IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Appeal No.D-31 of 2018

Appellant	Sheeraz Khan son of Khan Hassan through Mr. Jehanzaib Khan, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, D.P.G.

Spl. Crl. Anti-Terrorism Appeal No.D-143 of 2018

Appellant	Muhammad Ashraf son of Muhammad Anwar through Mr. Abdul Razzak, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, D.P.G.
Dates of hearing	12.08.2020, 25.08.2020 & 02.09.2020
Date of detailed reasons	10.09.2020

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JUDGMENT

Shamsuddin Abbasi, J:- Through captioned appeals, appellants Sheeraz Khan and Muhammad Ashraf have challenged the vires of the judgment dated 09.01.2018, handed down by Anti-Terrorism Court No.V, Karachi, in Special Case No.199 of 2015, arising out of FIR No.386 of 2014 registered at Police Site-A, District {West}, Karachi, for the offences punishable under Sections 324, 392, 302 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, through which they were convicted for offence under Section 302/34, PPC read with Section 7{i}{a} of Anti-Terrorism Act, 1997, and sentenced to undergo life imprisonment for committing murder of deceased Abdul Hameed with fine of Rs.50,000/- {Rupees fifty thousand} each and in default whereof they were ordered to suffer simple imprisonment for six months more. The appellants were also ordered to pay compensation of Rs.50,000/- (Rupees fifty thousand) each to the heirs of deceased Abdul Hameed, however, benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the appellants.

2. FIR in this case has been lodged on 09.08.2014 at 1650 hours whereas the incident is shown to have taken place on the same day at 2015 hours. Complainant Muhammad Ahmed Khan son of Khan Bahadur has stated that he is retired from SSG Pakistan Army and his elder brother, Abdul Hameed, aged about 40 years is serving in SSU Department of Police, who on the fateful day went to his duty on his motorcycle bearing Registration No.GAG-5477 Honda-125 while he was present in his house, meanwhile he received information through phone that his brother has become injured at Metrovill Chowk, SITE, Karachi, due to firing of unknown persons, who has been shifted to Abbasi Shaheed Hospital. He immediately rushed there where his younger brother Nadeem Iqbal was already present while his elder brother Abdul Hameed was under treatment in emergency, who sustained injuries on left side of abdomen and right shoulder and the bullet passed through and through from shoulder and the other one lying in his abdomen and the doctors informed that his brother has been shifted in Aga Khan Hospital, where he is under treatment in operation theater. The complainant has further stated that while his brother was conscious in Abbasi Shaheed Hospital, he disclosed that it was about 1650 hours when he reached at Main Metrovill Chowk he was stopped by two young boys boarded on motorcycle, out of them one was having light beard, and after verifying that he belongs to police the person having light beard took out pistol and fired two shots on him with intention to kill whereupon he sustained injuries and fell down on the ground and then shifted to Abbasi Shaheed Hospital by ambulance.

3. On receipt of injured Abdul Hameed, MLO Abbasi Shaheed Hospital informed P.S. Site-A and in response thereto SIP Muhammad Masood went to Abbasi Shaheed Hospital where he was informed that injured has been shifted to Aga Khan Hospital, therefore, he went to Aga Khan Hospital and sought permission in writing to record 154, Cr.P.C. statement of injured but the Doctors informed him that injured is not fit to record his statement so he recorded statement under Section 154, Cr.P.C. of Muhammad Ahmed Khan, brother of injured Abdul Hameed, and then came back at P.S. and incorporated the statement in FIR book, whereby a case under Sections 324, 392 & 34, PPC read with Section 7 of Anti-Terrorism

Act, 1997 was registered on behalf of the State vide Crime No.386 of 2014.

4. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Islam Gul, who inspected the place of occurrence and prepared Naqsha-e-Nazri on the same day and on 10.08.2014 he came to know that injured Abdul Hameed has expired as such he reached Aga Khan Hospital and obtained certificate and then shifted the dead body to Edhi Cold Storage and also prepared memo of inspection of dead body and inquest report. He also recorded the statements under Section 161, Cr.P.C. of witnesses and on the same day one Asad Khan son of Waris Khan appeared at P.S. claiming himself to be eye witness of the incident so he recorded his 161, Cr.P.C. statement and on 11.08.2014 he sent the empty secured from the place of incident to FSL and on the same day brother of deceased produced blood-stained shirt of deceased, which was sealed and sent to chemical examiner. On 28.08.2014 SIP Muhammad Siddique of P.S. Garden informed him about the arrest of two accused in different crimes so he went to P.S. Nabi Bux and arrested them in this crime after they confessed the commission of present crime during interrogation. On 07.09.2014 the accused voluntarily led the police and pointed out the place of incident and on 09.09.2014 they were produced before Judicial Magistrate for holding of identification parade where eye-witness Asad Khan correctly picked and identified them as same on 10.09.2014. He also sent the pistol recovered from the possession of accused Sheeraz by P.S. Garden to FSL and after examination it was found to be of deceased Abdul Hameed and after completing usual investigation, the challan was submitted before the Court of competent jurisdiction by adding Section 302, PPC, whereby the appellants were sent-up to face the trial while accused Jawad @ Javaid and Zeeshan were shown as absconders.

5. A charge in respect of offences punishable under Sections 324, 392, 302 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, was framed at Ex.1 to which they pleaded not guilty and claimed to be tried.

6. At trial, the prosecution has examined as many as eleven witnesses namely, complainant Muhammad Ahmed Khan as PW.1 at Ex.2, Mushtaque Ahmed {brother of deceased} as PW.2 at Ex.3, SIP Muhammad Masood as PW.3 at Ex.4, Muhammad Hanif {cousin of deceased} as PW.4 at Ex.5, Nadeem Iqbal {brother of deceased} as PW.5 at Ex.7, Mr. Sohail Ahmed {Senior Civil Judge} as PW.6 at Ex.8, Asad Khan {eye-witness} as PW.7 at Ex.9, MLO Dr. Proshetam as PW.8 at Ex.11, ASI Rasool Bux as PW.9 at Ex.12, ASI Muhammad Zahir Shah as PW.10 at Ex.14, Inspector Islam Gul {investigating officer} as PW.11 at Ex.16. They have exhibited number of documents in evidence. Vide statement Ex.17 the prosecution closed its side of evidence.

7. Statements under Section 342, Cr.P.C. of appellants Sheeraz Khan and Muhammad Ashraf were recorded at Exs.18 and 19 respectively, wherein they denied the commission of offence and professed their innocence. They opted not to examine any witness in their defence but stepped in witness box while recording their statements on oath under Section 340{2), Cr.P.C. at Exs.21 and 22 respectively.

8. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties as well as assessment of evidence on record, convicted the appellants as detailed in para-1 {supra} vide judgment dated 09.01.2018, impugned herein. Feeling aggrieved by the convictions and sentences, referred herein above, the appellants have preferred the captioned appeals.

9. Since both appeals are outcome of a common judgment, therefore, we deem it appropriate to decide the same together through a single judgment.

10. The relevant facts as well as evidence produced before the learned trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

11. It is jointly contended on behalf of the appellants that they are innocent and have been false implicated in this case with malafide intention and ulterior motives. It is next submitted that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt. Nothing was snatched by the appellants from deceased and the alleged recovery of pistols is foisted upon them. It is also submitted that the appellants have been acquitted by the learned trial Court in the cases of recovery of unlicensed pistols. The occurrence has taken place at 1650 hours and the FIR has been lodged at 2015 hours after the delay of about three hours and thirty five minutes. Nothing incriminating has been recovered from the possession of appellants and the prosecution has failed to prove the motive behind the offence. The presence of alleged eye-witness Asad Khan at the scene of offence is doubtful. The appellants have been shown arrested on 28.08.2014 and the alleged identification parade has been held on 10.09.2014 after the delay of about 13 days, which has lost its sanctity. The learned trial Court has based conviction solely on the identification parade held before a Magistrate through eye witness Asad Khan but on the same set of evidence acquitted co-accused Jawad @ Javaid, who at the time of trial against present appellants was absconding and later on arrested against whom supplementary charged sheet was filed on 21.09.2017 whereby the matter was proceeded vide Special Case No.199-A of 2017 and after a full dressed trial he was acquitted of the charge vide judgment dated 25.09.2018. It is further submitted that postmortem of deceased has not been not conducted as such cause of death of the deceased remained shrouded in mystery. It is also submitted that witnesses have made dishonest improvements in order to bring the case in line with medical evidence. The prosecution has failed to produce any independent witness in support of its case and the witnesses who have been examined are inimical to the appellants being closely related to deceased as such no reliance can be given to their testimony without independent corroboration. The conviction and sentence recorded by the learned trial Court is bad in law and facts and without application of a judicial mind to the facts and surrounding circumstances of the case. The matter needs sympathetic consideration with regard to innocence of the appellants

