

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**Cr. Revision Application No.D-55 of 2015
Cr. Appeal No.S-29 of 2015
Cr. Appeal No.S-30 of 2015****Present:-****Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon**

Date of hearing: 06.02.2019, 13.02.2019 & 18.02.2019.
Date of decision: 07.03.2019.
Appellants/Respondents: Through Mr. Abdul Razzak Leghari Advocate.
Applicant/Complainant: Through Mr. Aijaz Shaikh, Advocate.
The State: Through Ms. Rameshan Oad, APG.

J U D G M E N T

MUHAMMAD IQBAL KALHORO J: - Through this common judgment, we are deciding all the three listed matters. The appellants in both the Criminal Appeals have impugned the judgment dated 28.01.2015 rendered by learned Additional Sessions Judge, Tando Allahyar in Sessions Case No.207 of 2012 arising out of Crime No.60/2009 registered u/s 302, 337-A (i), 337-F (i), 147, 148, 149 PPC at PS Piyaro Lund, whereby, they have been convicted u/s 265-H (ii) CrPC for having committed above offences and have been sentenced to suffer as under:

1. **U/s 302(b) & 149 PPC** to undergo R.I for life and to pay Rs.1,00,000/- each as compensation to the legal heirs of deceased and in case of failure to suffer further S.I for six months.
2. **U/s 337-A (i) & 149 PPC** to undergo R.I for one year each and to pay Rs.5,000/- each as Daman to injured Ali Asghar.
3. **U/s 337-A (i) & 149 PPC** to undergo R.I for one year each and to pay Rs.5,000/- each as Daman.
4. **U/s 337-F(i) & 149 PPC** to undergo R.I for one year each and to pay Rs.5,000/- each as Daman to complainant for causing him injuries.
5. **U/s 148 PPC** to undergo R.I for one year each.

2. Whereas, complainant by means of captioned Cr. Revision Application No.D-55 of 2015 has prayed for enhancement of sentence of respondents from life imprisonment to death sentence. **(For the sake of understanding and ease, appellants in both the appeals would be referred to hereinafter as the appellants and applicant in Cr. Revision Application as complainant).**

3. Facts of prosecution case in brief are that on 23.08.2009 complainant Ali Muhammad Joyo along with one Mushtaque @ Gamoon Joyo and his brother Shafi Muhammad and Asghar Ali was raising a wall of house of his brother-in-law namely Moula Bux when at about 1pm all the accused namely Began @ Asghar Ali armed with a handle of hand pump, Munawar having an iron rod, Sikandar, Soomar and Asif all armed with a hatchet each arrived and started abusing complainant party and said that they had already restrained them from raising the wall but they (complainant party) would not stop its construction. Saying so all accused inflicted blows to them with iron rods and hatches, resultantly complainant, his brothers Shafi Muhammad and Asghar Ali received injuries on head and other parts of their body. The accused then left the scene after abusing them. Complainant party observed that blood was oozing out from head of Shafi Muhammad and he was lying unconscious on the ground. He was shifted to Tando Allahyar Hospital from where he was referred to Hyderabad. From Hyderabad when he was being taken to Karachi due to his precarious condition, he died on his way, hence the FIR.

4. After usual investigation the case was challaned. Trial Court framed charge against the appellants at Ex-03, they pleaded not guilty and claimed trial. To prove the case, the prosecution examined 07 witnesses who have produced all necessary documents at Ex-11/A to Ex-17/F which include FIR, relevant memos, medical certificates, etc. Thereafter, appellants' statement u/s 342 CrPC were recorded at Ex. 19 to 23, wherein they have denied prosecution case. However, they neither examined themselves on oath, nor they produced any witness in their defense. Finally, the appellants were convicted vide impugned judgment in the terms as stated supra.

5. Mr. Abdul Razzak Laghari, learned counsel for appellants argued that impugned judgment is contrary to law, facts, principles of criminal justice as well as material available on record; that no sufficient and substantial evidence is available connecting appellants with commission of offence; that impugned judgment is based on surmises, conjectures, misreading and non-reading of prosecution evidence; that there are material contradictions, *mala fide* improvements and exaggerations in the evidence of witnesses which have been ignored by the trial court; that all the private witnesses are related inter see; that prosecution has not examined any independence witness in corroboration of its case; that recovery of alleged weapons is doubtful, as mashir of recovery and I.O. of the case are completely silent about place of recovery; that no incriminating article was found at the place of incident; that medical evidence is sketchy and does not lead to any conclusion about cause of death of the deceased; that no postmortem of the deceased was conducted, which has

rendered the entire case suspicious. Lastly learned counsel prayed that since the entire prosecution case is full of doubts, the appellants may be acquitted.

