

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-02 of 2020
Criminal Appeal No.S-05 of 2020

Appellants: Inayat son of Sahib Khan Mari, 2) Zulfiqar Ali son of Anwar Ali Mari and 3) Mir Hassan son of Qadir Bux Mari through M/s Syed Tarique Ali Shah and Tahir Nisar Rajput, Advocates.

Respondent: The State, through Mr. Shawak Rathore, D.P.G for the State.

Date of hearing: 12-02-2021.

Date of decision: 12-02-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The facts in brief necessary for disposal of instant Criminal Appeals are that the appellants allegedly in furtherance of their common intention committed murder of Zulfiqar Ali by causing him knives, *Sarota* and *lathi* injuries, for that they were booked and reported upon.

2. At trial the appellants did not plead guilty to the charge and prosecution to prove it examined complainant Muhammad Ramzan and his witnesses and then closed its side.

3. The appellants in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence by stating that they have been involved in this case falsely by the complainant party, they did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

4. On conclusion of the trial, the appellants for offence punishable u/s 302(b) and 34 PPC were convicted and sentenced

to undergo Imprisonment for life and to pay fine of rupees two lac each to the legal heirs of the said deceased and in default in payment of fine to undergo Simple Imprisonment for five months by learned 5th Additional Sessions Judge (MCTC), Shaheed Benazirabad vide his judgment dated 10.12.2019, which is impugned by the appellants before this Court by preferring separate appeals.

5. It is contended by the learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party; FIR has been lodged with delay of about four days; it was unseen incident and evidence of the PWs has been believed by learned trial Court without lawful justification. By contending so, they prayed for acquittal of the appellants. In support of their contentions, they relied upon the cases of *Mst. Asia Bibi Vs. The State and others [PLD 2019 Supreme Court 64]*, *Nazir Ahmad Vs. The State [2018 SCMR 787]*, *Muhammad Asif Vs. The State [2017 SCMR 486]* and *Muhammad Imran Vs. The State [2020 S C M R 857]*.

6. Learned D.P.G for the State has sought for dismissal of the instant Criminal Appeals by contending that on arrest from the appellants have been secured the knife, 'Sarota' and 'lathi' allegedly used by them in commission of incident.

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

8. The complainant is not an eye witness of the incident. As per him he was informed by PWs Allah Rakhio and Roshan Ali that they have seen the appellants, committing the death of the deceased by causing him knife, 'Sarota' and 'lathi' injuries; therefore, he lodged FIR of the incident with the police. It was on 4th day of the incident, such delay having not been explained plausibly could not be overlooked. As per PWs Allah Rakhio and Roshan they found the appellants committing death of the deceased by causing him knife, 'Sarota' and 'lathi' injuries. Dr. Zainuddin on asking was fair enough to state that all injuries to the deceased were caused with some hard blunt substance. By stating so, he belied PWs Allah Rakhio and Roshan Ali that the deceased was also caused knife injuries. No attempt was undertaken by PWs Allah Rakhio and Roshan Ali to prevent the death of the deceased which goes to suggest that they actually have not witnessed the incident. Such conclusion also takes support from suggestion made to PW Roshan Ali whereby he was fair enough to say that as per his 164 Cr.P.C statement he had not seen the appellants causing blows to the deceased. The 161 Cr.P.C statement of PWs Allah Rakhio and Roshan Ali as per SIO Inspector Asghar Ali were recorded on 31.07.2017. It was with delay of 21 days even to FIR. No explanation to such delay is offered by the prosecution, which goes to suggest that the said witnesses were introduced by the complainant in investigation

later on only to involve the appellants in commission of incident. The 164 Cr.P.C statements of PWs Allah Rakhio and Roshan Ali as per admission made by SIO/Inspector Asghar Ali were recorded in absence of the appellants. If, it was so, then those statements as per mandate contained by section 265-J Cr.P.C could not be used against the appellants. The recovery of knife, 'Sarota' and 'lathi' being easily available in market, that too on 3rd day of arrest of the appellants could hardly connect them with the commission of incident. In these circumstances, it could be concluded safely that the prosecution has not been able to prove its case against the appellants beyond shadow of doubt and to such benefit they are found entitled.

9. 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".

10. 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."

11. *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)."

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

13. Above are the reasons of short order dated 12.02.2021 whereby the instant criminal appeals were allowed.

JUDGE