

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

JAIL CRIMINAL APPEAL NO.05-K OF 2021 **L/W**

1. ALI KHAN SON OF ARBAB ALI MAHAR.
2. MOUR SON OF MIANDAD BUGHIO.
3. AHMED ALI ALIAS FOUJI SON OF FAQIR MUHAMMAD SANDELO.

Appellants

VERSUS

THE STATE

Respondent

CRIMINAL APPEAL NO.07-K OF 2021

MUHAMMAD YOUSIF SON OF GHULAM QADIR BUGHIO.

Appellant

VERSUS

THE STATE

Respondent

Counsel for the Appellants in Jail Cr.A.No.05-K of 2021.	:	Mrs. Aftab Bano, Advocate
Counsel for the Appellant in Cr.A.No.07-K of 2021.	:	Mr. Mahmood A.Qureshi, Advocate
Counsel for the Complainant	:	Mr. Munwar Ali Bhatti, Advocate
Counsel for the State	:	Mr. Zahoor Shah, Additional Prosecutor General, Sindh.
FIR No., Date and Police Station	:	23/2015, 09.04.2015, Darri.
Date of Impugned Judgment	:	25.03.2021
Date of Institution of Jail.CrI. Appeal No.05-K of 2021 and CrI.Appeal No.07-K of 2021	:	06.04.2021 & 09.04.2021
Date of Hearing	:	13.09.2021
Date of Judgment	:	05.11.2021

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 25.03.2021, passed by the learned Additional Sessions Judge-II Larkana, in Sessions Case No.455 of 2015 re-The State v. Ali Khan and others, emanating from Crime No.23 of 2015 registered at P.S Darri, whereby appellants Ali Khan son of Arbab Ali Mahar, Mour son of Miandad Bughio, Muhammad Yousif son of Ghulam Qadir Bughio and Ahmed Ali alias Fouji son of Faqir Muhammad Sandelo have been convicted for offence under Section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced them to suffer R.I. for seven years and to pay fine of Rs.10,000/- (ten thousand only) each and in case of default to further undergo S.I. for two months; the appellants have also been convicted for offence punishable under Section 452 of The Pakistan Penal Code, 1860 (XLV of 1860) ("**The Act**") and sentenced them to suffer R.I. for four years; and the appellants have further been convicted for offence punishable under Section 506(2) of **The Act** and sentenced them to suffer R.I. for two years. All the sentences were ordered to run concurrently, extending the appellants benefit of Section 382-B of The Code of Criminal Procedure, (Act V of 1898) ("**The Code**").

2. Briefly, the facts of the prosecution case are that on 31.03.2015 at 05:30 a.m. (morning), complainant Zulfiqar Ali, his brother Rajib Ali and his son Sabir Hussain were present in their house situated in Gahno Khan Colony Larkana. As they opened the outer door to go to their work, they saw 06 (six) armed persons; of them three were identified as Ahmed Ali alias Fouji, having Kalashnikov, Ali Khan, having Kalashnikov, and Asif Ali, having pistol, while the other three persons were unidentified. Accused Ahmed Ali, Ali Khan and

Asif Ali allegedly went inside the room of the house of the complainant while the unidentified persons had overpowered them. The accused, who went inside the room, after sometime came out, having bundles in their hands, which they took away and while leaving accused Ali Khan drove away motorcycle CD-70 parked in the corridor of the complainant's house. On checking, the complainant found ornaments of gold, three mobile sets, one tablet set, four wrist watches, one USB, one wallet, containing cash of Rs.17,000/-, one identity card and one student card in the name of Rajib Ali, cash amount of Rs.350,000/-, missing. The complainant then went to accused Ali Khan Mahar at his village Wadda Mahar, who promised to return the robbed articles to them, but he did not return the same to the complainant party. Thereafter the complainant after consulting with his nek-mard appeared at police Station Dari, Larkana and lodged the captioned F.I.R on 09.04.2015.

