

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA**

Criminal Jail Appeal No. S- 59 of 2016.

Appellant: Waheed Shah son of Bahadur Shah alias Driver Shah, through Mr. Safdar Ali G. Bhutto, Advocate.

Respondent: The State, through Mr. Muhammad Noonari, Deputy Prosecutor General.

Dates of hearing: 26.04.2021.
Date of the decision: 26.04.2021.
Date of reasons: 25.05.2021.

JUDGMENT

Zulfiqar Ali Sangi, J.- Through this criminal jail appeal, appellant Waheed Shah son of Bahadur Shah alias Driver Shah has impugned the judgment dated **31.05.2016**, passed by learned Additional Sessions Judge Kashmore in Sessions Case No.**206/2014**, re; St. v. *Waheed Shah and others*, arising out of crime No.**35 of 2014** P.S Miani Katcho @ Badani; whereby the appellant was convicted for offence under sections **302 (b) P.P.C**; and was sentenced to suffer **R.I for life** and to pay an amount of Rs.100,000/- as compensation to legal heirs of deceased and in default whereof to undergo **R.I for six months** more. The appellant was however extended benefit of section 382-B Cr.P.C.

2. The facts of the case of the prosecution, as depicted from para 2 of the impugned judgment are as under:-

“About two months back harsh words were exchanged in between complainant party and accused Gul Hassan and others. On 27.6.2014 complainant Sait Ali Shah, his brother Suhri Shah, his son Ahsan Ali Shah and nephew Mehtab Ali Shah came to Bazar for purchasing articles. At about 6.00 a.m., when they reached near the shop of Soomar Mal; accused Gul Hassan Shah, Akbar Shah, Khalid Shah, Waheed Shah (appellant), Mann Shah, Bahadur Shah alias Driver Shah and two unidentified accused persons, all armed with T.T pistols came there. All the accused challenged Suhri Shah and asked him that they will kill him. Accused Gul Hassan Shah fired from his T.T pistol upon Suhri Shah, which hit him over his left ear and **accused Waheed Shah (appellant) fired upon Suhri Shah, which hit him under right ear.** Suhri Shah fell down. The remaining accused pointed their pistols upon complainant party and asked them to remain silent otherwise they will also be killed. Suhri Shah died instantly. All the accused then ran away towards northern. Complainant then along with P.Ws brought the dead body of Suhri Shah to police station Miani at Badhani, where complainant lodged F.I.R against accused on 27.6.2014, at 0640 hours.”

3. After the investigation was completed, the investigation officer submitted he challan before the court having jurisdiction showing appellant Waheed Shah under custody, while co-accused Bahadur Shah alias Driver Shah, Akbar Shah, Khalid Shah and Mann Shah alias Mahraj Shah in column No.2, who were joined to face trial by learned magistrate; whereas accused Gul Hassan Shah was shown as absconder and ultimately he was declared as proclaimed offender.

4. Thereafter the charge was farmed against appellant Waheed Shah and other co-accused to which they pleaded not guilty and claimed to be tried, the prosecution in order to prove its case examined following witnesses.

- (i). Complainant Sait Ali Shah (eyewitness).
- (ii). PW Ehsan Ali Shah (eyewitness).
- (iii). Ali Muhammad Shah (mashir).
- (iv). Constable Ghalib Hussain (corpse-bearer).
- (v). Barkat Ali (Tapedar).
- (vi). Sub Inspector Niaz Ahmed.
- (vii). Medical Officer Dr. Abdul Aziz.

5. Thereafter the side of prosecution was closed and statements under section 342 Cr.P.C, of the accused persons were

recorded wherein they denied the allegations against them, they not examined under oath nor produced any evidence in their defence. The learned trial court after hearing the parties passed impugned judgment whereby convicting and sentencing appellant Waheed Shah as stated above, while the co-accused Khalid Shah, Bahadur Shah alias Driver Shah, Akbar Shah and Mann Shah alias Mahraj Shah were acquitted of the charge.

