IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No. S- 59 of 2014

Date of hearing:	10.02.2020
Date of Judgment:	10.02.2020.
Appellant:	Yaseen through Mr. Altaf Shahid Abro, Advocate.
Complainant:	Wahid Bux Sial in Person.
State:	Through Ms. Rameshan Oad Assistant Prosecutor General, Sindh.

JUDGEMENT

ABDUL MAALIK GADDI, J- Through this Cr. Jail Appeal, the appellant has assailed the legality and propriety of judgment dated 04.12.2013 passed by learned 3rd Additional District & Sessions Judge, Shaheed Benazeerabad in Sessions Case No.343/2009 (Re: The State V/s Ali Muhammad & others) arisen out of Crime No.112/2009 registered U/S 302, 337-J, 506(2), 34 PPC at PS B-Section Nawabshah, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.3 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.3 of the impugned judgment which reads as under:-

> **"In view of my above findings, on points No.1 and 2 the offence of murder of deceased Mureed Hussain has been proved against accused Yaseen beyond any reasonable doubt and he is liable to punishment of Qisas for Qatl-e-amd. Therefore, I convict and sentence accused Yaseen Brohi u/s 302 (b) PPC. there are extenuating circumstances in the instant case as, complainant has not supported the case of prosecution to the full extent. Therefore, I convict him u/s 302 (b) PPC as tazir and sentence accused Yaseen for life imprisonment. He is further ordered to pay sum of Rs.2,00,000/- as compensation to the heirs of deceased u/s 544-A CrP.C. In default of payment he shall suffer S.I for six months more. Accused is present on bail his bail bond canceled and surety discharged and he is taken in to custody to serve out the sentence awarded to him. the benefit of section 382-B Cr.P.C awarded to him. He is also provided true copy of the judgment free of cost. Copy of judgment is also provide to learned DDPP for State for information".**

2. Brief facts of the prosecution case as per F.I.R are that, complainant Wahid Bux Sial lodged F.I.R at PS B-Section Nawabshah on 10.08.2009 at about 01-30 hours stating therein that Mureed

Hussain was his younger brother and was aged about 55 years and was residing with his family in Asif Colony, Line Par Nawabshah. There was dispute between Mureed Hussain and his son, wife and other family members. On 10.08.2009 complainant along with his brother Jalaluddin @ Bukhshal and nephew Ghulam Sarwar had gone to the house of Mureed Hussain. At about 00-30 hours on the light of electric bulbs they saw accused Yaseen Brohi, Ali Muhammad Sial and Mst. Dadli were killing Mureed Hussain. Accused Yaseen and Mst. Dadli were strangulating the neck of Mureed with handkerchief and Ali Muhammad was hitting him iron ramba blows on his neck. On seeing them accused Yaseen ran away. Then they saw that Mureed Hussain had expired. On enquiry Ali Muhammad disclosed that his marriage was being arranged for which he demanded money from his father and on his refusal he fought with Mst. Dadli the mother of Ali Muhammad and then they killed him. they issued threats to complainant party. Then they came to know that Mst. Dadli administered intoxicant tablets to Mureed Hussain and he went unconscious and then they committed his murder. Then complainant went to PS and lodged F.I.R.

3. After usual investigation, the police submitted the final report before the concerned Judicial Magistrate, who took cognizance of the offence and thereafter the case was entrusted to the learned trial Court, where the charge against the accused was framed at Exh.03, who pleaded not guilty and claimed trial.

4. At trial, the prosecution to prove its case has examined following witnesses:

i. PW-1 / Complainant Wahid Bux examined at Ex.07. He produced F.I.R at Ex.7/A, he also filed application at Ex.08.

ii. PW-2 / Dr. Arbab Ali was examined at Ex.9. He produced lashchakas form, postmortem report, Biopsy report, final postmortem report at Ex.9/A to Ex.9/D, respectively.

iii. PW-3 HC Muhammad Nawaz was examined at Ex.13. He produced receipt at Ex.13/A.

iv. PW-4 / SIP Ali Hassan was examined at Ex.14. He produced danistnama, mashirnama of place of incident, mashirnama of arrest, mashirnama of last wearing clothes, mashirnama of recovery of iron rumba, chemical examiner report of last wearing clothes and chemical report of samples of doctor at Ex.14/A to Ex.14/G, respectively.

v. PW-5 / Asif Ali was examined at Ex.15. He produced sketch at Ex.15/A to Ex.15/C.

vi. PW-6 PW Jalaluddin @ Bukhshal was examined at Ex.16.

vii. PW-7 Wazir Ali was examined at Ex.17.

