

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

Present

**Mr. Justice Amjad Ali Sahito
Mr. Justice Khadim Hussain Soomro**

Criminal Appeal No.S-262 of 2019

Appellant : Nadeem alias Nadoo.
Through Mian Taj Muhammad Keerio,
Advocate.

Complainant : Through Mr. Sameeullah Rind,
Advocate.

State : Through Mr. Shewak Rathore,
Deputy, Prosecutor General, Sindh.

Criminal Revision Application No.D-38 of 2019

Applicant/complainant : Through Mr. Altaf Sachal Awan,
Advocate.

State : Through Mr. Shewak Rathore,
Deputy Prosecutor General, Sindh.

Date of hearings: 19.11.2024 & 26.11.2024

Date of decision: 17.12.2024

J U D G M E N T

AMJAD ALI SAHITO, J.- By this common judgment, we intend to dispose of the above-cited criminal appeal as well as criminal revision, as they arise out of same incident, involving common question of law and facts as well as judgment (impugned herein) having been delivered by the learned trial Court on 14.09.2019.

2. Through captioned criminal appeal, appellant Nadeem alias Nadoo has assailed the legality and propriety of the judgment dated 14.09.2019, passed by learned 4th Additional Sessions Judge/MCTC, Hyderabad in Sessions Case No.442 of 2009 [Re: The State v. Awais Haleem and others], emanating from Crime No.29 of 2009, registered at Police Station Fort District Hyderabad, under sections 302 & 34

PPC, whereby the learned trial Court after full dressed trial, convicted and sentenced the appellant to suffer life imprisonment with direction to pay compensation amount of Rs.4,00,000/- to the legal heirs of the deceased; in case of default, he shall suffer S.I for six months more. However, he is awarded the benefit of Section 382-B Cr.P.C.

3. Through Criminal Revision Application No.D-38 of 2019, Applicant (complainant) Nadir Khan seeks enhancement in the sentence already awarded to the accused / respondent (appellant in captioned criminal appeal) through the impugned judgment, as per the charge framed against him.

4. Precisely, the facts of the prosecution case, in brief, are that on 03.05.2009 at about 10:00 P.M. accused Awais Haleem exchanged hot words with the father of the complainant and threw bricks but the dispute was mediated then his father left the home for his work and complainant was present in the home. At about 10:30 P.M complainant came out of the house and listened to voices of commotion and noticed that some people of Mohallah namely Awais Haleem s/o Muhammad Anwar Yousuf Zai, Muhammad Umar s/o Anwar Khan Yousuf Zai, Anwar Khan s/o Noor Khan Yousuf Zai and **present appellant** Rana Nadeem @ Nadoo s/o Muhammad Ayoub were beating his brothers namely Shakir Khan and Babar Khan and out of them, Rana Nadeem alias Nadoo (present appellant) **grappled brother Shakir Khan from backside**, then Awais Haleem stabbed sharp knife injury on the chest of Shakir Khan, while Muhammad Umar inflicted iron pipe blow on the head, whereas Anwar Khan (acquitted accused) caused wooden Danda blow, resultantly brother of complainant namely Shakir Khan fell down on ground, then all accused made their escape good. Thereafter, the complainant with the help of Babar Khan and Jung shifted the injured Shakir Khan to the Hospital but he succumbed to his injuries, before reaching at Hospital. After that, the complainant appeared at the Police Station and lodged a present FIR.

5. After completion of the usual investigation, the I.O. submitted a police report under section 173 Cr.P.C before the concerned Magistrate, showing accused Awais Haleem in custody while the rest of the accused as absconders. In the first round of litigation, the charge against co-accused Awais Haleem and Anwar Khan was framed

by learned 2nd Additional Sessions Judge, Hyderabad, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, in the previous round, the prosecution examined as many as eight (08) witnesses, who produced numerous documents and thereafter, the prosecution closed its side. Later on, after hearing the parties, the trial Court convicted and sentenced the co-accused Awais Haleem to suffer death as Ta'zir and Anwar Khan to suffer life imprisonment vide judgment dated 09.04.2014, however, the case of the co-accused Muhammad Umer and present appellant Nadeem @ Nadoo kept on dormant file. It is noted that the death sentence of the co-accused Awais Haleem was converted into life imprisonment while another co-accused Anwar Khan was acquitted by this Court vide judgment dated 30.10.2017 passed in Cr. Appeal No.D-08 of 2014.

