

# IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 298 of 2018

Appellant: Abdul Hameed Shah through Mr. Muhammad Farooq , advocate

The State: Mr. Muhammad Anwar Mahar, DDPP

Complainant: Gulawat Shah through Syed Lal Hussain Shah, advocate

Date of hearing: 12.09.2023

Date of judgment: 12.09.2023

## J U D G M E N T

**IRSHAD ALI SHAH, J-** It is the case of prosecution that the appellant with rest of the culprits, in furtherance of their common intention, not only caused fire shot injuries to Muhammad Ali and Waseem Gul but caused *danda* blow to complainant Gulawat Shah with intention to commit their murder; Muhammad Ali eventually died of such injuries, for that the present case was registered. The appellant and co-accused Rustam Ali denied the charge and prosecution to prove the same, examined in all 06 witnesses and then closed its side. The appellant and co-accused Rustam Ali in their statements recorded under Section 342 Cr.P.C denied the prosecution's allegation by pleading innocence by stating that they have been involved in this case falsely by the complainant party on account of old family dispute. They did not examine themselves on oath or anyone in their defence to prove their innocence. On conclusion of trial, co-accused Rustam Ali was acquitted while the appellant was convicted u/s. 302(b) PPC and sentenced to undergo life imprisonment with benefit of section 382(b) Cr.P.C by learned IInd -Additional Sessions Judge, Karachi, Central vide judgment dated 05.04.2018, which he has impugned before this Court by preferring the instant Criminal 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 complainant party in order to satisfy with him its dispute over property; the FIR has been lodged with delay of about 03 days; there is no recovery of any sort from the appellant; there is no independent witness to the incident; there is conflict between medical and ocular account of evidence with regard to age of the deceased and injury sustained by him; 342 Cr.PC statement of the appellant has been recorded improperly and on the basis of same evidence co-accused Rustam Ali has been acquitted even by learned trial Court. By contending so, he sought for acquittal of the appellant of the charge by extending him benefit of doubt. In support of his contention, he relied upon cases of *Sardar Bibi and another v. Munir Ahmed and others* (2017 SCMR 344) and *Mst. Asia Bibi v. the State and others* (PLD 2019 SC 64).

3. It is contended by learned DDPP for the State and learned counsel for the complainant that the appellant is neither innocent nor has been involved in this case falsely by the complainant party; his case is distinguishable to that of acquitted accused Rustam Ali; he has defeated recovery of crime weapon by going in absconsion and was taken into custody after refusal of pre arrest bail and there is no material conflict between medical and ocular account of evidence. By contending so, they sought for dismissal of the instant Criminal Appeal. In support of their contention, they relied upon cases of *Amanullah and another v. the State and others* (2023 SCMR723) and *Ellahi Bakhsh v. Rab Nawaz and another* (2002 SCMR 1842).

4. Heard arguments and perused the record.

5. It is inter alia stated by the complainant in his FIR that on 28.04.2015 his sons Muhammad Ali and Waseem Gul and his

nephews Abdul Hameed and Abid were having scuffle with each other, he intervened to separate them; in the meanwhile Abdul Hameed and Abid took out their pistols; Abdul Hameed fired at Muhammad Ali which hit him on his right thigh while Abid fired at Waseem Gul which hit him on first finger of his right hand; there came Rustam Ali his brother, who caused *danda* blow to him on his head; he and his sons were taken to Abbasi Shaheed Hospital; he and PW Waseem Gul were discharged after treatment while Muhammad Ali was shifted to Ziauddin Hospital Nazimabad who died on 01.05.2014. The evidence of the complainant is silent with regard to causing him *danda* blow by co-accused Rustam Ali. Excepting such omission, he has supported the narration made by him in his FIR to large extent. It was stated by PW Waseem Gul that on the date of incident he and Muhammad Ali had scuffle with the appellant and co-accused Abid on account of selling of narcotics in *Mohalla* on which they took out pistols, the appellant fired at Muhammad Ali which hit him on his right thigh while Abid fired at him which hit him on his first finger of right hand; there came Rustam Ali and he caused *danda* blow to his father the complainant on his head and then all the accused fled away. They all were referred to Abbasi Shaheed Hospital, he and his father the complainant were discharged while Muhammad Ali was shifted to Ziauddin Hospital he died there on 01.05.2014. Whatever is stated by PW Waseem Gul takes support from evidence of PW Naseeb Gul. The complainant and both of his above named witnesses have stood by their version on all material points. They could not be disbelieved only for the reason that they are related inter-se and/or there is no independent witness to the incident. The independent persons are oftenly found reluctant to involve themselves in dispute of others in

