IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Appeal No. 119 of 2017

Appellant	:	Rehmatullah through Mr. Patras Piyara, Advocate
Respondent	:	The State through Talib Ali Memon, Assistant. P.G
Date of hearing	:	18th June 2021
Date of decision	:	18th June 2021

JUDGMENT

SALAHUDDIN PANHWAR J.-Appellant/accused Rehmatullah has challenged the impugned judgment dated 13.02.2017, passed by learned VIII- Additional Sessions Judge, East Karachi in Sessions Case No.1884 of 2015 arising out of FIR No.211/2015, registered under section 295-B, PPC at PS Shah Faisal Colony Karachi. After full-dressed trial, the appellant was convicted under Section 295-B PPC and was sentenced for Life Imprisonment. Appellant was also extended benefit of Section 382-B, Cr.P.C.

2. Relevant facts of the prosecution case are that on 02.08.2021 at 1200 hours at Chokor Nala, near Natha Khan, Shah Faisal Colony, Karachi, complainant Sardar Ghani found sacred religious papers in a bag, which was lying in Nala. He accordingly, lodged FIR. During investigation some eleven bags were taken to police custody. Initially FIR was registered against unknown accused but later on, appellant was found involved in crime, he was arrested by police and after usual investigation, challan was submitted and he was sent up to face the trial.

4. Upon indictment, the accused did not plead guilty and claimed to be tried.

5. In order to prove its case, prosecution examined PW-1/Complainant Sardar Ghani at Ex-3, who produced F.I.R at Ex.3/A, site inspection memo at Ex.3/B. PW-2 Muhammad Altaf, Muslim Divine of Noori Masjid, at Ex.4, PW-3 Mufti Abdul Qayoom, Muslim Divine of Jama-e-Masjid Bilal at Ex.5. PW-4 Qari Shahnawaz, Moazzan of Jama Masjid Askari-4, at Ex.7. PW-5 Abdul Malik at Ex.8. PW-6 HC Liaquat Hussain Shah at Ex.9, who produced memo of arrest and recovery at Ex.9/A. PW-7 SIP AftabRaza at Ex.10, who produced entry at Ex.10/A. PW-8 Inspector Muhammad Khalid at Ex.11. Thereafter, prosecution side was closed vide statement at Ex.15.

7. Statement of accused under section 342, Cr.P.C was recorded at Ex.13, wherein he denied the prosecution allegations and claimed his false implication, however, he neither examined on oath, as required under Section 340(ii) Cr.P.C nor produced any defence evidence.

8. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellant as mentioned above. Appellant being aggrieved and dissatisfied with the judgment has filed the aforesaid appeal.

9. Learned counsel for the appellant, *inter alia*, has contended that the case of the prosecution is fraught with material contradictions; that there was no eye witness of the case who had seen the appellant while throwing or putting the sacred papers bags in the Nala; that is no circumstantial and or any other corroborative evidence on record to support the prosecution version against the appellant; that such an offence is admittedly heinous but it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required; however, in the present case prosecution has failed to prove its case beyond reasonable shadow of doubt, hence he prayed for acquittal of the appellant.

10. Conversely, learned Assistant Prosecutor General Sindh contended that all the PWs have supported the prosecution case; that no material contradiction in the evidence of the prosecution witnesses have been pointed out by the learned counsel for the appellant; that no ill-will or enmity has been pointed out to falsely implicate the appellant in such a heinous offence; that the prosecution has fully proved its' case against

the appellant beyond any reasonable doubt and the impugned judgment passed by learned Trial Court does not require any interference by this Court, hence prayed for dismissal of instant appeal.

11. Heard and perused record.

12. Perusal of the record shows that the instant FIR was lodged against the unknown culprit who had thrown the extract of Holy Quran and Islamic (religious) literature into ***NALA*** with intention to desecrate the same. Before going into any further details, it is relevant to add here that while evaluating the evidence (s) for holding one guilty or innocence the Court (s) are never supposed to be influenced of mere *heinousness* of the crime / charge rather the Court (s) are always required to ensure ***Criminal Administration of Justice*** by fair and proper appraisal of the evidences which, *too,* within settled principles of law of appreciation of evidences. I am guided in such conclusion with the case (s) of *Azeem Khan & another v. Mujahid Khan & ors* 2016 SCMR 274 wherein it is held as:-

> 32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable to an accused person being indefeasible and inalienable right of an accused. **In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In the event the justice would be casualty**.

13. Having said so, the perusal of the available material shows that FIR of the instant case was lodged by complainant **Sardar Ghani** which, too, after assurance of police and rangers regarding arrest of the accused, as is evident from examination-in-chief of said complainant which reads as:-

> "*I further saw* **fourteen bags containing Qurani Pages in same Nala**. *I took out the same out of Nala and kept at the upper place. Area people gathered who became emotional. Hearing the incident, Masjid Pesh Imam Altaf Hussain and Qari Abdul Qayoum reached the spot and they too saw the bags. These were empty sugar bags. Area people blocked the road.* Police and rangers came there who assured us for arrest of

> accused by Friday. On 03.8.2015, F.I.R was lodged against the unknown accused.

