

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Appeal No. D- 96 of 2015
[Confirmation Case No.15 of 2015]

Before;

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Irshad Ali Shah

Appellant: Shareef son of Muhammad Younas Lakho,
Through Ms. Ambreen Siyal, Advocate.

State: Mr. Shahzado Saleem Nahiyoon, D.P.G.

Date of hearing: 08.12.2020

Date of decision: 08.12.2020

JUDGMENT

IRSHAD ALI SHAH, J. The appellant by preferring the instant Criminal Appeal has impugned judgment dated 15.10.2015 passed by learned Ist Additional Sessions Judge, Shaheed Benazirabad whereby he has been convicted and sentenced as under;

- “a). **Under Section 302 (b) P.P.C:** Death as tazir for committing Qatl-i-amd of Ali Raza deceased. Accused be hanged with the neck till his death with directions to pay Rs.1,00,000/-to the heirs of the deceased by way of compensation U/s 544-A Cr.P.C and in default of payment thereof, undergo S.I, for six months.
- b). **Under Section 506(ii) PPC:** The accused shall suffer R.I for 03 years and fine of Rs.25,000/-. In default of payment of fine, the accused shall suffer S.I for 01 month.
- c). **Under Section 337-H(2) PPC:** The accused shall pay fine of Rs.3000/-. In default of payment of fine, the accused shall suffer S.I for 01 month. ”

2. The facts in brief necessary for disposal of instant Criminal Appeal are that the appellant with rest of the culprits in furtherance of their common intention committed Qatl-e-amd of Ali Raza by causing him fire shot injury, for that they were booked and reported upon.

3. At trial, the appellant and co-accused Zafar alias Zafar Ali, Fareed alias Ghulam Fareed and Hakim Ali did not plead guilty to the charge and the prosecution to prove it examined complainant Sikander Ali and his witnesses and then closed the side. Prior to conclusion of trial co-accused Zafar alias Zafar Ali, Fareed alias Ghulam Fareed and Hakim Ali were acquitted by learned trial Court by way of compromise.

4. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecutions' allegation by pleading innocence by stating that he has been involved in this case falsely by the complainant party. However, he did not examine anyone in his defence or himself on oath in disproof of the prosecution's allegation against him.

5. On conclusion of the trial, learned trial Court found the appellant guilty for the above said offence and then convicted and sentenced him as is detailed above and then made a reference with this Court u/s 374 Cr.P.C. for confirmation of death sentence to the appellant.

6. The appeal preferred by the appellant and the reference made by learned trial Court for confirmation of death sentence to appellant now are being disposed of by this Court, by way of single judgment.

7. 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; the FIR has been lodged with delay of about five days; the 161 Cr.P.C statements of the PWs have been recorded with further delay of one day even to FIR; the incriminating pistol has been

secured from the appellant on 3rd day of his arrest and it has been subjected to expert opinion with further delay of six days; the evidence of the prosecution being doubtful has been believed by learned trial Court without assigning cogent reasons; therefore, the appellant is liable to acquittal. In support of her contention she relied upon cases of *Muhammad Hussain vs The State (2008 SCMR 345)*, *Mst. Shazia Parveen vs The State (2014 SCMR 1197)*, *Nasrullah alias Nasro vs The State (2017 SCMR 724)*, *Haleem and others vs The State (2017 SCMR 709)*, *Muhammad Ismail vs The State (2017 SCMR 713)*, *Nadeem alias KALA vs The State and others (2018 SCMR 153)*, *G.M. Niaz vs The State (2018 SCMR 506)* and *Muhammad Asif vs The State (2017 SCMR 486)*.

8. Learned DPG for the State by supporting the impugned judgment has sought for dismissal of the instant appeal and confirmation of death sentence to the appellant by contending that it was he who has committed death of the deceased by causing him fire shot injury.

9. We have considered the above arguments and perused the record.

10. As per complainant Sikander Ali, PWs Muhammad Azeem and Zulfiqar Ali, they and the deceased when were going to their lands were confronted by the appellant and others, the appellant caused fire shot injury to the deceased when he was caught hold by rest of the culprits. The deceased as per complainant and PW Zulfiqar Ali died at the spot after sustaining fire shot injury and then his dead body was taken by them to hospital at Kazi Ahmed. PW Muhammad Azeem came

with a different version, as per him the deceased died on his way to hospital when he was being taken there in injured condition. If it was so, then the death of the deceased was not instantaneous. As per medical officer Dr. Zulfiqar Ali the dead body of the deceased was brought by Muhammad Ibrahim. If it was so, then it belies the complainant, PWs Muhammad Azeem and Zulfiqar Ali that they took the dead body of the deceased to hospital which has also made their availability at the place of incident to be doubtful. Be that as it may, the FIR of the incident has been lodged with delay of about five days while 161 Cr.P.C statements of the PWs have been recorded with further delay of one day even to FIR. Such delay having not been explained plausibly could not be overlooked for the reason that it is reflecting consultation and deliberation.

11. In case of *Muhammad Asif vs the State (2008 SCMR 1001)*, it has been held by Hon'ble apex Court that;

“Delay of about two hours in lodging FIR had not been explained—FIRs which were not recorded at the Police Station, suffered from the inherent presumption that same were recorded after due deliberation.”

12. In case of *Abdul Khaliq vs. the State (1996 SCMR 1553)*, it was observed by Hon'ble Court that;

“---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”

13. Only thing which connect the appellant with commission of incident is recovery of the pistol which he allegedly used in commission of incident. Such recovery was affected from the appellant

on 3rd day of his arrest and it has been subjected to expert opinion with delay of about eight days; such delay having not been explained plausibly could not be lost sight of. In that situation recovery of pistol from the appellant may safely be judged with doubt.

14. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is entitled.

15. In case of Tariq Pervaiz vs the State (1995 SCMR 1345). It has been held by the Hon'ble Supreme Court that:-

“For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of accused, then he would be entitled to such benefit not as a matter of grace and concession but of right.”

16. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant by way of impugned judgment are set aside; consequently, the appellant is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court, he is in jail and shall be released forthwith in the present case.

17. The above are the reason of short order dated 08.12.2020 whereby the captioned appeal and death reference were disposed of.

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