

Order Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Appeal No. S- 110 of 2014

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|-----------------|-------|------------|
| Abdul Ghafoor | ----- | Appellant |
| Versus | | |
| The State | ----- | Respondent |
| Date of Hearing | : | 20.09.2019 |

Mr. Imam Bux Baloch, advocate for appellant
Ms. Sana Memon, A.P.G.

J U D G M E N T

ZULFIQAR ALI SANGI, J.- Appellant Abdul Ghafoor has called in question the judgment dated 30.9.2014 passed by learned IInd Additional Sessions Judge, Sanghar in Sessions Case No. 05 of 2009 arising out of FIR No. 43 of 2009 registered at police station Shahdadpur under Sections 302 PPC whereby the learned Judge convicted the appellant under Section 302 PPC and sentenced him to suffer imprisonment for life. The appellant was also directed to pay Rs. 2,00,000/- (Rupees two lacs) under Section 544-A Cr.P.C. to the legal heirs of deceased Mst. Saima as compensation and in default whereof to suffer six months simple imprisonment. Benefit of Section 382-B Cr.P.C. was also extended to appellant.

2. Brief facts of the prosecution case as narrated by the complainant Muhammad Idrees in the FIR are that in the year 2002 his daughter Mst. Saima got married with Abdul Ghafoor son of Muhammad Yaqoob Arain and out of such wedlock two sons namely Muhammad Talha aged about 5 years and Muhammad Taha aged about 2 years were born, Appellant used to beat his wife Mst. Saima, therefore, about one and half year back to the date of incident, he brought his daughter along with her children at his home at Sinjhoru. On 27.12.2008, appellant came at his house at Sinjhoru along with nekmards Rao Waseem Akhtar Councilor Sinjhoru and Muhammad Ali (retired teacher) and in their presence a failsa was reduced into writing on stamp paper whereby the appellant undertook that he will not maltreat his wife and then taken away his wife at Shahdadpur. On 27.2.2009 at 0130 hours (night), cousin of complainant namely Abdul Wahid made telephone call to the complainant and informed that his daughter is burnt in fire. The

complainant therefore along with his wife Mst. Umat-ul-Aziz and Mst. Darkashan w/o Muhammad Ayoub went to Shahdadpur where they came to know that Mst. Saima has been taken to Hyderabad for treatment. On the way towards Hyderabad he came to know that his daughter Mst. Saima has been admitted in Civil Hospital Karachi. The complainant therefore reached at Civil Hospital Karachi and found his daughter unconscious and her body was completely burnt. In the evening Mst. Saima regained her senses and at about 0745 hours SIP Mirza Tariq Baig of Risala Police Station Karachi recorded her statement. Mst. Saima in her statement stated that on 26.2.2009 at night time her husband Abdul Ghafoor used filthy language with her therefore she asked him to leave her upon which he by jostling her on the ground in anger said that today he will not leave her; thereafter he brought one bottle of kerosene oil from the room and after sprinkling kerosene oil he set her on fire; she raised cries which attracted the neighbors but her husband closed the door. The children were weeping, therefore, appellant called Dr. Azam but he did not come. Thereafter cousin of appellant namely Abdul Wahid came there and then that took her in ambulance and brought at Civil Hospital Karachi. On the 2nd day i.e. 28.2.2009 at 0350 hours she succumbed to the injuries. Thereafter complainant brought her dead body at Shahdadpur and registered the FIR.

3. After completing investigation, I.O submitted report under Section 173 Cr.P.C. before the concerned Magistrate who sent up the case to the Court of learned Sessions Judge, Sanghar being sessions trial, who transferred the same to learned Additional Sessions Judge, Shahdadpur for proceeding. After completing all the necessary formalities under Section 265-C Cr.P.C. charge was framed against the appellant to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case against the appellant has examined 11 witnesses out of thirteen. Complainant Muhammad Idrees was examined as P.W-1 at Exh. 6, who produced C.D at Exh. 6-A, receipt of dead body at Exh. 6-B, FIR at Exh. 6-C. Thereafter advocate for complainant submitted statement and annexed photostat copies of Iqarnama and statement of Abdul Wahid at Exh.7 and then learned A.D.P.P. filed statement through which he gave up P.W Abdul Wahid vide statement at Exh.8, Waseem Akhtar was examined as P.W-2 at Exh.9 who produced original iqarnama at Exh.9-A. Muhammad Ali (retired teacher) was examined as P.W-3 at Exh.10, CWMO Jameela Syed was examined as P.W-4 at Exh.11 who produced lashchakas Form at Exh.11-A, autopsy report at Exh.11-B. Tapedar Aijaz Hussain was examined as P.W-5 at Exh.12 who produced sketch of place of wardat at Exh.12-A, Mst. Umat-ul-Aziz, mother of deceased was examined as P.W- 6 at Exh.13. Mashir Muhammad Yousif was examined as P.W- 7 at Exh.14