particularly when no incriminating evidence has been brought on record against them and they are facing the charges of capital punishment. The learned trial Court has not properly evaluated the evidence brought on record as well the contradictions and discrepancies on material aspects of the matter which has demolished the whole case of the prosecution. The learned counsel while summing up their submissions have prayed that the prosecution has miserably failed to prove the guilt of the appellants and, thus, according to them, under the abovementioned facts and circumstances of the case the impugned judgment is liable to be set-aside and the appellants deserve acquittal by extending them the benefit of doubt. Reliance has been placed on the case of *Mst. Sughra Begum and another v Qaiser Pervez and others* {2015 SCMR 1142}.

12. In contra, the learned DPG has argued that prosecution has successfully proved its case against the appellants. The story set-forth in the FIR is natural and believable. According to the case of prosecution, Abdul Hameed {deceased} while in the way to his duty was stopped by appellants and after verifying that he belongs to police department they committed his murder by firing upon him as such motive behind murder stands proved. The ocular account furnished by the prosecution has been corroborated by medical evidence. The pistol belonging to deceased has been recovered from the possession of appellant Sheeraz while 30 bore TT pistol has been recovered from appellant Muhammad Ashraf. The witnesses in their respective statements have supported the case of the prosecution and implicated the appellants with the commission of offence and mere relationship is not sufficient to discard their evidence. The eye-witness Asad Khan has identified the appellants in identification parade as well as before the trial Court. He submitted that factum of Qatl-i-Amd has been established through strong evidence and mere fact that postmortem was not conducted is of no legal consequence. Lastly submitted that the impugned judgment is based on fair evaluation of evidence and no interference is called-for. He, therefore, prayed for dismissal of appeals. In support of his submissions, he placed reliance on the cases of *Muhammad Aftab Siddiqui v SHO Shah Faisal Colony Police Station* {2006 MLD 320}, *Abdul Sattar and another v The State* {1981

SCMR 678} and *Lal Pasand v The State* {PLD 1981 Supreme Court 142}.

13. We have given anxious consideration to the submissions of learned counsel for the appellants and the learned DPG for the State and scanned the entire material available before us with their able assistance.

14. Insofar as the unnatural death of deceased Abdul Hameed is concerned, MLO Dr. Proshetam {Ex.11} has deposed that on 09.08.2014 he was Senior Medical Legal Officer at Abbasi Shaheed Hospital. It was about 5.30 pm injured ASI Hameed, aged about 40 years, was brought by one Babar in Ambulance of AMN Foundation with history of firearm injuries over left hypo chondrium and medial side of right shoulder. He examined him and issued Medico Legal Certificate {Ex.11/A} and deposed that injured was semi-conscious and was taken to Aga Khan Hospital by his parents. He was subjected to cross-examination by the defence counsel.

15. As regards the contention of the learned defence counsel that postmortem examination of the deceased was not conducted, the factum of Qatl-i-Amd of Abdul Hameed has been independently established through strong and convincing evidence by Dr. Proshetam, who had examined the deceased and issued Medico Legal Certificate showing nature of injuries and use of firearm. Mere fact that postmortem examination was not conducted has no material effect or legal consequences for the reason that deceased had sustained two firearm injuries over left hypo chondrium and medial side of right shoulder, hence in view of this background of the matter non-performance of postmortem would not be fatal to the prosecution case as held by the Hon'ble Supreme Court in the case of *Abdul Rehman v The State* {1998 SCMR 1778}. We, therefore, are in agreement with the learned trial Court that deceased Abdul Hameed died his unnatural death in result of firearm injuries as described by Medical Officer.

