

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-192 of 2018

Appellant: Mohammad Sajid alias Aatish son of Haji Mohammad Ayoub Arain, through Mr. Tahseen Ahmed H. Qureshi, Advocate.

Respondent: The State, through Mr. Shahzad Saleem Nahiyoon, Deputy Prosecutor General, Sindh.

Complainant: Azhar Ali son of Dost Mohammad Unnar, through Mian Taj Muhammad Keerio, Advocate.

Date of hearing: 17-03-2021.

Date of decision: 17-03-2021.

JUDGMENT

IRSHAD ALI SHAH, J; The facts in brief necessary for disposal of instant appeal are that the appellant with rest of the culprits allegedly in furtherance of their common intention caused butt blows to Athar Ali on his head and then went away by making fires at complainant Azhar Ali and his witnesses with intention to commit their murder, Athar Ali died of such blows, for that the present case was registered.

2. The appellant, co-accused Muhammad Imran and Mohammad Siddique denied the charge and prosecution to prove it, examined complainant Azhar Ali and his witnesses and then closed the side.

3. The appellant, co-accused Muhammad Imran and Mohammad Siddique in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence. They did not examine anyone in their defence or themselves on oath excepting co-accused Muhammad Siddique, who not only produced certain documents to prove his innocence but examined DWs Muhammad Ali and Shoib Ahmed in his defence.

4. On conclusion of the trial, learned First Additional Sessions Judge, Mirpurkhas vide his judgment dated 07.08.2018 acquitted co-accused Muhammad Siddique while convicted and sentenced the appellant and co-accused Muhammad Imran as under:

“For the offence punishable under section-302(b) read with section 34 PPC to suffer R.I Imprisonment for life as Tazir. He shall also pay Rs1,00,000/-as compensation under section 544-A Cr.P.C to the legal heirs of deceased and in case of default he shall also suffer S.I for Four (04) months more.

For the offence punishable under section-324 read with section-34 PPC to suffer R.I for Seven (07) years and pay fine of Rs.50,000/-and in default of payment of fine, further suffer S.I for two (02) months more.”

5. No order was passed as to whether the conviction and sentence awarded to the appellant and co-accused Muhammad Imran to run concurrently or consecutively. However, they were extended benefit of section 382-B Cr.P.C.

6. The appellant and co-accused Muhammad Imran by preferring separate appeals impugned the above said judgment before this Court. The appeal preferred by co-accused Muhammad

Imran has already been disposed of by this Court by way of compromise vide order dated 24.08.2020.

7. 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; the FIR of the incident has been lodged with delay of about three days; the 161 Cr.P.C statements of the PWs have been recorded with further delay of one day even to FIR; the identity of the appellant has been based under light of bulb, which has not been secured by the police; there is conflict between medical and ocular evidence; on the basis of same evidence co-accused Muhammad Siddique has been acquitted while the appellant and co-accused Mohammad Imran have been convicted by learned trial Court. Co-accused Mohammad Imran now has been acquitted by way of compromise; there is no recovery of any sort from the appellant and he is in custody since six years; therefore, he is entitled to his acquittal by extending him benefit of doubt. In support of his contention he has relied upon cases of *Abid alias Rana vs the State (2016 SCMR 1515)*, *Rahat Ali vs The State (2010 SCMR 584)*, *Mansab Ali vs The State (2019 SCMR 1306)* and *Abdul Rehman Malik vs Synthia D. Ritchie, Americans National and others (2020 SCMR 2037)*.

8. It is contended by learned D.P.G for the State and learned counsel for the complainant that the appellant is neither innocent nor has been involved in this case falsely by the complainant party; delay in lodgment of FIR and 161 Cr.P.C statements of the PWs was

natural; the appellant is having a criminal record and he after his involvement in the present case had preferred to go in absconcion for about two years; there is no conflict between medical and ocular account of evidence. By contending so, they sought for the dismissal of the instant appeal. In support of their contention they relied upon cases of *Muhammad Saleem vs The State (2018 SCMR 1001)*, *Muhammad Mansha vs The State (2016 SCMR 958)* and *Muhammad Ishaque vs The State (2018 YLR 786)*.

9. In rebuttal to above, it is stated by learned counsel for the appellant that the appellant has never been convicted in any other case.

