

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.250 of 2021

Appellant: Muhammad Faisal @ Kala through Syed Lal Hussain Shah, advocate

The State: Mr. Khadim Hussain Khuharo, Addl. PG for the State

Date of hearing: 11.10.2023

Date of judgment: 11.10.2023

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 during course of robbery committed murder of Mst. Aisha by causing her fire shot injury, for that the present case was registered. On conclusion of trial, co-accused Anwar Ali @ Anu Gernade, Azmat @ Aju and Rehmat Ali @ Wasooli were acquitted while the appellant was convicted u/s. 393 r/w Section 34 PPC and sentenced to undergo rigorous imprisonment for 07 years with fine of Rs.50,000/-; he was further convicted u/s. 302(b) r/w 34 PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.10,00,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for 06 months; both the sentences were directed to run concurrently with benefit of Section 382(b) Cr.PC learned 1st -Additional Sessions Judge Karachi East vide judgment dated 12.04.2021, which he has impugned before this Court by preferring the instant Crl. 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, in a blind FIR, without his formal identification

parade and on the basis of same evidence the above named co-accused have been acquitted by learned trial Court. By contending so, he sought for acquittal of the appellant by extending him benefit of doubt, which is opposed by learned Addl. PG for the State by contending that the car used in commission of the incident was owned by the wife of the appellant; there is CCTV recording and his case is distinguishable to that of the above named acquitted accused. In support of his contention, he relied upon case of *Muhammad Asghar and four others v. the State* (2004 SCJ 387).

3. Heard arguments and perused the record.

4. Admittedly, the FIR of the incident has been lodged against the unknown culprits and complainant Shahzad-ur-Rehman has not been examined by the prosecution under the pretext that he has shifted to Canada; his non-examination in any case could safely be resolved in favor of the appellant. It was stated by P.Ws Sohail-ur-Rehman and Muneeb-ur-Rehman that in order to attend the marriage ceremony within family, the complainant and his wife Mst. Aisha together with their kids came at Pakistan from Canada; on 26.08.2019 when they all were available in their house they woke up at about 8:30 hours on hearing of fire shot reports; they also took licensed pistol and made fires at the culprits, on exchange of such firing Mst. Aisha sustained fire shot injury on her chest; the culprits then made their escape good; Mst. Aisha then in injured condition was taken to Dar-ul-Sehat Hospital then was shifted to Agha Khan Hospital, she was declared dead there. As per postmortem report prepared by Dr. Noor-un-Nisa the death of the deceased was instantaneous. It is contrary to what was stated by P.Ws Sohail-ur-Rehman and Muneeb-ur-Rehman that the deceased in injured condition first

was taken to Dar-ul- Sehat Hospital and then to Agha Khan Hospital. It was further stated by them that the police came at Agha Khan Hospital and then shifted the dead body of the deceased to Jinnah Hospital; it was handed over to them for burial purpose after postmortem; later-on statement of the complainant was recorded u/s. 154 Cr.PC same subsequently was incorporated into formal FIR. It was stated by I.O/SIP Abdul Rehman that he recorded 154 Cr.PC statement of the complainant and it then was incorporated by him into FIR. On asking, he was fair enough to admit that both of the above said documents are under hand of WPC. He has not been examined by the prosecution; his non-examination being author of the above said documents could not be overlooked. It was further stated by I.O/SIP Abdul Rehman that on 26.08.2019 he secured the car allegedly used in commission of the incident and therein were found lying the *Kalashnikov* and pistol and prepared such memo in presence of ASI Nazeer and PC Rashid Qayum. Why it was not secured in presence of any independent person? No explanation to it is offered. It was further stated by P.Ws Saifu-ur-Rehman and Muneeb-ur-Rehman that on 02.09.2019 the appellant was arrested by I.O/SIP Abdul Ghani from Chawla Hospital when he was undergoing the treatment of his burns injuries there and they identified by him to be one of the culprit responsible for the present incident. The identity of the appellant by them at the Hospital when his face was found bandaged could hardly satisfy the requirements of the law. It is to be judged with doubt. No document is produced by the prosecution which may suggest that the appellant at the time of his arrest was actually admitted in Chawla Hospital for undergoing the treatment of his burns injuries. It was stated by

I.O/SIP Abdul Ghani that on investigation he got recorded 164 Cr.PC statement of the complainant whereby he also identified the appellant; it was recorded by Mr. Wazeer Hussain the Magistrate having jurisdiction. No much reliance could be placed upon such 164 Cr.PC statement of the complainant for the reason that the appellant has not been provided a chance to cross-examine the complainant on his 164 Cr.PC statement, on account of his non-examination. It was further stated by the said I.O/SIP that the appellant by admitting his guilt disclosed the names of co-accused Anwar Ali @ Anu Gernade, Azmat @ Aju and Rehmat Ali @ Wasooli. The admission of the guilt, if any, by the appellant before the said I.O/SIP in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used as evidence against him. It was further stated by I.O/SIP that on search, he secured from the car allegedly used in commission of the incident an envelope containing the CNIC and driving license of the appellant, it was done on 30.08.2019. If those documents were actually kept in that car then ought to have been secured by I.O/SIP Abdul Rehman at the time when the very car was secured. Subsequent recovery of such documents from that car is to be judged with doubt. It was further stated by I.O/SIP Abdul Ghani that on investigation he was provided CCTV recording of the place of incident by the complainant party. There is no forensic report of such CCTV recording. It has not been recovered under any memo. It has not been provided to the appellant by learned trial Court before the commencement of the trial. Even otherwise, on asking, the said I.O/SIP was fair enough to admit that such CCTV recording was made viral by the police; he did not call the witnesses to confirm their (culprits) identity whether they were present at the scene of incident or

not making fires. In that situation, the appellant could hardly be connected with such CCTV recording. It has also come on record that the said I.O/SIP recorded 161 Cr.PC statements of the witnesses Saifu-ur-Rehman and Muneeb-ur-Rehman twice. Why he did so? No explanation to it is offered by the prosecution. The recovery of the pistol was not made from the exclusive possession of the appellant; such recovery together with the recovery of the car allegedly used in commission of the incident even otherwise would not be enough to maintain the conviction against the appellant in the circumstances of the case. The appellant during course of his examination has pleaded innocence by stating that the car in question was taken by the police from his house. Such plea of innocence on his part could not be lost sight of. Co-accused Anwar Ali @ Anu Gernade, Azmat @ Aju and Rehmat Ali @ Wasooli have already been acquitted by the learned trial Court, on the basis of the same evidence. In that situation, 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 too is found entitled.

5. 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.”

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 case of *Sardar Bibi and others vs. Munir Ahmed and others* (2017 SCMR 344), it has been held by the Hon'ble 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. The case law which is relied upon by learned Additional Prosecutor General for the State is on distinguishable facts and circumstances. In that case, the identification parade was conducted whereby the complainant and at-least 05 of his witnesses identified the culprits. In the instant case, no identification parade has been conducted with involvement of the Magistrate.

10. 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.

11. Above are the reasons of short order of even date, whereby the instant Criminal Appeal was allowed.

JUDGE