

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Present:

MR. JUSTICE NAIMATULLAH PHULPOTO
MR. JUSTICE SHAMSUDDIN ABBASI

Criminal Appeal No.D-332 of 2011
Confirmation Case No.D-20 of 2011

Date of hearing: 24.04.2018.
Date of Announcement of Judgment: 08.05.2018

Appellants : Wahid Bux @ Bhutto
Through Mr. Tarique Ali Mirjat, Advocate.

Respondent : The State
Through Syed Meeral Shah Addl.P.G.

J U D G M E N T

SHAMSUDDIN ABBASI, J: Appellant Wahid Bux alias Bhutto has assailed the judgment dated 28.10.2011, passed by 1st Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No. 126 of 2009 arising out of Crime No.08/2009 registered at Police Station 60th Mile, District Shaheed Benazirabad, under section 302 PPC, whereby appellant was convicted under section 302(b) PPC and sentenced to death subject to confirmation by this court. Learned trial court has made reference to this court under section 374 Cr.P.C.

2. The brief facts of the case are that on 17.03.2009 at 0430 hours complainant Darya Khan appeared at Police Station and lodged F.I.R. u/s. 302 PPC. The facts disclosed by the complainant in the F.I.R. are that he got married his daughter Mst. Halima with Wahid Bux @ Bhutto. Wahid Bux was Truck driver by profession and one Hakim Ali was cleaner of his Truck. It is alleged that Hakim Ali was on visiting terms with Wahid Bux. On 16.03.2009, at evening time complainant went to

the house of Wahid Bux where Wahid Bux, Mst. Halima, Hakim Ali and Mir Abid Hussain Talpur were already available there. After taking meals they went to sleep. It is alleged that on 17.03.2009 at 02:00 a.m. he heard cries, woke up and saw on electric light that his son-in-law Wahid Bux having hatchet in his hand was present in room of Mst. Halima, Hakim Ali cleaner was also available there. On cries neighbor Ali Bux also came over there. It is stated that Wahid Bux declared that Hakim Ali was Karo with his wife Mst. Halima and he would not spare them, saying so he inflicted hatchet injuries to Mst. Halima and Hakim Ali, both sustained the injures on face and other parts and fell down, died at the spot. Then accused Wahid Bux left the place of incident with hatchet. Such F.I.R. was recorded by the SIP/ S.H.O. vide Crime No.08/2009, u/s. 302 PPC

3. After registration of F.I.R. police started investigation, arrested accused Wahid and secured bloodstained hatchet on his pointation and the same was referred to the Chemical Examiner for report. During investigation, police recorded the statements of Ashique Ali (brother of deceased Hakim Ali) and Haji Khan (cousin of deceased Hakim Ali) and also got recorded their statements u/s. 164, Cr.P.C, where both Ashique Ali and Haji Khan implicated Qasim, Ali Bux and Pir Bux in the alleged offence but during investigation police let off Qasim, Ali Bux and Pir Bux and placed their names in Column-2 of the challan but learned Civil Judge & Judicial Magistrate-III, Nawabshah did not agree with police report u/s. 173, Cr.P.C and joined them in the case. Thereafter, police submitted final report against all four accused.

4. Learned trial Court framed charge against the accused at Ex.2, but accused pleaded guilty and claimed for trial.

5. In order to prove the case, the prosecution had examined P.W-1 SIP Mureed Hyder at Ex.7, P.W-2 Dr. Rehana Parveen at Ex.8, P.W-3 Dr. Amjad Ali at Ex.9, P.W-4 Complainant Darya Khan at Ex.10, P.W-5 Ashique Hussain at Ex.11, P.W-6 Haji Khan at Ex.12, P.W-7 Shah Muhammad (mashir) at Ex.13, P.W-8 HC Muhammad Akram at Ex.14, P.W-9 Taliq Hussain (Tapedar) at Ex.15, P.W-10 SIP Abdul Latif at Ex.16, and P.W-11 Inayatullah (Judicial Magistrate) at Ex.20. Thereafter prosecution closed it's side at Ex.22.