7. On 27.07.2018, the present appellant Nadeem @ Nadoo was arrested by ASI Ali Anwar Hisbani and produced before the Court, as such, the charge against him was framed, to which he pleaded not guilty and claimed trial.

8. To establish the accusation against the present appellant, the prosecution examined PW-01 complainant Nadir Khan at Ex.03, P.W Babar Khan at Ex.04 then learned defence counsel filed a statement dated 29.08.2019 thereby adopting the same cross-examination on behalf of the present accused as earlier conducted whereupon learned ADPP for the State extended his no objection. The prosecution also examined PW ASI Ali Anwar Hisbani at Ex.05, who produced a memo of the arrest of the accused at Ex.05/A; P.W Babar Khan as mashir of arrest at Ex.06. Thereafter an application under section 540 Cr.P.C moved by counsel for accused regarding the reexamination of material witnesses on the ground of not cross-examined properly whereon no objection was extended by learned ADPP and said application was allowed vide order dated 31.08.2019 directing prosecution to produce its witnesses for cross-examination resultantly PWs Nadir Khan, SIP Nisar Ahmed and Babar Khan were again cross-examined by learned defence counsel then learned ADPP filed side close statement at Ex.09.

9. The appellant in his statement recorded U/S 342 Cr.P.C, denied the allegations leveled against him by pleading his innocence.

However, he did not examine himself on oath nor led any evidence in his defence.

10. Learned trial Court on evaluation of evidence and after hearing counsel for the parties, convicted and sentenced appellant Nadeem alias Nadoo vide **Judgment dated 14.09.2019**, which he has impugned before this Court by filing instant Criminal Appeal while complainant Nadir Khan has also filed Criminal Revision Application for enhancing his sentence.

11. It is argued by learned counsel for the appellant that some witnesses recorded their statements before I.O who stated that appellant Nadeem @ Nadoo was not present at the place of the incident; that this Court vide judgment dated 30.10.2017 has already converted death penalty of co-accused Awais Haleem into life imprisonment while co-accused Anwar Khan who is alleged to have caused *Danda* blow was acquitted on the same set of evidence, as such, same treatment is to be extended to present appellant; that incident is night time for which there is no source of identification mentioned in the FIR; that no independent witness has been cited to witness the alleged incident even the presence of prosecution's witnesses is doubtful as police were informed on 15 Madadgar; that motive is shown dispute with father of deceased namely Aziz-ur-Rehman but he was not examined by the prosecution. He further argued that after going through the entire prosecution evidence pointed out certain contradictions in the deposition recorded before the trial Court. According to him, the prosecution could not establish the allegations against the appellant through the evidence even the evidence of the complainant and his witnesses is not in the line which is very much contradictory with the ocular evidence as medical evidence concerning the stand taken by the complainant does not support him, therefore, he prays for acquittal of the appellant.

12. On the other hand, learned DPG duly assisted by the learned counsel for the complainant, while opposing the contentions raised by learned counsel for the appellant and supporting the impugned judgment contended that the prosecution has fully established its case against the appellant beyond reasonable doubt by producing consistent/convincing and reliable evidence and the contradictions whatever on record are of minor in nature and are not fatal to the prosecution case; that the impugned judgment and sentence awarded

to the appellant is/are result of proper appreciation of evidence brought on record which need no interference. While elaborating their arguments they submit that prosecution witnesses have fully implicated the appellant in the commission of the present offence which is serious in nature. According to them, the appellant has been rightly convicted by the trial Court; hence the appeals in hand may be dismissed. The complainant's counsel has placed reliance on the cases of Zubair Ahmed Vs. The State [PLD 2023 SINDH 151] and Syed Kamran Ali and another Vs. The State [2022 YLR Note 178 Sindh]

13. Learned counsel for the applicant in Criminal Revision Application No.D-38 of 2019, while adopting the arguments of learned D.P.G and learned counsel for the complainant, further submits the appellant has been rightly convicted by the trial Court, therefore, the punishment awarded to the appellant may be enhanced.

