

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR
Criminal Appeal No.230 of 2019

Appellants: 1. Zahid Hussain s/o Gul Bahar Jatoi.
2. Khadim Hussain s/o Saindad Jatoi.
Through: Mr. Rukhsar Ahmed Junejo
advocate.

The State: Through Mr. Shafi Muhammad Mahar,
Deputy Prosecutor General.

Date of hearing: 17-10-2023

Date of judgment: 17-10-2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged by the prosecution that the appellants with rest of the culprits in furtherance of their common intention committed murder of Rashid Ali by causing him brick injuries on his head, for that they were booked and reported upon by the police. On conclusion of trial, they were convicted u/s 302 (b) r/w 34 PPC as Ta'azir and sentenced to undergo imprisonment for life and to pay compensation of Rs. 500,000/- (Five lacs) each to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for six months with benefit of section 382-B Cr.P.C by learned IIIrd Additional Sessions Judge/MCTC-II Sukkur vide judgment dated 18-10-2019, which they have impugned before this Court by preferring the instant Crl. Appeal.

2. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the police at the instance of the complainant party; the FIR of the incident has been lodged with delay of about 11 days and evidence of the PWs being doubtful in its

character has been believed by learned trial Court without lawful justification, therefore the appellants are entitled to be acquitted of the charge by extending them benefit of doubt. In support of his contention he relied upon case of *Muhammad Imran Vs. The State (2020 SCMR 857)*.

3. None has come forward to advance arguments on behalf of the complainant. However, learned DPG for the State by supporting the impugned judgment has sought for dismissal of instant CrI. Appeal by contending that the prosecution has been able to prove its case against the appellants beyond shadow of reasonable doubt. In support of his contention, he relied upon case of *The State/ANF Vs. Muhammad Arshad (2017 SCMR 283)*.

4. Heard arguments and perused the record.

5. It was stated by complainant Muhammad Mithal and PW Ameer Ali that on 13-10-2017 when they, PW Nadir Ali and deceased Rashid Ali were available at their plot, which they were intending to sell, to pay the educational fees of deceased Rashid Ali, there came the appellants with two unknown culprits, they caught hold of the deceased and then appellant Zahid Hussain caused brick injuries to him on his head and then fled away; they intimated the police about the incident. Nothing has been brought on record which may suggest that the police actually was intimated about the incident by the complainant party promptly. It was further stated by them that then they took the deceased in injured condition to Hira Hospital at Sukkur and then to Agha Khan Hospital at Karachi, he died of such injured at Agha Khan

Hospital at Karachi on 20-10-2017. None has been examined by the prosecution from either of the Hospital to prove that the deceased in injured condition actually undergone the treatment in their Hospitals. It was further stated by them that they brought the dead body of the deceased at their native place, buried it. It was buried without actual post mortem on the dead body of the deceased. It was further stated by them that on 24-10-2017 they lodged report of the incident with PS Airport Sukkur. It was recorded by I.O/ASI Jahangeer. It was lodged with delay of about 11 days to the actual incident; such delay having not been explained plausibly could not be lost sight of. It is reflecting consultation and deliberation. PW Nadir Ali has not been examined by the prosecution. The inference which could be drawn of his non-examination in terms of Article 129(g) of Qanoon-e-Shahadat Order 1984 would be that he was not going to support the case of prosecution. If for the sake of arguments, it is believed that the complainant and his witness were actually present at the time of incident, then they could have put up resistance to the culprits who were having no weapon, being natural to prevent the death of the deceased, which they failed to put up, which has made their presence at the time of incident to be doubtful one. On asking, it was stated by PW Ameer Khan that his 161 Cr.P.C statement was recorded on 25-10-2017. It was with further delay of one day even to lodgment of FIR. No explanation to such delay is offered. The exhumation of the dead body of the deceased as per Mr. Wazir Ali, the Magistrate having jurisdiction was conducted on 10-03-2018; it was with delay of about 05

months to the incident. As per Dr. Zawar Hussain the death of the deceased occurred due to injuries caused to him on his head with some hard and blunt impact. It is settled by now that the medical evidence is corroboratory in nature; it does not identify the culprits. I.O/ SIP Sardar Bux Kolachi, who as per I.O/ ASI Liaquat Ali conducted the initial investigation of the case, too has not been examined by the prosecution. His non-examination could not be over looked. Evidence of I.O/SIP Liaquat Ali is only to the extent that he arranged for exhumation of the dead body of the deceased and preparation of such memo. On asking, he was fair enough to admit that such memo was prepared by WPC. If it was so, then examination of such WPC was essential. He too has not been examined by the prosecution. It was stated by I.O /SIP Irshad Ali that he visited the place of incident, secured there from blood stand brick and prepared such memo. The recovery of blood stained brick from the place of incident with delay of about 11 days to the incident appears to be some was strange. It was further stated by him that he then visited the grave of the deceased, prepared such memo, received the medical certificates of the deceased, and prepared such memo. The medical certificates of the deceased though allegedly secured under memo have been brought on record by the prosecution, for no obvious reason. It was further stated by him that he arrested the appellants prepared such memo, recorded 161 Cr.P.C statements of the PWs and then handed over the police papers to I.O/SIP Abdul Hakeem Langah for further investigation. He too has not been examined by the prosecution. His non-examination

could not be over looked. On asking, he was fair enough to admit that all the memos were prepared by WPC Ghulam Hyder. If it was so, then participation of I.O/SIP Irshad Ali in investigation of the present case was only to the extent of table. The appellants during course of their examination u/s 342 Cr.P.C have denied the prosecution's allegation by pleading their innocence; such plea on their part could not be ignored in the circumstances of the case.

6. The conclusion, which could be drawn of 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 are found entitled.

7. In case of *Imran Ashraf and others vs. the State* (2001 SCMR-424), it was held by Apex Court that;

"Section 154, Cr.P.C. lays down procedure for registration of an information in cognizable cases and it also indeed gives mandatory direction for registration of the case as per the procedure. Therefore, police enjoys no jurisdiction to cause delay in registration of the case and under the law is bound to act accordingly enabling the machinery of law to come into play as soon as it is possible and if first information report is registered without any delay it can help the investigating agency in completing the process of investigation expeditiously".

8. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it was held by Apex Court that;

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

9. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it was held by the 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. The case law which is relied upon by learned Deputy Prosecutor General for the State is on distinguishable facts and circumstances. In that case, the recovery of Narcotic Substance was involved. In that context it was held that the sufficient material has been brought on record by the prosecution, which connects the accused with commission of the incident. In the instant case there is inordinate delay of about 11 days in lodgment of the FIR and material witnesses were not examined by the prosecution for no obvious reason.

11. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants under impugned judgment are set aside, consequently, they are acquitted of the offence for which they were charged; tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other custody case.

12. The instant Criminal Appeal is disposed of accordingly.

J U D G E