant pieces of evidence sought to be used against the accused. The Jail authorities must ensure production of the accused before the Court for further examination of the accused under section 342 Cr.P.C. The trial Court shall conclude the proceedings within one month after the receipt of this judgment and record of case."*

2. The trial Court, after compliance with the remand Order, once again found the appellant guilty of the offence and awarded the following sentence:

> *"accused Sholo alias Rasool Bux S/O Manglo Shar is convicted u/s 265(ii) Cr.P.C and sentenced to death penalty, by hanging him through neck till his death, as provided u/s 302(b) PPC and to pay Rs.200,000/- compensation to LRs of deceased Hidayatullah as provided u/s 544-A Cr.P.C in case of default he shall suffer R.I for one year."*

Benefit of Section 382-B Cr.P.C was extended to the appellant.

3. Feeling aggrieved with the conviction recorded and sentence awarded this Criminal Appeal has been preferred in this Court. The learned trial Court has sent Murder Reference to this Court for confirmation of death sentence awarded to appellant Sholo alias Rasool Bux.

4. Through this single judgment we propose to dispose of the above-referred two connected matters i.e. Jail Crl. Appeal No.3/I of 2021 'Sholo alias Rasool Bux Vs. The State.' and Crl. Murder Reference No.2/I of 2021 'The State Vs. Sholo alias Rasool Bux' as both arise out of a common judgment dated 24.02.2021 passed by the learned Additional Sessions Judge (Hudood) Sukkur Camp at Central Prison-I, Sukkur.

5. Brief facts of the case are that FIR No. 18 of 2006 was lodged by the complainant Allah Dino at Police Station Geehalpur, District Kashmore on 27.09.2006 wherein he alleged that on 26.09.2006 at 05:30 p.m. he alongwith his sons Sanaullah and Ali Dost were in their house, when they heard cries of "Robbery, Robbery", raised by his son Hidayatullah who was returning back after grazing his cattle. On the said hue and cries, he alongwith his sons Sanaullah and Ali Dost went towards the place of noise where

they saw Sholo alias Rasool Bux armed with K.K, Miandad with Rocket Launcher, Sultan with Rocket Launcher, Soomro with K.K, Yaseen, Dodo, Melao alias Melo, Habib, Jallan, Saindad, Shahdad, Basheer son of Saindad, Bishak, Mehrab, Basheer son of Muhammad Hassan, Hassan, armed with K.Ks, all by caste Shar r/o village Katcha area Geehalpur, Taluka Kashmore and 10 unidentified persons armed with K.Ks had encircled Hidayatullah. Accused Sholo alias Rasool Bux challenged and told the complainant that he has unlawfully occupied their land as such they will not spare him (complainant party), saying so all the accused persons on the force of weapons drove cattle of complainant party. Hidayatullah tried to grapple with them, on that accused Sholo alias Rasool Bux fired at Hidayatullah with his K.K which hit him and he fell down by raising cries. The rest of the accused made aerial firing in order to create terror and harassment. On receipt of injury on his neck Hidayatullah succumbed to his injury. The complainant and his son were armless, therefore, could not do anything, however, on report of gunshot fire the other villagers reached at that venue but accused went towards southern side alongwith cattle.

6. Mehrab s/o Mughal and Bashir s/o Muhammad Hassan were arrested on 02.10.2006 whereas the rest of the accused remained absconder and the record shows that Mehrab and Bashir

absconded from the jail. Similarly, two other accused persons namely Jallan s/o Balo and Bashir s/o Saindad were arrested on 10.12.2012 who have also absconded. Present appellant Sholo alias Rasool Bux and acquitted accused Bashir s/o Muhammad Hassan were arrested from jail on 10.12.2012 as they were already in jail in connection with some other case.

7. The case was initially tried by Anti Terrorism Court-II Sukkur and subsequently transferred to the file of Sessions Judge Kashmore at Kandhkot on 15.11.2018.

8. Charge was framed on 14.03.2019 to which the accused did not plead guilty and claimed trial. The prosecution examined as many as seven witnesses to prove its case.

9. After remand of the case, the learned trial Court recorded fresh statement of accused Sholo alias Rasool Bux under Section 342 Cr.P.C. wherein the accused denied all the allegations and pleaded innocence. Neither he proposed to record his statement under Section 340(2) Cr.P.C nor opted to produce defence witnesses. The learned trial Court, after hearing the parties, found accused Sholo alias Rasool Bux guilty of offence and sentenced him as mentioned in Para-2.

10. The learned Counsel for the appellant while reiterating the grounds of appeal inter-alia contended that the FIR has been

lodged with inordinate delay without explanation but the trial Court while appreciating the facts of the case failed to adhere to this legal aspect. According to the learned Counsel, the FIR was lodged after deliberation, consultation and a number of persons being armed with respective weapons have been nominated. It was further submitted that there is no independent evidence to support the prosecution case. All the PWs are inter-se related, therefore, being interested witnesses the trial Court must have had appreciated the evidence with care and caution keeping in view the relationship of the witnesses. The learned Counsel maintained that the witnesses have not supported each other on material points. According to the learned Counsel for the appellant, the story put forth by the prosecution does not appeal to a prudent mind, as it is not possible to form such a huge assembly just for robbery of some cattle. The learned Counsel further maintained that the appellant has been ascribed of causing one injury, therefore, the capital sentence in such circumstances was not warranted at all. She prayed for acquittal of the convict.

11. The learned Counsel for the complainant while controverting the arguments addressed by the learned Counsel for the appellant contended that the prosecution has proved its case to the hilt. No doubt, apparently there is delay in lodging of FIR but plausible explanation has been offered by the prosecution.

Admittedly, there was no conveyance and since the incident took place at 05:30 p.m. and thereafter without facility of any conveyance it was not possible for the complainant to remove the dead body to police station and lodge FIR. The witnesses being inmates of house were available and their presence is natural, upon call of the victim they reached at the venue. The witnesses have narrated the facts, as had happened in a natural way without exaggeration. Despite lengthy cross-examination, all the witnesses stuck to their gun. Hence, in such circumstances, mere delay itself cannot be treated as a ground to wash out the prosecution case. The trial Court, after proper appraisal of evidence, awarded death sentence, which is the normal sentence in such state of affairs. The appellant remained absconder for almost six years, which is an additional ground to support the contention that appellant being the principal accused intentionally and willfully remained absconder, besides the appellant is a desperate and hardened criminal as a couple of cases have been lodged against him, the copies of respective FIRs would be produced before this Court. He prayed for dismissal of appeal.

12. The learned Additional Prosecutor General Sindh adopted the arguments of the learned Counsel for the complainant and submitted that the trial Court, after proper appraisal of material available on record, has rightly recorded conviction,

which is not open to any legal exception. Hence, the appeal be dismissed and Murder Reference be answered in affirmative.

13. I have heard the learned Counsel for the parties and have gone through the record minutely. The perusal of the record reveals that the incident took place in the year 2006, whereas the trial Court for the first time concluded the trial in the year 2019 for the reasons, firstly, the accused remained absconder for a long period and in this case for the first time was arrested in the year 2012, while he was already in custody in another case. Secondly, the case was initially proceeded with by Anti-Terrorism Court and subsequently transferred to the file of Additional Sessions Judge/Model Criminal Trial Court Judge, Kandhkot. The trial so conducted culminated in conviction of the appellant while the co-accused Bashir was acquitted. The convict challenged his conviction, appeal was allowed and case was remanded for the reasons contained in judgment dated 30.10.2019.

