

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Appeal No. S-67 of 2020

Appellants: Shahid s/o Luqman and Zafar Ali
s/o Nawab both by caste Jatoi,
Through Mr. Azhar Hussain Abbasi,
Advocate.

Complainant: Yasin s/o Karim Bux by caste
Bhayo Through Mr. Shakeel Ahmed
G. Ansari, Advocate.

The State: Through Mr. Ali Anwar Kandhro,
Additional Prosecutor General

Date of hearing: 15-05-2023

Date of judgment: 25-07-2023

Date of Announcement: 27-07-2023



J U D G M E N T

Zulfiqar Ali Sangi, J. Through instant criminal appeal, the appellants Shahid s/o Luqman and Zafar Ali s/o Nawab Jatoi have assailed the Judgment dated 16.10.2020, passed by the learned I-Additional Sessions Judge (MCTC), Shikarpur in Sessions Case No. 409/2017, re: State v/s Shahid and others, being outcome of Crime No.07/2017 of P.S. Karan Sharif, District Shikarpur, for the offence under sections 302 r/w Section 34 P.P.C; whereby the appellants were convicted under section 265-H (2) Cr.P.C for offence punishable under section 302 r/w Section 34 PPC, and sentenced to life imprisonment. Both the appellants were directed to pay Rs. 100,000/- in words rupees (one lac) each, as compensation to be paid to the legal heirs of deceased Mumtaz Ali Bhayo. In case of failure to pay the compensation amount, both the accused shall also suffer S.I for one year. However, the benefit of section 382 (b) Cr.P.C was extended to the appellants/accused.

2. Brief facts of the prosecution case are that on 30.07.2017 at 1600 hours, complainant Yasin Bhayo reported the matter with P.S Karan Sharif inter alia stating therein that they are


25/07/2023

annoyed with accused Shah Murad and others over the land matter, on which accused Shah Murad Jatoi and others were threatening them that they will cause physical and financial loss. On 30.07.2017, he and his brothers namely Mumtaz Ali aged about 38/39 years, Altaf and Aftab left their home to plough their land; however, at about 10.00 A.M, accused Shah Murad son of Nawab, Zafar son of Nawab duly armed with rifles, Zubair son of Nawab and Shahid son of Luqman duly armed with Kalashnikovs all by caste Jatoi r/o village Bilawal Wah, Taluka Shikarpur came there from western side. On reaching, all accused from their respective weapons made straight fire shots upon them with intention to commit their Qatl-i-Amd which hit his brother Mumtaz Ali who fell down and in the meantime, complainant and his brother Aftab rescued him, while taken the shelter of minor. After that all accused run away towards western side. They found their brother Mumtaz Ali having received fire shot injury on his left thigh and blood was oozing from his injuries. After arranging conveyance, they took the injured Mumtaz Ali to RBUT Civil Hospital Shikarpur but on a way he succumbed to injuries and died. Later on, post mortem of the deceased was conducted in the RBUT Civil Hospital Shikarpur and thereafter, dead body was handed over to them for funeral and burial ceremony. The complainant leaving the dead body of his deceased brother went to PS and lodged the instant FIR.

3. The police conducted the investigation, whereby ASI Mumtaz Ali Bhayo inspected the place of incident, recorded the statements of PWs under section 161 Cr.P.C, secured last worn clothes of deceased, arrested accused Shahid, sent the case property to Chemical Examiner and FSL Sukkur @ Rohri and Larkana respectively and collected reports and after its due completion, submitted the challan before the competent Court. After completing legal formalities, police papers were supplied to the accused. Formal charge was framed against them, to which they pleaded not guilty and claimed to be tried.


25/07/2023

4. The prosecution in order to prove its case examined as many as 8 witnesses, who produced certain items and documents in support of their statements. Thereafter learned prosecutor closed the prosecution side. The trial Court recorded statements of accused under section 342 Cr.P.C, wherein they stated that they are innocent and have falsely been implicated in this case. However, accused neither examined themselves on oath nor produced any witness in their defence.

5. After assessment of evidence, learned trial court has passed the impugned judgment and awarded the sentence to the present appellants/accused as mentioned above. Being aggrieved by and dissatisfied with the said judgment, appellants/accused above named have preferred the instant criminal appeal.

