

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No.S - 401 of 2010

Appellant: Arbab son of Bahadur by caste Hajano through Ms. Nasira Shaikh, Advocate.

Respondent: The State, through Ms. Safa Hisbani, A.P.G for the State.

Date of hearing: 05-03-2021.

Date of decision:05-03-2021.

JUDGMENT

IRSHAD ALI SHAH, J.- The facts in brief necessary for disposal of instant Criminal Jail Appeal are that the appellant allegedly committed murder of Uris by causing him fire shot injury when he prevented the appellant from maltreating his wife Mst. Mirzadi, for that he was booked and reported upon.

2. The appellant denied the charge, and prosecution to prove it, examined complainant Ghoram and his witnesses and then closed the side. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence, but did not examine him or anyone in his defence.

3. On conclusion of trial the appellant for an offence punishable under section 302 (c) PPC was convicted and sentenced to undergo Imprisonment for life and to pay rupees two Lac to legal heirs of the deceased, as compensation, with benefit of Section 382-B Cr.PC by learned Additional Sessions Judge, Tando Adam vide his judgment dated 03.10.2020, which

has been impugned by the appellant before this Court by preferring the instant Criminal Jail Appeal.

4. 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; the gun has been foisted upon the appellant; it has been subjected to chemical examination with considerable delay and evidence of the prosecution being doubtful in its character has been believed by learned trial Court without assigning cogent reasons. By contending so, she sought for acquittal of the appellant.

5. Learned A.P.G for the State by supporting the impugned judgment has sought for dismissal of the instant appeal. In support of her contention she relied upon case of *Abdul Ali vs Haji Bismillah (2002 SCMR 203)*.

6. I have considered the above argument and perused the record.

7. The complainant is not an eye witness of the incident; therefore, his evidence could safely be excluded from consideration. PW Taj Muhammad by claiming to be an eye witness of the incident has attempted to support the case of prosecution, but on asking was fair enough to admit that his 161 Cr.P.C statement was recorded by police on 04.08.2006. It was on 5th day of incident. No explanation to such delay is offered by the prosecution; therefore, his evidence could hardly be relied upon to base conviction.

8. 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."

9. PWs Mst.Mirzadi and Ghulam Rasool being natural witnesses to the incident have been given up by the prosecution for the reason that they have been won over by the accused. They ought to have been examined by the prosecution and in event of their failure to support the case of prosecution; they were to have been declared hostile and not to have been given up straightaway by the prosecution. In that way, the appellant has been prejudiced in his defence seriously. The gun which is alleged to have been secured from the appellant has been subjected to its examination on 14th day of its recovery. No plausible explanation to such delay is offered by the prosecution; therefore, the appellant could hardly be connected with such recovery. 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.

10. In case of *Muhammad Masha vs The State (2018 SCMR 772)*, it was observed by the Hon'ble Supreme Court of Pakistan 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."

11. The case law which is relied upon by learned A.P.G for the State is on distinguishable facts and circumstances. In that that case the delay in recording 161 Cr.P.C statements of the witnesses was ignored by Hon'ble apex Court for the reason that the complainant being eye witness of the incident has fully supported the case of prosecution. In the instant case the complainant is not an eye witness of the incident while Mst. Mirzadi and Ghulam Rasool being natural witness to the incident have been given up by the prosecution.

12. 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. Consequently, the appellant is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court. The appellant is in jail and he shall be released in the present case forthwith.

13. The instant Criminal Jail Appeal is disposed off accordingly.

Judge