(93)

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.D-12 of 2014
Cr. Revn. Appln. No.D-21 of 2012

Date of Hearing	ORDER WITH SIGNATURE OF JUDGE
12.02.2019	

Mr. Ghulam Dastagir A. Shahani, advocate for the appellant in Cr. Appeal No.D-12 of 2014.

Mr. Aitbar Ali Bullo, DPG

Mr. Mohammad Afzal Jagirani, advocate for complainant in Cr. Appeal No.D-12 of 2014 and for applicant in Cr. Revn. Appln. No.D-21 of 2012.

In compliance of earlier order, Mr. Ghulam Dastagir A. Shahani, advocate, has filed reply to show-cause notice issued to the respondent No.2/accused Mehrab Malgani in Cr. Revision Application No.D-21 of 2012, issued in terms of Section 435 read with 439, Cr.P.C, which is taken on record; copies whereof are provided to learned Counsel for the complainant/applicant as well as to learned DPG.

Admittedly, appellant Mehrab Malgani is shown to have fired upon the deceased along with absconding accused, but none of the injuries is specifically attributed to any of the accused to show that death of deceased occurred due to the injury specifically attributed to any of the accused from three. There is inconsistency in between the ocular testimony and medical evidence. The empties as shown by the prosecution were secured by the I.O. in the year 1996, but were sent to Ballistics Expert after arrest of the accused/appellant viz. in the year 2010. Even the blood-stained earth allegedly belonging to the deceased though was recovered in the year 1996, but was sent in the year 2010. Last worn clothes of deceased though were recovered but were not sent to the laboratory to ascertain whether the blood-stained earth though recovered and sent to the laboratory was of same deceased. No

offensive weapon is shown to have been recovered from the possession of appellant nor was produced by him during investigation or at the time of his arrest. Mere word against word has been adduced by the prosecution and no evidence has been brought on record to show that the offence has occurred in the manner as reported. Learned Counsel for the appellant has relied upon the following reported cases:-

1. 1969 P Cr.L.J. 588
2. 1972 SCMR 74
3. 1976 P Cr.L.J. 243
4. 2009 SCMR 1232
5. NLR 1991 Cr.C. 415
6. PLJ 1995 SC-477

Learned DPG though opposes the appeal and supports the impugned judgment and revision, but could not controvert the fact that the empties recovered from the scene of offence in the year 1996 were sent to expert in the year 2010. Learned DPG as well as learned Counsel for complainant have relied upon following reported cases:-

1. 2010 SCMR 1791
2. 2007 SCMR 91
3. 2011 SCMR 171
4. 2004 SCMR 252
5. 2005 SCMR 1054
6. 2005 SCMR 1823
7. 2005 SCMR 1318

All these discrepancies have persuaded us to hold that prosecution failed to prove its case against the appellant beyond any reasonable shadow of doubt. We, after hearing to the parties and having gone through the record, are of the considered view that case against the appellant is full of doubts and the trial Court has committed gross illegality while recording statement of appellant under Section 342, Cr.P.C, which from face of it is totally in violation of Section 364, Cr.P.C.

For the detailed reasons to be recorded later-on, Criminal Appeal No.D-12 of 2014 filed by appellant Mehrab Malgani, is hereby

(37)

allowed and Criminal Revision Application filed by complainant is hereby dismissed. Accordingly, impugned judgment dated 27.3.2012 penned down by learned Sessions Judge/Special Judge STA, Jacobabad, in STA Case No.02/2010 re-State vs. Mehrab Malgani, being outcome of Crime No.48/1996, registered at Police Station Dodupur, District Jacobabad, under Sections 302, 324, 504, 34, PPC, is hereby set aside. Consequently, the appellant is hereby acquitted of all the charges. Appellant Mehrab Malgani is in custody; therefore, he shall be released forthwith if his custody is not required in any other case.

JUDGE

JUDGE

(98)

IN THE HIGH COURT OF SINDH AT CIRCUIT COURT LARKANO

Present:

Mr. Justice Muhammad Saleem Jessar
Mr. Justice Adnan Iqbal Chaudhry

CRIMINAL APPEAL NO. 12 OF 2014

MEHRAB MALGHANI

VS.

