

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Criminal Appeal No.D-231 of 2009

PRESENT:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Khadim Hussain Tunio.

Date of hearing: 22.01.2020.

Date of decision: 22.01.2020.

Mr. Muhammad Jameel Ahmed, Advocate for appellant
alongwith appellant (on bail).

Ms. Rameshan Oad, A.P.G. for the State.

None present for complainant.

J U D G M E N T

ABDUL MAALIK GADDI, J – Through this appeal, appellant has assailed the legality and propriety of judgment dated 28.10.2009 passed by learned Additional Sessions Judge, Tando Muhammad Khan in D.C/Sessions Case No.72/2005 (Re-Muhammad Urs v. Bashir and others), whereby the learned trial court after full dressed trial convicted appellant Nabi Bux son of Haji Khudoo Khaskehli u/s 337-A(i) PPC (Shajjah-e-Khafifa) and sentenced him to undergo RI for one year, no order for compensation was made. However, the remaining accused namely Bashir, Sajjad, Leemon, Ghulam Nabi and absconding accused Aziz son of Haji Khan Khaskheli were acquitted of the charge on same set of evidence by the trial court.

2. Facts of the case as stated by complainant Muhammad Urs in his Direct Complaint are that in the month of September, 2000, four of the above named accused had caused hatchet blow to Hadi Bakhsh for which FIR being

crime No.149/2000 was registered by complainant Wahid Bux but police took no action against the accused. It is further alleged that on 04.09.2001, when PW Hadi Bakhsh and Ramzan were grazing their goats near Pacca watercourse in the lands of Ibrahim Punjabi, meanwhile, at about 1700 hours all the above named accused suddenly emerged from the surrounding and attacked PW Hadi Bakhsh and Ramzan. Accused Bashir Talpur gave hatchet blow to Ramzan on his head and accused Sajjad gave hatchet blow to Hadi Bakhsh on his face below right eye. The remaining accused gave lathi blows to the injured persons on the various parts of their body, Nabi Bakhsh had also caused hatchet blow to Hadi Bakhsh. It is alleged that Wahid Bakhsh had gone to police station for lodging FIR but he was detained by the police and instead of registering the FIR, police only made entry No.39 on the pretext that they had registered the FIR. Afterwards Wahid Bakhsh was also joined as an accused in the case/crime No.109/2001, therefore, the complainant agitated against the SHO, who kept him on hollow hopes that after issuance of medical certificate, his FIR would be registered. On the contrary, even after issuance of medical certificates of both the injured namely Hadi Bakhsh and Ramzan police did nothing which constrained the complainant to file Direct Complaint.

3. During pendency of this case, accused Aziz s/o Haji Khan Khaskheli was declared as proclaimed offender vide order dated 11.07.2007. The accused Ghulam Rasool alias Niazoo s/o Ismail Khaskheli was reported to be dead, thereafter, vide order dated 11.07.2007 proceedings against him were abated.

4. On 11.01.2008, a charge Ex.6 was framed against accused Bashir, Sajjad, Leemon, Ali, Nabi Bakhsh and Ghulam Nabi, to which, all of them vide

their respective pleas Ex.7, 8, 9, 10, 11 and 12 pleaded not guilty and claimed their trial.

5. Pending this case, accused Ali son of Allah Bux Talpur had also died, therefore, the proceedings against him were also abated.

