59

JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, LZRKZNA.

Cr. Jail Appeal No.S-36 of 2014

Appellant:	Azizullah @ Mumrz Ali @ Manthar Ali through Mr. Ghulam Ali J. Rind.
Respondent:	The State through Mr. Khadim Hussain Khoharo Addl. Prosecutor General.
Complainant:	Bhaledino in Person.
Dates of hearing:	**15.01.2018, 29.01.2018 & 02.02.2018.**
Date of judgment:	**09.02.2017.**

JUDGMENT

MUHAMMAD IQBAL KALHORO, J: Through this appeal, appellant Azizullah @ Mumrz Ali @ Manthar Ali has challenged his conviction and sentence of life imprisonment and fine of Rs. 20,0000/- (Rs. Two lac) to be paid to the legal heirs of the deceased Haji Miral as provided under section 544-A Cr.P.C. and in default thereof rigorous imprisonment of 6 months more meted out to him by learned 1st Additional Sessions Judge Jacobabad in Sessions Case No.222 of 2011 bearing crime No.05/2010 of Police Station Saddar Jacobabad under Section 302, 337-H (2) 148, 149 PPC vide impugned judgment dated 06.12.2014.

2. Brief facts of the prosecution case are that the complainant namely Haji Mithan lodged FIR in above crime and offences on 14.01.2010 at 1345 hours alleging therein that there is enmity between them and appellant Azizullah. On the above-said date he, his nephew Haji Miral, his brother's wife Mst. Bhaiwari and cousin Haji Atal were going to Mochi Basti for some work and when at about 11-00 hours they reached Juria Chowk, they saw appellant Azizullah, Haji Malhi, Abdul Wahid, Mola Bux and three unidentified persons, all armed with T.T. pistols. Appellant Azizullah called them out that they had not settled a dispute with him and saying so he and accused Moula Bux made straight fires upon his nephew Haji Miral who resultantly was injured. Meanwhile all the accused decamped from the scene after issuing threats to the complainant party and the injured was brought at hospital but he did not survive. Consequently the complainant appeared at police station and lodged such FIR.

3. On the very date i.e. 14.01.2010 police visited the crime scene and secured blood-stained earth and 5 empties besides visiting the hospital and completing all the necessary formalities there including getting the post mortem of the deceased conducted. No one from among the accused was arrested; hence the final report under section 512 Cr.P.C. showing all the accused absconders was submitted. The appellant was arrested on 04.07.2011 and against him supplementary challan was filed. After due formalities, the trial commenced during which the charge against him was framed, he, however, pleaded not guilty and opted to face the trial. In order to support its case, the prosecution examined in all seven (7) witnesses including complainant, Mst. Bhaiwari (the eye-witness), medico-legal officer, the investigation officer, the mashirs, etc. They have produced all the necessary documents from FIR to postmortem report, memos of place of incident, arrest of accused, etc. After conclusion of prosecution evidence, appellant's statement under section 342 Cr.P.C. was recorded wherein he denied the allegations and professed his innocence. The trial court then after hearing the parties convicted the appellant in the terms as described in Para No.1 of this judgment.

4. Learned defense counsel argued that appellant was implicated due to enmity between the parties; that there is a material contradiction in medical and ocular evidence in respect of death of the deceased, which creates doubt over presence of prosecution witnesses at the spot; that co-accused Moula Bux, who has been assigned similar role to that of the appellant in the FIR, and another were subsequently arrested and tried separately in Sessions Case No.376/2014 but were acquitted vide judgment dated 01.06.2016 as in their trial the complainant and the other witness in their cross-examination backed out from earlier evidence in respect of role of said accused Moula Bux, which also creates doubt over credibility of the witnesses and their evidence in the present case.

5. On the other hand Mr. Khadim Khonro learned Addl. Prosecutor General along with the complainant supported the impugned judgment and further argued that benefit arising of evidence recorded in the trial of co-accused could not be extended to the appellant and this case was to be decided on the basis of evidence available on record.

