IN THE HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

Crl. Appeal No. D – 226 of 2011.
[Confirmation Case No.10 of 2011]

Before;
Mr. Justice Muhammad Iqbal Mahar
Mr. Justice Irshad Ali Shah

Appellants: Ali Nawaz son of Khamiso Chhachhar, Ali Sher son of Khamiso Chhachhar,
through Syed Tarique Ahmed Shah Advocate

Complainant: Muhammad Siddique son of Sonharro,
Through Mr. Riazat Ali Sahar, advocate

Respondent: The State, through Mr. Shahzado Saleem Nahiyoon, D.P.G

Date of hearing: 19-09-2019.
Date of decision: 19-09-2019.

J U D G M E N T

IRSHAD ALI SHAH, J; The appellants by way of instant appeal have impugned judgment dated 18.07.2011 passed by learned Sessions Judge, Jamshoro at Kotri, whereby they have been awarded ***death*** penalty with compensation of Rs.100,000/-payable to the legal heirs of deceased Khuda Dino.

2. It is the case of the prosecution that the appellants in furtherance of their common intention, in order to have rifle of their father Khamiso returned from Khuda Dino by committing his murder by causing him fire shot injuries take away the above said rifle, for that they were booked and reported upon by the police to face trial accordingly.

3. The appellants did not plead guilty to the charge and prosecution to prove it, examined PW-1 complainant Muhammad Siddique at (Ex.5),

he produced receipt acknowledging the delivery of the dead body of the deceased to him and FIR of the present case; PW-2 Muhammad Achar at (Ex.6), he produced his 164 CrPC statement; PW-3 Arab at (Ex.7), he produced his 164 CrPC statement; PW-4 mashir Imamuddin, he produced memos of place of incident, dead body of the deceased, recovery of the cloth of the deceased and inquest report; PW-5 SIO/SIP Ghulam Sarwar at (Ex.12), he produced memo of arrest of the appellants and recovery of gun and rifle from them; PW-5 mashir PC Abdul Hameed at (Ex.13); PW-7 SIO/SIP Naseer Ahmed Soomro at (Ex.14), he produced reports of chemical and ballistic expert; PW-8 Dr. Ibrar Ahmed, he produced post mortem report on the dead body of the said deceased and then closed the side.

4. The appellants in their statements recorded u/s 342 CrPC at (Ex.17 & 18) denied the prosecution allegation by pleading innocence. They did not examine themselves on oath or anyone in their defence to disprove their innocence.

5. Learned trial Court, on evaluation of evidence, so produced by the prosecution awarded the ***death*** penalty to the appellants with compensation of Rs.100,000/- payable to the legal heirs of the said deceased and then made reference with this Court for confirmation of ***death*** penalty to the appellants, which is being disposed of together with the appeal preferred by the appellants.

6. It is contended by learned counsel for the appellants that they being innocent have been involved in this case falsely by the complainant party in order to grab their landed property, the FIR has been lodged

with un-explained delay of about 09 hours; the 161 CrPC statements of the PWs have been recorded on 7th day of the incident; the mashirnama of place of incident does not contain date and time of its preparation; the evidence which has been produced by the prosecution being inconsistent and unreliable containing improvement has been believed by learned trial Court without lawful justification. By contending so, he prayed for acquittal of the appellants.

7. Learned D.P.G for the State and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the appeal of the appellants.

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

9. In FIR it is specifically stated by the complainant that it was appellant Ali Nawaz who committed murder of the deceased by causing him fire shot injury with his rifle. No effective role in commission of incident has been attributed by the complainant in his FIR to appellant Ali Sher. At trial, the complainant specifically named both the appellants to be responsible for committing murder of the deceased by causing him fire shot injuries with rifle and gun. By stating so, complainant has improved his version in his FIR perhaps to make it in conformity with the medical evidence, which speaks of two injuries to the deceased, such improvement obviously has made the availability of the complainant at the time of the incident to be doubtful one. Had the complainant been available at the place of incident then his version in FIR and before learned trial Court would not to have been inconsistent with regard to the number of injuries to the deceased. In case of ***Muhammad Mansha***

vs the State (2018 SCMR 772) it has been held by Hon'ble apex Court that;

> *"Witnesses, in the present case, had made dishonest improvement in order to bring the case in line with the medical evidence, thus, conviction of accused was not sustainable on the testimony of said witnesses without independent corroboration which was conspicuously lacking in the present case."*

10. If for the sake of argument, the improvements so made by the complainant during course of his examination are ignored, even then the delay of more than nine hours in lodgment of FIR having not been explained plausibly could not be overlooked simply for the reason that distance between place of incident and Police Station Chhachhar as per FIR was only one and half furlong, which could have been covered within minutes and not hours. 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. In the above circumstances, it could be concluded safely that the evidence of the complainant being untrustworthy could hardly be relied upon to base conviction.

12. PW Muhammad Achar was fair enough to state that; on hearing of the fire shot report he went inside of the house of deceased and seen the appellants standing nearby the dead body of the deceased. If his version to that extent is believed to be true then he could not said to be eye witness to the actual murder of the deceased. His evidence as such could hardly lend support to the case of prosecution.

13. PW Arab has attempted to support the complainant in his version but he too on asking was fair enough to admit that his 161 CrPC statement was recorded by police after 3/4 days of the incident. If it is so, then no much reliance could be placed upon his evidence as he is appearing to be a managed witness. *In case of* ***Abdul Khaliq vs. the State (1996 SCMR 1553)***, it has been held 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. As per SIO/SIP Ghulam Sarwar, he prepared memo of place of incident at the time when FIR of the incident was not lodged. It is belied by memo of place of incident itself, it contains the crime number, which expressly make it to believe that the memo of place of incident was prepared after recording of FIR of the incident. Such memo even otherwise does not contain the date and time of its preparation which appears to be significant. There is no recovery of empty from the place of incident. As per SIO / SIP Naseer Ahmed 161 Cr.P.C statements of the PWs were recorded on 7th day of the incident. No plausible explanation to such delay is offered by the prosecution. The conclusion which could be drawn in the said circumstances would be that the investigation of the case which allegedly was conducted by the above named investigating officers, was only to the extent of table. It was table investigation.

15. No doubt there is recovery of the rifle and gun from the appellants, such recovery has not been affected from the appellants in presence of any independent witness and those have been subjected to

examination with a delay of more than one year. The appellants have already been acquitted in case of recovery of un-licensed weapons. In these circumstances, the appellants could hardly be connected with the recovery of crime weapons.

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 and they are appearing to be entitled to such benefit.

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. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants by learned trial Court by way of impugned judgment cannot be sustained, those are set-aside, consequently the appellants are acquitted of the offence, for which they were charged, tried and convicted by learned trial Court, they are in custody, they to be released forthwith. The death reference answered in negative.

19. The appeal and reference stand disposed of in above terms.

Judge

Judge

Ahmed/Pa