

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

Criminal Jail Appeal No.S-14 of 2018

Date of hearing: 26.05.2023

Date of decision: 26.05.2023

Appellant: Allah Bachayo s/o Arab Mallah,  
Through Mr. G.M. Laghari advocate.

The State: Through Ms. Sana Memon, Assistant P.G.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- Complainant is a nephew of deceased, Daim, whose dead body was found on lands of Abdul Ghaffar Pitafi Deh Unarki where sugarcane crop was standing within the limits of PS Tando Ghulam Hyder on 21.01.2015. When news about which was flashed on TV, the complainant came to know about it and proceeded to Government Hospital Matli, wherein the dead body was lying. He identified it and observed that deceased had three injuries, one on his forehead over the right eye, injury on right temporal region and head injury on the left side. Complainant took dead body to village for burial after which he started making search about accused and came to know that his uncle deceased Daim had married with Mst. Shahnaz three years back but about 6/7 months back had divorced her. After divorce, she had contracted marriage with appellant but even after that, his uncle Daim used to visit father of Mst. Shahnaz namely Kadero which appellant never liked and which prompted him to commit murder of his uncle. He reported this matter on 25.01.2023 after five days of the incident.

2. Investigation started and appellant was arrested on 03.02.2015, on 05.02.2015 during interrogation he agreed to produce certain articles belonging to the deceased from a place, found abandoned. Mashirs were arranged and appellant led the police party to a place on bypass road near main road between Badin and Hyderabad close to an outlet of Laghari Wah and took out a plastic bag from bottom of one 'Khabbar tree' (Salvadora oleoides) containing CNIC of deceased, some receipts of Naya Savera, receipt of Sagar Computerized Weight, receipt in the name of one Yaroo and identical documents 13 in number. After these discoveries appellant was referred to the Court for a trial u/s 173 CrPC

where a formal charge was framed against him and prosecution was invited to lead the evidence.

3. Prosecution has examined PW.1 complainant Punhoon at Ex.6 who has reiterated the facts stated in FIR but has made one improvement that after 3/4 days of the incident PW Haji had informed him that when he was going in a van to Hyderabad for selling ladyfingers on the day of incident, he had spotted appellant and deceased at Pitafi Railway Crossing going to sugarcane crops nearby said railway crossing. PW.2 Haji at Ex.7 in his evidence has confirmed this fact. The prosecution has examined PW.3 Shehnaz at Ex.8 who has revealed about her marriage with deceased, divorce from him and second marriage with appellant. However, she has denied that her husband ever took exception to visits of deceased to see her father after divorce. The next witness examined by the prosecution is PW.4 Senior Medical Officer at Ex.10 who had conducted post mortem of the deceased. He has confirmed presence of three injuries over the person of deceased as stated above.

4. PW.5 PC Shafi Muhammad at Ex.11, was duty officer at police post Nazarpur when the incident took place. He has revealed about the fact of receiving information about presence of unknown dead body in sugarcane crops on the lands of Abdul Ghaffar Pitafi, retrieving the said body, preparing necessary documents including memo of place of incident etc, handing over the deceased to PC Mehboob Ali for post-mortem and finally delivering dead body to the son of complainant namely Muhammad Ayoob. He has also described the facts about arrest of appellant from Nizamani Bus Stand. He has produced, documents prepared by him, in his evidence. PW.6 Muhammad Naeem at Ex.12 is Tapedar he had prepared sketch of place of incident on source of PC Shafi Muhammad and has produced the same in his evidence.

5. The next witness examined by prosecution is ASI Maqbool Ahmed PW.7 at Ex.13 he has supported the fact of discovery of dead body, preparation of documents including inquest report, brining dead body to Civil Hospital Matli for post-mortem and consigning it to mortuary and finally handing over the dead body to Muhammad Ayoob son of the deceased who he has stated in his evidence was not ready to register FIR and hence nephew of the deceased complainant Punhoon came forward to do so. PW.8 Loung at Ex.14 is Mashir of recovery of articles belonging to the deceased from appellant and has produced the said memo in his evidence. Inspector Qamar Zaman PW.9 at Ex.16 has supported the fact

of recovery of articles belonging to deceased from appellant in his evidence.

6. After prosecution evidence, appellant's statement u/s 342 CrPC was recorded in which he has denied the prosecution case and has pleaded innocence.

7. Learned defence counsel has highlighted innocence of appellant and lack of evidence connecting him in the offence in his arguments. Learned Assistant Prosecutor General has halfheartedly supported the impugned judgment.

8. I have considered prosecution case and contentions of the parties. There is no direct evidence against the appellant. This has been admitted by the complainant in his evidence. In FIR registered after five days of the incident, although he has named appellant on the basis of suspicion but has not revealed the source leading up to such suspicion, except that appellant had married with divorcee of the deceased, who still kept on visiting her father, which he did not like. In the evidence, he has made improvement by introducing PW Haji in the case, who, according to him, had informed him seeing the deceased last in the company of appellant going to sugarcane crop. This statement itself is suspicious in the light of complainant's revelation in FIR that the appellant was not liking the deceased because of his visits to his father-in-law, meaning thereby it was unlikely for both of them to get together at an abandoned place.

