HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

Cr. Appeal No.S-102 of 2020

[*Gulab versus The State*]

DATE	ORDER WITH SIGNATURE OF JUDGE
Appellant:	Through Mr. Ali Ahmed Zaman, advocate
State:	Through Ms. Rameshan Oad, APG
Complainant:	None present
Date of hearing:	25.09.2020
Date of Decision:	25.09.2020

JUDGMENT

ABDUL MAALIK GADDI, J:- Through this Appeal the appellant has called into question the legality and propriety of the impugned judgment dated 13.03.2020, penned down by learned Ist Additional Sessions Judge, Tando Muhammad Khan in Sessions Case No.17 of 2019 (***Re: The State versus Hakim & Other***s) arisen out of Crime No.65 of 2019 registered with PS Tando Muhammad Khan for offences punishable under Section 324, 114, 337-A(ii) & 34 PPC, whereby, the learned Trial Court after full dressed trial convicted and sentenced the appellant as stated in point No.2 of the impugned judgment. For the sake of convenience point No.2 of the impugned judgment is reproduced below:

POINT NO.2

> *"In view of reasons given in point No.1, the accused 01. Hakim S/o Muhammad Siddique Vighamal, 02. Muhammad Hassan S/o Essa Vighamal, 03 Mithan S/o Muhammad Hassan Vighamal are hereby acquitted from alleged charge under section 365-H(i) Cr.P.C. whereas accused Gulab S/o Muhammad Siddique is hereby convicted u/s 265-H-ii Cr.P.C and he is given sentence for six months u/s 324, 114, 337A-i, 34 PPC and Daman of Rs.20,000 to be paid by him to the complainant Mir Hassan/ injured. If he fail to pay the same within two months of this judgment, he shall be serve more three months in same Jail. The accused Gulab S/o Muhammad Siddique is present on bail, he is taken in custody and remanded to Central Prison Hyderabad to serve the awarded sentence. The accused Hakim S/o Muhammad Siddique, Muhammad Hassan S/o Essa and Mithan S/o Muhammad Hassan are present on bail, their bail bond are cancelled and surety discharged. Surety of convicted accused Gulab also be returned to his surety."*

2. Brief facts of the prosecution case, according to FIR, are that complainant/injured used to run Hotel situated in front of Noonari Patrol Pump Tando Muhammad Khan and he has enmity with accused party. On 25.02.2019, he was present at his hotel alongwith his sons and some other laborers, when at about 2330 hours a white coloured Mehran car came at the hotel, which was driving by accused Hakim S/o Muhammad Siddique Vighamal and other three persons also alighted from said car namely (1) Muhammad Hassan S/o Essa Vighamal having lathi in his hand, (2) Gulab (present appellant) S/o Siddique Vighamal having hatchet in his hand and (3) Mithan S/o Muhammad Hassan Vighamal having lathi in his hand, who said the complainant/injured that since you are not withdrawing as witness in a criminal case pending against them in the Court of law, therefore, we will kill you today; hence on instigation of accused Muhammad Hassan and Mitho accused Gulab (present appellant) caused his hatchet below at the head of complainant/injured with intention to kill him, who fell down and blooding started oozing from him; finally accused party escaped away from the place of incident, hence present FIR.

3. After usual investigation police submitted the final challan. Then after supplying copies to accused charge was framed against them at Ex.10, to which they pleaded not guilty and claimed trial.

4. In order to prove the case the prosecution has examined as many as seven witnesses, who produced certain documents at Ex-11 to 18/C. Then prosecution closed its side at Ex.-19. Statements of accused persons u/s 342 Cr.PC were recorded at Ex. 20 to 23, wherein they denied the allegations leveled against them and claimed their false implication. However, neither they examined themselves on Oath nor produced any witness in their defence. Thereafter, learned Trial Court after hearing the arguments of learned counsel for parties convicted and sentenced the present appellant, as stated supra, hence present appeal.

5. Learned counsel for the appellant contended that appellant is innocent and he has been falsely implicated in present case due to enmity with the complainant party; that there is a delay of about 18 days in registration of FIR without any explanation; which could be presumed to be the result of deliberation; that all the private witnesses are close relatives to each other, hence false implication of appellant cannot be ruled out; that there are major and apparent contradictions in the

statements of witness and complainant; that co-accused have been acquitted on the same set of evidence, therefore, appellant is also entitled for same relief. He lastly prayed that instant appeal may be allowed and appellant may be acquitted of the charge.

6. In contra, Ms. Rameshan Oad, learned Assistant Prosecutor General Sindh while supporting the impugned judgment submits that present appellant is nominated in FIR with specific role and the prosecution has fully established its case against the appellant beyond any reasonable doubt by producing consistent/convincing and reliable evidence and the impugned conviction and sentence awarded to the appellant is the result of proper appreciation of evidence brought on record, which needs no interference by this Court. Lastly she prayed that instant appeal may be dismissed and conviction may be maintained.

7. I have given my anxious thoughts to the contention raised at the bar and have also gone through the case papers so made available before me.