3. After completing the investigation, final report under Section 173 of **The Code** was submitted wherein the name of appellant Muhammad Yousif was placed in Column No.2, finding him innocent. After completing the formalities, a formal charge was framed against two accused namely Ali Khan and Mour who then were in custody. Earlier the prosecution examined SIP Sajjad Hussain at Ex.11 as PW.1 and SIP Irshad Ali at Ex.14 as PW.2. Thereafter co-accused Ahmed Ali alias Fouji and appellant Muhammad Yousif joined the trial and in result whereof an amended charge was framed against all the four appellants on 01.02.2018 at Ex.28. Then the prosecution examined in all 10 PWs namely Zulfiqar Ali at Ex.33 as PW.1, Sabir Hussain at Ex.34 as PW.2, Rajib Ali at Ex.35 as PW.3, SIP Sajjad Hussain at Ex.39 as PW.4, Fida Hussain at Ex.42 as PW.5, SIP Zulfiqar Ali at Ex.43 as PW.6, LNC Karam

Khan at Ex.44 as PW.7, SIP Zubair Ahmed at Ex.45 as PW.8, SIP Irshad Ali at Ex.48 as PW.9 and *SIP Sajjad Hussain at Ex.50 as PW.10*, whereafter the prosecution closed its side vide statement Ex.51. On conclusion of the trial, statements of the appellants under Section 342 of **The Code** were recorded, wherein they denying the prosecution allegations, professed their innocence. They, however, neither examined themselves on oath under Section 340(2) of **The Code** nor did they examine any person as their defence witness. After conclusion of the trial and hearing the parties' counsel, the learned trial Court has convicted and sentenced the appellants vide impugned dated 25.03.2021 as discussed in paragraph-1 *supra*.

4. Having felt aggrieved by the aforesaid judgment, convicting and sentencing the appellants, the appellants have preferred both the captioned appeals.

5. The learned Advocate for appellant Muhammad Yousif has mainly contended that the F.I.R was delayed by 09 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 no identification parade of appellant Muhammad Yousif was conducted; that no incriminating article was recovered from appellant Muhammad Yousif; that appellant Muhammad Yousif is innocent and he has been falsely implicated in this case by the complainant party due to their enmity over the property; and, that the prosecution has failed to prove its case against appellant Muhammad Yousif beyond reasonable doubt. The learned counsel prays that the appeal may be allowed and appellant Muhammad Yousif may be acquitted of the charge, extending him benefit of doubt. The learned counsel for appellants Ali Khan, Mour and Ahmed Ali alias Fouji adopting the arguments advanced by the

learned counsel for appellant Muhammad Yousif, has further submitted that the prosecution case is full of doubts; that the appellants are innocent and they have been falsely implicated in this case by the complainant party due to their dispute with them over the landed property; that the learned trial Court, without appreciating the evidence brought on record in proper manner, has passed the impugned judgment, convicting and sentencing the appellants. The learned Counsel prays for acquittal of the appellants.

6. The learned Advocate for the complainant has mainly contended that the appellants duly armed with deadly weapons entered into the house of the complainant and robbed them of the ornaments of the gold, cash amount and one motorcycle CD-70 from the house of the complainant; that some of the robbed articles have been recovered on the pointation of Appellant Mour; that there are minor contradictions in the evidence led by the prosecution; that the prosecution has proved its case against the appellants beyond any shadow of doubt; and, that the learned trial Court has rightly convicted the appellants. The learned Additional Prosecutor General, Sindh, adopting the arguments of the learned counsel for the complainant, prays for dismissal of both the instant appeals.

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

8. From a perusal of the record, it would be seen that the incident was shown to have taken place on 31.03.2015 at 05:30 a.m. and whereas the F.I.R was lodged on 09.04.2015 at 2000 hours i.e. after 09 days of the incident; the statement of the PWs under Section 161 of **The Code** were recorded with further delay on 25.04.2015 i.e. after more than 25 days of incident and 16 days

of the lodgment of the F.I.R and there is no plausible explanation for such an inordinate delay in lodgment of the F.I.R and recording statements of the PWs; it is reiterated that the delay in lodgment of the 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 and 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; and such an unexplained inordinate delay in lodgment of the F.I.R and in recording statements of the PWs under Section 161 of **The Code**, which being significant could not be lost sight of, for, under the given circumstances, the possibility of false implication of the appellants 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.

