

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.**

Criminal Jail Appeal No.D-107 of 2004.

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.

Mr. Justice Khadim Hussain M. Shaikh.

Date of hearing: 19.10.2017

Date of decision: 19.10.2017

Appellant: Abdullah through Ms. Nasira Shaikh, Advocate.

The State: Through Syed Meeral Shah A.P.G.

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J U D G M E N T

MUHAMMAD IQBAL KALHORO,J:-The appellant Abdullah has impugned the judgment dated 29.04.2004 passed by 1st Additional Sessions Judge, Badin whereby he was convicted under section 302(b) PPC and sentenced to suffer imprisonment for life and to pay fine of Rs.50,000/- with the condition that if fine is recovered, half of it will be paid to the legal heirs of deceased Saeed Khan and in case the fine is not deposited, he would suffer S.I for six months more. He was also convicted under section 337-A(ii) for three years and to pay fine of Rs.10,000/- and in case of default thereof to suffer S.I for one month more.

2. The brief facts of the prosecution case are that on 17.11.1990 at 2330 hours, the complainant Muhammad Khan lodged FIR No.146/1990, stating therein that he is farmer and cultivates his land. There was a dispute of his cousin Shafi Muhammad with Lalo, Bachal and others over some chattels. On the day of incident i.e 17.11.1990 he alongwith Saeed Khan was going to the village Arbab Hussain and when at about 5 p.m, they were passing

by the otaq of Abdullah Mugheri, he armed with hatchet, Allah Dino with Lathi, Allah Warayo @ Pireen with hatchet and Yaro Mugheri emerged from there and challenged them that they had made dispute with them hence they would not be spared. Thereafter, accused Abdullah caused hatchet injury to the complainant whereas Allah Warayo @ Pireen caused hatchet injury to Saeed Khan. The other accused caused kicks and fists blows to them. All the four accused forcibly confined them there by folding their hands and feet. Thereafter the relatives of complainant party namely Bachal, Abdullah son of Sohrab Mugheri, Ghulam Hussain and others arrived at the spot and rescued them. Resultantly, FIR as stated above was lodged by the complainant.

3. After registration of F.I.R., the police started investigation and arrested appellant on 20.11.1990 and so also co-accused Allah Warrayo, Allah Dito and Yar Muhammad on 21.11.1990, and allegedly recovered the crime weapons i.e the two hatchets from them. Then, after completing due formalities the police submitted challan against the appellant as well as co-accused leading to commencement of the trial against them.

4. A formal charge was framed against the appellant Abdullah and co-accused named above at Ex.2, who pleaded not guilty and claimed trial.

5. In the trial, the prosecution has examined Complainant Muhammad Khan as Ex.11, P.W Bachal as Ex.13, P.W Dr. Muhammad Hassan as Ex.17, P.W Ghulam Hussain as Ex.18, P.W Shafi Muhammad as Ex.27, P.W Tawak Ali as Ex.28, P.W Muhammad Ismail as Ex.33 and P.W Raja Mazhar Hussain as Ex.34. They have produced all the necessary documents viz. F.I.R., mashirnamas of arrest of accused, mashirnama of dead body, statements under section 164 Cr.P.C, provisional medico legal certificates, mashirnama of place of incident, mashirnamas of recoveries, etc. Whereafter prosecution closed its side vide Ex.36.

6. Statements of appellant and co-accused accused were recorded under section 342 Cr.P.C in which they have denied the allegations and pleaded innocence. They, however, neither examined themselves on oath nor led any evidence in their defense.

7. The learned trial Court after concluding the evidence and hearing the parties, while acquitting the co-accused, convicted the appellant in the terms as stated above.

8. Miss Nasira Shaikh learned Counsel for appellant Abdullah has argued that the appellant is innocent and has been falsely implicated in this case; that the evidence against the appellant is shaky and full of contradictions but the learned Trial Court has not appreciated the same; that in the F.I.R. the complainant has alleged that appellant Abdullah had caused sharp side hatchet injury to him, whereas, co-accused Allah Warrayo had caused sharp side hatchet injury to Saeed Khan, who subsequently died but in the evidence he has improved the story and has deposed that not only Allah Warrayo caused sharp side hatchet injury on the head of Saeed Khan (deceased) but accused Abdullah also caused sharp side hatchet injury on the forehead of deceased Saeed Khan; that such disclosure of the complainant in the evidence regarding role attributed to appellant Abdullah is in total contradiction with the role attributed to him in the F.I.R, but the trial Court has completely ignored this fact; that strangely the trial court acquitted co-accused Allah Warrayo, who is not only attributed the main role of causing hatchet injury to the deceased in the F.I.R. but in the deposition of the complainant as well, and has convicted the appellant Abdullah for life imprisonment, who has not been assigned any role of causing injury to the deceased in the FIR; that judgment of the trial court, therefore, suffers from irregularities and illegalities and is not sustainable in law. Learned counsel further argued that the statement of the appellant under section 342, Cr.P.C has been recorded in stereo type manner and the incriminating piece of evidence that he caused hatchet injury to the deceased was not even put to him for the purpose of seeking his explanation and, therefore, such piece of evidence cannot be relied upon for the purpose of convicting the appellant.