who produced memo of place of incident at Exh.14-A, inquest report at Exh.14-B, memo of arrest of accused Abdul Ghafoor at Exh.14-C. Memo of dead body seen at Exh. 14-D. ASI Mehboob Ali (scriber of FIR) was examined as P.W-8 at Exh.15. SIP Mirza Tariq Baig was examined as P.W-9 at Exh.16 who produced entry at Exh.16-A, letter wrote by him to WMO at Exh.16-B, statement of accused Abdul Ghafoor recorded by him at Exh.16-C, statement of Muhammad Idrees recorded by him at Exh.16-D, statement of Mst. Saima recorded by him at Exh.16-E, SIP Abdul Majeed was examined as P.W-10 at Exh.17 who produced arrival entry at Exh.17-A, ASI Waheed Iqbal was examined at Exh.18 who produced report under Section 173 Cr.P.C. at Exh.18-A who produced memo of inspection of dead body at Exh.18-B. Thereafter learned ADPP for the state closed the side of prosecution witnesses vide statement at Exh.19. Thereafter the statement of appellant under Section 342 Cr.P.C. was recorded wherein he denied all the prosecution allegations, and further stated that he was working in Saudi Arabia and he was sending money in the account of his wife in account No 2125-1 of National Bank Sinjhor. He purchased a house in the name of his wife. His wife Mst. Saima (deceased) was intermediate but SHO/SIP produced her statement with thumb impression which is false and according to doctor his wife was not in a position to put thumb impression and also she was not able to say anything. He further stated that actually she was burnt while boiling the milk; he himself tried to save her and in the incident he was also burnt and then he informed his cousin Abdul Wahid and his father-in-law (complainant) about the incident; He brought his wife to Civil Hospital Shahdadpur for providing first aid and then shifted to civil hospital Hyderabad and finally at Karachi for her treatment. In support of his said version he produced copy of cheque book No.4901401 to 4901425 at Exh.20-A and Cheque Book No. 1096211 to 1096220 at Exh.20-B, Cheque No. 48627004 dated 17.12.2003 at Exh.20-C, Cheque No. 49731941 dated 18.5.2004 at Exh.20-D, CNIC of Mst. Saima at Exh.20-E, and certificate of intermediate of Saima at Exh.20-F. He neither examined himself on oath nor led any evidence in his defence and lastly prayed for justice and acquittal.

5. Learned counsel for appellant has argued that learned Trial Court has erred in law by relying upon the Statement (dying declaration) of deceased Mst. Saima which was recorded in absence of medical officer; that body of deceased Mst. Saima was 100% burnt and in such condition no one would be able to say anything about the incident; that at the first instance in the morning time, doctor refused to issue medical certificate regarding fitness of deceased Mst. Saima to SIP Mirza Tariq Baig as she was unconscious and it is very strange that in evening at 7:45 p.m

