

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

5/25

PRESENT:

Justice Jamal Khan Mandokhail
Justice Musarrat Hilali
Justice Malik Shahzad Ahmad Khan

Criminal Appeal No.294 of 2020

(on appeal against the judgment dated 15.02.2016
passed by the High Court of Balochistan, Bench at Sibi,
in CrI.A.No.73 of 2015)

Ghous Baksh

...Appellant

VERSUS

The State

...Respondent

For the Appellant : Ms. Ayesha Tasneem, ASC
(on state expense)

For the State : Mr. Abdul Baqir, Add. PG.
Baluchistan

Date of Hearing : 11.11.2024

JUDGMENT

Musarrat Hilali, J.— Regarding an incident

alleged to have taken place on 15th August 2014 at 1:00 AM an FIR (No.153/2014) was registered on 17th August 2014 at 3:00 PM at Police Station City Usta Muhammad, District Jaffarabad. The complainant, Mst. Nazaan (PW-1) reported that her son Muhammad Sharif was fatally shot in her presence and that of Ghulam Fareed (PW-2). When the appellant's wife Mst. Shehzadi intervened to protect him, she was also shot by the appellant and succumbed to her injuries. It was further alleged that Jan Muhammad, the appellant's brother also participated in the offence but evaded arrest and was subsequently declared a proclaimed offender.

2. The appellant was tried by the learned Additional Sessions Judge, Usta Muhammad, and was convicted under Section 302(b) PPC on two counts of murder. He was sentenced to life imprisonment on each count, with both sentences ordered to

run concurrently. Additionally, the appellant was directed to pay compensation of Rs.200,000/- to the legal heirs of each deceased, failing which to undergo six months simple imprisonment. The benefit of Section 382-B Cr.P.C was extended to the appellant.

3. The appellant's appeal against his conviction and sentence was heard by the High Court of Balochistan ("High Court") where the learned judges dismissed the appeal and upheld the conviction and sentence awarded by the Trial Court. Leave to appeal was granted by this Court on 28.04.2020.

4. The arguments advanced have been meticulously examined, along with a comprehensive review of the case record.

5. The High Court, after considering the arguments and reviewing the record, dismissed the appellant's appeal mainly on the ground that the eyewitnesses PW-1 Mst. Nazaan and PW-2 Ghulam Fareed turned hostile and did not support the prosecution's case. That the complainant Mst. Nazaan had previously submitted a written application (Ex.P.1-A) implicating the appellant in the murders of Muhammad Sharif and Mst. Shehzadi. While PW-1 retracted her statement in the Court, she did not deny the contents of her application and the defence did not challenge it during cross-examination. This document remained unrefuted and the Trial Court correctly relied on it. The High Court concluded that the circumstantial evidence including the positive FSL report, the appellant's relationship to the deceased, and the location of the murders in his house, was compelling. The Court also applied the presumption under Article 122 of the Qanun-e-Shahadat Order, 1984, which shifts the burden of explanation to the appellant, which he failed to discharge.

6. We have carefully reviewed the judgment of the High Court. It is well-established that mere retraction of an earlier statement by a witness does not automatically render him/her hostile. Hostility and Retraction are two different concepts. Hostility, in legal terms, refers to a deliberate intent to deviate from the truth or act against the interests of the party calling the witness whereas 'Retraction' refers to the act of withdrawing or

taking back a statement, testimony, or accusation, often due to its inaccuracy, falsity, or unreliability. In this case, while PW-1 Mst. Nazaan, retracted her previous statement made in her written application (Ex.P.1-A) does not imply that she became hostile in the legal sense. The Trial Court's reliance on her retracted testimony as a basis for declaring her hostile was, therefore, not justified. The High Court also failed to distinguish between a witness retracting a statement and one being hostile. To ensure credibility and reliability a witness's testimony must undergo rigorous scrutiny considering all relevant surrounding circumstances and potential external factors that may have swayed his/her statement. The retracted statement of Mst. Nazaan not having been challenged or contradicted by the prosecution still holds evidentiary value especially considering the circumstances under which it was made.

7. We have also examined the circumstantial evidence presented by the prosecution. We have noted that the occurrence took place on 15th August 2014 while the FIR was registered on 17th August 2014. Two empties of .303-bore rifle were taken into possession from the place of occurrence on the same date i.e. 17th August 2014. The appellant was arrested on 30th August 2014 whereafter a licenced .303-bore rifle was recovered on his pointation which was received by the firearm expert for analysis on 20th January 2015 together with 2-empties taken into possession from the spot. The report of FSL was positive; however, the same cannot be relied upon in view of the findings rendered in the case titled **Sarfraz and another v. The State** (2023 SCMR 670) wherein it was held that *"sending the crime empties together with the weapon of offence is not a safe way to sustain conviction of the accused and it smacks of foul play on the part of the Investigating Officer simply for the reason that till recovery of weapon, he kept the empties with him for no justifiable reason"*. Moreover, the appellant while recording statement under section 342 Cr.P.C also opted to be examined on Oath and have produced evidence in defence, however, inspite of cross-examination the prosecution has not been able to dislodge the statements of DW-1 and DW-2. It is a well-established principle that circumstantial evidence must form a complete chain,

excluding every hypothesis other than the guilt of the accused. In the absence of direct or corroborative evidence, this Court finds the reliance on circumstantial evidence insufficient to establish guilt beyond a reasonable doubt. Her uncertainty regarding the identity of the perpetrator introduces a reasonable doubt, which is sufficient to entitle the accused/appellant to the benefit of doubt.

8. For what has been discussed above, we find merit in this appeal particularly on the ground that the retraction of a statement does not automatically equate to hostility and that this crucial point was not sufficiently addressed by the lower fora. Therefore, we allow this appeal and set-aside the impugned judgment. The appellant is acquitted of the charge and be set at liberty forthwith, if not required in any other case.

9. Above are the reasons for our short order of even date.

ISLAMABAD

11.11.2024

APPROVED FOR REPORTING