

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No.S -35 of 2012

Appellants: Allahditto alias Dito son of Shafi Muhammad Khoso,
Through Mr. Wazir Hussain Khoso Advocate

Complainant: Hussain Bux Through Mr. Rana Sohail Mahmood,
advocate.

Respondent: The State, through Mr. Shahzado Saleem Nahiyoan,
D.P.G.

Date of hearing: 16-11-2020.

Date of decision: 16-11-2020.

JUDGMENT

IRSHAD ALI SHAH, J: The appellant by way of instant appeal has impugned judgment dated 08.02.2012 passed by learned Sessions Judge, Umerkot whereby the appellant for an offence punishable u/s 302(b) PPC was convicted and sentenced to undergo rigorous Imprisonment for life and to pay fine of Rs. 100,000/=, half of the fine, if realized was ordered to be paid to the legal heirs of deceased Mumtaz Ali. The benefit of section 382-B Cr.P.C however was extended to the appellant.

2. The facts in brief necessary for disposal of instant Criminal Appeal are that the appellant and co-accused Zulfiqar Ali in furtherance of their common intention allegedly committed qatl-i-amd of Mumtaz Ali by causing him fire shot injuries, for that they were booked and reported upon by the police.

3. At trial, the appellant and co-accused Zulfiqar Ali did not plead guilty to the charge and the prosecution to prove it, examined complainant Hussain Bux and his witnesses and then closed its side.

4. The appellant and co-accused Zulfiqar Ali in their statements recorded u/s 342 Cr.P.C denied the prosecutions' allegation by pleading innocence, they did not examine themselves on oath or anyone in their defence.

5. On conclusion of the trial, learned trial Court acquitted co-accused Zulfiqar Ali, while convicted and sentenced the appellant as is detailed above by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in order to satisfy its matrimonial dispute with him; and on the basis of same evidence co-accused Zulfiqar Ali has been acquitted while the appellant has been convicted by learned Trial Court. By contending so, he sought for acquittal of the appellant.

7. It is contended by learned DPG for the State and learned counsel for the complainant that the appellant has committed qatl-i-amd of Mumtaz Ali by causing him fire shots injuries and on arrest from him has been secured the incriminating pistol which has been found similar with the empties secured from the place of incident and his case is distinguishable to that of co-accused Zulfiqar Ali. By contending so, they sought for dismissal of instant appeal.

8. I have considered the above arguments and perused the record.

9. Admittedly, the complainant and PW Tarique Ali are not eye witness of the incident as such their evidence could safely be

excluded from consideration. PW Ghulam Mustafa has claimed to be an eye witness of the incident but his 161 Cr.P.C statement admittedly has been recorded with delay of about seven days to F.I.R, such delay has not been explained plausibly by the prosecution, therefore, his evidence could hardly be relied upon.

10. *In case of Abdul Khaliq vs. the State (1996 SCMR 1553), it was observed by Hon'ble Court that;*

"---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained."

11. Only thing which apparently prevailed with the learned Trial Court to connect the appellant with the commission of incident is recovery of incriminating pistol from him, same obviously has been recovered from the appellant on 11th day of his arrest, therefore, such recovery could safely be judged with doubt. Be that as it may, the alleged pistol has been subjected to chemical examination with further delay of four days to its recovery, such delay having not been explained plausibly could not be overlooked. More so, the appellant it is said has already been acquitted in Arms Ordinance case by the Court having jurisdiction. In that situation, it would be unjustified to maintain the conviction against the appellant only on the basis of recovery of incriminating pistol, which is doubtful in its character.

12. There is no denial to the fact that on the basis of same evidence co-accused Zulfiqar Ali has been acquitted by the learned Trial Court, who as per PW Tarique in his 164 Cr.P.C statement was equally responsible for committing murder of deceased Mumtaz Ali.

13. In case of ***Sardar Bibi and others vs. Munir Ahmed and others (2017 SCMR-344)***, it was held by the Hon'ble Apex Court that;

“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused”.

14. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and appellant is found to be entitled to such benefit.

15. In case of **Tariq Pervaiz vs the State (1995 SCMR 1345)**. It has been held by the Hon'ble Supreme Court that:-

“For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of accused, then he would be entitled to such benefit not as a matter of grace and concession but of right.”

16. Pursuant to above discussion, the conviction and sentence recorded against the appellant are set-aside; consequently, the appellant is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court, he is present on bail his bail bond is cancelled and surety is discharged.

17. Instant criminal appeal is disposed of accordingly.

Judge