father of deceased informed SIP Mirza Tariq Baig about consciousness of victim and the alleged statement was recorded by SIP Mirza Tariq Baig and at the 2nd time SIP Mirza Tariq Baig did not take pain to obtain fitness certificate from the concerned doctor about unconsciousness of deceased Mst. Saima for recording her statement. This piece of evidence creates doubt in the prosecution case against the genuineness of alleged dying declaration; that it is also admitted fact that father of victim, her mother, brothers and sisters were present at the time of recording the statement by SIP Mirza Tariq Baig; that it is also an admitted fact that no one was present at the time of alleged incident hence the ocular evidence is missing in the present case; that appellant who is husband of deceased Mst. Saima had taken her to Taluka hospital Shahdapur then to Civil Hospital Hyderabad and lastly to Civil Hospital Karachi for her treatment which shows that he had taken efforts to save her; that it is also an admitted fact that the appellant tried to save life of deceased Mst. Saima (his wife) in which his hand was also injured; that it was time and again held by the superior courts that dying declaration or statement of person without the test of cross-examination is weak kind of evidence and its credibility certainly depend upon the authenticity of the record and circumstances under which it was recorded; that the witnesses are interested and hostile; that the impugned judgment of conviction of learned lower court is against facts, law, equity and against the principles of natural justice, which is liable to be set-aside and the appellant may be acquitted; that the impugned judgment is based upon presumption and on the evidence of interested witnesses which may be set-aside by this Honourable Court; that the impugned judgment is not proper which is liable to be set-aside.

6. Learned A.P.G. for the estate has argued that prosecution has proved its case against appellant Abdul Ghafoor who is guilty of Qatl-e-amd of his wife. She supported the `impugned judgment` as according to her it is based upon evidence of all the witnesses who have furnished reliable evidence on record. She further submits that trial court rightly relied upon dying declaration of Mst. Saima and prayed for dismissal of this appeal.

7. I have heard learned counsel for the appellant as well as learned A.P.G. for the state and perused the record available in file with their assistance.

8. The burn articles and clothes of deceased so also the article recovered from place of incident were not sent for chemical analysis to prove the allegation against accused for set on fire to deceased after putting kerosene oil. Complainant in FIR disclosed that his daughter Mst. Saima (deceased) disclosed to Mirza Tariq Baig that on 20.2.2009 her husband namely Abdul Ghafoor after abusing and

maltreatment brought bottle of kerosene oil and by throwing it upon her set on fire. Complainant in his examination in chief stated that **“in the evening time my daughter Mst. Saima regained senses, two police officials namely SIP Mirza Tariq Baig and ASI Waheed Iqbal of PS Risala came at hospital and they got recorded statement of my daughter Mst. Saima in which she had categorically stated that after beating her, her husband accused Abdul Ghafoor set her on fire with kerosene oil.”** Mashirnama of inspection of place of incident shows that burn clothes were recovered and were sealed. One plastic bottle and shopper was also recovered where from police found smell of kerosene oil. Record shows that such material was not sent to the Chemical Examiner to verify about the authenticity that it was kerosene oil which was used in the commission of offence which create doubt about the recovery of said articles, this fact shows that entire case was prepared at police station which also comes from the mouth of mashir namely Muhammad Yousuf who in his cross examination has admitted that police obtained his signature at police station.

9. Complainant in his examination-in-chief has stated that **“ again Abdul Wahid called him on cell phone and informed that Mst. Saima is in precarious condition due to burn injuries therefore she is being shifted to Hyderabad hospital on the advice of doctor for better medical treatment. After hearing this news I along with my wife Mst. Amtul Aziz and son Abdul Salam left my house from Sinjhor town and proceeded towards Hyderabad in Taxi Car.”** He in cross examination stated that **“ I in my FIR has stated that after receiving information with regard to incident in present case on mobile phone I alongwith my wife Mst. Amtul Aziz and Mst. Darakshan came at Shahdadpur.”** Whereas Mst. Amtul Aziz in cross-examination has stated that **“It is incorrect to say that Mst. Darakshan was accompanied with us at Karachi”**. It creates doubt about the presence of Mst: Darakshan.

10. Complainant in his examination-in-chief has stated that **“ in evening time my daughter Mst. Saima regained senses, two police officials namely SIP Mirza Tarique Baig and ASI Waheed Iqbal of PS Risala came at hospital and they got recorded the statement of my daughter Mst. Saima in which she had categorically stated that after obtaining her, her husband accused Abdul Ghafoor set her on fire with kerosene.”** P.W, Amtul Aziz in her examination-in-chief stated that **“at the evening time she regained her senses where SIP Mirza Tariq Baig was also available who interrogated Mst. Saima in presence of me and others and recorded her statement wherein she disclosed that at the time of incident her husband maltreated her firstly and thereafter fallen kerosene**

