IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Jail Appeal No. 858 of 2019

[Dil Ahmed ……v…… The State]

Date of Hearing	:	20.07.2023
Appellant through	:	Ms. Sara Malkani, Advocate.
Respondents through	:	Mr. Faheem Panhwar, DPG.

O R D E R

Zulfiqar Ahmad Khan, J:- Through instant Criminal Appeal, the appellant has impugned the judgment dated 26.09.2019, passed by the learned Additional Sessions Judge-V, East, Karachi, in Sessions Case No. 560 of 2015, arising out of FIR No.253/2014, under section 302 PPC at Police Station Landhi, whereby appellant was convicted and sentenced to Life Imprisonment and fine of Rs.200,000/-. The benefit provided under Section 382-B Cr.P.C was also extended to the appellant.

2. The allegation against the appellant is that on 26.10.2014 at 0630 hours, the appellant committed murder of his wife namely Mst. Maimoona by setting her on fire.

3. After framing of charge, the prosecution has examined as many as six (06) witnesses. PW-01 Muhammad Salim (Complainant) at Exh. 5, PW-02, Muhammad Sadiq at Exh. 6, PW-03 SIP Rao Sardar at Exh. 7, PW-04 Inspector Ali Khan Sanjrani, (I.O. of the case) at Exh. 8, PW-05 Dr. Muhammad Arif (MLO) at Exh. 9, PW-06, SIP ghulam Yaseen at Exh. 10. Thereafter prosecution side was closed vide Ex:11 and statements of appellant under section 342, Cr.P.C. was recorded at Exh. 12, who claimed his innocence, however,

neither examined himself 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 appellant through impugned judgment in the manner described in the operative part of this edict.

5. The appellant being aggrieved and dissatisfied with his conviction has preferred instant appeal. Learned counsel for the appellant contended that there are several discrepancies in the prosecution case which was not considered by the learned trial Court. According to her, this is an unseen incident, none of the witnesses produced by the prosecution had seen the incident, however, one Saad who informed the complainant being brother of the deceased was never produced as witness. Also she points out that the Chemical Examiner's report clearly eliminated the possibility of any petrol or other flammable liquid but the trial Court still held that the victim died of sprinkling of petrol in a casual manner which create serious doubts into the genuineness of the prosecution case and it is a settled principle of criminal administration of justice that a single doubt appearing in the prosecution case, benefit of that doubt is to be given to the accused not as a matter of grace or concession but as a matter of right. While concluding her submission, she requested for setting aside of the impugned judgment.

6. On the other hand learned APG 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

appellant 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 neither the complainant nor anyone else is an eye-witness of the alleged occurrence. It further unfurls that the prosecution failed to introduce on record the motive of murdering the deceased by the appellant. In criminal jurisprudence and in murder trial, the prosecution has to base its case on five piece of evidence i.e. (1) Ocular evidence, (2) Recovery of incriminating articles, (3) Medical evidence, (4) Circumstantial evidence and (5) Motive. In a case based on circumstantial evidence the prosecution is obligated to show that different pieces of evidence brought on the record are inter-linked so as to make a single chain whose one end touches the dead person and the other clenches the neck of the accused. Further, the evidence must be of a quality to be incompatible with the innocence of the accused. Any missing link in the chain would destroy the entire prosecution case. In Hashim Qasim and another v. The State (2017 SCMR 986) the Hon'ble Supreme Court of Pakistan ruled:

> "In cases of circumstantial evidence, there are chances of procuring and fabricating evidence. Therefore, Courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the Investigator circumstantial evidence may sometimes appear to be conclusive but it must always be narrowly examined, if only because this count of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference, if the accused's guilt from circumstantial evidence to be sure and that there are no other co-existing circumstances,

> which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all."

8. It is pertinent to record here that motive in murder trial is also an essential factor to bring the guilt of the accused at home but here in this case the prosecution has failed to prove the significant factor of motive of accused in murdering his wife. The learned trial Court based its findings basis upon which the conviction was pronounced upon the appellant. The essence of the findings of the learned trial Court is that the deceased informed to the complainant hat her husband set her on fire by besprinkling petrol upon her and having considered the said statement as a dying declaration, the learned trial Court reached to the conclusion that the appellant committed the murder of the deceased. Article 46 of the Qanun-e-Shahadat Order, 1984 deals with the admissibility of the dying declaration and it is considered pertinent reproduce the same hereunder:-

> **46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**: Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot, be found, or, who has become incapable of giving evidence, or whose attendance can not be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:
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> (1) When it relates to cause of death: When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which cause of his death comes into question.

