

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No.S – 166 of 2017

Appellant: Wali Mohammad son of Sain Bux Waswano,
2) Zulfiqar son of Wali Mohammad Waswano,
3) Ghulam Mustafa son of Loung Waswano (now
has died) and 4) Aijaz son of Ghulam Mustafa
Waswano through Mr. Ahsan Gul Dahri,
Advocate.

Respondent: The State, through Ms. Rameshan Oad, A.P.G.

Mr. Mushtaque Hussain Khaskheli, Advocate on
behalf of mother of the deceased namely
Mst.Sakeena Khatoon.

Date of hearing: 13-01-2021.

Date of decision: 13-01-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The appellants together with Ghulam
Mustafa (now has died) have impugned judgment dated
12.07.2017 passed by learned 4th Additional Sessions Judge,
Shaheed Benazirabad, whereby they have been convicted and
sentenced as under;

*“U/S 302(b) PPC have been convicted and
sentenced to undergo Rigorous Imprisonment for
Life and to pay compensation of Rs.50,000/each
to the legal heirs of deceased Gul Hassan alias
Gudoo.*

*U/S 342 PPC, have been convicted and sentenced
to under Rigorous Imprisonment for Six month.”*

2. The conviction and sentence awarded to the
appellants have been ordered to run concurrently with benefit of
section 382-B Cr.P.C.

3. The facts in brief necessary for disposal of instant appeal are that the appellants together with Ghulam Mustafa (now has died) and absconding accused Aslam took by force deceased Gul Hassan alias Gudoo and PWs Ali Gul and Rab Nawaz, kept them under wrongful restraint and then committed murder of Gul Hassan alias Gudoo by cutting his throat with a dagger, for that they were booked and reported upon.

4. At trial, the appellants together with Ghulam Mustafa (now has died) did not plead guilty to the charge and the prosecution to prove it, examined complainant Ghulam Rasool and his witnesses and then closed its side.

5. The appellants together with Ghulam Mustafa (now has died) in their statements recorded u/s 342 Cr.P.C denied the prosecutions' allegation by pleading innocence by inter-alia stating that they have been involved in this case falsely by the complainant party on account of previous enmity; the deceased was having a criminal record; it was unseen incident and was reported in daily news paper "Kawish". They however, did not examine anyone in their defence or themselves on oath.

6. On evaluation of evidence so produced by the prosecution learned trial Court convicted and sentenced the appellants together with Ghulam Mustafa who (now has died) by way of impugned judgment.

7. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party only to satisfy its old enmity with them; the FIR has been lodged with delay of about one day; it was unseen incident and such report was published in daily newspaper "*Kawish*"; the evidence of the prosecution being doubtful has been believed by learned trial Court without lawful justification; therefore, the appellants are liable to their acquittal on point of doubt. In support of his contention he has relied upon cases of *Ishtiaq Masih vs The State (2010 SCMR 1039)*, *Faisal Mehmood vs The State (2016 SCMR 2138)*, *Muhammad Jamil vs Muhammad Akram and others (2009 SCMR 120)*, *Mst. Sughra Begum and another vs Qaiser Pervez and others (2015 SCMR 1142)*, *Nadeem alias Kala vs The State and others (2018 SCMR 153)*, *Muhammad Asif vs the State (2017 SCMR 486)*, *Muhammad Rafique alias Feeqa vs The State (2019 SCMR 1068)*, *Shahid Abbas vs Shahbaz and others (2009 SCMR 237)* and *Imtiaz alias Taj vs the State and others (2018 SCMR 344)*.

8. Learned APG for the State and learned counsel for the legal heirs of the deceased by supporting the impugned judgment have sought for the dismissal of the instant appeal by contending that they have actively participated in commission of incident.

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

10. The incident initially was reported at P.S Daur by PW Shahban. It was recorded by SIO/ASI Raza Muhammad under Roznamcha entry No.12 dated 29.01.2015. It was stated therein by PWs Shahban that Wali Muhammad and others have committed murder of his brother Gul Hassan alias Gudoo. PW Shahban as per SIO/ASI Raza Muhammad never turned up to lodge formal report of the incident despite request so made to him in that respect, which appears to be significant. On the next date of incident there came at P.S Daur Ghulam Rasool and he lodged report of the incident with narration that the deceased, PWs Ali Gul and Rab Nawaz were taken by the appellants and absconding accused by force, they kept them under wrongful restraint and then they committed murder of deceased Gul Muhammad alias Gudoo by cutting his throat. Specific role of cutting throat of the deceased was attributed to appellant Zulfiqar while rest of the appellants were involved in the incident on the basis of vicarious liability. The complainant is not an eye witness of the incident and as per him he lodged FIR of the incident after consultation with the notables of his community. The FIR which is lodged with unexplained delay of one day that too after consultation with the notables could hardly be relied upon. Be that as it may, PW Shohban being very

important witness has not been examined by the prosecution for no obvious reason. The presumption which could be drawn of his non-examination would be that he was not going to support the case of the prosecution. It was stated by PWs Ali Gul and Rab Nawaz that they and the deceased were taken by the appellants and absconding accused by force. No resistance was offered by them nor anyone from neighborhood followed them, which appears to be surprising. PW Ali Gul was fair enough to admit that his 161 Cr.P.C statement was recorded by police before lodging FIR. The recording of 161 Cr.P.C statement of the witness even before the lodgment of formal FIR is contrary to law. It was a night time of incident. When asked about the identity of the culprits, it was stated by PW Ali Gul that the appellants were identified by him through their voice. The identity of the appellants and others through their voice is appearing to be a weak piece of evidence. PW Rab Nawaz was not able to disclose as to when his 161 Cr.P.C statement was recorded by the police. In that situation, the evidence of PWs Ali Gul and Rab Nawaz being doubtful could hardly be relied upon. As per medical officer Dr. Ali Bux, time between death and post mortem of the deceased was about 10 to 12 hours. No plausible explanation to such delay is offered by the prosecution. The recovery of dagger is made on 7th day of arrest from appellant Zulfiqar. It has been subjected to chemical examination on 4th day of its recovery. In

that situation, appellant Zulfiqar could hardly be connected with such recovery. SIO/ASI Raza Muhammad was fair enough to admit that the deceased was having a criminal record and on 30.01.2015 a news was published in daily newspaper “Kawish” indicating therein that the unknown culprits have committed the death of the deceased and the complainant has suspected Wali Muhammad and others, for such death. If, such piece of evidence is taken into consideration then it makes the involvement of the appellants together with Ghulam Mustafa (now has died) in this case to be doubtful one and to such benefit they are found entitled.

11. 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.”

12. Having discussed above, the conviction and sentence recorded against the appellants together with Ghulam Mustafa (now has died) by way of impugned judgment are set-aside; consequently, they are acquitted of the offence for which they have been charged, tried and convicted by learned trial Court,

they shall be released forthwith in the subject case, if not required in any other custody case.

13. The instant appeal is disposed of accordingly.

Judge

Ahmed/Pa,