14. After remand, the trial Court observed the legal formalities and complied with the observations, again found the appellant guilty of offence and awarded capital punishment. The conviction is based on ocular account, medical evidence and recovery of shells as corroborative piece of evidence. Ocular account was furnished by two PWs i.e. complainant, father of victim and PW Ali Dost. The complainant narrated the facts in a

natural way, supported the contents of FIR in letter and spirit. Lengthy cross-examination was conducted but the learned Defence Counsel failed to shake and shatter the statement. No omission, contradiction or improvement could be brought on record. Similarly PW Ali Dost, who too was an eye-witness of the incident, supported PW Allah Dino on each and every material aspect. During the course of cross-examination the PW stuck to his gun despite lengthy cross-examination nothing favourable to accused could be extracted.

15. PW M.O Doctor Mushtaq Ahmed produced MLC and postmortem report. MLC corroborates ocular account in as much as the PWs deposed that the firing was made from a very short distance. The presence of blackening on entrance wound corroborates the ocular account. Although no recovery of crime weapon was effected as admittedly the convict was arrested after six years but nevertheless the recovery of empty shells from venue cannot be over looked. The recovery of empty shells of various kind of weapons also corroborate the ocular account, inasmuch as, the accused were numerous and armed with different kind of weapons. Except very minute and immaterial contradiction, the prosecution evidence is straight forward, coherent, confidence inspiring and not suffering from any defect rendering it

inadmissible. PW Haji Badal and I.O supported the prosecution case and remained firm to their stance without having been shaken. Admittedly, PWs are inter-se related but mere relationship is not fatal for acceptability of statement unless it suffers from any inherent defect or the PW be bent upon to book the accused falsely by improving his version dishonestly, or the statements do not ring true or being a chance witness, one cannot offer plausible explanation for his presence at the venue. Admittedly, venue is located at a distance of about 200 paces from the house of victim, where the complainant alongwith victim and other PW Ali Dost, Sanaullah and rest of the family members resided. This position has not been disputed. The presence of inmates in house and particularly in rural area at the evening time is a natural phenomenon. Moreover, throughout cross-examination the presence of eye-witnesses have not been disputed nor denied. Therefore, no reason to doubt the presence of eye-witnesses at venue.

16. Of course, there is delay of more than twelve hours in lodging FIR, but in my opinion the delay has been explained plausibly. The victim after sustaining injury instantaneously expired. From the very beginning it has been stated that due to non-availability of conveyance they could not remove the dead

body to police station. Even by removal of dead body from venue to house the night might had fallen. Early in the morning without wasting time and by arranging conveyance the dead body was removed to police station. The statements under Section 161 Cr.P.C of the PWs were recorded on the same day. Therefore, at night time journey to police station located at a distance of 5 k.m might not have been safe. Secondly, delay is understandable, the complainant party helplessly observed the death of a family member with their naked eyes. Fear of another attack though not expressed by them categorically yet such apprehension prevailing upon their mind cannot be ruled out particularly in the wake of conduct and whereabouts of the accused party. Some accused were arrested but they made their escape good even from jail. Some accused are still absconder and by now only one accused was found guilty whereas one accused has been acquitted. In such circumstances, to stuck on a technicality i.e. the delay, perhaps may not be a legal and viable approach nor would serve the ends of justice. The trial Court rightly concluded that the delay has plausibly been explained.

17. Appellant remained absconder for a considerable period. He was arrested from jail when he was under custody in

another criminal case. The list of cases provided by Counsel for complainant in Sindhi language, the detail is as under:-

1. FIR No. 17/2001 at P.S Gheehal Pur offence under Sections 13-D, 7-C Arms Ordinance;

2. FIR No. 07/2003 at P.S Gheehal Pur offence under Sections 337-A(ii), F(i), 147, 148, 149, 114, 504 PPC and Section 13-A Arms Ordinance;

3. FIR No. 17/2010 at P.S Gheehal Pur offence under Sections 324, 353, 401, 148, 149 PPC;

4. FIR No. 14/2010 at P.S Gheehal Pur offence under Sections 324, 353, 401, 148, 149 PPC and Section 13-D Arms Ordinance.;

5. FIR No. 03/2010 at P.S Gheehal Pur offence under Sections 324, 353, 147, 149 PPC;

6. FIR No. 13/2009 at P.S Gheehal Pur offence under Sections 302, 337-H(ii), 148, 149, 114 PPC;

7. FIR No. 42/2011 at P.S Gheehal Pur offence under Sections 324, 353, 148, 149 PPC;

8. FIR No. 20/2008 at P.S Gheehal Pur offence under Sections 324, 147, 149, PPC and Section 3/4 EXP. Act;

9. FIR No. 23/2008 at P.S Gheehal Pur offence under Sections 17(1), 17(2) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and Sections 147, 149, PPC;

10. FIR No. 18/2006 at P.S Gheehal Pur offence under Sections 17(3), 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, 3/4 EXP. Act, 7 ATA and Sections 147, 149, PPC;

11. FIR No. 18/2002 at P.S Gheehal Pur Offence under Sections 379, 215 PPC.

12. FIR No. 31/2011 at P.S Miani @ Badani offence under Sections 324, 511, 427, 504, 337-H(ii), 148, 149, PPC, 6/7 ATA and 3/4 EXP. Act;

13. FIR No. 11/2009 at P.S Gheehal Pur (Katcho) offence under Sections 365-A, 148, 149, PPC, 6/7 ATA and 17(3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979;

Urdu translation reflects that appellant is involved in a couple of heinous cases. The list contains that more than 11 FIRs lodged at police station Geehalpur and one FIR at police station Miani wherein the appellant was nominated in different offences mostly regarding attempt to qatl-i-amd, assault, robbery, dacoity etc. Responding to question regarding abscontion he admitted his abscontion with the explanation that due to tribal enmity he absconded but during this period he indulged in criminal activities. Of course, no judgment regarding fate of the above cases has been placed before us, nevertheless, the worth of the FIRs and allegations contained therein carry sufficient weight and reflect the conduct of the accused.

18. Finally, as per the prosecution case, besides robbery of buffalos the dispute over landed property was also a set up as motive. As per statements of PW.1 and PW.2 the complainant party was threatened to vacate the village. Motive to this extent was even admitted by defense counsel by giving such suggestion in cross-examination. Moreover, the convict, while recording his statement under Section 340(2) Cr.P.C on 19.04.2017 before Judge, Anti-Terrorism Court, Kashmore at Kandhkot, categorically stated that they have been nominated in this case on account of dispute over landed property. Hence, the motive also stands proved and

corroborates the prosecution case. It is pertinent to mention here that though after remand the accused did not record his statement before trial Court under Section 340(2) Cr.P.C, nevertheless, his earlier statement under Section 340(2) is part of the record and cannot be ignored.

19. As a sequel to above discussion, it can safely be concluded that the prosecution proved the guilt to the hilt beyond any shadow of doubt. The trial Court after proper appreciation of material available on record rightly recorded conviction to which no exception can be taken. The record reveals that the convict has been nominated in more than 10 cases of heinous nature, such a conduct i.e. his involvement in a series of heinous cases create a legal impediment in his way for leniency as far as quantum of sentence is concerned. **Therefore, the appeal is dismissed and the Murder Reference is answered in *affirmative.***

Sd/-
MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

I have appended my separate note.
Sd/-
MR. JUSTICE DR. SYED MUHAMMAD ANWER
JUDGE

With due regards and utmost respect for my Hon'ble brother Judge Mr. Justice Muhammad Noor Meskanzai I am not in agreement with the finding of guilt of the appellant rendered by him, therefore, I have rendered my own separate judgment.
Sd/-
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH
JUDGE

Dated, Islamabad, the
14th May, 2022
*Imran/**

DR. SYED MUHAMMAD ANWER, J. I have gone through the judgment rendered by the Honourable Chief Justice with dissenting note by my learned brother Mr. Justice Khadim Hussain M. Shaikh, Judge. After going through the judgment and dissenting note of the learned brother Judge, one point that emerged undoubtedly is that there exist more than one questions of law as well as more than one questions of fact where there are disagreements between them. These disagreements are of such a nature that they create serious doubts in the findings made in the impugned judgment by the trial court.