9. Record further reveals that only three accused namely appellants Ahmed Ali alias Fouji, Ali Khan and one Asif Ali were named in the belated F.I.R and whereas three unknown culprits were shown therein by the complainant, who by making improvement recorded his further statement on 17.04.2015 i.e. after more than 17 days of the incident and 06 days of lodgment of the F.I.R wherein he added name of appellant Mour as an accused, but matter did not end there as he by recording his second further statement dated 22.04.2015 added appellant Muhammad Yousif as an accused after 21 days of the incident and 13 days of the lodgment of the F.I.R, despite the fact that Muhammad Yousif was already known to the complainant and there is dispute between them over the property that has been admitted by PW.6 SIP Zulfiqar Ali by deposing that *“it is correct to suggest that in the further statement of the complainant dated 17.04.2015 he did not nominate accused Muhammad Yousif, the complainant and Muhammad Yousif are acquainted to each other; there are some disputes over a plot between complainant and accused Muhammad Yousif; no any description or Hulia of unidentified accused is disclosed in the F.I.R”*. It needs no reiteration that any statement or further statement of the complainant recorded during investigation by the

police would neither be equated with F.I.R nor is read as a part of the F.I.R; but it can be treated as statement under Section 161 of **The Code**, which can only be used by the accused to contradict the witness and the same cannot be used by the prosecution; such an unexplained inordinate delay of more than 09 days in lodgment of the F.I.R and improved supplementary statements of the complainant one after the other with further delay of 06 days and 13 days respectively of the F.I.R, which also made the basis for other alleged eye witnesses, who recorded their statements under Section 161 of **The Code**, on 25.04.2015 i.e. after 25 days of the incident, 16 days of the lodgment of F.I.R, 03 days of the second supplementary statement dated 22.04.2015 of the complainant, clearly establish their coming into existence after due deliberations and consultations. And, thus the complainant and alleged eye witnesses would be unreliable. Reliance in this context is placed on the cases of **FALAK SHER alias SHERU versus THE STATE (1995 SCMR 1350)** and **Khalid Javed and another versus The State (2003 SCMR 1419)**. Admittedly, the three accused were not known to the complainant and PWs Sabir Hussain and Rajib Ali, therefore, holding of identification test of the three unidentified accused, which included appellants Mour and Muhammad Yousif, (not named in the F.I.R) through the complainant and PWs was very much necessary for the reason that the purpose of identification test is to test that evidence and is a check against the false implication; it would be a good piece of evidence against the genuine culprits, for, the safe rule is that the sworn testimony of the witness in the Court as to the identity of the accused, who were strangers to the witnesses, generally speaking, required corroboration, which should be in the form of an earlier identification proceeding, but no identification parade was carried out through the PWs prior to their

statements before the learned trial Court and as such the identity of appellants Mour and Muhammad Yousif connecting them with the commission of alleged offence is completely lacking in this case, hence no reliance can be placed on the statements of PWs complainant Zulfiqar, Sabir Hussain and Rajib Ali, who all allegedly claimed themselves to be the eye witnesses.

10. On evaluating the evidence and the documents adduced in evidence, I find that, in his F.I.R Ex.12, PW complainant Zulfiqar Ali Bughio, has stated that he, his brother named Rajib Ali, whose son and their other family members woke up in the early morning in order to proceed to bricklins and opened the outer gate at about 05:30 a.m. when they witnessed 06 (six) armed persons forcibly intruded into their house and whereas in his statement before the Court he has stated that at that time he was slept in the room, his son and brother were sleeping in separate rooms while PW.2 Sabir Hussain Bughio, who happened to be the son of complainant, has stated that he slept in veranda at the time of robbery; his father awakened him from the sleep and whereas PW.3 Rajib Ali does not state about his sleeping at that time in a room. The complainant has stated that on 22.04.2015 accused Mour was arrested and whereas PW SIP Irshad Ali, who then was ASI and first investigating officer, has stated that on 17.04.2015, he recorded further statement of the complainant in which he disclosed the name of accused Mour; on the same date he left the police station vide entry No.34 and proceeded to Airport road wherefrom he arrested accused Mour son of Miandad by associating PC Karam Khan and PC Nadar Ali to act as mashirs; but he has admitted that entry No.34 does not transpire that the subordinate staff members accompanied him when he left the police station to visit the place of incident and whereas PW.7 mashir NLC Karam Khan Ex.44 has stated

