

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD**

***Cr. Jail Appeal No.S-163 of 2017***

***Cr. Appeal No.S-165 of 2017***

*Date of Hearing:* 21.03.2022

*Date of Judgment:* 21.03.2022

*Appellants/accused:* *Anwar alias Anoo S/o Juman Kakepoto  
and Yar Muhammad alias Mazar S/o  
Jumoo Makrani,  
Through M/s. Omparkash H. Karmani  
and Imtiaz Ali Chanhio, Advocates.*

*The State:* *Mr. Shahzado Saleem Nahiyoon,  
Additional P.G.*

**J U D G M E N T**

**Salahuddin Panhwar, J-** Through captioned appeals, appellants have challenged the judgment dated 22.06.2017 passed in Sessions Case No.95 of 2012 (Re: the State v. Yar Muhammad alias Mazar and another) arising out of Crime No.496 of 2010, registered at Police Station Tando Allahyar under Sections 302 & 34 PPC.

2. Succinctly, relevant facts as set out in prosecution case are that complainant Ghulam Mustafa lodged FIR at P.S Tando Allahyar on 16.12.2010 at 1300 hours, stating therein that he is having business of cattle. On 12.12.2010, his brother namely Ghulam Hussain alias Laloo, aged about 25/26 years, who also works with him, went outside from the house at about 4:30 p.m; however, did not come back till night, therefore, he enquired about him. Ghulam Haider and Abdul Raheem came to his house and informed that in the evening time they were going towards

Mirpurkhas for attending religious Jalsa, they saw that Ghulam Hussain alongwith Anwar alias Anoo son of Juman and Yar Muhammad son of Juman were standing at Hamid Farm at about 6:00 p.m. and Ghous informed that they were going towards the land of Jani Dall. Thereafter, they went to the houses of Yar Muhammad and Anwar but they were not present in their houses. On 13.12.2010 they alongwith local people of village started searching at the Farm of Hamid and adjacent areas of the said Farm. Near the Cotton Crop, on the land of Jani Dall, they found the dead body of Ghulam Hussain alias Laloo having bullet injuries on the body of Ghulam Hussain. They informed the police and police reached the place of incident. Thereafter, the dead body was shifted to the hospital for postmortem and after the postmortem it was handed over to him. Anwar alias Anoo Kakepoto and Yar Muhammad alias Mazar Makrani were also missing since 12.12.2010, therefore, he suspected that Yar Muhammad and Anwar with their common intention have killed his brother Ghulam Hussain by causing fire shots as his brother used to cross near the houses of Anwar and Yar Muhammad. Hence, FIR was lodged against the accused.

3. After investigation, both accused were sent up for trial. Charge was framed and the trial Court examined PW-01 Ghulam Mustafa (complainant) as Ex-07, he produced copy of N.C as Ex-7/A. FIR as Ex-7/B and receipt of receiving dead body by him as Ex-7/C. PW-02 Abdul Rahim, PW-03 Ghulam Qadir, PW-04 Ghulam Haider were examined at Ex.-08 to Ex-10. PW-05 Dr. Ghulam Muhammad at Ex-11, he produced police letter as Ex-11/A, lash Chakas Form as Ex-11/B, receipt regarding hand over the dead body to ASI Ghulam Asghar Sirewal as Ex-11/C, postmortem report as Ex-11/D and report of chemical examiner as Ex-

11/E. PW-6 Muhammad Ghous was examined at Ex-13. PW-07/ASI Ghulam Asghar at Ex-14, he produced entry No.08 as Ex-14/A, mashirnama of dead body as Ex-14/B, Danishnama as Ex-14/C, mashirnama of clothes as Ex-14/D, receipt regarding handing over the dead body to Ghulam Mustafa as Ex-14/E, Entry No.14 as Ex-14/F. PW-8/SIP Afzal Ahmed was examined at Ex-15, he produced mashirnama of site inspection as Ex-15/A, mashirnama of arrest dated 19.12.2010 as Ex-15/B and mashirnama of recovery as Ex-15/C. PW-9 Tapedar Muneer Ahmed at Ex-16, he produced letter of police as Ex-16/A, four copies of sketch as Ex-16/B to 16/E. PW-10 Muneer Ali Solangi, who recorded confessional statement of accused, was examined at Ex-17, he produced letter of I.O as Ex-17/A, statement under Section 164 Cr.P.C of accused Yar Muhammad on prescribed proforma as Ex-17/C. PW-11 Ali Muhammad was examined at Ex-18. Thereafter, the prosecution side evidence was closed vide statement as Ex-20.

4. At the close of trial, statements of accused under Section 342 Cr.P.C. were recorded at Ex-21 & Ex-22, in which the accused denied the prosecution allegations. Accused Yar Muhammad examined himself on oath as Ex.23, and also examined D.W. namely Umed Ali at Ex-24. Accused Anwar also examined himself on oath at Ex-26, who also examined his D.W. namely Usman at Ex-27, who produced some documents.

5. At the outset, the learned counsel for appellant in Criminal Jail Appeal No.S-165 of 2017 has contended that in present case there are three pieces of evidence against the appellants and same are not confidence inspiring to maintain the judgment recorded by the trial Court.

