

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No.S – 13 of 2019

Appellants: Rajab Ali s/o Wahid Bux Khoso, 2) Ali Nawaz son of Wahid Bux Khoso,
Through Mr. Wazir Hussain Khoso, Advocate

Respondent: The State, through Ms. Rameshan Oad, A.P.G.

Date of hearing: 14-12-2020.

Date of decision: 14-12-2020.

JUDGMENT

IRSHAD ALI SHAH, J: It is alleged that the appellants in furtherance of their common intention committed Qatl-e-amd of Fareed Ahmed by causing him fire shot injuries, for that they were booked and reported upon.

2. At trial, the appellants did not plead guilty to the charge and the prosecution to prove it, examined complainant Abdul Ghaffar and his witnesses and then closed its side.

3. The appellants in their statements recorded u/s 342 Cr.P.C denied the prosecutions' allegation by pleading innocence. They examined Wahid Bux and Nazeer in their defence. They did not examine themselves on oath.

4. It was stated by DW Wahid Bux that the rifle allegedly involved in the commission of incident was belonging to him and

same at the time of incident was lying with Nazeer Ahmed for repair purpose. It was stated by DW Nazeer Ahmed that the rifle owned by Wahid Bux at the time of incident was lying with him for repair purpose.

5. On evaluation of evidence so produced by the prosecution learned Sessions Judge, Tharparkar at Mithi for an offence punishable u/s 302(b) r/w Section 34 PPC convicted and sentenced the appellants to undergo Rigorous Imprisonment for life and to pay compensation of Rs.200,000/-each to the legal heirs of deceased Fareed Ahmed and in default where of to undergo Simple Imprisonment for six months vide his judgment dated 24th January, 2019, which is impugned by the appellant before this Court by way of instant appeal.

6. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party in order to satisfy its matrimonial dispute with them; the FIR has been lodged with delay of about two days and evidence of the prosecution being doubtful has been believed by learned trial Court without lawful justification; therefore, the appellants are liable to their acquittal on point of doubt. In support of his contention he relied upon cases of *Zahir Yousaf and another vs The State and another* (2017 SCMR 2002), *Muhammad Asif vs The State* (2017 SCMR 486),

Akhtar Ali and others vs The State (2008 SCMR 6) and Zafar vs The State (2018 SCMR 326).

7. It is contended by learned APG for the State that the appellants have committed qatl-i-amd of the deceased by causing him fire shot injuries and on arrest from them has been secured the incriminating rifle, therefore they have rightly been convicted by learned trial Court. By contending so, she sought for dismissal of the instant appeal. In support of her contention she relied upon cases of *Ansar Mehmood vs Abdul Khaliq and another (2011 SCMR 713) and Abdul Khaliq vs The State (2020 SCMR 178).*

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

9. Initially the incident was recorded by police under Roznamcha entry No.10 dated 07.12.2013. It does not contain the name of appellants. For all purposes it was first information report. Incident formally was recorded by police u/s 154 Cr.P.C on 09.12.2013 with delay of about two days to the incident. Such delay having not been explained plausibly could not be overlooked.

10. 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.”

11. The complainant is not eye witness of the incident. He lodged report of the incident on information which was furnished to him by PWs Sikander Ali and Niaz Muhammad. Both of them have claimed to be eye witnesses of the incident. They on asking, were fair enough to admit that their 161 Cr.P.C statements were recorded by the police on 19.12.2013. If it was so, then it was with delay of 10 days even to FIR. No plausible explanation to such delay in recording their 161 Cr.P.C statements has been furnished which goes to suggest that they are managed witnesses.

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. No active role in commission of incident is attributed to appellant Ali Nawaz. His involvement in the present case on the basis of instigation if is examined in the light of admitted dispute between the parties over matrimonial affairs is appearing to be doubtful.

14. Only thing which connect appellant Rajab Ali with the commission of incident is recovery of rifle which he allegedly used in commission of incident, same as per DW Nazeer was owned by DW Wahid Bux, was lying with him, for repair purpose. If for the sake of argument, such piece of evidence is ignored even then the such recovery is not enough to maintain conviction against appellant Ali Nawaz simply for the reason that it has been affected from him on 3rd day of his arrest. It was subjected to ballistic expert on 3rd day of its recovery and appellant in such recovery case as per his learned counsel has already been acquitted by the Court having jurisdiction.

15. Mashooque, who happened to be 1st mashir to almost every memo prepared in the present case has not been examined by the prosecution, for no obvious reason. 2nd mashir Mumtaz Ali on asking was fair enough to admit that his signatures were obtained by police on seven blank papers. If it is so, then it makes the memos prepared in the present case to be doubtful. SIO/SIP Abdul Rehman during course of his examination was fair enough to admit that injured Fareed Ahmed when was brought before him was in a position to speak. If it was so, then statement of the injured was to have been recorded by him to have been used as evidence. It was not done by him for no obvious reason. In that way a valuable piece of evidence was lost.

16. 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 appellants beyond shadow of doubt.

17. 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."

18. The case law which is relied upon by learned A.P.G for the State is on distinguishable facts and circumstances. In case of *Ansar Mehmood (supra)* an issue of summoning of medical officer was involved. In case of *Abdul Khaliq (supra)* the statement of the complainant to the extent of accused was endorsed by the eye witnesses and medical officer. In the instant case the complainant is not an eye witness of the incident while the evidence of the PWs have been found to be doubtful for the reason that their 161 Cr.P.C. statements have been recorded with delay of about 10 days even to FIR without lawful explanation.

19. In view of the facts and reason discussed above, the conviction and sentence recorded against the appellants by way of impugned judgment are set-aside; consequently, the

appellants are acquitted of the offence for which they have been charged, tried and convicted by learned trial Court, they shall be released forthwith in the subject case, if not required in any other custody case.

20. Instant criminal appeal is disposed of accordingly.

Judge

Ahmed/Pa,