that on 17.04.2015 he alongwith ASI Irshad Ali Shahani, PC Nadir Ali, PC Abdul Khaliq, PC Abdul Ghafoor Shaikh left P.S under entry No.34 for investigation in crime No.23 of 2015 P.S Dari; and after visiting from different places, ASI Irshad Ali Shahani received spy information that accused Mour is standing at the Airport road at PEPSI Colla Deepo, then they reached at the pointed place at about 2015 hours where they tactfully apprehended/arrested him. The complainant has claimed that he had identified accused Mour before the police but investigating officer SIP Irshad Ali has stated that the complainant was not called at police station to identify accused Mour; PW Sabir Hussain has stated that he had accompanied with his father for lodging the F.I.R and whereas PW Rajib Ali has stated that they went to police station with complainant (for lodging F.I.R), but the complainant does not state about accompanying of either his son PW Sabir Bughio and or his brother Rajib Ali to the police station at the time of lodging the F.I.R and whereas PWs SIP Sajjad Hussain and SIP Irshad Ali both have stated that the complainant alone came at the police station for lodging of the F.I.R; the complainant has stated that he, his son Sabir Ali and his brother Rajib Ali including 6/7 womenfolk were present in the house (at the time of incident) likewise PW.2 Sabir Hussain has stated that about 6/7 womenfolk alongwith 3 /4 children were present in the house at the time of incident and he further went on to say that the son of PW Rajib namely Waseem Ali Bughio aged about 18 years was also present in the house at the time of incident and whereas PW.3 Rajib Ali does not speak about availability of womenfolk, but he has admitted that his son namely Waseem was available in the house at the time of incident, who has not been cited as witness in this case. However, no one among the women and Waseem Ali was either examined by the prosecution or was cited as witness,

which also adversely reflects upon the prosecution case, the complainant has stated that their house is consisted upon 4/5 rooms, while PW.2 Sabir Hussain has stated that their house is consisted upon 03 rooms with one veranda and whereas PW.3 Rajib Ali has stated that there are 03 rooms built on the ground floor in their house; the complainant has stated that accused Mour Bughio and Yousif Bughio were not known to him previously while PW.2 Sabir Hussain and PW.3 Rajib Ali have stated that accused Ali Khan and Ahmed Ali were already known to them, but they do not state about the identity of three other accused namely Mour, Muhammad Yousif and Asif Ali; in his F.I.R, the complainant has stated that they had identified and seen the accused namely Ahmed Ali alias Fouji, Ali Khan and Asif Ali and three unidentified accused on the light of bulbs but in evidence no one among the PWs including the complainant has shown any source of light on which they had seen and identified the accused. The mashirnama of place of incident does not show the availability of any electricity bulb at the place of incident; moreover, the complainant in his F.I.R has not given any description or marks of identification of the unidentified accused i.e. their structure or their physique and or color etc and in absence of such material description or marks of identification of the appellants Muhammad Yousif and Mour, who were not named in the F.I.R, no reliance can be placed on the statements of PWs. PW complainant and PW.3 Rajib Ali have stated that the accused remained available in the house for about half an hour during the robbery while PW.2 Sabir Hussain has stated that about one and half hour was consumed in robbery; PW.5 mashir Fida Hussain, who is allegedly mashir of recovery of alleged stolen property, has admitted that the mashirnama was prepared at the police station; on 22.04.2015 the complainant called him and went together

