IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Jail Appeal No.S-233 of 2017

Appellant: Sudheer son of Muharram Machi through Syed Zeeshan Hyder Shah, Advocate.

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

Date of hearing: 02-02-2021.
Date of decision: 02-02-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The facts in brief necessary for disposal of instant Criminal Jail Appeal are that the appellant allegedly with rest of the culprits in furtherance of their common intention committed death of Muhammad Anwar and then misappropriated his wrist watch and mobile phone, for that the present case was registered.

2. At trial the appellant and co-accused Nabi Dino @ karo did not plead guilty to the charge and prosecution to prove it examined complainant Amanullah and his witnesses and then closed its side.

3. The appellant and co-accused Nabi Dino @ karo in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence. They did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

4. It was specifically stated by the appellant in his statement u/s 342 Cr.P.C that;

> "*Sir, I am innocent, before murder I was keep boy of complainant and used to visit his house, his wife was illicit terms with deceased Anwar he suspected that his wife had illicit terms through me, the complainant due to such fact might have murdered deceased Anwar and falsely involved me on 06.04.2015, police taken me from my house and kept me at various police stations and on 16.05.2015 police shown my arrest. Meanwhile my relatives protested. I produce at Ex.21/A, such news paper. On 07.4.2015, which shows my arrest thereafter my relatives protested. I produce news paper 03.5.2015 at Ex:21/B and such news paper dt:04.05.15 at Ex.21/C. I Pray for justice.*"

5. The plea taken up by the appellant was ignored by learned Trial Court by making an observation that it is afterthought otherwise it was to have been considered in juxtaposition with the evidence of the prosecution.

6. Be that as it may, on conclusion of the trial, co-accused Nabi Dino @ Karo was acquitted while appellant was convicted and sentenced to undergo Imprisonment for life without ordering him to pay compensation to the legal heirs of the deceased being mandatory in terms of section 544-A Cr.P.C, for an offence punishable u/s 302 and 34 PPC by learned Additional Sessions Judge, Badin vide his judgment dated 21st September, 2017, which has been impugned by the appellant before this Court by preferring the instant Criminal Jail Appeal.

7. It is contended by the learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party; FIR has been lodged with delay of about two days; it was unseen incident and evidence of the

prosecution has been disbelieved in respect of co-accused Nabi Dino @ Karo while it has been believed in respect of the appellant without lawful justification. By contending so, he sought for acquittal of the appellant.

8. Learned A.P.G for the State has sought for dismissal of the instant Criminal Jail Appeal by contending that on arrest from the appellant has been secured the belongings of the deceased and finger prints report is making him involved in the incident.

9. In rebuttal to above, it is stated by learned counsel for the appellant that the report of the finger print expert was inconclusive excepting right thumb impression of the appellant; therefore, same could not be used as a conclusive proof leading to involvement of the appellant in commission of incident.

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

11. As per complainant, PWs Abdullah and Asif, they on 05.04.2015 at about 05:00 A.M on hearing of cries raised by the deceased went at the place of incident and found the appellant, co-accused Nabi Dino @ Karo and absconding accused Khadim Hussain making their escape good. If, it is believed to be so, then apparently they responded to the incident, when it was almost over. They even otherwise have also been belied in their version by medical officer Dr. Mubashar Hussain with regard to the *time* of death of the deceased as narrated by them to be 05:00 A.M. by

admitting to suggestion that the deceased had died at 02.30 A.M. The FIR of the incident has been lodged on 07.04.2015. It was with delay of about two days. No plausible explanation to such delay has been offered by the complainant; therefore, such delay could not be lost sight off. It is reflecting consultation and deliberation. As per PWs Abdullah and Asif their 161 Cr.P.C statements were recorded by the police on 11.04.2015. It was with delay of four days to FIR even, therefore, such delay having not been explained plausibly could not be ignored, which has made their credibility to be doubtful. It was stated by SIO/SIP Abdul Malik that the complainant and his witnesses by making further statements declared co-accused Nabi Dino @ Karo and Khadim Hussain to be innocent. It goes to suggest that the complainant and his witnesses were actually not certain about the real culprits of the incident, while reporting the incident to police in first instance. PW Mehmood was examined by the prosecution to prove the grudge between the appellant and the deceased. As per him his 161 Cr.P.C statement was recorded by the police on 09.04.2015. No explanation to such delay is offered by the prosecution therefore, no much reliance could be placed upon evidence of PW Mehmood having been introduced later on. As per SIO/SIP Abdul Malik on 19.05.2015, from the appellant was secured by him wrist watch, mobile phone and two currency notes of Rs. 500/- belonging to the deceased. It was on 3rd day of

the arrest of the appellant. The recovery made with delay could hardly strengthen the case of prosecution. SIO/SIP Abdul Malik however is belied in his version so far preparation of *"mashirnamas"* of recovery etc. by him is concerned by PW/Mashir Iqbal Ahmed by admitting to suggestion that all the "*mashirnamas"* were prepared by the *"munshis"* and not by the investigating officer. No "*munshi"* being author of any of such *"mashirnama"*, the prosecution has been able to examine. As such, it would be safe to say that the performance of the SIO/SIP Abdul Malik in the present case was only to the extent of table investigation. Even otherwise, no question has been put to the appellant during course of his examination u/s 342 Cr.P.C to have his explanation on alleged recovery and reports of Chemical Examiner and Finger Print Expert; therefore, recovery and expert reports could not be used against the appellant legally. On the basis of same evidence co-accused Nabi Dino @ Karo has been acquitted while the appellant has been convicted which appears to be surprising. In these circumstances, it could be concluded safely that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

12. In case of *Mehmood Ahmed & others vs. the State & another (1995 SCMR-127),* it has been observed by the Hon'ble Apex Court that;

> *"Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate".*

13. In case of *Abdul Khaliq vs. the State (1996 SCMR 1553)*, it has been observed by Hon'ble Apex 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."*

14. In case of *Sardar Bibi and others vs. Munir Ahmed and others (2017 SCMR-344),* it has been observed by the Hon'ble Apex Court that;

> *"When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused".*

15. In case of *Sheral alias Sher Muhammad vs The State (1999 SCMR 697),* it has been observed by Hon'ble Apex Court that;

> "*Law requires that any circumstance appearing in the evidence must be put to the accused before it is used against him. There is absolutely no reason as to why the same was not suggested to the appellant and his explanation obtained thereto."*

16. *In case of Muhammad Masha vs The State (2018 SCMR 772), it was observed by the Hon'ble Apex Court that;*

> *"4....Needless to mention that while giving the benefit of*

doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), GhulamQadir and 2 others v.The State (2008 SCMR 1221), Muhammad Akram v.The State (2009 SCMR 230) and Muhammad Zaman v.The State (2014 SCMR 749).”

17. 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 and he is acquitted of the offence for which he was charged, tried and convicted by learned trial Court, he is in custody and shall be released forthwith in the present case.

18. The instant criminal jail appeal is disposed of accordingly.

JUDGE

Ahmed/Pa,