6. Statements of accused were recorded u/s. 342, Cr.P.C by the learned trial court where accused denied the allegation leveled against them and pleaded their innocence. However, neither accused examined themselves on oath nor led any evidence in their defence.

7. Learned trial court after hearing the learned counsel for the accused and State Counsel and assessment of the evidence, passed the impugned judgment and convicted the Appellant Wahid Bux u/s. 302(b) PPC and sentenced him to death and acquitted co-accused Qasim, Ali Bux and Pir Bux by extending them benefit of doubt. Appellant Wahid Bux being aggrieved has preferred this appeal. Learned trial court has made reference to this for confirmation of death penalty u/s. 374, Cr.P.C being Reference No.20/2011. Both appeal and reference are decided together.

8. Learned Counsel for appellant submits that the incident had taken place inside the house of Appellant Wahid Bux in odd hours of night at about 02:00 a.m. He further contended that the prosecution had failed to produce any eye-witness of this incident. He further contended that the learned trial court has acquitted three co-accused Qasim, Ali Bux and Pir Bux on same set of evidence by extending them benefit of doubt and

convicted the appellant. He further contended that during investigation police recovered hatchet on the pointation of Appellant Wahid Bux after three days of incident and the same was sent to Chemical Examiner after the delay of about three months and prosecution had failed to produce any evidence regarding safe custody of hatchet. He further contended that mashir namely Shah Muhammad had also not supported the case of prosecution and he was declared hostile by the prosecution. He further contended that there is delay of 30 days in recording of statements of witnesses u/s. 161, Cr.P.C. He further contended that the only eye-witness Ali Bux was also not examined by the prosecution. He further contended that incident is unseen and Appellant has been convicted only on the basis of hearsay evidence without corroboration of any independent evidence. He further contended that even the complainant of this case namely Darya Khan was also declared hostile. Lastly, he contended that the appeal may be allowed.

9. On the other hand, learned Additional Prosecutor General Sindh has supported the judgment on the ground that crime weapon has been recovered on the pointation of Appellant and the same was sent to Chemical Examiner wherefrom positive report came on the record.

10. We have heard learned Counsel for the Appellant as well as learned Additional Prosecutor General Sindh and scanned the material available on record. We have examined the statements of prosecution witnesses.

11. P.W-4 complainant Darya Khan has categorically stated that on 17.03.2009 at 02:30 a.m when he was available at his house, he received telephone call from one Haji that his daughter Mst. Halima has been murdered at village Sabir Hussain Talpur. On receipt of such

information, he alongwith his other housemates came at the place of incident and found dead bodies of his daughter Mst. Halima and Hakim Ali. He further stated that thereafter he alongwith Haji went to Police Station 60th Mile and lodged F.I.R. He stated that police had visited the place of incident in his presence. Complainant was declared hostile and was cross examined by the learned D.D.A/DDPP for the State where he voluntarily stated that he can't say that accused had committed murders of his daughter and Hakim. Complainant denied that due to compromise, he was not implicating accused.

12. P.W-1 Mureed Hyder, who recorded an F.I.R. of complainant Darya Khan at P.S and this witness has produced copy of F.I.R. bearing Crime No.08/2009 u/s. 302 PPC. P.W-2 Dr. Rehana Parveen, who conducted postmortem of deceased Halima, produced postmortem report of deceased Halima. P.W-3 Dr. Amjad Ali, who conducted postmortem of deceased Hakim Ali, produced postmortem report of deceased Hakim Ali.

13. P.W-5 Ashique Hussain deposed that deceased Hakim Ali had dispute with accused Wahid Bux over money and an amount of Rs.1,60,000/- was outstanding against Wahid Bux of deceased Hakim Ali. On 15.03.2009 at about 08:00 p.m he received telephonic message from his brother Hakim Ali that disputed amount was settled between him and Wahid Bux and he further disclosed that Wahid Bux was also with him and accused Pir Bux, Qasim and Ali Bux were issuing threats to him on that Ashique Ali replied to his deceased brother that if he feel necessary he would come but deceased Hakim Ali restrained him. At about 02:00 a.m they received a message from co-villager Wazir that his brother Hakim Ali and Mst. Halima have been murdered on the allegation of Siyakari. Thereafter, he came at place of incident and

