

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Present:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Khadim Hussain Tunio.

Cr. Jail Appeal No. D- 20 of 2015
Confirmation Case No.03 of 2015

Date of hearing: 12.02.2020.

Date of Judgment: 12.02.2020.

Appellant Murad Ali Through Mr. Aijaz Shaikh, Advocate
s/o Umed Ali Machi
(Pauper):

State: Through Mr. Shewak Rathore, D.P.G, Sindh.

Complainant: Soomro Machhi present in person.

JUDGEMENT

ABDUL MAALIK GADDI, J- Through this appeal, the appellant has assailed the legality and propriety of judgment dated 23.02.2015 passed by learned Additional Sessions Judge, Kotri in Sessions Case No.294/2011 (Re: The State V/s Murad Ali and another) arisen out of Crime No.03/2011 registered U/S 302, 201, 34 PPC at PS Budhapur, 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 the relevant portion of Point No.3 of the impugned judgment which reads as under:-

“POINT No.3

On my findings on point No.1 & 2, the prosecution has been successful to prove it`s case beyond all reasonable doubts against accused Murad Ali for

offence under section 302 PPC, therefore, he is sentenced to death as Ta`zir. He be hanged by neck till he is dead and under section 544-A Cr.P.C accused Murad Ali to pay compensation of Rs.5,00,000/- to heirs of deceased. In default of payment of fine, the accused shall suffer S.I for six months. The accused Murad Ali is produced from Special Prison Nara, Hyderabad and sent back to jail with directions to the Superintendent Jail to carry out the sentence.”

2. It may be mentioned here that Presiding Officer of the trial court has also submitted a Reference u/s 374 Cr.P.C. for confirmation of death sentence which was assigned number as 03/2015.

3. Facts of the prosecution case in brief are that complainant Soomro Machhi lodged F.I.R. on 17.08.2011 stating therein that on the fateful day viz 14.08.2011, his brother Ali Sher was taken away by accused Murad Ali for hunting purpose but he did not come back till night, hence complainant went to accused Murad Ali and inquired about his brother, but he showed his unawareness. The complainant while he was searching for his brother, on 16.08.2011 in the morning, he came to know that accused Murad Ali had illicit relations with Mst. Darya Khatoon, the wife of Ali Sher therefore, accused Ali Murad, Laloo, Jaam and Mst. Darya Khatoon in furtherance of their common intention committed murder of Ali Sher by causing firearm injuries and sunk the dead body in river. Thereafter at about 10.00 a.m they found the dead body of deceased from Daraa Machhi bank of river, having injuries on the body. Thereafter, the F.I.R. was lodged at police station.

It appears from the record that during investigation, accused Murad Ali, Laloo and Jaam were arrested and police submitted final challan before the competent Court while showing co-accused Mst. Darya Khatoon as absconder. Accused Laloo and Jaam were released under section 497 Cr.P.C. Process was issued against the absconding accused Mst. Darya Khatoon, which was returned unexecuted and after all codal and legal formalities she was declared as proclaimed offender and her case was ordered to be proceeded in her absence under section 512 Cr.P.C.

4. Formal charge against accused / appellant was framed at Ex.5, to which he pleaded not guilty and claimed trial of the case.

5. In order to prove its case, the prosecution examined complainant Soomro at Ex.8, who produced F.I.R. at Ex.8/A, his statement under section 162 Cr.P.C. at Ex.8/B; P.W Meer Hassan at Ex.9, who produced his statement under section 164 Cr.P.C. at Ex.9/A; mashir Ameer Ali Machhi at Ex.10, who produced memo of dead body at Ex.10/A, inquest report at Ex.10/B, mashirnama of place of incident at Ex.10/C, mashirnama of arrest of accused Laloo at Ex.10/E, Tapedar Khalid Hussain Solangi at Ex.13, who produced letter of SHO P.S Budhapur at Ex.13/A, sketch of place of vardat at Ex.13/B; Dr. Nazeer Memon at Ex.14, he produced police letter at Ex.14/A, post-mortem report of deceased Ali Sher at Ex.14/B; ASI Sadaruddin Qambrani at Ex.15, who produced receipt of handing over of dead body at Ex.15/A. Thereafter, learned DDPP closed prosecution side under his statement at Ex.16.

6. Statement under Section 342 Cr.P.C of the accused was recorded at Ex.17, wherein he denied all the allegations leveled against him by the prosecution and claimed his false implication in this case. However, neither he examined himself on oath nor led any evidence in his defence to disprove the charges as required under section 340(2) Cr.P.C.