8. From the perusal of record it appears that though the appellant is nominated in FIR with specific role, yet the prosecution witnesses has not supported the version of complainant and there are material discrepancies and contradictions in between their statements. I have gone through the statements of prosecution witnesses and complainant/injured. Complainant in his statement deposed that when he received the injury about 20/25 persons arrived at his hotel, however, his this statement has been contradicted by his sons PW Aziz and Waseem, who deposed that no person arrived at their hotel soon after this incident. It is also noted that on one hand complainant deposed that he was caused injury by the accused persons as he was witness in a murder case, however, on the other hand he himself admitted in cross-examination that said murder case has been compromised between the parties. Now question is that if the parties had already compromised the said murder case, then why accused persons wanted to restrain the complainant from becoming witness in said case. It is also noted that complainant himself stated during his examination-in-chief that after receiving injury he became unconscious, however, while cross-examination he stated that he himself got registered the NC at PS. Statement of complainant to the extent of becoming unconscious after receiving injury has also been affirmed by his sons PW Aziz and Nazeem, who deposed that after receiving injury their

father was in unconscious condition when he was brought at PS and came in his senses at Hospital. Now question again arises that since the complainant admittedly was unconscious due to alleged injury, then how he himself got registered the NC at PS. It is further noted that son of complainant PW Aziz during his cross-examination deposed that his father was not in good terms with accused party due to above said compromise in murder case; this statement has further been affirmed by another son of complainant PW Waseem, who in his cross-examination deposed that his father is still annoyed with accused party due to aforesaid compromise.

9. The above minute scrutiny of the record and evidence clearly depicts that the prosecution case against the appellant is of highly doubtful nature and his conviction and sentence on the basis of such type of shaky, undependable and untrustworthy evidence cannot be maintained. It is well settled law that not many circumstances creating doubt in the prosecution story are required but only a single circumstance creating doubt in the prosecution story is enough to acquit the accused. Reliance is placed on the case of "*Tariq Pervez versus The State*" (1995 SCMR 1345). The case in hand is replete with number of circumstances which have created serious doubt about the prosecution story. It is also universally recognized principle of law that conviction can only be based upon unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused not as a matter of grace, but of right. It is also noted that the place of alleged incident is situated at a thickly populated area and the complainant himself stated in his statement that about 20/25 persons gathered over there when alleged incident took place, yet the prosecution had not examined any independent witness and all the private prosecution witnesses are sons of the complainant, hence false implication of appellant, due to admitted enmity, cannot be ruled out. Reliance can be placed on the reported cases *of "SAEED AHMAD versus MUHAMMAD NAWAZ and others"* (2012 SCMR 89) & "*MUHAMMAD ZAHIR and another versus SHAH SAEED and 2 others"* (2016 P Cr.L.J 1821).

10. Insofar as medical evidence is concerned, it is by now well settled law that medical evidence may confirm the ocular evidence with regard to the seat of injuries, nature of the injuries, kind of weapon used in the occurrence, but it would not connect the accused with the commission of

the offence. Reference in this respect may be made to the case of "*Muhammad Tasaweer versus Hafiz Zulkarnain and 2 others*" (PLD 2009 SC 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "*Mursal Kazmi alias Qamar Shah and another versus The State*" (2009 SCMR 1410) and "*Altaf Hussain versus Fakhar Hussain and another*" (2008 SCMR 1103).

11. It is also noted that though the similar motive is alleged against all the accused, but the co-accused have been acquitted by the learned Trial Court for the reasons that case against them has not been proved and no appeal against their acquittal has been preferred either by the State or by the complainant, as confirmed by the learned APG, as such, the said acquittal has attained finality, therefore, the question for determination, before this Court, is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellant can be believed against the appellant. In this regard, I am guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as "*Iftikhar Hussain and another Vs. State*" (P Cr. L.J 2004 SC 552), wherein the Hon'ble Supreme Court at page 562 held as under:--

> "*17. …It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others Vs. The State (2000 SCMR 1758), relevant para therefrom is reproduced below:-*"
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> > *The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be*

applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaram Mollah and others (PLD 1962 SC 502). Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Zainullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)." Similar view was reiterated in the subsequent judgment of the Hon''ble Supreme Court of Pakistan reported as Akhtar Ali and others Vs. The State (2008 SCMR 6).

12. For what has been discussed above, I am of the view that prosecution case is full of doubt and it has failed to prove the case against present appellant through an independent corroboration on material particulars, as has been held by the Hon'ble Apex Court (supra), hence the impugned judgment dated 13.03.2020, to the extent of present appellant only, cannot sustain in the eyes of law. Accordingly, the instant appeal is ***allowed***; resultantly the conviction and sentence awarded to the appellant through impugned judgment dated 13.03.2020 in the subject crime is set aside and the appellant, who is present on bail granted by Trial Court under Section 382-A Cr.PC is acquitted of the charge. Consequently surety furnished by the appellant in present crime, if any, stands discharged.

JUDGE

Sajjad Ali Jessar