6. Learned counsel for the appellants has contended that the appellants are innocent and have falsely been implicated in this case by the complainant; that the impugned judgment is contrary to law, facts and equity and the learned trial court has miserably failed to properly appreciate and assess the evidence of the prosecution witnesses, whose evidence is insufficient and full of major contradictions and the judgment has been passed in violation of guiding principles laid down by the superior courts. He further submits that the complainant and eye witnesses, who have been examined by the trial court, are highly interested hence their testimony is not reliable and trustworthy; that the presence of complainant party at the time of alleged incident is highly doubtful, as according to facts and circumstances of this case they were not harmed by the appellants/accused persons; that it has come in the evidence of the complainant and P.Ws that four persons duly armed with K.Ks and rifles fired upon deceased Mumtaz Ali but the evidence of medical officer shows that the deceased Mumtaz Ali received only one injury of entry wound with exit from the other side on the left upper thigh; that the medical evidence is in conflict with the ocular evidence. He lastly, prayed that appellants be acquitted of the charge. Learned counsel for the appellant has relied upon the cases of Ashiq Hussain v/s The State (1993 SCMR 417), Hakim alias Kaku and


25/07/2023

another v/s The State (PLD 1989 Karachi 396), Muhammad Mansha v/s The State (2018 SCMR 772), Nadeem alias Kala v/s The State and others (2018 SCMR 153), Mir Ali and 3 others v/s The State (1990 P.Cr.L.J 2042), Amin Ali and another v/s The State (2011 SCMR 323), Najaf Ali Shah v/s The State (2021 SCMR 736), Muhammad Aslam Khan v/s The State (1999 SCMR 172) and Ayub Masih v/s The State (PLD 2002 SCMR 1048).

7. Learned Additional Prosecutor General assisted by the learned counsel for the complainant has supported the impugned judgment and has submitted that the complainant and P.Ws have fully supported the case of prosecution, no major contradictions have been found in their evidence, only minor contradictions found which are very possible on account of examination of PWs as they were examined after lapse of about 03 years, their evidence cannot solely be discarded on the ground that they are relative to each other; that the circumstantial evidence under mashirnama is well established; that the reports of Chemical Examiner and FSL are also positive; that the ocular version is fully corroborated with medical and circumstantial evidence. They further submit that the prosecution has established the case beyond any reasonable doubt in proving the guilt of accused. They lastly submits that the learned trial Court finding the appellants/accused guilty of the offence has rightly convicted and sentenced them by way of impugned judgment which calls for no interference by this Court, therefore, the appeal filed by the appellants being devoid of merits is liable to be dismissed. Learned counsel for the complainant has relied upon the case of Saeed Akhtar and others v/s The State (2000 SCMR 383).

8. I have heard learned counsel for the appellant, learned Deputy Prosecutor General and learned counsel for the complainant and have gone through the material available on record with their able assistance.

9. The meticulous perusal of the evidence brought on record is entailing that all the witnesses have tried to support the case of prosecution but their evidence on deeper analysis was found


25/07/2023

unreliable coupled with material improbabilities. The broad features involved in this case are that the complainant and other two eye-witnesses (all the three eye-witnesses) are real brothers inter-se and the deceased was also their brother. The mashir Raheem Bux was their real father. Their presence at the place of incident at the relevant time is doubtful as the complainant during cross-examination stated that nobody came at the time of incident whereas the PW-2 Aftab Ahmed stated that all the people working in the fields adjacent to the place of incident came running to place of incident when accused after incident went away. The people working in the fields adjacent to place of incident also saw the accused persons. As per complainant, their father Raheem Bux met with them at bridge situated outside of their village and was accompanied with them at police station. However PW-03 is also a real brother of the deceased, who stated during his cross-examination that only they three brothers were accompanied with injured deceased at police station and no other private person was available there. Further it is strengthened from the fact that complainant during cross-examination stated that they neither informed the names of accused to police first time when they brought the deceased in injured condition and subsequently when police came to hospital at the time of postmortem. On both the occasion, they did not disclose the names of the accused, which fact has also been supported by PW-3 Altaf Ahmed. Whereas PW- 2 Aftab Ahmed negated the same and stated that they informed the police about the incident and the names of accused Shah Murad and others on their first interaction with the police when they brought the deceased at police station in injured condition. This PW further stated that Yasin disclosed the names of accused on first visit of police station which the complainant himself denied such fact as stated above. All these facts suggest that the incident was an unseen incident but later on the complainant party cooked up the false story to involve these appellants.

