

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No.S -94 of 2015

Appellant: Allah Rakhio son of Gul Muhammad Jamali ,
Through Mr. Sajjad Ahmed Chandio Advocate

Complainant: Ali Asghar son of Kamal Khan Jamali
Through Mr. Muhammad Jamil Ahmed Advocate

Respondent: The State, through Ms. Sobia Bhatti, A.P.G.

Date of hearing: 04-12-2020.

Date of decision: 04-12-2020.

JUDGMENT

IRSHAD ALI SHAH, J: The appellant by way of instant Criminal Appeal has impugned judgment dated 17-06-2015 passed by learned 1st Additional Sessions Judge Dadu, whereby he has been convicted and sentenced as under;

- “1. I found the accused Allah Rakhio son of Gul Muhammad Jamali resident of village Shahdad Jamali Taluka Johi District Dadu guilty for committing offence u/s 395 PPC and convict him u/s 265-H(ii) Cr.P.C as such sentence him R.I for Seven Years (07 years) and he shall pay the fine amount Rs.20,000/- (Rupees Twenty Thousands only) in default of fine amount he shall further undergo S.I for Six Months (6 Months).*
- 2. The accused is found guilty for committing offence u/s 148 PPC and sentenced R.I for One year (01 year).*
- 3. The accused found guilty for committing offence u/s 302 (b) read with section 149 PPC and convicted u/s 265-H(ii) Cr.P.C and sentenced R.I for Life Imprisonment, he shall pay amount of Rs1,00,000/- (One Hundred Thousand) as fine. In default of fine amount he shall further undergo*

S.I for Six Months (6 months). However, if the fine recovered, the same shall be paid to the L.Rs of deceased Nizamuddin Jamali as compensation as provided u/s 544-A Cr.P.C.

4. *The accused found guilty for committing u/s 324 PPC and sentenced R.I for Five Years (5 years) and he shall pay amount Rs.30,000/- (Thirty Thousands) as fine, if the fine recovered, the same shall be paid to all the three victims in equal shares as compensation.*
5. *Accused found guilty for committing offence u/s 504 PPC and sentenced R.I for six Months (6 months).*
6. *Accused found guilty for committing offences u/s 337-Hii PPC and sentenced R.I for One Month (1 month).*
7. *Accused found guilty for committing offences u/s 337-F(iii) PPC for causing hurt to Pw Asad Ali Jamali and sentenced R.I for Two Years and he shall pay Daman of Rs.25,000/-to him.*
8. *Accused found guilty for committing offences u/s 337-F(v) PPC for causing hurt to Pw Khadim Hussain and sentenced R.I for Three Years and he shall pay Daman of Rs.25,000/-to him.*
9. *Accused found guilty for committing offences u/s 337-F(iii) PPC for causing hurt to Pw Muhammad Yaseen Jamali and sentenced R.I for Two Years and he shall pay Daman of Rs.25,000/- to him.”*

2. The facts in brief necessary for disposal of instant appeal are that the appellant with rest of the culprits during course of robbery of two bufelloes of complainant Ali Asghar not only committed murder of Nizamuddin but caused fire shot injuries to Pws Khadim Hussain, Muhammad Yaseen and Asad Ali with intention to commit their murder and then went away by making aerial firing to create harassment, for that they were booked and reported upon.

3. At trial, the appellant did not plead guilty to the charge and the prosecution to prove it, examined complainant Ali Asghar and his witnesses and then closed the side.

4. The appellant in his statement recorded u/s.342 Cr.P.C denied the prosecution allegation by pleading innocence by stating that he has been involved in this case falsely by the complainant party on account of previous enmity. In order to prove enmity, the appellant produced certain documents. He however, did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

5. On conclusion of the trial, learned trial Court convicted and sentenced the appellant, as is detailed above, by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in order to satisfy its old enmity with him; the FIR of the incident has been lodged with delay of about three days; Pws Yaseen and Khadim have not been examined by the prosecution; no buffaloe allegedly robbed was secured by the police; there is no recovery of any sort from the appellant and evidence of the prosecution being doubtful has been believed by learned trial Court without lawful justification. By contending so, he sought for acquittal of the appellant. In support of his contention he has relied upon cases of *Khalid @*

Khalidi and 2 others vs The State (2012 SCMR 327) and Hakim Ali and 4 others vs The State and another (1971 SCMR 432).

7. Learned A.P.G for the State and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the instant appeal by contending that the delay in lodgment of FIR is explained; non examination of the Pws Yaseen and Khadim Hussain is not fatal to the prosecution; the appellant had actively participated in commission of incident and he has rightly been convicted by learned trial Court on the basis of proper assessment of evidence. In support of their contention they have relied upon cases of *Muhammad Ahmad (Mahmood Ahmed) and another vs The State (2010 SCMR 660) and Munir Ahmad vs The State (2020 SCMR 968).*

8. I have considered the above arguments and perused the record.

9. Initially the incident was recorded in Roznamcha under entry No.11 dated 11.05.2012, therein appellant is not ascribed as an accused, which appears to be significant. Subsequently on 14.11.2012, the formal FIR of the incident was lodged by the complainant Ali Asghar. It was with delay of about three days to the incident, therein the name of appellant was disclosed first time as an accused, with an allegation that he has not only participated in robbery of buffaloes but has caused fire shot injury to PW Asad Ali with intention to commit his murder.

Delay in lodgment of FIR by three days, having not been explained plausibly by the complainant could not be overlooked. PWs Yaseen and Khadim Hussain being injured witnesses of the alleged incident have not been examined by the prosecution. The presumption which could be drawn of their non-examination would be that they were not going to support the case of prosecution. Neither memo of recovery of alleged robbed buffaloes was prepared by the police nor it is produced at the trial by the complainant party, such omission prima facie has made the allegation of robbery of the buffeloes to be doubtful. As per medical officer Dr. Vijay Parkash, PW Asad Ali sustained fire shot injury at his left knee joint. PW/Mashir Muhammad Mithal has come with the different version. As per him PW Asad Ali has sustained fire shot injury on his lower part of right leg under knee. Such contradiction goes to suggest that PW/Mashir Muhammad Mithal has not witnessed the preparation of memo of injuries personally. The appellant has been attributed role of causing fire shot injury to PW Asad Ali on his left knee joint. As per PW Asad Ali his 161 Cr.P.C statement was recorded by the police on 12.05.2012. If it was so, then it was earlier by two days even to registration of FIR, which appears to be surprising. There is no recovery of crime weapon from the appellant. In these circumstances, it could be concluded safely that the involvement of the appellant in the present case the prosecution has not been able to prove beyond shadow of doubt.

10. In case of *Faheem Ahmed Farooqui vs. The State (2008 SCMR-1572)*, it is held that;

“single infirmity creating reasonable doubt regarding truth of the charge makes the whole case doubtful.

11. The case law which is relied upon by learned A.P.G for the State and learned counsel for the complainant is on distinguishable facts and circumstances. In those cases neither there was delay in lodgment of FIR by three days nor incident was recorded in Roznamcha prior to formal recording of FIR.

12. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant are set-aside. Consequently, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court. The appellant shall be released forthwith in present case, if not required in any other custody case.

13. The instant appeal is disposed of accordingly.

Judge

Ahmed/Pa,