

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Appeal No. S-52 of 2014

Appellant No.1 Altaf Hussain Kharos,
Through Mr. Faiz Muhammad Larik,
advocate

Appellant No.2 Nisar Kharos ,
Through Mr. Altaf Hussain Surahyo,
advocate

The State: Through Mr. Muhammad Noonari,
Deputy Prosecutor General.

Date of hearing: 07-05-2021.

Date short order: 07-05-2021.

Date of reasons: 20-06-2021.

J U D G M E N T

Zulfiqar Ali Sangi, J.

Through instant criminal appeal,

the appellants Altaf Hussain Kharos and Nisar Kharos have assailed the Judgment dated: 14.11.2014, passed by the learned II-Additional Sessions Judge, Shikarpur in sessions case No.253/2011 (Re: State V/s Altaf & others), being outcome of crime No.15/2011 of P.S. Usman Isani @ Bado, for the offence U/S 302,364, 120-B, 148, 149 P.P.C, whereby the trial court has convicted the appellants U/S 302 (b) P.P.C to suffer R.I for life imprisonment and to pay fine/Diyat amount of Rs.50,000/- each only to be paid to the legal heirs of deceased, in case of default in payment of fine/Diyat amount, they were directed to suffer R.I for six months more. The benefit of Section 382-B Cr.P.C was extended to the appellants.

2. The brief facts of the prosecution case are that the complainant Nizamuddin Kharos lodged the F.I.R at P.S. Usman Isani at Bado on 04.04.2011 at 1830 hours alleging therein that on 01.04.2011, he along with his sons Akhtiar, Asghar Ali and brother Nazaruddin were present in their house, accused Altaf Hussain, Aijaz, Nisar and two unknown accused called his son Ashgar Ali from his house and they went to hotel but his son Asghar did not come back at house till night time, hence the complainant party went to accused Nisar and inquired about his son, who disclosed that his son had left the hotel and proceeded to Larkana. The complainant searched his son Ashgar Ali and inquired from his relatives on mobile phone but failed to get any information of his son. On 03.04.2011, the complainant came to know that one dead body is lying in soan wahi, hence they rushed there, where he found dead body of his son in the water. Thereafter the complainant went to P.S. Bado and informed the police about presence of dead body of his son in the soan wahi and police recovered the dead body and brought at Taluka Hospital Madeji, where post mortem was conducted and after post mortem, the dead body was handed over to complainant for burial purpose. Thereafter the complainant went to the police station and lodged the F.I.R.

3. During investigation, police arrested the accused Altaf and Nisar. After usual investigation, police submitted the challan against the accused to face their trial. However, accused Aijaz and Ghulam Nabi were declared proclaimed offenders. The formal charge was framed against accused Altaf Hussain and Nisar, to which they pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case, examined PW-1 Inspector Noor Nabi at Ex.9, who produced memo of wardat at Ex.9/A, memo of arrest and recovery at Ex.9/B, memo of production of rope by accused at Ex.9/C, roznamcha entries at Ex.9/D; PW-2 complainant Nizamuddin at Ex. 12, who produced receipt of dead body at Ex. 12/A, and FIR at Ex. 12/B; PW-3 Nazarddin at Ex. 13; PW-4 Dr. Sham Lal at Ex.14, who produced post mortem report at Ex.14/A, inquest report at Ex. 14/A; Pw-5 Allah Warrayo, who produced mashirnama of inspection of dead body at Ex.15/A, danistnama at Ex. 15/B; PW-6 Tapedar Maqsood Ahmed Mangi at Ex.16, who produced sketch at Ex. 16/A; PW-7 HC Mir Hassan Chandio at Ex. 18, who produced photo stat copy of roznamcha entry at Ex. 18/A, PW-8 PC Azhar Ali at Ex. 19. Thereafter learned ADPP for the State closed the prosecution side vide his statement at Ex.20.

5. Trial Court recorded statements of accused Altaf Hussain and Nisar under section 342 Cr.P.C, wherein they pleaded not guilty and claimed innocence. They further stated that all the private P.Ws as well as official witnesses are interested and they have deposed falsely. The accused persons neither examined themselves on oath nor produced any defence evidence.

6. After assessment of evidence, learned trial court has passed the above impugned judgment and awarded sentence to the present appellants/accused as mentioned above. Being aggrieved by and dissatisfied with the said judgment, appellants/accused above named have preferred this criminal appeal.

7. Learned counsel for the both appellants have contended that both the appellants are innocent and have falsely been implicated in this case; that there is no any convincing evidence against accused; that the prosecution has failed to establish its case against accused; that the impugned judgment passed by learned trial court is contrary to law, facts and equity and liable to be set aside; that from the perusal of the record, it would appear that there are many material contradictions and inconsistencies in the evidence of prosecution witnesses, but the learned trial court has not given due weight to those contradictions and inconsistencies and the same have not been properly discussed by the learned trial court while passing the impugned judgment; that, admittedly, there is no eyewitness of the alleged incident, but the entire prosecution case hinges upon the last seen evidence, which is not supported by the strong circumstantial evidence; that the learned trial court has erred in appreciating the prosecution evidence. They further submitted that, the ocular testimony is not worthy of reliance, as it is totally based on the evidence of interested, partial, biased and hostile witnesses, on the basis of which conviction cannot be awarded to the appellants/accused; that the conviction of the appellants is based upon manifestly and unsatisfactory evidence, which is full of contradictions and improvements. They have prayed for acquittal of the appellants/accused.

