

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No.S-315 of 2019

Appellant : Arbab Ali Shar s/o Gul Bahar Shar through Mr. Amanullah G. Malik, advocate

Respondent : The State, through Syed Sardar Ali Shah, Additional Prosecutor General

Date of hearing: 14.11.2022

Date of judgment: 14.11.2022

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Arbab Ali Shar was tried alongwith co-accused Arbab and Pervaiz Ahmed (since acquitted) by learned Additional Sessions Judge/MCTC, Ubauro, in Sessions Case No.78 of 2018, for offences under Sections 302, 311, 147, 148, 149 PPC. On the conclusion of trial, vide judgment dated 06.12.2019, Appellant Arbab Ali was found guilty of *Qatal-e-Amd* of deceased Rukan Ali @ Rodhan Shar and Mst. Haseena Shar and convicted under Section 302(b) PPC and sentenced to imprisonment for life as Tazir on two counts. Appellant was ordered to pay compensation of Rs.100,000/- to the legal heirs of both deceased. In case of failure, in payment of compensation, he was ordered to suffer S.I for six months more.

2. Brief facts of the prosecution case leading to filing of appeal are that SIP Totomal was posted as SHO at P.S. Reti on 19.11.2017. On the same date, he alongwith his subordinate staff namely PCs Muhammad Ishaque, Jan Muhammad, Mashooq and Ajab Gul left police station vide roznamcha entry No.5 at 1000 hours in the Government vehicle for patrolling duty. When the police party reached at Katcha Road near village Jabbar Khan Shar, SHO received spy information that accused Arbab s/o Gul Bahar Shar had declared his wife Mst. Haseena as Kari on establishing illicit relations with one Rukan

@ Radhan Shar. Further information was given to the SHO that appellant Arbab alongwith co-accused was going to commit murder of Mst. Hasina and Rukan @ Radhan Shar. On such information, police party proceeded to pointed place and reached at Chadoo Chowk at 1100 hours and saw appellant Arbab s/o Gul Bahar, Arbab s/o Bagh Ali Shar and one unidentified person armed with pistol. They were catching hold deceased Rukan @ Radhan. It is alleged that appellant Arbab s/o Gul Bahar was causing dagger blows to Rukan @ Radhan. Acquitted accused Pervaiz and one unidentified person had caught hold Mst. Haseena. It is further alleged that accused Parvez caused dagger blow to Mst. Haseena, she fell down and accused succeeded to run away. SHO/Police party saw that Rukan @ Radhan and Mst. Haseena had expired. SHO prepared inquest reports in presence of police constables and sent dead bodies through PC Muhammad Ishaque for conducting their post-mortem examination and reports on the same date at 1800 hours. SHO lodged FIR against appellant and others at P.S vide Crime No. 50/2017 for offences under Sections 302, 311, 147, 148, 149 PPC on behalf of the state.

3. After usual investigation, charge was submitted against appellant Arbab s/o Gul Bahar, co-accused Arbab s/o Bagh Ali and Pervez Ahmed s/o Bagh Ali for offences under Sections 302, 344, 147, 148, 149 PPC. Trial Court framed charge against appellants to which they pleaded not guilty and claimed for trial. Prosecution examined 07 PWs and relevant documents were produced. Thereafter, prosecution side was closed. Trial Court recorded statements of appellants under Section 342 Cr.P.C in which they claimed false implication in this case and denied the allegation leveled by the prosecution. However, they did not lead evidence in defence and declined to give evidence on oath. Learned trial Court, after hearing learned Counsel the parties and assessment of the evidence, convicted and sentenced present appellant as stated above; however, acquitted co-accused namely Arbab s/o Bagh Ali and

Parvez s/o Bagh Ali from the charges. Appellant has challenged his conviction and sentence recorded by trial Court by filing the instant appeal.

4. Mr. Amanullah G. Malik, learned advocate for the appellant with great energy put before the Court reasons for disbelieving the evidence of police officials and has endeavored to show with their evidence as to the partrolling and witnessing the commission of *Qatal-e-Amd* of both deceased was highly unreliable. It is further argued that it was the case of spy information, SHO deliberately avoided to join independent witness of the locality to witnesses the incident. It is further argued that co-accused have been acquitted by the trial Court on same set of evidence and conviction awarded to the appellant on the same set of evidence without independent corroboration is not sustainable in law. Reliance is placed on the case of ***Saifullah vs. The State (1992 MLD 984)***. Lastly, it is submitted that prosecution story appears to be unnatural and unbelievable, hence he prayed for setting aside the conviction and sentence awarded to the appellant by the learned trial Court through impugned judgment.

5. Syed Sardar Ali Shah, Additional Prosecutor General argued that evidence of police cannot be discarded simply because they belong to police force and submitted that independent persons were not available at the time of incident. Police officials had no motive to falsely implicate the appellant in this case. Learned Addl. Prosecutor General prayed for dismissal of the appeal.

6. It is settled law that the evidence of police officials cannot be discarded simply they belong to police force. The police officer is a good witness as any other person. The standard of judging his evidence is same on which evidence of any other witness judged; however, in a case of this nature where the fate of accused persons hinges upon the testimony of police officials alone, it is the duty of the court to find out if there was possibility of

securing independent person at that time. Judicial approach as to be cautious in dealing with such evidence. Rightly reliance is placed upon the case of ***Saifullah vs. The State (1992 MLD 984)***.