2. In such a situation I left with no other option but to follow the undisputed legal maxim of Islamic Criminal justice system that, doubts remove the punishment of *hadd.* This maxim has been followed by this court in many cases. For reliance on this maxim to hold an opinion it would be appropriate here to discuss the basis of this maxim in detail.

3. Shariah law gives us a comprehensive approach for dispensation of criminal justice especially while dealing with criminal cases of *hudood*. The legal scheme provided by Shariah for dispensation of Criminal Justice is very balanced and practical one. As already discussed above one of the governing Shariah Legal Maxims while deciding hudood cases is (الحدود تدرء

(بالشبہات *al hudood tadrao bilshubhaat* (Hudood are averted due to doubts).

4. This Maxim is based on the wordings, expressions and meanings of number of Ahadith, saying of Sahabah Ikram (RA), Tabaeen and Tabatabeen like Hazrat Omer (RA), Hazrat Abdullah Ibn Abbas(RA), Hazrat Abdullah bin Masud (RA), Ma'az Ibn Jabal (RA) Uqba Bin Aamir (RA) etc. In addition to that ever since the age of Sahabah (RA) there is a consensus amongst the Muslim Jurists on this maxim, hence there exist the status of Ijma al-Mutawatir (اجماع المتواتر) in Ummah on this legal Maxim. (Sahih Ibni Hamam, Fath al Qadir. d.861 Hijri, Vol 5. p.32, Imam Suyuti al-Ashbah wa al-Nazair, p.172, Imam Ibn Nujaim Al Ashbah wa al-Nazair al, Qaida Sadisah p.133 and Wahbah Zuhaili, al fiqh al Islami wa adilahta hu, Vol 4. p. 107).

5. Following are the Ahadith which provide the basis of this Legal Maxim of Shairah while deciding any criminal case involving *hadd*. Almost all the major books and compendiums of Ahadith have Ahadith and saying of Sahabah (RA) which are the basis of this Maxim:

i. The foremost Hadith in this regard is the hadith reported by Ibn Majah (Hadith No.2545 , Vol 2 , p. 379) from Abu Hurairah (RA) as:

عن ابی هریرہ قال قال رسول اللہ - صلی اللہ علیہ وسلم - ادفعوا الحدود ما وجدتم لهُ مدفعاً۔

ترجمہ: ابوھریرہؓ سے روایت ہے رسول اللہ صلی اللہ علیہ وسلم نے فرمایا دور کرو تم حدوں کو جہاں تک تم دفع کرنے کا کوئی طریقہ پاؤ۔

"It is reported from Abu Huraira (RA) that Holy Prophet (SAW) said : Ward off hudood as much as you can in finding some way out for that."

ii. Same hadith is included by Abdul Salam Ibn i Tamiya in Muntaqa tu alakhbar (No. 4039 in Vol.2, p.507) and Ali al-mutaqi d. 975 Hijri also included this in Kanz al- Ummal fi Sunnan Wa al-Aqwal at No.12974 Vol.5 p. 164 with some addition of words as:

(12974) ادفعوا الحدود عن عباد اللہ ما وجدتم لهُ مدفعاً۔

اللہ کے بندوں سے حدود چھوڑ دیا کرو جب تم ان کے لئے خلاصی کی کوئی راہ پاؤ۔

"Ward off hudood from the people as much as you can in finding some way out for that."

iii. In Jamia al-Masaneed of Mehmood al Khwarzami (No.1427 p.288) this Masnad is commonly known as Masnad Imam Azam same hadith is reported from Ibn Abbas (RA) through the reference of Imam Abu Hanifah (RA) as:

قال ابوحنیفه عن مِقسَم عن ابن عباسؓ قال قال رسول اللہ صلی اللہ علیہ وسلم : "ادرءُوا الحدود بالشبہاتِ"

"شبہ کی وجہ سے حدود کو پرے کر دیا کرو"

"It is reported from Ibn Abbas that the Holy Prophet (ﷺ) said : Repel hudood due to doubts"

Same Hadith is also reported through Imam Abu Hanifah in his Masnad collected by Allama Hasfaki (Baab No.158 Page 256).

iv. Imam Abu Bakar Abdul Razaq d. 211 Hijri in his Musanaf noted the words of Hazrat Omar (RA) (No.13713 Vol.7 p.412) in support of this maxim in the following manner:

عبدالرزاق عن الثوری عن الاعمش، عن ابراهیم، أنّ عمر ﷺ بن الخطّابِ قال:

"ادرءُوا الحدود ما استطعتم"

حضرت عمر بن خطاب نے فرمایا: جس قدر ممکن ہو حدود کو ساقط کر دیا کرو۔

"Hazrat Omar said: Avert Hudood as much as possible."

v. Imam Abi Bakar Ahmed bin al Husain Bahiqi , d. 458 H. in Sunnan al Kubra al Bahiqi quoted the words of Hazrat Omer (RA) (No.17061 p.616) in this regard as:

انّ عمر ﷺ قال: إذا حضر تمونا فاسألوا فِي العفوِ جهدكم فإنّي اخطئ فی العفو احب إلّی من ان اخطئ فی العقوبه۔

حضرت عمرؓ فرماتے ہیں کہ جب تم میرے پاس آؤ تو پوری کوشش کرو کہ میں معاف کر دوں کیونکہ معافی میں خطا یہ زیادہ بہتر ہے کہ خطا میں کسی کو سزا دے دوں۔

"Hazrat Omer said : Whenever you take any case before me then try as much as you can that I forgive (the accused) because it is better for me that I err in forgiving than I err in awarding punishment."

vi. Imam Abu Baker Abdullah bin Muhammad bin Abi Shaibah d. 235 Hijri in Musanaf Ibn e Abi Shu'abah Vol 8 reported a quote (No. 29085) of Hazrat Omer in this regard in the following manner:

حدثنا هشيم، عن منصور، عن الحارث عن ابراهيم قال: قال عمر رضی اللہ عنہ بن الخطاب: لأن أعَطِّل الحدود بالشبهاتِ أحَبَّ إلى من ان أُقيمَهَا فى الشبهاتِ۔

حضرت ابراہیم فرماتے ہیں کہ حضرت عمرؓ نے فرمایا: میں حدود کو شکوک و شبہات کی وجہ سے معطل کر دوں یہ میرے نزدیک زیادہ پسندیدہ ہے اس بات سے کہ میں ان سزاؤں کو شبہات میں قائم کر دوں۔

"Hazrat Omer (RA) said: It is preferable for me that I suspend punishment of Hudood if there are some doubts than I award punishments in hudood if there are some doubts."

vii. In addition to that the quotation of some other Ashab al-Rasool (RA) also reported in Sunnan al Kubra al-Bahiqi (No.17063) like;

