

171

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.S-63 of 2011

Date of Hearing	ORDER WITH SIGNATURE OF JUDGE
09.03.2020.	


1. For hearing of M. A. No.1499/2012.
2. For hearing of M. A. No.6203/2013.
3. For hearing of Main Case.

M/s Safdar Ali G. Bhutto and Javed Ahmed Soomro, advocates for appellant Ghulam Mohammad Mashori.

Mr. Ali Anwar Kandhro, Addl. P.G.

Mr. Habibullah G. Ghouri, advocate for complainant.

Heard learned Counsel for the appellant, learned Counsel for the complainant and learned Addl. Prosecutor General. For the reasons to be recorded later-on, instant appeal is allowed, conviction and sentence awarded to the appellant vide impugned judgment dated 27.05.2011 in Sessions Case No.22 of 2008 (Re: The State v. Nawab Mashori & others) arisen out of Crime No.02/2008, registered at Police Station K.N. Shah, under Sections 302, 147, 148, 149, 504, PPC, are set aside and appellant Ghulam Mohammad is acquitted of the charge. He is confined in jail; hence, he shall be released forthwith, if not required to be detained in any other case.


JUDGE

2. Brief facts giving rise to this appeal are that, on 02.01.2008 at 2200 hrs., complainant Dhani Bux lodged the aforesaid F.I.R., alleging therein that on that day he along with his father Haji Shah Passand, cousin Abdul Sattar and uncle Zakir Hussain was present in the land to look after water rotation when at about 1600 hrs. accused Nawab, Nisar, Ghulam Muhammad, Yaseen and Hakim Ali, duly armed with guns, came there and on the instigation of Hakim Ali, other said accused in prosecution of their common object fired gun shots on his father Haji Shah Passand, who died on the spot. Motive behind the alleged incident was stated in the FIR to be the dispute over irrigation water between the parties

3. During investigation, police inspected place of incident on 03.01.2008 and secured blood stained earth and seven empty cartridges of 12 bore from there. SIP Adam Khan Abro recorded statements of PWs, namely, Abdul Sattar and Zakir Hussain on 05.01.2008. On 10.01.2008, said SIP arrested accused Nawab Mashori and on 17.01.2008, he recovered unlicensed SBBL gun with two live cartridges on the pointation of said accused. After usual investigation, police submitted the report under section 173, Cr. P.C., against accused Nawab, showing accused Nisar, Ghulam Muhammad, Yaseen and Hakim Ali as absconders. Accused Hakim Ali and Ghulam Muhammad were subsequently arrested and sent up for trial by way of supplementary reports, dated 26.06.2008 and 15.12.2008, respectively. After codal formalities, trial Court declared the absconding accused Nisar and Yaseen as proclaimed offenders vide order dated 13.10.2010. The trial Court framed the formal charge against accused Nawab, Hakim and Ghulam Muhammad, to which they pleaded not guilty and claimed trial.

4. At the trial, in order to substantiate the charge against the accused, prosecution examined seven witnesses. P.W-1 Dr. Arbab Ali, the medical officer, examined at Exh.10, who produced police letter at Exh.11 and

postmortem report at Exh.12. He while conducting postmortem examination on the dead body of the deceased Haji Shah Passand observed following injuries on the person of the deceased:

INJURIES:

1. Firearm injury (entry wound) 1 cm in diameter on left side of neck.
2. Firearm injury (exit wound) 1.5 cm in diameter on right side of neck.
3. Firearm injury (entry wound) 1 cm in diameter on upper and right side of chest.
4. Firearm injury (exit wound) 1.5 cm in diameter lateral to deep scapular region of chest back side.
5. Firearm injury (entry wound) 1 cm in diameter on upper and lateral side of left upper arm.
6. Firearm injury (exit wound) 1.5 cm in diameter on upper and lateral side of left upper arm.

OPINION:

After doing the external and internal postmortem examination of deceased Shah Passand son of Dhani Bux Mashori, I am of the opinion that death has occurred due to loss of heavy blood and respiratory failure due to all injuries collectively i.e. 1,2,3,4,5 and 6. All the injuries were caused by firearm anti mortem in nature. Injury No. 1,2,3 & 4 were sufficient to kill a person in ordinary course of life.