It appears that all these witnesses have been cross-examined by the counsel for appellant.

5. Thereafter, learned DDPP closed prosecution side at Ex.18. Later on statement of accused was recorded U/S 342 Cr.P.C at Ex.19, in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor led any evidence in his defence.

6. Learned counsel for the appellant contended that the case is managed one and appellant is innocent and has been falsely implicated in this case; that prosecution case is full of doubts and infirmities, as such, accused deserve benefit of doubt; that there are material contradictions and discrepancies in the evidence of prosecution witnesses and alleged incident is totally un-witnessed one, therefore, prosecution evidence is based on whims and surmises and its benefit may be accorded to the accused; that all the PWs are interested and related to each other. Moreover, complainant Wahid Bux, who was also one of the eye witnesses, did not support the case of the prosecution, whereas PW Ghulam Sarwar was given-up by the prosecution without any reason and the evidence of PW Jalaluddin @ Bukhshal found contradictory and also interested one; therefore, his evidence cannot be safely relied upon for maintaining the conviction; that nothing has been recovered from the possession of present accused / appellant; that questions regarding the recovery of articles as well as Forensic Laboratory report, medical report and motive of the case, were also not put to the accused/appellant in his statement U/S 342 Cr.P.C for his explanation and life imprisonment was awarded to the accused / appellant without assigning any valid reason; that deceased Mureed Hussain, complainant, PWs and co-accused are belongs to the Sial community and present accused belonged to Brohi communities are on inimical terms with each other, as such, false implication of the appellant in this case cannot be ruled out.

7. Conversely, learned A.P.G. Sindh assisted by complainant, who is present in person, while supporting the impugned judgment submits that prosecution has fully established its case beyond any reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentenced awarded to the appellant is the result of the proper appreciation of evidence brought

on record, which needs no interference by this Court. She lastly prayed for dismissal of this appeal. While concluding his arguments, she has relied upon the case laws reported as Usman Ali v. Khaista Muhammad & others (2002 P.Cr.L.J page 493).

8. I have heard the learned counsel for appellant, learned A.P.G for the State and perused documents & evidence so brought on record.

9. After hearing the learned counsel for the parties, I have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that as per F.I.R the complainant Wahid Bux Sial along with PWs Ghulam Sarwar and Jalaluddin @ Bukhshal went to the house of deceased Mureed Hussain and it was 12:30 hours (night) and on the light of electric bulb they saw that present appellant Yaseen along with Ali Muhammad Sial and Mst. Dadli were killing Mureed Hussain, but in evidence complainant Wahid Bux Sial, who is also the eye witness of the incident, examined at Ex.7, did not support the prosecution case, as such, he was declared hostile by learned DDPP for State. For the sake of convenience, it would be proper to reproduce the evidence of complainant Wahid Bux which reads as under:

> *"We are three brothers. Mureed was my younger brother and he used to reside separately along with his family. On 10.08.2009 at about 00-30 hours unknown accused persons had gave intoxications to my brother Mureed Hussain and caused him iron road blows and also strangulated his neck where upon he expired. then I registered such F.I.R. I produce such F.I.R at Ex.7/A, it is same, correct and bears my signature. I cannot say whether present accused are same.*
>
> ***Cross to DDPP for State***
>
> *It is incorrect that to suggest that I am deposing falsely due to compromise. It is incorrect that I mentioned the names of accused persons in F.I.R voluntarily states that the same were mentioned by police It is incorrect to suggest that I identified the accused. It is incorrect that accused present in Court are same."*

10. It appears from the record that complainant through his application dated 14.12.2011, which is available on record at Ex.8, stating therein that he has forgiven the accused and recorded his no objection if the accused would be released by the Court, but today during arguments complainant submits that he did not give any evidence with regard to identification of the accused before the trial Court. Keeping in view of the evidence and in view of his application,

so available on record at Ex.8, the conduct of the complainant appears to dubious, as such, contents of F.I.R cannot be safely relied upon.

