

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S-117 of 2018.
Criminal Appeal No.S-118 of 2018

Date of hearing: 06.12.2021
Date of decision: 24.12.2021

Appellant: Sevji through Mr. Mashooque Ali Bhurgri, advocate.

The State: Through Mr. Shahzado Saleem Nahiyoon, A.P.G.

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JUDGMENT

MUHAMMAD IQBAL KALHORO,J- By means of captioned Criminal Appeals, appellant has challenged impugned judgments dated 26.04.2018 passed by learned 2nd Additional Sessions Judge Badin in Sessions Case No.166/2017 emanating from crime No.59/2017 of P.S Tando Bago, whereby he has been convicted u/s 302(b) P.P.C and sentenced to undergo imprisonment for life as Ta'zir and to pay rupees one lac as compensation to the legal heirs of deceased Sevji as required under section 544-A CrPC, and in case of failure in payment of compensation to undergo SI for six months more. In Criminal Appeal No.S-118/2021 he has challenged impugned judgment dated 26.04.2018 passed by the same court in Sessions Case No.58/2017 emanating from Crime No.60/2017 of same Police Station, whereby he has been convicted u/s 23(1) (a) as well as u/s 25 of Sindh Arms Act and sentenced to undergo R.I. for seven years in both the offences. Both the sentence are ordered to run concurrently in both the cases with benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 9.8.2017 at 12:00 noon, complainant and his uncles Bhojan Das and Gango Kolhi and other inmates were present in the house of complainant where they heard a firearm report. They saw that accused Sevji armed with a gun, Jejo son of Walo Kolhi and Navo son of Natho Kolhi were standing in front of the house. All three accused persons while abusing told that they will not spare them. Accused Sevji Kolhi then made a straight fire from his gun upon complainant party with intention to kill which hit son of complainant namely Sevji aged about 6 or 7 years, who after sustaining injury fell down on the ground. Complainant party shifted injured Sevji to Tando Bago Hospital and then taken him to Hyderabad Civil Hospital where during treatment he succumbed to injuries on 10-08-2017 at 6.00 p.m. for which FIR was lodged by the complainant on 11.08.2017 at 2300 hours.

3. During investigation, on 12.8.2017 at 1700 hours accused Sevji was arrested by the Investigating officer from Manik Wah Mori Tando Bago Khadehro road in presence of mashirs Mansingh and Gamoon and on 15.8.2017 he became ready to produce the gun

used by him in commission of murder of Sevji. Then he led the police party to his house situated in Village Bhagwano Kolhi and produced one unlicensed gun and two white colour cartridges which were secured and sealed at spot in presence of mashirs under the mashirnama. Thereafter, FIR bearing Crime No.60/2017 u/s 23(1) (a) and 25 Sindh Arms Act was also registered against him.

4. In the trial, the prosecution has examined 08 witnesses, who have produced all necessary documents i.e. FIRs, memos, etc. In the statements recorded u/s 342 Cr.PC in both the cases the appellant has denied allegations of prosecution. However, vide impugned judgments the appellant has been returned guilty verdict in the terms as stated above. Hence these appeals

5. Mr. Mashooque Ali Bhurgri, learned counsel for appellant has argued that appellant is innocent and has been falsely implicated in this case; that the witnesses have contradicted each other on material facts of the case and that no confidence inspiring evidence has come on record.

6. On the other hand, learned Additional Prosecutor General Sindh has supported the impugned judgment and submits that prosecution has been able to prove its case against the appellant beyond reasonable doubt.

7. I have considered submissions of parties and perused material available on record. In the FIR registered on 11.08.2017 at 2300 hours after two days of the incident on 09.08.2017 at 1200 hours, complainant has revealed that he was present in his house along with PWs Bhojan Das and Gangoo Kolhi, his uncles, when at about 12:00 noon they heard fire shot report and saw that outside of his house appellant Sevji armed with a gun, Jeejo and Novo were present who abused them. Then appellant made a straight fire to them but it hit his son instead, namesake of appellant, Sevji aged about 6/7 years seriously injuring him. He was taken to local hospital in Tando Bago and thereafter to civil hospital Hyderabad where he died on 10.08.2017 at 06:00 p.m. However, in his deposition complainant has narrated a different story. He has disclosed that he was present at his land where his wife came at about 12:00 noon and disclosed about the incident and the fact that his son was taken to the hospital. Upon which he reached the hospital and after getting a letter for civil hospital Hyderabad got his son admitted there. In his cross-examination, he has admitted that he is not the eyewitness. His narration has completely belied story said by him in FIR.

8. The second witness examined by the prosecution PW-2 is Bhojan Das who has also not stuck to what has been stated in FIR and has disclosed that he was present in his house and came out of it after hearing a fire shot report where appellant Sevji armed with a gun was present and he abused him and fired upon him which however hit son of the complainant injuring him seriously. Although he has assigned role of firing to the appellant

but has not disclosed about presence of other two acquitted accused namely Jeejo alias Utamchand and Novo who otherwise are shown accomplice of the appellant and present at the spot. He does not say either that he was present in the house of complainant along with complainant and other witnesses where, as per FIR and other prosecution papers, the incident took place and son of the complainant was injured. Per him, he was in his house and after hearing the fire shot when he came out appellant fired at him but it hit son of the complainant. Meaning thereby that son of the complainant was standing within his close proximity or at least within a short radius of his position and it was not house of the complainant where allegedly the incident took place.