STATE

CRIMINAL REVISION NO. D-21 OF 2012

Abdul Fattah

Vs.

State & another

Appellant		Mehrab Malgani, through Mr. Ghulam Dastgir A. Shahani, advocate.
Complainant:		Mr. Muhammad Afzal Jagirani, advocate for the Complainant in Criminal Appeal No. 12 of 2014 and for the Applicant in Cr. Revison No. D-21 of 2012.
State		Mr. Aitbar Ali Bullo, DPG, for the State.
Date of hearing:	:	12.02.2019
Date of announcement	:	12.02.2019

JUDGMENT

Muhammad Saleem Jessar, J.-The appellant is aggrieved by the judgment dated 27.3.2012 passed by Sessions Judge / Special Judge STA, Jacobabad in STA Case No.02 of 2010, whereby the appellant was convicted under sections 302(b) read with section 345, PPC and sentenced to R.I. for life and also burdened with fine of Rs.200,000/-, payable to the legal heirs of the deceased as envisaged under section 344-A, Cr. Procedure Code, and in case of default to suffer further S.I. for

one year. Benefit of section 382-B, Cr. Procedure Code was also extended to the appellant.

2. The brief facts of the case are that complainant Abdul Fattah Malghani lodged F.I.R. at PS Dodapur wherein he alleged that on 28.12.1996 he with his nephew Deedar Hussain and maternal nephew Fida Hussain were going towards village LalBuxMalghani, when they reached near Kotri Shakh (Canal) at about 10-00 am., accused Mehrab, Shahban and Mehmood duly armed with TT pistols. were standing there, who abused the complainant party and said that they would take revenge from them, thereafter, they all made fires from their TT pistols at Fida Hussain, which hit him and he fell down on the earth and died and the accused went away. The complainant left Deedar Hussain over the dead body and went to PS Dodapur to lodge the F.I.R.

3. After registration of the FIR, and completion of investigation by police, challan was submitted before the trial court showing accused therein as absconder. However, appellant Mehrab was subsequently arrested on 29.4.2010 and was produced before the Court with supplementary challan. Necessary papers were supplied to accused as per receipt at Ex.3. NBWs were issued against absconding accused, namely, Shahban and Mehmood but the same could not be executed against them, therefore, proceedings under sections 87 and 88 of the Cr. Procedure Code were initiated against them and they were declared as proclaimed offenders.

4. Formal charge against accused was framed by the trial court at Ex.4, to which he pleaded not guilty and claimed to be tried vide his plea at Ex4/A.

5. To substantiate the charge the prosecution examined complainant Abdul Fattah at Exh.06, he produced attested copy of F.I.R. at Exh. 6/A, PW-Deedar Hussain at Exh. 7, mashir Ghulam Sarwar at Exh.8, he produced mashirnama of place of occurrence and seeing dead body and danishnama at Exh.8-A; PW-medical officer Dr. Imdad Hussain at Exh.9, he produced post mortem of dead

(103)

body of deceased Fida Hussain at Exh.9/A, Tapedar Fakhruddin at Exh.10, he produced sketch of place of occurrence at Exh. 10/A, SHO Zahoor Ahmed Lashari who arrested accused at exh11, he produced attested copy of roznamcha entries 12 and 14 and mashirnama of arrest of accused at Exh.11-A and 11-B respectively, PW-mashir Lal Khan was given up by I/C DPP for the State vide statement at Exh.12, then PC Faiz Muhammad was examined at Exh.13, he was corpse bearer and produced receipt regarding delivery of dead body to the legal heirs of the deceased at Exh.13-A, HC Rafiq Ahmed mashir of arrest at ech.14, PC GhulamFarooq was given up by I/C DPP for State vide Exh.14;retired SHO Aligul was examined at Exh.16, who produced chemical report at Exh.16-A and then learned ADPP closed the prosecution's side vide his statement as Ex.17.

6. The statement of accused u/s 342 Cr.P.C was recorded wherein he pleaded his innocence. However, he has declined to examine himself on oath as required u/s 340 (2) Cr.P.C and to lead any evidence in his defence.

7. Learned trial Court, after framing three points for determination, answered first two points in the affirmative and under Point No.3, convicted and sentenced the appellant as above. Hence this appeal.