10. It is further transpired from the evidence and the documents produced/exhibited by the prosecution that the


25/07/2023

complainant party is telling a lie in respect of place of incident where the deceased received the injuries and the availability of accused for making fire upon the deceased. As per the evidence of complainant Yasin the deceased received the injury at "Wahi" (watercourse) on the side where they were working in the land and they saved themselves on other side of the bank of "Wahi" (watercourse). The PW-2 Aftab Ahmed stated that the accused persons came at place of incident and made fire shots while hidden themselves in the other side of "Wahi" (watercourse) and same "Wahi" (watercourse) was situated on their northern side. The deceased Mumtaz received fire shot injury at "Wahi" (watercourse) on the side where they (Complainant party) were also hidden. On careful scrutiny of the evidence it reflects that there was a "Wahi" (watercourse) in between the accused persons and the complainant party. When the evidence of these eye-witnesses is confronted with the evidence of Tapedar PW-5 Zubair Ahmed who prepared the sketch of the place of incident on the pointation of complainant (Eye-witness) the same is not found supportive to the evidence of eye-witnesses. As per the evidence and sketch prepared by the Tapedar there was a link road and thereafter a "Wahi" (watercourse) was situated, the appellants and the complainant party including the deceased were at one side of the said "Wahi" (watercourse) which is completely in contradiction which creates very serious doubt about the presence of eye-witnesses and happening of the incident.

11. The oral evidence so produced by the complainant party is also not supported by the medical evidence so also other corroborative/circumstantial evidences. As per the evidence of eye-witnesses who were the near relatives to each other that 04 accused persons fired from their respective weapons upon the deceased Mumtaz and all fires hit to him; however, the recovery of empties from the place of incident was shown as 08 empties of 7.62 and 05 empties of 7 mm rifle total 13 in numbers but when they were matched with the medical evidence, it was found false one. The medical evidence of doctor, who conducted the post mortem, reflects that the deceased Mumtaz received only one firearm injury. There is


25/07/2023

no direct and confidence inspiring evidence as to who fired amongst four assailants which hit to the deceased. Four persons were charged by the prosecution for a single injury, which creates doubt in the case. In such circumstances, the Supreme Court of Pakistan (comprising of four Judges) in the case of **Darey Khan and another v. The State (1972 SCMR 578)**, has acquitted the accused while extending the benefit of the doubt. The Supreme Court of Pakistan in another case of **Muhammad Shafi alias Khudoo v. The State and others (2019 SCMR 1045)** has also acquitted the accused while observing that “Ocular account is in conflict with medical evidence in-as-much as according to the crime report both the appellant, as well as, Abdul Razzaq, co-accused, are assigned one blow each to the deceased, whereas according to the initial medical examination, Medical Officer noted solitary injury on the head, its impact on the eye has been utilized by the witnesses to array the latter in the crime.”

12. The background of the complainant party including the deceased does not have a clean record as apparently they have criminal history and involve in several disputes with different people and with different communities which fact has been admitted by the complainant and the other witnesses during cross-examination. It is admitted by the complainant that an FIR No. 04/2017 for offence under section 376, 511 PPC at police station Karan Sharif for committing an offence of attempt of Zina with the wife of Saeed Ahmed Bhayo was registered against the deceased. It is further admitted by the complainant that an FIR No. 29/2015 for offence under section 322,337-f(i) and 34 PPC at police station Karan Sharif was also registered against him (complainant), his father (mashir in the present case) and his deceased brother by Muhammad Bux Pahore. The complainant further admitted that several FIR's were also registered against the deceased by the state for Oil Theft, Police encounters, Patharidari and recovery of unlicensed Arms. It has also come in the evidence that an FIR No. 12/2010 for offence under section 451 and 459 PPC at police station Karan Sharif against the complainant and deceased Mumtaz was also registered by one Irshad


25/07/2023

Bhayo. The complainant also admitted that an FIR No. 08/2009 for offence under sections 342, 344, 346 and 506/2 PPC was also registered at police station Karan Shari against him, deceased Mumtaz, his father and his brother Altaf; all are the witnesses in the present case and the same FIR was registered by Mehmood Khan. All these facts were also admitted by the other witnesses in their cross-examination. The enmity with the present appellants is also admitted by the prosecution witnesses. Looking to these facts and the contradictions and the observation discussed in the above paras the entire case against the appellants is doubtful.