16. The learned trial Court has based conviction of the appellants on the sole testimony of Asad Khan {PW.7 Ex.9}, who is said to be

eye-witness of the incident and has identified the appellants in the identification parade held before a Magistrate. As per prosecution case itself the appellants were put to a test of identification after 13th day of their arrest. Though the appellants were correctly identified by eye-witness Asad Khan, but the memo of identification parade {Ex.8/B} reveals that the appellants were identified without any reference to the role allegedly played by them during the occurrence due to which the identification parade has lost its value. Reliance may well be made to the case of *Sabir Ali alias Fauji v The State* {2011 SCMR 563}, wherein the Hon'ble Supreme Court held as follows:-

> *"It is also settled principle of law that role of the accused was not described by the witnesses at the time of identification parade which is always considered inherent defect, therefore, such identification parade lost its value and cannot be relied upon".*

17. Furthermore, as mentioned above, the identification parade has been held after 13 days of the arrest of appellants and in such a situation, possibility of the witness having seen the appellants prior to the identification conducted before Judicial Magistrate cannot be ruled out. Reference may well be made to the case of *Nazeer Ahmed v Muhammad Iqbal and another* {2011 SCMR 527}, wherein it has been held that:-

> *"Identification parade having been conducted after 24 days of the arrest of the accused, possibility of the witnesses having seen them could not be excluded".*

18. The prosecution has also maintained that PW Asad Khan while recording his evidence before the trial Court has correctly identified the appellants. The Hon'ble Apex Court has repeatedly held that identification of a culprit before the trial Court during the trial is generally unsafe because the prosecution witnesses get many opportunities to see the accused before the trial Court on many previous occasions before making their depositions. Thus, such identification of the appellants has also failed to inspire our confidence.

19. Needles to mention here that the prosecution primarily is bound to establish guilt against the accused beyond shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence and if Court comes to the conclusion that the charges so imputed against the accused have not been proved beyond reasonable doubt, then the accused must be acquitted of the charge. According to the prosecution case itself PW Asad Khan is a chance witness, he has not properly explained his presence at the scene of offence. In his cross-examination, PW Asad Khan has admitted that he belongs to KPK Province and working in a garments factory and on the fateful day while he was returning home from his factory and was standing at a fruit thela when the incident occurred within his sight. His claim that he was present at the crime spot on the fateful time is without any evidence. His presence there was a sheer chance as in the ordinary course of business, his place of residence and normal course of events, he was not supposed to be present on the spot keeping in view the place where he resides, it is in this context that the testimony of a chance witness ordinary is not accepted unless justifiable reasons are shown to establish his presence on the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime scene. True that in rare cases, the testimony of a chance witness may be relied upon, provided that some convincing explanation appealing to the prudent mind for his presence on the crime spot is established, otherwise his testimony would fall within the category of suspected evidence. It has been claimed that PW Asad Khan was working in Rehman Garments at Khattak Chowk and residing at Metrovill; regarding both the places, no proof has been filed. In this context, we have taken guidance from the case of *Muhammad Ali v the State* {2017 SCMR 1468), where it has been held as under:-

> *"Both the said related eye witnesses were also chance witnesses as both of them lived about three miles away from the scene of the crime".*

Likewise, in the case of *Mst. Anwar Begum v Akhtar Hussain alias Kaka* {2017 SCMR-1710}, the Hon'ble Supreme Court has held as follows:-

> *"It is well settled by now that in order to maintain conviction of a convict on capital charge on the basis of testimony of chance witnesses the court has to be a guard*

> *and corroboration is to be sought for relying upon any such evidence. But no corroboration is available in this case as per contention of FIR".*

20. Apart from above, we have noticed material contradictions in the statements of eye-witness Asad Khan and investigating officer Inspector Islam Gul. The investigating officer has deposed that on the day of incident eye-witness Asad Khan appeared at police station and disclosed the facts of the incident and he recorded his statement under Section 161, Cr.P.C. on the same day whereas in his examination-in-chief eye-witness Asad Khan has deposed that he went to police station for recording his 161, Cr.P.C. statement on 10.08.2014. But he deviated from this version and stated in cross-examination that he appeared before investigating officer after one month of the incident for said purpose. This aspect of the matter has caused serious dent to the prosecution case viz-a-viz evidence of this witness.