9. PW Haji is a maternal uncle of the deceased, as disclosed by him in 164 CrPC statement available at Ex.7-A page 39 of paper book. It is surprising that he did not get alarmed seeing the deceased in the company of appellant who, as alleged, was angry with him over his visits to his father-in-law, which fact being a family secret, this witness, being maternal uncle of the deceased, was supposed to know. More than that, complainant has admitted that after 3/4 days of the incident PW Haji had informed him about such fact i.e. last seen appellant and the deceased together, yet he did not incorporate the same fact in FIR. Only at the time of evidence, he has disclosed such fact which is not without a doubt. According to PW Haji he was travelling in a van going for Hyderabad when he spotted the appellant and the deceased near Pitafi Railway Crossing. It is not possible for a person to spot and identify two people within the blink of an eye while passing by them in a high speed vehicle like a van, who were almost 100 or 150 feet away from him, the

distance admitted by him in cross examination was between them. His evidence therefore, does not seem to be natural and not safe to rely upon.

10. The dead body of deceased was found on 21.01.2015 and as per evidence of complainant he was informed, before FIR, by this witness about seeing appellant and the deceased together a day before, yet this fact was not mentioned by him in FIR is another factor which makes evidence of this witness unworthy of reliance. He himself in his evidence has not confirmed the statement of complainant that he had informed the complainant about such fact. He in his evidence has shown only inadequate suspicion in the words that he had thought that appellant might have committed murder of the deceased after seeing the news on TV about discovery of his dead body.

11. The next piece of evidence which per prosecution case connects appellant with the deceased is recovery of certain articles / documents, which were in possession of the deceased at the time of his death, on the source of appellant. This recovery has been effected from an abandoned place not in possession or control of appellant firstly, and secondly, the prosecution has not explained as to whether that place was nearby to the place from where dead body was found or away from it to appreciate its worth and connection with the place of incident. Apart from that Mashir Loung and SIP Qamar Zaman have contradicted each other over the exact place from where these articles were recovered in their respective evidences. PW Loung has stated that accused had pointed out towards a place nearby bushes, dug it and retrieved a plastic bag containing articles. Whereas memo of recovery and evidence of Inspector Qamar Zaman shows that place of of incident was bottom of a Khabbar tree (*Salvadora oleoides*) wherefrom he took out the plastic bag. PW Loung does not talk about bottom of the tree and Inspector Qamar Zaman does not talk about a place nearby the bushes. PW Loung reveals about digging of place by appellant, whereas evidence of PW Qamar Zaman is silent over this fact.

12. But more than that, although the memo of recovery of such articles has been produced in Court but these articles themselves have not been produced in the trial, as admitted by learned APG. The trial Court was not afforded an opportunity to appreciate the prosecution case regarding recovery of those documents and confirm whether the same were actually recovered, as alleged, and belonged to the deceased or not.

Merely producing a memo of recovery of such articles and a copy of daily diary recording movement of police for such purpose in the trial was not sufficient to prove the fact of recovery of articles from appellant, and the same belonging to the deceased. The prosecution was required to produce such documents for examination by the Court and the Court was obligated to appreciate, by examining attentively each and every document to conclude ownership of those documents by the deceased and its recovery from the appellant.

13. It is apparent that prosecution has only two pieces of evidence, that is, the last seen evidence, the deceased having been spotted in company of appellant a day before his murder and recovery of articles belonging to the deceased. But both these pieces of evidence, are not confidence inspiring for the reasons as articulated above. In FIR registered after five days of the incident, the source of PW Haji who had seen appellant and deceased together does not find a mention, and the recovery of articles as above from appellant does not seem to be reliable piece of evidence either. Besides there is no direct evidence against the appellant and suspicion of the complainant that appellant was not happy with the deceased on account of the latter's visiting his father-in-law has been negated by PW Shahnaz in her evidence. For these reasons I am of the view that prosecution has not succeeded in proving its case against the appellant beyond a reasonable doubt. The case is covered by a number of discrepancies to the benefit of which appellant is entitled. It is settled that once a reasonable doubt creeps in the prosecution case its benefit has to go to the accused not as a matter of grace but as a matter of right.

14. Accordingly, this appeal is allowed. The conviction and sentence awarded to the appellant Allah Bachayo vide impugned judgment dated 02.12.2017 passed by learned Sessions Judge Tando Muhammad Khan in Sessions Case No.03/2015 arising out of Crime No.04/2015, u/s 302 PPC, at PS Tando Ghulam Hyder is hereby set-aside. The appellant is acquitted of the charges and he shall be released forthwith if he is not required in any other custody case.

The appeal in hand is accordingly disposed of.

J U D G E