

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. S- 38 of 2019.
Criminal Revision Appln. No. S- 66 of 2019.

Date of hearing	Order with signature of Judge
30.12.2019.	

Messrs Habib Ali Leghari, and Asif Ali Abdul Razzak Soomro, Advocates for appellants in Crl. Appeal No. S- 38 of 2019.
Mr. Ali Anwar Kandhro, Additional Prosecutor General.
Mr. Muhammad Waris, Advocate holding brief for Mr. Sajjad Ahmed Chandio, Advocate for applicant in Criminal Revision Appln. No. S- 66 of 2019, who reported to be busy before Circuit Court, Hyderabad.

Learned counsel for the appellants contended that appellants have been made victims of old enmity existed and admitted by complainant party in their evidence. They further contended that medico legal certificates are not supported by ocular as well as circumstantial evidence, as according to them neither the offensive weapons were shown to have been recovered nor empties were recovered from the scene of alleged offence. They further contended that medical evidence, if presumed to be true, even it cannot figure upon appellants that same were caused by them, it is only meant for recognize the kind of injury, seat of injury and the weapons used etc. They further contended that prior to this incident the father of one of appellant Javed Ali was murdered by the complainant party in which they are facing trial before the Court of law. Hence, in order to exert illegal pressure upon appellant's party the instant false case has been concocted upon them, so that the appellants may meet with their unjustified demands. The learned counsel further contended that there is contradiction between medical evidence and the evidence of investigating officer of the case to the extent of nature of injuries. They further added that medico legal officer had admitted in his cross-examination that injury allegedly sustained by the complainant at the hands of appellant Javed Ali could be presumed to be self suffered; as for as injury sustained by injured Yousif attributed to appellant Saddam is concerned, the said injury

according to available evidence is superficial and was not through and through. They referred to memo of injuries prepared by the investigating officer available at page 57 of the paper book and contended that it is not corroborated one, therefore, the prosecution has miserably failed to prove its case against appellants, as such they prayed for grant of appeal and acquittal of the appellants.

On the other hand, learned D.P.G., opposed the appeal on the grounds that the appellants are not only nominated in F.I.R but have been assigned specific role of causing injuries to P.Ws and such evidence has been brought on record; that P.Ws who are injured have also fully supported their case, therefore, no case for interference is made out. He, however, confronted the fact that the injuries noted down by the investigating officer in memo of injuries available at page 57 of the paper book does not show the injury allegedly sustained by PW Yousif to be through and through and even offensive weapon was not shown to have been recovered from their possession.

Heard arguments. For detailed reasons, to be recorded later on the Crl. Appeal No. S- 38 of 2019 is hereby allowed. Consequently, the impugned judgment dated 12.06.2019 penned down by learned Additional Sessions Judge-III, Dadu, in Sessions case No.99 of 2016, Re; State v. Javed Ali and others, which is outcome of Crime No.01/2016 of P.S Radhan Station registered for offences under Sections 324, 337-D, 337-F (iii), 114, 34 and 504 P.P.C., is hereby set-aside. Resultantly, the appellants Javed Ali, Saddam and Ashfaq alias Altaf are acquitted of all the charges. The appellants are reportedly confined in jail; therefore, they shall be released forthwith, if their custody is not required in any other case. In view of above, the Criminal Revision Appln. No. S- 66 of 2019, filed by complainant seeking enhancement of sentence having become infructuous is dismissed.

JUDGE

Ansari*

(93)

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Appeal No.S-38 of 2019

Javed Ali Janwari and others - Appellants
vs.
The State and another - Respondents

Cr. Revision application No.S-66 of 2019

Ghulam Shabir Janwari - Applicant
vs.
Javed Ali Janwari and others - Respondents

Date of hearing : 30.12.2019

Decision/Reasons : 30.12.2020

Appellants Javed Ali Janwari, Sadam and Ashfaque @ Altaf, : through M/s. Habib Ali Leghari and Asif Ali Abdul Razzak Soomro, advocates.

The State : through Mr. Ali Anwar Kandhro, Additional Prosecutor General, Sindh.

Applicant Ghulam Shabir : Mr. Muhammad Waris, advocate holding brief of Mr. Sajjad Ahmed Chandio, advocate for the applicant in Criminal Revision No. S-66 of 2019 and for the complainant in Cr. Appeal No.S-38 of 2019.

