

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

**Criminal Appeal No.S-82 of 2015
Criminal Appeal No.S-86 of 2015**

Appellants: Through M/s. Ayaz Hussain Tunio and Syed Tarique Ahmed Shah, Advocates.

Respondent: The State, through Mr. Abdul Waheed Bijarani, Assistant Prosecutor General, Sindh for State assisted by the complainant.

Date of hearing: 30-05-2022.

Date of decision: 03-06-2022.

JUDGMENT

IRSHAD ALI SHAH, J; The appellants together with co-accused Mohabat, Bhai Khan and Nim were charged and tried for committing murder of Khalid and Lal Khan and for causing fire shot injuries to PW Shoukat with intention to commit his murder. After due trial, co-accused Mohabat, Bhai Khan and Nim were acquitted while appellants for committing the said offence were convicted and sentenced to undergo various terms of imprisonment with fine/compensation. All the sentences were ordered to run concurrently with benefit of section 382-(b) Cr.P.C by learned Additional Sessions Judge, Matiari vide Judgment dated 18.05.2015, which is impugned by the appellants by preferring two separate appeals.

2. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party in order to satisfy its matrimonial dispute with them; the F.I.R of the incident has been lodged with delay of about one day; the weapons have been foisted upon the appellants and evidence of the complainant and his witnesses has been disbelieved in respect of co-

accused Mohabat, Bhai Khan and Nim while it has been believed in respect of the appellants without lawful justification by learned Trial Court, therefore, the appellants are entitled to their acquittal by extending them benefit of doubt.

3. Learned Assistant Prosecutor General, Sindh, who is assisted by the complainant by supporting the impugned judgment has sought for dismissal of the instant criminal appeals by contending that the prosecution has been able to prove its case against them beyond shadow of doubt.

4. Heard arguments and perused the record.

5. It is inter alia stated by complainant Moula Bux that on 24.01.2012, his brothers Lal Bux and Shoukat Ali and son Khalid went on donkey cart to make some purchase from shop of Aarib Nizamani, at about 0530 hours, he heard fire shot reports and on hearing so, went outside of his house, when reached at Village Jamal Khan, there he found dead bodies of Lal Bux and Khalid lying on the ground while PW Shoukat Ali was found sustaining fire shot injuries, there he was intimated by his brothers PWs Muhammad Ali and Imdad Ali that at the instigation of co-accused Bhai Khan and Nim besides causing lathi blows by co-accused Mohabat and Lalo to deceased Lal Bux, both the deceased were fired at by appellants Mevo and Ashique Ali while PW Shoukat Ali was fired at by appellant Ali Muhammad. The evidence of the complainant prima facie suggests that he was not an eyewitness of the incident and he came at the place of incident on hearing of fire shot reports. Whatever is stated by him in his evidence was based on information which was communicated to him by his brothers PWs Muhammad Ali and Imdad Ali. In that situation, the lodgment of F.I.R on his

part with delay of about one day could not be lost sight of; it is reflecting consultation and deliberation. PW Muhammad Ali has not been examined by the prosecution. The inference which could be drawn of his non-examination in terms of Article 129 of Qanoon-e-Shahadat Order 1984 would be that he was not going to support the case of prosecution. PW Imdad Ali was fair enough to admit that his 161 Cr.P.C statement was recorded by police on 18.02.2012. It was with delay of about 24 days to the incident. No explanation to such delay is offered by the prosecution. In that situation, no much reliance could be placed upon his evidence. PW Shoukat Ali, who is said to be an injured witness of the incident, was fair enough to say that the incident took place on road near to village Aarib. By saying so, he belied the complainant that the incident took place by the side of village Jamal Khan. It was further stated by PW Shoukat Ali that no bullet hit to donkey. He in that respect is belied by PW Imdad Ali; as per him, bullet hit to donkey. Inconsistent and contradictory evidence of PW Shoukat Ali could hardly be relied upon to base conviction. It was stated by I.O/SIP Gulsher that he was intimated about the incident on telephone by the complainant and on such information, he went to Taluka Hospital Hala. Apparently, he proceeded to the Taluka Hospital Hala without recording such entry in Roznamcha. Such omission on his part could not be overlooked. If, it was to have been recorded then it would have given true picture of the incident. He was fair enough to admit that he recorded 161 Cr.P.C statement of PW Shoukat Ali on 30.01.2012. PW Shoukat Ali as per Medical Officer Dr. Abdul Khaliq was discharged from the hospital on 25.01.2012, therefore, recording of his 161 Cr.P.C statement on 30.01.2012 with delay of about five days to his

actual discharge from the hospital is appearing to be significant. Such delay having not been explained could not be overlooked. No Report of Chemical Examiner or Forensic Expert is produced in evidence, for no obvious reason. The appellants were arrested on 05.02.2012, the recovery of crime weapons was allegedly made from them on 14.02.2012. It was with delay of 09 days to their actual arrest. In that situation, the conviction against the appellants could hardly be maintained on the basis of recovery of crime weapons which are alleged to have been foisted upon them by the police. On the basis of same evidence, co-accused Mohabat, Bhai Khan and Nim have been acquitted while the appellants have been convicted, which too is appearing to be surprising. In these circumstances, it could be concluded safely that the prosecution has not been able to prove its case against the appellants beyond doubt and to such benefit they too are found entitled.

6. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it was observed by the Hon'ble 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”.

7. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been held by Hon'ble Court that;

“Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”

8. 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”.

9. 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”.

10. In view of the facts and reasons discussed above, the appellants are acquitted of the offence, for which they have been charged, tried and convicted by learned Trial Court. Appellant Ali Muhammad is present in Court on bail, his bail bond is cancelled and surety is discharged while appellants Mevo and Ashique Ali are in jail to be released forthwith, if are not required to be detained in any other custody case.

11. Both criminal appeals are disposed off accordingly

JUDGE

Muhammad Danish*