found dead bodies at place of incident. He further stated that the complainant Darya Khan was already available there and kept them on hopes for Faisla. Thereafter, complainant lodged F.I.R. with his own accord. He further deposed that complainant due to close relations with co-accused Qasim, Ali Bux and Pir Bux had not implicated them in this case. He has further deposed that his statement u/s. 164, Cr.P.C was recorded by the learned Magistrate. During cross examination, this witness has disclosed that he had received telephonic message from his cousin Ali Ahmed Brohi on mobile phone (this Ali Ahmed Brohi was neither examined by the police u/s. 161, Cr.P.C nor produced by the prosecution before the learned trial court to record his statement). He has further stated that after arrival at Police Station, police left to visit place of incident. He further stated that after 5 /6 days of the incident his statement u/s. 164, Cr.P.C was recorded by the Magistrate. We have also gone through the statement u/s. 164, Cr.P.C (Ex.11/A) which show that the same was recorded by the Magistrate on 03.04.2009, whereas, incident had taken place on 17.03.2009. This witness had admitted that he didn't disclose the name of Ali Ahmed, who informed him on mobile phone regarding incident of this case. This P.W had implicated Ali Bux, Pir Bux and Qasim and stated that deceased Hakim Ali informed him that he had dispute with Wahid Bux over money and accused Ali Bux, Pir Bux and Qasim had issued threats to Hakim Ali for dire consequences for the dispute over the money. But it is a matter of record that case against co-accused Ali Bux, Pir Bux and Qasim was not believed by learned trial court and they were acquitted of the charge. Thereafter, prosecution had examined P.W Haji Khan, who has stated in the same line as stated by P.W Ashique Ali. He has further stated that on 17.03.2009 at about 02:00 a.m. they received a telephonic message

that Hakim Ali and Mst. Halima were murdered on the allegation of Siyahkari and on receipt of such information they came at the place of incident and found the dead body of Hakim Ali lying on a cart. He also disclosed that his second cousin Ali Ahmed had communicated information regarding murder of Hakim Ali on telephone at 02:00 or 02:30 a.m. He also stated that after three days of the incident his statement u/s. 164, Cr.P.C was recorded by Magistrate but his statement u/s. 164, Cr.P.C (Ex.12/A) shows that the same was recorded on 03.04.2009. This P.W had implicated Ali Bux, Pir Bux and Qasim and stated that deceased Hakim Ali informed him that he had dispute with Wahid Bux over money and accused Ali Bux, Pir Bux and Qasim had issued threats to Hakim Ali for dire consequences for the dispute over the money.

14. The prosecution examined P.W-7 Shah Muhammad who was cited as mashir of place of incident, seeing the dead bodies, inquest reports, arrest of accused Wahid Bux and recovery of hatchet on the pointation of accused Wahid Bux. It is a matter of record that he stated that police visited the place of incident but he stated that he can't say if police had collected bloodstained earth from the place of incident. He further stated in his cross examination that all the memos were signed by him on same date and his signatures were obtained in the house of accused Wahid Bux. He further stated that when he had come at place of incident he found dead bodies and hatchet lying on the venue of incident. On that, learned State Counsel declared him hostile. Thereafter, prosecution had examined P.W-8 HC Muhammad Akram, who after conducting postmortems of deceased Hakim Ali and Halima handed over the dead bodies to their relatives. Thereafter, prosecution had examined P.W-9 Tali Hussain (Tapedar) who prepared sketch of

place of incident and produced the same before the learned trial court. Point A denotes that dead body of deceased Hakim Ali was lying and Point B denotes the place where the dead body of deceased Mst. Halima was lying. The distance in between Point A and Point B was 6 feet. This sketch shows the house of Ghous Bus situated adjacent to the house of accused Wahid Bux.