JUDGMENT

MUHAMMAD SALEEM JESSAR. J - The appellants in Criminal Appeal No. S-38 of 2019 are aggrieved by judgment dated 12.06.2019 passed by Third Additional Sessions Judge, Dadu in Criminal Case No. 99 of 2016, whereby the appellants have been convicted and sentenced as under:

Appellant Javed Ali was found guilty of offence under section 337-F(iii), PPC and was convicted and sentenced to three years R.I. and to pay *Daman* amounting to Rs.30,000/- to be paid to injured Ghulam Shabbir and in case of default in payment thereof, to suffer

S.I. for one month. He was also found guilty of offence under section 34, PPC and was accordingly sentenced to suffer R.I. for seven years.

Appellant Saddam was found guilty of offence under section 337-D, PPC and was convicted and sentenced to suffer R.I. for seven years and to pay *Arsh* in the sum of Rs.600,000/- to be paid to the legal heirs of injured Muhamamd Yousif, as the said injured expired during pendency of trial and in case of default in payment of the Arsh amount, to further undergo imprisonment for six months more.

Appellant Ashfaque @ Altaf (hereinafter referred to as "Altaf") was found guilty of offence under section 114, PPC and was also convicted under section 34, PPC for common intention under section 337-D, PPC and was sentenced to suffer R.I. for seven years.

All the above appellants were also found guilty of charge under section 504, PPC and were also sentenced to R.I. for one year. Appellants Sadam and Ashfaque @ Altaf were extended benefit of section 382-B, Cr.P.C. for the period for which they remained in custody before conviction. The above sentences were to run concurrently.

2. The prosecution case as narrated by the complainant in the FIR lodged by him, is that on 06.01.2016 the complainant Ghulam Shabbir son of Haji Meer Janwari, resident of Radhan, Taluka Meher, alongwith his maternal uncle Muhammad Yousif son of Sajan Janwari and Ghulam Muhammad son of Pehlwan Janwri, were going on their motorcycle to Radhan Village from Radhan. At about 1500 hours (3.00 p.m) when they reached Radhan Village they saw appellants Javed Ali, Sadam and Altaf, all sons of Ghulam Hyder, who were armed with pistols alongwith one unidentified person, who abused the complainant and his companions and Altaf instigated his brothers to kill the complainant party as they are enemies of the appellants. On the instigation of Altaf, Javed Ali fired from his pistol on Ghulam Shabbir and the bullet hit him on his right arm, while

Q2

accused Saddam fired from his pistol on Muhammad Yousif which hit him on right side of his abdomen. The complainant party raised cries which attracted the villagers and on arrival of the villagers, the assailants fled the place of occurrence. The complainant and his companions went to Police Station and obtained letter for treatment. After getting first aid, and leaving his maternal uncle Muhammad Yousif at hospital for further treatment, the complainant Ghulam Shabbir went to the Police Station to lodge his complaint which was registered as FIR No.01 of 2016 under sections 324, 504, 114/34, PPC.

3. After usual investigation, I.O submitted charge sheet before the trial court showing all the accused persons as absconders. The concerned Judicial Magistrate, after completing proceedings against absconding accused, sent up the case to the Sessions Judge, Dadu for trial. The case proceeded in absence of the accused / appellants. The prosecution examined PW-1 Ghulam Shabbir, the complainant of the FIR at Exh.3, who produced FIR at Exh.3-A, PW-2 Muhammad Yousif at Exh.4, PW-3 ASI Manzoor Ali at Exh.5, who produced memo of injuries, letter of medical treatment and memo of place of incident at Exh. 5-A to 5-C, PW-4 Masheer Shoukat Ali was examined as Exh.6. Prosecution gave up PW Haji Meer vide statement at Exh.7. PW-8 Dr. Niaz Ali was examined at Exh.8, who produced police letter at Exh.8-A, provisional medico-legal certificate of injured Muhammad Yousif at Exh.8-B, referral letter of CMCH Larkana, X-ray report, X-ray films and final Medico-Legal Certificate of injured Ghulam Shabbir at Exh.8-G, letter of CMCH Larkana, X-ray report, X-ray films and final medico-legal certificate of injured Ghulam Shabbir at Exh.8-H to 8-J. Later on, appellant Altaf was arrested and sent up to face trial through supplementary challan dated 27.8.2016. On 02.09.2016, the case was transferred from Sessions Judge, Dadu to the Court of First