عمرو بن شعيب عن ابيه أن معاذاً و عبدالله بن مسعود و عقبه بن عامر رضی الله عنهم قالوا: "إذا اشتبه الحدُّ فادرَءُوهُ۔"

عمرو بن شعیب اپنے والد سے نقل فرماتے ہیں کہ معاذ، ابن مسعود اور عقبہ بن عامر (رضی اللہ عنہم) فرماتے ہیں کہ جب شبہ ہو تو حد ساقط کر دو۔

"Hazrat Amr bin Shuaib reported from his father that: Ma'az (RA), Ibn Masud (RA), and Uqba bin Malik (RA) said 'When you find doubt in Hadd, repel it."

viii. Imam Abu al Hassan Ali bin Omer Al-Dar Qutni (d. 385 Hijri) in Sunnan Al-Dar Qutni has also reported of these Sahabah (RA) (3063 Vol.4, p.12) in this regard as:

... عن عمرو بن شعيب عن ابيهِ عن عبدالله بن مسعود رضی اللہ عنہ و معاذ رضی اللہ عنہ بن جبل و عقبه رضی اللہ عنہ بن عامر الجُهنيّ قالوا "اذا اشتبهَ عليك الحد فادراهُ ما استطعتَ۔"

حضرت عبد اللہ ابن مسعودؓ، معاذؓ بن جبل، عقبہؓ بن عامر جُہنی (یہ تینوں حضرات) فرماتے ہیں: جب حد (ثابت ہونے کا معاملہ) تمہارے سامنے مشکوک ہو جائے تو جہاں تک تم سے ہو سکے اسے پَرے رکھو۔

"Hazrat Amr bin Shuaib reported from his father that: Ma'az (RA) bin Jabal, Abdullah bin Masud (RA), and Uqba bin Amir al Juhaini (RA) said 'avert Hadd as much as possible when you find doubt in it."

ix. Abu Bakar Abdul Razaq in his Musanaf reported the words of Hazrat Abduallah Ibn Masud (RA) (Vol. 7, P.412, No.13712) in the following manner in support of this legal Maxim :

عن القاسم بن عبدالرحمٰن قال: قال ابن مسعودؓ: "ادرءُوا الحدود والقتل عن عبادِ اللہ ما استطعتم"

حضرت ابن مسعودؓ نے فرمایا: اللہ کے بندوں سے جتنا ممکن ہو حدود اور قتل کو ساقط کیا کرو۔

Abdullah Ibn Masud (RA) said: avert hudud and execution (as punishment) from people as much as you can."

Tabrani also quoted the same in Al-Mujam Al-Kabir at (No.9580 Vol.7, P.584).

x. Imam al-Bahiqi in Sunnan Al-Kubra Lil Bahiqi also quoted the words of Hazrat Abdullah Ibn Masud (17062 Vol.10 p.616) in the following manner:

قال ابن مسعود: ادرَءُوا الحدود ما استطعتم فانكم ان تُخطؤا فی العفو خيرٌ من ان تخطؤا فی العقوبة و اذا وجدتم لمُسلم مخرجاً فادرَءُوا عنهُ الحدّ۔

ابن مسعود فرماتے ہیں: جتنا ہو سکے حدود کو ساقط کرو، اگر عفو میں خطاء ہو گی تو یہ بہتر ہے سزا میں خطا سے۔ اگر کسی مسلمان کے لئے نجات کا کوئی راستہ دیکھو تو اس سے حد کو ساقط کر دو۔

"Ibn Masud (RA) said: Avert Hudood as much as possible, To err in forgiveness is better than to err in awarding punishment. If you see any way out for any

Muslim then try to adopt it for avoiding hudood from him."

In his commentary on Ahadith, Imam Showkani in Nail al-Autar Sharah Muntaqa tu Al-Akhbar (No: 3115, Vol.7, P.125) states that on this topic this is one of the most authentic hadith in this regard which is also the view point of Imam Abu Hanifah who was very strict in authentication of Ahadith.

Imam Bahiqi also quoted a Hadith with reference of Waqee' (RA) (No.17064, Vol. 10, p.616) that:

"حدثنا وکیع ... عن ابی وائل عن عبداللہ قال: ادرءُوا الجلد و القتل عن المسلمین ما استطتم۔

عبداللہ فرماتے ہیں کہ کوڑوں اور قتل کو جتنا ہو سکے مسلمانوں سے ساقط کرو۔

"Hazrat Abdullah said: avert whipping and execution from the Muslims as much as possible."

xi. Imam Tabarani also reported a quote of Hazrat Abdullah (RA) in the same context at (No.8852 Vol.7, P.321) in Mujam al-Kabir as:

حدثنا علی بن عبدالعزیز، ثنا ابو نعیم المسعودی عن القاسم قال قال عبداللہ: ادرءُوا الجلدَ والقتل عن عَبادِ اللہ ما استطعتم۔

حضرت قاسم سے مروی ہے حضرت عبداللہ نے فرمایا: جہاں تک ممکن ہو اللہ کے بندوں سے قتل اور کوڑوں کی سزا کو ٹالنے کی کوشش کرو۔

It is reported from Masoodi that Hazrat Abdullah (RA) said: Try to avert whipping and execution (as punishment) from the people as much as you can."

Ibn e Abi Shaibah in his Sunnan reported from Zahri (No.29089, Vol.8 p. 378) as:

حَدّثنا عبدالاعلی: عن بُردٍ، عن الزھریِ قال: "ادفعوا الحدودَ بکلِّ شبھةٍ"

حضرت بُرد فرماتے ہیں کہ زھری نے ارشاد فرمایا: ہر شبہ کی وجہ سے سزاؤں کو دور کر دو۔

"Zuhri said: avoid hudood due to every kind of doubt."

Kanza al-Ummal contains a similar saying of Hazrat Omar bin Abdul Aziz (No.1295, Vol. page 162), with reference from Abu Muslim al-Kujjee:

ابو مسلم الکجی عن عمر بن عبدالعزیز: "ادرَءُوا الحدود بالشبھاتِ"

"Avert hudood due to doubts."

xii. Imam Tirmizi reported a Hadith (1424, Vol. 1 p.535) from Hazrat Aysha (RA) in the following manner:

و عن عائشة رضی اللہ عنہا قالت: قال رسول اللہ صلی اللہ علیہ وسلم- "ادرَءُوا الحدود عن المسلمین ما استطتم، فإن کان لہُ مخرجٌ فخلُّوا سبیلہُ، فإن الامام ان یخطئ فی العفو خیر من أن یُخطئ فی العَقوبة۔

حضرت عائشہؓ سے روایت ہے کہ انہوں نے کہا کہ رسول اللہ ﷺ نے فرمایا "مسلمانوں سے مقدور بھر سزا (حدود) دور کرو۔ اگر بچنے کی کوئی صورت نکل آئے تو چھوڑ دو کیونکہ امام (حاکم) کا معافی میں غلطی کرنا سزا میں غلطی کرنے سے بہتر ہے۔

"It is reported from Hazrat Aysha she said that the Holy Prophet said: avert hudood from the Muslims when you can find a way for them then release them. Because it is better for Imam (Judge) to err in forgiving than to err in awarding punishment."

xiii. Abdullah Al Hakim al-Naishapuri d. 405 Hijri in his Al-Mustadrak 'Ala Al-Sahihain (No.8163) reported same Hadith from Hazrat Aysha (RA). Same is reported by Ibn I Tamiya in Muntaqa Al-Akhbar (4040). Same Hadith is also

reported in Mishkat Al Masabih (3570) and Sunnan al Kubra al Bahiqi (17057) also reported the same.

xiv. In Muntiqa al-Akhbar with reference of Ibni Majah contains this Hadith which contains a general guideline for every Muslim while dealing with the matters involving the punishment of *hadd* as:

منتقیٰ الاخبار 4039/حدیث باب بَابُ أَنَّ الْحَدَّ لَا يَجِبُ بِالتُّهَمِ وَأَنَّهُ يَسْقُطُ بِالشُّبُهَاتِ

وعن ابی هریرہ! قال رسول الله "ادفعوا الحدود ما وجدتم لها مدفعاً. رواہُ ابن ماجه

حضرت ابوہریرہ سے مروی ہے انہوں نے کہا رسول اللہ -صلی اللہ علیہ وسلم نے فرمایا مقدور بھر سزا کو رد کرو۔

The Holy Prophet said "remove hadd as much as possible."

