

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.80 of 2021
Criminal Jail Appeal No.92 of 2021

Appellants: Kashif and Tanveer Masih through Mr. Shah Imroze Khan, advocate

The State: Mr. Zahoor Shah, Addl. PG for the State

Complainant: through Mr. Muhammad Riaz Abbasi, advocate

Date of hearing: 04.10.2023

Date of judgment: 04.10.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of prosecution that the appellants with one more culprit in furtherance of their common intention committed murder of Dominick @ Choudhry Javed Masih by causing him knife injuries and then in order to save themselves from legal consequences thrown his dead body in *Katchra Kundi* by putting it in a sack, for that they were booked and reported upon by the police. At trial, the appellants and co-accused Shahbaz Hidayat @ Baggi denied the charge and the prosecution to prove the same, examined in all 08 witnesses and then closed its side. On conclusion of trial, co-accused Shahbaz Hidayat @ Baggi was acquitted while the appellants were convicted u/s. 302 r/w Section 34 PPC and sentenced to undergo rigorous imprisonment for life as *Tazir* and to pay compensation of Rs.200,000/- each to the legal heirs of the said deceased; they were further convicted under Section 201 r/w Section 34 PPC and 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; both the sentences were directed to run concurrently with benefit of section 382(b) Cr.P.C by learned V-Additional

Sessions Judge, Karachi East vide judgment dated 16.01.2021, which they have impugned before this Court by preferring two separate appeals.

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 at the instance of the complainant party and on the basis of same evidence co-accused Shahbaz Hidayat @ Baggi has already been acquitted by learned trial Court, therefore, the appellants are entitled to their acquittal by extending them benefit of doubt, which is opposed by learned Addl. PG Sindh and learned counsel for the complainant by contending that on arrest the belongings of the deceased have been secured from them by the police on their pointation and their case is distinguishable to that of acquitted accused Shahbaz Hidayat @ Baggi.

3. Heard arguments and perused the record.

4. It was stated by complainant Shahid Pervez and PW Aneel Ayaz that on 21.01.2019 their father Dominick @ Choudhry Javed went for work but did not return; on 22.1.2019 it was intimated to them by Aslam who happened to be Constable at PS Korangi Industrial Area Karachi that a dead body has been recovered, therefore, they should come and identify the same, which was identified by them at Jinnah Hospital Karachi to be of their father; subsequently on 23.01.2019 they lodged report of the incident with police suspecting the appellants to have committed murder of their father by causing him knife injuries. Apparently, complainant and PW Aneel Pervez are not eye witnesses to the incident; therefore, their evidence hardly lends support to the case of prosecution. The delay in lodgment of the FIR by them even by one day that too after consultation with the elders could

not be lost sight of. Evidence of I.O/SIP Mumtaz Ali is only the extent of conducting the initial investigation of the case; his evidence is not enough to improve the case of prosecution. It was stated by I.O/SIP Nisar Ahmed that he apprehended the appellants who admitted their guilt before him; therefore, their custody was handed over by him to I.O/SIP Yousif Naimat for further investigation of the present case. It was stated by I.O/SIP Yousif Naimat that the appellants on interrogation also admitted before him and the complainant party to have committed the present incident. If for the sake of arguments, it is believed that such admission was actually made by the appellants before the above named police officials or the complainant party even then such admission in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used against them as evidence. It was further stated by I.O/SIP Yousif Naimat that the appellants then led him to recovery of motorcycle with cart, shoes of the deceased and blade allegedly used by them in commission of the incident. On asking, he was fair enough to admit that he has not been able to produce any document which may prove the ownership of the deceased over the motorcycle with cart. Perhaps in that context it was contended by learned counsel for the appellants that it has been foisted upon the appellants by the police only to strengthen its case. On chemical examination the sack, shoes of the deceased and blade etc. were found to be stained with human blood. There is nothing on record which may suggest that it was blood of the deceased. Even otherwise those articles being easily available in market have been subjected to chemical examination with delay of more than one month to its recovery with no plausible explanation to such delay, therefore, the appellants could hardly be connected with such recovery. On the basis of same evidence, co-accused

Shahbaz Hidayat @ Baggi has already been acquitted by learned trial Court and his acquittal has not been challenged by the prosecution. The appellants in their statements recorded under Section 342 Cr.PC have pleaded innocence; such plea of innocence on their part could not be lost sight of.

5. The discussion involved a conclusion that the prosecution has not been able to prove its case against the appellants beyond shadow of reasonable doubt and to such benefit they are also found entitled.

6. 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".

7. In case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR 344), it has been held by the Apex Court that;

"When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused".

8. 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".

9. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants under impugned judgment 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.

10. The instant appeals are disposed of accordingly.

JUDGE

Nadir*