

IN THE HIGH COURT OF SINDH, AT KARACHI
Criminal Appeal No. 365 of 2018

Appellant: Faizan through Mr. Muhammad Hanif
Noonari, advocate

The State: Mr. Muhammad Anwar Mahar, DDPP

Date of hearing: 18.09.2023

Date of judgment: 18.09.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellant with one more culprit during course of robbery resorted to firing whereby baby boy Abdullah aged about 1 ½ years by sustaining fire shot injury died, for that the appellant was booked and reported upon by the police. On conclusion of trial, the appellant was convicted u/s. 302 PPC without specifying the clause and sentenced to undergo imprisonment for life and to pay compensation of Rs.200,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for six months; he was further convicted under Section 397 PPC and sentenced to undergo rigorous imprisonment for seven years; no order was passed which may suggest that both the sentences were directed to run concurrently or consecutively, however, benefit of Section 382(b) Cr.P.C was awarded to the appellant by learned IInd-Additional Sessions Judge, Karachi East vide judgment dated 10.05.2018, 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 police; FIR of the incident has been lodged with delay of about 04 days; no identification parade of the appellant has been

conducted through the Magistrate and the evidence of the PWs being doubtful in its character has been believed by the learned trial Court without assigning the cogent reasons. By contending so, he prayed for the acquittal of the appellant by extending him benefit of doubt, which is opposed by learned DDPP for the State by contending that the prosecution has been able to prove its case against the appellant on the basis of circumstantial evidence.

3. Heard arguments and perused the record.

4. It was stated by complainant Muhammad Uzair Khan that on 29.07.2014 he, his wife Mst. Ume Salma and son Abdullah aged about 1½ years were going back to their house on their motorcycle after shopping when reached at gate of PNS Naval at main Shahrah-e-Faisal; they were confronted by two persons on motorcycle; they signaled them to stop and one amongst them, the appellant directly fired at them; such fire hit to his son Abdullah; he took out his pistol and fired at the culprits; both the culprits sustained fire shot injures; he then took his son Abdullah to Agha Khan Hospital; he was declared dead; later-on, he was intimated by I.O/ASI Zafar Iqbal that one of the culprit namely Irfan has died while other has been identified as Faizan who is under treatment for injuries which he has sustained during course of incident; on 03.08.2014, he lodged report of the incident with PS Shahrah-e-Faisal. It was lodged with delay of about 04 days to actual incident. It was further stated by the complainant that he then went at Jinnah Hospital and identified the appellant to be one of culprit involved in the incident. Narration of the incident made by the complainant takes support from evidence of his wife Mst. Ume Salma. It was night time incident, therefore, it was obligatory upon the police

to have got the appellant identified through the complainant and Mst. Ume Salma by way of identification parade involving a Magistrate, in order to maintain the transparency; it was not done, therefore, it would be safe to conclude that identity of the appellant by the complainant and Mst. Ume Salma either at Hospital or at trial besides being doubtful does not satisfy the requirements of the law. It was stated by I.O/ASI Zafar Iqbal that on the date of incident when he was available at PS Shahrah-e-Faisal a dacoit was brought by mob of 40/50 persons in injured condition, who then was referred to Jinnah Hospital for treatment of his injuries, he died there; he then went at Jinnah Hospital there one Mairaj met with him who identified the dead body of the culprit to be of his brother Irfan and for the appellant he disclosed that he is Faizan who was taken by the deceased culprit for shopping; later on, he came to know that the appellant has also sustained fire shot injuries during course of the incident, therefore, he was brought by him at Hospital. PW Mairaj has not been examined by the prosecution. The inference which could be drawn of his non-examination in terms of Article 129(g) of Qanun-e-Shahadat Order, 1984 would be that he was not going to support the case of the prosecution. Even otherwise as per Medical Certificate, the appellant was brought at Hospital through the ambulance of Edhi Centre. His non-examination could not be overlooked. Dr. Jagdesh Kumar who examined the injuries of the appellant has not been examined by the prosecution for the reason that he has retired from service. The retirement of employee from service may not be a sufficient reason for his non-examination. By such omission, the appellant has been prejudiced in his defence. The examination of Dr. Qamar Ahmed who identified the signature of Dr. Jagdesh Kumar on the medical certificate of the appellant is not enough

to discharge the burden of proof. It was stated by I.O/SIP Muhammad Farooq Azam that the appellant during course of interrogation confessed his guilt before him. If for the sake of arguments, it is believed that such confession was actually made before him by the appellant even then same in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used against him as evidence. No weapon is secured from the appellant. It is the prosecution which has to prove its case beyond reasonable doubt; such burden could not be shifted to the appellant involved in the incident on the basis of weakness of defence or otherwise. In these circumstances, it would be safe to conclude 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.

5. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR127), it was observed by the Hon'ble Court that;

"Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate".

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 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 and shall be released forthwith, if not required to be detained in any custody case.

9. The instant Criminal Appeal is disposed of accordingly.

JUDGE