IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Crl. Jail Appeal No.S-222 of 2016

Peeral son of Wali Mohammad, Appellant through	:	Mr. Sajjad Ahmed Chandio, Chandio, Advocate
The State, respondent, through:		Ms. Safa Hisbani, APG
Date of Hearing	:	04.10.2019

J U D G M E N T

Zulfiqar Ali Sangi---J., Through this criminal jail appeal, the appellant named above has assailed the legality and propriety of the judgment dated 03.11.2016, passed by the learned Ist Additional Sessions Judge, Dadu in Sessions Case No.816 of 2014 re: State v. Peeral and others arising out of Crime No.64 of 2001 of PS: Johi, registered under section 302 PPC, whereby the learned trial Court after full dressed trial, while acquitting co-accused Zafar S/o Ghulam Rasool Lashari of the charge, convicted and sentenced the present appellant for offence punishable under section 302(b) PPC to suffer Rigorous Imprisonment for 25 years and to pay fine of Rs.50,000/-, in default whereof the appellant shall further undergo Simple Imprisonment for 06 months. In case, the fine is deposited it shall be paid to legal heirs of deceased Misri Jamali as compensation u/s 544/A Cr.P.C. However, the benefit of section 382-B Cr.P.C. was extended to the appellant.

2. The facts of the prosecution case in brief, are that on 04.07.2001 complainant Ghulam Rasool Jamali appeared at Police Station Johi and lodged his F.I.R. alleging therein that on 26.04.2001 he alongwith his nephew Misri and relative Farooq Ali Jamali went to Rais Mitho Khan and at about 10:30 p.m. they reached near Chowdagi on link road leading to village Haji Allah Bachayo Jamali where they saw accused Dildar alias Diloo with rifle, Peeral (present appellant) with gun and Zafar Lashari with Danda and accused gave hakals to the complainant party to off the torch and hand over the articles and cash available with them. Upon which Misri replied that they have nothing and further that they will not give anything to them (accused) on which accused Peeral being annoyed fired straight gunshot which hit Misri who fell down; accused Dildar Leghari also fired shot upon the complainant party who fell down and while taking advantage of jungle reached at village where they came to know that accused persons had lodged FIR against Misri. Thereafter, complainant party narrated such facts to their Nekmard Ali Muhammad Jamali who produced them at Police Station Johi wherefrom they were produced before learned Judicial Magistrate Johi where their statements U/S.164 Cr.P.C were recorded and matter was referred to SSP Dadu for legal opinion. The SSP Dadu vide his letter dated 27.06.2001 opined to dispose of the case bearing Crime No.43/2011 registered by complainant Dildar Leghari under “B” Class and further directed to register case against accused Dildar @ Diloo Leghari, Peeral Jamali and Zafar Lashari u/s 302PPC, hence present FIR was lodged by the complainant.

3. On conclusion of the investigation, challan in the aforesaid crime was submitted against the accused.

4. Thereafter, trial Court framed charge against the accused, to which they pleaded not guilty and claimed to be tried vide their pleas.

5. In order to prove its case, prosecution examined PW-1 complainant Ghulam Rasool Jamali at E.5, who produced copy of FIR at Ex.5/A, P.W-2 Qurban Ali Jamali at Ex.6, P.W-3 mashir Niaz Ahmed at Ex. 7 who produced mashirnama of arrest and recovery at Ex.7/A, P.W-4 Dr. Muhammad Hashim Thaheem at Ex.8, who produced attested copy of post-mortem report of deceased at Ex.8/A, P.W-5 Tapedar Waseem Ali Jamali at Ex.9 who produced sketch at Ex.9/A, P.W-6 mashir Peer Bux at Ex.10 who produced memo of place of incident at Ex.10/A, P.W-7 Investigation Officer Inspector Ali Akbar Panhwar at Ex.11 who produced attested photocopies of statements U/S.164 Cr.P.C of Ghulam Rasool, Farooque Ali, Qurban Ali and Abbas at Ex.11/A to 11/D, attested photocopies of mashirnama of arrest of accused Peeral, mashirnama of recovery and mashirnama of arrest of accused Dildar at Ex.11/E to Ex.11/G and P.W-8 mashir Muhammad Ismail (Rtd: ASI) at Ex.12. Thereafter, learned DDPP for the State vide his statement Ex.13 closed the side of prosecution.

6. The statements of accused under section 342 Cr.P.C were recorded, wherein they denied the prosecution allegations and

professed their innocence. Accused Peeral further stated that all the P.Ws are set-up and interested and due to dispute over some landed property he has been booked in this Case. He also stated that deceased was murdered by someone else, such FIR was lodged by complainant Dildar Leghari bearing Crime No.43/2001 at PS Johi and he produced such FIR at Ex.14-D/1. Co-accused Zafar also stated that witnesses are set-up and interested and he has been booked in this case due to friendship with accused Peeral. However both the accused persons neither examined themselves on oath nor cited any witness in their defence to disprove the allegations of prosecution.

7. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record, through impugned judgment acquitted co-accused Zafar and convicted and sentenced the present appellant, as stated above.

8. Learned trial court in the impugned judgment has already discussed the evidence led by the prosecution in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

9. Learned advocate for appellant has contended that the case registered against the appellant is false and has been registered due to enmity; that prosecution case is highly doubtful; that no incident as alleged in the F.I.R. has took place; that the evidence so brought on record is contradictory on material particulars of the case, therefore, the same cannot be safely relied upon for maintaining

conviction. He further contended that the learned trial Court has passed the impugned judgment on the basis of surmises, conjectures, same is perverse and against the natural norms of justice so also against the principles of criminal justice; that the PWs are interested who deposed falsely against the appellant; that impugned judgment is opposed to law, facts and as such cannot be upheld; that the impugned judgment is not passed in accordance with law, facts and equity; that it was the case of acquittal but learned trial court wrongly discussed the points for determination and on same set of evidence has acquitted co-accused Zafar while convicted the appellant, which is against the settled principle of law; that source of identification was torch which was not recovered during investigation nor was produced at the trial stage. He prayed that the appeal may be allowed as prayed after giving benefit of doubt.