یہ ہی حدیث جامع الترمذی میں باب ماجاء فی دَرءِ الحدود میں آئی ہے۔ جلد اول ترمذی کیج اور یزید سے بھی اس موقوف حدیث کا تذکرہ ہے۔

یہ ہی حدیث عبداللہ ابن عباس کے حوالہ سے مسند امام اعظم میں موجود ہے۔

xv. Following hadith is important for the judges while deciding a case of *hadd*.

8163 - أَخْبَرَنَا الْقَاسِمُ بْنُ الْقَاسِمِ السَّيَّارِيُّ، أَنْبَأَ أَبُو الْمُوَجِّهِ، أَنْبَأَ عَبْدَانُ، أَنْبَأَ الْفَضْلُ بْنُ مُوسَى، عَنْ يَزِيدَ بْنِ زِيَادٍ الْأَشْجَعِيِّ، عَنِ الزُّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، أَنَّ رَسُولَ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ: «ادْرَءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ، فَإِنْ وَجَدْتُمْ لِمُسْلِمٍ مَخْرَجًا فَخَلُّوا سَبِيلَهُ، فَإِنَّ الْإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ بِالْعُقُوبَةِ»

حضرت عائشہ روایت کرتی ہیں کہ رسول اللہ صلی اللہ علیہ وسلم نے ارشاد فرمایا: جہاں تک ہو سکے مسلمانوں کو حدود (کی سزا) سے دور رکھو، اگر مسلمان (ملزم) کے لئے بچاؤ کا ذرا بھی کوئی موقع نکل آئے تو اس کی راہ چھوڑ دو (یعنی اس کو بری کر دو) کیونکہ امام (یعنی حاکم و منصف) کا درگزر کرنے میں خطاء کرنا سزا دینے میں خطاء کرنے سے بہتر ہے۔ (امام ترمذی کے مطابق یہ حدیث حضرت عائشہ کا اپنا ارشاد ہے حدیث نبوی -صلی اللہ علیہ وسلم- نہیں ہے)۔

هَذَا حَدِيثٌ صَحِيحُ الْإِسْنَادِ وَلَمْ يُخَرِّجَاهُ"

المستدرك على الصحيحين للحاكم (426/4)

یہ حدیث صحیح الاسناد ہے لیکن امام بخاری اور مسلم نے اس کو نقل نہیں کیا۔

Perhaps a legal maxim of English common law evolved in 19th Century "it is better that ten guilty persons escape than that one innocent person suffer", coincide in the wording of this Hadith.

xvi. "ادفعوا الحدود عن عبادِ الله ما وجدتم لهُ مدفعاً۔"

اللہ کے بندوں سے حدود چھوڑ دیا کرو جب تم ان کے لئے خلاصی کی راہ پاؤ۔

ابن ماجہ عن ابی ھریرہ (ابن ماجہ ۵۵۴)

xvi. Number of great Ashab al-Rasool (SAW) are reported of having the above mentioned point of view regarding the averment of *hadd* punishment when there exist doubt in the following manner:-

۸۶،۲۹ حَدّثنا عبدالسلام عن اسحاق بن ابی فروہ عن عمرو بن شُعَیب عن ابیہِ آنّ معاذاً و عبدالله بن مسعود و عقبه بن عامرٍ قالوا: ذا اشتَبهَ علیك الحَدُّ فادراهُ۔

حضرت شعیب فرماتے ہیں کہ حضرت معاذ، حضرت عبداللہ ابن مسعود حضرت عقبہ بن عامر

ان سب حضرات نے ارشاد فرمایا: جب تم پر حد مشتبہ ہو جائے تو اس کو زائل کر دو / ہٹا دو"

۸۸،۲۹ حَدّثنا ابن فصیل، عن الاعمش، عن ابراهیم، قال کانوا یقولون۔

ادرَؤا الحدودَ عن عباد الله ما استَطعتُمْ

حضرت ابراھیم فرماتے ہیں کہ صحابہ فرمایا کرتے تھے: سزاؤں کو اللہ رب العزت کے بندوں سے اپنی طاقت کے بقدر زائل (ہٹا) کرو۔

۹۰،۲۹ حَدّثنا وکیع عن سفیان، عن عاصم، عن ابی وائل، عن عبدالله قال:

"ادرؤُا القتل و الجلدَ عن المسلمینَ ما استطعتم"

حضرت ابووائل فرماتے ہیں کہ حضرت عبداللہ بن مسعود نے ارشاد فرمایا:

قتل اور کوڑے کو مسلمانوں سے اپنی طاقت کے بقدر زائل کرو۔

۹٤,۲۹ حدّثنا وكيع، عن يزيد بن زياد البصري عن الزهري، عن عروة عن عائشه قالت: "ادراو الحدود عن المسلمين ما استطعتم، فإذا وجدتم للمسلمين مخرجاً فخلّوا سَبيلهُ، فإن الامام أن يُخطئ في العفوِ، خير من ان يُخطئ في العقوبة (ترمذی ۱٤۲٤، حاكم ۳۸٤)

حضرت عروہ فرماتے ہیں کہ حضرت عائشہ نے فرمایا: سزاؤں کو مسلمانوں سے اپنی طاقت کے بقدر دور کرو پس جب تم مسلمانوں کے لئے نکلنے کا کوئی راستہ پاؤ تو ان کو چھوڑ دو اس لئے کہ حاکم کا معافی میں غلطی کرنا سزا میں غلطی کرنے سے بہتر ہے۔

۷,۱۷ ... عن عائشه قالت: قال رسول-صلى الله عليه وسلم- "ادْرَءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ، فَإِنْ وَجَدْتُمْ لِلْمُسْلِمِ مَخْرَجًا فَخَلُّوا سَبِيلَهُ، فَإِنَّ الْإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ لَهُ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ"

السنن الکبریٰ بیہقی جلد ۱۰

حضرت عائشہ فرماتی ہیں رسول اللہ صلی اللہ علیہ وسلم نے فرمایا: جتنا ہو سکے مسلمانوں سے حدود کو ساقط کرو۔ اگر کوئی مسلمان کے لئے بچاؤ کی راہ نکلتی ہے تو نکالو، امام معاف کرنے میں غلطی کر جائے۔ یہ بہتر ہے اس سے کہ سزا دینے میں خطاء کرے۔

xvii. *Imam Bahiqi's* book al-Kabir contains a whole chapter on this topic and mentioned these under some of the relevant Ahadith in it as:

۸۸۵۲ حدثنا علی بن عبدالعزیز، ثنا ابو نعیم المسعودی عن القاسم قال قال عبدالله: درءُوا الجلدَ والقتل عن عِباد الله ما استطعتم

حضرت قاسم سے مروی ہے حضرت عبداللہ نے فرمایا: جہاں تک ممکن ہو اللہ کے بندوں سے قتل اور کوڑوں کی سزا کو ٹالنے کی کوشش کرو۔

۹۵۸۰ حدثنا اسحاق بن ابراهيم عن عبدالرزاق، عن ثوری و معمر عن عبدالرحمٰن بن عبدالله عن القاسم بن عبدالرحمٰن قال: قال ابن مسعودٍ: ادرءُوا الحدود و القتل عن عباد الله ما استطعتم۔

حضرت عبداللہ بن مسعود فرماتے ہیں: جہاں تک ممکن ہو، اللہ کے بندوں کو حدود اور قتل سے بچانے کی کوشش کرو۔

xviii. There is a consensus of Umah on this maxim as reported by Ibn-i-Nujyam.