to the police station on a motorcycle; the case property was not sealed, and it is not in his knowledge as to who was writing the mashirnama; second I.O SIP Zulfiqar Ali has stated that on 22.04.2015 after five days of the arrest of accused Mour Bughio he led the police party to the pointed place which was situated at the Southern side of Quaid e Awam University near the wall and produced one pair of neelum, one pair of ear rings, one ladies gold ring, one ladies watch, one gents watch and one mobile phone china and the property was sealed at the spot, such mashirnama of recovery was prepared by citing mashirs Fida Hussain and Gulzar and after reading over the contents of the same he obtained their signature and LTI over it. Thereafter the property was handed over to its real owner; per second I.O SIP, he received the case papers for further investigation on 20.04.2015, but he has not stated a single word about recording of further statement dated 22.04.2015 of the complainant wherein appellant Muhammad Yousif was nominated by him as an accused and suppressing such fact by the I.O. also adversely reflects upon the prosecution case; furthermore, the alleged recovered property namely ornaments of gold was not produced in evidence at the time of recording the depositions evidence of the PWs during the trial.

11. So far the alleged recovery of one pair of neelum, one pair of ear rings, one ladies gold ring, one ladies watch, one gents watch and one mobile phone china is concerned, the same having not been proved, is of no help to the prosecution, for, appellant Mour was allegedly arrested on 17.04.2015 and he remained in police custody and the alleged recovery was shown to have been made on 22.04.2015 i.e. after 05 days of his arrest of the appellant; the alleged place of recovery being open and public place was also accessible to everyone; moreover, the alleged recovered property was not sealed at the spot and

mashirnama thereof was prepared at the police station and it was not written in presence of the mashirs as is evident from the evidence of PW mashir Fida Hussain, who has stated that *“mashirnama was prepared at police station, the case property was not sealed and it is not in my knowledge who was writing the mashirnama”* descriptions and marks of identification and or weight of the alleged recovered ornaments of gold were not shown and even the identification test thereof was not made and the same having been already returned to their owner, were not produced in the learned trial Court at the time of recording evidence of the PWs as is evident from the statement of second I.O. SIP Zulfiqar Ali, who has stated that *“I have not prepared any mashirnama of identification of the recovered property, the recovered gold ornaments does not disclose its weight and description; the property was handed over to its real owner after carrying out all the formalities”*.

12. Statement of appellant Mour under Section 342 of **The Code** depicts that the alleged recovery of ornaments of gold, two wrist watches and mobile phones etc was not put to appellant Mour to extract his explanation, which cannot be used against him in view of the well settled law. Furthermore the place wherefrom the alleged recovery of ornaments of gold, watches and mobile was shown to have been made is located in heart of Larkana City, where besides the Quaid e Awam University's employees, the security personnel always remain available, but no effort is shown to have been made by the police to associate any independent person from the locality to witness the alleged recovery proceedings, which is violative of mandatory provisions of Section 103 of **The Code**, for, the official making searches, recovery and arrest, are required to associate private persons, more particularly, in case in which the availability of private persons cannot be disputed for the

transparency in the recovery proceedings and to eliminate the chance of fabrication; it is strange enough that one mashir namely Gulzar son of Muhammad Ishaq Bughio (not examined) is brother of complainant Zulfiqar Ali and PW Rajib Ali, who both are the sons of Muhammad Ishaq Bughio and whereas PW Fida Hussain Bughio is also relative of the complainant as is admitted by the latter, stating that *"I am relative of the complainant"*. Reliance in this context is placed on the case of *STATE Vs. BASHIR and others [1997 SC 408]*, wherein the Hon'ble Supreme Court of Pakistan has held that:

"it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."

13. 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 of **The Code**, rendered the credibility of the prosecution witnesses doubtful and their evidence unreliable and 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".

14. In view of what has been stated above, I am of the considered view that 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.”

15. 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 25.03.2021, 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 Criminal Appeals are allowed and conviction and sentence awarded to appellants Ali Khan son of Arbab Ali Mahar, Mour son of Miandad Bughio, Ahmed Ali Fouji son of Faqir Muhammad Sandelo and Muhammad Yousif son of Ghulam Qadir Bughio vide impugned judgment dated 25.03.2021 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.

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

khurram