15. Learned DDPP has also given up PW Jamaluddin on the ground that he was not supporting the case of prosecution. Thereafter, prosecution examined P.W-10 SIP Abdul Latif, who investigated the case, arrested accused Wahid Bux, secured hatchet from him and recorded statements of witnesses u/s. 161, Cr.P.C. He recorded further statement of P.Ws and found Qasim, Ali Bux and Pir Bux as innocent and released them u/s. 497, Cr.P.C and after usual investigation he submitted challan against accused for disposal of the case. Finally, prosecution had examined P.W-11 Inayatullah (Civil Judge and judicial Magistrate) who recorded statements of P.Ws Haji Khan and Ashique Ali u/s 164, Cr.P.C. Thereafter, prosecution had closed their side.

16. We have also perused the statements of accused Wahid Bux recorded u/s. 342, Cr.P.C, in which accused neither examined himself on oath nor led any evidence in his defence. He has simply stated that he is innocent and he had not committed any offence and has been implicated at the instance of his enemies and further stated that he has been made double target as on one hand his wife had been murdered and on the other hand, he has been dragged in this case and confined in jail since his arrest.

17. We have found that in all 11 prosecution witnesses have been examined in order to establish their case against the accused. It is a matter of record that incident had taken place at 02:00 a.m. inside the house of Appellant Wahid Bux and the incident was unseen. Prosecution had not examined a single eye-witness of the incident and even prosecution had failed to examine Ali Ahmed, who soon after the incident had informed the complainant on phone and perhaps was sole eye-witness of the incident. Learned Trial Court had convicted the Appellant Wahid Bux on the basis of hearsay evidence, it was not corroborated by any reliable, confidence inspiring and trustworthy evidence. The only piece of evidence that hatchet was recovered on the pointation of Appellant Wahid Bux was not sufficient. Moreover, hatchet was recovered after 03 days of incident and the same was sent to Chemical Examiner with a delay of about three months as alleged recovery of hatchet was effected on 23.03.2009 and the same was dispatched for chemical examination on 20.06.2009. We have also noticed that alleged recovered hatchet was sent to Chemical Examiner through PC Nazar Muhammad but PC Nazar Muhammad was not examined by the prosecution. The prosecution had miserably failed to show that the alleged recovered hatchet was kept in safe custody for 03 months. Even otherwise, the prosecution had failed to explain such inordinate delay in sending the hatchet to Chemical Examiner.

18. I.O recorded further statements of P.Ws Ashique Ali and Darya Khan on 30.03.2009. Delay in recording such statements

has not been explained by prosecution. Honourable Supreme Court in the various cases has held that delay in reporting the matter to the police or recording the statements of witnesses by the police has been found adversely affecting the veracity of witnesses as held in the case of Muhammad Sadiq v/s. The State (PLD 1960 S.C 223, Sahib Gul v/s Ziarut Gul (1976 SCMR 136), Muhammad Iqbal v/s State (1984 SCMR 930) and Muhammad Asif v/s The State (2017 SCMR 486).

19. We are very surprised and shocked that trial Court had relied upon the contents of F.I.R., complainant was declared hostile. Under the law, F.I.R. is not substantive piece of evidence. No conviction can be recorded on the basis of F.I.R. We have gone through the evidence of P.Ws Ashique Ali and Haji Khan, which was not confidence inspiring. Evidence of both P.Ws is hearsay evidence as both were not the eye-witnesses of the incident. They have deposed that they received telephonic message from co-villager Wazir, who informed them that Hakim Ali and Mst. Halima were murdered on the allegation of Siyah Kari. P.W Ashique Ali in his examination-in-chief had disclosed that he received information regarding the incident from co-villager Wazir but in his cross-examination he deviated from his first version and stated that he had received telephonic message from his cousin Ali Ahmed Brohi through mobile phone. Learned trial Court had also not considered the evidence of Ashique Ali and Haji Khan as eye-witnesses of the incident and it has been held that the evidence of P.Ws Ashique Ali and Haji Khan was not confidence inspiring and only held by learned trial Court that ***contents of FIR have been supported by medical evidence of both doctors in unequivocal***