6. On the other hand, Mr. Aijaz Shaikh, learned counsel for complainant and Ms. Rameshan Oad, learned APG contended that prosecution has fully proved its case against the appellants without any shadow of doubt; that ocular evidence is supported by medical and circumstantial evidence; that no chance of false implication of appellants is available as this is a day light incident in which all the appellants were clearly identified; that non conduction of postmortem is not fatal when the incident is supported through confidence inspiring oral account; that presence of witnesses is established from their injuries in the incident. In addition, learned counsel for complainant prayed that since no mitigating circumstances are available, the trial court has committed error by awarding lesser punishment to the appellant. He prayed that life imprisonment of the appellants may be converted into death penalty. This last contention was however not supported by learned APG who prayed for dismissal of revision application filed in this regard. The following case law were relied upon by them in support of their case **1990 SCMR 1272, 2007 SCMR 641, 999 SCMR 2250, 2011 SCMR 664 & 1985 P. Cr. L.J 463, PLD 2005 SC 484, 2013 P Cr. L.J 864, 2016 YLR 2369, 2013 P Cr.L.J 864, 2006 SCMR 1786 and 1998 SCMR 1778.**

7. We have considered submission of the parties and perused the record including the case law cited at bar. As per prosecution case, the alleged incident took place on 23.08.2009 at 1300 hours while its FIR was lodged on 25.08.2009 at 1430 hours after delay of two days. Such delay assumes importance when we compare version in FIR with the evidence and find certain improvements therein. In a case where FIR is promptly registered and which gives a general description qua role of each accused in the incident, it could be presumed the complainant was under stress, etc. and therefore was not able to give a detailed account and assign specific role to each accused. But when FIR is registered after a considerable time, such presumption would not be available and the complainant's giving general description about role of each accused in the incident and subsequently assigning specific role to each accused in evidence would be looked at with a certain degree of suspicion. Here FIR was registered after more than 48 hours and only when the complainant got free from burial of his deceased brother. In such circumstances, his giving a general version of the incident without attributing any specific role or injury to any of the accused and subsequent assigning a particular role to each accused in his evidence has to be considered with due care and cautious. Keeping the same in mind, we proceed to examine the relevant details in this regard. FIR indicates

that complainant along with witnesses was present and was raising a wall of house of his brother in law when the appellants armed with iron rod, handle of water pump, and hatchets arrived and jointly attacked upon them injuring him, his brother Shafi Muhammad (deceased), and Asghar Ali. The complainant has not attributed any specific injury or role to any one of the accused and has said that all accused attacked and injured them. Subsequently, he in his evidence while referring to all the accused has said that "*above named accused inflicted hatchet blows to me and my brothers.*", again no specific role assigned to anyone. But in his cross examination, while denying a suggestion that in the FIR he had mentioned all the accused injuring his brother Shafi Muhammad has said accused Munawar and Asghar had caused injuries to his said brother. It is not clear that if this was his case, why he did not disclose such specific role of the said two accused in FIR that was lodged by him after a delay of two days. Such a piece of evidence being absent in the story of FIR seems to be an improvement on his part. Further, Pw-2 Ali Asghar in his evidence has said that '*Bagan alias Asghar inflicted blow of handle of hand pump on the head of shafi Muhammad, Munwar caused an iron rod blow over the head of shafi Muhammad*', that means one blow each by two accused duly armed with a heavy iron-made object and therefore shall result the deceased having suffered two injuries on his head. However, his medical certificates (provisional and final Ex. 17/E and 17/D) show that he had received only one injury around right temporal parietal region. The said pw has also deposed that accused Soomar had inflicted him a hatchet blow which he in his cross-examination has clarified was a sharp-side. But his final medical certificate (Ex.17/B) indicates that he had received a lacerated wound on right parietal region by a hard and blunt object, which obviously is a contradiction between medical and oral evidence. Pw-3 Mushtaque @ Gamo in his evidence has deposed that '*we noticed that accused Bagan was holding handle of hand pump, and Munwar had iron rod, and Asif, Sikandar, Soomar hatchet*'. But in his second breath he states that '*accused Bagan and Munwar inflicted sharp side hatchet blows over the head of Shafi Muhammad*' without explaining how they swapped their articles with hatchets held by co accused and caused blows with them to the deceased who even has not been show to have suffered any injury from a sharp cutting weapon. He further states that accused Soomar inflicted a hatchet blow of sharp side on the head of pw Ali Asghar, whereas accused Asif and Sikandar inflicted hatchet blows over Ali Mohammad. Medical evidence about them however does not show any of them has received any injury from a sharp cutting weapon. In view of what he has stated in his evidence, we are convinced that his presence at the spot is not free from doubt.

