

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 576 of 2019

Criminal Jail Appeal No. 624 of 2019

Appellants: Syed Wasi Haider, Abdul Waheed and Shah Dino, through Mr. Iftikhar Ahmed Shah, advocate

The State: Mr. Muhammad Anwar Mahar, DDPP for the State

Date of hearing: 13.09.2023

Date of judgment: 13.09.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellants with co-accused Noman committed murder of Mst. Robina Khalid by causing her fire shot injuries when she was going back to her house in her car after attending her duty at Dow University Hospital Karachi as Medical Officer, for that they were booked and reported upon. The appellants and co-accused Noman denied the charge and prosecution to prove the same, examined in all 09 witnesses and then closed its side. The appellants and co-accused Noman during course of their examination under Section 342 Cr.P.C denied the prosecution's allegation by pleading innocence. On conclusion of trial, co-accused Noman was acquitted while the appellants were convicted under Section 302(b) r/w Section 34 PPC and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.2,00,000/- each and in default whereof to undergo simple imprisonment for six months with benefit of section 382(b) Cr.P.C by learned Xth-Additional Sessions Judge, Karachi East vide judgment dated 30.05.2017, which they impugned before this Court by preferring an appeal, whereby on 17.05.2018 their case was remanded by this Court to the learned trial Court for recording statements of the appellants u/s. 342 Cr.PC afresh and then to pass fresh judgment. The statements of the appellants under Section 342 Cr.PC were recorded afresh whereby

they denied the prosecution's allegation by pleading innocence; they examined themselves on oath and Ali Muhammad and Asghar Ali in their defence, they again were convicted under Section 302(b)/34 PPC and sentenced to undergo rigorous imprisonment for life as *Tazir* and were directed to pay compensation of Rs.200,000/- each to the legal heirs of the deceased with benefit of Section 382(b) Cr.PC doubt by learned Vth-Additional Sessions Judge, Karachi, East, vide judgment dated 03.09.2019 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; the FIR is blind one; the identification parade of the appellants was defective one and evidence of the PWs being doubtful in its character has been believed by the learned trial Court without assigning cogent reasons, the acquittal of co-accused Noman has ever been challenged, therefore, the appellants are entitled to be acquitted of the charge by extending them benefit of doubt, which is opposed by the learned DDPP for the State by supporting the impugned judgment by contending that on arrest from the appellants has been secured the robbed articles of the deceased.

3. Heard arguments and perused the record.

4. It was stated by complainant Khalid Pervaiz that on 24.11.2014 he was intimated by someone on cell phone that his wife Mst. Robina Khalid has been fired at and has been shifted to Darul Sehat Hospital; on such information, he went at Darul Sehat Hospital, there his wife was found lying dead, his statement under Section 154 Cr.PC was recorded by I.O/ASI Asghar Ali; on 13.12.2014 he was informed by the police that the culprits involved in the incident have been arrested and from them have been secured purse, cell phone and gold bangle, which they snatched from the deceased. Evidence of the complainant prima facie suggests that he is not eye witness to the incident; therefore, his evidence hardly lends support to the case of

the prosecution. It was stated by PWs Zahid Pervaiz and Shoaib Akhtar that they witnessed the incident and then identified the appellants during course of identification parade before the Magistrate. On asking, PW Zahid Pervaiz was fair enough to say that his 161 Cr.PC statement was recorded on 25.12.2014, it was with delay of more than 01 month to the incident. On asking, PW Shoaib Akhtar was fair enough to say that his 161 Cr.PC statement was recorded on 28.11.2014, it was with delay of 04 days to the incident. No plausible explanation to such delay is offered by them, which prima facie suggest that they were introduced in investigation by the police only to be used at the time of need and were used accordingly. It was stated by I.O/SIP Khadim Ali that the appellants on arrest in some other case by police party of PS CID Civil Line Karachi and on admission of their guilt before I.O/ASI Muhammad Ashraf were handed over to him for further investigation of the present case and they on interrogation confessed before him to have committed the present incident. If for the sake of arguments, it is believed that the appellants actually made such confession before the above said police officers, even then same in terms of Article 39 of Qanun-e-Shahadat Order, 1984 could not be used against them as evidence. It was further stated by I.O/SIP Khadim Hussain that the appellants then led to him to recovery of purse, cell phone and gold bangle which they snatched from the deceased at the time of incident; those were secured from their house under memo, which is silent with regard to recovery of gold bangle from the appellants. Even otherwise, no identification parade of said articles was got conducted by the said I.O/SIP through the Magistrate, such omission on his part could not be overlooked. Nothing has been brought on record in shape of any document which may prove the ownership of the deceased over the said articles. It was further stated by the said I.O/SIP that on 12.12.2014 he produced the appellants before the Magistrate for conducting their identification parade through PWs Zahid Pervaiz and Shoaib Akhtar; it was postponed and then was conducted on

16.12.2014. In all it was with delay of 11 days to the actual arrest of the appellants. Such delay could not be ignored. It was stated by Mr. Abdul Qadeer the Magistrate who conducted the identification parade that all the appellants were asked to stand in same row and then the witnesses were called to identify them. If it was so, then the identification parade of the appellants was joint one and it does not fulfill the requirements of the law. The pistol secured from appellant Shah Dino, it is said was found matched with the empty secured from the place of incident. As per learned counsel for the appellants they have already been acquitted in cases relating to recovery of unlicensed weapons from them. The recovery of weapons, if any, in absence of direct evidence is not enough to be taken as a conclusive proof of the guilt of the appellants. The appellants have pleaded innocence by denying to have committed the alleged incident. 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 doubt and to such benefit they are found entitled.

5. 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.”

6. In case of *Shafqat Mehmood and others vs. The State* (2011 SCMR 537), it has been held by the Apex Court that;

“Delay of seven days in holding the identification parade after the arrest of accused had made the same doubtful”.

7. In case of *Naeem @ Titu and 04 others v. the State* (2020 YLR 74), it was held Division Bench of Lahore High Court that;

“Perusal of proceedings of test identification parade available on record reflected that the same was conducted jointly---During the said proceedings only rows were changed---Witness had not put his hands over the head of the culprits during the proceedings---Such test identification parade was devoid of legal credence.”

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 appellants under impugned judgment are set aside, 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.

11. The instant Appeals are disposed of accordingly.

JUDGE

Nadir*