14. We have heard the learned counsel for the parties at considerable length and perused the available record with their able assistance.

15. After hearing the parties, careful consideration and meticulous examination of the evidence/available record, suffice to say that mere heinousness of the offence is not sufficient to convict the accused because the accused continues with the presumption of innocence until found otherwise at the end of the trial. It is the settled principle of law that the burden of proof of allegation is always upon the prosecution to prove its case beyond a shadow of a doubt. Keeping in view the basic touchstone of criminal administration of justice, we have examined the ocular evidence, medical evidence as well as circumstantial and documentary evidence along with impugned judgment and conclude that the prosecution has failed to prove its case against the appellant for the reasons that it was stated by complainant Nadir Khan, PWs Babar Khan and Bahadur Khan @ Bahaduryar Jan that on the night of incident, quarrel took place between the parties wherein accused were beating to deceased Shakir Khan. Admittedly the incident took place at about 10:30 PM night time. The complainant failed to disclose the source of identification. Even he failed to disclose in the FIR that on what source of light, he had witnessed the incident. The place of the incident was a street, not a single person from the same Muhullah had witnessed the incident to

support the version of the complainant. In cross-examination, the complainant admitted that *“Nobody from Mohallah had come when I came out after hearing commotion.”* As per the post-mortem report, the deceased received an incised wound deep chest cavity and another wound on the left cheek. However, the complainant admitted that *“I, my father and uncle had come out of the house on hearing commotion.”* If it is true then it seems to be that before the arrival of the witnesses/complainant the injured had already received the injuries, hence the presence of the present appellant at the place of incident is doubtful. The role assigned against the present appellant is that he caught hold of the deceased Shakir Khan from his back while co-accused Umer Khan gave an iron pipe blow to him, acquitted co-accused Anwar Khan hit danda blow to him while co-accused Owais stabbed him with churi/knife who fell on ground was taken to hospital but before reaching there he had died.

16. It is a known principle of appreciation of evidence that the benefit of all favourable circumstances in the prosecution evidence must go to the accused regardless of whether he has taken any such plea or not. With this principle in mind, we have gone through the evidence of the prosecution. As regards as the role assigned to the present appellant Nadeem alias Nadoo is concerned, admittedly he had not caused any injury to the deceased. The only role assigned to him is that he allegedly caught hold of the deceased from the back while co-accused Owais caused the fatal blow to the deceased with a knife/churri. There is no evidence that at the time of the actual occurrence appellant/accused had exchanged hot words with the deceased. There is also no evidence that the appellant shared common intention with the main accused. Absolutely, there is no evidence that the action of the appellant was pre-concerted. If for the sake of arguments, the evidence of the complainant and his witnesses is believed to be true, then the specific role of committing the death of the deceased by causing him knife injury is attributed to co-accused Awais Haleem, whose death sentence has been converted into imprisonment for life by this Court even learned counsel for appellant has placed on record copy of order dated 19.10.2023 wherein the Hon’ble Supreme Court of Pakistan has dismissed his appeal being served out his sentence and released from the jail. The role attributed to the appellant in the commission of the incident is only to the extent that he grappled the deceased from back at the time of the incident.

Further, it is customary of our society to involve as many persons in a criminal case as possible prima facie suggests that the complainant party has widened the net by assigning one or another role in the commission of an incident. I.O/SIP Nisar Ahmed in his evidence admitted that *“It is correct to suggest that I recorded the statement of witness Muhammad Rafique, Noor-ul-Hassan, Muhammad Ilyas and others U/S. 161 Cr.P.C in which they stated that at the time of the alleged incident, the present accused was not present.”* It is noted here that the name of the present appellant was initially placed in column No.2 of the challan, which is normally used for cases where the involvement of the suspects could not be established. This placement in column No.2 was based on the statements of local witnesses who were investigated by the investigating officer. The witnesses named above provided testimonies that the appellant was not present at the crime scene. Even otherwise, one of the co-accused namely Anwar Khan in appeal has been acquitted by this Court vide Judgment dated 30.10.2017 whose acquittal has not been challenged and has attained finality. In this regard, reliance is place on the case of *Waleed Shah Vs. The State [2022 P Cr. L J Note 1]*, wherein this Court has held as under:

“The record reflects that during investigation co-accused Bahadur Shah alias Driver Shah, Akbar Shah, Khalid Shah and Mann Shah alias Mahraj Shah were found innocent by the investigating agency and their names were placed in column No.2 of the challan. It is, therefore, obvious that the complainant has implicated as many persons as possible from the accused side. The net was thrown wide deliberately in order to ensure that no male member from the accused side was spared to pursue the criminal case. The learned trial Court while agreeing with the investigation has acquitted these co-accused persons vides the impugned judgment by disbelieving version of prosecution and no acquittal appeal was filed to challenge the said acquittal. In view thereof, it appears that the learned trial Court has not evaluated all these factors, discrepancies and the evidence in true perspective and thus reached to an erroneous conclusion by holding the appellant is guilty of the offence and awarded sentence to him.”

17. The prosecution case is that the accused were beating to deceased Shakir Khan with lethal weapons wherein the present appellant grappled him from back; however, it is admitted by PW-Babar Khan in his evidence that his paternal uncle and his brother Nadir did not try to rescue deceased from the hands of accused persons. It is not appealing to a prudent mind that no blood relative

would remain mum if he sees that someone from his family is beaten by the accused and naturally would react to rescue him, thus this unnatural conduct of the witness cannot be ruled out.

18. It is argued by learned counsel for the applicant/complainant that the appellant was a fugitive from the law and as such in the first round of litigation his case was kept on dormant file and was arrested in the year 2018, therefore, he was escaping himself from legal punishment. This argument has no force when there was only evidence against the appellant grappling the deceased from the back which on merits found suspicious then his abscondance piece of evidence in isolation, if at all, is not sufficient to uphold the conviction and sentence. It is further settled that mere absconding in the absence of any other incriminating piece of evidence could not entail penal consequences against the accused or to expose him to the criminal liability on which he had been charged. It is further settled that when the accused has been able to dent in the prosecution case, therefore, no useful purpose would be served either to remand the matter or to maintain the same.

19. We have also noted several other contradictions and discrepancies in the evidence of prosecution witnesses and when these were confronted with learned D.P.G and learned counsel for the complainant they had no satisfactory reply/answer with them. No evidence has been brought on record by the prosecution to connect the appellant with the commission of the offence.

20. The upshot of the above discussion is that the prosecution has miserably failed to bring home the guilt of the appellant beyond reasonable doubt and it is a settled proposition of law that for giving the benefit of the doubt to an accused there doesn't need to be many circumstances creating doubts if there is a single circumstance which creates reasonable doubt about the guilt of the accused, then the accused will be entitled to the benefit. In this respect, reliance can be placed upon the case of **MUHAMMAD MANSHA v. THE STATE reported in 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 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”. Reliance in this behalf can be made upon the cases of Tarique Parvez 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).”

21. It is a well-settled principle of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy in the prosecution story. By taking the guideline from the case laws cited at (supra), we are of the view that in the present case, the prosecution story is overwhelmed under the thick clouds of doubt and the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding the appellant guilty of the offence. Thus, the instant Criminal Appeal No.S-262 of 2019 is **allowed**. Consequently, the conviction and sentence awarded to the appellant namely Nadeem alias Nadoo son of Muhammad Ayooob by learned Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad vide impugned judgment dated 14.09.2019 are hereby set aside. He is acquitted of the charge by extending the benefit of the doubt. He shall be released forthwith in the present crime/case if he is not required in any other custody case/crime.

22. Since the appeal preferred by appellant Nadeem alias Nadoo against his conviction and sentence has been allowed, therefore, no case for enhancement of his sentence is made out accordingly Criminal Revision Application D-38 of 2019 is **dismissed** having become infructuous.

JUDGE

JUDGE