8. Learned counsel for the appellant attacked the impugned judgment on the ground that it suffers from misreading and non-reading of evidence. He submitted that none of the injuries sustained by the deceased has been specifically attributed to the appellant. Learned counsel further submitted that there is contradiction and inconsistency in the ocular evidence and the medical evidence. He also submitted that the empties were sent to forensic expert very late. Even the clothes worn by the deceased at the time of the alleged incident were not sent to laboratory to ascertain whether the blood on the clothes matches with the blood stained earth or not. Learned counsel vehemently argued that no incriminating material including the offensive weapon was recovered from the appellant nor the same was produced at any subsequent state of the proceedings before the trial court or at the time of his arrest. Learned counsel particularly drew the attention

of the Court to the statement of the complainant that before lodging FIR he went to his house, which creates suspicion that there was consultation before lodging of the FIR. Reliance was placed by the learned counsel on the following cases:

1. 1969 Pakistan Cr. Law Journal 588
2. 1972 SCMR 74,
3. 1976 Pakistan Cr. Law Journal 243,
4. 2009 SCMR 1232,
5. NLR 1991 Cr.Cases 415, and
6. PLJ 1995 SC 477.

9. So far as Criminal Revision No.D-21 of 2012 is concerned, learned counsel for the applicant contended that since the accused has committed a heinous crime and murdered an innocent person in broad day light, therefore, he does not deserve any leniency. It was contended that though the prosecution witnesses were examined after a lapse of 14 years but still they gave a consistent version of the incident and despite lengthy cross-examination, their testimony was not shaken. In view of such position, the learned counsel strongly urged that the punishment awarded to the respondent may be enhanced from life imprisonment to death.

10. On the other hand, learned counsel for the private respondent / accused submitted that in view of the submissions made in the criminal appeal, there is every likelihood that the same may be allowed and the accused may be acquitted. Therefore, he prayed for dismissal of the criminal revision application.

11. Learned DPG and the counsel for the complainant vehemently opposed instant appeal and fully supported the impugned Judgment. However, learned counsel for the complainant / applicant prayed for enhancement of sentence awarded to the appellant as, according to him a heinous crime has been committed by him. Learned DPG stated that the appellant was known to the complainant and has been named in the FIR, therefore, there is no doubt about his identification and participation in the crime. Learned DPG further submitted that mere

relationship between the witnesses and the deceased was not enough to discard their evidence as it is the duty of the Court to see whether such evidence is trustworthy or requires corroboration. Learned DPG also submitted that the appellant remained absconder for a long period and this goes against him and he was rightly convicted and sentenced by the trial Court. It was also argued that the witnesses were natural witnesses and have no reason to falsely implicate the appellant in the case and since the incident took place in broad day light, therefore, there is no question of mistaken identity. It was further argued that the motive of the crime has been mentioned in the FIR and has also been proved by cogent evidence.

12. Point No.1 is with regard to the issue whether deceased Fida Hussain died unnatural death and since there is no dispute with regard to the fact that the deceased died due to unnatural death, therefore, there is no need to scrutinize this issue as the same would be an exercise without any fruitful result.

13. Point No.2 is whether appellant alongwith the absconding accused Shahban and Mehmood with common intention committed qatl-amd of deceased Fida Hussain by causing him fire arm injuries as alleged by the prosecution. It may be pointed out that mere death of a person does not ipso facto demonstrate that he has been murdered by the accused person(s). It is the duty of the Investigation Officer to collect evidence in such a case and prove the guilt of the accused and such evidence should be credible, confidence inspiring, free from contradiction and improvements, and un-impeachable. If the evidence brought on record is short of the above standard it has to be discarded and the accused merits acquittal in order to ensure that no innocent person is sent to gallows.

14. In order to reach a conclusion on Point No.2 the trial Court relied on the ocular evidence produced by the prosecution; medical evidence, circumstantial evidence and motive of the murder. It is to be seen whether the evidence brought on record fulfills the above standard or not.