The above shows that FIR was lodged on ***next day*** which shows that complainant had sufficient time to recollect all material facts before lodging the FIR but he (complainant) admitted in his cross-examination that:-

> *"I heard the contents of F.I.R. thereafter, signed the same. It is correct to suggest that in the F.I.R. only one bag is mentioned took by me from the Nala."*
>
> *"It is correct to suggest that in my 161 Cr.P.C. statement only one bag is mentioned. My statement was recorded on 03.08.2015."*
>
> *"I say that we had changed the bag due to wet condition and considering the respect of religious papers."*

14. The above admissions show that at relevant time only one bag was found else the complainant would not have admitted that despite reading out of contents of FIR he signed the same though it contained **one bag** and not **11 bags** as was later claimed by prosecution. Be that as it may, I am unable to appreciate that if the said witness was the complainant then how and why his 161 Cr.PC statement was recorded?. Needless to add that *legally* there is no room for recording of **161 Cr.PC statement** of **complainant.** Here, it is also worth adding that said **Sardar Ghani** was / is also co-mashir of inspection of place of occurrence. The admission of recording of 161 Cr.PC statement of said witness also goes to suggest that none, *perhaps,* was prepared to become **complainant** (lodger of FIR) then the said **Sardar Ghani** was asked to become complainant.

15. It is also matter of record that the said **Sardar Ghani** (complainant) also *categorically* stated that due to wet condition the ***bag*** was changed. This *even* was affirmed by PW-3 Mufti Abdul Qayoum while admitting in his cross-examination as:-

> "It is incorrect to suggest that we did not change the bags. Vol. says that said bags were in miserable conditions; therefore, we changed the bags. I do not remember those bags colors."

The PW-2 of such recovery of bags namely Muhammad Altaf, however, claimed in his cross-examination as:-

> "The bags were not changed and bag available in the Court are same."

16. *Prima facie,* these witnesses remained stuck with their respective claim (s) yet claimed during their examination-in-chief that ***'CASE PROPERTY IS SAME'.*** I am surprised that how all these witnesses can claim the property as ***same*** when per two of them the ***bags were changed*** while per one of them ***bags were changed?.*** This was / is begging for an explanation but the same appears to have completely remained unattended by the learned trial Court although the prosecution was always required to ensure production of ***safe*** custody of case property and production thereof with such assurance in court, particularly when the case rests *mainly* on case property.

17. Here, it is worth adding that where the culprit is ***unknown*** then appearance / introduction of one as ***accused*** must be worth believing and if there is any reasonable dent in discovery of the name / identification of the ***accused*** the same shall always go in favour of the accused even at time of evaluating the evidence. Keeping such position in view, the perusal of record shows that it was the PW-4 Qari Shahnawaz (Moazzan in Jama Masjid Askari-IV) who introduced the name of the accused (present appellant) while stating in his examination in chief as:-

> *"We are used to collect the Shaheed Qurran Shareef and other religious books in a box. The Shaheed Quran Shareef and other religious books are then handed over to Ashraful Madaras for further disposal in sea. Once, the bags were to be disposed of through same process and when we contacted the Ashraful Madaras Staff, they told us that for want of vehicle they were unable to collect the bags from our Masjid. One security guard namely abdul Malik is posted at our Masjid since three years. I discussed the matter with him who told me that his sister's husband namely Rehmatullah is rickshaw driver who may be called and he would dispose of the said bags in sea. On 02.08.2015, Abdul Malik brought Rehmatullah. Rehmatullah told me that he was used to dispose of such types of bags in sea. He further informed me that he was well aware with disposal of such matter process. I showed bags to him and handed over 11 bags to him. Amount of Rs.500/- was agreed as fair (fare). He took the bags on his rickshaw and went away. Prior to that, he checked and confirmed the Shaheed Quran Paks and religious books lying in the bags. He received the bags at 1100 hours time and at 1500 hours time, I heard the protest was made by the people by blocking the road on the pretext that Shaheed Quran-e-Pak and religious books were*

> *thrown in the dirty nala. One Sardar Ghani lodged FIR at police station.* ***I/O Muhammad Khalid recorded my statement at Askari-IV, R.E.C. Office****.* I was called at police station where I went and I saw the bags lying there and identified the same. Accused Rehmatullah is same. "

18. The perusal of above shows that said witness, nowhere, gives any description of bags nor gives any justification for departing from *normal* procedure for disposal of *Shaheed Quran-e-Pak* and other religious material, particularly when he does not claim any emergency for disposal of such *sacred* material. The witness, however, admitted in his cross-examination that:-

> "About six months ago of present incident, I handed over the sacred papers to Ashraful Madaris."