اجماع التعامل۔ اجماع متواتر (امت کا تلقی بالقبول اسے حاصل ہے)

صحابہ کے دور سے اجماع چلا آرہا ہو۔ الاشباہ والنظائر۔ ابن نجیم۔

الحدود تدرؤ بالشبہات

شبہات کی وجہ سے حدود معاف ہو جائیں گی۔

یعنی شبہات سے حدود ساقط ہو جاتے ہیں۔

6. In consequence of all the reasons stated herein above I have decided to concur with the findings made by my learned brother Judge, Mr. Justice Khadim Hussain M. Sheikh whereby he accepted the appeal of the appellant and set aside the conviction and sentence awarded to the appellant Sholo alias Rasoul Bux son of Manglo Shar vide the impugned judgment dated 24-02-2021 passed by the learned trial court and acquitted him of the charge extending him benefit of doubt.

JUSTICE DR. SYED MUHAMMAD ANWER
JUDGE

Islamabad, May, 14th 2022.
Mubashir

Jail Crl.Appeal No.03-I of 2021 **L/w**
Crl.Murder Reference No.02-I of 2021

JUDGMENT

KHADIM HUSSAIN M. SHAIKH –J. I have had a privilege to go through the judgment authored by my Hon'ble brother Judge Mr. Justice Muhammad Noor Meskanzai, the Chief Justice, having also gone through the record and evidence minutely. In my considered opinion, this is a case of acquittal, therefore, I am unable to concur with the finding of guilt of the appellant, rendered by his lordship Mr. Justice Muhammad Noor Meskanzai, for the following reasons:-

2. From a perusal of the record, it would be seen that the alleged incident was shown to have taken place on 26.09.2006 at about 05:30 p.m, while the subject FIR was lodged on 27.09.2006 at 07:15 a.m. i.e. after about 14 hours of the incident; the distance between the place of incident and the police station as shown in the FIR Ex.11/A was only 5/6 kilometers and in my humble view the report relating to the incident could be lodged by the complainant party within an hour by covering such distance of 5/6 kilometers even by foot; the statement under Section 161 Cr.P.C of alleged eye witness Ali Dost, who happened to be the son of complainant Allah Dino and real brother of deceased Hidayatullah, was recorded with further delay of more than six hours even from the lodgment of the FIR, as is evident from the deposition of investigating officer Inspector Amanullah Shah, who has stated that **"I recorded the statement of PW Ali Dost at 01:00 or 01:15 p.m, I recorded the statement of PW Ali Dost on the same day when PC Zulfiqar produced the blood stained clothes of deceased before me"**, despite the fact that per prosecution PW Ali Dost remained available at the police station from 07:00 a.m. till dispatch of the dead body to hospital at 10:00 a.m. and there is no plausible explanation for such an inordinate delay in lodgment of the FIR and in recording

statement of the said PW; it is reiterated that the delay in lodgment of the FIR 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; if such delay having resulted in embellishment, being a creation of afterthought, going to the extent of being fatal to the prosecution case, assumes great importance in absence of convincing explanation, which prima facie points out to fabrication of the prosecution story, like the case one in hand, in which such an inordinate delay in lodgment of the FIR and in recording statement of the PW under Section 161 Cr.P.C without plausible explanation thereof, in the wake of previous hostility between the parties over the landed property as is reflected from the FIR, more particularly, when 16 persons with their names parentage and addresses, most of them belonging to one and the same family, alongwith 10 unknown persons, are implicated in this case by throwing very wide net, being significant could not be lost sight of, and under the given circumstances, the possibility of false implication of the appellant after consultations and deliberations could not be ruled out. 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.***

3. On my own independent evaluation of the evidence, I find that it was day time incident, for, on 26.09.2006 (the date of incident) the sunset time in the vicinity, where the alleged incident had taken place was at 06:20 p.m. and the offence was shown to have taken place at 05:30 p.m. i.e. 50 minutes before the sunset time and needles to say that from sunset to dusk there is always span of nearly 40 to 50 minutes there; PW Ali Dost Shar, who claimed himself to be one of the eye witnesses of the occurrence, attempting to improve the prosecution case, has stated in his evidence that **"it was odd hours of the night and there was no conveyance, therefore, we did not proceed to PS at that time"**, which even otherwise could hardly be termed to be a plausible explanation for such an inordinate delay of 14 hours in lodgment of the FIR; PW Ali Dost, who per prosecution, accompanying the mashirs and police, went to the place of vardhat and showed them that place, has stated that **"investigating officer Inspector Amanullah Shah proceeded from PS to place of vardhat alongwith us just after our reaching at PS Geehalpur; and, I.O secured 20 empty bullets of K.Kov and 20 empty bullets of G.3 rifle from the**

place of vardhat lying in scattered manner"; while investigating officer Inspector Amanullah Shah has deposed that **"I secured 20 empty bullets of G.3 rifle, 40 empty bullets of 7.62 bore** (bore of Kalashnikov) **and 5 empty cartridges of 12 bore"** (bore of shot gun) and whereas PW mashir Haji Badal has deposed that **"the police secured 40 empty bullets of K.Kovs and 20 empty bullets of G.3 rifles"**, seeing the case property, he went on to depose that **"the case property available in the Court viz 60 empty bullets and clothes of the deceased are same whereas five empty cartridges of 12 bore available with the case property were not secured by the police in our presence"**, thereby he has not only contradicted Investigating Officer Inspector Amanullah Shah and alleged eye witness Ali Dost on such aspect, but he has also belied the contents of the mashirnama of place of vardhat Ex.22/C, which shows that besides 60 empty bullets i.e. 40 empty bullets of K.Kovs and 20 empty bullets of G.3 rifle, 5 empty cartridges of 12 bore gun, were also secured from the place of vardhat, that also runs counter to the prosecution case for the reason that, per prosecution, there were in all 26 culprits, who committed the alleged offence; of them accused Miandad and Sultan were allegedly armed with rocket launchers while the rest 24, which included 10 unknown persons, were alleged to be armed with Kalashnikovs and no one among the 26 culprits was alleged to be armed with either G.3 rifle or with gun; none from the complainant party including the deceased was alleged to be armed with any weapon; per prosecution, besides the culprits numbering 26, deceased Hidayatullah and three PWs namely the complainant and his two sons PW Ali Dost and PW Sanaullah (not examined), were allegedly present at the spot alongwith

