

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.254 of 2020

Appellants: Muzammil and Bakht Rehman through
M/s. Salahuddin Khan Gandapur, Pir
Darwesh Khan, Safeeruddin Gandapur
and Bakht Azam, advocates

The State: Mr. Muhammad Anwar Mahar, DDPP for
the State

Complainant: through Mr. Bakht Azam, advocate

Date of hearing: 10.10.2023

Date of judgment: 10.10.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of prosecution that the appellants during course of robbery committed murder of Muhammad Sohail by causing him fire shot injuries, for that they were booked and reported upon by the police. On conclusion of trial, appellant Muzammil was convicted under Section 302(b) PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.100,000/- to the legal heirs of the said deceased and in default whereof to undergo simple imprisonment for 01 year; he was further convicted under Section 397 PPC and sentenced to undergo rigorous imprisonment for 07 years; both the sentences were directed to run concurrently; appellant Bakht Rahim was convicted under Section 392 PPC and was sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.50000/- and in default whereof to undergo simple imprisonment for 06 months. The benefit of Section 382(b) Cr.PC was awarded to both of the appellants by learned VIIth-Additional Sessions Judge/MCTC-II Karachi Central vide judgment dated 16.3.2020, which they have

impugned before this Court by preferring the instant Crl. Appeal.

2. It is contended by learned counsel for the appellants that they being innocent have been involved in this case falsely by the police, in a blind FIR without formal identification parade and the evidence of the PWs being doubtful in its character has been believed by the learned trial Court without assigning cogent reasons. By contending so, they sought for acquittal of the appellants by extending them benefit of doubt. In support of their contention, they relied upon case of *Hayatullah v. the State* (2018 SCMR 2092).

3. Learned DDPP for the State and learned counsel for the complainant have sought for dismissal of the instant Crl. Appeal by contending that empties secured from the place of incident were found matched with the pistols secured from the appellants and the prosecution has been able to prove its case against them by leading cogent evidence, therefore, the identity of the appellants involving a Magistrate was not necessitated. In support of their contention, they relied upon case of *Dadullah and another v. the State* (2015 SCMR 856).

4. Heard arguments and perused the record.

5. It was stated by P.W Nek Badshah that Muhammad Sohail was his employee; on 29.04.2018 he and Muhammad Sohail were present at his shop at Bilal Colony, there came two culprits with pistols on their motorcycle; they robbed him of his cash, CNIC, mobile phone and other documents; they also robbed P.W Adil of his money who came at the place of incident from nearby store. In the meanwhile Muhammad Sohail came towards counter, on that he was fired at by one of the culprits, such fire hit to him on his chest, who by sustaining such fire fell down on

the ground; he caught hold one of the culprit; his pistol fallen down, he took that pistol and made fire when he was about to make other fire its bullet stuck; both the culprits then managed their escape good from the place of incident; his brother P.W Nazeer Ahmed came at the place of incident and took Muhammad Sohail to Abbasi Shaheed Hospital, there he was declared dead; police came at the place of incident and performed usual formalities; P.W Deen Muhammad who happened to be brother of the deceased was intimated about the incident, who in turn intimated the incident to complainant Atta Muhammad who happened to be father of the deceased; he came, obtained the dead body of the deceased for burial and then lodged report of the incident on 01.05.2018 with PS Sir Syed Karachi; it was lodged on 2nd day of the incident; it was lodged against the unknown culprits; it was recorded by I.O/SIP Gulsher Ahmed who also conducted the initial investigation of the case. The complainant is not eyewitness to the incident; therefore, his evidence is of little help to the case of prosecution. P.W Deen Muhammad who intimated the complainant about the incident has not been examined by the prosecution. His non-examination could not be overlooked. It was further stated by P.W Nek Badshah that on 15.5.2018 he and P.W Nazeer Ahmed were called by I.O/SIP Muhammad Ashraf at PS New Karachi there they identified the appellants to be the culprits responsible for the present incident. The identity of the appellants at Police Station, in lock-up and later-on in trial Court could hardly satisfy the requirements of law. On asking, P.W Nek Badshah was fair enough to admit that he has not disclosed the *hulia*/features of the appellants in his 161 Cr.PC statement. If it was so, then identity of the appellants by him in absence of disclosure of their *hulia*/features in his 161 Cr.PC statement is somewhat

surprising. P.W Nazeer Ahmed too has not been examined by the prosecution. His non-examination could not be overlooked. P.W Adil being one of the star witness to the incident, on account of his failure to identify the appellants at trial was declared hostile, therefore, his evidence hardly connect the appellants with commission of the incident. It was stated by I.O/SIP Qasim Khan that he arrested the appellants together with the pistols after an encounter and during course of interrogation they admitted to have committed the present incident; therefore, he transmitted such information to I.O/SIP Muhammad Ashraf. It was stated by I.O/SIP Muhammad Ashraf that he obtained the custody of the appellants; they also admitted before him to have committed the present incident. If for the sake of arguments, it is believed that the appellants actually admitted their guilt before the said police officials even then such admission on their part in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used against them as evidence. The pistols are alleged by the appellants to have been foisted upon them by the police. If for the sake of arguments, it is believed that such pistols were actually secured from the appellants and on forensic examination were found matched with the empties secured from the place of incident even then such recovery could hardly be made a reason to maintain conviction against them particularly when ocular account of evidence furnished against them by the prosecution is found to be doubtful and untrustworthy. The appellants have pleaded innocence; such plea of innocence on their part could not be lost sight of in the circumstance of the case.

6. The conclusion which could be drawn of the discussion would be 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 found entitled.

7. In case of *Imran Ashraf and others vs. The State* (2001 SCMR-424), it was observed by the Apex Court that;

"Section 154, Cr.P.C. lays down procedure for registration of an information in cognizable cases and it also indeed gives mandatory direction for registration of the case as per the procedure. Therefore, police enjoys no jurisdiction to cause delay in registration of the case and under the law is bound to act accordingly enabling the machinery of law to come into play as soon as it is possible and if first information report is registered without any delay it can help the investigating agency in completing the process of investigation expeditiously".

8. 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."

9. 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."

10. 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".

11. The case law which is relied upon by learned DDPP for the State and learned counsel for the complainant is on distinguishable facts and circumstances. In that case one of the culprits was apprehended at the spot by the witnesses and there

was judicial confession of the accused. In that context, it was held that non-holding of identification parade thus was of no help to the accused. In the instant case, none of the appellants was apprehended at the spot and there is no judicial confession by either of them, therefore, the identification parade of the appellants through Magistrate was essential.

12. 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.

13. The instant Criminal Appeal is disposed of accordingly.

JUDGE

Nadir*