JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Present:
Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Khadim Hussain Tunio.

Cr. Jail Appeal No. D- 07 of 2013
Confirmation Case No. 01 of 2013

Date of hearing 25.02.2020.
Date of judgement: 25.02.2020.

Mr. Mian Taj Muhammad Keerio, Advocate for appellant.
Ms. Rameshan Oad, A.P.G. for the State.
None present for complainant.

J U D G M E N T

ABDUL MAALIK GADDI, J- Through this criminal jail appeal, the appellant Javed Qazi son of Mehmood Qazi has challenged the judgment dated 29.01.2013 passed by learned IInd Additional District & Sessions Judge, Hyderabad in Sessions Case No.168 of 2008 (Re-State v. Javed Qazi) arising out of crime No.11/2008 for offences punishable u/s 302 r/w Section 34 PPC, registered at Police Station Tando Yousif, Hyderabad whereby the learned trial court after full dressed trial convicted the appellant u/s 302(b) PPC and sentenced him to death as Ta'zir. The appellant was also directed to pay the compensation amount of Rs.2,00,000/- (Rupees Two Lac) to the Walis of deceased (Khalid Qazi). Failing which, he shall suffer simple imprisonment for six months more. However, benefit of section 382-B Cr.P.C was extended to the appellant.

2. It may be mentioned here that Presiding Officer of the trial court has also submitted a Reference u/s 374 Cr.P.C. for confirmation of death sentence which was assigned number as 01/2013.

3. The prosecution story in nut shell is that on 14.03.2008 at 2330 hours complainant was standing near Faisal's Cabin when he found his elder brother Khalid Qazi coming from Phatak side along with his friends Majeed alias Bhugar, Javed alias Choori and Farooque alias Kadu. His brother was got loading balance in his mobile at the Cabin of Faisal while Majeeed was standing outside the shop of Rafique Hair Dresser and Javed was standing near Faisal's cabin. Suddenly Javed took out his pistol and made a fire. Complainant also found pistol in the hand of Majeed. According to complainant thereafter, second bullet was also fired but he did not see who fired from both the persons namely Javed and Majeed which hit on the temple of his brother Khalid who fell down on earth and the people after closing their shops started running away due to fear. Then Javeed and Majeed went away towards Phatak side by raising their pistols and Javed uttered that from today they are the Badmash (Criminals) of this area. Complainant then along with PW Saleem took his brother Qazi Khalid to Civil Hospital in a Rickshaw where doctor declared him to be dead. In the meanwhile police also arrived there who got conducted post-mortem of deceased and then handed over the dead body to complainant, who after burial lodged F.I.R that his brother Khalid Qazi had been murdered by Javed and Majeed by giving pistol shot without any reason or cause.

4. Charge was framed against both the accused on 16.05.2008 at Ex.5 to which they pleaded not guilty and claimed their trial vide their pleas on record at Ex.6 and 7.

5. It reveals from the record that co-accused Abdul Majeed Baghar had expired inside jail by his natural death on 29.12.2008 during trial and therefore, proceedings against him were abated by the trial court vide order dated 20.02.2009 after completing all the legal and codal formalities which is evident from case file at Ex.10/A to 10/J respectively.

6. Prosecution in order to prove its case examined following witnesses at trial:

PW-1 Complainant Muhammad Raees at Ex.9. He produced FIR at Ex.9/A.

PW Muhammad Essa at Ex.10, who produced certain documents regarding the death of co-accused Abdul Majeed @ Bughar at Ex.10/A to 10/J.

PW-2 Abdul Hameed at Ex.11. He produced the Danishtnama of dead body, mashirnama of Lash and mashirnama of Surzameen at Ex.12, 13 and 14 respectively.

PW-3 Muhammad Saleem at Ex.15.

PW-4 Muhammad Farooque at Ex.16.

PW-5 Faisal at Ex.17.

PW-6 Fakir Muhammad at Ex.18. He produced the mashirnama of clothes of deceased at Ex.19.