Additional Sessions Judge, Dadu for disposal according to law. Appellant Javed Ali, joined the trial on 5.10.2016 after obtaining bail. Thereafter, case papers were supplied to the appellants at Exh.10. Charge was framed against Javed Ali and Altaf at Exh.11 and they pleaded not guilty and their pleas were recorded at Exh. 12 and 13. In the meanwhile, appellant Saddam was granted interim bail and he also joined the trial. He was also supplied case papers at Exh.14; however, when his bail was not confirmed he absconded and relevant proceedings were initiated against him. Later on he was arrested on 09.11.2018 and was remanded to District Jail Dadu. Accordingly, amended charge was framed against the accused / appellant. The trial court recorded evidence of PWs Ghulam Shabbir, Muhammad Yousif, Shoukat Ali and Dr. Niaz Ali and they were cross-examined by learned counsel for the appellants. On 28.03.2019, the case was transferred from the Court of I-Additional District Judge, Dadu to the Court of III-Additional District Judge, Dadu who examined PW ASI Manzoor Ali. Thereafter the prosecution closed its side vide Exh.24.

4. Although the appellants did not examine themselves on oath; however, during their 342, Cr.P.C. statements the appellants, stated that they are innocent and they have falsely been implicated in this case due to old enmity between the parties as the complainant party has killed the father of the appellants which case is pending against the complainant party before II-Additional District Judge, Meher vide sessions case No.137 of 2014. Appellant Javed Ali produced certified copies of case diary of said case as well as the FIR lodged by appellant Javed Ali bearing No.46/2013 which was lodged against PW Muhammad Yousif and his other close relatives. Appellant Saddam produced copy of judgment dated 03.01.2019 whereby appellant Javed Ali was acquitted in Crime No.72/2017 lodged at PS Radhan Station.

(10)

5. Learned trial Court, after hearing the learned counsel for the parties, formulated following points for consideration:

1. Whether on 06.01.2016 at 1500 hours on link road leading from Radhan Station to Radhan Village near Radhan village present accused duly armed with pistols alongwith one unknown accused in furtherance of their common intention abused the complainant party and on the instigation of accused Altaf, accused Javed Ali caused fire arm injury to complainant Ghulam Shabbir on his right arm and accused Sadam caused fire arm injury to PW Muhammad Yousif which hit [him] on his right side of abdomen and deep to cavity with intention to commit their Qatl-e-Amd"
2. What should the judgment be?

6. Vide the impugned judgment, the learned trial Court answered Point No.1 in the affirmative and under Point No.2, convicted and sentenced the appellants as noted hereinabove.

7. Learned counsel for the appellants submitted that the impugned judgment is result of misreading and nonreading of evidence on record and is based on surmises and conjecture. Learned counsel vehemently argued that while passing the impugned judgment learned trial court completely lost sight of the fact that there is admitted enmity between the parties inasmuch as PW Muhammad Yousif was alleged to have murdered the father of appellants. Learned counsel argued that medico legal certificates are not supported by ocular as well as circumstantial evidence as it was pointed out that neither the alleged weapons used in the crime have been recovered from the possession of the appellants nor any empties were recovered from the place of Wardat. It was also submitted that all the witnesses in the case are related inter se and this fact was admitted by the PWs in their evidence. Learned counsel further submitted that the complainant party has filed false FIR against the appellants earlier also and invited my attention to the copy of FIR on record. Referring to the evidence of the medico legal officer, learned counsel submitted that it was admitted

by the said doctor that the injury sustained by the complainant could be self-inflicted. So far as injury alleged to have caused by appellant Saddam to injured Muhammad Yousif, the same was said to be superficial and was not through and through. Learned counsel also referred to the memo of injuries (Page 57 of the paper book) and contended that the same is not corroborated and, therefore, the prosecution has not been able to prove its case beyond reasonable doubt. Learned counsel submitted that the appellants have been falsely implicated in the instant case for putting pressure on them to withdraw the murder case of their father in which members of the complainant party have been nominated as accused. Per learned counsel, there are contradictions in the evidence of the PWs, benefit whereof is to be given to the appellants, therefore, he prayed that the impugned judgment may be set aside and the appellants may be acquitted.

