

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE ATHAR MINALLAH

CRIMINAL APPEAL NO. 39-K OF 2022, CRIMINAL M.A. NO. 113-K OF 2022
AND CRIMINAL PETITION NO. 613 OF 2022

(Against the judgment dated 22.04.2022 passed by the High Court of Sindh, Karachi in Criminal Jail Appeal Nos. 126/2020, 185/2020 and Confirmation Case No. 03/2020)

Mst. Hajira Bibi @ Seema and
Mst. Shaina Hameed
Abdul Qaseem

(In Cr.A. 39-K/2022 and Cr.MA 113-K/2022)
(In Cr.P. 613/2022)

...Appellant/Appellants(s)

VERSUS

Abdul Qaseem and another
The State

(In Cr.A. 39-K/2022 and Cr.MA 113-K/2022)
(In Cr.P. 613/2022)

...Respondent(s)

For the Appellant(s):

Mr. Mahmood Habibullah, ASC
(In Cr.A. 39-K/2022. Via video link from Karachi)

Mr. Amir Mansoob Qureshi, ASC
(In Cr.P. 613/2022. Via video link from Karachi. Also for
respondent No. 1 in Criminal Appeal No. 39-K/2022)

For the State:

Mr. Hussain Bux Baloch, DPG
(Through video link from Karachi)

Date of Hearing:

06.02.2023

JUDGMENT

CRIMINAL APPEAL NO. 39-K OF 2022

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Appellants Mst. Hajira and Mst. Shaina Hameed were tried by the learned Additional Sessions Judge, Karachi, pursuant to a case registered vide FIR No. 72/2019 under Sections 302/201/202/109/34 PPC at Police Station Tamoria, Karachi. The allegation against the appellants was that they had abetted the murder of the deceased Abdul Habib, brother of the complainant, with co-accused Saeed Wali. The said co-accused Saeed Wali did not join trial and was declared a proclaimed offender. Co-accused Haroon, who allegedly facilitated the main absconding accused Saeed Wali by driving motorcycle, being juvenile was tried separately

by the learned Additional Sessions Judge, Karachi. The learned Trial Court vide two separate judgments dated 27.01.2020 convicted the appellants and co-accused Haroon as under:-

i) **Appellants Mst. Hajira and Mst. Shaina**
Under Section 302(b)/34 PPC read with Section 109 PPC

To death as Tazir. They were also directed to pay compensation amounting to Rs.10,00,000/- to the legal heirs of the deceased each and in case of default in payment, they shall suffer SI for six months more.

ii) **Under Section 202 PPC**

To suffer RI for six months or to pay fine of Rs.5000/- each. In case of default, they were further directed to suffer SI for 05 days.

The sentences were ordered to run concurrently. Benefit of Section 382-B Cr.P.C. was also extended to the appellants.

i) **Co-accused Haroon**
Under Section 302(b)/34 PPC

To imprisonment for life as Tazir. He was also extended benefit of Section 382-B Cr.P.C.

2. In appeal the learned High Court while maintaining the conviction of the appellants under Section 302(b) PPC, altered the sentence of death into imprisonment for life. The other conviction and sentence under Section 202 PPC and the amount of compensation and the sentence in default whereof was also maintained. The convictions were ordered to run concurrently with benefit of Section 382-B Cr.P.C. However, the learned High Court acquitted co-accused Haroon and ordered his release. The prosecution story as given in the judgment of the learned Trial Court reads as under:-

"3. The brief facts of the prosecution case are that complainant Abdul Qaseem son of Abdul Hameed stated that on 18.02.2019 through phone call he came to know that his brother Abdul Habib son of Abdul Hameed has been murdered due to firing and dead body shifted to Abbasi Shaheed Hospital. On such information he reached the hospital where he saw the dead body of his brother. The police conducted legal formalities, thereafter dead body was handed over to them for funeral ceremony. He further disclosed that he inquired and came to know that on 18.02.2019 his brother Abdul Habib left the house to Pakistan House in his vehicle Black Color Land Cruiser. When he reached at about 2025 to 2045 at service road, Sarena Mobile Market road near Sakhi Hassan Chowrangi, some unknown accused have made fires upon him and injured him thus he died at the spot. He further stated that his brother was member of Pak Sarzameen Party (PSP). He also remained

candidate for MPA from PS-122, hence instant FIR was lodged against unknown accused.”

3. After completion of the investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. The prosecution in order to prove its case produced 22 witnesses. In their statements recorded under Section 342 Cr.P.C, the appellants pleaded their innocence and refuted all the allegations leveled against them. However, they did not opt to appear as their own witness on oath as provided under Section 340(2) Cr.P.C in disproof of the allegations leveled against them. They also did not produce any evidence in their defence.

4. At the very outset, learned counsel for the appellants argued that the appellants were only involved to the extent of abetment but no proof in this regard could be placed on record. Contends that no specific date, time and place where the conspiracy was hatched has been mentioned in the crime report. Contends that the only evidence against the appellants is the voice messages but even if the same is believed to be true, the same does not constitute the offence with which the appellants have been charged with. Lastly contends that the reasons given by the learned courts below to sustain conviction of the appellants are speculative and artificial in nature, therefore, the appellants may be acquitted of the charge.