21. We have taken note of the fact that while proceeding with the case of co-accused Jawad @ Javaid, who at the time of trial against present appellants was absconding and later on arrested, the learned trial Judge acquitted him of the charge by extending him the benefit of doubt though he was correctly picked and identified by eye-witness Asad Khan in a test of identification held before a Magistrate with a specific role of causing fire-arm injuries to deceased Abdul Hameed. Whereas in the case of present appellants though they were identified by eye-witness Asad Khan in identification parade, but he has not assigned any specific role to them, yet learned trial Judge has convicted the appellants on the testimony of same eye-witness, who has not assigned any specific role to them in identification parade, by observing that eye-witness while identifying him in a test of identification attributed him specific role of causing fire-arm injuries to deceased, but did not depose so while recording his evidence at trial. Such an observation of the learned trial Judge is not based on valid and cogent reason. Besides, the acquittal order of co-accused Jawad @ Javed has not been challenged in appeal and the same has attained finality and this fact has been admitted by the learned DPG.

22. Admittedly, complainant Muhammad Ahmed Khan {PW.1 Ex.2} and PWs Mushtaque Ahmed {PW.2 Ex.3} and Nadeem Iqbal

{PW.5 Ex.7} are brothers of deceased while PW Muhammad Hanif {PW.4 Ex.5} is his cousin. It is significant to note that the incident has taken place in a thickly populated area but intriguingly no independent witness has been produced by the prosecution to provide an independent support to the evidence of complainant and other PWs, who according to the learned defence counsel are interested witnesses being closely related to complainant party. All this shows that the case of the prosecution has been presented by related, interested and chance witnesses who all remained unable to bring the guilt of the appellant home rather they miserably failed to justify truthfulness of their depositions before the learned trial Court.

23. Insofar as the contention of learned D.P.G. that recovery of 9 MM pistol belonging to deceased Abdul Hameed from the possession of appellant Sheeraz Khan and 30 bore TT pistol from the possession of appellant Muhammad Ashraf fully established the involvement of the appellants in the commission of murder of deceased. Record reflects that appellants Sheeraz Khan and Muhammad Ashraf have been acquitted in the cases of recovery of unlicensed arms by the Court of competent jurisdiction. Such orders of acquittal have neither been assailed by the complainant or the State as admitted by the learned DPG as such their acquittal has attained finality. It is important to note that the recovered pistols have not been sent to FSL so as to ascertain that the empty secured from the place of incident was fired from the same pistols. Hence, in view of this background of the matter a strong corroborative piece of evidence has been withheld by the prosecution without furnishing a plausible explanation. This fact, thus, caused a big dent to the prosecution case and benefit thereof must go to the appellants. Even otherwise, it is a settled by now that the recovery of empties etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material put-forward by the prosecution in respect of guilt of the appellant has been disbelieved. It has been affirmed by the Hon'ble Supreme Court in case cited as 2001 SCMR 424 *{Imran Ashraf and 7 others v The State}* in the following manner:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other judgment is needed on the same analogy, reference can be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* reported as 2007 SCMR 1427, wherein the relevant citation (c) enunciates:

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

24. It is a cardinal principle of administration of criminal justice that prosecution is bound to prove its case against accused beyond shadow of any doubt. If any reasonable doubt arises in the prosecution case, the benefit thereof must be extended to the accused not as a matter of grace or concession but as a matter of right. Likewise, it is also well-embedded principle of criminal justice that there is no need of so many doubts in the prosecution case rather any reasonable doubt arising out from the prosecution evidence, pricking the judicious mind, is sufficient for acquittal of the accused. Rule for giving benefit of doubt to an accused has been laid down by the Hon'ble Supreme Court in the case of *Muhammad Mansha v. The State (2018 SCMR 772)* wherein it has been ruled as under:-

> *"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made in the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."*

25. The final and eventual outcome of the entire discussion is that the prosecution has failed to discharge its onus of proving the guilt of the appellants beyond shadow of reasonable doubt. Accordingly, by our short order dated 02.09.2020 we had allowed the captioned appeals, set-aside the conviction and sentence recorded by the learned trial Court vide judgment dated 09.01.2018, acquitted the appellants of the charge by extending them the benefit of doubt and ordered their release from jail forthwith if not required to be detained in connection with any other case and these are the reasons thereof.

JUDGE

JUDGE

Naeem