

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.

Criminal Appeal No. S – 50 of 2022

Criminal Appeal No. S – 51 of 2022

Appellant: Qurban Ali son of Ashique bycaste Khambro through
Mr.Nawab Ali Pitafi, Advocate.

State: Mr. Zulifqar Ali Jatoi, Additional
Prosecutor General.

Date of hearing: 10.07.2023

Date of Reasons: 17.07.2023

J U D G M E N T

NAIMATULLAH PHULPOTO, J. Through captioned appeals, appellant Qurban Ali has impugned judgments dated 15.06.2022 passed by learned Additional Sessions Judge Ubauro in main Sessions case No. 233/2020 for offence under section 302(b) PPC and sentenced to imprisonment for life as Ta'zir. In the connected / off shoot case No.96/2020 appellant was also convicted under section 24 of Sindh Arms Act, 2013 and sentenced to 05 years R.I and to pay fine of Rs.50,000/-, in case of default in payment of fine, he was ordered to suffer S.I for 03 months. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that ASI Muhammad Ameen Leghari of Police Station Reti left P.S along with PC Sanaullah and others for patrolling duty on 26.05.2020. It is alleged that ASI Muhammad Ameen received spy information that appellant Qurban Ali Khambro

was prepared to commit murder of his sister Mst. Jameela on the pretext of Kari with one Zahid Khambro. Police party on receiving such information, proceeded to the house of appellant Qurban Ali and reached near his house at 1500 hours and saw woman, she was running in the street to save her life. Appellant was armed with gun and was behind her. It is further alleged in the FIR that PC Sanaullah identified appellant as Qurban Ali Khambhro and his sister as Mst. Jameelan. Police officials challenged Qurban Ali Khambhro and asked him not to commit murder of his sister Mst. Jameelan. It is further alleged that appellant Qurban Ali made repeated fires upon his sister Mst. Jameelan. Police party tried to catch hold the appellant but he succeeded in running away in the streets. Police found Mst. Jameelan lying dead in the street. ASI Muhammad Ameen made PCs Sanaullah and Attaullah as mashirs. Two empty cartridges and blood stained earth were collected from the place of incident. Inquest report and mashirnama of vardat were prepared. Dead body was sent through PC Attaullah for post mortem examination and report to Taluka Hospital Daharki. Thereafter, ASI returned to P.S Reti, where he lodged FIR against appellant on behalf of state on 26.05.2020 vide crime No. 16/2020 for offences under sections 302, 311 PPC.

3. On the same date (26.05.2020) investigation was handed over to SIP Imtiaz Hussain. On 31.05.2020, Investigating Officer left Police Station along with P.Cs Sanaullah and Attaullah for conducting investigation of the case, he received spy information near graveyard that accused Qurban Ali involved in this case was standing near Narli bridge. Appellant was arrested by Investigating Officer in presence of above-named constables. He was carrying DBBL gun of 12 bore which was recovered from him, the same was without license. According to Investigating Officer, it was used in the commission of offence. Appellant and gun were brought at Police station where FIR was lodged on behalf of

State vide crime No.17/2020 under section 24 of Sindh Arms Act, 2013. Investigating officer sent gun and cartridges to ballistic expert Larkana for examination and report. Blood stained clothes and earth were also sent to Chemical Examiner. Positive reports were received. On the conclusion of usual investigation, final reports were submitted in both the cases before concerned Judicial Magistrate who took cognizance of the offences and sent up the R & Ps to the Sessions Court for trial.

4. Trial Court framed charge against the appellant/accused in the main case under section 302 PPC at Exh.2. Appellant Qurban Ali pleaded not guilty and claimed to be tried. In support of its' case prosecution examined 06 witnesses at Exh. 10 to Exh.15 who produced certain documents, then prosecution side was closed.

5. Trial Court recorded the statement of appellant/accused under section 342 Cr.P.C at Exh.17 where, he denied allegations leveled against him by the prosecution witnesses. Appellant did not lead evidence in defense and declined to give statement on oath in disproof of prosecution evidence.

