

ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No.D-72 of 2019 and

Criminal Reference No.D-35 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For hearing of M.A.No.4813/2019 (426 Cr.P.C).
2. For hearing of main case.

25.08.2020

Mr. Habibullah G. Ghouri, Advocate for the Appellant.

Mr. Aitbar Ali Bullo, Deputy Prosecutor General, Sindh.

Heard learned counsel for the appellant and learned Additional Prosecutor General for the State.

For the reasons to be recorded later on, instant Criminal Appeal is allowed, conviction and sentence awarded to the appellant namely Ameer Bux son of Qaisar Dasti vide impugned Judgment dated 17.10.2019, passed by learned Additional Sessions Judge-II, Jacobabad in Sessions Case No.258/2018 for offence punishable under sections 302, 311, 34 P.P.C, emanating from Crime No.09 of 2018, registered at Police Station Dodapur, are set aside and the appellant is acquitted of the charge, as a result of which Criminal Reference No.D-35 of 2019 is replied in negative and is accordingly disposed of. The appellant is directed to be released forthwith, if he is not required in any other case.

Manzoor

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Criminal Appeal No.D-72 of 2019
Criminal Reference No.D-35 of 2019

Before:

Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Irshad Ali Shah

Appellant : Ameer Bux son of Qaisar Dasti
Through Mr.Habibullah Ghouri, Advocate
The State : Through Mr.Aitbar Ali Bullo, A.P.G.
Date of hearing : 25.08.2020
Date of decision : 25.08.2020.

J U D G M E N T

IRSHAD ALI SHAH-J: The appellant by means of the instant appeal has impugned judgment dated 17.10.2019, passed by learned 2nd Additional Sessions Judge, Jacobabad, whereby he for having committed death of his wife Mst.Zainab, by casing her fire shot injuries under the pretext of "Karap", has been convicted and sentenced as under;

"therefore, accused Ameer Bux is convicted for offence under section 302 (b) read with section 311 PPC and accused Ameer Bux Dasti is sentenced to death, he shall be hanged by neck, till his death. Accused is further directed to pay Rs.500,000/- (rupees Five Lacs) as compensation under section 344-A Cr.PC, to legal heirs of deceased".

2. The **death** sentence is subjected to confirmation by the High Court but no order for confirmation of death sentence is passed

by learned trial Court in the impugned judgment. However, a reference was made by learned trial Court separately, for confirmation of death sentence awarded to the appellant, as per the mandate contained by Section 374 Cr.PC.

3. At trial, the appellant did not plead guilty to the charge and the prosecution to prove it, examined in all seven witnesses including complainant ASI Abdul Khalique and then closed its' side.

4. The appellant in his statement recorded u/s.342 Cr.PC denied the prosecution allegation by pleading innocence by stating that the complainant and his witnesses have deposed falsely. He did not examine anyone in his defence or himself on oath.

5. On evaluation of evidence, so produced by the prosecution, the appellant was convicted and sentenced accordingly by learned trial Court by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police; PW Niaz Hussain (father of deceased Mst.Zainab) only independent witness of the incident has not supported the case of prosecution; the evidence of the complainant and his witnesses being contradictory in its nature has been believed by learned trial Court without cogent reasons; the pistol has been foisted upon the appellant and the reports of ballistic and forensic experts could not be used against the appellant as those have not been confronted to

him during course of his examination under section 342 Cr.PC. By contending so, he sought for acquittal of the appellant.

7. Learned A.P.G for the State by supporting the impugned judgment has sought for dismissal of the instant appeal and confirmation of death sentence.

