

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

Criminal Jail Appeal No.S-28 of 2014

Appellant : Arz Muhammad S/o Jaindo by caste Mangwano
through M/s. Wali Muhammad Khoso and Imdad
Ali Dahri , advocates.

The State : **Through** Ms. Sana Memon, Assistant
Prosecutor General, Sindh.

Complainant : Ghulam Shabir **through** Mr. Hameedullah Dahri,
Advocate.

Date of hearing : 05-07-2021.
Date of decision : 05-07-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The facts in brief necessary for disposal of instant appeal are that the appellant allegedly with rest of the culprits in furtherance of their common intention caused injuries to Gulab Khan and Gul Hassan with hatchet, lathi and chisel (ramba) with intention to commit their murder, eventually Gulab Khan died after sustaining such injuries, for that they were booked and reported upon by the police.

2. The appellant, co-accused Muhammad Soomar and Jaindo did not plead guilty to the charge, and the prosecution to prove the same, examined complainant Ghulam Shabir and his witnesses and then closed its side.

3. The appellant and the said co-accused in their statements recorded u/s 342 Cr.P.C denied the prosecution's allegation by pleading innocence by inter alia stating that the deceased had died at the hands of PW Gul Hassan and they have been involved in this

case falsely by the complainant party due to enmity. They did not examine anyone in their defence or themselves on oath in terms of section 340 (2) Cr.P.C.

4. On conclusion of the trial, co-accused Jaindo was acquitted, co-accused Muhammad Soomar for an offence punishable under section 337-A(i) P.P.C for causing injuries to PW Gul Hassan was convicted and sentenced to undergo R.I for 20 months with payment of Rs.10,000/- as *Daman* to PW Gul Hassan while the appellant for an offence punishable under section 302 (b) P.P.C for causing death of Gulab Khan was convicted and sentenced to undergo rigorous imprisonment for life and to payment fine of Rs.100,000/- as compensation to legal heirs of the said deceased by learned Additional Sessions Judge Matiari vide his Judgment dated 17th February 2014 which is impugned by the appellant before this Court by preferring the instant jail appeal.

5. 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 in order to satisfy its dispute with them over construction of the shop; the F.I.R has been lodged with delay of about 10 hours; the 161 Cr.P.C statements of the PWs have been recorded with delay of about six days; and on the basis of same evidence co-accused Jaindo has been acquitted while the appellant has been convicted by learned Trial Court without assigning cogent reason for the same. By contending so, he sought for acquittal of the appellant by extending him benefit of doubt. In support of his

contentions, he relied upon the cases of *Allah Rakhio and another Vs. The State* [2001 P. Cr. L.J 1959] and *Kafeeluddin Vs. The State* [1989 P. Cr. L. J 251].

6. Learned A.P.G for the State and learned counsel for complainant by supporting the impugned judgment, have sought for dismissal of the instant jail appeal by contending that the appellant has actively participated in commission of incident by causing chisel (ramba) blow to the deceased on his head and prosecution has been able to prove its case against him. In support of their contentions, they relied upon the case of *Farman Ali and another Vs. The State and another* [2020 SCMR 597].

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

8. It is stated by ASI Rehmatullah that on 28.05.2010 he was posted at P.S. Shahpur on the same date on having intimated of the incident on phone he proceeded to the Taluka Hospital Matiari. If it is believed so then he was under obligation to have recorded such intimation in Roznamcha, which he has failed to record obviously, such omission on his part could hardly be ignored. On his arrival at Taluka Hospital Matiari, as per him, he undertook investigation of the case, prepared memo of injuries, Lash Chakas Form and Danishtnama by recording crime number of the incident therein. How the crime number was recorded in said documents when formal F.I.R of the incident was yet to be recorded? It appears to be surprising. It was stated by complainant Ghulam Shabir that during

course of incident besides PW Gul Hassan who was caused lathi blows by co-accused Soomar, the deceased was caused chisel (ramba) and hatchet blows by co-accused Jaindo (since acquitted) on his person. As per Dr. Irshad Ahmed, the deceased was found sustaining single lacerated wound on his parietal region of head and it was caused to him with hard and blunt substance. By stating so, he belied the complainant that the deceased besides chisel (ramba) blow on his head was also caused hatchet injuries on his person. Evidence of PWs Gul Hassan and Ghulam Ali is also silent with regard to sustaining of hatchet injuries by the deceased on his person at the hands of co-accused Jaindo (since acquitted). Why the complainant insisted on sustaining hatchet injuries by the deceased besides chisel (ramba) injury on his head? No explanation to it is offered by the prosecution which goes to suggest that the complainant was not an eye witness of the incident. Had he been the eye witness of the incident, then he would have lodged the F.I.R of the incident promptly and not with delay of about 10 hours. The delay in lodgment of the F.I.R on the part of complainant, as such, could not be lost sight of. In that situation, the complainant could hardly be relied upon to maintain conviction against the appellant. The 161 Cr.P.C statements of PWs Gul Hassan and Ghulam Ali as per IO/SIP Muhammad Siddique were recorded by him on 06.06.2010. It was with delay of about nine days to the F.I.R. No plausible explanation to such delay is offered by the prosecution; therefore, the evidence of said PWs could safely be judged with

doubt. As per IO/SIP Muhammad Siddique he during course of investigation recovered hatchet, lathi and chisel (ramba) from the appellant and others in presence of PW/mashir Muhammad Juman and prepared such memos. PW/Mashir Muhammad Juman during course of his examination on asking was fair enough to admit that those articles were given to the police by the complainant after three days of the incident and prior to the arrest of the accused. Not only this, but he gone to the extent of saying that his signatures were obtained on the memos by police at P.S Shahpur. In that situation, the appellant could hardly be connected with the alleged recovery of chisel (Ramba). Surprisingly, on asking IO/SIP Muhammad Siddique was fair enough to state that on recovery, the above said articles were sent by him to the Chemical Examiner. If it was so, then he was under obligation to have produced such reports, which he has failed to produce for no obvious reason, which *prima facie* suggest that no such exercise was undertaken by him. The investigation of the present case on the part of police officer(s) for the above said reasons could hardly be said to be fair/honest.

9. Significantly, on the basis of same evidence co-accused Jaindo has been acquitted by learned Trial Court by extending him benefit of doubt while the appellant has been convicted and sentenced.

10. The discussion involved the conclusion that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt.

11. 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".

12. In case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR-344), it has been held by the 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".

13. In case of *Muhammad Mansha vs The State* (2018 SCMR 772), it has been held by the Hon'ble Apex Court that;

"4....Needless to mention that while giving the benefit of doubt to an accused 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 would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

14. The case law which is relied by learned A.P.G and

learned counsel for the complainant is on distinguishable facts and circumstances. In that case, the incident was reported promptly. In the instant case, the incident was reported with unexplained delay of about 10 hours.

15. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant by way of impugned judgment are set-aside. Consequently the appellant is acquitted of the offence for which he has been charged, tried and convicted by learned Trial Court and he shall be released forthwith if not required in any other custody case.

16. Above of the reasons of short order dated 05-07-2021 whereby the instant appeal was allowed.

JUDGE

Muhammad Danish Steno*