6. In order to prove his case, the complainant Muhammad Urs had examined himself as Ex.14 and produced the memo of Direct Complaint as Ex.14-A and his statement in preliminary inquiry was recorded as Ex.14-B, Witness SIP Vikio Khan Solangi as Ex.15, witness Hadi Bakhsh deposed as Ex.16 and produced his statement in preliminary inquiry as Ex.16-A. Injured Ramzan was examined as Ex.17 who produced his statement in P.E as Ex.17-A. Medical Officer Dr. Maqbool Ahmed was examined as Ex.19, who produced provisional medical certificate in respect of injuries on the person of Hadi Bakhsh as Ex.19-A and letter dated 04.09.2001 of police addressed to him as Ex.19-B. He also produced the final medical certificate of injured Hadi Bakhsh at Ex.19-C, provision medical certificate and final medical certificate of injured Ramzan as Ex.19-D and 19-E and he also produced his stated in P.E as Ex.19-F. The process server HC Ali Khan vide statement Ex.20 informed the court that PW ASI Muhammad Rafique, after retirement had died. He also produced extract of death register of concerned Union Council as Ex.20-A. He also produced his statement on Oath as Ex.20-B and unservedailable warrant against the witness ASI Muhammad Rafique as Ex.20-C. Thereafter, learned advocate for the complainant vide his statement Ex.21 closed the complainant's evidence.

7. Statement u/s 342 Cr.P.C. of accused Bashir Ahmed was recorded as Ex.22, that of accused Sajjad as Ex.23, that of accused Leemon as Ex.24, that of accused Nabi Bakhsh as Ex.25 and that of accused Ghulam Nabi as Ex.26. To which all the accused denying the allegations against them claimed

that they were innocent. None of the accused led any evidence in defence nor any of them examined themselves on Oath.

8. After hearing the learned counsel for the parties, the learned trial court acquitted the co-accused named above on same set of evidence while convicted the present appellant vide impugned judgment as stated herein above.

9. It is argued by learned counsel for the appellant that appellant is innocent and has been falsely involved in this case on account of admitted enmity with the complainant party; that with regard to the same subject matter the complainant Wahid Bux lodged FIR being crime No.149/2000 at P.S. Tando Muhammad Khan against the present appellant and others and the said FIR was disposed of under `C` class with the approval of concerned Magistrate but the said order has not been assailed before any higher forum however, this Direct Complaint has been filed by the complainant almost on same facts after more than 02 years for which no plausible explanation has been furnished as such according to him on this ground false implication of the appellant in this case due to deliberation and consultation cannot be ruled out; that co-accused Bashir, Sajjad, Leemon, Ghulam Nabi and absconding accused Aziz although were nominated in Direct Complaint with same allegation of causing injuries to PWs Hadi Bakhsh and Ramzan, were acquitted by the trial court on same set of evidence whereas the present appellant was convicted without assigning any valid reason; that the evidence so brought in this case by prosecution witnesses is contradictory to each other on material particulars of the case and according to him no conviction could be maintained on the basis of contradictory evidence therefore, he was of the view that that under aforementioned facts and circumstances no case

of conviction against the appellant is made out therefore, appellant being innocent may be acquitted from the charge.

10. On the other hand, learned A.P.G. though opposed this appeal but she is not in a position to rebut the contentions advanced by learned counsel for the appellant.

11. We have heard learned counsel for the parties at a considerable length and have gone through the evidence and documents available on record.

12. After hearing the learned counsel for the parties, we have come to the conclusion that prosecution has failed to prove its case against the appellant for the reasons that admittedly there exists long standing enmity in between the appellant and complainant party and this fact is very much evident from FIR No.109/2001 lodged by appellant party at P.S Tando Muhammad Khan against the complainant party in which both the injured of this case namely Hadi Bux and Ramzan were shown as accused and they were also convicted by the trial court whereas it is alleged that prior to above FIR, complainant party had also lodged an FIR bearing Crime No.149/2000I which was subsequently cancelled under `C` class with the approval of concerned Magistrate. It is noted that complainant of said FIR has not been examined in this case which clearly falsify the version of complainant Muhammad Urs who filed the instant Direct Complaint. Furthermore, there are material contradictions in between ocular and medical evidence with regard to nature and seat of injuries which create doubts in the case of complainant. No recovery of hatchet or lathi was affected from the appellant to strengthen the case of complainant Muhammad Urs. It has also come on record that appellant Nabi Bux was the main witness of crime No.109/2001 and he had also sustained injuries in that case.