PW-7 Dr. Shakeel Ahmed at Ex.19. He produced the copy of police letter and postmortem report of the deceased at Ex.19/A & 19/B.

PW-8 Incharge Special Team Mubashar Ali at Ex.20

PW-9 Inspector Sardar Khan at Ex.21. He produced the copy of entry, carbon copies of Lash Chakas Form and letter to MLO, receipt of delivery of the dead body at Ex.21/A to 21/D.

PW-10 SIP Mehmood Akhtar at Ex.22. He produced the mashirnama of arrest of accused Abdul Majeed, arrival and departure entries, letter of sending the case property to the chemical examiner and chemical report at Ex.22/A to 22/D respectively.

PW-11 Tapedar Syed Muhammad Naeem Shah at Ex.24. He produced the sketch of wardat in triplicate at Ex.24/A.

Thereafter prosecution side was closed at Ex.25.

7. Statement of accused Javed Qazi was recorded under Section 342 Cr.P.C at Ex.26, wherein he denied all the prosecution allegations and stated that these allegations are false however, he recorded his statement on Oath in disproof of prosecution allegations. Thereafter, his statement on Oath was recorded and same was cross examined by DDPP for State at Ex.27.

8. Learned trial court after hearing the learned counsel for the parties convicted and sentenced the present appellant as stated above.

9. Mr. Mian Taj Muhammad Keerio, learned counsel for appellant mainly contended that the appellant is innocent and has been falsely involved in the case in hand due to enmity of complainant with one Jameel (uncele of the complainant) and the appellant had family terms with said Jameel and the case is managed one; that the judgment passed by trial court is against the law and facts; that learned trial court has erred in not appreciating the evidence on record; that the complainant has not disclosed in FIR that whose fire was hit to the deceased on his forehead which resulted in his death; that it was a night time incident and no source of identification has been disclosed by the complainant; that complainant and other witnesses are interested besides no recovery has been made from the appellant; that there is also delay of about 24 hours in lodgement of FIR; that FIR is silent with regard to fatal firearm injury caused to the deceased; that no empty was recovered from the place of wardat; that statement of accused was not recorded in accordance with law as all incriminating pieces of evidence were not put to the accused even question was not put to the accused with regard to postmortem report of

the deceased, blood stained clothes, blood stained earth and whether the same were sent to the chemical examiner or not and its report etc. have not been asked from the appellant and accused has not been provided fair opportunity of being heard on material points of the case therefore, the right of appellant has been seriously prejudiced; that prosecution case is full of doubts and infirmities, as such, accused deserves benefit of doubt; that there are material contradictions and discrepancies in the evidence of prosecution witnesses, therefore, prosecution evidence is based on whims and surmises and its benefit may be accorded to the accused. He therefore, prays that instant appeal may be allowed and the impugned judgment may be set aside.

10. Conversely, learned A.P.G. while supporting the impugned judgment submits that prosecution has fully established its case beyond any reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentence awarded to the appellant are the result of proper appreciation of evidence brought on record, which needs no interference by this Court. She further contended that eye witnesses of the incident have fully supported the version of complainant as well as medical evidence is inconsonance and confidence inspiring. She therefore, prayed for dismissal of this appeal.

11. Arguments heard and record perused.

12. From perusal of FIR it appears that allegations leveled by the complainant in his FIR are general in nature as he alleged that present appellant and co-accused Majeed Bhagwar (who died during the trial on 29th December, 2008) were armed with pistols but he could not specify that whose fire shot hit to the deceased on his forehead which resulted

into his death. For the sake of convenience, it would be proper and relevant to reproduce the relevant portion of cross examination of complainant Muhammad Raees which reads as under:-

> ***"It is correct in FIR it is not mentioned who inflicted bullet injury. It is correct I have not stated in FIR that Javed accused put pistol on forehead of deceased and fired."***