four stolen buffaloes, but PW mashir Haji Badal, in his examination in chief, has stated that **"the police visited the place of vardhat on the pointation of Ali Dost and saw four prints marks of the people as well as some marks of dying of deceased Hidayatullah",** and he did not even state about the availability of the marks of alleged four robbed buffaloes; PW Ali Dost has stated that **"the empty bullets were lying at the distance of about 8/10 paces from the place of blood stained earth secured by the police"**, while mashir Haji Badal has stated that **"the empties were lying in the scattered manner at the distance of about 2/3 paces"**; Investigating officer Inspector Amanullah Shah has stated that **"PC Zulfiqar returned at PS and produced the clothes of deceased and receipt of handing over dead body of deceased Hidayatullah to legal heirs"** (on the day of incident) and whereas complainant Allah Dino has stated that **"I handed over the clothes of deceased to police at PS after third day of incident; I did not go to the police station thereafter"**; contradicting the complainant, the I.O has stated that **"the complainant of this case did not appear before me during the investigation"**; he has further stated that **"I inspected the dead body of deceased Hidayatullah at PS Geehalpur and prepared such memo of inspection of dead body at 0920 hours; I also prepared the danistnama of the dead body; the dead body was sent to Taluka Hospital, Kashmore for postmortem through PC Zulfiqar; the dead body of deceased was dispatched to Taluka hospital at 10:00 or 10:15 a.m. on private vehicle"**, while PW Ali Dost has stated that **"we proceeded from PS Geehalpur at about 09:45 a.m. alongwith the dead body accompanied by PC for Kashmore Hospital"**, and whereas the complainant has stated that

"the police sent the dead body from PS through police constables to Kashmore hospital at about 10.00 a.m, on the same datson (Datsun); I alongwith some persons was also with dead body". As the investigating officer did not produce roznamcha entry regarding dispatching of the dead body to the hospital, hence specific questions on such aspects were asked from him to which he taking shelter of his memory, deliberately avoided to give specific replies by stating that **"I could not remember whether I made such entry in the roznamcha while sending the dead body of deceased for its postmortem"**, he has stated that **"I prepared memo of seeing the dead body of deceased with my own hand"**; strangely Ex.29/A and Ex.32/A both are lash chakas forms written with different hands; column No.8 of lash chakas form Ex.29/A shows the time of inspection of dead body of deceased Hidayatullah as 0735 hours on 27.09.2006, and whereas column No.8 of lash chakas form Ex.32/A shows the time of inspection of dead body of deceased Hidayatullah as 0920 hours on 27.09.2006, which have been contradicted by mashir Haji Badal by stating that **"the police saw the dead body of deceased Hidayatullah at about 07:15 a.m; the dead body was lying on a cot; the memo of seeing dead body and lash chakas form were prepared by I.O Amanullah Shah, we put our LTIs on two papers"**, furthermore, column No.5 of lash chakas form Ex.29/A shows time of report to the police as 0715 hours, which is overwritten and seems to have been changed 0915 hours into 0715 hours without any initial or authentication thereof, while column No.5 of lash chakas form Ex.32/A shows time of report as 0915 hours, that in fact was 0715 hours as is reflected from the FIR Ex.11/A; apparently, there was no valid reason for preparing two lash chakas

forms showing different times of inspection of dead body of deceased Hidayatullah, which rather denotes that the proceedings relating to the dead body of deceased Hidayatullah, were prepared in haphazard manner; moreover, the complainant has stated that **"when we reached near to the accused, accused Sholo alias Rasolo challenged us to leave the village and they will not spare us; t**hereafter accused Sholo alias Rasolo fired from his k.kov upon my son Hidayatullah", while PW Ali Dost has stated that **"all the accused tried to took away the buffaloes forcibly to which my brother Hidayatullah gave resistance to which accused Sholo alias Rasolo fired from his k.k.ov upon my brother Hidayatullah"**; the complainant has stated that **"we did not raise cries as the accused controlled us when we reached at the place of vardhat"**, while PW Ali Dost has stated that **"we raised cries"**, but he did not state about accused's controlling them as was stated by complainant Allah Dino; according to mashir Haji Badal **"there was a space of 2/3 feet in between the protective bund and link road"** (the place of incident), while per PW Ali Dost **"the protective bund is at the distance of about five paces away from the link road"**; according to the complainant and PW Ali Dost, the accused fired upon Hidayatullah from a short distance of half feet from him, while PW Dr. Mushtaq Ahmed Soomro, who conducted the postmortem of dead body of the deceased, has stated that **"the injury No.1** (entry wound) **caused to the deceased was fired within 10 feet distance"**; the complainant has stated that **"we left our house for police station alongwith dead body at 06.00 a.m. the Datsun belongs to Shafi Muhammad Nahar on which the dead body was taken to the hospital"**, but neither

Shafi Muhammad Nahar was examined by the prosecution nor was he even cited as witness or mashir by the prosecution. Investigating officer Inspector Amanullah Shah has deposed that **"I proceeded from police station to place of vardhat at about 01:00 or 01:15 p.m on a private vehicle, but I do not remember its exact kind/nature",** contradicting his such stance PW Ali Dost Shar, who alongwith alleged mashirs Haji Badal and Abdul Hameed allegedly accompanying I.O Inspector Amanullah Shah went to the place of vardhat and showed him that place being alleged eye witness of the occurrence, has deposed that **"my father Allah Dino alongwith Sanaullah took the dead body of deceased to our village whereas I alongwith Haji Badal and Abdul Hameed proceed to PS Geehalpur, we reached at PS at about 01:00 p.m. the investigation officer Amanullah Shah proceeded from PS to place of vardhat alongwith us just our reaching at PS Geehalpur and we proceeded from PS to place of vardhat on police mobile". The mashir of vardhat accompanied with me from place station (sic) when I proceeded from place of vardhat"**; while mashir Haji Badal has stated that **"we did not go with the police from the place of vardhat to PS Geehalpur"**, to a suggestion the I.O admitting the over writing of time in the mashirnama of place of vardhat has stated that **"it is correct to suggest that the time of mashirnama of vardhat has been corrected"**, disputing the proceedings at the place of vardhat, the defence put a specific suggestion to the I.O, to which he stated that **"it is incorrect to suggest that I completed all the formalities at the police station Geehalpur"**, even otherwise the roznamcha entries, which could prove the movements of the police towards the place of vardhat and their

return to the police station were not produced in evidence as is admitted by the investigation officer in his cross examination by stating that **"I have not produced departure or return entry in the Court"**. In such view of the matter, coupled with the aforementioned material contradictions in the evidence of the I.O, mashir Haji Badal and alleged eye witness Ali Dost, who allegedly showed the place of vardhat to the police, the departure of the police to the place of vardhat and their return after the alleged inspection of the place of vardhat could not be established. It is worthwhile to mention here that the prosecution claimed that complainant Allah Dino and his two sons namely Sanaullah and Dost Ali allegedly had seen the occurrence, but it is strange enough that Sanaullah was not examined by the prosecution, which suggests that either he was not supporting the prosecution case or the prosecution intentionally did not examine him so as to frustrate the purpose of cross examination otherwise there was no valid reason for not examining that material witness, who per prosecution, was the eye witness of the occurrence and brother of deceased Hidayatullah & PW Ali Dost and son of complainant Allah Dino; even alleged eye witness Sanaullah was neither cited as witness in the list of witnesses proposed to be examined by the prosecution nor was he cited as reserved witness in the challans/charge sheets available at pages 42 to 45 and his statement under Section 161 Cr.P.C was not shown to have been recorded during the investigation as is revealed from the deposition of Investigating officer Inspector Amanullah Shah, who has stated that **"I recorded the statement of PW Ali Dost under Section 161 Cr.P.C"**, but he did not state about recording of the statement of other alleged eye witness namely Sanaullah (not examined);

manifestly, there was hardly justification for not citing the alleged eye witness Sanaullah even as a reserved witness in the challans/charge sheets and so also for his non examination as a prosecution witness, which adversely reflects upon the prosecution, for, adverse inference that had he been examined? He would not have supported the prosecution case, can legitimately be drawn against the prosecution as provided under Article 129(g) of Qanuan-e-Shahadat Order, 1984. Admittedly, even not a single buffalo out of alleged four robbed buffalos said to have been driven away by the accused, has been recovered by the police and no effort for their recovery was shown to have been made by the police by tracking foot prints thereof; and, no weapon allegedly used by the appellant in the commission of the alleged offence was recovered from him.