Court proceedings. The complainant and his witnesses indeed were having no reason to have involved the appellant in this case falsely who too was their close relative. Of course, during course of their examination they have admitted that one Sana Gul has also sustained fire shot injury. He has not been examined by the prosecution. His non-examination is not enough to disbelieve the complainant and his witnesses. If he was not going to support the case of prosecution then it was for the appellant to have called him in his defence to take advantage of his evidence, if any, which he has failed to do. As per Medical Officer, Dr. Muhammad Naeemuddin, deceased Muhammad Ali was found sustaining injury on his left knee joint, his age and parentage according to supplementary medico legal report was different. Such omission is not enough to make a conclusion that the death of the deceased was not unnatural, which otherwise is proved beyond doubt by the complainant and his witnesses to be unnatural and at the hands of the appellant. The delay in lodgment of the FIR is well explained by the complainant by stating that the elders of the community prevented him from lodging the same to have a private *faisla* which they failed to have on account of death of the deceased, therefore, such delay in lodgment of the FIR could hardly be treated to be fatal to the case of prosecution. The recovery of one empty and one live bullet from the place of incident is not enough to conclude that it was a sole fire which was made by the accused at the complainant party. The second empty might have gone missing from the place of incident which was *mohalla*. The appellant was taken into custody on account of refusal of pre-arrest bail to him, by such act the recovery of crime weapon from him was defeated. No benefit of such non-recovery of crime weapon could be extended to the appellant in the

circumstances. Acquittal of co-accused Rustam Ali is not enough to earn acquittal for the appellant for the reason that he was having a different role in commission of incident. Evidence brought on record by the prosecution is transpiring confidence. It could not be disbelieved in favour of the appellant on the basis of its quantity. It is settled by now that it is the quality of the evidence prevails and not its quantity. The appellant in his statement recorded under Section 342 Cr.P.C has pleaded innocence but has not been able to examine himself on oath or anyone in his defence to prove such innocence, therefore, plea of innocence on his part deserved to be ignored as an afterthought. No prejudice has been caused to the appellant while recording his statement under Section 342 Cr.PC which contains material circumstances. In these circumstances, it would be safe to conclude that no illegality or irregularity has been committed by learned trial Court by convicting the appellant for the offence with which he was charged.

6. In case of *Muhammad Raheel @ Shafique v. State* (PLD 2015 SC 145), it has been held by Apex Court that:

*"5. Thus, their acquittal may not by itself be sufficient to cast a cloud of doubt upon the veracity of the prosecution's case against the appellant who was attributed the fatal injuries to both the deceased. Apart from that the principle of falsus in unofalsus in omnibus is not applicable in this country on account of various judgments rendered by this Court in the past and for this reason too acquittal of the five co-accused of the appellant has not been found by us to be having any bearing upon the case against the appellant".*

7. In case of *Asfandiyar vs. The State and others* (2021 SCMR 2009), Apex Court has held that:

*"Law does not require a particular number of witnesses to prove a criminal charge and statement of a solitary witness with a ring of truth is more than sufficient to drive home the charge; corroboration is a rule of prudence and not law and cannot be invariably insisted in every case. Belatedly taken plea of substitution by the petitioner that the deceased was done to death by one Ashfaq is nothing but a far cry; it is inconceivable that a father would substitute the assassin of his son with an innocent without rhyme or reason. Longstanding absconsion with*

*arrest as late as on 2.5.2012 is yet another predicament bracing the petitioner. On an overall analysis of the evidence, we have not been able to find space to admit any hypothesis other than petitioner's guilt; view concurrently taken by the Courts below, being unexceptionable, calls for no interference. Petition fails. Leave declined."*

8. In case of *Bashir Ahmed Leghari vs. The State (2020 SCMR 595)*, Apex Court has held that:

*"In this backdrop, prosecution's failure to recover the weapon, statedly used in the occurrence, fades into insignificance; he is certainly not expected to keep the gun for such a long period of time with him as a souvenir of his crime."*

9. The case law which is relied upon by the learned counsel for the appellant is on distinguishable facts and circumstances. In case of *Sardar Bibi and another (supra)* the accused who were acquitted were having similar role with the accused who were convicted. In the instant case, the appellant is having a different to that of acquitted accused. In case of *Asia Bibi (supra)* the delay in lodgment of FIR was not explained plausibly. In the instant case, it is explained plausibly.

10. In view of the facts and reasons discussed above, it is concluded that the conviction and sentence awarded to the appellant by way of impugned judgment is not calling for any interference by this Court by way of instant Criminal Appeal. It is dismissed accordingly.

**JUDGE**