13. Admittedly, it was night time incident occurred at about 11-30 p.m, and no source of identification has been disclosed by complainant party. It is noted that FIR is silent with regard to the specific allegation of causing fatal firearm injury by the appellant. I.O. of the case during investigation failed to collect the empties from the place of incident. On perusal of record, it appears that no direct evidence against the appellant is available to saddle him with the liability of commission of murder of deceased. Prosecution case revolves on suspicious and smokes to the effect that which of the accused caused fatal firearm injury to the deceased. As per contents of F.I.R, the dead body was taken into rickshaw towards hospital by complainant and PW Saleem but the said rickshaw driver had not been made as a witness in the incident. No Rickshaw number even has been mentioned in the FIR. It is also noted that blood stained clothes of the eye witnesses who had taken the injured / deceased to hospital are not produced as a case property in the above matter which was the most important piece of evidence and no blood has been secured from rickshaw which also makes the prosecution case doubtful.

14. It has further been brought on record that present appellant voluntarily surrendered before the court on 14.05.2008 as he was shown as absconder in the challan sheet. Present appellant was alleged to be

armed with pistol at the time of incident but no recovery of pistol has been affected from him. It has come on record that the complainant lodged FIR on second day of incident at about 2330 hours i.e. after the delay of about 24 hours of the alleged incident though the distance between place of incident and police station was / is only about 3 kilometers. The appellant has also taken the defence plea that he has been falsely implicated by complainant on account of his enmity with one Jameel (uncle of the complainant) as the appellant had family terms with said Jameel. He also examined himself on Oath reiterating the same facts. FIR is silent with regard to fatal fire shot upon the deceased. Even no empty was recovered from the place of incident. Admittedly, the incident took place in a thickly populated area surrounded by shops despite of this fact no independent person has been cited as mashir to witness the event. I.O. of the case has also not made any effort to record the evidence of any independent person of the locality to witness the event. The prosecution case is based upon the evidence of alleged two eye witnesses as discussed above but on perusal of the record their evidence appears to be contradictory against each other on material particulars of the case, therefore, no reliance could be placed safely for maintaining conviction on the interested evidence on record.

15. We have also perused the evidence so brought on record which shows that complainant Muhammad Raees is the brother of deceased whereas PW Muhammad Saleem whose evidence on record at Ex.15 shows that at the time of incident he was available at his house and he only saw the injured / deceased lying on the ground in injured condition however, he in his evidence has deposed that he heard that two persons namely Abdul Majeed and Javed were present at the time of incident but

he does not know who inflicted fire upon the deceased Khalid to kill him. So far as the evidence of Muhammad Farooq is concerned, he is stated to be near relative of the complainant and deceased. He further deposed in his examination in chief that "**Muhammad Javeed made one aerial fire. Javeed made second aerial fire which hit on forehead of Khalid**". However, it is surprising to note that how an aerial firing could be hit to Khalid. It has come on record that this witness Farooq was standing at the distance of about 30 paces away from the place of incident, therefore, mistaken of identity of accused could not be ruled out particularly in a scenario when it was a night time incident. It is also noted that statement of Farooq u/s 161 Cr.P.C. was recorded by police after more than one month of the alleged incident i.e. on 24.04.2008. A perusal of his statement shows that same is also not in consonance with the evidence recorded by him before this court, therefore, false implication of the accused cannot be ruled out.

16. It is contended by learned counsel for the appellant that the statement of appellant under Section 342 Cr.P.C was not recorded in accordance with law and all the incriminating pieces of evidence were not put to the appellant and even question was not put to the appellant with regard to medical evidence / postmortem report of the deceased, blood stained clothes and blood stained earth as well as chemical report etc; therefore, he was of the view that on this score alone and in view of the said lacunas in the prosecution case the appellant is entitled for benefit of doubt and may be acquitted of the charge. In this connection he has relied upon an unreported judgment passed by the Honourable Supreme Court of Pakistan in Criminal Appeals No.24-K, 25-K & 26-K of 2018 dated 26.02.2019.