19. Be that as it may, the introduction of the name of the accused (*present appellant)* undeniably was through said witness hence *logically* the arrest of the accused (present appellant) must be after such disclosure i.e statement of the said witness but the accused (present appellant) was arrested on **03.8.2015 @ 2100 hours** which, too, on claim as is evident from memo of arrest (Ex.10/A) that:-

> *".. During patrolling received information through spy that the accused involved in case crime NO.211/2015 offence U/s.295-B, PPC of PS Shah Faisal Colony named Rehmatullah is standing with Rickshaw at Rashid Minhas Road near Askari-IV."*

20. Worth reminding that FIR of incident was lodged against unknown person on **03.8.2015 at 1300 hours.** This goes to suggest that arrest of unknown accused with ***proper name*** was made within ***seven hours*** which, too, without giving details as to how and through whom the name of accused was disclosed. Here, it is worth adding that though claimed disclosure of accused is referred to PW-3 **Qari Shahnawaz** but per the I.O/PW-Inspector Muhammad Khalid in his cross-examination negates possibility of *specific* identification of present appellant as **accused** till time of his arrest. Relevant portion, to make the point clear, is reproduced hereunder:-

> *"..Qari Shahnawaz and accused sister's husband Abdul Malik had disclosed the accused name. It is correct to suggest that I*

> *recorded the Qari Shahnawaz statement on* **06.08.2015,** *while the accused arrested on* **03.8.2015.**

21. The above picture, *prima facie,* makes the arrest of present appellant as **accused** not only doubtful but *illogical.* This was always floating on surface but was never appreciated by the learned trial Court while convicting the appellant.

22. There is another material aspect which makes whole case of prosecution couple with manner of *identification* (disclosure of unknown accused) and arrest of the accused (present appellant). It was unanimous claim of all private witnesses that there was protest on the very date of incident i.e **02.8.2015** hence logically the arrival of the police must have been on the very day i.e **02.8.2015** but the prosecution claimed that FIR was lodged on **03.8.2015** as well inspection of site on **03.8.2015** i.e after recording of the F.I.R. The perusal of the mashirnama of sirzamine (Ex.3/B) shows that there is tampering whereby the date ***02.08.2015*** was changed into ***03.08.2015.*** The I.O SIP Khalid , however, responded to such questions as:-

> "It is incorrect to suggest that place of incident inspection memo was prepared on 02.08.2015. I say that photocopy print is wrong while original memo contained date 03.08.2015 in site inspection memo. It is incorrect to suggest that by tempering, date 02.08.2015 is made as date 03.08.2015 in site inspection memo."

23. This stands evident from examination-in-chief of PW-3 Mufti Abdul Qayoum who stated in his examination in chief as:-

> "I am Pesh Imam at Jama Masjid Bilal Drigh Road, cant. Bazar. On 02.08.2015 I was present in my Masjid after offering Zohar prayer. I received a phone call from Molana Altaf who informed me that some body had committed insult of Quran-e-Pak. I went to the Nala where I saw several persons gathered there. I saw about 11 bags containing Qurane Pak with direct. **We blocked the Shahra-e-Faisal and protested. Police party came there. Police recorded our statements. We went to police station where Sardar Ali acted as complainant and FIR was registered.**

24. Further, the memo of place of occurrence also shows that complainant Sardar Ghani acted as ***first mashir*** which was not possible if the FIR would have been recorded *earlier.* This also makes clear that

prosecution never acted *honestly* rather such attempt was made to avoid the consequences, as discussed in case of *Mst.Asia Bibi v. The State* (*PLD 2019 SC 64)* regarding pre-inquiry.

25. The bare perusal of the available material shows that prosecution case was / is full of ***dents*** therefore, it was never safe to *blindly* believe such prosecution case which never justified appearance / disclosure of the name of the present appellant as **accused.** It is also worth adding that the presence of appellant near ***Askari-IV*** was / is also not believable because such place was / is near to place from-where he (accused) allegedly took 11 bags and thrown in ***nala*** for which not only protest was conducted but police and rangers came and assured for arrest of accused. The benefits of such dents (s) was / is to be given to the accused not as matter of grace but as matter of right, as held in the case of *Najaf Ali Shah v. State* 2021 SCMR 736 that:-

> 9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty person should let off but one innocent person should not suffer. …… It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. This Court in the case of *Mst.Asia Bibi v. The State* (*PLD 2019 SC 64)* while relying on the earlier judgments of this Court has categorically held that *"if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he /she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of ……*

26. The above discussion as well effects of settled principle of law are sufficient to convince me that impugned judgment of conviction is not sustainable in law. The same, accordingly, is hereby set-aside and the appellant / convict stands acquitted of the charges. These are the reasons of the short order dated 18.06.2021 whereby the appeal was allowed.

JUDGE

SAJID