13. It is settled that the Court(s) must never be influenced with severity of the offence while appreciating evidence for finding guilt or innocence because severity of an offence could only reflect upon quantum of punishment. Therefore, even such like tragic cases, the Courts are always required to follow the legally established position that it is intrinsic worth and probative value of evidence which plays a decisive role in determining the guilt or innocence and not heinousness or severity of offence. Reliance can be placed on the case of **Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274)**. The rule of benefit of the doubt is essentially a rule of prudence which cannot be ignored while dispensing justice following the law. The conviction must be based on unimpeachable evidence and certainty of guilt and doubt arising in the prosecution case must be resolved in favour of the accused. The said rule is based on the maxim. **"It is better that ten guilty persons be acquitted rather than one innocent be convicted"** which occupied a pivotal place in the Islamic Law and is enforced strictly because of the saying of the Holy Prophet (PBUH) that the **"mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent"**. It is well settled by now that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is casted upon the accused to prove his innocence. It has also been held by the Honourable Superior Courts that the conviction must be based and founded on unimpeachable evidence and certainty of guilt,


25/07/2023.

and any doubt arising in the prosecution case must be resolved in favour of the accused. In case of **Wazir Mohammad v. The State (1992 SCMR 1134)**, it was held by Honourable Supreme Court that "In the criminal trial it is the duty of prosecution to prove its case against the accused to the hilt, but no such duty is casted upon the accused, he has only to create doubt in the case of prosecution. "Honourable Supreme Court in another case of **Shamoon alias Shamma v. The State (1995 SCMR 1377)**, held that "The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against accused, entitles him/them to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise. "Reliance is also placed on case of **Naveed Asghar and 2 others v. The State (PLD 2021 SC 600)**.

14. The over-all discussion arrived at conclusion that the prosecution has miserably failed to prove the guilt against present appellants beyond shadow of any reasonable doubt and it is a well-settled principle of law that for creating the shadow of a doubt, there should not be many circumstances. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is always extended in favour of the accused not as a matter of grace or concession, but as a matter of right. In this respect reliance is placed on the case of **Muhammad Mansha v. The State (2018 SCMR-772)**, wherein the Hon'ble Supreme Court of Pakistan has held that:-

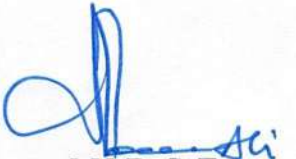
"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then accused would be entitled to the benefit 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 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)**".

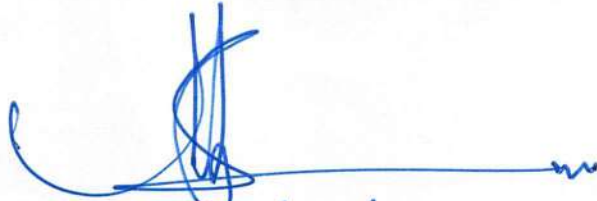

25/07/2023

15. Resulting upon above discussion, I am of the judicious view that the learned trial Court has not evaluated the evidence in its true perspectives and thus arrived at an erroneous conclusion by holding present appellants as guilty of the offence. Thus, the instant criminal appeal is allowed; the conviction and sentence recorded against the appellants by way of impugned judgment could not be sustained, the same are set aside and the appellants are acquitted of the charge. Appellants are in custody, they should be released forthwith if they are not required any other custody case.

16. The above criminal appeal is disposed of in the above terms.

Announced by me in the
open court in the presence
of Additional Prosecutor General
S. S. Melh.


JUDGE
25/07/2023.


27/7/2023