6. In the connected / off shoot case, charge was also framed separately against appellant/accused at Exh. 2 to which he pleaded not guilty and claimed to be tried. At trial prosecution examined PW/mashir PC Sanaullah and SIP Imtiaz Hussain complainant as well as Investigating Officer of the case at Exh. 4 and 5. Thereafter, prosecution side was closed. In the statement recorded under section 342 Cr.P.C, allegations were denied.

7. Learned trial Court after hearing learned counsel for the parties convicted and sentenced the appellant in the main case as well as in the off shoot/connected case separately as mentioned supra hence the

appellant has filed these appeals against his conviction and sentence. By this single judgment, I intend to decide both cases, as same both cases required same appreciation of evidence.

8. The facts of the cases as well as evidence produced before the trial Court find an elaborate mention in the impugned judgments, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant argued that impugned judgments are contrary to law and facts of the cases are against the principles of criminal justice; that prosecution case is full of doubts and trial Court has failed to appreciate the evidence according to settled principles of law; that it is unbelievable that ASI Muhammad Ameen had received spy information that appellant was prepared to commit murder of his sister Mst. Jameelan on the pretext of KARI; that conduct of the police officials was highly questionable as they made no attempt at all to rescue the deceased and even no effort was made to catch hold the appellant who committed murder of his sister; learned advocate for the appellant has referred to the cross examination of PW-1 ASI Muhammad Ameen and argued that he had clearly replied that he had seen the appellant and deceased while running in the street from their **back side**; it is further argued that deceased had sustained injuries from her front side and ocular evidence was contrary to the medical evidence. As regards to the evidence in the connected / off shoot case is concerned, it is argued that it was unbelievable that appellant was carrying gun after five days of the incident with which he had committed the murder of his sister; that gun produced before the trial Court was SBBL but Investigating Officer in his evidence stated that it was DBBL gun; that there are material contradictions in the evidence of prosecution

witnesses; lastly, it is argued that prosecution failed to produce evidence before the trial Court with regard to safe custody and safe transmission of the crime weapon to the Ballistic Expert. In support of his contentions he has relied upon the reported cases of (i) MUREED HUSSAIN vs THE STATE THROUGH PROSECUTOR GENERAL SINDH (2014 SCMR 1689), (ii) MUHAMMAD IMRAN vs THE STATE (2020 SCMR 857), MUHAMMAD BILAL vs THE STATE (2021 YLR 1252), ABDUL BASIT vs THE STATE AND ANOTHER (2021 P.CR.L.J 348), ALLAH BAKHSH vs THE STATE (2021 MLD 972), NAIK NAWAZ ALIAS SHEKAR vs THE STATE AND 3 OTHERS (2021 YLR 872) AND HANIFULLAH ALIAS PENTAR AND 4 OTHERS vs HABIB UR REHMAN AND 3 OTHERS (2021 YLR 899).

10. Learned Additional Prosecutor General supported the impugned judgment and argued that prosecution has proved its case beyond the reasonable doubt based on reliable evidence of the police officials which is corroborated by other pieces of evidence as such prayed that appeals may be dismissed.

11. After re-assessment of entire evidence, I have come to conclusion that prosecution has NOT proved the charge against the appellant in the main case as well as in the connected / off shoot case beyond the reasonable doubt. Trial Court has made errors in assessing the evidence, misapplied the law that affected the accuracy of the verdict. Trial Courts' Judgment is legally unreasonable, for the following reasons:

(a) I find that prosecution's case primarily rests upon the evidence of police officials. ASI Muhammad Ameen stated before the trial Court that he was on patrolling duty on 26.05.2020 along with his subordinate staff. He received spy information that appellant was prepared to commit murder of his sister Mst. Jameela at the house. Police party proceeded to the pointed place and reached at 1500 hours and saw Mst. Jameela running in the street and appellant was behind her and fired upon her from back. It is stated

that PC Sanaullah identified the appellant but in the cross examination ASI Muhammad Ameen replied that appellant and deceased were seen by the police party from their back side in the street. PC Sanaullah replied in cross examination that appellant was not previously known to him. Above referred evidence clearly shows that evidence of eye-witnesses/police officials was unnatural, unbelievable and un-trustworthy.

