JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-104 of 2015
Cr. Jail Appeal No.S-112 of 2015
Cr. Appeal No.S-118 of 2015
Cr. Jail Appeal No.S-124 of 2015

Date of hearing	:	18.11.2022, 25.11.2022 & 02.12.2022
Date of judgment	:	02.12.2022
Appellants Darya Khan and Zaheer Ahmed	:	Through Mr. Ali Zaman Khan Patoli, Advocate
Appellants Gul Hassan and Khan Muhammad	:	Through Mr. Muhammad Saleem Laghari, Advocate
The State	:	Through Mr. Abdul Waheed Bijarani, Assistant P.G Sindh.
Complainant Abdul Razzak	:	Present in person.

JUDGMENT

Muhammad Saleem Jessar, J.- By this single judgment, I propose to dispose of above said four Criminal Appeals as same have arisen from one and the same common judgment passed by the trial Court.

2. Through these Appeals, appellants have impugned the judgment dated 29.07.2015 passed by learned Additional Sessions Judge, Tando Muhammad Khan vide Sessions Case No.716/2011, (re: The State v. Khan Muhammad & others), arising out of F.I.R No.47 of 201 registered at P.S Tando Muhammad Khan, under Sections 302, 392, 34 PPC, whereby accused Khan Muhammad and Gul Hassan have been convicted under Section 302(b) PPC for committing murder of deceased Abdl Wahid and sentenced to suffer rigorous imprisonment for life and to pay compensation of Rs.100,000/- each to the legal heirs of deceased in terms of

Section 544-A Cr.P.C. They have also been convicted for offence under Section 392 PPC and sentenced to suffer rigorous imprisonment for 10 years and to pay compensation of Rs.50,000/- each to the legal heirs of deceased in terms of Section 544-A Cr.P.C. Accused Darya Khan and Zaheer Ahmed have been convicted for offence under Section 392 PPC and sentenced to suffer rigorous imprisonment for 10 years; besides to pay compensation of Rs.50.000/- each to the legal heirs of deceased in terms of Section 544-A Cr.P.C. In case of default in payment of aforesaid compensation, all the accused were ordered to suffer simple imprisonment for 06 months with direction that the afore-mentioned sentences shall run concurrently with benefit of Section 382-B Cr.P.C.

3. The crux of the prosecution case is that on 11.02.2011 at 2000 hours, complainant Abdul Razzak lodged instant F.I.R alleging therein that he is Tailor Master and are three brothers. His elder brother Abdul Khalique is employee and his younger brother Abdul Wahid (deceased) was Taxi Driver who used to drive Taxi Car of one Tarique Khanzado. On 02.02.2011 when complainant was present in his house, Abdul Wahid came in the house for taking meal and in the meantime he received call on his phone at 1300 hours and talked with caller and told him that after taking meal he is coming to taxi stand. Thereafter, Abdul Wahid left for taxi stand in his taxi alongwith Gul Hassan and Muhammad Khan, when they reached at Disco Hotel, they met with three persons, the complainant and Gul Hassan alighted from the Taxi. Abdul Wahid after fixing fare went alongwith them, while complainant and Gul Hassan went on coaster to Hyderabad and they came back in evening at Tando Allahyar, where at Taxi stand they came to know that those three persons have killed Abdul Wahid at Shaikh Bhirkio Jalal Mori link road and also took away the Taxi. After receiving such information, they informed their relatives Abbas, Ali Kalroo and Arzi Khan who then came and accompanied with them at PP Shaikh Bhirkio, where they came to know that police took away the dead body for postmortem to Taluka Hospital, Tando Muhammad Khan; hence, they went to the

hospital and saw the dead body of Abdul Wahid with multiple injuries on different parts of his body. After necessary formalities, they starting searching the accused and inquired from the people nearby area of place of incident and came to know that all three accused persons had alighted at chowk of place of incident where deceased Abdul Wahid alighted and during talks they fired upon him (deceased) and then fled away. Thereafter, F.I.R of the incident was lodged.

