

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S- 157 of 2016

Appellant Muhammad
Siddique : Through Mr. Muhammad
Yaseen Laghari, Advocate

State : Through Ms. Sana
Memon, A.P.G, Sindh

Complainant Muhammad
Umar : Present in person

Dates of hearing & judgment : 26.10.2020

JUDGMENT

Muhammad Saleem Jessar, J.-Through instant criminal appeal, appellant Muhammad Siddique S/o Muhammad Achar has assailed judgment dated 09.08.2016, passed by the learned Additional Sessions Judge, Tando Allahyar, in Sessions Case No. 100 of 2014 (re: The State v. Muhammad Siddique), being outcome of F.I.R. No.09 of 2014, registered at Police Station Bukera Sharif, under sections 302, 311 PPC, whereby he was convicted under section 302(B) PPC and sentenced to suffer RI for life. However, he was extended benefit of section 382-B PPC.

2. Facts of the case, in nutshell, as stated in the FIR lodged at P.S Bukera Sharif by complainant Khaman alias Muhammad Umar on 16.05.2014 at 1800 hours are, that complainant resides with his brothers at Tando Allahyar. About two years back his sister namely Mst. Samani alias Guddi left their house to get married with one Mehar son of Siddique Masrak; upon which, his brother Muhammad Siddique was annoyed. Thereafter, on 15.05.2014 sister of complainant Samani came at the house of Siddique alias Basar Masrak at 1000 hours and complainant alongwith his younger brother

Muhammad Umar and Haroon Masrak went to house of said Siddique alias Basrak and when after taking Mst. Samani with them were on their way, accused Muhammad Siddique took out his licensed pistol from fold of his Shalwar and while raising Hakal (accosting) made straight fire shots from his said pistol upon Mst. Samani, as a result thereof she received injuries and died at the spot. Then accuse fled away. Thereafter, complainant party saw that Mst. Samani received fire shot injuries on right side of her head, back, backbone and right side arm. Thereafter, complainant informed their Nek Mard namely Muhammad Ismail Masrak and then lodged such F.I.R.

3. After completing formal investigation, I.O submitted the challan against the accused and the documents required u/s 265-C Cr. P.C. were provided to him vide receipt Ex.01.

4. A formal charge was framed against the accused at Ex.02, to which he pleaded not guilty and claimed to be tried vide his Plea Ex.02/A.

5. In order to prove its case, prosecution complainant Muhammad Umar at Ex.03, who had produced F.I.R. at Ex.3/A; P.W-2 Muhammad was examined at Ex.04; P.W-3 Haroon was examined at Ex.05; P.W-4 Ismail was examined at Ex.06; P.W-5 Ghulam Mustafa was examined at Ex.07, who produced mashirnama of examination of dead body at Ex.7/A, danishnama at Ex.7/B, mashirnama of clothes at Ex.7/C, mashirnama of site inspection at Ex.7/D, mashirnama of arrest and recovery at Ex.7/E; P.W-6 Dr. Yasmeen Senior WMO at Civil Hospital, Tando Allahyar was examined at Ex.08, who produced letter of police at Ex.8/A, Lash Chakas form at Ex.8/B, Provisional Medical Certificate at Ex.8/C, receipt of dead body at Ex.8/D, letter at Ex.8/E, Chemical Report at Ex.8/F and final post mortem report at Ex.8/G; P.W-7 Khair Muhammad Tapedar was examined at Ex.09, who has produced four copies of sketch as Exs.9/A to 9/D; P.W-8 I.O Habibullah was examined at Ex.10, who produced entry No.4 at Ex.10/A, entry No.9 at Ex.10/B, entry No.12 at Ex.10/C, certified true

copy of statement u/s 164 Cr.P.C. of P.W Haroon at Ex.10/D, statement u/s 164 Cr.P.C. of Muhammad Masrak at Ex.10/E and report of FSL at Ex.10/F; P.W-9 Mr. Khalid Hussain, Judicial Magistrate-I, Tando Allahyar was examined at Ex.12, who produced letter at Ex.12/A, receiving copy of notice to accused at Ex.12/B, receiving copy of notice upon P.Ws Muhammad Haroon and Muhammad Masrak at Ex.12/C, original statement u/s 164 Cr.P.C. of P.W Haroon at Ex.12/D, original statement u/s 164 Cr.P.C. of P.W Muhammad at Ex.12/E. Thereafter, prosecution side was closed by learned DDPP, vide statement Ex.13.