(b) According to evidence, it was spy information case and incident had occurred in a village. No effort was made by ASI Muhammad Ameen/head of the police party to call the villagers, whose presence has come on record. Conduct of police officials was also highly questionable, as they made no effort at all to rescue the deceased Mst. Jameela and made no effort to arrest the appellant at spot. **It is unbelievable that appellant waited for the police then he committed murder of his sister.**

(c) Contention of learned Additional P.G that evidence of police officials cannot be discarded, simply because they belonged to the police force. In the present case, the fate of the appellant hinges upon testimony of the police officials alone, it is necessary to find out if there was any possibility of securing independent persons, at that time. It has come on record in the evidence of ASI Muhammad Ameen Leghari that 8/10 persons had gathered at the time of incident so also woman of a village but prosecution did not produce them before trial Court as such material evidence was withheld, it would be fatal to the case of prosecution. In the cases of evidence of police officials judicial approach has to be cautious in dealing with such evidence as held in the case of Saifullah vs. The State (1992 MLD 984).

(d) that ocular evidence was contrary to the medical evidence. According to evidence of eye-witnesses PW-1 ASI Muhammad Ameen and PW-2 PC Sanullah when they reached at the place of incident, saw deceased Mst. Jameela running in the street. Appellant followed her from back and fired from his gun at her sister from back side but perusal of evidence of Dr. Shazia at Exh.13 shows that deceased had sustained two fire arm injuries at neck and chest.

(e) that there are material contradictions in the prosecution evidence . Complainant ASI Muhammad Ameen deposed at Exh 10 that appellant was identified by PC Sanaullah but PC Sanaullah in his cross examination replied that appellant was not previously known to him. PW-1 Complainant ASI Muhammad Ameen has deposed that appellant was carrying SBBL gun at the time of incident but PW-6 SIP Imtiaz Hussain stated in his evidence that appellant was carrying DBBL gun.

(f) that Investigating Officer during investigation failed to interrogate/investigate the motive attributed to the appellant for commission of the offence.

(g) that empties and gun were not sent to expert on same date, which created doubt in the prosecution case.

(h) Trial Court had also failed to appreciate evidence of police officials in the connected / off shoot case and convicted the appellant for offence under section 24 of Sindh Arms Act, 2013 without confidence inspiring evidence. Prosecution failed to produce before trial court evidence with regard to safe custody and safe transmission of the gun to the Chemical Examiner.

(i) Incharge Malkhana of Police Station was also not examined, prosecution utterly failed to prove safe custody and safe transmission of the gun to Expert, therefore, positive report of the expert would not improve the case of prosecution. Rightly, reliance is placed on the case reported as Kamaluddin alias Kamala vs. The State (2018 SCMR 577) wherein it has been held that:

“ As regards the alleged recovery of a Kalashnikov from the appellant’s custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and, thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the

prosecution before the trial court through production of any witness concerned with such custody and transmission.”

(j) For the reasons it is unbelievable that appellant after commission of the murder of the sister was arrested by the police when he was carrying gun used by him in commission of offence after five days.

12. The Hon'ble Supreme Court has been pleased to hold in case **Muhammad Mansha v. The State (2018 SCMR 772)** that:-

“ 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 then guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of Tarique Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

13. For the above stated reasons, I have no hesitation to hold that trial Court made errors in assessing the evidence. There are multiple circumstances in the cases, which created reasonable doubt as discussed above, a conclusion is irresistible and inescapable that the prosecution had failed to prove its case against appellant beyond reasonable doubt. Resultantly, aforesaid appeals are allowed. Conviction and sentence separately recorded by the trial Court vide judgments dated 15.06.2022 are set aside and appellant is acquitted of the charges in main case as well as off shoot /connected case. Appellant Qurban Ali Khambro is in custody, he be released forthwith, if he is not required in some other case/crime. These are the reasons for allowing the aforesaid appeals and directing the acquittal of the appellant.