4. After conducting investigation, the Police arrested accused Khan Muhammad, Gul Hassan, Darya Khan and Zaheer Ahmed. They were challaned before the Court concerned by showing accused Khamiso alias Khamoo as shown absconder after completing proceedings against him as required under Section 87 & 88 Cr.P.C,

5. The trial Court framed charge against all four accused as Ex-09, to which the accused pleaded not guilty and claimed to be tried vide their pleas as Ex.10 to 13.

6. To prove its charge, the prosecution examined PW-01 Abdul Razzak (complainant) at Ex-15, who produced copy of FIR at Ex-15/A and his statement u/s. 164 Cr.P.C at Ex-15/B, Identification Parade as Ex-15/C. PW-2 Abdul Khalique (Mashir) was examined at Ex-16, who produced Danishnama at Ex-16/A, mashirnama of place of incident and recovery of bloodstained earth at Ex-16/B, receipt of receiving dead body at Ex-16/C, mashirnama of recovery of bloodstained clothes at Ex-16/D, mashirnama of place of incident at Ex-16/E, mashirnama of recovery of white colour Toyota Corolla car at Ex-16/F, mashirnama of arrest of accused Khan Muhammad Machhi, Darya Khan Lashari, Zaheer Ahmed Jarwar and Gul Hassan Lashari at Ex-16/G. PW-3 Gul Hassan was examined at Ex-17, who produced identification parade at Ex-17/A and his statement u/s.164 Cr.P.C at Ex-17/B. P.W-4 I.O was examined at Ex-18, who produced departure entry at Ex-18/A. PW-5 Dr. Zulfiqar Ali Siddiqui was examined at Ex-20, who produced letter at Ex-20/A and inquest report at Ex-20/B, postmortem report at Ex-20/C,

receipt regarding receiving dead body at Ex-20/D. PW-6 Syed Noor Hussain Shah (Tapedar) was examined at Ex-21, who produced three copies of Map at Ex-21/A to Ex21/C. P.W-7 Muhammad Hashim was examined at Ex-22. Thereafter, the prosecution closed its side vide statement as Ex-23.

7. The statements of appellants under Section 342 Cr.P.C were recorded at Ex-24 to 27, where they denied the allegations leveled by the prosecution against them and claimed their innocence by not examining themselves on oath as required under Section 340(2) Cr.P.C, nor leading any evidence in their defense.

8. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing learned Counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellants in the terms as stated above and the appellants/convicts through these appeals have challenged their conviction recorded by the trial Court.

9. Mr. Ali Zaman Khan Patoli, learned Counsel submitted that four accused were jointly arrested by the police under Crime No.66-2011 registered with P.S Tando Muhammad Khan under Sections 324, 353 & 102 PPC. Said case was challaned by the police which was tried by the Court of Additional Sessions Judge, Tando Muhammad Khan vide Sessions Case No.711 of 2011 (Re: The State v. Khan Muhammad & others). He further submitted that all four accused were acquitted from the charge of Crime No.66 of 2011 P.S Tando Muhammad Khan under Sections 265-K Cr.P.C in terms of order dated 28.12.2013. He next submitted that both the appellants namely Darya Khan and Zaheer Ahmed in Criminal Appeal Nos.104 and 118 of 2015 were also acquitted from the charges of offshoot cases vide Crime Nos.69 & 70 of 2011 P.S Tando Muhammad Khan under Section 13-D Arms Ordinance, 1965. In support of his contention, he submitted a copy of judgment dated 22.10.2014 vide Criminal Case No.141 of 2011 passed by Civil Judge & Judicial Magistrate-II, Tando Muhammad Khan under the cover of his statement dated 02.12.2022. He further submitted that all four accused were arrested by the police

on 05.03.2011 in presence of the mashirs namely Abdul Khalique and Abbas Ali, one of them is brother and other one is brother-in-law of the complainant and subsequently all four accused were subjected to identification parade on 10.03.2011 before the Court of Civil Judge and Judicial Magistrate-I, Tando Muhammad Khan and the mashirs in whose presence appellants were arrested had identified / picked them in the identification parade; therefore, such piece of evidence cannot be believed in toto to maintain conviction against the appellants.

10. Mr. Muhammad Saleem Laghari, Advocate for appellants Gul Hassan and Khan Muhammad in Criminal Appeal Nos.112 & 124 of 2015 after arguing the appeals at some length submitted that appellants would be satisfied if the sentences awarded to them under Section 302(b) PPC may be altered / converted to Section 302(c) PPC. Learned Assistant P.G as well complainant, who is present in person, have no objection.