manner, who deposed that both deceased died due to injuries caused by sharp cutting weapon. Learned trial court has admitted that motive has not been proved as complainant has not supported the case of prosecution. Learned trial court has awarded death sentence to Appellant Wahid Bux that only on the evidence of recovery of hatchet and positive report of Chemical Examiner. In absence of any direct evidence and in absence of any corroborative piece of evidence learned trial court had wrongly convicted the Appellant and sentenced to death particularly, when it is a matter of record that mashir of recovery of hatchet had not supported the case of prosecution in respect of alleged recovery of hatchet on the pointation of Appellant Wahid Bux. The law does not stand on presumptions or assumptions. The only aspect of the case that both deceased were murdered in the house of Appellant on the issue of Siyah Kari and Appellant had produced crime weapon. In absence of any cogent, reliable and confidence inspiring evidence, which was not supported by any independent corroborative piece of evidence, the conviction awarded by learned trial court is without any justification. Mere medical evidence and doubtful recovery of hatchet itself were not established on identity of accused. The evidence of I.O is to collect evidence and he has not got authority to declare someone as guilty or innocent. It is a prerogative of the Court to declare someone guilty or innocent.

20. In the case of *MUHAMMAD ASHRAF vs. THE STATE* (2012 SCMR 419), the Honourable Apex Court has held as under:-

“8. To prove the ocular account prosecution had produced

two eye-witnesses. P.W.5 Sher Muhammad is real father of the deceased while P.W.6 Muhammad Azam is real brother of the deceased. Both are related inter se and with the deceased. They claimed that there was no previous enmity between the parties but they were not on speaking terms as the mother of the complainant had died before the incident and in spite of the fact both parties were residing adjacent to each other but accused party had not come to say Fateha with the complainant. It was admitted by the P.W.5 during cross-examination that deceased was running the grocery shop in village Narowal and adjacent to his grocery shop parents of the appellant were residing and the appellant along with his wife was also residing with his parents. It is admitted fact that he had shifted his place of residence from the said house and started living in a house which was at a distance of one acre from the place of occurrence and the house of the complainant was at a distance of three acres from the place of occurrence, so both the eye-witnesses are chance witnesses as the incident has not taken place in front of their places of residence or places of their business. Both the eye-witnesses are not natural witnesses and they claimed that they had seen the incidence but had failed to explain two injuries caused with blunt weapon on the forehead and below the left eye of the deceased and had only attributed one injury to the appellant at the back of his ear. While appearing in the trial Court they had attributed the blunt weapon injuries to Muhammad Yousaf who allegedly was armed with sota. This improvement was introduced by them to bring the ocular version in line with medical evidence. Both the eye-witnesses had been confronted with their previous statements recorded under sections 154 and 161, Cr.P.C. and the High Court has declared that they had made dishonest improvements in their statements qua the role ascribed to Muhammad Yousaf acquitted accused. Even otherwise quarrel took place at a spur of moment and it is shrouded in mystery how they reached the spot and saw the incident. We have no hesitation in holding that they had not seen the incident. Even otherwise, motive mentioned in the F.I.R. has not been believed by both the courts below and we are in agreement with both the courts below that the motive had not been proved through the evidence on record. Recovery is also useless as the hatchet was not stained with blood. Medical evidence contradicts the ocular account that the incident was promptly reported. Two blunt weapon injuries were also not explained by the eye-witnesses. In the circumstances we find that prosecution has not been able to prove the case against the appellant beyond any reasonable doubt and conviction and sentence awarded to the appellant is not sustainable.

9. Coming to the defence plea raised by the appellant that the deceased had illicit relations with his wife and due to this

reason he had shifted his place of residence and had started living at the place which is far from his house and the incident had taken place at the evening time when he had seen his wife in compromising position with the deceased, the deceased had succeeded in running away from the place of incident, the appellant followed him and had caused him injury with hatchet, it may be noted that he neither appeared in his defence as required under section 340(2), Cr.P.C. nor produced any evidence to support his plea. The witnesses had also denied this fact, hence the defence plea is brushed aside.

10. As we have discussed above that the prosecution has failed to prove the guilt against the appellant beyond shadow of doubt, the conviction and sentence awarded to the appellant are set aside and this appeal is allowed. The appellant is acquitted of the charge. He shall be set at liberty forthwith if not required to be detained in any other case.”