6. Learned counsel for the appellant criticized the impugned judgment and argued that, the prosecution witnesses are closely related *inter-se*, and no independent witness has been examined by the prosecution at trial. Learned counsel next contended that prosecution witnesses have made contradictions, improvements and omissions in their evidence on the very material points, as such their presence at spot is doubtful, therefore, their evidence is un-reliable and un-trustworthy. Learned counsel further contended that the incriminating material collected and produced on record by the prosecution against appellant was not put to the appellant in his statement under section 342 Cr.P.C. Per learned counsel the star witness Mehtab Ali Shah was not examined by the prosecution, therefore, presumption would be that he was not going to support the case of prosecution; therefore, he was not examined. Learned counsel further contended that, on the basis of same set of evidence produced by the prosecution, the co-accused Khalid Shah, Bahadur Shah alias Driver Shah, Akbar Shah and Mann Shah alias Mahraj Shah have been acquitted of the charge by learned trial Court, whereas only present appellant was convicted and sentenced. Learned counsel lastly submitted that the prosecution not proved the case against the appellant and entire case of prosecution is doubtful, therefore, the appellant may acquitted by

extending him the benefit of the doubt. Learned counsel in support of his contentions relied upon case of **Nadeem alias Kala v. The State and others (2018 SCMR 153)**, **Ahmad Khan and another v. The State (2007 P.Cr.L.J 117)** and **Lal Khan v. The State (2006 SCMR 1846)**.

7. Learned D.P.G. appearing for the state opposed instant appeal and submitted that the prosecution case has rightly been believed by the learned trial court and the appellant has rightly been awarded conviction. He further added that eyewitnesses have fully supported the case of prosecution and appellant has been assigned direct role of making fire upon deceased; that ocular evidence gets supported by medical evidence and that no major contradictions appeared in the statements of the eyewitnesses and the contradiction pointed out by learned defence counsel are minor in nature which cannot be considered in presence of strong evidence available against the appellant. Lastly, he prayed that the appeal may be dismissed.

8. I have heard learned counsel for appellant and learned D.P.G. for the state and have scanned the evidence produced by the prosecution with their able assistance.

9. After reassessment of evidence produced by the prosecution I am of the view that the prosecution has not proved case against the appellant beyond reasonable doubt, the evidence produced by the prosecution is not reliable, trustworthy and confidence-inspiring.

10. The ocular evidence is consist upon three witnesses i.e. complainant Sait Ali Shah and P.Ws Ahsan Ali Shah and Mehtab Ali Shah. The complainant is brother of deceased Suhri Shah, while PW Ahsan Ali Shah is son of complainant, whereas PW Mehtab Ali Shah is nephew of the complainant. The motive for the alleged incident as set-out in F.I.R is previous grudge and ill-will between the parties due to exchange of harsh words two months prior to this incident. Therefore, on account of close relationship of complainant, witnesses and deceased with each and previous grudge between the parties, the evidence of prosecution witnesses needed corroboration from some independent source, which is lacking in the present case.

11. From perusal of evidence of these eyewitnesses it reveals that there are noticeable contradictions in their depositions on very crucial points. It appears that at the very start the complainant in his examination-in-chief has made exaggeration and improvement to the effect that he has shown presence of in all six persons, namely, Ali Muhammad Shah, Mehtab Shah, Ehsan Ali Shah and Himath Ali Shah besides himself (complainant) and the deceased Suhri Shah by deposing that **“on 27.6.2014 at morning time, I, deceased Suhri Shah, Ali Muhammad Shah, Mehtab Shah, Ehsan Ali Shah, and Himat Ali Shah came to Badani town”**, though as per contents of F.I.R the complainant has shown presence of only four persons i.e. complainant himself, deceased Suhri Shah and two PWs, namely, Ahsan Ali Shah and Mehtab Ali Shah. Similarly, PW Ahsan Ali Shah has also made exaggeration in respect of number of persons present at place of incident; he has also shown presence of six persons. Furthermore, the F.I.R and deposition of complainant disclose the time of incident as 06.00 a.m., whereas PW Ahsan Ali Shah contradict them

by showing the time of incident as 05.15 a.m. It further reveals that complainant Sait Ali Shah in his examination-in-chief has deposed that on their reaching at shop of Soomo Mal they saw accused persons standing near the shop of Soomo Mal, (complainant in his cross-examination has also deposed that accused were already present at the vardat), whereas PW Ahsan Ali Shah in his examination-in-chief has deposed that **“deceased Suhri Shah went to purchase articles from the shop of Soomo Mal, while we were sitting at the hotel. At about 05.15 a.m. accused Gul Hassan Shah, Waheed Shah, Khalid Shah, Bahadur Shah, Akbar Shah and Man Shah all armed with TT pistols came there. The harsh words were taken place in between accused and Suhri Shah. We left the hotel and came there”**. Whereas, contents of F.I.R on this point reveals that the accused persons came from northern side and all of them challenged Suhri Shah. Further, the complainant in his examination-in-chief has deposed that he showed place of vardat to police at about 07.00 to 07.30 a.m., whereas mashirnama of inspection of place of vardat shows its time as 07.30 to 08.10 hours. According to evidence of complainant and contents of mashirnama the place of incident was shown to police by complainant Sait Ali, whereas mashir of inspection of place of incident, namely, Ali Muhammad Shah has deposed that place of vardat was shown to police by Sabir Shah.

