IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Jail Appeal No. 503 of 2019

[Subhan & others ……v…… The State]

Date of Hearing	:	21.07.2023
Appellant through	:	M/s. Imdad Ali Malik & Mumtaz Ali Mehdi, Advocates.
Respondents through	:	Mr. Fahim Hussain Panhwar, DPG.

O R D E R

Zulfiqar Ahmad Khan, J:- Through instant Criminal Jail Appeal, the appellants have impugned the judgment dated 23.07.2019, passed by the learned VII Additional Sessions Judge Karachi Central, in Sessions Case No. 514 of 2016, arising out of FIR No.91/2016, under section 302, 392, 34 PPC at Police Station Gulberg, Karachi, whereby appellants were convicted and sentenced as under:-

> "a. Accused Muhammad Subhan s/o Muhammad Fareed is sentenced under S.302(b) PPC to suffer Imprisonment for life with direction to pay Rs.100,000/- as compensation to the legal heirs of the deceased. In case of default, he shall have to undergo 06 months SI.
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> b. Accused Khalil Ahmed s/o Abdul Hussain is sentenced under S.302(b) PPC to suffer Imprisonment for life with direction to pay Rs.100,000/- as compensation to the legal heirs of the deceased. In case of default, he shall have to undergo 06 months SI.
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> c. The benefit of section 382-B Cr.P.C. is also extended to the accused."

2. The allegation against the appellants is that on 10.05.2016 at 1125 hours in conjunction with their allies committed murder of deceased Muhammad Siddique while snatching his motorcycle.

3. After framing of charge, the prosecution has examined as many as eleven (11) witnesses. PW-01 Syed Imtiaz Hussain at Exh.

3, PW-02, Shehnaz Bibi (Complainant) at Exh. 4, PW-03 Muhammad Asghar at Exh. 05, PW-04 Muhammad Shahzad Arif at Exh. 6, PW-05 Imran Ali at Exh. 7, PW-06, Tahir Khan Exh. 9, PW-7 Syed Rabi ul Hassan at Exh. 10, PW-8 Muhammad Zafar Iqba at Exh. 11, PW-9 Aijaz Ahmed at Exh. 13, PW-10 Javed Iqbal at Exh. 14 and PW-11 Javed Hussain at Exh. 15. Thereafter prosecution side was closed vide Ex:17 and statements of appellants under section 342, Cr.P.C. were recorded at Exh.18 & 19, who claimed their innocence, however, neither examined themselves on oath nor led defense witnesses in support of their claim.

4. After observing all formalities and hearing the parties, the learned trial Court convicted the appellants through impugned judgment in the manner described in the operative part of this edict.

5. The appellants being aggrieved and dissatisfied with their conviction have preferred instant appeal. Learned counsel for the appellants contended that there are several discrepancies in the prosecution case which was not considered by the learned trial Court. Learned counsel further contended that the alleged motorcycle was also not produced before the learned trial Court as the case property, therefore, the conviction recorded by the learned trial Court be set aside and accused be acquitted of the charge. He further contended that PW-8 Muhammad Zafar Iqbal appeared in the witness box admitted during course of cross examination that he did not see the accused making fire upon the deceased which creates a serious doubt in the prosecution story and it is settled principle that the benefit of doubt always goes in

favour of the accused not as a matter of grace or compensation but as a matter of right.

6. On the other hand learned DPG argued that learned trial Court is the fact finding authority and having examined the all material available on record, the learned trial Court convicted the appellants which judgment based on the sound reasons and does not call for the interference by this Court.

7. I have heard the arguments and have gone through the relevant record. On reappraisal of the evidence, it is observed that appellants have not been named in the FIR. The prosecution based its case that the appellants were arrested in an offence under Section 101/2016, under Section 353, 324, 34 PPC read with Section 7 of the Anti-Terrorism Act, 1997, P.S. Gulberg, Karachi and during the course of interrogation, the appellants admitted to have committed the alleged offence. Before proceeding further, I would like to quote Articles 37, 38, 39 and 40 of Qanun-e-Shahadat Order, 1984, which read as under:--

> "37. Confessions caused by inducement, threat or promise, when irrelevant in criminal proceeding. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."
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> "38. Confession to police officer not to be proved.---No confession made to a police officer shall be proved as against a person accused of any offence."