7. Mr. Aijaz Shaikh, learned counsel appearing on behalf of the pauper appellant Murad Ali contended that the case is managed one and appellant is innocent and has been falsely implicated in this case; that there is matrimonial dispute between the parties as the complainant had demanded the hand of appellant's daughter for his son and on refusal he has been booked in this case falsely; that someone else had committed the murder of deceased and the complainant party after receiving the huge amount had patched up with him/them; that there is no eye witness of the incident, no direct evidence against the appellant and the entire prosecution story hinges upon the last seen evidence which has not been corroborated from any other piece of evidence; that there are material contradictions in the evidence of prosecution witnesses which create serious doubts in the prosecution case; that complainant and PW Mir Hassan are brothers inter-se as well as brothers of the deceased and are interested therefore, their evidence could not be safely relied upon for maintaining

conviction; that there is no independent witness on the point of last seen evidence; no recovery of gun with which it is alleged that the appellant caused firearm injury to the deceased has been affected; that the entire case is based on suspicious, surmises and conjunctures; that co-accused namely Laloo s/o Umed Ali and Jaam s/o Mehar though their names were mentioned in the FIR but they were let off by the police on the basis of further statement of complainant dated 30.08.2011 recorded u/s 162 Cr.P.C, hence the findings recorded by the trial Court requires interference by this Court. He lastly prayed for acquittal of the appellant from the charge. In support of his contentions, he placed reliance on the cases reported as Sajjad Hussain v. The State (2019 YLR 2617), Muhammad Rasib alias Babu v. The State (2016 YLR 2312) and Ghous Bux v. Saleem and 3 others (2017 P.Cr.L.J. 836).

8. On the other hand, Mr. Shewak Rathore, learned D.P.G. appearing for the State alongwith complainant who is present in person, contended that appellant / accused is the son of sister of the complainant and appellant had illicit relations with the wife of deceased namely Mst. Darya Khatoon who is also nominated in the FIR; that Mst. Darya Khatoon after committing the murder of deceased left her house and she is still absconder; that there is ocular evidence in shape of last seen evidence which is corroborated with other circumstantial evidence and further submitted that prosecution has fully established its case against the appellant beyond reasonable doubt by producing constant / convincing evidence and the impugned conviction and sentence awarded to the appellant is the result of proper appreciation of evidence brought on record which needs no interference. Lastly, he prayed for dismissal of this appeal. In support of his contention he has placed reliance upon the case of TAKDIR SAMSUDDIN SHEIKH versus STATE OF GUJRAT and another (2012 SCMR 1869).

9. We have heard the learned counsel for pauper appellant, learned D.P.G for the State as well as complainant present in court and perused the material available on record with their able assistance.

10. As per contents of FIR, it is alleged that on 14.08.2011 deceased was lastly seen in company of the appellant who had taken him from his house for hunting purpose towards jungle and thereafter he was

found missing. On 16.08.2011 at about 10-00 a.m, the dead body of deceased was discovered from Daraa Machhi bank of river. It is alleged in the FIR by complainant Soomro that present appellant and wife of deceased namely Mst. Darya Khatoon had illicit relations with each other and they alongwith co-accused Laloo and Jaam after committing the murder of deceased Ali Sher had thrown his body in the river but it is surprising to note that on 30.08.2011 complainant got recorded his further statement in which he stated that accused Laloo son of Umed Ali and Jaam son of Mehar are innocent hence they were let off by the police u/s 497 Cr.P.C. on the basis of that further statement recorded u/s 162 Cr.P.C whereas third accused namely Mst. Darya Khatoon is still absconder and her case is kept on dormant file by the trial court.

11. It is noted that present appellant was arrested on 21.08.2011 but no recovery of any weapon whatsoever has been affected from him though it is alleged that there were firearm injuries on the chest and thigh of the deceased which went through and through. No doubt in this case an innocent person has lost his life but who committed his murder is to be determined and this fact is still under suspicious. The case of complainant entirely rests upon the last seen evidence and without recovery of any weapon from the appellant it cannot be said that deceased had received firearm injuries at the hands of accused / appellant as no one had seen the incident and the evidence of complainant and P.Ws in absence of any direct evidence cannot be relied upon. The complainant has also improved his statement by saying in his cross examination that accused was armed with DBBL gun when he called his brother but this fact has not been mentioned by him in FIR.

12. So far as illicit relations of the appellant with the wife of deceased namely Mst. Darya Khatoon are concerned, no any proof in this regard has been produced in the evidence even no any independent person has been examined before the trial court and the evidence of complainant and PW Mir Hassain who are brothers inter se appears to have been set up after the incident. PW Mir Hassan by making improvement has deposed that Mst. Darya Khatoon also followed the deceased and appellant which fact neither has been

mentioned in FIR nor proved from any independent corroborative piece of evidence available on record. Except the words of complainant and PW Mir Hassan there is nothing on record with regard to the illicit relations of appellant and Mst. Darya Khatoon. PW Mubarak has not been examined by the trial court as well as mashir Mitho and the evidence of co-mashir Meeral has been recorded by the trial court. The ocular version is contradictory to the medical and other pieces of evidence, no recovery has been affected from the appellant and the motive has also not been proved but it appears that the same has been set up by the prosecution.