oil on her and set her on fire.” Whereas Mirza Tariq Baig in his examination-in-chief stated that **“on same date at about 7:45 p.m. the father of injured / victim came at police station and informed to us that injured / victim now became conscious and then I proceeded along with him at hospital to record her statement. Is saw her, she was able to make her statement. Then I recorded her statement in which she stated that her husband Abdul Ghafoor abused and maltreated her then locked her in a room and brought oil and set fire upon her.”** P.W Waheed Iqbal in his examination-in-chief stated that **“on 28.2.2009 I received information at 4:35 a.m. that one dead body of burnt lady lying in hospital, therefore, I reached at hospital for completing necessary formalities at 4:55 a.m.”** it shows PW Waheed Iqbal was not present on 27.2.2009 when dying declaration was stated to be recorded; such conflict in the evidence makes the dying declaration doubtful. Reliance can be place in case of Muhammad Ameer and other v. Riyat Khan and others 2016 SCMR 1233, wherein Honourable Supreme court of Pakistan held as under:-

“3. The linchpin of this case was a dying declaration attributed to Muhammad Afzal deceased which declaration he had allegedly made before the local police in an injured condition in a hospital on 24.03.2004 and which was subsequently made the basis of an FIR two days later, i.e. on 26.03.2004. It has been found by us to be rather intriguing that if the dying declaration had actually been made by the deceased on 24.03.2004 before the police itself then why an FIR had not been chalked out on the basis of the same during the next two days. Another factor sufficient to raise an eyebrow in the context of the dying declaration is that Dr. Nazir Ahmed (PW2), under whose medical care Muhammad Afzal deceased was when alive, had categorically stated before the trial court that the police had not recorded any statement of Muhammad Afzal deceased in his presence and he had gone on to state that Muhammad Afzal deceased had never made any statement before him about the alleged occurrence. A dying declaration is an exception to the hearsay rule and, thus, the same is to be scrutinized with due care and caution, particularly in the backdrop of the observations made by different Courts about veracity of a dying declaration in the Province of the Punjab and a reference in this respect may be made to the cases of Bakhshish Singh alias Bakhshi and others v. Emperor (AIR 1925 Lahore 549), Tawaib Khan and another v. The State (PLD 1970 SC 13) and Usman Shah and others v. The State (1969 PCr.LJ 317). In the case in hand it quite clearly appears that Muhammad Afzal deceased had no regard for the truth because he had categorically stated in the so-called dying declaration that he was taken to the hospital in an injured condition by Ghulam Abbas (PW9) and by one Noor Muhammad but the above mentioned doctor had contradicted the deceased by stating that the deceased had been brought to the hospital in an injured condition by a police constable and on that occasion no private person was accompanying the deceased. Even Ghulam Abbas (PW9) had given a big lie to Muhammad Afzal deceased by unambiguously stating before the trial court that he had not taken Muhammad Afzal deceased to the hospital in an injured condition at all. The other person who had statedly taken Muhammad Afzal deceased to the hospital in an injured condition was Noor Muhammad but the record of the case shows that the said person, though cited in the Calendar of Witnesses, had been given up by the prosecution as unnecessary. The legal inference to be drawn in that context is that if the said witness had entered the witness-box then he would not have supported the case of the prosecution. All this shows that either Muhammad Afzal deceased had economized with the truth while making

his dying declaration or the dying declaration itself was a fabricated document which had been manufactured at some subsequent stage for the purposes of implication of the present appellant and to justify availability of the so-called eye-witnesses. In these peculiar circumstances we have decided not to place any reliance upon such a document.”

11. The complainant in his examination-in-chief stated that he recorded the voice of deceased in mobile phone and thereafter the said voice was transferred to CDs but that evidence was not produced before the police during investigation. The said version for the first time was disclosed by the complainant in his deposition recorded on 10.5.2010.