11. It is noted that PW Ghulam Sarwar, who was also the eye witness of the incident and was with the complainant at the time of alleged incident, has not been examined by the prosecution. The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence. During the course of arguments, I have specifically asked question from learned A.P.G as to why PW-Ghulam Sarwar has not been examined, she has no satisfactory reply with her.

12. Now I come to the evidence of PW-Jalaluddin @ Bukhshal, who was also one of the eye witnesses of the incident. His evidence is available at Ex.16, and on perusal of the same it reveals that the evidence of this witness appears to contradictory on material particular of the case and according to him, he allegedly saw the incident on the light of electric bulb and admittedly he is the brother of complainant as well as deceased but his evidence is not supported by any corroborative / in-impeachable piece of evidence which connects the appellant Yaseen in commission of the offence. Besides, this witness is brother of the complainant and at the time of incident he was present along with complainant and PW-Ghulam Sarwar, but as observed above, PW-Ghulam Sarwar has not been examined whereas complainant has been declared hostile by the prosecution and in such circumstances, the evidence of this witness cannot be safely relied upon for maintaining the conviction as the incident appears to be on the basis of matrimonial dispute. It is noted that at the time of alleged incident the electric bulb was ON and the complainant party saw the incident on the light of electric bulb but during investigation neither the said bulb was secured from the place of incident nor it has been produced in evidence by the Investigating Officer. It is also surprising

to note that when complainant along with other PWs was allegedly present at the place of occurrence, why they did not stop the accused or shown their resistance although they are related to each other, therefore, this aspect of the case lead to me that perhaps the incident has not taken place in a fashion as stated in F.I.R.

13. On perusal of case file it reveals that the complainant party arrived at the place of incident at 12:30 A.M (night) but nothing on record to show as to why complainant party went to the house of deceased in late night hours and for what purpose. It also reveals from the record that the alleged incident took place inside the house in a room of the deceased whereas site plan disclosed that the dead body was available at the verandah of the house and it was shifted to the hospital by PC Muhammad Nawaz, which is mentioned in column of the postmortem report. It is also shocking to note that when complainant party was near relative to the deceased then why they did not shift the dead body to hospital by themselves, this aspect too creates doubt in the prosecution case.

14. It is also noted that crime number is not mentioned on postmortem report as well as on last chakas form. It also reveals from the record that appellant Yaseen was arrested on 10.08.2009 from the Kohistan CNG station Sanghar and the incident took place at Asif Colony Nawabshah but no recovery was effected from him, so also nothing on record to show that the case property was produced before the trial Court at the time of trial.

15. I have also gone through the evidence of Medico Legal Officer Dr. Arbab Ali Channa, which is available at Ex.9. However, on perusal of the same it reveals that the same is not in the line of ocular evidence furnished by prosecution witnesses. Cause of death has been opined by the doctor as Asphyxia (lack of the oxygen), but nothing has been mentioned in the report whether the cause of death is suicidal or homicidal. It is stated in F.I.R that accused Ali Muhammad caused iron road on the head of deceased whereas no injury has been mentioned in the medical report on the neck and head of the deceased.

16. It is contended by learned counsel for the appellant that the statement of appellant under Section 342 Cr.P.C was not recorded in accordance with law and all the incriminating pieces of evidence were not put to the appellant and even question was not put to the appellant with regard to medical evidence, recovery of articles from the

place of incident as well as chemical / forensic science laboratories reports; therefore, he was of the view that on this score alone and in view of the said lacunas in the prosecution case the appellant is entitled for benefit of doubt and may be acquitted of the charge. In this connection he has relied upon unreported judgment passed by the Honourable Supreme Court of Pakistan in Criminal Appeals No.24-K, 25-K & 26-K of 2018 dated 26.02.2019.