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

11. As per complainant Azhar Ali, PWs Zahoor and Bilawal, on 27.08.2014 when they and Athar Ali were sitting in their house, there at about 10:30 pm time, on knock to the door, Athar Ali went outside of house. Subsequently, on hearing of his cries, they went outside of the house and there under the light of bulbs, they found that at the instigation of co-accused Muhammad Imran, the appellant was causing butt blows to Athar Ali, on his head, when he was caught hold by co-accused Mohammad Siddique. As per provisional medical certificate which was issued by Dr. Ved Parkash, injured Athar Ali was found sustaining injury with gunshot. Such conflict between medical and ocular evidence with regard to the weapon, used for causing

injury to Athar Ali could not be lost sight of. No bulb was secured by the prosecution being source of identity. The identity of the appellant even otherwise under the light of bulb is a weak piece of evidence. It was further stated by them that on resistance they too were fired at by the appellant and others with intention to commit their murder and then they went away. No fire hit either to the complainant or to his witness, which prima facie has made their availability at the place of incident to be doubtful. It was further stated by them that they took Athar Ali, in injured condition to civil hospital Mirpurkhas. They in such version are belied by Dr. Ved Parkash by stating that injured Athar Ali was brought at hospital by SIP of PS Mehmoodabad through police mobile. Such conflict again has made the availability of the complainant and his witnesses at the place of incident to be doubtful. It was further stated by them that injured Athar Ali then was taken by them to hospital at Hyderabad, there he died on 28.8.2014. No document is produced by them, which may suggest that the deceased actually was taken by them to hospital at Hyderabad and he died there. Such omission could not be overlooked. It was further stated by them that the dead body of the deceased then was taken back by them to Mirpurkhas. On post mortem, the deceased besides injury on his head as per Dr. Kashif Ali Khan was also found sustaining two more injuries on dorsal aspect of his left and right foot. How and in what manner the deceased sustained those injuries? No explanation to it is furnished by the prosecution. Dr. Kashif Ali Khan

on being asked about the weapon used, was fair enough to say that injury on the head of the deceased might have been caused with fire arm or hard blunt substance. The conflict with regard to the weapon used for causing injury to the deceased, on his head, as such could not be lost sight of. Admittedly, the deceased has died on 28.8.2014, the FIR of the incident was lodged by the complainant on 30.08.2014. It was with delay of about two days even after death of the deceased; such delay having not been explained plausibly could not be ignored. It reflects consultation and deliberation. As per SIO/SIP Sardar Khan the FIR of the incident was recorded by WHC Abdul Razaque while mashirnama of arrest and recovery was prepared by HC Ali Nawaz. None of them is examined by the prosecution for no obvious reason. Their non-examination prima facie suggest that they were not going to support the case of prosecution. As per SIO/SIP Kamaluddin, he recorded 161 Cr.P.C statements of the witnesses on 31.08.2014. It was with delay of about one day, even to FIR. No explanation to such delay is offered by the prosecution; therefore, such delay could not be lost sight of. On the basis of same evidence, co-accused Muhammad Siddique has been acquitted by learned trial Court while appellant has been convicted. 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 and to such benefit he is also found entitled.

12. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it has been observed by the Hon'ble Apex Court that;

“Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate”.

13. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been observed by Hon'ble Apex 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.”

14. In case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR-344), it has been held by Hon'ble apex Court that;

“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused”.

15. In case of *Tariq Pervaiz vs the State* (1995 SCMR 1345). It has been held by the Hon'ble Supreme Court that;

“For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of accused, then he would be entitled to

such benefit not as a matter of grace and concession but of right.”

16. The case law which is relied upon by learned D.P.G for the State and learned counsel for the complainant is on distinguishable facts and circumstance. In case of *Muhammad Saleem (supra)* the case of the prosecution was supported by injured witnesses. In the instant case, there is no injured witness. In case of *Muhammad Mansha (supra)* the evidence of the prosecution was supported by medical evidence. In the instant case, there is conflict between ocular and medical evidence with regard to use of weapon. In case of *Muhammad Ishaque (supra)* the accused committed death of at least five persons including a pregnant woman in order to settle his dispute with them over landed property and on arrest from him was secured the crime weapon. In the instant case, the motive of the incident is weak and there is no recovery of any sort from the appellant even after his arrest/surrender.

17. In view of above, the conviction and sentence awarded to the appellant by way of impugned judgment are set-aside, consequently he is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court. He is in custody and shall be released forthwith in the present case.

JUDGE