(109)

15. A perusal of the F.I.R. shows that it was lodged by complainant Abdul Fattah, who disclosed that he was going from his house to village Lal Bakhsh Malghani along with PW Deedar Hussain and deceased Fida Hussain son of Mehmood. He further states that at 10.00 a.m. when they reached near culvert at face of Kotri Channel, accused Mehrab, Shahban and Mehmood were standing there duly armed with TT pistols. The complainant states that "We came near to them that all having abused, while accosting, told that there is revenge of us upon you." During his cross-examination, PW-Abdul Fattah (the complainant of the above F.I.R.) stated "It is correct to say that we and accused were disputed even before this incident." It is very strange that despite admitting the fact that there was dispute between the parties even before this incident, the complainant party, instead of avoiding collision with the accused, which would have been natural reaction by the complainant party, went straight towards them. This creates a doubt in the case of the prosecution as to whether the incident occurred in the manner in which it was disclosed in the F.I.R. In this regard further support is found by the statement of the complainant PW Abdul Fattah in his deposition wherein he states that "**After incident first I went to my house and then to PS Dodapur...**" This also creates a doubt as to whether the F.I.R. was filed after consultation in order to implicate some of the members of the other party falsely.

16. There is yet another and graver improbability mentioned in the F.I.R. which a prudent mind will not believe. The complainant as well as PW-2 Deedar Hussain in their deposition have stated that **"accused Mehrab, Shahban and Mehmood, all armed with TT pistols, they by raising hakals, said to us that they have to settle their dispute with us by saying so all of them fired at us, me and the complainant saved those fires by falling on the ground, same hit to Fida Hussain...."** This narration of the facts, which allegedly were unfolded at the place of incident on the fateful day, are most unusual and unbelievable for the reason that as per the statement of the complainant in his cross-examination, the distance between the accused and the complainant party was about 7/8 paces.

(101)

Even if it is believed that the complainant Abdul Fattah and PW Deedar Hussain fell down on the ground to save them from the fire and the first burst hit the deceased only, but they did not disappear in thin air and were very much present on the same place and the accused were allegedly armed with TT pistols, which are not single shot fire arms, therefore, there were bullets in the TT pistols which could easily be fired on the remaining members of the complainant party who were allegedly lying flat on the ground and were sitting ducks for the accused persons. Revenge is a dangerous motive and people when taking revenge do not try to square the things up by inflicting as much damage / loss as was suffered by them at the hands of the other party. The persons taking revenge usually inflict as much harm on the opposing party as they can. This situation is also corroborated by the above statement of the complainant and PW Deedar Hussain who stated that they saved themselves by falling down on the ground which shows that the accused were bent upon killing them also. It is not the case of the prosecution that the accused persons were only targeting the deceased. Therefore, it is strange that though two persons of the opposing party were present before the accused, who have already allegedly killed some member of their party, but still they left the scene of incident without making an attempt to kill the other two members of the opposite party and in that way also to wipe out the eye witnesses of the crime committed by the accused. This is highly improbable and not believable by a prudent mind.

17. It is also very intriguing that though all the three persons of the complainant party were together but only deceased sustained fire arm injury and the others were able to avoid such fate by falling down on the ground. The question arises as to why the deceased also did not fall down on the ground to save himself from the firing or why the accused did not fire at the other two persons.

18. PW-9, Aligul, was the initial I.O. of the case who, after attaining the age of superannuation, stood retired before recording of his evidence in this case. He

(103)

was called for recording his evidence on 26.9.2011. In his deposition he stated that on 28.12.1996, he was SHO of PS Dodapur when complainant came to the said PS and disclosed about the commission of the crime. On his information, FIR No.48/1996 was recorded and he [the SHO] visited the place of incident on the same day. He stated that he secured three empties of TT pistol and blood stained earth from the place of incident and sealed them. However, record shows that these sealed articles were dispatched to Chemical Examiner on 18.05.2010. No explanation has been given for such long delay in sending the sealed articles for chemical examination. In the case reported as Samandar @ Qurban and others Vs. The State reported in 2017 MLD 539 Karachi, while dealing with the point of delay in sending the weapon to Ballistic Expert, this Court held as under:

> *"Apart from above, sending of crime weapon to ballistic expert for forensic report with delay of 20 days of their recovery also added further doubt into the prosecution case, thus in view of above coupled with non-compliance of section 103, Cr. P.C., it can safely be presumed that alleged recovery of crime weapon was not made from the possession of the appellants as alleged by the prosecution."*

In the case reported as Yaqoob Shah Vs. The State (1995 SCMR 1293) Honourable Supreme Court held that *the report of the Fire-Arm Expert was of no avail to the prosecution as the crime empties and the fire-arms allegedly recovered from the accused were sent to Forensic Science Laboratory after delay.* Reference in this respect may also be made to the decision reported as Ghulam Hussain Vs. The State (1998 P.Cr.L.J.779).