12. Record reflects that except the dying declaration no other evidence was collected. No eye-witnesses is available except appellant himself who otherwise denied the allegations. Record further reflects that appellant was a person who was trying to save deceased Mst. Saima being her husband. He took her at the first instance to civil hospital at Shahdadpur and on advise of doctor he immediately proceeded to Hyderabad and then to Civil Hospital Karachi where she was alive. Hardly it is possible for a person who want to kill anyone can make efforts to save that person, like in the present case. It does not appeal to common sense that a person being the accused of heinous offence was trying to save her by knowing that if she remained alive definitely she will depose against him. In such circumstances the story setup by the complainant is unbelievable. The dying declaration of deceased is again declare as doubtful for the reason that SIP Tariq Mirza who recorded the dying declaration stated in cross examination that **“ It is correct to suggest that when I recorded the statement of injured / victim Mst. Saima at that time she was lying on Bed No.06 of Burn Ward of Civil Hospital Karachi. In the meantime doctor was also there but I did not remember his name. It is correct to suggest that I could not obtain countersign of doctor on the statement.** He further in cross-examination stated that **“ It is correct to suggest that I did not obtain any signature on statement from other witnesses.** Again in cross examination he stated that **“It is correct to suggest that medical officer given certificate that she has received 100% burn injuries on her body.”** Complainant in his chief examination also stated about the presence of SIP Tariq Baig and ASI Waheed Iqbal whereas Waheed Iqbal stated that he went to hospital on 28.2.2009 on receiving information about the dead body lying in hospital who also conducted proceedings under Section 174 Cr.P.C. It shows that if the dying declaration was recorded in his presence then there was no need to conduct proceedings under Section 174 Cr.P.C. and when on 28.2.2009 after conducting proceedings under Section 174 Cr.P.C. he came to know about the dying

declaration then he handed over such proceedings to ASI Tariq Baig which too is clear from the chief examination of such ASI Waheed Iqbal.

13. All the incriminating piece of evidence available on record in shape of examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused, if the same are against him, while recording his statement under section 342 Cr.P.C in which the words used “**For the purpose of enabling the accused to explain any circumstances appearing in evidence against him.**” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. From the careful perusal of statement of the appellant, under section 342 Cr.P.C. it reveals that the portion of examination-in-chief about the recovery of empty cartridge and bloodstained earth from the place of wardat and recovery of bloodstained clothes was not put to the appellant in his statement under section 342 Cr.P.C. enabling him to explain the circumstances, as has been held by Honourable Supreme Court of Pakistan in the case of **Muhammad Shah v. The State** (2010 SCMR 1009).

14. In the present case, trial court only believed the dying declaration statement made by deceased and voice recorded by complainant but unfortunately the same were not put to him during examination under section 342 Cr.P.C. It is well settled principle of law that the piece of evidence which is not put to the accused in statement under section 342 Cr.P.C. that cannot be relied upon against him. In case of **Nusrat Ali Shar etc. v. The State in Cr. Appeal Nos. 24-K, 25-K and 26-K of 2018, Honourable Supreme Court of Pakistan** has held that on this ground that a piece of evidence which is not put to the accused under Section 342 Cr.P.C. the case cannot be remanded to the trial court and in the particular case where the High Court has remanded the case and that has been challenged before Honourable Supreme Court. The said order of High Court was set-aside and appeals were remanded back to High Court for deciding on merits. In view of dicta laid down by Honourable Supreme Court, appeal is decided on merits. The Honourable Supreme Court held in the case of **Imtiaz @ Taj v. The State 2018 SCMR 344 (2) Qadan and others v. The State 2017 SCMR 148 and Mst: Anwar Begum v. Akhtar Hussain alias Kaka and 2 others 2017 SCMR 1710** that a piece of evidence or a circumstance not put to an accused person at the time of recording his statement under Section 342 Cr.P.C. could not be considered against him.

15. From the above discussion, it is evident that there are serious doubts in the case of prosecution. It is settled law that even a single doubt in the prosecution story is disastrous and its benefit must go to the accused. In this regard, I would like to place reliance on the case of *Tariq Pervez v. The State (1995 SCMR 1345)* wherein Honourable Supreme court of Pakistan held as under:-

“ The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

16. For the above reasons, this appeal was allowed by short order dated 20.9.2019 whereby the conviction and sentence awarded to the appellant by the trial court vide judgment dated 30.9.2014 were set-aside and the appellant was acquitted of the charge.

JUDGE

Karar_hussain/PS*