P.W-2 Dhani Bux, the complainant, examined at Exh.13, who produced FIR at Exh.14 and receipt of receiving dead body of deceased at Exh.15. P.W-3 Zakir Hussain, the eye-witness, examined at Exh.16. P.W-4 H.C Muhammad Malook Hingoro, the corpse carrier, examined at Exh.18. P.W-5 Khadim Hussain Mashori, the mashir, examined at Exh.19, who produced memo of examination of dead body of deceased at Exh.20, inquest report at Exh.21, memo of place of incident at Exh.22, memo of recovery of clothes of deceased at Exh.23, memo of arrest of accused Nawab at Exh.24. He also produced blood stained earth, empty cartridges recovered from place of incident and clothes of the deceased as Articles 1 to 3, respectively. P.W-6 H.C Zulfiqar Ali Mangi, the mashir, examined at Exh.25, who produced mashirnama of recovery of gun from accused Nawab at Exh.26. He also produced SBBL gun in sealed parcel and two

live cartridges recovered from accused Nawab as Articles 4 & 5, respectively. P.W-7 SIP Adam Khan Abro, the investigating officer, examined at Exh.27, who produced Chemical and Ballistic Expert's reports at Exh.28 and 29, respectively.

5. The statements of the accused Nawab, Ghulam Muhammad and Hakim Ali under section 342, Cr. P.C were recorded at Exh.32 to 34, respectively, wherein they claimed innocence. They, however, declined to examine themselves on oath under section 340(2), Cr. P.C or to lead evidence in their defense.

6. Learned counsel for the appellant has mainly contended that the learned trial Court has erred on the facts and law while passing impugned judgment; that the learned trial court failed to assess and evaluate the evidence adduced by the prosecution at trial properly; that the ocular testimony is not worthy of the credit, being full of contradictions and the improvement; that the learned trial Court has chosen not to reproduce any part of the evidence of the prosecution witnesses in the impugned judgment; that the conviction of the appellant is based upon manifestly un-satisfactory evidence; that the assessment made by the learned trial court is based on misreading and non-reading of the evidence on record; that it is case where prosecution has miserably failed to bring home charge against the appellant and benefit thereof should have been extended to appellant; that the proclaimed offenders, namely, Nisar and Yaseen were subsequently arrested by the police, they were sent up for trial whereafter accused Nisar was convicted while Yaseen acquitted of the charge by the trial Court on the basis of same evidence vide judgment dated 08.01.2019 by extending benefit of doubt; hence, the appellant is also entitled to the same concession. In support of his contentions, learned counsel for the appellant have relied on the case of *Mumtaz Ali and another v. The State (2013 YLR 1619)*.

7. Per contra, learned counsel for the complainant and Addl. P.G. have fully supported the impugned judgment. They have maintained that it was a daylight incident and the appellant has been nominated in the FIR with specific role of sharing common intention to cause murder of the deceased and causing firearm injury to him on his left upper arm; that the prosecution witnesses have fully connected the appellant in their evidence with the commission of alleged offence; that medical evidence also confirms ocular testimony regarding injuries sustained by the deceased; that Forensic Science Laboratory (FSL) report in respect of 12 bore SBBL gun recovered from appellant/accused Nawab (*now deceased*) proves that the same was used in the commission of alleged offence by him.
8. Heard the learned counsel for the appellants, complainant and Addl. P.G as well as scanned the material available on record with their assistance.
9. A careful analysis of the impugned judgment would show that the learned trial Court has not made meticulous analysis of the statements of the above said eye-witnesses rather observed that the challan was submitted on 25.01.2008 showing accused Ghulam Muhammad and others as absconder and he was declared proclaimed offender vide order dated 03.09.2008, but subsequently arrested; as such, his ascendance period of ten months is against him. By perceiving so, at the end, trial Court has drawn conclusion of appellant being guilty under section 302(b), P.P.C, which seems to be without any assessment of evidence on record, perfunctory and mechanical.
10. It appears from the perusal of record that the prosecution case against the appellant rests upon ocular testimony, consisting of two witnesses, namely, P.W-2 complainant Dhani Bux and P.W-3 Zakir Hussain. Both the said witnesses are respectively son and real brother of

the deceased. They while reiterating the contents of the FIR deposed that accused Nawab fired at the deceased which hit him on his left neck, accused Nisar fired at the chest of the deceased and accused Ghulam Muhammad and Yaseen also fired shot which hit the left arm of the deceased.