19. It is further noted that no fire arm weapon was recovered from the possession of the present appellant. Therefore, the delay in sending the empties to the chemical examiner and non-recovery of the crime weapon from the appellant, makes the case of the prosecution very doubtful as in such case the recovery of empties from the place of incident would be of no assistance to the prosecution. It may be noted that recovery of empties will not connect the accused with the murder unless the crime weapon is recovered from the accused and the report of the chemical examiner clearly states that the recovered empties were fired from the said weapon. No such report is available in the instant case and, therefore, it

(105)

cannot be said that the recovered empties were the same which were fired by the accused / appellant from his TT pistol which resulted in the death of the deceased.

20. There is also contradiction in the ocular evidence and medical report. As per the deposition of PW-9, Aligul, he secured three empties from the place of incident. In this regard reference may be made to the deposition of PW-1 Abdul Fattah, the complainant, who stated "**they by raising hakals said to us that they have to settle their dispute with us by saying so *all of them fired at us.*"** Similar statement was made by PW-2 Deedar Hussain in his deposition. It is alleged that there were three accused persons at the time of incident i.e. Mehrab, Shahban and Mehmood who fired at the complainant party, who were also allegedly three persons. There is no clarification for the intriguing situation that when three persons fired three shots from their TT pistols at three different persons but all the bullets hit one person only, who died on the spot, while neither injury of any kind was sustained by other two persons nor any other empties were found at the place of incident. It is also strange that three persons fired at three persons with their TT pistols and each person fired only one shot and the shots fired at three persons hit only one of them. It clearly shows that the incident did not take place as narrated in the F.I.R. or that the said witnesses were not present at the place and time of incident.

21. The effect of the abovesaid contradictions in the evidence of prosecution witnesses and infirmities / flaws in the prosecution case is that serious dents have been put and doubts have been created in the prosecution case. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

(107)

"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

22. The motive set up in this case is enmity between the parties. The superior Courts have held that enmity is a double-edged weapon which cuts both ways. In the instant case no independent witness has been produced to support the case of the prosecution. Therefore, in view of admitted enmity between the parties, false implication of the accused / appellant cannot be ruled out unless his guilt is proved by cogent and unimpeachable evidence which, in our opinion, is not available in the present case.

23. There is no doubt that in the case reported as Anwar Shamim v. The State (2010 SCMR 1791), relied by learned DPG for the State, it has been held that mere relationship between the witness and deceased was not enough to discard the evidence of the witness. However, in the same case it was held that in such cases it is the duty of the Court to ascertain whether such witness should be believed without corroboration. In the present case we are not inclined the believe the witnesses without corroboration for the reasons as discussed above.

24. In the case reported as 2007 SCMR 91, the trial Court relied on the evidence of injured complainant, which is not the case in the present matter as none of the complainant party, except the deceased, received any fire arm injury, and as such the cited case is distinguishable on facts.

25. We have also examined the other cases cited by the learned counsel for the State and the same are distinguishable on facts and are not relevant in the instant case.

26. After hearing the case at length on 12.2.2019, by a short order, we have allowed criminal appeal No. D-12 of 2014 and dismissed Criminal Revision Application No. D-21 of 2012 by setting aside the impugned Judgment dated 27.3.2012 passed by learned Sessions Judge / Special Judge STA, Jacobabad in

STA Case No. 02/2012 (State v. Mehrab Malgani), being outcome of Crime No.48/1996 registered at PS Dodapur under sections 302, 324, 504, 34, PPC and acquitted the appellant Mehrab Malgani and it was directed that he may be released forth with if not required in any other case.

27. The above are the reasons for our short order dated 12.02.2019.

Judge

Judge

12.02.2019.