The learned counsel further contends that though it is alleged that pistol was recovered from appellant Yar Muhammad Makrani and empty shells were also recovered from the scene but both were not sent to FSL and ballistic report, therefore, this piece of evidence cannot be considered to award conviction. He has further contended that in present case there is no eye-witness and confessional statement retracted at the trial, though same was delayed for about four days, cannot be relied upon while awarding conviction against the appellants. He has relied upon the cases of MUHAMMAD ISMAIL and others v. The STATE (2017 SCMR 898) and MUHAMMAD MANSHA v. The STAE (2018 SCMR 772).

6. Learned Counsel for appellant in Criminal Appeal No.S-163 of 2017 adopted the arguments made by learned counsel for co-accused and has contended that last seen evidence is not sufficient to award life imprisonment and role of Anwar is mere presence, hence, common intention of Anwar is not reflecting from the alleged crime.

7. Learned Additional P.G without confronting the factual aspect with regard to FSL contends that prosecution was bound to produce the FSL report. However, medical evidence is corroborating the confessional statement.

8. Heard the learned counsel for the parties and perused the record minutely. Admittedly, Haji Ghulam Hussain was murdered on 12.12.2010, the FIR was lodged and during investigation two accused persons were arrested, their confessional statements were recorded with delay of four days. It is also a matter of fact that present incident was not seen by the eye-witnesses, however; there is last seen evidence of three

prosecution witnesses namely Abdul Rahim, Ghulam Haider and Muhammad Ghous.

9. I have examined plea of learned counsel for appellants with regard to confessional statement. The confessional statement was recorded after a delay of four days as contended by the learned counsel for the appellants. It is held in the case of **Mst. Saira Bibi and others v. The State** reported as 2019 P.Cr.LJ 1363 that;

*“It is established principle of law that if the judicial confession is recorded with undue delay, the same shall have no legal consequences.”*

10. Admittedly, confessional statement is retracted statement as accused at the time of trial pleaded not guilty and therefore the confessional statement against him being a witness cannot be considered as truthful statement because a person who recorded evidence against himself appeared before the Magistrate, subsequently resiled cannot be considered as a truthful witness. However, it is settled principle of law that confessional statement can be considered alongwith circumstantial evidence if there is independent corroboration. Here the recovery of pistol and empty shells recovered at the site whether sent to the ballistic expert for forensic examination and report or not. Prosecution has failed to produce such evidence on record. It is also settled principle of law that in criminal administration of justice, recovery of weapon only cannot be considered as corroborative piece of evidence until it is supported by the positive report of Forensic Science Laboratory (FSL) and in present case when admittedly there were empty shells recovered and case of the prosecution was that the pistol was used in commission of the offence but such efforts with regard to get such offensive weapon examined in order

to verify whether it was in running condition and also to match it with the recovered empty shells were not taken. Needless to mention that onus of probandi was upon the prosecution to prove each aspect of the case. Reliance can be placed on the case of **Sajjan Solangi v. The State** reported as 2019 SCMR 872, in which it is held that;

*“Although, a 12 bore gun was recovered allegedly on the pointation of the petitioner and a crime empty was recovered from the place of occurrence but surprisingly the gun was not sent to the forensic expert for comparison or to determine whether it was in working condition or not. Allegedly, petitioner got recovered the said gun from the bushes which place was accessible to everyone. The private persons were also present there as admitted by the witness but only police officials were made witness of the said recovery. In the absence of any positive report of Forensic Science Laboratory, the recovery of the gun is inconsequential.”*

11. In another case reported as **Akhter Muhammad v. The State** (2019 YLR 2603), it is held that;

*“-----nor the FSL report was obtained to affirm that the same was in running condition. Admittedly, the prosecution has badly failed to establish the charge against the appellant through confidence inspiring evidence and beyond shadow of reasonable doubts and the learned trial Court while delivering the impugned judgment has failed to extend the benefits of such doubts in favour of appellant-----.”*

12. With regard to medical evidence, suffice it to say that medical evidence at the most is supporting piece of evidence and relevant only if primary evidence i.e. ocular account inspire confidence. The medical evidence neither pinpoint the accused nor establish the identity of the accused and at the most can depict the locale as well as nature of injury, duration, weapon used etc; however, it can never be considered to be corroborative piece of evidence and at the most can be considered a supporting evidence only to the extent of specification of set of injuries, the weapon used, duration, the cause of death etc. The medical evidence

cannot determine the guilt of accused, however, that can only corroborates with regard to injuries. At this juncture, it would be conducive to refer to the relevant cases of (i) **SARDAR BIBI and another v. MUNIR AHMED and others** (2017 SCMR 344) as well (ii) **ZAHOOR AHMAD v. The STAE** (2017 SCMR 1662).

13. It would be pertinent to state that while giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is single circumstance which creates reasonable doubt in a prudent mind about the guilt of an accused, then the accused would be entitled to the benefit of such doubt not as a grace or concession but as a matter of right. Reference can be made to the case of **TARIQ PERVEZ v. The STATE** (1995 SCMR 1345).

14. With regard to last seen evidence, it is settled principle of law that last seen evidence is a weaker piece of evidence and same cannot be considered as sole ground while awarding conviction against the appellants. In these circumstances, this is not a case free from doubt. Accordingly, impugned judgment dated 22.06.2017 recorded against the appellants by the Additional Sessions Judge, Tando Allahyar is hereby set aside and resultantly both the appeals are allowed. Appellants Anwar alias Anoo and Yar Muhammad alias Mazar shall be released forthwith if not required in any other custody case.

JUDGE

Shahid