

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 803 of 2019
Criminal Jail Appeal No.09 of 2020

Appellants: Abdul Rehman, Khalid Langah and Kashif Ali
@ Raja through Mr. Aaquib Rajpar, advocate

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

Date of hearing: 04.09.2023

Date of judgment: 04.09.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of prosecution that the appellants during course of robbery committed murder of Abdul Rehman by causing him fire shot injury, for that they were booked and reported upon by the police. On conclusion of trial, they were convicted under Section 302 PPC and sentenced to undergo imprisonment for life as *Tazir*; they were further convicted u/s. 397 PPC and sentenced to undergo simple imprisonment for 10 years; both the sentences were directed to run concurrently with benefit of Section 382(b) PPC by learned 3rd -Additional Sessions Judge/MCTC-II, Malir Karachi vide judgment dated 31.10.2019, which they have impugned before this Court by preferring two separate Appeals.

2. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the police in blind FIR which was lodged with delay of about one day; no identification parade of the appellants has been conducted; pistols and cell phone have been foisted upon them and evidence of the PWs being doubtful in its character has been believed by the learned trial Court without lawful justification, therefore, the appellants are entitled to their acquittal by extending them benefit of doubt.

3. None has come forward to advance arguments on behalf of complainant Ubedullah. However, learned Addl. PG for the State by supporting the impugned judgment has sought for dismissal of the instant appeals by contending that the prosecution has been able to prove its case against the appellants beyond shadow of doubt and they have rightly been identified by the complainant and his witnesses at trial.

4. Heard arguments and perused the record.

5. It is stated by the complainant that on 19.02.2018 when he and deceased were sitting at their marble store, there came the appellants who robbed them of their cell phones, money and other belongings; on resistance they opened the fire, which hit to the deceased, who died on his way to hospital; on the next day his statement under Section 154 Cr.PC was recorded by the police, which then was incorporated into FIR. It was against the unknown culprits. As per I.O/SIP Shoukat Ali, who conducted the initial investigation of the case; 154 Cr.P.C statement of the complainant was written by ASI Saleem. He has not been examined by the prosecution. His non-examination being author of very important document could not be overlooked. On asking, it was stated by the complainant that he was informed by the police that the appellants have been arrested from Bhit Shah. He in that respect has been belied by I.O./SIP Hakim Ali by stating that he arrested appellants Kashif Ali and Abdul Rehman from Bhit Shah, on pointation of the complainant. Be that as it may; nothing has been brought on record which may suggest that who actually intimated the complainant or the police about the involvement of the appellants in commission of the incident. On arrest, as per the complainant, appellants Kashif and Abdul Rehman became ready to produce the crime weapon by admitting their guilt; such admission, if is made by the appellants, even then in terms of Article 39 of Qanun-e-Shahadat Order, 1984 could not be used against them as evidence. As per I.O/SIP Hakim Ali memo of arrest of appellants Kashif and Abdul Rehman was written by PC Altaf. He

too is not examined by the prosecution. His non-examination could not be overlooked. It was stated by PW Habibullah that on the day of incident, he was intimidated by his relative on his cell phone that somebody has killed Abdul Rehman, on such information, he went at Jinnah Hospital Karachi. If it is so, then he is not eyewitness to the actual incident, therefore, his evidence hardly supports the case of prosecution. It was stated by PW Sabir Hussain that on 19.02.2018 he saw three persons making fires at the place of incident, which was visited by the police on 21.2.2018 and his statement was recorded. By stating so, he identified the appellants to be the same persons; such identity could hardly satisfy the requirements of the law. Even otherwise, his prima facie evidence suggests that his 161 Cr.PC statement was recorded on 21.02.2018 when the place of incident was visited by the police, it was with delay of about 01 day to FIR. Apparently he has been introduced by the police in investigation only to strengthen the case of prosecution. Appellant Khalid, as per I.O/SIP Long Khan, was arrested by I.O/SIP Mian Hasnain. He too has not been examined by the prosecution. His non-examination could not be lost sight of. It was stated by I.O/SIP Long Khan that on arrest from appellants Kashif and Abdul Rehman were secured robbed cell phones. By stating so, he was fair enough to admit that such cell phones can easily be managed from market. No identification parade of either of the appellants has been conducted, which as per I.O/SIP Long Khan was declined by the Magistrate having jurisdiction. No such order has been produced. If for the sake arguments, it is believed that such order was passed then why it was not challenged? No explanation to it is offered by the prosecution. The pistols allegedly used by the appellants in commission of the incident, as per report of Forensic Expert have been found dissimilar to the empties secured from the place of incident. The appellants have pleaded innocence during course of their statements recorded under Section 342 Cr.P.C have denied the prosecution's allegations by stating that nothing was secured from them by the police. In these

circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the appellants beyond shadow of reasonable doubt and to such benefit they are 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 *Asghar Ali @ Saba vs. the State and others (1992 SCMR 2088)*, it has been held by the Apex Court that;

“The identification in Court of a person produced as an accused months after the event could not satisfy the requirements of law for proving the identity of the culprit.”

8. In the case of *Muhammad Mansha vs. The State (2018 SCMR 772)*, it has been held by the Hon’ble 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".

9. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants by learned trial Court under impugned judgment are set aside, consequently, they are acquitted of the offence for which they were 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.

10. The instant Criminal Appeals are disposed of accordingly.

JUDGE