

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Jail Appeal No. D- 31 of 2023

Criminal Reference No. D- 03 of 2023

Before:

Mr. Justice Irshad Ali Shah

Mr. Justice Zulfiqar Ali Sangi

Appellant: Touqeer S/o Niaz Muhammad Kalwar,
through Mr. Rukhsar Ahmed M. Junejo,
Advocate.

The State: Syed Sardar Ali Shah, Additional
Prosecutor General

Date of hearing: 11-01-2024

Date of Decision: 11-01-2024

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of the prosecution that the appellant with rest of the culprits in furtherance of their common intention committed murder of Sajid Ali alias Baloch by beheading his head and then thrown his dead body in a plot adjacent to Anaj Mandi Adilpur in order to cause disappearance of evidence to save themselves from legal consequences; for that the present case was registered. At trial, the appellant, co-accused Abdul Qadeer, Ghulam Mustafa and Pehlwan denied the charge and prosecution to prove the same examined complainant Shoukat Ali and his witnesses and then closed its side. The appellant and the said accused in their statements recorded under section 342, Cr.P.C denied the prosecution's allegation by stating that they have been involved in this case falsely by the complainant party to satisfy its matrimonial dispute with them and they in order to prove their innocence also examined Sanaullah and Mumtaz Hussain in their defence. On conclusion of trial, co-accused Abdul Qadeer,

Ghulam Mustafa and Pehlwan were acquitted while the appellant was convicted under section 302(b) PPC and sentenced to death to be hanged by neck till his death subject to confirmation by this Court by learned Ist. Additional Sessions Judge / MCTC, Ghotki vide judgment date 10.06.2021, which the appellant impugned before this Court by preferring an appeal; a reference was also made by learned trial Court for confirmation of the death sentence to the appellant, an appeal was also filed by the complainant whereby he impugned the acquittal of the accused, who were acquitted by the trial Court. On hearing, the acquittal appeal was dismissed while the appeal preferred by the appellant was accepted in shape of remand directing the learned trial Court to provide an opportunity to him to make cross-examination to the witnesses; the death reference was answered in negative. On remand, the direction so issued by this Court was complied with; the statement of the appellant u/s 342, CrPC was recorded afresh whereby he pleaded innocence by denying the prosecution's allegation; he examined none in his defence or himself on oath to disprove the prosecution allegation. On conclusion of trial, he again was convicted u/s 302(b) PPC and sentenced to death as *Tazir* to be hanged by neck till his death subject to confirmation by this Court; he was also directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for six months by learned IInd. Additional Sessions Judge, Ghotki vide judgment dated 24.5.2023, which he has impugned before this Court by preferring the instant Criminal Jail Appeal; a reference is also made by learned trial Court for confirmation of death sentence to the appellant.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in a blind FIR which was lodged with delay of about 03 days to the incident and the evidence of the PWs has been believed by learned trial Court in respect of appellant without lawful justification, therefore, he is entitled to his acquittal by extending him benefit of doubt. In support of his contention, he relied upon case of *Gul Muhammad and others vs. The State (2021 SCMR 381)*.

3. None has come forward to advance arguments on behalf of the complainant. However, learned Addl. PG for the State by supporting the impugned judgment has sought for dismissal of the instant Jail Appeal and confirmation of the death sentence to the appellant by contending that on arrest from him has been secured the dagger which he has allegedly used in commission of the incident.

4. Heard arguments and perused the record.

5. It is stated in FIR by the complainant that the deceased gone missing and then his dead body was recovered by the police on such recovery he lodged FIR of the incident against unknown culprits. It was lodged with delay of about 03 days. The involvement of the appellant and others in commission of the incident by making further statement and by way of 164 Cr.P.C statements allegedly made by the complainant and his witness could reasonably be judged with doubt. The further statement, even otherwise could hardly be treated as part of FIR. The 164 Cr.P.C statements of the complainant and his witness have been recorded with delay of about 02 months to the actual incident; those apparently are contrary to the

narration made by the complainant in his FIR which was lodged against unknown culprits. Admittedly, neither the complainant nor any of his witness has seen the appellant or anyone else committing the death of the deceased, therefore, the involvement of the appellant by the complainant and his witness on the basis of extra judicial confession of his guilt is appearing to be doubtful. It was stated by IO/SIP Abdul Majeed that on investigation he apprehended the appellant; on interrogation he by admitting his guilt led him to recovery of dagger. Such recovery was made on 7th day of arrest of the appellant; it was found stained with the blood. There is nothing on record which may suggest that it was the blood of the deceased on it, therefore, such recovery too is to be judged with a reasonable doubt. The dagger is alleged by the appellant to have been foisted upon him by the police at the instance of the complainant party. If for the sake of argument, it is believed that such recovery was actually made by the police from the appellant; even then same could not be treated to be a conclusive proof that the appellant is guilty for the offence alleged against him, in absence of direct evidence which is doubtful. The extra judicial confession, if any, if is made by the appellant before the said IO/SIP could not be used against him as evidence in terms of Article 39 of Qanoon-e-Shahadat Order, 1984. On the basis of same evidence, the above named co-accused have already been acquitted by learned trial Court by extending them benefit of doubt and their acquittal has been maintained by this Court even. The appellant in his statement recorded u/s 342, Cr.P.C has pleaded innocence his such plea could not be lost sight of in the circumstances of the case.

6. The conclusion which could be drawn of the above discussion could be that the prosecution has not been able to prove the involvement of the appellant in the commission of the incident beyond shadow of a reasonable doubt and to such benefit he too is found entitled.

7. In case of *Imran Ashraf and others vs. the State* (2001 SCMR-424), it has been held by Apex Court that;

“Section 154, Cr.P.C. lays down procedure for registration of an information in cognizable cases and it also indeed gives mandatory direction for registration of the case as per the procedure. Therefore, police enjoys no jurisdiction to cause delay in registration of the case and under the law is bound to act accordingly enabling the machinery of law to come into play as soon as it is possible and if first information report is registered without any delay it can help the investigating agency in completing the process of investigation expeditiously”.

8. In case of *Tahir Javed vs. the State* (2009 SCMR-166), it has been held by Apex Court that;

“---Extra-judicial confession having been made by accused in the presence of a number of other persons appeared to be quite improbable, because confession of such a heinous offence like murder was not normally made in the public”.

9. In case of *Muhammad Jamil vs. Muhammad Akram and others* (2009 SCMR 120), it has been held by Apex Court that;

“When the direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence.”

10. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it has been held by the Apex Court that;

“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".

12. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant under impugned judgment are set aside, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by learned trial Court; he shall be released forthwith, if not required to be detained in any other custody case.

13. Above are the reasons of the short order of even date, whereby the instant Criminal Jail Appeal was allowed and Reference was disposed of accordingly.

Judge

Judge

ARBROHI