4. Per prosecution there were in all 26 culprits, who committed the alleged offence; of them accused Miandad and Sultan were allegedly armed with rocket launchers while the rest 24, which included 10 unknown culprits, were said to be armed with Kalashnikovs and no one among the 26 culprits was alleged to be armed with either G.3 rifle or with gun; but that has been negated by the alleged place of incident as 20 empty bullets of G.3 rifle, 40 empty bullets of Kalashnikov (7.62 bore) and 5 empty cartridges of 12 bore gun, were shown secured from the place of vardhat, which proves that the firing was also made from G.3 rifle and 20 bore gun; no one among the complainant and the alleged eye witnesses Ali Dost or Sanaullah (not examined) had admittedly sustained any injury or scratch in the alleged incident and it is strange enough that non among the culprits had even attempted to fire at the complainant and his two sons Sanaullah (not examined) & Ali

Dost and freely allowed them to see the entire scene of vardhat and become eye witnesses against them, which being incomprehensible does not appeal. And, in the wake of aforementioned material and glaring contradictions in their evidence, the presence of the complainant and alleged eye witnesses, who are father and brothers of the deceased, at the place of incident when the actual occurrence took place, being highly doubtful could not be established by the prosecution; moreover, per prosecution deceased Hidayatullah on receiving firearm injuries had died instantaneously that is also reflected from the medical evidence and as such there was hardly justification for immediately shifting dead body of the deceased to the house of the complainant without reporting the matter to the police; again in the morning instead of lodging report with the police, the dead body of deceased Hidayatullah was allegedly shifted from the house of the complainant to the police station, which did not make any sense. The Investigating Officer had neither seen that cot on which the dead body of the deceased was allegedly taken from the place of incident to the house of complainant and kept there for whole night nor did he inspect the place in the house of the complainant where the dead body of the deceased was allegedly kept, so as to see if the blood of the deceased was available in the house of the complainant and on the cot, which was essential to substantiate such stance of the prosecution. Under these circumstances, the murder of deceased Hidayatullah is apparently shrouded in mystery.

5. The aforementioned infirmities, material & glaring contradictions; admissions adverse to the prosecution case, and dishonest & deliberate improvements to strengthen the prosecution case during the trial in the

statements by the PWs qua the contents of the FIR, mashirnamas and danistnamas etc, rendered the credibility of the prosecution witnesses doubtful and their evidence unreliable and hence no explicit reliance can be placed upon their evidence. 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 Shafiqe 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".***

6. Over and above all co-accused Bashir son of Muhammad Hassan was acquitted of the charge on the same set of evidence and no appeal against his acquittal was filed, and as such that acquittal judgment attained a finality as was even observed by this Court while passing judgment dated 30.10.2019, remanding the instant case to the learned trial Court with direction to examine accused under Section 342 Cr.P.C by putting all the relevant pieces sought to be used against the accused.

7. In view of what has been stated above, I am of the considered view that the prosecution has failed to prove its case against the appellant 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 end 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."***

8. So far the question of alleged abscondence of the appellant is concerned, it is reiterated that abscondence is not conclusive by itself to establish guilt; its probative value depends on the facts and circumstances of each particular case, having regard to the fact that it can be consistent with either guilt or innocence of the accused, as sometimes persons despite being absolutely innocent remain in hiding which cannot be the

proof of their guilt; it is of course corroborative circumstance and gives some kind of support to the other evidence strongly enough to sustain the charge; and, thus the abscondence by itself is not sufficient to bring home guilt to the accused and it is well settled that when ocular evidence is disbelieved then abscondence alone does not play any role in conviction of an accused person because it is held to be a weakest type of corroboratory evidence. Since I have already held that the prosecution has failed to prove its case against the appellant by adducing any evidence worth consideration against him, therefore, in my humble view, the appellant cannot be convicted on the basis of his alleged abscondence, which could at the best be a corroboratory piece of evidence to the other concrete evidence, which is completely lacking in this case. As far as the alleged involvement of the appellant in other cases is concerned, patently the photocopies of the FIRs in question were placed on record by the learned counsel for the complainant after hearing the case and reserving it for judgment, which under the law, cannot be given any effect to; even otherwise photocopies of the FIRs placed on record by the learned counsel, which needless to say have no evidentiary value, would reveal that most of the FIRs related to some encounters between the police and the accused, involving ineffective firing and none of the cases based on such FIRs was shown to have been ended in conviction; on a query the learned counsel for the complainant has stated that he does not know about the fate of the cases based on those old FIRs, pertaining to the period of more than one decade ago, moreover, the FIRs in question were neither collected during the investigation nor were produced in evidence and even the same were not confronted to the appellant in his statement under Section 342 Cr.P.C so as to obtain his explanation thereon as

mandated by provisions of Sections 342 and 364 Cr.P.C and as such the same cannot be considered and used for the purpose of conviction of the appellant, for, mere filing of photocopies of the old FIRs of certain cases showing the name of the appellant without their fate would hardly be a proof for determining the tendency and previous conduct of the appellant, therefore, the contention of the learned counsel for the complainant that the appellant is habitual and hardened criminal, is untenable.

9. Patently, the aforesaid material and glaring contradictions, infirmities, admissions adverse to the prosecution case, and, dishonest & deliberate improvements in the statements of the PWs during the trial to strengthen the prosecution case, which did go to the root of the case, rendering it doubtful, were not at all attended to by the trial Court while passing the impugned judgment dated 24.02.2021, convicting and sentencing the appellant, 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. And, thus, I am of the humble view that the impugned judgment dated 24.02.2021 of the trial Court suffers from mis-reading and non-reading of the evidence and the conviction and sentence awarded to the appellant cannot sustain, therefore, I, accept the captioned appeal, set-aside the conviction and sentence awarded to appellant Sholo alias Rasool Bux son of Manglo Shar vide the impugned judgment dated 24.02.2021, passed by the learned trial Court and acquit him of the charge, extending him the benefit of doubt.

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

Khurram

ORDER SHEET

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate / Revisional Jurisdiction)

***

J. Cr. Appeal No.03/I of 2021

(Sholo alias Rasool Bux Vs. The State and another) **Linkedwith**

Cr. Murder Ref. No. 02/I of 2021

(The State Vs. Sholo alias Rasool Bux)

Date **Present**

14.05.2022

Islamabad

ORDER OF THE COURT

With majority two to one, the appeal is accepted. Appellant Sholo alias Rasool Bux is acquitted of the charge. He shall be released forthwith if not required in any other offence. With the result, **Cr. Murder Reference No.02-I of 2021 is answered in negative**.

Sd/-

MR. JUSTICE MUHAMMAD NOOR MESKANZAI

CHIEF JUSTICE

Sd/-

MR. JUSTICE DR. SYED MUHAMMAD ANWER

Sd/-

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

*Imran/**