

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

**Criminal Appeal No.D-178 of 2019
[Confirmation Case No.41 of 2019]
Criminal Appeal No.D-38 of 2020**

Before;

Mr. Justice Arshad Hussain Khan
Mr. Justice Irshad Ali Shah

Appellants: Ali Sher, Ali Nawaz (now has died) and Ghulam Abbas all sons of Ali Bux Babar, through Mr. Noor-ul-Haq Qureshi, Advocate in Criminal Appeal No.D-178 of 2019.

Appellant: Nadeem Babar Son of Eidan through Mr. Ghulam Shabbir Babar, Advocate in Criminal Appeal No.D-38 of 2020.

Respondent: The State, through Mr. Fayaz Hussain Sabki, Assistant Prosecutor General, Sindh.

Date of hearing: 06.07.2021

Date of decision: 08.07.2021

JUDGMENT

Irshad Ali Shah, J; It is the case of the prosecution that the appellants allegedly with rest of the culprits in prosecution of their common object committed death of Mst. Aarifa by causing her fire shot injuries under the garb of 'Karap', caused disappearance of her dead body in order to save themselves from legal consequences, for that they were booked and reported upon by the police.

2. After due trial, co-accused Ali Hassan, Dadan, Khamiso, Wahid Bux, Muhammad Qasim, Mazhar alias Teru, Paryal Khan,

Abdul Latif alias Latif and Molvi Aijaz Ahmed were acquitted while appellants Ali Sher, Ali Nawaz (now has died) and Ghulam Abbas for offence punishable under section 302(b) P.P.C were awarded death penalty with fine of Rs.500,000/- each payable to the legal heirs of the said deceased as compensation and in default whereof to undergo simple imprisonment for three months. Besides above, they together with appellant Nadeem Babar for offence punishable under section 201 P.P.C were convicted and sentenced to undergo R.I for five years and to pay fine of Rs.50,000/- each and in default whereof to undergo simple imprisonment for one month. All the sentences were ordered to run concurrently with benefit of section 382(b) Cr.P.C. by learned Additional Sessions Judge-II Jamshoro @ Kotri vide his Judgment dated 28th September 2019, which is impugned by the appellants before this Court by preferring two separate appeals while learned Trial Court has also made reference under section 374 Cr.P.C for confirmation of death sentence to appellants Ali Sher, Ali Nawaz (now has died) and Ghulam Abbas, those now are being disposed of by way of single judgment, as these are involving common question of facts and law.

3. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the police on the basis of extra judicial confession

otherwise none has seen them committing the alleged incident; the crime weapons have been foisted upon them and on the basis of same evidence co-accused who were nine (09) in numbers have been acquitted while the appellants have been convicted and sentenced by learned Trial Court without assigning lawful justification for doing so; therefore, the appellants are liable to their acquittal by extending them benefit of doubt. In support of their contentions, they relied upon the cases of *Saleemullah and another vs. The State and another* [2019 YLR 1494], *Tanvi Vs. The State and another* [PLD 2020 Lahore 774], *Muhammad Azam and another Vs. The State* [2019 MLD 1597], *Muhammad Abid Vs. The State and another* [PLD 2018 Supreme Court 813], *Hashim Qasim and another Vs. The State* [2017 SCMR 986], *Altaf Hussain Vs. Fakhar Hussain and another* [2008 SCMR 1103], *Mushtaq and 3 others Vs. The State* [PLD Supreme Court 1] and *Ali Sher and others Vs. The State* [2008 SCMR 707].

4. Learned APG for the State by supporting the impugned judgment has sought for dismissal of the instant appeals and confirmation of death sentence to appellants Ali Sher, Ali Nawaz (now has died) and Ghulam Abbas by contending that they have committed murder of an innocent lady under the garb of 'karap' and then have caused disappearance of her dead body to save

themselves from legal consequences and such allegation the prosecution has been able to prove against them by bringing on record cogent evidence.

5. We have considered the above arguments and perused the record.

6. Admittedly none has seen the appellants committing the alleged incident. The F.I.R of the incident has been lodged on behalf of the State by ASI Muhammad Ali, on the basis of information which was communicated to him probably by PW Mst. Bushra Ibrahim a Human Right Activist. It was stated by Mst. Bushra Ibrahim that she was told by Mst. Aarifa (deceased) on phone that her father and others are intending to kill her as '*Kari*'. No CDR report in that respect of such conversation is collected by the police; such omission on part of police could not be lost sight of. Mst. Shabiran, who allegedly put PW Mst. Bushra Ibrahim into motion has been declared hostile to the prosecution, on account of her failure to support the case of prosecution, which appears to be significant. As per I.O/D.S.P Shamsul-Qamar, he conducted exhumation of dead body of Mst. Aarifa on pointation of her grave by her brother Mir Hazar Khan and then prepared such mashirnama. He on asking was fair enough to admit that he had not seen the dead body of the deceased himself. If it was so then the

exhumation proceedings of the grave of the deceased, on his part was a hollow formality. As per Women Medical Officer Dr. Farrukh Naz, the facial features of the dead body were un-recognizable. If it was so then identity of the dead body of the deceased was to have been ascertained through DNA or other mode. No DNA was arranged by the police or the Medical Board which was constituted to supervise the exhumation proceedings, to make believe that it was actually dead body of deceased Mst. Aarifa or someone else. PW Mir Hazar Khan who allegedly pointed the grave of the deceased to the police for exhumation of her dead body was not examined by the prosecution, perhaps knowingly. He when was examined by the appellants in their defence, was fair enough to say that he was not available at the time of exhumation of dead body of the deceased. His evidence *prima facie* has made the entire exhumation proceedings of the dead body of the deceased on the part of police and Medical Board to be doubtful. In these circumstances, it would be hard to maintain the conviction and sentence against the appellants on the basis of their alleged extra judicial confession which even otherwise is inadmissible piece of evidence as is prescribed under Article 38 of Qanoon-e-Shahadat Odder 1984 or on the basis of recovery of the crime weapons, which are alleged by the appellants to have been foisted upon them.

7. The evidence which is brought on the record by the prosecution is disbelieved in respect of co-accused Ali Hassan, Dadan, Khamiso, Wahid Bux, Muhammad Qasim, Mazhar alias Teru, Paryal Khan, Abdul Latif alias Latif and Molvi Aijaz Ahmed by recording their acquittal while it is believed in respect of the appellants by convicting them, which appears to be surprising.

8. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellants beyond shadow of doubt and to such benefit they too are found entitled.

9. 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”.

10. 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".

11. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellants (except Ali Nawaz, whose appeal is ordered to abate on his death) by way of impugned judgment are set-aside, they are acquitted of the offence for which they have been charged, tried and convicted by learned Trial Court, they shall be released in the present case forthwith, if not required in any other custody case.

12. Above are the reasons of short order dated 08.07.2021, whereby the captioned appeals and reference were disposed of.

JUDGE

JUDGE

Muhammad Danish Steno*