ORDER SHEET

HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Cr. Appeal No.S-237 of 2021

DATE	ORDER WITH SIGNATURE OF JUDGE
Appellant :	Through Mr. Ashfaque Ahmed Almani advocate
Complainant :	Through Mr. Muhammad Irfan Chandio advocate
The State :	Through Mr. Imran Ahmed Abbasi Assistant P.G
Date of hearing:	28.11.2022
Date of Decision:	28.11.2022

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JUDGMENT

ADNAN-UL-KARIM MEMON, J. This appeal has been directed against the judgment dated 30.11.2021 passed by learned I[st] Additional Session Judge / MCTC Tando Allahyar in Sessions Case No.78 of 2019 arising out of Crime No.33 of 2018 registered at PS Bukera Sharif for offenses punishable under Sections 462-B, 427 & 34 PPC, whereby, the present appellant was convicted under Section 265-H(ii) Cr. P.C. and sentenced to undergo R.I. for 10 years for offense under Section 427-B PPC with fine of Rs.20,00,000/-. By the same judgment, he was also sentenced to undergo R.I for one year with fine of Rs.10,000/- and in case of non-payment of fine he was directed to further suffer S.I for one month; however, both sentences were ordered to run concurrently and benefit of Section 382-B PPC was extended to accused / appellant.

2. The allegation against the present appellant as per FIR lodged by complainant Fayyaz Ahmed Manager OGDCL, is that on 24.11.2018 at 0200 to 0300 he along with the acquitted as well as absconder accused, was involved in the theft of Oil through Truck at D-Farm of the land of Tarique Khokhar near village Waroo Mari situated at Deh Rechal Taluka and District Tando Allahyar by tampering the petroleum pipelines of Oil and Gas Company for loading purpose due to which fire erected near 12 Dia Truck main line of (OGDCL) Gas Gathered Station Tando Allahyar and two persons namely Essa Khan and Arshad sustained burn injuries. It is also alleged against the appellant that he along with co-accused, through the above illegal act, has caused a huge loss of approximately 3000-4000 litters of crude oil to national assets.

3. After registration of FIR investigation was carried out and challan was submitted before the competent Court of law, whereby accused Ayaz and Naeem Shah were shown absconders, whose case was bifurcated by the trial Court. After framing of charge against the present accused as well as acquitted accused persons, the prosecution examined their witnesses and on completion of other legal formalities learned trial Court vide impugned judgment dated 30.11.2021 convicted the present appellant, as mentioned supra, while acquitted the co-accused persons, except accused Ayaz and Naeem Shah, who have been declared proclaimed offenders and their case was kept on dormant file.

4. Learned counsel for appellant argued that the impugned judgment is contrary to law, facts, and circumstances of the case; that the case of prosecution was not free from doubt, as one Fazal Illahi stated during cross-examination that he did not see any of the accused persons at the spot; that on the same set of evidence co-accused have been acquitted while the present appellant has been convicted; that said Fazal Illahi also stated during cross-examination that fire flames were controlled by the villagers but the prosecution twisted the facts and implicated the appellant and co-accused in false case; that there are material contradictions in the evidence of prosecution witnesses; however, same have not been considered and overlooked by the trial Court to the extent of present appellant. He prayed for setting aside the impugned judgment and as a result whereof acquittal of the present appellant.

5. Learned Additional P.G, assisted by learned counsel for complainant, supported the impugned judgment and argued that the appellant has been nominated in FIR with specific role; that due to illegal act of the appellant two persons have lost their lives; that besides appellant has caused huge loss to national exchequer; that all the witnesses have fully supported the prosecution case and there is no contradiction in their evidence, as alleged by the appellant's counsel; that there is sufficient material against the appellant. They lastly prayed for dismissal of present appeal.

6. I have heard learned counsel for the parties and gone through the record.

7. Complainant Fayaz Ahmed in his examination-in-chief deposed that after securing complete area they reached P.S Bukera Sharif at 2300 hours; S.H.O Bukera Sharif informed at 1730 hours on 24.11.2018 Mr.

