THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S-259 of 2019.

Date of hearing: 19.09.2022

Date of decision: 26.09.2022

Appellant:	Khan Muhammad through Mr. Farhan Ahmed Bozdar, advocate.
Complainant:	Through Mr. Qambar Ali Jamali, advocate.
The State:	Through Mr. Shahzado Saleem Nahiyoon, Adl. P.G.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- Appellant, having been charged with committing murder of deceased Muhammad Ibrahim by firing upon him with a pistol in a public street in village Ali Bux Sanjrani, Taluka Sakrand on matrimonial affairs, on 16.02.2012 at 08:30 p.m. stood trial in the Court of 1st Additional Sessions Judge Shaheed Benazirabad, has been returned guilty verdict through impugned judgment dated 19.08.2019 u/s 302(b) PPC to suffer RI for life and to pay compensation of Rs.02 lacs to the legal heirs of deceased, in default, to further undergo SI for six months, has challenged the same by means of this appeal.

2. In the trial prosecution has examined as many as eight witnesses including the eye witnesses, Medico-Legal Officer, Tapedar, etc. and has produced all the relevant documents: FIR, post-mortem report, relevant memos, sketch of incident. When the entire evidence was put to the appellant u/s 342 CrPC for his explanation and rebuttal, he denied it and produced an order under Section 249 CrPC (stoppage of proceedings due to non-appearance of witnesses) in Crime No.50/2012 pertaining to recovery of crime weapon from him, in his support. He however neither examined himself on oath nor led any evidence in defense.

3. Learned defense counsel has argued that there are material contradictions in evidence of prosecution witnesses which make

the case against appellant doubtful; that appellant was identified by witnesses in the light of bulb but the same was not secured from place of incident; that FIR is delayed for almost one day regarding which no explanation has been forwarded; the witnesses are related to complainant and are interested; the complainant and eye witnesses have made improvements in their evidence; proceedings against appellant in recovery of crime weapon were stopped due to non-appearance of witnesses; pistol, and empty recovered from spot, were sent together for lab report, therefore, pistol as the crime weapon is not beyond doubt. In support of his arguments, he has placed reliance upon case law reported as 2018 SCMR 2118, 2020 SCMR 319 and 2020 SCMR 505.

4. On the other hand, learned counsel for complainant and learned Additional Prosecutor General have opposed his submissions and prayed for upholding the impugned judgment.

5. I have considered contentions of the parties and perused material available on record including the case law cited at bar. As per story of FIR, the incident took place at 08:30 p.m. on 16.02.2012. Appellant was identified by complainant and PW.2 Naeem Zafar, an eye witness, in the light of a bulb installed in the street. These witnesses have otherwise admitted that there was darkness in the street at the relevant time. It was the only source though which they could identify the appellant, but neither memo of place of incident, nor the sketch of place of incident points out to any position or a place where any street light or a bulb was present. Non-recovery of a bulb may be a technical error of the investigation officer, and could be ignored therefore, but when identity of the appellant is solely based upon presence of light coming from a bulb, at least, its position should have been identified and marked in the aforesaid papers to strengthen prosecution case on this point.

6. Furthermore, the complainant and the eye-witness both in their cross-examination have iterated that death of the deceased was instantaneous. The medico-legal officer, on the other hand, has described the probable time between injury and death as within twenty minutes, and in cross-examination has further expanded such duration by admitting that time between them could be 30 minutes. And that the deceased could have been saved by being given prompt medical aid. It is not clear, why the complaint party, if they were present at the spot, did not try to do it or at least make an effort by removing the deceased immediately to hospital to

save him, when it is shown that ultimately his body had to be taken to hospital in a car of a relative who was available in the village therefore easily accessible for this purpose. A person lying critically injured for 20 to 30 minutes without his dear and near ones huddling around him making any attempt to give him medical aid or remove him from there for such purpose is simply unbelievable, and in fact depicts that either they were not present or the incident did not happen in the manner as alleged by them. Then, as per evidence of witnesses, they were five persons including the deceased, whereas the accused, in advanced age, was alone and had initially engaged with the deceased verbally. And he only after some time had taken out a pistol from his fold and fired at the deceased. It is strange that none of the four persons made any effort to dissuade the accused from firing upon the deceased, or gave the deceased first aid, or tried to catch the accused. These undeniable phenomena cast murky cloud over presence of the witnesses at the spot and their being the eyewitnesses.

7. Additionally, the complainant in his evidence has affirmed that he had informed the police of the incident on phone and they had come at the spot. He has stood by his assertion in cross examination and has even given some details in this regard. But the other witness, and the IO in their evidence have asserted, and the relevant paper i.e. memos show, that the police had directly gone to Rural Health Center Sukrand, and not to the place of incident, where the body of the deceased was brought by the complaint party. And that the police had visited place of incident only on next day of registration of FIR and prepared its memo.

8. Besides, there is unexplained delay of 19 hours in lodging FIR. The incident happened within sight of complainant, and the accused was identified by him, as he was already known to him. The police, per his evidence, had reached the spot on his phone after some time when the accused was available in the house. Yet neither he informed the police of name of the accused then and there and try to get him arrested, which should be normally his natural conduct, nor even after post mortem did he report the matter to the police immediately to cast off any chance of suspicion over his credibility as an eyewitness, but preferred to go to police station for FIR only after a considerable time. This delay seen in this backdrop assumes significance and can hardly be ignored.

9. The other piece of evidence is recovery of crime weapon from appellant and positive FSL report with empty recovered from the spot.

The incident occurred on 16.02.2012, the empty was recovered on 17.02.2012, the appellant was arrested on 22.02.2012 and from him the crime weapon was recovered on 24.02.2012. There is a gap of 8 days between recovery of empty and the crime weapon, but they both were sent together to the lab for a report on 27.02.2012, and not separately, which is contrary to the principle set by superior courts in this regard to avoid manipulation. Plus there is no record to show where for such time the empty was kept, and not sent to the lab immediately as required. Want of explanation to these questions has rendered the whole exercise doubtful regarding identity of the crime weapon, the empty recovered from the spot and their connection, if any, with the appellant, and therefore unreliable to maintain his conviction.

10. For foregoing discussion, it can be easily seen that presence of eyewitnesses is not beyond a doubt, and recovery of a pistol from the appellant to be the crime weapon is not without a question either. Therefore, I am of the view that the prosecution has not been able to prove its case against the appellant beyond a reason doubt. It is well settled that when there is a doubt in the case, the benefit of which shall be given to the accused. Resultantly, the impugned judgment is set aside along with conviction and sentence awarded to the appellant. The appeal is allowed, and the appellant is acquitted of the charge. He shall be released forthwith if not required in any other custody case. The appeal is disposed of accordingly.

J U D G E

Irfan Ali