

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Jail Appeal No.D- 126 of 2009
{Confirmation Case No.12 of 2009}

Criminal Jail Appeal No.D- 128 of 2009

Before;

Mr. Justice Muhammad Iqbal Mahar
Mr. Justice Irshad Ali Shah

Appellant: Ghulam Abbas son of Qabil Khoso,
Through Mr. Badal Gahoti, Advocate

Appellant: Asghar son of Ghulam Abbas Khoso,
Through Ms. Nasira Shaikh, Advocate

State: Ms. Safa Hisbani, A.P.G

Date of hearing: 29.08.2019

Date of decision: 29.08.2019

J U D G M E N T

IRSHAD ALI SHAH, J. As per the case of the prosecution, on 23.02.2002 the appellants allegedly with rest of the culprits after having formed an unlawful assembly and in prosecution of their common object fired at the complainant party with intention to commit their murder, consequent upon such firing Muhammad Nawaz, Ghulam Muhammad, Ali Nawaz and Mashooque Ali died for that they were booked and reported upon by the police.

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

3. The appellants in their statements recorded under Section 342 Cr.P.C denied the prosecution allegations by pleading innocence, they examined none in their defence or themselves on oath to disprove the prosecution allegation against them.

4. On evaluation of evidence, so produced by the prosecution, the learned Additional Sessions Judge, Tando Adam came to the conclusion that the prosecution has been able to prove its case against the appellants and then for offence punishable under Section 302(b) PPC, on each count convicted and sentenced appellant Asghar to undergo imprisonment for life, while awarded death penalty to appellant Ghulam Abbas, on each count. Additionally, both of the appellants were also directed to pay rupees two lac compensation each to the legal heirs of the said deceased and then made a reference with this court under Section 374 Cr.P.C for confirmation of the death sentence vide his judgment dated 28.07.2009, which is also impugned by the appellants by way of preferring two separate appeals.

5. The appeals so preferred by the appellants and reference so made by learned trial court now are being disposed of through single judgment.

6. It is contended by the learned counsel(s) for the appellants that the appellants being innocent have falsely been

involved in this case by the complainant party in order to satisfy their enmity with them; the names of the appellants are not disclosed in FIR, those were disclosed subsequently by the complainant by way of an application made with S.S.P Investigation Sanghar; the 161 Cr.P.C statements of the PWs Ali Dino and Ali Khan have been recorded with delay of four days to FIR; the evidence which the prosecution has produced before the learned trial court being untrustworthy and doubtful has been believed by learned trial court without assigning cogent reasons. By contending so, they sought for acquittal of the appellants.

7. Learned A.P.G for the State and PW Ali Dino in person by supporting the impugned judgment have sought for dismissal of the appeals of the appellants.

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

9. Admittedly, the names of the appellants have not been disclosed in FIR, which has been lodged promptly, those have been disclosed by the complainant before S.S.P Investigation Sanghar by making an application on 18th day of the incident. Such application could hardly be treated to be a part of FIR. If for the sake of arguments, it is believed that such application could be treated as a part of FIR, then it does not specify the

role which is played allegedly by the appellants in commission of the incident. In that situation, the involvement of the appellants in commission of incident, on the basis of evidence of the complainant by making improvement to his version in his FIR, could safely be said to be doubtful one.

10. No doubt, PWs Ali Dino and Ali Khan have involved the appellants in commission of incident, on point of vicarious liability by stating that they too have taken the part in commission of incident, but they are appearing to be managed witnesses as their 161 Cr.P.C statements as per SIO / Inspector Dhani Bux were recorded on 4th day of the incident, without offering any plausible explanation to such delay. In that situation, it would be hard to rely upon evidence of the said witnesses to maintain conviction.

11. 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.”

12. The discussion involved a conclusion that the prosecution has not been able to prove its case against the appellants beyond shadow of doubt and the appellants are found entitled to such benefit.

13. In case of **Tarique Pervaiz vs. The State (1995 SCMR 1345)**, it has been held by Hon'ble Apex Court that;

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

14. Based upon above discussion, the conviction and sentence awarded to the appellants by way of impugned judgment are set-aside, the appellants are acquitted of the offence, for which they have been charged, tried and convicted by the learned trial court, they shall be released forthwith, in the present case.

15. The instant appeals and reference made by learned trial court are disposed of in above terms.

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