8. We have considered the above arguments and perused the record.

9. As per FIR, the incident took place at about 0830 hours. As per medical officer Dr.Hifsah, 0830 hours was the time when the dead body of the deceased was delivered to her for postmortem at Civil Hospital, Jacobabad. Such inconsistency goes to suggest that the deceased has been done to death at the time other than the one which is claimed to be by the prosecution. As per PWs/PC Allah Warrayo, PC Shah Murad and PC Muhammad Khan, they with complainant ASI Abdul Khaliq went to the place of incident on the basis of information furnished to them to the effect that the appellant is going to commit murder of his wife Mst.Zainab. If it is believed that the complainant and said PWs went at the place of incident on information then they were under lawful obligation to have recorded such entry in roznamcha. It was not recorded. Such omission on their part could not be overlooked. The said PWs have inter-alia stated that the appellant committed murder of his wife Mst.Zainab, by causing her fire shot injuries within their sight and

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then made his escape good. They were belied in that respect by complainant ASI Abdul Khaliq by stating that "I had not seen accused Ameer Bux present there, as he had already left place of vardat". The complainant and above said PWs however, were found unanimous in their version that PW Niaz Hussain being available at the place of incident told them that Mst.Zainab was his daughter, she was married with the appellant and she has been killed by the appellant by causing her fire shot injuries after declaring her to be "Kari" with Barkat Ali Dasti. However, PW Niaz Hussain in his evidence did not support the case of prosecution by stating that Mst.Zainab was murdered by some unknown culprits. By stating so, he also declared the appellant to be innocent. Surprisingly, PW Niaz Hussain was not declared to be hostile to the prosecution. The evidence which is produced by the prosecution being inconsistent on all material points is not appearing to be trustworthy to be relied upon.

10. On arrest, as per complainant ASI Abdul Khaliq, the hands of the accused were tied with towel and on search from him was secured incriminating pistol of 12 bore with five live cartridges, for that a mashirnama of arrest and recovery was prepared under his dictation by PC Muhammad Rafique. The mashirnama of arrest and recovery does not contain a note that it was prepared by PC Rafique Ahmed under dictation of complainant ASI Abdul Khaliq, which appears to be significant. As per PW/Mashir PC Muhammad Khan, the appellant on arrest was handcuffed. As per PW/PC Shah

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Muhammad Murad, on arrest the hands of appellant were tied with "romal". Which one amongst them is correct? God knows better. However, both of the above said mashirs insisted that above said mashirnama was prepared by the complainant himself. By stating so, they belied the complainant that it was prepared by PC Rafique Ahmed under his dictation. Be that as it may, PC Rafique Ahmed has not been examined by the prosecution though was called to be examined, for no obvious reason. His non examination could not be lost sight of. The inconsistencies between evidence of the complainant and mashir to recovery, as are pointed above, have made the recovery of pistol allegedly from the appellant to be doubtful.

11. The reports of Chemical and Ballistic Experts though have been brought on the record by the prosecution through SIO/SIP Muhammad Ali but those have not been confronted to the appellant during course of his examination under section 342 Cr.PC, therefore, those could not be considered against him legally.

12. In case of *Imtiaz alias Taj vs. The State and others (2018 SCMR-344)*, it has been held by the Hon'able Apex court that;

"According to the prosecution a firearm had been recovered from the appellant's custody during the investigation but it is undeniable that a positive report statedly received from the Forensic Science Laboratory in respect of the said firearm had not been put to the appellant at the time of recording of his statement under section 342 Cr.P.C. The law is settled that a piece of evidence or a circumstance not put to an accused person at the time of recording his statement under section 342 Cr.P.C. cannot be considered against him and, thus, no corroboration to the ocular account was forthcoming on this score".

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13. The overall discussion involves a conclusion that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and he is found to be entitled to such benefit.

14. In case of *Faheem Ahmed Farooqui vs. The State (2008 SCMR-1572)*, it is held that;

"single infirmity creating reasonable doubt regarding truth of the charge makes the whole case doubtful.

15. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant together with the impugned judgment are set-aside. Consequently, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court. The appellant shall be released forthwith in present case, if not required in any other custody case.

16. Above are the reasons of our short order dated 25.08.2020, whereby instant appeal was allowed in the above terms and reference was disposed of.

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