9. No doubt, as stated above he has implicated the appellant as long as firing by him is concerned but on other material aspects of the case viz. place of incident, presence of complainant and witnesses, presence of acquitted co-accused named above, he has not supported the case as narrated in the FIR. Except him, prosecution has not examined any other eyewitness. The complainant who as per FIR himself is an eyewitness of the incident has admitted in cross examination that he is not the eyewitness. His evidence of the incident is hearsay which was disclosed to him by his wife. However, neither his wife is a witness nor she has been examined in the trial. PW Bhojan Das in his cross-examination has disclosed that when they brought injured at Tando Bago Hospital, mother of the deceased, among others was with him. This disclosure does not identify with the fact disclosed by the complainant in evidence that when he was available at land his wife i.e. mother of the deceased had come there and told him about the incident. If mother of the deceased had taken the injured along with others to hospital, then how she happened to go at the same time to her husband available at the lands and told him about the incident.

10. From the evidence of complainant it is understood that complainant's wife, who informed him about incident, is the eyewitness but PW-2 Bhojan Das in his evidence has not stated any word about her presence at the spot. In his cross examination, he has asserted that appellant had fired at him from a distance of 100 paces. But, medico legal officer PW-3 Dr. Muhammad Aslam in his cross-examination has revealed that deceased received injury from within a distance of 30 ft. The sketch prepared by PW-6 Anbji Tapedar as Ex.11/B indicates the points where deceased received firearm injury and the place where appellant along with other accused was standing. Point 'D' has been identified to be a place where appellant Sevji was standing and had fired at deceased present at point 'A'. The distance between two points shown by Tapedar is 417 ft. The deceased was fired at from a shotgun which fires cartridges having pellets. Larger the distance the fire is made from, wider the radius it would cover. If the fire was made from the distance as narrated by PW Bhojan Das i.e. 100 paces or from a distance of 417 ft. and PW Bhojan Das was present along with the deceased, it should have hit him apart from the deceased. His emerging unscathed in such situation casts a shadow on his presence at the place of incident. Even otherwise when his evidence viz-a-viz of 100 paces distance compared with

the evidence of medico legal officer stating distance of 30 ft. from within which fire was made at the deceased is compared, it does not inspire confidence about his presence. In addition, from the place of incident no empty was recovered. Medico legal officer's evidence shows that a pallet was removed from body of deceased but record is silent whether it was handed over to police or not. But, the FSL report produced in the off-shoot case (Sessions Case No.58/2017) as Ex.05-D reveals that one crime pallet was also sent along with the gun and live cartridges which has been opined to be a component of shotgun cartridge. However, the report does not show that under what test or formula the pallet was processed and confirmed to be component of cartridge of DBBL.

11. On 12.08.2017 appellant along with co-accused (since acquitted) was arrested and on 15.08.2017 in response to interrogation he led the police to his house and produced one unlicensed gun which prosecution claims was used in commission of offence. Such paper was prepared and signed by the mashirs. One of the mashirs namely Mansingh has been examined by prosecution in Sessions Case No.58/2017 registered against appellant u/s 23(1) (a) and 25 Sindh Arms Act. This witness has stated that from the hedge of his house, appellant produced the gun. However, he does not say that along with the gun two cartridges were also recovered. He is also mashir of arrest of the appellant and other accused in the main case and has admitted in cross-examination that police only obtained his left thumb impression on the memo of arrest otherwise he was not aware wherefrom the accused were arrested. He has further admitted that they were already aware about availability of the gun in the house of appellant. His admission has reduced evidentiary value of recovery of the gun on pointation of appellant.

12. The other PW-2 examined by the prosecution is IO of the case. He, however, has revealed that gun was recovered from the house of appellant on his pointation and does not say that it was available in the hedge wall of the house of appellant as disclosed in the FIR (Ex.5-A) and memo of recovery (Ex.10-G). Furthermore, in this case it has been the constant claim of the prosecution that the gun recovered from the appellant was unlicensed one but in the main case PW-5 who is same witness Mansingh has produced at Ex.10-H memo of recovery of license of the gun in the name of co-accused Jeejo alias Utamchand. This aspect of the case has neither been investigated properly nor it has been brought on record that if co-accused Jeejo alias Utamchand was the owner of the gun, how it happened to be possessed by appellant and recovered from his house. More so, this gun, regarding recovery of which although a separate case was registered bearing Crime No.60/2017, is stated to have been used in the commission of the offence. And therefore, it was imperative to ask about such fact from the appellant in his statement u/s 342 CrPC in the main case. But, in the main case (Sessions Case No.166/2017) appellant has not been asked such question about recovery of the said gun or its use by him in the commission of offence. In the connected Sessions Case No.58/2017 pertaining to recovery of the gun tried by the same presiding officer, this question has been asked from the appellant. Although this

offence allegedly committed by the appellant was confined to possession of unlicensed weapon by him and not its use in the commission of offence, which was a fact to be proved in the main case and not in off-shoot case of recovery. It is settled if a certain piece of incriminating evidence is not asked from the appellant in 342 CrPC statement the consequence of such evidence will not be brought against him. Although this question has been asked from the appellant but as stated above not in the main case where this fact was required to be proved having been recorded in evidence against him.

13. The upshot of above discussion is that prosecution has failed to prove its case against appellant on both counts. Hence, these appeals are hereby allowed, convictions and sentences awarded to appellant Sevji vide impugned judgments dated 26.04.2018 respectively passed in Sessions Case No.166/2017 and Sessions Case No.58/2017 are set aside and he is acquitted of the charge. He shall be released forthwith if not required in any other custody case.

JUDGE

Ali Haider