IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR
Criminal Jail Appeal No. S-09 of 2020

Appellant:	Ali Sher son of Hadi Bux Mahtam **through** Mr. Amanullah Bugti advocate.
The Complainant:	Mr. Abdul Ahad Buriro, advocate.
The State:	Mr. Shafi Muhammad Mahar, Deputy P.G for the State.
Date of hearing:	15-11-2023
Date of judgment:	15-11-2023

J U D G M E N T

IRSHAD ALI SHAH, J- It alleged that the appellant has committed murder of Hayatullah Khan by causing him fire shot injuries in order to satisfy with him his dispute over settlement of account, for that he was booked and reported upon by the police. On conclusion of trial, he was convicted under Section 302(b) PPC and sentenced to undergo life imprisonment as *Ta'zir* and to pay compensation of Rs.500,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for 03 months with benefit of section 382(b) Cr.P.C by learned Ist Additional Sessions Judge/ MCTC Sukkur vide judgment dated 30-01-2020, which the appellant has impugned before this Court by way of instant criminal jail appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police at the instance of the complainant party on the basis of last seen evidence and more so, the evidence of the P.Ws being doubtful in its character has been believed by learned trial Court without assigning cogent reasons, therefore, the appellant is entitled to be acquitted of the charge by

extending him benefit of doubt. In support of his contention, he relied upon cases of *Irfan Ali v. the State* (2015 SCMR 840) and *Muhammad Hussain v. the State* (2011 SCMR 1127).

3. Learned Deputy P.G for the state and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the instant criminal jail appeal by contending that the last seen evidence is supported by recovery of crime weapon and the prosecution has been able to prove its case against the appellant beyond shadow of doubt.

4. Heard arguments and perused the record.

5. It was stated by complainant Baz Khan that on 23-08-2017 his cousin Hayatullah Khan went to meet with the appellant, but did not return; on inquiry, it was told to him by PWs Abdul Ghani and Asim Khan that they have seen the appellant going with the deceased on his motorcycle; subsequently they made search for the deceased and on 24-08-2017 they found his dead body in hilly area of Rohri. It was actually recovered by I.O/SIP Zahid Hussain Shah. It was further stated by the complainant the dead body of the deceased then was referred by the police to Taluka Hospital Rohri and after postmortem it was given to him for burial, which he taken to his native place and then on 29-08-2017, he lodged report of the incident with PS Rohri, it was recorded by ASI Ajab Ali whereby he suspected the appellant to be responsible for the alleged incident. The lodgment of the FIR with delay of about five days even to the recovery of the dead body of the deceased could not be over looked, it is reflecting consultation and deliberation. Evidence of PWs Asim Khan and Abdul Ghani is only to the extent that they saw the deceased going with the appellant on his motorcycle. On asking both of them were fair enough to admit

that their 161 Cr.P.C statements were recorded by the police on 30-08-2017. It was with delay of about one day, even to lodgment of the FIR. No explanation to such delay is offered. Obviously neither the complainant nor any of the witness has seen the appellant committing the actual death of the deceased and they have involved the appellant in commission of incident only for the reason that they have lastly seen the deceased going with the appellant; such piece of evidence is weak in its nature. In order to cover such weakness, it was by the complainant and his witnesses on arrest the appellant admitted before them to have committed death of the deceased, such admission in presence of the complainant party could hardly be expected from the culprit so involved in the incident. It was stated by I.O/SIP Aijaz Ali that on investigation, he apprehended the appellant, who by admitting his guilt led him to recovery of pistol allegedly used by him in commission of incident. Such place of recovery was not in exclusive possession of the appellant. If for the sake of argument, it is believed that the appellant actually admitted his guilt before the said I.O/SIP, even then same in terms of Article 39 of Qanun-e-Shahadat Order, 1984 could not be used against the appellant as evidence. The recovery of the pistol was made on 4th day of arrest of the appellant. No explanation to such delay is offered. It was further stated by the said I.O/SIP that he dispatched the pistol and empties secured from the place of incident to the ballistic expert. It was joint dispatch; those were to have been sent independently to maintain transparency. The description of the pistol disclosed in memo of recovery and report of ballistic expert differs, which appears to be surprising; therefore possibility of its manipulation could be ruled out. No question, with regard to recovery of such pistol has been put to

the appellant during course of his examination u/s 342 Cr.P.C; therefore, he could not be connected with such recovery legally. Even otherwise, the recovery of pistol and purse of the deceased being available in market could hardly be made a reason to maintain the conviction against the appellant when evidence furnished by the complainant and his witnesses has been found to be doubtful and untrustworthy.

6. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

7. In case of *Imran Ashraf and others vs. the State (2001 SCMR-424),* it has been 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 has been 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 case of *Tahir Javed vs. the State (2009 SCMR-166),* it has been held by Apex Court that;

> *"---Extra-judicial confession having been made by accused in the presence of a number of other persons appeared to be quite improbable, because confession of*

such a heinous offence like murder was not normally made in the public".

10. In the case of *Muhammad Javed vs. The State* ***(2016 SCMR 2021)***, it has been held by Apex Court that;

> *"….although a report of the Forensic Science Laboratory was received in the positive in respect of matching of the firearm recovered from the appellant's custody with a crime-empty secured from the place of occurrence yet the investigating officer (PW9) had clearly acknowledged before the trial court that the crime-empty had been sent to the Forensic Science Laboratory on the day when a carbine had been recovered from the custody of the appellant."*

11. In case of *Muhammad Jamil vs. Muhammad Akram and others (2009 SCMR 120),* it has been held by Apex Court that;

> *"When the direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."*

12. *Muhammad Ashraf vs. the State (2014 PCr.LJ-1531),* wherein it is has been held that;

> *"S. 342---Failure to put to accused any incriminating piece of evidence in his statement under S.342 Cr.PC.---Effect---If any incriminating piece of evidence, was not put to accused in his statement under S.342 Cr.PC. for his explanation, then same could not be used against him for his conviction".*

13. In the case of *The State through P.G. Sindh and others vs. Ahmed Omar Sheikh and others (2021 SCMR 873)*, it has been held by Apex Court that:

> *"66. "Last seen" evidence is merely a circumstantial evidence, and that too a weak type of evidence, which alone cannot sustain the weight of a capital punishment, and would require other independent corroborative evidence to effect conviction. In a case of murder, where the prosecution case rests on "last seen" evidence, then corroboration would be required from*

other circumstantial evidence; each piece of such evidence would have to be proved to complete the chain, stemming from the accused being "last seen" with the deceased, leading to his death. To achieve this, the prosecution has to prove that the death of the deceased took place in close proximity to the time and place, where the accused was "last seen" with the deceased. Thus, the evidentiary value of the "last seen" evidence of an accused with the deceased will depend upon the facts and circumstances of each case, and for a court to reach a conclusion of guilt of the accused, such circumstances must not only be proved, but must also be found to be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

14. In the case of *Muhammad Mansha vs. The State (2018 SCMR 772)*, it has been 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".*

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

16. Above are the reasons of the short order of even date, whereby the instant Criminal Appeal was allowed.

JUDGE

Nasim/P.A