10. Conversely, Ms. Safa Hisbani, learned A.P.G. Sindh while supporting the impugned judgment and opposing the aforesaid contentions submitted that the prosecution has fully established its case against the present appellant beyond reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentence awarded to the appellant is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, she prayed that the appeal may be dismissed.

11. I have heard learned counsel for the parties and perused the material available in the file.

12. Incident took place on 26.04.2001 at 2200 hours and FIR was registered on 04.07.2001, such delay of three months has not been explained properly by the complainant, presence of witnesses who's statement u/s 161 Cr.P.C were also recorded with delay become doubtful, complainant stated in FIR that after the incident they went away to wards their houses, letter on they came to known about FIR No. 43 of 2001 registered by accused party and then complainant brought by police before Magistrate for recording 164 Cr.P.C statement, SSP passed order for disposal of said case under "B" class and registration of FIR against appellant party vide order No. 2300.2301 dated 27.06.2001, record shows that such order of SSP was not produced by prosecution before the trail court.

13. Admittedly the source of identification was torch light and same was not been recovered during investigation nor produced during the trial which creates serious doubt in identification of accused person at odd hours of the night, in cases where the identification was based on torch light, and had not been recovered nor produced during trial, the Apex Courts held the same identification as doubtful.

In the case of ABDUL RAHIM v. ALI BUX and 4 others, (2017 P Crl. L J 228), Division Bench of this Court has held as under:-

> ***"11. Record further reveals that the incident is alleged to have taken place in dark hours of the night and Complainant and PWs/eye-witnesses seen and identified the culprits/Respondents on***

torch lights, but the said Torches were not produced in evidence, since the source of identification of the culprits is shown as torchlight, which as per verdicts of Superior Courts is weak type of source and unsafe to be relied upon. In this regard reference is made to the case of Hakim Ali, reported in 1996 PCr.LJ 231 (DB-Kar), and case of Aurangzeb, reported in 2008 PSC (Cr.) 965."

14. The recovery of blood stained earth of deceased Misree Jamli and one empty cartridge from the place of incident on 05.07.2001 become doubtful, it is come in the evidence that crime No. 43 of 2001 was registered on 27.04.2001 by accused Dildar Ali against present complainant party showing the same place of incident, during investigation of crime No. 43 of 2001 place of incident was visited but blood stained earth and empty cartridge was not recovered, when earlier the same place of incident was visited then after the three months of incident the recovery of blood stained earth and one empty cartridge is unbelievable, which cut the roots of prosecution case.

15. The investigation officer Ali Akber during cross examination stated that accused was arrested on 11.07.2001 whereas the weapon was produced by accused on 19.07.2001 during interrogation, which shows that the recovery was effected after 08 days of the arrest of accused. Investigation officer further stated during cross examination that he made recovery of weapon from accused after 23 days of the incident whereas according to FIR this incident was took place on 26.04.2001. The said recovered Gun and empty cartridge was not send to FSL, nor such report was produced

by prosecution during the trail. In the circumstance the recovery of Gun is become doubtful.

16. In the present case no person from family of deceased come forward for registration of FIR, made as witnesses nor take any interest in the case and only the accused nominated in crime No. 43 of 2001 in league with police had registered present FIR with some motivation.

17. Co-accused namely Zafar s/o Ghulam Rasool Lashari was acquitted by the trial court by disbelieving the evidence of prosecution witnesses and on same set of evidence appellant was convicted by the trial court without any corroboratory evidence coming from independent source. Honourable Supreme Court of Pakistan has held in case of Muhammad Asif v. The State [2017 SCMR 486] as under:-

> ***"11. Both these two eye-witnesses have been disbelieved by the investigating agency qua the acquitted two co-accused/the real brothers of the appellant. It is a trite principle of law and justice that once prosecution witnesses are disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case.***

In this regard reference can be made to case of Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 SC 11). The view held in the above case/reference is reproduced below:-

"Appreciation of evidence--- Principle of indivisibility of credibility--- Maxim: Falsus in uno falsus in omnibus--- Application of principle---Witness found false with regard to implication of one accused about whose participation he had deposed on oath---Credibility of such witness regarding involvement of other accused in same occurrence when shaken---Where it was found that a witness has falsely implicated one accused person, ordinarily he would not be relied upon with regard to other accused in same transaction but if testimony of such witness was corroborated by very strong and independent circumstances regarding each one of other accused, reliance might then be placed on such witness for convicting other accused when principle of indivisibility of credibility as laid down in Muhammad Faiz Bakhsh v. The Queen is to be ignored".

18. 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, bloodstained earth from the place of wardat, recovery of bloodstained clothes, recovery of double barrel gun and medical evidence including postmortem report 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).

19. 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 used 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 but to decide on merits. The Honourable Supreme Court has 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.

20. From the above discussion, it is evident that the prosecution has miserably failed to prove the case against appellant beyond shadow of reasonable doubt. 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 has 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."***

21. Above are the reasons of short order dated 04.10.2019; whereby captioned appeal was allowed, impugned judgment and conviction were set aside and the appellant was ordered to be released forthwith

J U D G E