ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S–06 of 2016

Appellant: Abdul Hameed alias Hamid Son of Muhammad Shareef through Mr. Wazeer Hussain Khoso, Advocate.

Complainant: Nabi Bux Son of Haji Ahmad, through Mr. Haji Khan Khoso, Advocate.

Respondent: The State, through Mr. Shahid Ahmed Shaikh, Deputy Prosecutor General, Sindh.

Date of hearing: 04-03-2021.
Date of decision: 15-03-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The appellant by preferring instant appeal has impugned judgment dated 22.12.2015 passed by learned Sessions Judge Tando Muhammad Khan whereby he for an offence punishable under section 302 P.P.C has been convicted and sentenced to undergo imprisonment for life and to pay fine of Rs.100,000/- to legal heirs of deceased Rashid Ali as compensation.

2. The facts in brief necessary for disposal of instant appeal are that the appellant after having formed an unlawful assembly and in prosecution of their common object committed murder of Rashid Ali by causing him fire shot injury and then went away by making fires in air to create harassment, for that the present case was registered.

3. At trial, the appellant and co-accused Saddam Hussain, Sikandar, Piyaro, Haji Nawab and Riaz did not plead guilty to the charge and prosecution to prove it, examined complainant Nabi Bux and his witnesses and then closed the side.

4. The appellant and co-accused Saddam Hussain, Sikandar, Piyaro, Haji Nawab and Riaz in their statements recorded under section 342 Cr.P.C denied the prosecution's allegation by pleading innocence. They did not examine anyone in their defence or themselves on oath to disprove the prosecution's allegation, in terms of section 340 (2) Cr.P.C.

5. On conclusion of the trial, co-accused Saddam Hussain, Sikandar, Piyaro, Haji Nawab and Riaz were acquitted while the appellant was convicted and sentenced by learned Trial Court by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party; PW Ali Ghulam, (not examined) in his 164 Cr.P.C statement has attributed role of causing fire shot injury to the deceased to co-accused Sikandar; on the basis of same evidence co-accused Saddam Hussain, Sikandar, Piyaro, Haji Nawab and Riaz have been acquitted while the appellant has been convicted by learned Trial Court. By contending so, he sought for acquittal of the appellant. In support of his contention,

he relied upon case of *The State and others Vs. Abdul Khaliq and others [PLD 2011 Supreme Court 554].*

7. Learned D.P.G for the State and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of instant appeal by contending that the appellant has committed death of the deceased by causing fire shot injury and on arrest from him has been secured the crime weapon and acquittal of the co-accused has been impugned before this Court by way of preferring an acquittal appeal. In support of their contention, they relied upon case of *Manzoor Hussain alias Mama Vs. The State [2014 P. Cr. LJ 744].*

8. In response to above, it is contended by learned counsel for the appellant that the acquittal appeal has already been dismissed by this Court on 20.12.2018 for non-prosecution.

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

10. As per complainant his deceased son Rashid Ali was having a pesticide shop. On the date of incident, he and his sons Ali Ghulam and Anwar Ali, on hearing of fire shot reports came out of Hotel of Muhammad Khoso and found the appellant and acquitted accused having pistols and iron rods. Out of them, the appellant fired at Rashid Ali which hit on his chin, who by sustaining that fire fell down, by raising cries and then accused went away by making fires in air to create harassment. The complainant in such version is supported by PW Anwar Ali. They

despite lengthy cross examination, have stood by their version, on all material points with regard to the death of the deceased at the hands of the appellant. They could not be disbelieved only for the reason that they are related inter se. No doubt PW Ali Ghulam (not examined) in his 164 Cr.P.C statement has named co-accused Sikandar Ali to be responsible for causing fire shot injury to the deceased but such omission deserves to be ignored as an innocent mistake, on his part. Otherwise, he in his 161 Cr.P.C has implicated the appellant committing death of the deceased, by causing him fire shot injury. His non-examination could hardly be resolved in favour of the appellant. If, the appellant was having a feeling that PW Ali Ghulam is not going to support the case of prosecution then he was having right to have examined him in his defence. His failure to do so, prima facie suggest that he was not going to support the appellant. On arrest from the appellant has been secured the crime weapon and such recovery, the prosecution has been able to prove, by examining SIO/ASI Ghulam Shabbir Chandio and PW Mashir Abid Hussain. In these circumstances, it would be hard to upset the conviction and sentence awarded to the appellant.