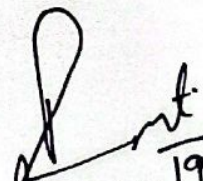
11. As per ocular account furnished by the P.W-2 complainant Dhani Bux and P.W-3 Zakir Hussain Ghulam, both Ghulam Muhammad and Yaseen fired shots at the left arm of the deceased. If so, then there must have been at least two firearm injuries being entry wounds on left arm of the deceased. This piece of evidence of the said prosecution witnesses is inconsistent with the medical evidence, which suggests only one injury viz. injury No.5 (entry wound) and No.6 (exit wound) on the upper and lateral side of left upper arm of the deceased. No evidence has been brought on record as to who in fact caused said injury which has been attributed to two accused persons. Furthermore, P.W-1 Dr. Arbab Ali in his cross-examination has not ruled out the possibility of causing injuries to deceased with single weapon by one shot. It is fundamental defect in the prosecution case/evidence and unless reasonably explained it is sufficient to discredit the same.

12. Another aspect of the matter is that after the conviction of the present appellant vide impugned judgment, co-accused Yaseen was arrested on 14.10.2013, who was sent up through supplementary challan to face trial and subsequently he was acquitted of the charge by the trial Court vide judgment dated 08.01.2019 while, the appellant was convicted on the same set of evidence. It goes without saying that rule of consistency demands that if an accused has been exonerated from the charge on the basis of certain evidence and extended benefit of doubt, co-accused charged with similar allegations is also entitled to the same concession. The Honourable Supreme Court in the case of *Umar Farooque v. The State*

(2006 SCMR 1605) has observed "on exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of he witnesses, Umar Farooque could be convicted".

13. In view of the above stated facts and discussion, I am of the considered view that in the instant case there is no convincing and trustworthy evidence against the appellant to connect him with the commission of alleged offence and thus, prosecution has miserably failed to prove its case against them beyond reasonable doubt. I therefore, allow this criminal appeal, set aside the conviction and sentence of the appellant and acquit him of the charges. He be set at liberty forthwith, if not required to be detained in any other case.

14. Above are the reasons of my short order announced in open Court on 09.03.2020.


JUDGE 19/03/20

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. **S-63** of 2011

Appellant : Ghulam Muhammad s/o Nawab Mashori,
through M/s. Safdar Ali G. Bhutto and
Javed Ahmed Soomro, advocates

Respondent : The State, through Mr. Ali Anwar Kandhro
Additional Prosecutor General

Complainant : Dhani Bux s/o Haji Shah Passad Mashori,
through Mr. Habibullah G. Ghouri,
advocate
M.

Date of Hearing : 09.03.2020

Date of Order : 09.03.2020

JUDGMENT

ZAFAR AHMED RAJPUT, J: This Criminal Appeal is directed against the judgment, dated 27.05.2011, passed by the learned 1st Addl. Sessions Judge, Dadu in Sessions Case No.22 of 2008, arising out of FIR No.2 of 2008, registered under sections 302, 147, 148, 149, 504, P.P.C. at police station K. N. Shah, whereby the appellants/accused, namely, Nawab s/o Ghulam Hussain Mashori and Ghulam Muhammad s/o Nawab Mashori were convicted for the offence punishable under section 302(b), P.P.C. as Ta'zir and sentenced to imprisonment for life and to pay fine of Rs.50,000/- each, which on recovery shall be payable to the legal heirs of deceased Shah Passand and in default thereof to undergo further R.I for two months. Benefit of section 382-B, Cr. P.C., however, was extended to appellants. While co-accused Hakim Ali was acquitted of the charge by extending him the benefit of doubt and case against the proclaimed offenders, namely, Nisar and Yaseen was ordered to remain on dormant file, till they are arrested. During pendency of this appeal, appellant Nawab Mashori expired on 23.06.2015 in Jail Ward of C.M.C. Hospital, Larkana hence, vide order dated 28.07.2015, proceedings of appeal to the extent of appellant Nawab Mashori stood abated on account of his death.