6. I have considered the submissions of the parties and have perused the material on record. It may be mentioned that medico-legal officer in his evidence has stated that deceased sustained two firearm injuries with exit wounds, one on left chest al lower epigastria region and the other on upper side of his right leg. The prosecution has examined two eye witnesses, the complainant and mother of the deceased namely Mst. Bhaiwari to support its case. In the FIR, the complainant has attributed particular role of firing at the deceased to both the

appellant and co-accused Moula Bux and he has done so without specifying any particular injury on the person of deceased to any one of them. But in his evidence, he has disclosed that the fire made by the appellant hit below the left nipple on the chest of the deceased, whereas the fire of co-accused Moula Bux had hit the right foot of the deceased. P.W. Mst. Bhiwari has not made any such distinction in the role of the appellant and co-accused Moula Bux and has simply deposed that both the accused fired at the deceased, who fell down on the ground. It is, therefore, obvious that the complainant has made improvement in his evidence and has tried to attribute the fatal firearm shot to the appellant. Both the eye-witnesses are unanimous in their evidence over the fact that the deceased was initially injured and was brought at the hospital where he died. The complainant in cross-examination has further confirmed this fact by stating that the deceased expired in hospital at about 12: noon or 1: p.m. and they had reached hospital at 11-30 a.m. P.W. Mst. Bhaiwari in her cross-examination has revealed that in the hospital the deceased was alive for a period of two hours. Their said assertion in the evidence is in total contrast to the medical evidence, which describes that the deceased died instantaneously after receiving injuries. This fact is not only mentioned in the postmortem report but the medico-legal officer in his evidence has corroborated it by revealing that the probable time between injuries and death was instantaneous. The incident as reported in the FIR happened at 11: a.m. and according to evidence of the complainant, the deceased in injured condition was brought by them in hospital at 11.30: a.m. and he was alive there for one or two hours. The huge difference in the medical evidence and ocular evidence regarding time of death of the deceased is striking and cannot be said to be simply result of a lapse of time between the incident and recording of evidence of the eye-witnesses as argued by the trial court in the impugned judgment. Rather it tends to invigorate a suspicion over presence of the eye-witnesses at the time of the incident and their witnessing the crime. In the light of postmortem report and evidence of the doctor telling instantaneous death of the deceased after being hit by fire shots, the witnesses' assertion that the deceased was brought in hospital in an injured condition after half an hour of the incident and he sustained life there for one or two hours seems an irreconcilable and unbelievable idea, which leads to an adverse inference about presence the witnesses at the crime scene. No doubt the present case is to be decided on the material available on record, but in the given facts and circumstances it cannot be ignored wholly that in a separate trial (*Sessions Case No.376/2014*) held against, among other, co-accused Moula Bux, attributed similar role to that of the appellant in the FIR and in the evidence of P.W. Mst. Bhaiwari, the witnesses completely backtracked from earlier evidence qua role of said accused (Moula Bux), which led to his acquittal vide judgment dated 01.06.2016. This turn of events coupled with the contradiction in

66

ocular and medical evidence relating to time of death of the deceased has seriously impaired credibility of the eye-witnesses.

7. Additionally, it may be mentioned that there is no corroborative piece of evidence against the appellant either. The 5 empties recovered allegedly from the spot were not produced by any of the witnesses nor identified in the court during the trial. But be that as it may, there is no link between the 5 empties and the appellant as from him no crime weapon was recovered to seek its matching with the said empties and to establish thus his involvement in the case. Another aspect of this episode is that although the investigating officer in order to safeguard the status of the 5 empties to be corroborative evidence in the case was required in law to send the empties immediately after their recovery to Forensic Science Laboratory for report, but he never did so. Thus not only the said empties lost any relevance to the prosecution case insofar as their recovery from the spot is concerned, but any chance of a credible matching of the said empties with the crime weapon, if it were to recover subsequently from the appellant was also squandered.

8. The statement of the appellant under section 342 Cr.P.C. has been recorded in a stereotype manner without specifying his role as articulated in the evidence of the witnesses. Although the appellant has been alleged in the evidence of the complainant a particular role of causing fire-arm injury on the chest of the deceased, but he has not been put to the said piece of evidence specifically. More so, neither the medical evidence, nor the recovery of crime-empties form place of the incident have been confronted to him in his statement under section 342 Cr.P.C. It is by now a settled law that any piece of evidence that is relied upon by the prosecution to support its case, but not put to the accused in his statement 342 Cr.P.C. cannot be considered for the purpose of convicting him.

9. For foregoing discussion, I am of the view that prosecution has not been able to prove its case against the appellant beyond a reasonable doubt. Resultantly, the appeal is allowed, the conviction and sentence awarded to the appellant by the learned trial court vide impugned judgment are set aside and he is acquitted. He shall be released from jail forthwith, if not required in any other custody case.

N A