21 In the case of *ABDUL SATTAR vs. THE STATE* (2012 YLR 580), it has been held as under:-

“12. It is settled principle of law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, it must go to the accused and is sufficient to discredit the prosecution story and entitles the accused for acquittal. The said rule is based on the maxim:--

"It was better that ten guilty persons be acquitted rather than one innocent person be convicted, care should be taken by Court in convicting an accused."

22. The Honourable Supreme Court in the case of *PATHAN vs. THE STATE* (2015 SCMR 315) has made following observation:-

“The recovery of scissors, which otherwise appears doubtful and other pieces of evidence, keeping in view the well embedded principle of law and justice would not be sufficient to carry conviction on a capital charge.”

23. The Honourable Supreme Court has discussed the evidence of recovery in view of the unfair investigation in the case of *Mst. RUKHSANA BEGUM and others vs. SAJJAD and others* (2017 SCMR 596).

24. In the case of *SHER MUHAMMAD vs. THE STATE* (1984 P.Cr.L.J 1361) the Honourable Supreme Court has observed as under:-

“if the sole eye-witness, in the instant case, has been disbelieved relating to the part ascribed to the acquitted co-accused, indeed very strong and independent corroboration is required of his testimony in respect of the part ascribed to the present appellant which is not forthcoming in the present case. It is reasonably probable that the occurrence was an unwitnessed one and the assailant could not be known as no one was there to see the occurrence. Since this is the position, in our view, the case of the appellant is not free from doubt. The result is that relying on the authorities cited by learned counsel for defence we are of the considered view that the prosecution has not succeeded in establishing its case as against the appellant beyond any shadow of doubt. Consequently, the conviction and sentence awarded to him in the instant case were not proper and he should have been given the benefit of doubt which we hereby give to him by setting aside his conviction as well as sentence. The result is that the appeal of the appellant is accepted and he is acquitted. He shall be released from jail forthwith if not wanted in any other case.”

25. It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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. In the case of *TARIQ PERVEZ V/S. THE STATE* (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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.”

26. We have come to the conclusion that the prosecution has failed to prove its case beyond shadow of reasonable doubt as the

incident was unwitnessed incident. Prosecution failed to examine one Haji who informed the complainant through telephonic message regarding the incident. Prosecution has also not examined one Ali Ahmed Brohi, who informed P.Ws Ashique Ali and Haji Khan regarding incident. Non-examination of such material witnesses would be fatal to the prosecution case. Moreover, complainant has not supported the case of prosecution and was declared hostile. He was cross-examined by Prosecution, but nothing favourable to prosecution came on record. The only piece of evidence was recovery of hatchet on the pointation of Appellant Wahid Bux on the basis of which trial court recorded conviction. It is a matter of record that mashir of recovery had not supported the case of prosecution regarding recovery of hatchet and he had clearly stated that he had come at the place of incident and found dead bodies and hatchet was lying on the place of incident. It has come in evidence that hatchet was recovered on 23.03.2009, whereas, the same was dispatched on 20.06.2009 to the office of Chemical Examiner for examination. Neither prosecution has explained inordinate delay in dispatching the hatchet to the Chemical Examiner nor produced any entry of Malkhana regarding safe custody or examined Head Muhrir and P.C Nazar Muhammad, who deposited the hatchet to the office of Chemical Examiner. Even the learned trial court has disbelieved the evidence of P.Ws Ashique Ali and Haji Khan and acquitted co-accused Qasim, Ali Bux and Pir Bux from the charge. Conviction of appellant on same set of evidence without

independent corroboration was not warranted in law. Under these circumstances, we are of the firm opinion that it is the case of hearsay evidence. In the cases of capital punishment strong evidence is required for conviction, which is lacking in this case and the evidence so produced by the prosecution is not confidence inspiring and trustworthy. There are multiple circumstances in this case, which have created reasonable doubt in prosecution case.

27. In view of above, we are of the considered view that the prosecution has miserably failed to prove it's case against the appellant, therefore, we allow this appeal and set aside conviction and sentence recorded by trial court and acquit Appellant Wahid Bux of the charge by extending him benefit of doubt. It is ordered that the Appellant shall be released forthwith if not required in any other case. Consequently, Reference No.20 of 2011 made by trial court for confirmation of death sentence is answered in negative.

JUDGE

JUDGE

A.H.