IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-37 of 2013

Date of hearing:	30.03.2020 and 06.04.2020.
Date of decision:	10.04.2020.
Appellant:	Ali Nawaz Through Mr. Ghulamullah Chang, Advocate.
The State	Ms. Safa Hisbani, Assistant P.G. for the State.
Complainant:	Mr. Nasrullah Unar Advocate.

J U D G M E N T

MUHAMMAD IQBAL KALHORO J:- By means of this appeal, appellant has challenged conviction and sentence of life imprisonment u/s 302 PPC and fine of Rs.50,000/-, in default thereof to suffer RI six months more for committing murder of Din Muhammad along with his three (03) accomplices on 01.08.2008 at 9.30 pm.

2. As per brief facts, on the day of incident complainant along with deceased Din Muhammad, who was his nephew, and his son Haji Khan was returning from village Sahib Sohoo on a motorcycle driven by the deceased when at about 09:30 p.m. they were waylaid by appellant along with co-accused Khan and two (02) others unidentified. They all were duly armed with pistols except Khan who had a hatchet. The appellant after yelling that the deceased had got him implicated in a theft case fired upon him by putting barrel of his pistol on his temporal region killing him at the spot. This incident was witnessed not only by the complainant and his son Haji Khan but P.W-3 Roshan Ali, the son of complainant's sister and resident of Tando Jam, who was mysteriously present at the lands of his maternal uncle (the complainant) at odd hours of night and turned up at the spot after a while after being attracted there on fire shots and cries and saw the appellant with his accomplices duly armed and fleeing away on the motorcycle of the complainant party.

3. After usual investigation and arrest of the accused, the trial started and the prosecution examined 09 witnesses, who produced all necessary documents. In the statement recorded u/s 342 Cr.P.C, the appellant denied allegation against him. However, vide impugned judgment the appellant has been returned guilty verdict in the terms as stated above, whereas co-accused have been acquitted.

4. Mr. Ghulamullah Chang, learned defense counsel has argued that the appellant is innocent and has been falsely implicated in this case; that although prosecution has alleged a motive but has not been able to prove the same; that the witnesses have contradicted each other on material facts of the case; that oral account of the witnesses is in conflict with medical evidence which makes the presence of witnesses at the spot highly doubtful; that appellant was arrested on 19.08.2008, whereas, the alleged recovery of a pistol was effected from him on 27.08.2008 from a place not in his exclusive possession; that empty was recovered allegedly on next day of the incident but it was sent to the ballistic expert along with pistol vide a letter dated 30.08.2008 and, therefore, the positive FSL report in this connection is of no consequence because the law requires that the empty shall be sent to the ballistic expert immediately after its recovery independent of crime weapon.

5. On the other hand, learned Assistant Prosecutor General Sindh and learned counsel for the complainant have supported the impugned judgment and submitted that prosecution has been able to prove its case against the appellant beyond a reasonable doubt. In support of their arguments, they have relied upon the case law reported in 2002 SCMR 1885 and PLD 2004 Quetta 123.

6. I have considered submissions of parties and perused the material available on record including the case law relied at bar. The complainant and his witness Haji Khan have asserted in the evidence that appellant had killed the deceased by putting barrel of a country-made pistol (carbine) on his temporal region and firing from it. In clear terms, they speak of only one fire arm injury on temple of the deceased. All the relevant papers prepared before FIR i.e. inquest report, memos of dead body, place of incident, etc. also show only one injury on the person of deceased at the same locale. However, the postmortem report and evidence of the doctor reflects two injuries on the body of deceased. One injury is inside the oral cavity (mouth) which is entry wound, and the other is on temporal region that is exit wound. This establishes unambiguously that the deceased was fired inside his mouth from down to up as exit wound is on his temple and not by putting pistol on his temple as alleged by the witnesses and shown in the papers including FIR. This has essentially put presence of the witnesses at the spot under cloud. It appears their evidence, and story of FIR are based on exterior examination of dead body which depicted only one injury on the temple of the deceased. All the relevant police papers too showing only such injury seem to have been prepared on external inspection of dead body and this in fact expressly led the complainant party to structure prosecution story in the manner as it stands in their evidence.

7. The recovery of crime weapon i.e. carbine from the appellant and its matching with empty is of no consequence to the prosecution because the empty allegedly recovered next day of the incident was kept by the investigation officer and was sent to ballistic expert on 30.08.2008 along with carbine recovered on 27.08.2008. The law

requires that empty shall be sent to ballistic expert immediately after recovery from the spot independent of crime weapon, if not recovered simultaneously. Its subsequent sending for FSL report together with a crime weapon recovered afterwards would give rise to a presumption of tampering and manipulation as the said empty being retrieved later on by firing from subsequently recovered pistol cannot be ruled out in such circumstances. There is another aspect also which seriously questions credence of recovery of empty from the spot. The appellant was armed with a country made pistol which does not automatically ejects spent casing like automatic weapon. From a country made pistol unless the empty cartridge is taken out for reloading, etc., it will not come out. The witnesses in their evidence have nowhere stated that appellant after firing on the deceased had taken out the empty and thrown it on the ground. Therefore, both the empty to be empty used in crime weapon and the recovered carbine to be crime weapon are not free from doubt.

8. The delay of 16 hours in approaching the police by the complainant for registration of FIR when police station was at 6/7 kilometer away and his village was hardly at the distance of 1 and half kilometer from the spot and easily reachable is not understandable either and it strengthens the idea of the complainant party getting knowledge of the incident later on. The motive part of the story is also unproven as no documentary evidence in this regard has been brought on record. In these facts and circumstances, I am of the view that prosecution has not been able to prove the case against the appellant beyond a reasonable doubt. It is well settled that benefit of doubt must go to the accused. Accordingly, the appeal is allowed and the appellant is acquitted of the charge against him. He shall be released forthwith, if not required in any other custody case.

The appeal is disposed of in above terms.

JUDGE