

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-60 of 2017

Appellant: Ali Akbar son of Umar Lashari through Mr. Sajjad Ahmed Chandio, Advocate.

Respondent: The State, through Mr. Shahzado Saleem Nahiyoona, Deputy Prosecutor General, Sindh.

Complainant: Shah Muhammad Birhmani through Mr. Abdul Hameed Bajwa, Advocate.

Date of hearing: 09-03-2021.

Date of decision: 09-03-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The appellant by way of instant appeal has impugned judgment dated 20.02.2017 passed by learned Ist Additional Sessions Judge, Dadu whereby he for an offence punishable u/s 302(b) PPC for committing murder of Ghulam Rasool has been convicted and sentenced to undergo Rigorous Imprisonment for 25 years and to pay fine of Rs.50,000/- as compensation to the legal heirs of the said deceased.

2. The facts in brief necessary for disposal of instant appeal are that the appellant it is alleged with rest of the culprits have committed murder of Ghulam Rasool by causing him iron rod and lathi blows, for that he was booked and reported upon.

3. At trial, appellant did not plead guilty to the charge and prosecution to prove it examined complainant Shah Muhammad and his witnesses and then closed the side.

4. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence by stating that it was unseen incident and was reported as such in newspaper and he has been involved in this case falsely by the complainant party on pointation of army dogs. By stating so, he produced certain documents but did not examine anyone in his defence or himself on oath in terms of section 340(2) Cr.P.C.

5. On evaluation of evidence so produced by the prosecution the appellant was convicted and sentenced as above by way of impugned judgment. However, co-accused Abdul Aziz was acquitted by way of compromise.

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; the FIR of the incident was lodged on 3rd day of the incident; it was unseen incident as was reported accordingly to police; the identity of the appellant at night time under the light of torch was weak piece of evidence; there is no recovery of torch; the investigation of the case was dishonest and evidence of the prosecution being doubtful has been believed by learned trial Court without lawful justification. By contending so, he has sought for acquittal of the appellant. In support of his contention he relied upon case of *Nooruddin and another vs The State (2005 MLD 1267)*, *Sardar Bibi and another vs Munir Ahmed*

and others (2017 SCMR 344) and Muhammad Mansha vs The State (2018 SCMR 772).

7. Learned D.P.G for the State and learned counsel for the complainant by supporting the impugned judgment has sought for dismissal of the instant appeal by contending that it was the appellant that who has committed the death of the deceased by causing him iron rod blow, on his head and on arrest from him has been secured such iron rod.

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

9. Admittedly, initially on 10.05.2010 the incident as per SIO/SIP Ahtesham was recorded in *Roznamcha* under entry No.29. It was stated therein by the complainant that the dead body of his cousin Ghulam Rasool is lying at the link road adjacent to village Ali Sher Khoso. No culprit was named therein. Subsequently, on 12.10.2010, the complainant lodged FIR of the incident by making narration that on 10.05.2010 when he, PWs Abdul Razaque, Ali Sher and Mureed when were searching for the deceased, on account of his failure to return to his home timely, when reached adjacent to village Ali Sher Khoso, there they found the appellant, co-accused Abdul Aziz (acquitted by way of compromise) and three unknown culprits causing iron rod and lathi blows to the deceased. On examination, as per medical officer Dr. Haji Khan, the deceased was found only two injuries on his

face. If, it was so, then where gone the injuries, which allegedly were caused to the deceased by three unknown culprits? No explanation to it is offered by the prosecution. Identity of the appellant and others is based on torch light, which is a weak piece of evidence. No torch light even otherwise was produced by the complainant or any of his witness before the police during course of investigation. No cogent explanation is offered by the complainant for his failure to lodge FIR of the incident with police timely. The lodgment of the FIR of the incident on 3rd day of the incident by disclosing the names of the culprits is appearing to be result of consultation. PWs Ali Sher and Abdul Razaque have attempted to support the complainant in his version, but their evidence is not enough to believe the case of the prosecution for the reason that their 161 Cr.P.C statements as per SIO/ASI Muhammad Ismail were recorded on 22.05.2010. It was with delay of about 10 days even to FIR. PW Mureed has not been examined by the prosecution. The presumption which could be drawn of his non-examination as per Article-129 of Qanun-e-Shahdat Order 1984 would be that he was not going to support of the case of prosecution. On arrest, as per SIO/ASI Muhammad Ismail from the appellant was secured the iron rod which he allegedly used in commission of incident, for that he prepared under mashirnama prepared in presence of mashir Arab. It was on 9th day of arrest of the appellant. Recovery made with such delay could safely be judged with doubt. Be that as it may,

PW/Mashir Arab on asking was fair enough to admit that his signatures on mashirnamas were obtained by the investigating officer without reading the contents whereof to him. By stating so, he made the correctness of mashirnama of recovery of iron rod allegedly from the appellant to be doubtful. SIO/SIP Ahtesham on asking was fair enough to admit that the place of incident is situated within the jurisdiction of P.S. Drig Bala. If, it was so, then the incident was to have been reported at P.S. Drig Bala. No explanation is offered by the prosecution for lodgment of the FIR of present case with PS Wahi Pandi. Beside this, on asking it was also admitted by SIO//SIP Ahtesham that the sniffer dogs were called by him and appeal was also made in newspaper for assistance in investigation. If, it was so, then it prima facie suggests that the incident was unseen and appellant was roped in commission of incident subsequently by the complainant party after due consultation and deliberation. In these circumstances, it could be concluded safely that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

10. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it has been observed by the Hon'ble Apex Court that;

"Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the

names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate”.

11. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been observed 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.”

12. 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.”

13. Having concluded above, the conviction and sentence recorded against the appellant by way of impugned judgment are set-aside, consequently he is acquitted of the offence for which he was charged, tried and convicted by learned trial Court. He is in custody and shall be released forthwith in the present case.

14. Above are the reasons for short order dated 09.03.2021, whereby the instant appeal was accepted.

JUDGE