9. Learned Additional Prosecutor General Sindh after going through the evidence of the prosecution witnesses has not supported the impugned judgment.

10. We have considered the submissions of the parties and have perused the material available on record. The prosecution in all have examined eight (8) witnesses, out of them the complainant is the only eye-witness of the incident. This incident is alleged to have taken place on 17.11.1990 at about 06:00 p.m, whereas, its report was registered on the same day at 2230 hours at P.S Badin after about 5 ½ hours. Initially, the F.I.R. was registered under section 324, 323, 342, 504 PPC, but subsequently on account of death of deceased Saeed Khan on 18.11.1990, the offence under section 324 PPC was converted into offence under section 302 PPC. In the F.I.R. the complainant has disclosed that when at the time of incident they were passing by Otaq of Abdullah Mugheri, appellant Abdullah armed with hatchet, Allah Ditto having lathi, Allah Warrayo having hatchet and one Yar Muhammad came out of it and after abusing them appellant Abdullah caused him sharp side hatchet below on his head, whereas, accused Allah Warrayo caused sharp side hatchet below to Saeed Khan, the deceased, and the remaining accused also caused them lathi and fists blows meanwhile. However, in the evidence he has improved the story and has stated that not only accused Allah Warrayo caused sharp side hatchet blow to the deceased but appellat Abdullah also caused him sharp side hatchet blow on his head. The evidence of Medico Legal Officer, P.W-5 Ex.15, reveals that deceased received only one incised wound on left upper parietal region, which proved to be fatal, the other was swelling over his left eye lid with blue discolouration. As per complainant's evidence two persons had caused sharp side hatchet blows to the deceased, but medical evidence has disproved this fact and shows that there is only one such injury. The complainant's evidence is, therefore, contradictory to the medical evidence. Nonetheless, it would be relevant to note that if the said injury is seen in the backdrop of the story of the F.I.R; it would not be difficult to conclude that it is attributed specifically against co-accused Allah Warrayo. But, if this injury is looked at through the prism of evidence of the complainant disclosing that both the accused caused sharp side injury each with their hatchets to the deceased, it would be very difficult (because there is only one injury) to determine as to out of two accused, the appellant and co-accused Allah Warrayo, who caused the said injury to the deceased.

However, it is obvious that in both the situations discussed above the said injury cannot specifically be attributed to appellant Abdullah.

11. In our estimation, the complainant has improved the prosecution story in deposition and has materially deflected from the revelation made by him in the F.I.R. He has contradicted himself by stating that appellant Abdullah too had caused hatchet injury to the deceased. It is a well established principle of criminal jurisprudence that if there is a single circumstance creating reasonable doubt in the prudent mind over the prosecution case, the benefit of which has to be extended to the accused not as a matter of grace but as a matter of right.

12. In addition to above, we have noted the statement of appellant under section 342, Cr.P.C has been recorded in a formal way. The learned Trial Court has framed question No.1 in stereo type manner that all the accused in furtherance of their common intention injured deceased Saeed Khan without putting the specific incriminating piece of evidence deposed by the complainant against him for seeking his explanation thereon. We have also noted that although in the F.I.R. and in the evidence of complainant co-accused Allah Warrayo is equally implicated but by impugned judgment the trial Court has acquitted said co-accused and has convicted appellant Abdullah without forwarding convincing reasons. The conclusion drawn by the Trial Court is not only against the facts of the case but the same militates the well established principles of law regulating appreciation of evidence in the criminal cases. The appellant has not only been visited with the conviction and sentence of imprisonment for life under section 302(b) PPC through the impugned judgment but he has also been convicted under section 337-A(ii) PPC for causing injury to the complainant and sentenced to suffer R.I for three years and to pay fine of Rs.10,000/-, and in default in payment of fine to suffer S.I for one month more. But neither in the charge this fact is specifically mentioned nor any such evidence has been put to the appellant Abdullah in his statement under section 342, Cr.P.C so that he could have explained it. It is a well settled law that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C for his explanation, the same cannot be relied upon for the purpose of convicting

him, Therefore, in our view, the conviction of the appellant Abdullah under Section 337-A(ii) PPC is not maintainable either.

13. For the foregoing discussion, we are of the view that the prosecution has not been able to prove its case against appellant Abdullah beyond a reasonable doubt, therefore, while extending the benefit of doubt to him we acquit him of the charge and order his release forthwith if not required in any other case. These are the reasons of our short order dated 19.10.2017.

JUDGE

JUDGE