8. On the other hand, learned APG appearing for the State vehemently opposed the appeal and supported the impugned judgment. Learned APG submitted that the complainant and the PWs have fully supported the case of the prosecution and prosecution has been able to prove the case beyond any shadow of doubt. It was further submitted that the appellants are not only nominated in the FIR but have also been assigned specific roles of causing injuries to the PWs; that the injured have fully supported the case of the prosecution as such no case for interference has been made out. Learned APG also pointed out that there is no material contradiction in the evidence of the PWs and that the testimony of the witnesses has not been shaken in cross-examination. He, therefore, prayed for dismissal of the appeal.

9. I have heard M/s. Habib Ali Leghari and Asif Ali, advocates for the Appellants and Mr. Ali Anwar Kandhro, Additional Prosecutor General,

Sindh, for the State and have scanned the record carefully with their assistance.

10. Enmity between the parties i.e. complainant / injured on the one hand and the appellants on the other, is an admitted position as father of the appellant Javed Ali was murdered some time back and in that case PW Muhammad Yousif and some of his relatives have been nominated in the FIR. PW Muhammad Yousif is maternal uncle of the complainant Ghulam Shabbir. Thus, all the persons nominated in the said murder case are related inter se and, therefore, it is an admitted position that there is blood feud between the parties. In such view of the matter, great caution is required as enmity is termed as double edged weapon which cuts both ways.

11. In view of the above fact, I have carefully examined the medical evidence on record in juxtaposition with the memo of injury prepared by the I.O. of the case. From the evidence of PW-8 Dr. Niaz Ali, available at page 69 of the paper book), it transpires that the injury sustained by PW Muhammad Yousif was through and through as the said PW has deposed as under:

"I received X-ray reports of injured and other reports on the basis of it I issued final medico legal certification and declared the injury No.1 under section 337-D Jaifah and injury No.2 was the exit of injury No.1..."

12. From the above deposition of the MLO, it transpires that injury No.1 was actually entry wound while injury No.2 was exit wound, meaning thereby that the injury was through and through. However, injuries noted down by the I.O. in the memo of injuries (available at page 57 of the paper book) do not show that the injury allegedly sustained by PW Muhammad

102

Yousif was through and through. Thus, there is a clear contradiction in the medical evidence and the memo of injuries prepared by the I.O. of the case.

13. Apart from above, the MLO also stated in his deposition that the injury sustained by PW Ghulam Shabbir can be self-inflicted. There is a marked difference in a fire arm injury which is self inflicted and an injury caused from some distance. In the former case the distance is very short and therefore there is blackening of the wound due to close proximity of the fire arm while in the latter, there is no blackening of the wound as the fire arm is used from a distance. This also creates doubt in the prosecution case.

14. The MLO further stated in his deposition that name of PW Ghulam Shabbir was not appearing on the X-ray film. Since the medico legal certificate was issued by the MLO on the basis of such X-ray film, and, as stated above, the X-ray film did not mention the name of the PW Ghulam Shabbir, therefore, a further doubt is created as to the injury sustained by the said PW. On what basis such medico legal certificate was issued by the MLO when the X-ray was not taken by him or in his presence and there was no name on the X-ray film to show that it belonged to the said PW. Therefore, there was no reason to believe that the same was the X-ray of the said PW. In a criminal case, where there is enmity between the parties, such x-ray cannot be taken into consideration for the purpose of conviction.

15. There is also contradiction in the deposition of PW Muhammad Yousif. In his examination-in-chief this witness stated that "we raised cries on which the villagers came running therefore accused went away"; however, in his cross examination the same witness states that "The co-villagers had seen the accused while making firing on us." Thus, there is a contradiction in these two statements of the PW as the first statement shows that the villagers were unaware of the incident until cries were raised by the

(105)

injured; however, the second statement clearly shows that the entire episode unfolded before the eyes of the villagers. Therefore, it cannot be said that the villagers were attracted by the cries of the injured as they were already seeing the incident by their own eyes.

16. The other and most important aspect of the case is that no recovery of weapons has been shown to have been effected from the appellants. Thus, even if it is presumed that the PWs sustained fire arm injuries, the appellants cannot be held responsible for causing such injuries to the PWs unless it is proved by cogent evidence that such injuries were caused by the appellant. The I.O. of the case has not performed his duties diligently and adequately. It was the duty of the I.O. to collect empties from the spot and to recover the weapons used in the crime to connect the appellants or, for that matter, anyone else, with the crime. This creates serious doubts in the prosecution story and in the absence of recovery of crime weapon, it cannot be said that the prosecution has proved its case against the accused / appellant beyond shadow of reasonable doubt.