7. I have re-examined the evidence of the police officials/prosecution witnesses. SHO Totomal was performing his patrolling duty on 19.11.2017 when he reached at Katcha Road near village Jabbar Khan Shar, he received spy information that appellant Arbab s/o Gul Bahar has declared his wife Mst. Haseena as Kari with one Rukan @ Radhan and was prepared to kill his wife and Rukan @ Radhan. SHO, after receiving of spy information, proceeded to the pointed place where he saw appellant armed with dagger, acquitted accused Parvez armed with dagger and one unidentified person armed with pistol. It is the case of the prosecution that appellant committed murder of Rukan @ Radhan by means of dagger and wife of the appellant was done to death by means of dagger by acquitted accused Parvez. Appellants were identified by PC Jan Muhammad and after commission of murders, they ran away. Trial Court failed to appreciate the evidence of police officials on the basis of sound judicial principles for the reasons (a) prosecution story was unnatural and unbelievable and it is against conduct of the criminal to commit any offence in presence of police officials (b) presence of police officials at the time of incident was highly doubtful for the reasons as to why efforts were not made by the police officials to rescue deceased persons (c) it does not appeal to prudent mind that appellants, after commission of the murders, ran away in presence of police when police party armed with official sophisticated weapons. According to the case of prosecution, appellant and others were identified by PC Jan Muhammad at the time of incident but at the trial he was given up by the prosecution. There is no explanation on the part of prosecution that as to why the evidence of these witnesses was withheld, therefore, a presumption under Illustration (g)

of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the said witness been examined in the Court his evidence would have been un-favourable to the prosecution. Although, the prosecution was not bound to produce each and every witness but if the prosecution fails to produce such witnesses who are central figure and the entire story revolved around them, then the prosecution story would become doubtful. According to prosecution evidence, role assigned to the accused Pervez was that he committed murder of Mst. Haseena in presence of police officials, on same set of evidence, co-accused Pervez has been acquitted on the ground that prosecution case was doubtful against him. It is quite strange that on the same set of evidence, appellant has been convicted without independent corroboration as Appellant and co-accused Pervez had similar role in the commission of the offence. Trial Court found evidence doubtful to the extent of acquitted co-accused but convicted the appellant on same set of evidence meaning thereby that witnesses of ocular account/police officials had been disbelieved by the trial Court to the extent of acquitted co-accused, hence appellant could not be convicted on same set of evidence in absence of any corroboratory piece of evidence, which was totally missing in the present case. Learned advocate for the Appellant has rightly placed reliance upon the case of *Pervaiz Khan and another vs. The State (2022 SCMR 393)*. Relevant portion is reproduced as under:-

"The High Court through the impugned judgment concurred with the findings of the trial court regarding the acquittal of three co-accused who actively participated in the occurrence and their role was getting support from the medical evidence meaning thereby the witnesses of the ocular account have been disbelieved qua the said acquitted co-accused and their evidence cannot be taken into consideration against the present appellants in the absence of any corroboratory piece of evidence which is totally missing in this case because the FSL report to the extent of one of the appellant is negative and even no recovery was effected from the other appellant. Learned counsel for the complainant tried to distinguish the case of the present appellants from the case of the acquitted accused by saying that as present appellants firstly fired upon the deceased hence the subsequent firing by the remaining accused although has been disbelieved but cannot give any benefit to the appellants. This argument has no force because in the FIR and also during the trial all the witnesses of the ocular account remained consistent on the point that all the seven accused fired upon the

deceased persons and their bullets hit the deceased on different part of their bodies. So there is nothing on record to distinguish the role of the present appellants from the role of those accused who have been acquitted by the trial Court and their acquittal has been maintained by the High Court and further their acquittal was never challenged before this Court. Due to the above circumstances, the conviction and sentence of appellants is not sustainable on the same set of evidence, which was found doubtful to the extent of three acquitted co-accused.”.

8. The prime duty of the Court is to do justice according to its own conscience. While dealing with the life and liberty of an accused, utmost care and caution is required to be exercised by the Courts of law because slight carelessness on their part may deprive an accused person/citizen of his life and many cause irreparable hardship and damage to his family. Reliance is placed upon the judgment passed by Hon’ble Supreme Court of Pakistan in the case of *Nawab Siraj Ali & Nawab Sajjad Ali, Ghulam Murtaza and Shahrukh Jatoi vs. The State through Advocate General, Sindh*, in Criminal Appeal Nos. 400, 401 & 402 of 2019 dated 18.10.2022.

9. For the above stated reasons, I have no hesitation to hold that trial Court failed to appreciate evidence according to sound judicial principles. A single circumstance, which creates reasonable doubt in prosecution case is sufficient to extend the benefit of doubt. In this regard, I am fortified with the case reported as *Muhammad Mansha vs. The State (2018 SCMR 772)*, wherein the Hon’ble Apex Court has held as under: -

“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 circumstance which creates a 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. Reliance in this behalf can be made upon the cases of Tariq Pervez vs. The State (1995 SCMR 1345), Ghulam Qadir and 02 others vs. The State (2008 SCMR 1221), Muhammad Akram vs. The State (2009 SCMR 230) and Muhammad Zaman vs. The State (2014 SCMR 749)”.

10. At the conclusion of the arguments, by short order dated 14.11.2022, for the reasons to be recorded later on, captioned appeal was

allowed. Convictions and sentences recorded by learned trial Court vide judgment dated 06.12.2019 were set-aside. These are the reasons for allowing the appeal.

J U D G E

Faisal Mumtaz /PS