

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Jail Appeal No.D- 75 of 2016
[Confirmation case No.16 of 2016]

Before;

Mr. Justice Irshad Ali Shah

Mr. Justice Amjad Ali Sahito

Appellant: Safar son of Basar Lund,
Through Mr. Nazeer Ahmed Bhatti, Advocate.

Complainant: Through Razzaque Rahim Shaikh, Advocate

State: Ms. Safa Hisbani, A.P.G

Date of hearing: 18.12.2019
Date of decision: 18.12.2019

J U D G M E N T

IRSHAD ALI SHAH, J. The facts in brief necessary for passing the instant judgment are that as per prosecution the appellant with rest of two culprits in furtherance of their common intention fired and killed Abdul Hakim when he was found sitting at the hotel of one Nazeer Rind at Johi District Dadu. During course of such incident PW Muhammad Yousif it is said has also sustained fire shot injury for that the present case was registered. On investigation, the appellant was apprehended and was reported upon by the police to face trial for the above said offence in accordance with law.

2. At trial, the appellant did not plead guilty to the charge and prosecution to prove it, examined complainant Allan Khan and his witnesses and then closed the side.

3. The appellant, in his statement recorded u/s 342 Cr.P.C has denied the prosecution allegation by pleading innocence, by stating that he has been involved in this case falsely by the complainant

party. It was denied by him that the pistol was secured from him by the police on his arrest. He, however, did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

4. On conclusion of the trial, learned Additional Sessions Judge-II, Dadu found the appellant to be guilty and therefore, for offence punishable u/s 324 PPC convicted and sentenced him to Rigorous Imprisonment for five years and for offence punishable u/s 302(b) PPC awarded him death penalty subject to confirmation by this Court, with fine of Rs.200,000/-payable to the legal heirs of said deceased as compensation vide his judgment dated 12.07.2016, which is impugned by the appellant before this Court by way of filing the instant appeal. Simultaneously, a reference was also made by learned trial Court for confirmation of the death sentence to the appellant.

5. The appeal and reference, now are being disposed of by this Court by way of instant judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in order to satisfy its dispute with him over plot; the FIR has been lodged with delay of about one day; the 161 Cr.P.C statements of PWs have been recorded with further delay of one day even to FIR; no blood mark was found by the police at the place of

incident; the pistol has been recovered from the appellant on 3rd day of his arrest, it has not been found to be similar with the empties secured from the place of incident; PW Muhammad Yousif being sole independent witness to the incident has not been examined by the prosecution and learned trial Court has believed the evidence of the prosecution without assigning the cogent reasons. By contending so, he sought for acquittal of the appellant.

7. Learned A.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 appellant and confirmation of death sentence to him.

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

9. The death of the deceased being un-natural, the prosecution has been able to prove by examining medical officer Dr. Abdul Karim. Now is to be examined the liability of the appellant towards the alleged incident. It is stated by complainant Allan Khan that on 13.11.2014 deceased Abdul Hakim, PW Jaro Khan and Allahjurio came to him, he took them to hotel, when they were having a tea, there came the appellant, absconding accused Buxal and one unknown culprit. Out of them, appellant and Buxal fired at the deceased. The deceased sustained the fire made by the appellant while fire made by Buxal hit to Pw Muhammad Yousif. After that,

according to him, the appellant and others made their escape good and then they reported the incident to police. Significantly, the incident was reported on the next date of incident that too after burial of the deceased. No plausible explanation to such delay is offered by the prosecution, which reflects consultation and deliberation.

10. 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. PW Jaro Khan no doubt has attempted to support the complainant in his version but he could hardly be believed simply for the reason that as per SIO / ASI Zameer Hussain, his 161 CrPC statement was recorded on 15.11.2014. It was with delay of one day even to FIR. No plausible explanation to such delay has been offered by the prosecution.

12. In case of *Abdul Khaliq vs. the State (1996 SCMR 1553)*, it was observed by Hon'ble 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.”

13. PW Muhammad Yousif being sole injured and independent witness has not been examined by the prosecution, for no obvious

reason. The inference which could be drawn of his non-examination would be that he was not going to support the case of prosecution.

14. On arrest, from appellant, it is said has been secured by SIO / ASI Zameer Hussain the pistol allegedly used in commission of incident. It was on 3rd day of arrest of the appellant; such delay could not be overlooked. Be that as it may, the empties secured from the place of incident were found to be dissimilar with the alleged pistol by the Expert. In that situation, it would be hard to connect the appellant with the recovery of alleged crime weapon.

15. SIO / ASI Zameer Hussain has attempted to support the case of prosecution, but on asking was fair enough to admit that the memo of examination of dead body, memo of examination of injuries PW Muhammad Yousif and memo of recovery of pistol from the appellant were prepared either by the WPC and PC. If, it was so, then his role in investigation was only to the extent of table.

16. The discussion involved a conclusion that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and he is found to be entitled to such benefit.

17. In case of ***Muhammad Masha vs The State (2018 SCMR 772)***, it was observed by the Hon'ble Supreme Court of Pakistan 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), Ghulam Qadir 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)."

18. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant together with the impugned judgment are set-aside. Consequently, the appellant is acquitted of the offence, for which he has been charged, tried and convicted by learned trial Court. The appellant shall be released forthwith in the present case.

19. The captioned appeal and death reference are disposed of in above terms.

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