6. Statements of accused U/S: 342 Cr. P.C. was recorded vide Ex.14, in which he denied the prosecution allegations. He has stated that he has been falsely involved in the present case by the complainant. He prayed for justice and mercy. However, neither he opted to appear in witness box to examine himself on Oath under Section 340(2) Cr. P.C. in disproof of charge, nor produced any witness in his defence.

7. After formulating points for determination, recording of evidence, hearing learned advocate appearing for the appellant / accused as well as the learned DDPP appearing for the State, learned trial Court convicted and sentenced the appellant as stated above.

8. Learned counsel for appellant has completed reading of evidence of all prosecution witnesses and argued that prosecution has implicated the appellant with malafide intention; that the case against the appellant is false and fabricated; that the prosecution has failed to prove its case through trustworthy evidence and there are contradictions in the evidence of witnesses; that all prosecution witnesses are related inter se hence interested and no independent and private person / witness of the locality has been cited to corroborated the ocular version; that while recording their statements before the trial Court all material / eyewitnesses were declared by learned DDPP as hostile; therefore, their evidence cannot be taken as

confidence inspiring. He further submitted that evidence of Investigating Officer is also very important, as he too send the crime weapon i.e. pistol allegedly recovered from the possession of the appellant, after a delay of 20 days from its recovery; that the side map prepared by Tapedar of the beat does not bear proper date on which it was prepared; therefore, the evidence of Tapedar also lose its sanctity. Hence, prosecution has failed to prove its case against appellant beyond any reasonable shadow of doubt.

9. Learned A.P.G appearing on behalf of State opposed the appeal and submitted that all prosecution witnesses have fully supported the case of prosecution and have implicated the appellant. She; however, could not controvert the admitted fact i.e. the complainant as well as alleged eye-witnesses and mashirs including Tapedar of the beat had not supported the case of prosecution and almost all prosecution witnesses except Tapedar have also been declared by the prosecution to be hostile witnesses.

10. I have heard learned counsel for the appellant / accused, learned A.P.G. appearing for the State as well as the complainant, who was present in person.

11. It seems that in the F.I.R. complainant has stated that appellant on fateful date and time had murdered Mst. Samani by causing fire shots injuries to her and then ran away. Both eyewitnesses namely Muhammad and Haroon, while examining before Magistrate under section 164 Cr.P.C. although deposed against appellant; however, at the time of recording their evidence before trial Court have not supported the prosecution version and were declared hostile by learned DDPP and also subjected to lengthy cross but nothing against the appellant could be brought against appellant. Besides this, mashirs of the events conducted in this case as well as Tapedar of the beat had also not supported the prosecution case and almost all prosecution witnesses were declared hostile except Tapedar;

however, the site map produced by him does not bear proper date on which it was allegedly prepared, hence it has lost its sanctity.

12. Particularly, while examining before the trial Court, complainant Muhammad Umar has stated that *"I am complainant in the present case. Present accused Muhammad Siddique is my real brother, while deceased Mst. Samani alias Guddi was my sister, and had left the house and went away with our relative namely Muhammad. However, dispute arose between them and said person had turned her out from his house after beating, therefore, she came back to the house of father of said Muhammad.----- I had heard about the incident by sister had been murdered. I do not know who had murdered my sister. ----- The contents of F.I.R. were not read to me. The accused present in Court was not nominated by me in the F.I.R. and police had given his name in the F.I.R."* Consequently, learned DDPP, appearing for the State, requested the trial Court to declare complainant as hostile. Accordingly, he was declared hostile and was cross-examined by learned DDPP wherein he deposed that *"----- It is correct that in the FIR I have not mentioned any person as suspected. It is incorrect that I have disclosed the name of Muhammad Siddique as killer of my sister."* P.W-2 Muhammad (Ex.4), who is said to be brother of the complainant as well as eye-witness of the incident while recording his evidence before the trial Court has stated that *" I do not know who had killed my sister. My statement was recorded but the same was not read over to me and the statement was written at the instance of police."* Whereas P.W-3 Haroon who per F.I.R, was also present at scene alongwith complainant and P.W Muhammad, in his examination-in-chief has stated that *"Complainant is my relative. I do not know anything about this incident."* Both these P.Ws were also declared hostile and cross-examined by the learned ADPP. Similarly, remaining prosecution witnesses namely P.W-4 Ismail (Ex.06), Mashir Ghulam Mustafa (Ex.07) were also declared hostile by learned DDPP before trial Court.