13. From the perusal of record, it also appears that no Criminal Acquittal Appeal has been filed by complainant Muhammad Urs against the acquittal of co-accused Bashir, Sajjad, Leemon, Ghulam Nabi and absconding accused Aziz. It is noted that after cancellation of FIR No.149/2000 of P.S. Tando Muhammad Khan, the complainant party had not challenged the said order of cancellation of FIR before any higher forum thus it appears that said order has attained finality and the present Direct Complaint has been filed by complainant Muhammad Urs even after the delay of two years which has not been explained plausibly. During the course of arguments we have specifically asked the question from learned A.P.G. to explain the delay in filing Direct Complaint, she has no satisfactory answer with her, therefore, on this ground false implication of the appellant in this case with due deliberations and consultations could not be ruled out. Furthermore, the complainant Muhammad Urs who filed the Direct Complaint is not the eye witness of alleged incident.

14. The allegation against the present appellant is that on 04.09.2001 he alongwith co-accused caused hatchet blow to Hadi Bakhsh but it is surprising to note that since it is alleged that co-accused Bashir Talpur gave hatchet blow to Ramzan on his head and accused Sajjad gave hatchet blow to Hadi Bakhsh on his face below right eye and the remaining accused gave lathi blows to the injured persons on the various parts of their body and they have been acquitted by the trial court on same set of evidence, having same role of causing injuries and only the present appellant has been convicted.

15. It is noted that injured Muhammad Ramzan and Hadi Bux were the accused in Crime No.109 of 2001 lodged by appellant party at P.S Tando Muhammad Khan in which they were convicted and have been shown as injured in this case, have given evidence against the present appellant. Their

evidence has been perused and considered at length and found that the same was contradictory to each other on material particulars of the case such as nature of injuries and seat of injuries caused to them by appellant and other co-accused, therefore, their evidence cannot safely be relied upon for maintaining the conviction against present appellant.

16. As observed above, record shows that on the basis of same set of evidence co-accused namely Bashir, Sajjad, Leemon, Ghulam Nabi and absconding accused Aziz have been acquitted while the present appellant was convicted. Under these circumstances, we are of the view that prosecution evidence if disbelieved for co-accused persons, could not be relied upon with regard to present appellant unless they were corroborated by evidence which come from unimpeachable independent source which prima facie appears to be missing in this case. In this regard we also confronted with learned A.P.G. but she could not controvert this fact that same set of evidence was disbelieved by the trial Court against co-accused while on the basis of same set of evidence, appellant was convicted. Therefore, in view of the facts and circumstances of the case as well glaring discrepancies and contradictions in the evidence of injured / P.Ws, as mentioned above and further that no appeal against acquittal of co-accused who have been acquitted of the charge through same judgment has ever been filed, no conviction could be maintained against the present appellant which is in clear violation of 'rule of consistency'. Needless to emphasize that rule of consistency demands that if prosecution has disbelieved the evidence in respect of a co-accused on same set of evidence, the same cannot be relied upon for convicting other accused. In this context, it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of **Muhammad Asif Vs. The State** reported in 2017 SCMR 486 wherein it was held as under:

“It is a trite of law and justice that once prosecution evidence is 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 another case reported as **Umar Farooque v. State** (2006 SCMR 1605) Honourable Supreme Court of Pakistan held as under:

“On exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted.”

17. In view of above, , instant appeal is allowed. Impugned judgment dated 28.10.2009 handed down by learned Additional Sessions Judge, Tando Muhammad Khan in D.C/Sessions Case No.72 of 2005 is hereby set aside. Resultantly, appellant Nabi Bux son of Haji Khuddo by caste Khaskheli is hereby acquitted of the charge. He is present on bail. His bail bond stands cancelled and surety furnished by him before this Court is hereby discharged.

18. These are the reasons of our short order dated 22.01.2020 whereby this appeal was allowed.

JUDGE

JUDGE

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