5. On the other hand, learned Law Officer assisted by learned counsel for the complainant vehemently opposed this appeal. It has been contended that to sustain conviction of the appellants, the prosecution has placed on record trustworthy and reliable evidence, therefore, the appellants do not deserve any leniency from this Court.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

7. It is the prosecution story that the appellants were second wife and step daughter of the deceased, who had some business dispute with him and for this reason they hatched a conspiracy to commit murder of the

deceased with the help of appellant Mst. Hajra's brother Saeed Wali. To bring home the guilt of the appellants the prosecution mainly relied upon the testimonies of Abdul Qasim (PW-2), Abdul Aziz (PW-3) and Ms. Wardat Izar (PW-18). A bare perusal of the record reveals that no specific date, time and place where the conspiracy was hatched has been mentioned in the crime report. The name and number of witnesses to that extent also does not find mention in the crime report. Although the above-named three prosecution witnesses were subsequently brought into picture by the prosecution in support of its case but their testimonies also do not reveal any exact date and time when the conspiracy was hatched. There are three stages in the commission of a crime, i.e. **(i)** the mental stage in which the crime is considered and determined upon, **(ii)** the preparatory stage, and **(iii)** the stage of execution. Before proceeding further, it would be advantageous to reproduce Sections 107 and 109 of the Pakistan Penal Code, which read as under:-

"107. Abetment of a thing:

A person abets the doing of a thing, who:

First: Instigates any person to do that thing; or

Secondly: Engages with one or more other person or, persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly: Intentionally aids, by any act or illegal omission, the doing of that thing.

"109. Punishment of abetment if the Act abetted is committed in consequence and where no express provision is made for its punishment:

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence:

Provided that, except in case of Ikrah-i-Tam, the abettor of an offence referred to in Chapter XVI shall be liable to punishment of ta'zir specified for such offence including death."

8. A bare perusal of Section 109 PPC shows that the same comes into operation if there is abetment of an offence. Section 107 deals with abetment of a thing. Abetment under the said provision involves active complicity on the part of the abettor at a point of time prior to actual

commission of offence. It is essence of crime of abetment that the abettor should substantially assist the principal culprit towards commission of offence. Concurrence in the criminal acts of another without such participation therein does not per se become culpable. Mere negligence in an act also does not bring in a person within the purview of the offence of abetment. Perusal of Section 107 PPC reveals that three ingredients are essential to dub any person as conspirator i.e. **(i)** instigation, **(ii)** engagement with co-accused, and **(iii)** intentional aid qua the act or omission for the purpose of completion of abetment. Expression "abettor" has been defined in Section 108 PPC to mean a person who abets either commission of an offence, or commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. Intention to aid commission of the crime is the gist of offence of abetment and in the absence of necessary intention, such offence is not made out. Liability of an abettor of a crime is generally co-extensive with the principal offender. All the three ingredients of Section 107 PPC, which have been referred above, are missing in this case. We have specifically asked the learned Law Officer and the learned counsel for the complainant to show us from record any material, which could connect the appellants with the commission of the crime but except the voice messages from the Whatsapp chat of the appellants and the principal accused, they could not point out anything. Since the audio messages were in Pashto language, the same were translated into English and a transcript thereof has been placed on record as Exh.27/1. The learned High Court has also reproduced the same in the impugned judgment. We have carefully gone through the transcript of the messages and are persuaded to observe that the same do not constitute any offence. To establish the charge under section 109 PPC, it is the duty of the prosecution to produce evidence of conclusive nature in order to prove the ingredients as mentioned in the definition of abetment, referred above. However, the prosecution has not produced evidence in support of any one of the ingredients of abetment specified in section 107 PPC. Evidence produced by the prosecution in this case is unsatisfactory and is not sufficient to sustain conviction of the appellants. It is settled principle of law that the conviction must be based on unimpeachable, trustworthy and reliable evidence. Any

doubt arising in prosecution case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable doubt. It is also an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. The peculiar facts and circumstances of the present case are sufficient to cast a shadow of doubt on the prosecution case, which entitles the appellants to the right of benefit of the doubt. For the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the accused. This Court in the case of Mst. Asia Bibi Vs. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "*if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1995 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048).*" The same view was reiterated in Abdul Jabbar vs. State (2019 SCMR 129). However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt.

9. For what has been discussed above, this appeal is allowed and the impugned judgment to the extent of the appellants is set aside. The appellants are acquitted of the charge. They shall be released from jail forthwith unless detained/required in any other case.

CRIMINAL M.A. NO. 113-K OF 2022

10. In view of the order passed in the connected Criminal Appeal No. 39-K/2022, this application for grant of bail to the appellants has become infructuous and is dismissed accordingly.

CRIMINAL PETITION NO. 613 OF 2022

11. Through this petition, the complainant has called in question the vires of the impugned judgment whereby the learned High Court acquitted co-

accused Haroon. We have gone through the merits of the case and found that the learned High Court while acquitting co-accused Haroon has given cogent reasons, which are neither arbitrary nor perverse or fanciful. The learned High Court has evaluated the evidence in its true perspective and has come to the conclusion, which is unexceptionable. Learned counsel for the complainant could not point out any material to interfere with the impugned judgment. Consequently, this petition having no merit is dismissed and leave to appeal is refused.

JUDGE

JUDGE

JUDGE

Islamabad, the
6th of February, 2023
Approved For Reporting
Khurram