> "39. Confession by accused while in custody of police not to be proved against him.---Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."
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> "40. How much of information received from accused may be proved.---When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

8. Article 37 of Qanun-e-Shahadat Order, 1984 speaks about the confession caused by inducement, threat or promise, when irrelevant in criminal proceedings and Article 38 thereof goes on to show the confession to police officer not to be proved as against a person accused of any offence. Article 39 says that no confession of accused while in custody of police shall be proved as against such person. The disclosure of accused before the police officer being not a substantive piece of evidence cannot solely form a base for appellants' conviction. It may be mentioned here that by now it is well-settled that unless substantive or direct evidence is available, conviction cannot be based on any other type of evidence, howsoever, convincing it may be. Reliance in this regard may be placed on the case of Muhammad Noor v. Member-I, Board of Revenue, Balochistan and others reported as 1991 SCMR 643 wherein the Honourable Supreme Court of Pakistan has been pleased to lay down as under:--

> "The answer obviously is in the negative. We say because none of the pies of evidence relied upon is a substantive piece of evidence and so long a substantive or direct evidence is not available no

> other type of evidence, howsoever, convincing it may be, can be relied upon or can form the basis of conviction."

9. Certain other discrepancies found in the prosecution case. PW-08 Muhammad Zafar Iqbal (Exh. 11 available at page 133 & 135 of the paper book) during course of cross-examination went on to admit as under:-

> ***"It is correct to suggest that I had not seen accused doing first fire shot on deceased Siddique"***

10. It is gleaned from appraisal of the foregoing that the PW-8 Muhammad Zafar Iqbal appeared into the witness box being eye witness of the alleged incident but he admitted the suggestion of the learned defense counsel to the effect that he did not see the appellant while firing upon the deceased which fact unequivocally creates a serious doubt in the prosecution case. It further unfurls from the record that the motorcycle alleged to have been stolen from the deceased by the appellant during the course of offence had also not been recovered from the possession of the appellant nor it had been produced before the learned trial Court being the case property.

11. Another limb of the matter is that the appellants were arrested in another crime No.101/2016, under Section 353, 324, 34 PPC read with Section 7 of the Anti-Terrorism Act, 1997, P.S. Gulberg, Karachi and the said crime was tried by learned Anti-Terrorism Court No.XVI, Karachi wherein the appellants were also acquitted of the charge of that offence vide judgment dated 08.05.2019 (available at page 53 of the Court file).

12. Apart from above, another lacuna on the part of the prosecution is of non-conducting the identification parade. It is an admitted position that FIR was lodged against the un-known accused persons and, whereas, PW-3 Muhammad Asghar alleged to have seen the accused but the Identification Parade test had not been conducted. Identification parade is necessary where the offenders/ accused are complete stranger to the witnesses[1]. Whole object of the identification proceedings is to find out whether the suspect is or is not the real offender.

13 There are certain other discrepancies and contradictions in the prosecution case which cast doubt in the prosecution case, which entitles the appellants to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. The Hon'bel Supreme Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq_Pervaiz v. The State (1995 SCMR 1345) and Ayub Mosih v. The State (PLD 2002 SC 1048)."" The same view was reiterated in Abdul Jabbar v. State (2019 SCMR 129) when the Hon'ble Supreme Court observed that once a single loophole is observed in a case presented by the prosecution, such as

[1] Per Asif Saeed Khan Khosa. J in Kanwar Anwaar Ali (PLD 2019 S.C. 488)

conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution case is to be resolved in favour of the accused. However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt.

14. In these circumstances, I am of the opinion that the quality and standard of evidence is lacking, which is required to establish a criminal case for justifying conviction and sentence. The appeal filed by the appellant was allowed and the impugned judgment dated 23.07.2019 recorded by the learned Additional Session Judge-VII Central, Karachi was set aside by means of short order dated 21.07.2023. Above are the reasons of the short order.

Karachi
Dated: 25.07.2023.

JUDGE

Aadil Arab.