IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 658 of 2021

Appellants:	Muhammad Asif, Muhammad Bilal and Muhammad Nabeel through Maula Bux Bhutto, advocate
The State:	Mr. Khadim Hussain Khuharo, Additional Prosecutor General Sindh
Date of hearing:	15.08.2023
Date of judgment:	15.08.2023

J U D G M E N T

IRSHAD ALI SHAH, J- The appellants in furtherance of their common intention are alleged to have committed murder of Furqan Hussain after subjecting him to unnatural lust and then thrown his dead body in abandoned shop in order to cause disappearance of evidence to save themselves from legal consequences, for that they were booked and reported upon by the police. On conclusion of trial, they were convicted under Section 302(b) r/w Section 34 PPC and sentenced to undergo rigorous imprisonment of life and to pay compensation of Rs.500,000/- each to the legal heirs of the deceased; they were further convicted under Section 377 r/w Section 34 PPC and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500,000/- each and in default whereof to undergo Simple Imprisonment for 04 months; they were further convicted under Section 201 r/w Section 34 PPC and were sentenced to undergo rigorous imprisonment for 07 years and to pay fine of Rs.50,000/- each and in default whereof to undergo simple imprisonment for 04 months; all the sentences were directed to run concurrently with benefit of Section 382 (b) Cr.P.C by learned Vth-Additional Sessions Judge, Karachi East vide judgment dated 25.09.2021, which they have impugned before this Court by preferring the instant Criminal 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 in a blind FIR and the evidence of the PWs being doubtful in its character has been believed by the learned trial Court without lawful justification, therefore, the appellants are entitled to be acquitted by extending them benefit of doubt, which is opposed by learned Addl. PG for the State by supporting the impugned judgment by contending that on arrest from the appellants have been secured the iron rod which allegedly was used by them in commission of incident and prosecution has been able to prove its case against them beyond shadow of doubt.

3. Heard arguments and perused the record.

4. It was stated by I.O/SIP Niaz Ahmed that on 23.02.2019 he was posted at PS Awami Colony, he came to know about the availability of the dead body of the deceased at abandoned shop at Katchi Abadi Korangi, therefore, on direction of his SHO he went at the place of incident, arranged for the Edhi Ambulance and then took the dead body of the deceased to Jinnah Hospital, there came the complainant Zeeshan Hussain who identified the dead body of the deceased to be of his brother Furqan Hussain and then lodged report of the incident, it was recorded by him at his verbatim. It was stated by complainant Zeeshan Hussain that his brother Furqan Hussain left his house on 20.02.2019, but did not return; subsequently on 23.02.2019 he was called by I.O/SIP Niaz Ahmed to identify the dead body of unknown person at Jinnah Hospital, which he identified to be of his brother Furqan Hussain, who as per FIR was killed by some unknown culprits, for unknown reasons. It was further stated by the complainant that the appellants were the friends of the deceased and he was seen lastly in their company. By stating so, he suspected them to be involved in murder of the deceased. Suspicion may be strong could not be made substitute of evidence. On the basis of such suspicion, the appellants were apprehended by I.O/SIP Muhammad Babar. On their pointation, he secured the iron rod allegedly used by

them in commission of incident and they as per him also admitted before him to have committed the alleged incident. If for the sake arguments, it is believed that such admission was actually made by the appellants before him even then same could not be used against them as evidence in terms of Article 39 of Qanun-e-Shahadat Order, 1984. It was stated by PW Muhammad Yaseen that on the night of incident he was going on his rickshaw, when reached adjacent to Tayyaba Masjid, there he seen the appellants taking away with them a child on two motorcycles and he thought that they are members of political party and there is dispute between them and because of fear he went away from the place of incident. Subsequently, he came to know that child was killed by them. His evidence prima facie suggests that he was stranger to the appellants and to the deceased. In such situation, it was obligatory upon the police to have subjected the appellants to identification parade through him by involving the Magistrate. No such exercise was undertaken; such omission on the part of police could not be overlooked. The identity of the appellants by PW Muhammad Yaseen at the trial could not satisfy the requirement of the law. No motorcycle allegedly used in commission of incident is secured. It was stated by I.O/SIP Ali Haider that on investigation he collected DNA report and on completion of investigation submitted challan of the case against the appellants before the Court having jurisdiction. On asking, he was fair enough to say the annual swabs of the deceased as per DNA report were not found containing semen stains; such report could not overlooked it obviously is favoring the appellants. The place from where the iron rod was recovered was garbage lane, it was not in exclusive possession of the appellants; such recovery is alleged by the appellants to have been foisted upon them by the police at the instance of complainant party. Even otherwise, it would be hard to maintain conviction against the appellants on the basis of such recovery alone. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the

appellants beyond shadow of doubt and to such benefit they are entitled.

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

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

6. In case of *Asghar Ali @ Saba vs. the State and others* ***(1992 SCMR 2088),*** it has been held by the Apex Court that;

> *"The identification in Court of a person produced as an accused months after the event could not satisfy the requirements of law for proving the identity of the culprit."*

7. 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".*

8. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants 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.

9. The instant Criminal Appeal is disposed of accordingly.

JUDGE