17. When the said lacunas / infirmities were confronted with learned A.P.G, she has no satisfactory answer with her. However, she submits that case may be remanded to trial Court for re-recording the statement of appellant under Section 342 Cr.P.C. We are not impressed with the submission of learned A.P.G and observe that the law is settled by now that a piece of evidence or a circumstance not put to an accused person at the time of recording of his statement under section 342 Cr.P.C. cannot be considered against the accused person facing the trial. In the case in hand, which pertains to year 2008, through an act or omission of the Court a serious lacuna in that regard had crept into the case of the prosecution and the accused persons could not be prejudiced on account of the said act or omission of the Court; therefore, remand of the case would not serve the purpose however, it will amount to put the parties into torture for another round of litigation and to fill-up the lacuna, if any, left by the prosecution before the trial Court.

18. We are persuaded to hold that it was the primary responsibility of the trial court to ensure that truth is discovered. The procedure adopted by the trial court is reflective of miscarriage of justice. Offence is punishable for death or imprisonment for life and appellant has been awarded death penalty without providing him opportunity with regard to material questions to be put to him in statement of accused u/s 342 Cr.P.C. As regards to the contention of learned counsel for appellant that all the pieces of evidence were not put to accused under section 342, Cr.P.C for his explanation, Honourable Supreme Court in an unreported judgment in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of MUHAMMAD HASSAN v. THE STATE, has held as under:-

> "3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the F.I.R., statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime-empties with the firearm allegedly recovered from the appellant's possession during the investigation but we have found that except for the alleged recovery of *Kalashnikov* from the appellant's possession during the investigation no other piece of evidence being relied upon by the prosecution against the appellant was put to the appellant at the time of recording of his statement under section 342, Cr.PC.
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> 4. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.PC so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. The case in hand is a case of murder entailing a sentence of death and we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under section 342, Cr.PC which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.PC but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned Courts below."

In the case of **MUHAMMAD NAWAZ and others Versus The STATE AND OTHERS** (2016 SCMR 267), Honourable Supreme Court of Pakistan has observed as under:-

> "…….While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his / her examination under section 342, Code of Criminal Procedure, could not be used against him / her for maintaining conviction and sentence."

19. It is well settled principles of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of prosecution story is adduced by the prosecution. We are of the considered view that prosecution could not establish the guilt of appellant at home without reasonable doubt. In our view, where a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a 'matter of right', hence, single doubt is sufficient to acquit the accused.

20. In these circumstances, we are of the view that prosecution case is not free from doubts and it is well settled principle of law that even a single circumstance creating a reasonable doubt, the benefit of which, always goes in favour of accused. In the instant case there are material discrepancies and lacunas in the prosecution evidence. In this regard reliance can be placed upon the case of 'TARIQ PERVAIZ v. The STATE' [1995 SCMR 1345], wherein it has been held by the Honourable Supreme Court of Pakistan that:

> ***"For giving benefit of doubt to appellant 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 matter of right"***

21. Keeping in view of the above, we are of the firm view that the Presiding Officer of the learned trial court acted erroneously in the matter, with misconception and misinterpretation and disposed of the matter purely on non-appreciation and non-application of the required norms of law and that of justice. Consequently, we allow the instant

Criminal Jail Appeal No.D-07 of 2013, set aside the impugned judgment dated 29.01.2013 passed by learned IInd Additional District & Sessions Judge, Hyderabad in Sessions Case No.168/2008, arising out of Crime No.11/2008 u/s 302 PPC registered at Police Station Tando Yousif and acquit the appellant from above charge. The appellant is in custody, therefore, Jail Authorities are directed to release the appellant forthwith from the above case, if he is not required in any other case.

22. In view of above, Murder Reference No. 01 of 2013 submitted by learned IInd Additional District & Sessions Judge, Hyderabad is answered in NEGATIVE and the sentence of death awarded to appellant Javed Qazi is NOT CONFIRMED.

23. These are the reasons of our short order dated 25.02.2020, whereby we had allowed this appeal, set aside the impugned judgment dated 29.01.2013 and acquitted the appellant from charge.

JUDGE

JUDGE

Tufail