Ali Dino (present appellant) surrendered himself in injured condition at P.S and requested for issuance of letter for medical treatment. This is the evidence against said Ali Dino basing his involvement in this case but said witness admittedly is hearsay witness who was not available at the place of incident and he also admitted that Mr. Wazir, who informed him regarding the incident, is not working as Chowkidar at the place of incident. He admitted that he had not seen the accused persons at the place of incident; he had not given name of any the accused to police out of suspicion and he handed over the articles to police and it was their responsibility to seal it or not and he even did not see police on spot sealing them and police did not collect any sample from crude oil for chemical examination in his presence; he admitted that he had not given the name of any accused in his FIR which is present in Court. This all suggests that the case of prosecution is not free from doubt.

8. The proposed F.I.R shows that present appellant Ali Dino being injured in the incident surrendered himself at Police Station Bukera Sharif Tando Allahyar and requested for medical letter for treatment and was referred for treatment but there is no explanation as to why 164 Cr. P.C. statement of appellant has not been recorded before Magistrate to substantiate the allegation of prosecution. The investigating officer failed to bring any tangible evidence except the statement of appellant purported to have been made before him for commission of offence which is hit by Article 38 of the Qanoone-Shahadat Order. There is only one iota of evidence relied upon by the trial Court, which is statement before the police officials; therefore, learned counsel has rightly referred to article 38 of Qanun-e-Shahadat Order, 1984, which speaks as under:-

> "38. Confession to police officer not to be proved. No confession made to a police officer shall be proved as against a person accused of any offence."

9. In view of Article 38 of Qanun-e-Shahadat Order, 1984 admission of guilt before the police officials are inadmissible. It is settled principle of law that the disclosure before police has no legal value under Qanun-e-Shahadat Order, 1984. In this case, the alleged confession of appellant before investigating officer has no evidentiary value and the same cannot be used against him and no weight can be given to such disclosure of accused until and unless there was / is corroboration, which factum is missing in the present case. At this juncture, it is worth to add that to believe or disbelieve a witness, depends upon the intrinsic value of statement made by him. It all depends upon the rule of prudence and

reasonableness to hold that a particular witness was present at the scene of crime and that he is making true statement. A person, who is reported otherwise to be very honest, above board, and very respectable in society gives a statement that is illogical and unbelievable, no prudent man despite his nobility would accept such statement. Reference is made to the case of *Abid Ali & 2 others v. State* (**2011 SCMR 208**). There can be no denial to the well-settled principle of law that one, who remains changing his stance or attempting to improve his statement, loses credibility hence cannot be termed to be **truthful witness**. Besides, the perusal of judgment impugned, would also show that on the basis of same set of evidence co-accused were acquitted. I am conscious that the judgment of conviction would not become illegal only for the reason that some of the accused were acquitted and some were convicted. (**Falsus in uno Falsus in omnibus**). However, what the law would demand from the court of law to make such judgment sustainable is that reasons for believing the same set of evidence for one and disbelieving for other accused persons must be explained else such judgment would not stand. The learned trial Judge while convicting and acquitting through the same stroke believed and disbelieved the words of the same persons to stick with two different and opposite views i.e conviction and acquittal. Thus, I am clear in my mind that in the instant case the trial court has given no reasonable legal justification or explanation to award conviction to the appellant, which could be stamped as an act of **'sifting the grain from the chaff'**. In absence of such explanation same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the appellant on the same set of charges. Reference can be made to the case of Muhammad Ali V. The State' **(2015 SCMR 137)** wherein it is held:-

> *"The same set of evidence has been disbelieved qua the involvement of Noor Muhammad, Riaz and Akram co-accused who were ascribed specific roles of causing injuries on the person of the deceased. Reliance in this regard is placed on Muhammad Akram v. The State **(2012 SCMR 440)** wherein this Court while considering other actors held that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge and acquitted the accused."*

10. It is pertinent to state that evidence, so brought on record, was neither natural nor confidence inspiring hence no conviction could sustain

on such evidence. It is well-settled principle of law that where the direct evidence fails the corroborative piece(s) of evidence as portrayed by the prosecution that one matchbox and some piece of jacket and stool was collected from the spot, will be of no help for prosecution, therefore, discussion on corroborative pieces of evidence is not material in peculiar circumstances needs not to be discussed. Here in the present case, there is no direct evidence against the appellant that he was directly involved in the case, as admittedly nobody had seen the incident, merely saying the appearance of appellant before the police officer and saying that he was involved in the incident is not sufficient to award conviction based on the sole statement of accused, there must be direct evidence to sustain conviction which factum is missing in the present case. Reliance can be made to the case of '*Abid Ali & 2 others* **2011 SCMR 208'** wherein it was held:-

> "Although where ocular account has been disbelieved the recovered articles which are carrying corroborative value cannot substantiate the charge against the appellants because in absence of direct evidence, corroborative evidence by itself cannot bring home charge of murder against the appellants."