11. Heard learned Counsel for the parties as well perused the material made available before me on record.

12. I have gone through the evidence adduced by prosecution before the trial Court and find that appellants were not nominated under the FIR; besides none had seen them while committing the alleged offence. Mere piece of evidence which the prosecution collected against them is that they were subjected to identification parade where they were picked by the mashirs namely Abdul Khaliq and Abbas Ali. It may be noted with great concern that they were arrested by police on 05.03.2011 in presence of said mashirs and on 10.03.2011 they were subjected to identification test before the Judicial Magistrate where above named mashirs had picked them up from the row at the time of identification parade. Since all the appellants were not previously known to the mashirs nor the complainant had given features, characters and heights of their bodies in FIR; therefore, their implication in this case through identification parade at belated stage raises serious questions which the prosecution has not responded so far; hence, such type of identification lost its value

and cannot be relied upon as laid down by the Honourable Supreme Court of Pakistan in case of MUHAMMAD PERVEZ v. The STATE and others (2007 SCMR 670). Besides, even Article 22 of Qanun-e-Shahadat Order, 1984 explicitly explains on the issue that;

"If role of accused was not described by witnesses at identification parade, such type of identification loses its value and cannot be relied upon---If prosecution witnesses had seen the accused before identification parade, such piece of evidence of identification parade can also not be relied upon.

13. Further, the alleged robbed car belonging to deceased was also not recovered from their exclusive possession. The complainant Abdul Razaq is the real brother of deceased and at the time of setting fare with unknown culprits he was accompanied with the deceased and has not been made mashir of identification parade; however, he was examined before the Magistrate u/s 164 Cr.P.C on 18.03.2011. In his 164 Cr.P.C statement he had identified the appellants Khan Muhammad and Gul Hassan Lashari but he was not able to assign any specific role against them right from taking away his brother in the car till commission of the offence. Perusal of inquest report reveals the police was informed by the passersby/people of Jalal Mori (bridge); however, no particular name of those persons has been mentioned. This document suggests that none had seen the appellants while committing murder of the deceased. In the circumstances, the prosecution has failed to establish its charge against accused Darya Khan and Zaheer beyond any reasonable shadow of doubt. It is well settled law that if there creates a single doubt about the guilt of accused, the benefit whereof is to go to accused as of his right but not grace or concession. Reliance in this regard can be placed upon the case of MUHAMMAD AKRAM v. The STATE (2009 SCMR 230), wherein at page-236, it has been held by the Hon'ble Supreme Court of Pakistan as under:-

> " It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq

> Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

14. In the circumstances and in view of dicta laid down by the Superior Courts, Criminal Appeal No.S-104 of 2015 and Criminal Appeal No.S-118 of 2015 are allowed; consequently, impugned judgment 29.07.2015 to the extent of appellants /accused Darya Khan and Zaheer is set aside and both appellants are acquitted of the charges. Whereas, the appellants Gul Hassan and Khan Muhammad were specifically implicated by PW Abdul Razaq in his 164 Cr.P.C statement but no other incriminating evidence inspiring confidence has been collected; hence, mitigating circumstances do exist.

15. In view of the above discrepancies as well mitigating circumstances, the case against appellants Gul Hassan and Khan Muhammad requires leniency for which learned Assistant P.G as well complainant raised no objection. I therefore, while dismissing their appeals viz. Criminal Jail Appeal No.S-112 of 2015 and Criminal Jail Appeal No.S-124 of 2015, maintain the conviction recorded against them by the trial Court; however, alter / convert their sentences from Section 302(b) PPC to 302(c) PPC. Therefore, sentences to the extent of appellants Gul Hassan and Khan Muhammad are hereby modified to the period they have already undergone. Besides, fine amount of Rs.100,000/- each as set out by the trial Court is also reduced to Rs.50,000/- for each offence against each appellant. With these modifications, above appeals were disposed of by my short order dated 02.12.2022. These are the reasons of my short order of even date. Office to place copy of judgment in all connected files.

JUDGE

Shahid