

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Jail Appeal No. 731 of 2019

Appellant: Mashooque through Mr. Wazeer Hussain Khoso, advocate

The State: Ms. Rubina Qadir, Deputy Prosecutor General for the State

Complainant through Syed Israr Ali Shah, advocate

Date of hearing: 19.09.2023

Date of judgment: 03.10.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of prosecution that the appellant, co-accused Maqsood and Imran not only committed murder of Ali Sher but caused fire shot injuries to PW Ali Raza with intention to commit his murder, for that they were booked and reported upon by the police. At trial, co-accused Maqsood and Imran were acquitted by way of compromise while the case proceeded against the appellant and on its conclusion, he was convicted under Section 302(b) PPC as *Tazir* and sentenced to undergo rigorous imprisonment for life and to pay compensation of Rs.100,000/- to the legal heirs of the deceased and in default whereof to undergo rigorous imprisonment for six months; he was further convicted under Section 337(f)(iii) PPC and sentenced to pay *Daman* of Rs.25000/- and in default whereof to undergo rigorous imprisonment for 02 years; he was also required to pay compensation of Rs.10,000/- to PW Ali Raza without specifying the penal section for which he was awarded the compensation and in default whereof to undergo rigorous imprisonment for 02 months; all the sentences were directed to run concurrently with benefit of section 382(b) Cr.P.C by learned 1st -Additional Sessions Judge/MCTC, Thatta vide judgment

dated 18.04.2019, which he has impugned before this Court by preferring the instant Criminal Jail 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 old enmity and the evidence of the PWs being doubtful in its character has been believed by the learned trial Court without lawful justification. By contending so, he sought for acquittal of the appellant by extending him benefit of doubt. In support of his contention, he relied upon the cases of *Muhammad Imran v. the State* (2020 SCMR 857) and *Muhammad Aslam v. Muhammad Rashid and another* (2002 SCMR 1795).

3. Learned DPG for the State and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the instant Criminal Appeal by contending that the prosecution has been able to prove its case against the appellant beyond shadow of reasonable doubt. In support of their contention, they relied upon cases of *Ali Asghar alias Aksar v. the State* (2023 SCMR 596) and *Muhammad Bashir and another v. the State* (2023 SCMR 190).

4. Heard arguments and perused the record.

5. It was stated by complainant Ali Muhammad that on 10.05.2014 he and PW Gul Hassan after closing their hotel were going to their house when reached at Hyderi Chowk, there they found standing the appellant, co-accused Maqsood and Imran duly armed with weapons, in the meanwhile there came Ali Sher and Ali Raza, on their motorcycle, they were asked by the appellant and others to withdraw from their case pending against them before the Court of Law; it was about 09 or 09.10 or 09.15 p.m. time; he and PW Gul Hassan tried to intervene but the

appellant and others made straight fires which hit to Ali Sher and Ali Raza. Ali Sher succumbed to such injuries. In FIR, the role attributed to accused Imran in commission of the incident was only to the extent of making aerial firing. By attributing him the role of making fires at the deceased and PW Ali Raza, the complainant has made an improvement which appears to be dishonest. If for the sake of arguments, it is believed that the appellant and others actually made fires at the deceased and PW Ali Raza then it is general in nature. On asking, PW Ali Raza, was fair enough to say that the fires were made by the appellant alone. By stating so, he belied the complainant that the fires were made by the appellant and others. On asking, it was stated by PW Gul Hassan that the appellant made fires at the deceased. By stating so, he belied the complainant that the firing was general in nature. Such inconsistencies between the evidence of the complainant and his witnesses could not be overlooked, which has put them within the ambit of untrustworthy witnesses. As per FIR, the incident took place at about 09.10 p.m. time. As per postmortem report, the dead body of the deceased was brought at Civil Hospital Thatta at about 09.15 p.m. for postmortem. It is somewhat strange to deliver the dead body of the deceased in hospital, within 05 minutes of its occurrence that too after observing all the codal formalities by the police. As per postmortem report prepared by Dr. Ghulam Sarwar Channa, the time between injuries and death was within 0 to 15 minutes. If it was so, then it belies the complainant and his witnesses that the deceased succumbed to injuries at the spot. It was further stated in the postmortem report that the time between death of the deceased and postmortem was about 1 to 2 hours. If it is considered to be so then the deceased might have died at about 07 or 08 p.m. which belies the complainant party that incident

took place around 9.10 p.m.; such inconsistency could not be ignored which prima facie has made the presence of the complainant and his witness at the time of incident to be doubtful. It was stated by I.O/Inspector Muhammad Younis that he apprehended the appellant and secured from him the pistol allegedly used by him in commission of the incident. Such pistol as per report of Forensic Expert was sent to him together with the empties secured from the place of incident, those ought to have been sent separately to maintain the transparency. Even otherwise the conviction could not be maintained on the basis of recovery when evidence of witnesses is found to be doubtful. It was further stated by the said I.O/Inspector that he prepared all the mashirnamas. He in that respect is belied by PW/mashir Gul Hassan by stating that at-least three mashirnamas of the case were prepared by WHC of police station which prima facie suggest that the participation of the said I.O/Inspector in investigation of the present case was only to the extent of table. The appellant has been acquitted impliedly for having committed an offence punishable under Section 324 PPC even by learned trial Court by awarding him no punishment for such offence. The appellant has pleaded innocence during course of his examination under Section 342 Cr.P.C; such plea on his part could not be lost sight of in the circumstances of the case.

6. The discussion involves a conclusion 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.

7. In case of *Muhammad Jamil vs. Muhammad Akram and others* (2009 SCMR 120), it has been observed 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.”

8. In the case of *Muhammad Javed vs. The State (2016 SCMR 2021)*, it has been held by the Apex Court that;

"....although a report of the Forensic Science Laboratory was received in the positive in respect of matching of the firearm recovered from the appellant's custody with a crime-empty secured from the place of occurrence yet the investigating officer (PW9) had clearly acknowledged before the trial court that the crime-empty had been sent to the Forensic Science Laboratory on the day when a carbine had been recovered from the custody of the appellant."

9. 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".

10. The case law which is relied upon by learned DPG for the State and learned counsel for the complainant is on distinguishable facts and circumstances. In both the cases so relied it was held that mere relationship of PWs is not enough to disbelieve them. In the instant case, evidence of the complainant and his witnesses being inconsistent on material points with regard to the incident is not appearing to be transparent confidence to be relied upon to maintain conviction.

11. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant under impugned judgment are set aside, consequently, 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 other custody case.

12. The instant Criminal Jail Appeal is disposed of accordingly.

JUDGE