

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-209 of 2018

Appellant: Sikandar Ali Son of Ghulam Qadir Bhurgri
through Mr. Badal Gahoti, Advocate.

Complainant: Abdul Ghaffar Son of Sono Khan Magsi, through
Mr. Javed Ali Buriro, Advocate.

Respondent: The State, through Mr. Shahzado Saleem
Nahiyoan, D.P.G for the State.

Date of hearing: 19-01-2021.

Date of decision: 10-02-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The facts in brief necessary for disposal of instant appeal are that deceased Tarique with his friends Allahdino and Majid allegedly were apprehended by police party of P.S Phulji led by Inspector Ghulam Sarwar Gondal. They were kept confined illegally and they were shifted from one to other police station, thereafter deceased Tarique was taken away and then killed in a fake police encounter, for that the present case was registered.

2. At trial, the appellant and co-accused Ghulam Sarwar and six others did not plead guilty to the charge and prosecution to prove it, examined complainant Abdul Ghaffor Magsi and his witnesses and then closed its side.

3. The appellant and co-accused Ghulam Sarwar and six others in their statements recorded u/s 342 Cr.P.C denied the

prosecution's allegation by pleading innocence by *inter alia* stating that the deceased and his witness were notorious persons of the locality and they have been involved in this case falsely by the complainant party, on account of registration of F.I.R Crime No.52 of 2014 under section 324, 353 and 427 P.P.C of P.S Rukkan District Dadu. They did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

4. On conclusion of the trial, co-accused Ghulam Sarwar and six others were acquitted while the appellant was convicted and sentenced to undergo Imprisonment for life and to pay rupees one lac to the legal heirs of deceased Tarique as compensation for an offence punishable u/s 302 (B) P.P.C PPC by learned 1st Additional Sessions Judge, Badin vide his judgment dated 06th September, 2018, which has been impugned by the appellant before this Court by preferring the instant Criminal Appeal.

5. It is contended by the learned counsel for the appellant that the FIR has been lodged with delay of about 25 days; the deceased was the notorious criminal of the area and has died in a police encounter; the appellant being innocent has been involved in this case falsely by the complainant party only to satisfy its grudge with him and on the basis of same evidence co-accused Ghulam Sarwar and six others have been acquitted while the appellant has been convicted and sentenced by learned Trial Court without assigning cogent reasons. By contending so, he

sought for acquittal of the appellant. In support of his contention, he relied upon the case of *Mst. Yasmeen Vs. Javed and another* [2020 S C M R 505] *Eissan and others Vs. The State* [2008 P Cr. L J 1197], *Gul Zaman Vs. The State and another* [S B L R Sindh 1291], *Ghulam Murtaza Vs. The State* [2010 P Cr. L J 461], and *Abdul Rahim Vs. Ali Bux and others* [S B L R 2016 Sindh 1426].

6. Learned D.P.G for the State and learned counsel for the complainant have sought for dismissal of the instant Criminal Appeal by contending that the deceased has been done to death by the appellant and others in a fake police encounter and acquittal of co-accused has been impugned by the complainant before this Court by filing a Criminal Acquittal Appeal. In support of their contention, they relied upon the cases of *Muhammad Nadeem alias Deemi Vs. The State* [2011 SCMR 872], *Zulfiqar Ahmed and another Vs. The State* [2011 SCMR 492] and *Shah Faisal Vs. The State* [2016 Y L R 721].

7. In rebuttal to above, it is stated by learned counsel for the appellant that the acquittal appeal has already been dismissed by this Court for non-prosecution on 31.10.2019 and with such dismissal of the acquittal appeal the acquittal of co-accused has attains finality.

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

9. As per complainant deceased Tarique together with his friend Majid and Allahdino were taken by police party of P.S Phulji led by S.H.O Ghulam Sarwar Gondal and others at the instance of Sikandar Khuhro with whom the deceased was having a dispute over Railway plot. On coming to know of such facts he with his friends Ali Jan and Ayaz Ali went at police station Phulji. The deceased then was shifted to P.S Rukkan and therefrom was shifted to the place of incident where he was killed. The incident as per the complainant was witnessed by him under the light of Motorcycles. PW Ayaz Ali has supported the complainant so far identity of the appellant and others under the light of motorcycles is concerned. The identity of the culprits involved in the incident under the light of Motorcycles with specific role even otherwise is appearing to be a weak piece of evidence. The F.I.R of the incident has been lodged with delay of about 25 days that too after having a recourse under section 22-A & B Cr.P.C. The complainant was also fair enough to admit that there is conflicting statements in his application under section 22-A & B Cr.P.C and his F.I.R with regard to the weapon used by the appellant. PWs Majid and Ali Jan have not been examined by the prosecution for no obvious reason. The presumption which could be drawn of their non-examination would be that they were not going to support the case of prosecution. Evidence of PW Allahdino is only to the extent that he was apprehended by the police party together with the

deceased. On asking, he was fair enough to admit that he did not see the accused committing murder of the deceased. The very case on investigation as per complainant was recommended by the police to be disposed off under 'C' Class. On the of same evidence co-accused Ghulam Sarwar and six others have been acquitted and their acquittal has attains finality while the appellant has been convicted and sentenced 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.

10. 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”.

11. 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”.

12. *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.”

13. The case law which is relied upon by learned counsel for the complainant and learned D.P.G for the State is on distinguishable facts and circumstances. In case of *Muhammad Nadeem alias Demi* (supra) delay in lodgment of F.I.R was only to the extent of 17 hours and prosecution was able to prove its case against the appellant beyond shadow of doubt. In the instant case, the delay in lodgment of F.I.R is 25 days and prosecution has not been able to prove its case against the appellant beyond shadow of doubt. In case of *Zulfiqar Ahmed* (supra) the widow and father of the deceased being natural witness to the incident were believed by the learned Trial Court. In the instant case, PWs Majid and Jan Ali being material witnesses to the incident have not been examined by the prosecution. In case of *Shah Faisal* (supra) the accused took different pleas. In the instant case, there is no different plea.

14. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant by way of impugned judgment are set-aside; consequently, 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.

15. The instant criminal appeal is disposed of accordingly.

JUDGE

*Muhammad Danish Steno**