

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 663 of 2019

Appellant: Sohaib Azhar Butt through M/S Shahab Sarki,
Barrister Zulfiqar Ali Langah, Rashid Rajer
and Jawaid Panhwar, advocates

The State: Mr. Khadim Hussain Khuharo, Additional
Prosecutor General Sindh

Date of hearing: 10.08.2023

Date of judgment: 10.08.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellant and co-accused Pervaiz Anwer in furtherance of their common intention committed murder of Ali Gul by causing him fire shot injuries, for that they were booked and reported upon by the police. The appellant and the above-named co-accused denied the charge and the prosecution to prove it, examined complainant Hassan Khan and his witnesses and then closed its side. The appellant and the above-named co-accused during course of their examination under Section 342 Cr.P.C denied the prosecution's allegations by pleading innocence, they examined Tanveer ul Haq and Azhar ul Haq in their defense and then closed their side. On conclusion of trial, co-accused Pervaiz Anwar was acquitted while the appellant was convicted under Section 302(b) PPC and sentenced to undergo rigorous imprisonment for life and to pay compensation of Rs.10,00,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for 06 months with benefit of section 382(b) Cr.P.C by learned III-Additional Sessions Judge, Karachi East vide judgment dated 05.10.2019, which is impugned by the appellant before this Court by preferring the instant Criminal Appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police in a blind FIR and the evidence of the PWs has been disbelieved in respect of the above-named co-accused while it is

believed in respect of the appellant by the learned trial Court without assigning cogent reasons, therefore, the appellant too is entitled to be acquitted by extending him benefit of doubt.

3. None has come forward to advance arguments on behalf of the complainant. However, learned Addl. PG for the State has sought for dismissal of the instant Criminal Appeal by contending that on arrest from the appellant has been secured the car and the pistol allegedly used in commission of incident and his case is distinguishable to that of the above-named acquitted accused.

4. Heard arguments and perused the record.

5. FIR of the incident is lodged against unknown culprits. The complainant is not eyewitness to the incident; therefore, his evidence is of little help to the case of prosecution. PW Saleem being driver of the ambulance who actually intimated the complainant about incident and took the death both of the deceased to the hospital has not been examined by the prosecution. The inference which could be drawn of his non-examination in terms of Article 129(g) of Qanun-e-Shahadat Order, 1984, would be that he was not going to support the case of prosecution. PW Mian Gul who happened to be father of the deceased suspected the appellant and his accomplice for committing the death of the deceased on account of some dispute over sale and purchase of the property. By raising such suspicion, he produced certain cheques before the police allegedly issued by the appellant. The suspicion could never be made substitute of legal proof though it may be strong. As per PW Nizamuddin, he saw the appellant committing death of the deceased by causing him fire shot injuries by coming out of a car, which was being driven by the above-named co-accused. His 161 Cr.PC statement has been recorded with delay of 18 days to the incident. No plausible explanation to such delay is offered by him which prima facie suggests that he was introduced in investigation at latter stage by the police only to strengthen the involvement of the appellant in present case. If for the sake of

arguments, it is believed that PW Nizamuddin has actually seen the appellant committing the death of the deceased then he was to have been subjected to identification parade through him. Such exercise has not been undertaken; such omission on the part of the police could not be overlooked. It was stated by PW I.O/ASI Ghulam Qadir that on arrest the appellant and the above-named co-accused admitted before him to have committed the death of the deceased. If for the sake of arguments, it is believed that the appellant or the above-named co-accused actually admitted their guilt before the above-named police officer even then such admission on their part in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used as evidence. As per I.O/SIP Umar Khattak on pointation of the appellant and the above-named co-accused he secured the car allegedly used in commission of the incident and therein was found lying the pistol allegedly used by the appellant for committing death of the deceased. Such recovery is alleged by the appellant to have been foisted upon him by the police at the instance of complainant party. Even otherwise, it would be hard to maintain conviction against the appellant on the basis of such recovery alone. On the basis of same evidence, the above-named co-accused has already been acquitted by the learned trial Court. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he too is found entitled.

6. In case of *Abdul Khaliq vs. the State (1996 SCMR 1553)*, it was observed by Apex Court that;

“---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”

7. In case of *Sardar Bibi and others vs. Munir Ahmed and others (2017 SCMR 344)*, it has been held by the Apex Court that;

“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar

role without availability of independent corroboration to the extent of such other accused”.

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

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

9. 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".

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

11. Above are the reasons of the short order of even date whereby the instant Criminal Appeal was allowed.

JUDGE