

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-92 of 2019

Appellant: Shahmir son of Ghulam Hyder Khoso through
Wazir Hussain Khoso, Advocate.

Respondent: The State, through Mr.Shahzado Saleem
Nahiyoon D.P.G for the State.

Date of hearing: 04-02-2021.

Date of decision: 04-02-2021.

JUDGMENT

IRSHAD ALI SHAH, J; The facts in brief necessary for disposal of instant Criminal Appeal are that the appellant allegedly with co-accused Nawab in furtherance of their common intention committed death of Sabir Hussain, for that they were booked and reported upon by the police.

2. At trial the appellant and co-accused Nawab did not plead guilty to the charge and prosecution to prove it examined complainant Riaz Hussain and his witnesses and then closed its side.

3. The appellant and co-accused Nawab in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence. They did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

4. It was specifically stated by the appellant in his statement u/s 342 Cr.P.C that;

“I am innocent and falsely involved by the complainant party as I was on dispute with PW Ghulam Mustafa over matrimonial affair as his wife wants to marry with me and he suspected me. Complainant and HC Malook are close relatives of PW Ghulam Mustafa. Complainant party had killed our three relatives and such FIR was lodged at P.S Rajri Cr.No.3/2016 u/s 302 P.P.C. All witnesses of this case are residing nearby from place of incident. Deceased was criminal and killed due to dispute over forest land at Katcha Till four days complainant party was unaware about culprits and after consultation, they managed false story and implicated me in this false case. I am innocent and pray for justice. I produce P.S copy of FIR Cr.No.3/2016 and voter list of PW Ghulam Murtaza. I produce attendance sheet of our school staff at relevant days.”

5. On conclusion of the trial, co-accused Nawab was acquitted while appellant was convicted and sentenced to undergo Imprisonment for life and to pay compensation of rupees three lac to the legal heirs of the deceased for an offence punishable under Section 302(b) PPC by learned Additional Sessions Judge-I/Model Criminal Trial Court Matiari vide his judgment dated 10th May, 2019, which has been impugned by the appellant before this Court by preferring the instant Criminal Appeal.

6. It is contended by the learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party; FIR has been lodged with delay of about three days; it was unseen incident and evidence of the prosecution has been disbelieved in respect of co-accused Nawab while it has been believed in respect of the appellant without lawful justification. By contending so, he sought for acquittal of

the appellant. In support of his contention he has relied upon case of *Muhammad Javed vs The State (2016 SCMR 2021)*.

7. Learned A.P.G for the State has sought for dismissal of the instant Criminal Appeal by contending that on arrest from the appellant has been secured the crime weapon.

8. In rebuttal to above, it is stated by learned counsel for the appellant that the crime weapon has not matched with the empty secured from the place of incident as per report of Forensic Expert and the appellant has already been acquitted by learned trial Court in case of alleged recovery of crime weapon.

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

10. As per complainant Riaz Hussain and Shah Jahan they on hearing of fire shot report went at the place of incident and found the deceased lying on the ground in injured condition while the appellant and co-accused Nawab were found standing by the side of the deceased, who after seeing them made their escape good and on inquiry they were informed by PW Ghulam Murtaza that deceased has been fired at by the appellant. If, it is believed to be so, then apparently they have responded to the incident, when it was almost over. The FIR of the incident has been lodged with delay of about three days. No plausible explanation to such delay has been offered by the complainant; therefore, such delay could not be lost sight off. It reflects consultation and deliberation. PW

Ghulam Murtaza has claimed to be eye witness to the incident, but on asking was fair enough to say that his 161 Cr.P.C statement was recorded by police after five days. No plausible explanation to such delay is offered by the prosecution, which has made the credibility of his evidence to be doubtful. It was stated by SIO/SIP Fateh Ali that on investigation co-accused Nawab was found to be innocent such fact could not be lost sight of. PW Malook too is not an eye witness to the incident, as per him the incident was reported by the complainant after due consultation with each other. The report made with police after due consultation could hardly be relied upon. As per SIO/SIP Fateh Ali on arrest from the appellant was secured TT pistol. It was secured on 6th day of the arrest of the appellant. The recovery made with such delay could hardly strengthen the case of prosecution. No definite opinion was expressed by the Forensic Expert for empty secured in present case having been fired from the pistol allegedly secured from the appellant. In that situation, the appellant could hardly be connected with recovery of TT pistol more particularly when he has already been acquitted in such recovery case by learned trial Court. On the basis of same evidence co-accused Nawab has been acquitted while the appellant has been convicted by learned trial Court which appears to be surprising. In these circumstances, it could be concluded safely that the prosecution has not been able

to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

11. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it has been observed by the Hon'ble Apex Court that;

"Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate".

12. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been observed by Hon'ble Apex 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."

13. In case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR-344), it has been observed 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. In case of *Muhammad Masha vs The State* (2018 SCMR 772), it was observed by the Hon'ble Apex Court that;

"4....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 upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), GhulamQadir 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)."

15. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant by way of impugned judgment are set-aside and he is acquitted of the offence for which he was charged, tried and convicted by learned trial Court, he is in custody and shall be released forthwith in the present case.

16. Above are the reason of short order dated 04.02.2021 whereby the instant appeal was allowed.

JUDGE