11. Besides, it is well-settled law that the status of medical evidence is also 'corroborative' in nature, the purpose whereof stood limited as to provide corroboration regarding the manner of injury or material, used for such purpose, but it cannot help in identifying the culprit. Here the appearance of appellant before the police officer for medical treatment and burning injuries sustained by him does not suggest the direct involvement of appellant in the incident, thus medical evidence as portrayed by the prosecution will be of no help to the prosecution case.

12. Elaborating further on the question of admission of alleged guilt of appellant before police, primarily mere admission of guilt before the police officials is not admissible under the law; as there was no recovery of incriminating article(s) from the appellant; besides there was no cogent and convincing circumstantial material against the appellant. It is well-settled law that the conviction cannot be based on extra-judicial confession when admittedly same is not corroborated by other reliable evidence.

13. The extra-judicial confession before police officials is regarded to be a weaker type of evidence by itself; therefore, the greatest care and caution has to be exercised while relying on such extra-judicial confession

keeping in mind to assess the other aspects of the case. Extra-judicial confession is a weak piece of evidence. It must be shown that it was made and made voluntarily and further that it was made truly.

14. Coming to the evidence of prosecution witnesses namely Mashir Muhammad Hussain he deposed that on 24.11.2018 when he was posted as PC at P.S Bukera Sharif one person came there and disclosed his name as Ali Dino (present appellant) that in night time said appellant along-with his friends went to D-Farm and connected the pipeline with the truck and were stealing the oil and suddenly due to flaming fire he was burnt and escaped away from the place of the incident then he stated that being injured medical letter be issued to him and upon his statement police arrested him in this crime and Inspector Asadullah Channa prepared memo of arrest at P.S wherein said mashir Muhammad Hussain and co-mashir mashir PC Abdul Sattar acted as witnesses, but in cross-examination said Muhammad Hussain admitted that on 24.11.2018 no arrest was made by them and on 25.11.2018 no accused was arrested by them in Crime No.33 of 2018. This gives the reason that either his evidence is not supporting the prosecution story or the document relating to arrest of appellant is managed to involve the appellant in this case wherein there is no direct evidence against him.

15. It is strange to note here that Inspector Asadullah Channa deposed that he met with Field Manager of Oil and Gas Company who gave him a burnt jacket and matchbox, 10 visiting cards containing numbers, CNIC in the name of Ayaz Khan, one mobile phone, then how it can be possible that in huge flaming of fire, matchbox type thing did not catch fire while huge loss caused to the Government exchequer in terms of crude oil and said articles were collected by Inspector Asadullah Channa from the place of incident, it seems to be managed one to strengthen the prosecution story which is not appealing to prudent mind to accept true one.

16. Admittedly it is unseen incident wherein no one has seen committing the alleged offense and even no recovery has been effected from him. The evidence of prosecution has been accepted for the present appellant, while at the same time it has been discarded for the co-accused, hence these types of lacunas are creating sufficient doubt in the prosecution story. Thus the prosecution evidence seems to be doubtful and not inspiring confidence to maintain conviction which is discarded accordingly.

17. In view of above discussion, it appears that learned Trial Court while scrutinizing the record has failed to appreciate the material contradictions, improvements, and admissions of prosecution witnesses made at trial rendering its case highly doubtful. In this respect, reliance can be placed upon the case of ***Muhammad Mansha v. The State (2018 SCMR 772),*** wherein the Hon'ble Supreme Court of Pakistan has held as under:-

> 4. "Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v, The State (2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749)."

18. Accordingly, in view of the above discussion, I am of the firm view that the conviction, so awarded by the trial court judge, is not sustainable.

19. The upshot of the above-detailed discussion is that the prosecution has failed to prove the charge against the appellant, hence conviction and sentences awarded to him by the Trial Court through impugned judgment dated 30.11.2021 were set-aside, consequently the appellant was acquitted from the instant offense, for which he was charged, tried and convicted by the Trial Court, by providing benefit of doubt. He was ordered to be released forthwith if no longer required in any other case/ crime.

20. Above are the reasons for my short order of even date whereby after hearing the parties appeal was allowed and the appellant was acquitted of the present charge.

JUDGE

Muhammad Danish