17. In the case reported as *Mir Alam Vs. Amroaz Khan and another* (PLD 2015 Peshawar 125) it was held as under:

"No weapon of offence has been recovered from direct or indirect possession of the appellant nor he has confessed his guilt before the competent Court of Law. Moreover, mere recovery of crime empties, blood from the spot and the bloodstained garments of the deceased in absence of direct and substantive evidence which has been disbelieved by us would not be sufficient to prove the guilt of the appellant, as these pieces of evidence are always considered as corroborative pieces of evidence which are taken alongwith direct and substantive evidence and not in isolation."

18. Apart from this, the I.O. also did not collect empties from the spot.

In the case of *Syed Manzar Abbas Vs. The State* reported in 2002 P.Cr.L.J.

1566 [Lahore], the accused was acquitted, *inter alia*, on the ground that

no bloodstained earth or crime empty was taken into possession by the police from the place of incident.

19. The kind of evidence produced in the instant case can be gauged from the deposition of PW-1 Ghulam Shabbir wherein, in his cross-examination, he states that PW Muhammad Yousif is his maternal uncle and PW Ghulam Muhammad is also his relative while Mashir Haji Meer was his father. Thus, all the witnesses are related inter se. The same witness further deposed that the place of incident is a thoroughfare 'and has outgoing of people'; however, although as per the PW himself, many people were available, but none of them, being independent witnesses, was associated as witness in these proceedings. It also creates doubt in the case of the prosecution that despite availability of a number of people at the place of incident, as admitted by the complainant, no independent witness was associated and all the witnesses are related to the complainant. This is also injurious to the prosecution case as it is settled principle of law that despite availability of disinterested witnesses, non-examination of such witnesses in the case gives inference that in case such witnesses had been examined, they would have deposed against the prosecution as envisaged under Article 129(g) of Qanoon-e-Shahadat Order. In the case of Bashir Ahmed alias Manu vs. the State reported in 1996 SCMR 308 it was held by Honourable Supreme Court that despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that had they been examined, they would not have supported the prosecution version. In another case reported as Mohammad Shafi vs. Tahirur Rehman (1972 SCMR 144) it was held that large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, therefore no

implicit reliance could be placed on evidence of interested eye-witnesses. In the case reported in 1980 SCMR 708, it was observed that no witness of locality nor owner of hotel was produced in support of prosecution case nor any independent evidence to corroborate testimony of the three eye-witnesses was produced, as such, the acquittal was upheld by the Honourable Supreme Court.

20. It is also noteworthy that all the three PWs, namely, Ghulam Shabbir, Muhammad Yousif and Ghulam Muhammad, were riding on a single motorcycle, when they were allegedly attacked by the appellants who are alleged to have fired at the complainant from a distance. It has not been brought on record as to how many bullets were allegedly fired by the appellants. However, it is miraculous that out of three persons, sitting close together on a motorcycle, only two were hit. Besides, once again the I.O. failed to act properly and prudently by not collecting the clothes of the injured. There is high probability that the third person, who is not alleged to have received any injury, may also have received blood stains from the blood of his companions. However, this important aspect of the case was completely ignored by the I.O. of the case and even blood stained cloths of the two injured were not collected what to say about the clothes of the third person who was not injured in the alleged firing incident. In the case reported as Mohammad Shahbaz Vs. State (2009 P.Cr. L.J. 1428 [Lahore], the accused was acquitted, *inter alia*, for the reason that during investigation last-worn clothes of the deceased were not recovered by the police.

21. In view of the above contradictions in the evidence of prosecution witnesses and infirmities / flaws in the prosecution case, serious 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 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. It is well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

"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. Accordingly, vide short order dated 30.12.2019, instant appeal was allowed and the impugned judgment dated 12.06.2019, passed by III-Additional Sessions Judge, Dadu in Sessions Case No.99/2016, (State Versus Javed Ali and others), arising out of crime No.01/2016 of P.S. Radhan Station, was set-aside and the appellants were acquitted of the charge. The appellants were in custody, and they were ordered to be released forthwith if their custody was not required in any other case.

23. In view of the above, Criminal Revision No.S-66 of 2019, filed by the complainant for enhancement of sentence, became infructuous and was accordingly dismissed by the same short order.

22. Above are the reasons for the above short order dated 30.12.2019.

JUDGE

115