8. On 26.04.2021 arguments of learned counsel for the appellants were heard and matter was adjourned for arguments of learned D.P.G. and learned counsel for the complainant. This is an old appeal pertaining the year 2014, therefore, the court could not

wait for complainant for an indefinite period. A lady, namely, Mst. Sugra claimed to be mother of deceased was present on 07.05.2021 and submitted that complainant is her husband and he is not interested in the proceeding, however, she assisted learned D.P.G. and learned D.P.G. concluded his arguments. On 07.05.2021, S.H.O P.S. Usman Esani @ Bado was also present and submitted that they have taken serious efforts for service of notice upon the complainant, but could not serve the notice, because the complainant was hiding himself and avoiding the service of notice.

9. Learned Additional Prosecutor General has submitted that prosecution has proved the case beyond the shadow of doubt; that the complainant and P.Ws have fully supported the prosecution case and no any material contradiction came on record to disprove the version of prosecution, no doubt there are minor contradictions in between the evidence of witnesses which does not make the case of prosecution as doubtful, as after laps of about more than 2 years the evidence of prosecution witnesses were recorded. He further submitted that there is no eye witness of the incident who had seen the accused persons while committing murder of deceased Asghar Ali, but the circumstances of the case and last seen witnesses as well as recovery of rope and medical evidence reasonably connect the present accused with the commission of murder of deceased Asghar Ali. The Complainant Nizamuddin is father of deceased and eye witness Nazarddin is brother of complainant, they both have categorically deposed that accused Altaf and Nisar came from their house along with two unidentified persons and in their presence as well as in presence of eye witness Akhtiar, the deceased Asghar Ali

proceeded with accused Nisar and Altaf and others towards hotel as the accused wanted to talk with the deceased Asghar Ali. It has also come on record that deceased Asghar Ali has never returned back alive at his house and only his dead body had come. Lastly, he prayed that the appeal of the appellants may be dismissed.

10. I have heard learned counsel for the appellant and learned Additional Prosecutor General and have gone through the material available on the record with their able assistance.

11. On reassessment of the evidence produced by the prosecution it established that the prosecution has not proved the case against the appellants beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence.

12. The delay in the registration of FIR has not been explained by the complainant. It is alleged by the complainant that on 01-04-2011 the appellants took the deceased from his house at 11. pm but he could not come back, they were searching but could not succeed and later on received information on 03-04-2011 that a dead body is lying in the soan wahi and they rushed there where they found the dead body of the deceased. Complainant not recorded any complaint about his missing son for about three days. The dead body was recovered on 03-04-2011 even then on the same day FIR was not registered and it was registered on 04-04-2011, PW-03 Nazaruddin admitted during the cross-examination that the complainant lodged the FIR after consultation with him and the other relatives. The complainant also during the cross-examination stated that **“without lodging FIR postmortem of deceased Ghulam**

Asghar was conducted and on 3rd day of recovery of dead body of Asghr I lodged FIR against present accused.” In these circumstances the evidence of complainant and his witnesses cannot be relied upon.

13. The story as stated by the complainant is not believable for the reason that when the appellants and the complainant party was on inimical terms then how they (complainant party) allow the deceased to go with the appellant. The enmity which was disclosed by the complainant is that the appellant Altaf wanted to marry with the daughter of Bashir Ahmed but the deceased was engaged with the said girl and appellant Altaf annoyed. If this was a position then such story that appellants came at the house of complainant and asked the deceased to accompany with them to take tea at hotel in presence of the complainant and the other witnesses is unbelievable and creates the doubt. During cross-examination complainant admitted that after the death of deceased such girl was married with his other son Akhtiar who was also witness of this case but he was not examined by the prosecution.

14. There is no eye witness of the murder and no evidence is available with the prosecution that when murder was committed and by whom it was committed. The complainant stated that appellants took the deceased on 01-04-2011 and dead body was recovered from soan wahi on 03-04-2011 and at the time when dead body was recovered blood was oozing from the nose, fact that blood was oozing had also been confirmed by the other witnesses including the police witness. The PW-03 admitted during the cross-examination that ***“It***

is fact that I am not eye witness of this incident and also I had not seen accused while committing murder of deceased Asghar.”

15. The complainant given contradictory evidence in respect of information about poison to the deceased, he stated in his cross-examination that ***“I have heard form hotel that accused persons offered poison in tea and thereafter they committed murder of my son.”*** Complainant also admitted during the cross-examination that ***“I do not inquired from waiters and owner of hotel whether my son and accused had come to that hotel or not.”*** Medical evidence is silent about the poison. There is no evidence that the appellants and the deceased were seen at the hotel. This fact alone is sufficient to disbelieve the evidence of complainant.

16. The only piece of evidence against the appellant Altaf is that he lead the police party after his arrest and handed over to them a piece of rope. The appellant was arrested on 05-04-2011 and the recovery was allegedly effected on 13-04-2011 after 09 days of his arrest and the same recovery is also not helpful to the prosecution as none of the PW seen the accused persons by using the same rope and even committing murder of the deceased. The mashir of the recovery namely Allah Wadhayo stated during cross-examination that ***“I do not remember the date and month of recovery of dead body as well as inspection of place of wardat. At about 11-30 a.m accused discover the rope and produced before the police but I do not remember the date and month of said recovery.”*** Under

these circumstances the recovery of rope cannot be used against the appellant Altaf as the same was not proven by the prosecution.

17. After the reassessment of material available on record I found that in the present case there are also numbers of infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez v. The State reported as (1995 SCMR 1345)**, wherein the Hon'ble Supreme Court has held as under:-

"The concept of benefit of doubt to an accused persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubt. 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 a matter of right".

18. The instant criminal appeal was allowed vide short order dated: **07.05.2021**, and the impugned judgment dated: **14.11.2014** was **set-aside**. Appellants were acquitted from the charges and were ordered to be released forthwith if not required in any other custody case.

19. These are the reasons of my short order dated: **07-05-2021**.

Judge