12. The place where murder was allegedly committed by the accused person is also doubtful as the complainant in his cross-examination has deposed that incident took place on mid road, which is a Pakka road; whereas mashirnama of inspection of place of incident also shows place of incident as road, but PW Ahsan Ali Shah has contradicted the complainant and mashirnama by deposing that “

Suhri Shah was inside the shop when accused came there; the accused fired upon Suhri Shah, when he was standing inside the shop; however mashirnama of inspection of place of incident shows that place of incident is near shop of Soomo Mal at distance of three steps from shop, while investigating officer of the case in his cross-examination has deposed that murder was committed at metallic road which creates very serious doubt in the case of prosecution and makes the presence of the complainant and the eyewitnesses at the relevant place and time as doubtful.

13. The complainant in his cross-examination has deposed that they left house by foot, while PW Ahsan Ali Shah in his cross-examination deposed that they came at place of vardat on two motorcycles. Not only had this but he further added that, one motorcycle was driven by Suhri Shah while another was driven by him. The complainant in his cross-examination has deposed that they had shown motorcycle and purchased articles and minor son of Suhri to police, whereas PW Ahsan Ali Shah in his cross-examination has deposed that articles purchased by Suhri Shah remained at the shop and were not shown to police, whereas mashirnama of inspection of place of incident is silent on this point. The complainant and PW Ahsan Ali Shah have deposed that they took the dead body to police station on cot, whereas I.O of the case SIP Niaz Ahmed has deposed that complainant party brought the dead body at P.S at their shoulders.

14. The contradictions stated above are not minor in nature and are serious and creates doubt regarding the happening of the episode within sight of witnesses. In particular, presence of both the

witnesses of ocular account i.e. complainant Saith Ali and PW Ahsan Ali Shah at the place of occurrence is not free from doubts. It is well settled law that statements of eyewitness which are in contradictions to each other and also self-contradictory had no evidentiary value. Reliance in this regard can be placed upon the case of **Nazir Ahmed v. The State (NLR 2006 Criminal 184)**.

15. Moreover, the eyewitness Mehtab Ali Shah who is natural and material witnesses of the alleged incident was **given-up** and not examined by the prosecution. The act of withholding evidence of most natural and a material witness of occurrence has created an impression that, had this witness been brought into witness-box, he might not have supported the prosecution, rather he would have deposed against the prosecution. Prosecution, in such eventuality must not be in position to avoid the consequence in view of **Article 129(g) of Qanun-e-Shahadat 1984**, which provides that, the evidence which could be, and is not produced would, if produced, be **unfavorable** to person who withholds it.

16. The motive for alleged occurrence as set-out in the F.I.R is that about two months prior to the incident harsh words were exchanged by the parties with each other, so due to that grudge the accused persons committed murder of the deceased. The motive seems to be very weak, and it does not appeal to the mind that, a person would be done to death due to petty differences on exchange of harsh words only which even was not reported to the police prior to the incident of murder. The record reflects that during investigation co-accused Bahadur Shah alias Driver Shah, Akbar Shah, Khalid Shah and Mann Shah alias Mahraj Shah were found innocent by the

investigating agency and their names were placed in column No.2 of the challan. It is, therefore, obvious that the complainant has implicated as many persons as possible from the accused side. The net was thrown wide deliberately in order to ensure that no male member from the accused side was spared to pursue the criminal case. The learned trial Court while agreeing with the investigation has acquitted these co-accused persons vides the impugned judgment by disbelieving version of prosecution and no acquittal appeal was filed to challenge the said acquittal. In view thereof, it appears that the learned trial Court has not evaluated all these factors, discrepancies and the evidence in true perspective and thus reached to an erroneous conclusion by holding the appellant is guilty of the offence and awarded sentence to him.

17. Thus based on the particular facts and the circumstances of the case and by relying on the settled principle of law that, for extending benefit of doubt, it is not necessary that there should be many circumstances. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit must be given to the accused not as a matter of grace or concession, but as the matter of right as has been held by the Supreme Court in the case of **Tariq Pervez v. The State (1995 SCMR 1345)**.

18. The instant criminal jail appeal was allowed vide short order dated **26.04.2021**, and the impugned judgment dated **31.5.2016** was **set-aside**. Appellant Waheed Shah was acquitted from the charge and was ordered to be released forthwith if not required any other custody case.

19. These are the reasons of my short order dated: **26-04-2021**.

Judge