11. In case of *Muhammad Mansha Vs. The State (2016 SCMR-958),* it has been observed by the Hon'ble Apex Court that;

> *"8.The case in hand is one in which the appellant was named in the promptly lodged FIR with a specific role, which role is established on record.*

> *The occurrence was of a day time and the appellant was known to the PWs, who have identified him to be the person who has committed cold-blooded murder of Haji Liaquat Ali, deceased, and there seems to be no reason as to why the appellant should not undergo the maximum punishment provided for the offence".*

12. No doubt that co-accused Saddam Hussain, Sikandar, Piyaro, Haji Nawab and Riaz have been acquitted by learned Trial Court but there could be made no denial to the fact that their case was distinguishable to that of the appellant; therefore, their acquittal would never be sufficient to earn acquittal for the appellant, who is having different role/case.

13. In case of *Iftikhar Hussain v. State (2004 SCMR-1185),* it has been observed by the Hon'ble Court that;

> *"17. It is true that principle of falsus in unofalsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e sifting of grain out of chaff i.e if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others v. The State 2000 SCMR 1758, relevant para therefrom is reproduced here-in-below;*
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> *"thus the proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for*

> *recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in unoflasus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC-502)…..*

14. In case of *Muhammad Raheel @ Shafique v. State (PLD 2015 SC-145),* it has been observed by Hon'ble Apex Court that;

> *"5. thus, their acquittal may not by itself be sufficient to cast a cloud of doubt upon the veracity of the prosecution's case against the appellant who was attributed the fatal injuries to both the deceased. Apart from that the principle of falsus in unofalsus in omnibus is not applicable in this country on account of various judgments rendered by this Court in the past and for this reason too acquittal of the five co-accused of the appellant has not been found by us to be having any bearing upon the case against the appellant".*

15. Admittedly, the deceased was son of the complainant and normally a blood-relation may widen the net but would always attribute specific role to actual culprit. In the instant case,

the complainant and his witness on ocular premises since beginning though named number of person(s) in FIR and in 161 Cr.PC statements, including acquitted accused, but specific role for committing death of the deceased by causing him fire-shot injury has been attributed by them, to the appellant. The allegation against the appellant is having independent corroboration in shape of medical evidence; place of incident; manner of incident as well weapon used by him. Further, there came nothing on record which may suggest that the witnesses who have been examined by the prosecution were having any reason/motive to falsely name the appellant for an act, resulting into death of the deceased, therefore the learned trial Court has committed no illegality while following the principle of appraisal of evidence by sifting of grain out of chaff.

16. In case of *Ali Bux v. State (2018 SCMR 354),* it has been observed by the Hon'ble Apex Court that;

> *"3. The occurrence in this case had taken place in broad daylight and at a place where at the same could have been seen by many persons available around the place of occurrence. An information about the said occurrence had been provided to the police on telephone within fifteen minutes of the occurrence. In the FIR lodged in respect of the incident in question the present appellants had been nominated and specific roles had been attributed to them therein. The ocular account of the incident had been furnished before the trial Court by three eye-witnesses namely Ali Akbar complainant (PW-01) Ghulam Shabir, (PW-02) and Bilawal (PW-03) who had made consistent statements and had pointed their accusing fingers towards the present appellants as the main perpetrators of the murder in issue. The*

> *said eye-witnesses had no reason to falsely implicate the appellants in a case of this nature and the medical evidence had provided sufficient support to the ocular account furnished by them".*

17. The case law which is relied upon by learned counsel for the appellant is on distinguishable facts and circumstances. In that case, the acquittal of the accused was assailed and it was case of Zina. In the instant case, conviction is assailed by the appellant and it is murder case.

18. In view of facts and discussed above, it could be concluded safely that the appellant has failed to establish non/mis reading of evidence on part of learned trial Court, which may justify making interference with the impugned judgment by this Court by way of instant appeal, it is dismissed accordingly. However, benefit of section 382(b) Cr.P.C is extended to the appellant.

JUDGE

Muhammad Danish Steno*