13. So far as the evidentiary value of a hostile witness is concerned,

it is a settled proposition of law that the evidence of such witness is also to be considered like evidence of any other prosecution witness but evidence of such witness requires strong corroboration through other pieces of evidence. In this context, reference may be made to the case of **Abdul Wahid Bhurt and another Vs. Ashraf and 4 others** reported in 2019 YLR 487 decided by Federal Shariat Court, wherein after discussing various case-law on this point, following dictum was laid down:

"11. In the light of the above principles it is settled that the testimony of a hostile witness cannot be altogether left out of consideration. The evidence of a hostile witness has to be considered like the evidence of any other witness, but with a caution for the simple reason that the witness has spoken in different tones. When a witness speaks in different voices, it would be for the Court to decide in what voice he speaks the truth. In such cases, the determining test is corroboration from independent source and conformity with the remaining evidence."

14. Therefore, in the light of above dictum, it is to be seen as to whether the evidence of hostile witnesses / complainant has been corroborated by any other independent piece of evidence. Admittedly, there are three alleged eye-witnesses of the incident i.e. the complainant Muhammad Umar, his brother P.W-2 Muhammad and P.W-3 Haroon. It seems that all prosecution /eyewitnesses have completely exonerated the present appellant from commission of alleged offence. They more or less have mentioned that they did not see the incident and / or present appellant while committing the offence.

15. It is a well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the

case reported as Wazir Muhammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

*“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but **no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.**”*

16. In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

*“The prosecution must prove its case against the accused beyond reasonable doubts **irrespective of any plea raised by the accused in his defence.** Failure of prosecution to prove the case against the accused, entitles the accused to an **acquittal.**”*

17. The issue before me is simply what evidence is there to prove that the appellant murdered Mst. Samani and does this evidence prove beyond a reasonable doubt that the appellant murdered the deceased. The 03 key prosecution witnesses while recording their evidence before the trial Court have resiled from their FIR and statements under S.164 Cr.P.C respectively that the appellant murdered Mst. Samani. It is true that in the case of **Wahid v. State** (NLR 2002 Criminal 6) it was observed that evidence of a hostile witness can be taken into consideration so as to find out if the said witness was worthy of belief in the light of other evidence. In this case however all 03 of the key prosecution witnesses who were all declared hostile, resiled from their F.I.R. as well as statements under S.164 Cr.P.C that the appellant murdered Mst. Samani. It is settled law that evidence on oath will trump S.164 statement(s) which were later denied. Thus, there is no direct ocular evidence that appellant had murdered Mst. Samani.

18. Moreover, another crucial point in this case is that, appellant was arrested on 16.05.2014 alongwith offensive weapon; however, said crime weapon sent by said I.O for report received in Forensic Science Laboratory on 03.06.2014 i.e. after a delay of 20 days. Most significantly, I find that there is absolutely no evidence on record to

show that alleged crime weapon was kept in safe custody from the time of its recovery until it was sent to and received in the office of Chemical Examiner, which was an unexplained delay of 20 days; that it is the case of prosecution that during intervening period when the alleged pistol was recovered and sent to Chemical Examiner for report it was kept in Malkhana; however, no entry with regard to keeping such pistol in safe custody has been brought on record to substantiate such contention. The aspect of the case has cause a dent in the prosecution case. During the course of arguments, Court has specifically asked the question from learned A.P.G to explain that during such intervening period of 20 days before and with whom the case property was lying and in case it was lying in Malkhana whether any evidence with regard to safe custody has been brought on record to corroborate this fact, she has no satisfactory answer. Under these circumstances, in my view, there is every possibility that the alleged recovered pistol during the said 20 days' delay in sending it to the chemical examiner may have been interfered with.

19. In view of aforesaid circumstances of the case, it can safely be held that prosecution has not succeeded in proving its case against the accused / appellant beyond shadow of reasonable doubt as such the impugned judgment is liable to be set aside. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In the present case, none of the P.Ws including complainant and mashirs while examining before the trial Court has implicated the appellant with commission of alleged offence and they all were declared hostile by the learned DDPP.

20. For the foregoing reasons, by a short order passed on 26.10.2020, instant Criminal Appeal was allowed. Consequently, Judgment dated 09.08.2016, passed by the learned Additional Sessions Judge, Tando Allahyar, in Sessions Case No. 100 of 2014 (re: The State v. Muhammad Siddique), being outcome of F.I.R. No.09 of 2014, registered at Police Station Bukera Sharif, under sections 302, 311 PPC was

set aside. Resultantly, the appellant / convict Muhammad Siddique S/o Muhammad Achar was acquitted of the charges. He was in custody and was, therefore, ordered to be released forthwith if his custody was no longer required by jail authorities in any other custody case.

21. Above are the reasons for the said short order.

JUDGE

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