13. We have also noted number of contradictions in the evidence of prosecution witnesses on material points of the case such as PW Mir Hassan stated that he had seen the dead body and saw that the abdomen was slaughtered by knife and the material organs were missing but medical evidence i.e. postmortem report available on record at Ex.14/B does not show this fact as there is no mention in the postmortem report with regard to slaughtering the abdomen of deceased and that some material organs were missing hence there is clear conflict in the medical evidence and the evidence of P.W Mir Hassan. As stated above there is also no mention in the FIR that Mst. Darya Khatoon followed / went behind the appellant and deceased which has been deposed by PW Mir Hassan in his evidence. According to learned counsel for appellant this piece of evidence has been improved by said PW Mir Hassan and on this aspect there is no evidence available on record and the evidence of complainant and PW Mir Hassan is also contradictory to each other on material aspects of the case. Besides, there is also defence of appellant which he had taken in his statement recorded u/s 342 Cr.P.C. that due to matrimonial dispute as the complainant had demanded the hand of his daughter for his son to which he refused, he has been implicated in the case in hand. It has also been brought on record that the dead body was identified by one Arzee son of Muhammad Sulleman and Umar son of Arzee but they have not been examined by the trial court and the case against appellant appears to have been made on the basis of assumptions and presumptions which is not permissible under the law.

14. From the perusal of evidence it has also come on record that complainant in his FIR has stated that he was met with appellant on the same day about the missing of his brother but he lodged the FIR on 17.08.2011 after the delay of about 03 days which has not been plausibly explained. Furthermore, he also failed to show the source of information whereby he came to know that present appellant alongwith co-accused has committed the murder of deceased Ali Sher. Apparently, this is a case of unseen evidence wherein no source of information has been disclosed nor any recovery has been affected from the possession of accused. There is also no incriminating piece of evidence available on record to connect the present appellant with the commission of offence. No one had seen the appellant while making fire(s) upon the deceased and there are improvements in the evidence of prosecution witnesses more particularly on the point of medical evidence, motive and recovery which even otherwise has not been made from the appellant. Ocular account seems to be contradicted by medical evidence. All these things create reasonable doubts in the case of prosecution.

15. It reveals from the record that trial court convicted and sentenced the appellant / accused on the basis of circumstantial evidence in shape of last seen evidence and according to law in order to claim the conviction in a case which depends upon the circumstantial evidence, the prosecution must establish four basic requirements which reads as under:-

- “(i) The circumstances from which the conclusions are drawn should be fully established.
- (ii) All the facts must be consistent with the hypothesis.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) The circumstances should, to a moral sanctity/certainty, actually exclude every hypothesis, but the one proposed to be proved.”

These principles were also enunciated in the case of “State of UP v. Dr. Ravindra Prakash Mital, AIR 1992 Supreme Court 2045.” The record of the case must show that a chain of events has been interwoven in such a way that its assessment would lead to

inescapable conclusion that accused committed the offence. The evidence is of course to be of high quality. It should inspire confidence in the mind of Judge because direct evidence is not before him. But as observed above in this case all the four ingredients as focused above are missing and the evidence of last seen furnished by complainant Soomro and P.W Meer Hassan are not worthy of any credence. Mere fact that the accused was lastly seen with deceased is not enough to sustain conviction for murder unless some convincing / unimpeachable evidence is brought on record but the same is missing in this case. During the course of arguments, we have specifically asked the question to learned Deputy Prosecutor General to prove any of the circumstance as stated above for maintaining conviction of the appellant, he has no satisfactory answer with him.

16. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond any shadow of doubt. It is, by now well established principle of law that it is the prosecution, which has to prove its case against the accused by standing on its own legs and it cannot take any benefit from the weaknesses of the case of the defence. In the instant case, the prosecution remained failed to discharge its responsibility of proving the case against the appellant. It is also well established that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In the case of Muhammad Akram v. The State (2009 SCMR 230), the Hon'ble Supreme Court of Pakistan, at page 236, was pleased to observe as under:

"13. ..It is an axiomatic principle of law that in case of doubt the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. Keeping in view of the above, we are of the firm view that the Presiding Officer of the learned trial court acted erroneously in the matter, with misconception and misinterpretation and disposed of the matter purely on non-appreciation and non-application of the required norms of law and that of justice. Consequently, we allow the instant Criminal Jail Appeal No.D-20 of 2015, set aside the impugned judgment dated 23.02.2015 passed by learned Additional Sessions Judge, Kotri in Sessions Case No.294/2011 arising out of Crime No.03/2011 u/s 302, 201, 34 PPC registered at P.S Bhudapur and acquit the appellant from the above charge. The appellant is in custody therefore, Jail Authorities are directed to release the appellant forthwith from the above case, if he is not required in any other case.

18. In view of above, Murder Reference No. 03 of 2015 submitted by learned Additional Sessions Judge, Kotri is answered in NEGATIVE and the sentence of death awarded to appellant Murad Ali is NOT CONFIRMED.

19. These are the reasons of our short order dated 12.02.2020, whereby we had allowed this appeal, set aside the impugned judgment dated 23.02.2015 and acquitted the appellant from the charge

JUDGE

JUDGE

Tufail