17. When the said lacunas / infirmities were confronted with learned A.P.G, she has no satisfactory answer with her. However, she submits that case may be remanded to trial Court for re-recording the statement of appellant under Section 342 Cr.P.C. I am not impressed with the submission of learned A.P.G and observed that the law is settled by now that a piece of evidence or a circumstance not put to an accused person at the time of recording of his statement under section 342 Cr.P.C. cannot be considered against the accused person facing the trial. In the case in hand, which pertains to year 2009, through an act or omission of the Court a serious lacuna in that regard had crept into the case of the prosecution and the accused persons could not be prejudiced on account of the said act or omission of the Court; therefore, remand of the case would not serve the purpose however, it will amount to put the parties into torture for another round of litigation and to fill-up the lacuna, if any, left by the prosecution before the trial Court.

18. I am persuaded to hold that it was the primary responsibility of the trial court to ensure that truth is discovered. The procedure adopted by the trial court is reflective of miscarriage of justice. Offence is punishable for death or imprisonment for life and appellant has been awarded imprisonment for life without providing him opportunity with regard to material questions to be put to him in statement of accused u/s 342 Cr.P.C. As regards to the contention of learned counsel for appellant that all the pieces of evidence were not put to accused under section 342, Cr.P.C for his explanation, Honourable Supreme Court in an unreported judgment in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of MUHAMMAD HASSAN v. THE STATE, held as under:-

> "3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the F.I.R., statements of three eyewitnesses, medical evidence, motive,

> recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime-empties with the firearm allegedly recovered from the appellant's possession during the investigation but we have found that except for the alleged recovery of *Kalashnikov* from the appellant's possession during the investigation no other piece of evidence being relied upon by the prosecution against the appellant was put to the appellant at the time of recording of his statement under section 342, Cr.PC.
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> 4. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.PC so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. The case in hand is a case of murder entailing a sentence of death and we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under section 342, Cr.PC which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.PC but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned Courts below."

In the case of **MUHAMMAD NAWAZ and others Versus The STATE AND OTHERS** (2016 SCMR 267), Honourable Supreme Court of Pakistan has observed as under:-

> ".....While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his / her examination under section 342, Code of Criminal Procedure, could not be used against him / her for maintaining conviction and sentence."

19. It is well settled principles of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of prosecution story is adduced by the prosecution. I am of the considered view that prosecution could not establish the guilt of appellant at home without reasonable doubt. In my view, where a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace

and concession but as a 'matter of right', hence, single doubt is sufficient to acquit the accused.

20. As far as the case law relied upon by learned Asst. Prosecutor General is concerned, the facts of the same are very much distinguishable from the facts of present case as in the case in hand, complainant during examination in chief has given a hostile version in toto whereas in the cited case the complainant has admitted his relationship with the accused and perhaps due to this reason he might have given such hostile statement.

21. In these circumstances, I am of the view that prosecution is not free from doubts and it is well settled principle of law that even a single circumstance creating a reasonable doubt, the benefit of which, always goes in favour of accused. In the instant case there are material discrepancies and lacunas in the prosecution evidence. In this regard reliance can be placed upon the case of 'TARIQ PERVAIZ v. The STATE' [1995 SCMR 1345], wherein it has been held by the Honourable Supreme Court of Pakistan that:

> ***"For giving benefit of doubt to appellant it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as matter of right"***

22. In the light of what has been discussed above and case law I am of the considered view that the prosecution has failed to prove its case against the appellant beyond any reasonable doubt, therefore, instant appeal is hereby allowed, impugned judgment dated 04.12.2013 is set-aside. Consequently, appellant is acquitted of the charge; he is in custody, he shall be released forthwith if not required any other custody case.

23. Above are the reasons of my short order dated 10.02.2020 whereby the instant appeal was allowed.

JUDGE

Fahad Memon
10.02.2020