(2) Or is made in course of business: When the statement is made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business.. or in the discharge of professional duty; or of an acknowledgment Written or signed by him of the receipt of money, goods, securities or property of any kind ; or of a document used in commerce written or signed by him ; or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker: When the statement is against the pecuniary or proprietary interest of the person making it, or when. if true, it would expose or would have exposed him to a criminal prosecution or to a suit for damages,

(4) Or gives opinion as to public right or customs or matters of general interest : When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence, of which it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) Or relates to existence of relationship: When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before question in dispute was raised.

(6) Or is made in will or deed relating to family affairs: When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, of in any family pedigree, or upon any tombstone, family portrait or other things on which such statements are usually made and when such statement was made before the question in dispute was raised.

(7) Or In document relating to transaction mentioned in Article 26, paragraph (a): When the statement is contained in any deed, will or other

> document which relates to any such transaction as is mentioned in Article 26, paragraph (a).
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> (8) Or is made by several persons and expresses feelings relevant to matter in question: When the statement was made by a number of parsons, and expressed feelings or impressions on their part relevant to the matter in question;

9. It seems that the trial Court in a very callous way threated statement of PW-1 as “Dying declaration” of the victim who did not utter any such words. The rule relating to dying declaration and its admissibility is provided in Article 46 of the Qanun-e Shahadat Order, 1984, which says that the statement of dying man is relevant and admissible in evidence, however, for recording such declaration no particular mode has been provided. Sub-Article (1) of Article 46 of the Order, 1984, provides that when the evidence or statement of a person, who is dead, as in the instant case, relates to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, such statement becomes relevant and gains evidentiary value because of the special circumstances that the person, who made such statement, was no more alive/available. Now, it has been well settled by the Hon'ble Supreme Court that “dying declaration” is a weak type of evidence and is similar to the statement of an interested witness, therefore, requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell a lie. In the case titled Abdur Rahim alias Rahima v. The State and others (PLD 2003 SC 662) the Supreme Court has held that “the law so far developed qua an oral dying declaration is that it is a weak piece of evidence which must be corroborated by independent circumstances'. In another case titled Mst. Zahida Bibi v. The State (PLD 2006 SC 255) Hon'able Supreme Court has held that;-

> "dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie."

10. Same view was also reiterated in the case the cases titled Farman Ahmed v. Muhammad Inayat (2007 SCMR 1825) and Tahir Khan v. The State (2011 SCMR 646). Thus by no stretch of imagination PWs statement (with wasn't even reiterated by PW-2) could be taken as Dying Declaration.

11. The another limb of the prosecution case that the cloths of the deceased was sent to the Director Laboratories & Chemical Examiner to the Government of Sindh, Karachi for examination and analysis. The Chemical Examiner Report is available at page 151 of the paper book (Exh. 8/G) and it was concluded as under:-

> "Result of Examination
> Tests performed for the detention of the following substances are found **negative** in the above article No.01.
>
> 1. Volatile gropu-I-c Petrol Diesel, Kerosene and Alcohol."

12. It is gleaned from appraisal of the foregoing that the cloths of the deceased was sent to the Laboratory as she was alleged to have been set on fire by besprinkling petrol, however, the Chemical Examination reported that the petrol, Diesel, Kerosene and Alcohol

was not found in the cloths of the deceased. This aspect also creates a serious doubt in the prosecution story. If we take petrol/kerosene oil away from the place of incident the prosecution's case is demolished like a sand castle in one go. One Saad, according to the complainant informed him regarding the alleged incident but he was also not produced as a prosecution witness. Neither the complainant (PW-1) not his brother PW-2, stated that Saad, who was eye witness told them that someone has sprinkled petrol/kerosene oil in the house or over the victim. Thus there is a possibility that such a story was created by PW-1 and PW-2. Also the owner of the house, where the incident took place was not produced in the Court. There are several other discrepancies and lacunas found in the prosecution case and in this regard that benefit would go in favour of the accused. Furthermore, it is a well settled principle of law that if two views are possible on the evidence adduced in the case, one indicating the guilt of accused and other to his innocence, the view favourable to the accused is to be adopted[1]. Mere heinousness of the offence if not proved to the hilt is not a ground to punish an accused. 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

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[1] Per Sayyed Mazhar Ali Akbar Naqvi in Saghir Ahmed v. the State (2023 SCMR 241) and Shahid Orakzai v. Pakistan Muslim League (2000 SCMR 1969), Ijaz Hussain v. The State (2002 SCMR 1455), Iftikhar Hussain and others v. The State (2004 SCMR 1185) and Muhammad Zubair v. The State (2010 SCMR 182).

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 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.

13. 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 is allowed and the impugned judgment dated 26.09.2019 recorded by the learned Additional Session Judge-V Karachi East in Session Case No. 560 of 2015 is set. Appellant is acquitted of the charge. He be released forthwith if no more required in any other criminal case.

Karachi
Dated: 20.07.2023.

JUDGE

Aadil Arab.