8. The above assessment has been considered with remaining record which reflects that appellants were arrested on 26.08.2009 but on 01.09.2009 a handle of hand pump from accused Bagan, one iron rod from accused Munwar and three hatchets from accused sikandar, Asif and Soomar were allegedly recovered. None of the recovered item was blood stained and there is no identification either that these were the same used in commission of the offence. Memo of recovery is completely silent about place from where these articles were recovered by the police and this fact has been admitted by Mashir in his evidence. It also shows that the said articles were sealed but nothing is on record to show that the same were sent for any forensic analysis to establish their use in the alleged offence. Obviously therefore alleged recovery of these articles is neither of any consequence nor does it furnish supporting evidence to establish nexus of the appellants with the alleged offence. Place of occurrence was visited on 31.08.2009 after almost 7 days of the incident where nothing was found to establish that alleged incident had taken place there. So even the place of incident as alleged by the prosecution has not been convincingly established. This fact if read together with disclosure of mahsir in his evidence that house of appellants was 15/20 feet away from residence of deceased (alleged place of incident) and that houses of appellants Asif and Soomar were even farther away, the motive part of the story that accused were livid over raising of a wall by the complaint party would appear shrouded in a mystery. For, if the wall was not common or congruous between the houses of parties, then why its construction by complaint party would infuriate appellants and that too to such a degree that they would start injuring them so severely that one of them would lose his life. There is no justification either that why the owner of house pw Mushaque who allegedly was present and was constructing the wall was not even touched by the appellants, whereas his three brothers in law who had come from other village to help him raise the wall were severely injured. It is therefore obvious that motive part of the story, place of incident and recovery of crime weapons have not been proved beyond a reasonable doubt. This would mean there is no supporting evidence except the oral account of the incident and medical certificates of the injured and the deceased which as discussed above does not seem to correspond with oral account furnished by the witnesses.

9. But before making any final inference in view of what has been discussed above, we would like to further examine the record, it has been deposed by the witnesses that the deceased died while being taken away to Karachi due to his precarious condition and then his body was brought in the village and buried. However, it has not been explained why his post mortem was not got conducted or and why even his death certificate was not obtained to establish his death on

the date and time as narrated by the witnesses. In essence we have on record only provisional and final medical certificates (Ex. 17/E and 17/D) of the deceased issued on 23.08.2009 and 10.09.2009 respectively but no document to show when he had died and where. We are aware that requirement of post mortem in murder case is not absolute and it is not substitute of direct evidence and is only a source of corroboration about nature and seat of injury, kind of weapon, duration between injury and death. And if death is proved by direct evidence of natural witnesses, then non availability of medical evidence would be of no consequence as is held in the case of **Abdul Rehman V. the state (1998 SCMR 1778)** and **Sikandar V. the State and another (2006 SCMR 1786)**. But in the present case as discussed above supporting evidence is completely absent and direct evidence suffers from improvements and contradictions in respect of number of injuries and weapon used or the accused who caused the injuries. For instance, two appellants namely Asghar and Munwar are alleged to cause injuries to the deceased but his medical certificate shows only one injury. The question would be to whom out of the above two appellants this injury could be attributed; there is no evidence to answer it. Therefore, one of the appellants of them is completely innocent as except his role qua deceased nothing has been alleged against him and his mere presence without any active role and without any evidence regarding his sharing common intention with other accused to commit murder of the deceased would not make him liable for offence u/s 149 PPC so as to be punished like the other. And this has led us to believe that the witnesses are not truthful in their evidence and they in order to throw a wide net have implicated every male member of the family of appellants and in such attempt have made their case weak. When such is the situation, in our view it would be safe to follow golden rule of releasing ten guilty rather than convicting one innocent. Therefore, instead of maintaining the conviction we have decided to extend benefit of doubt to the appellants.

10. Consequently, we allow the appeals in hand and acquit the accused on benefit of doubt. They shall be released forthwith if not required in any custody case. Resultantly the revision application filed by the complainant for enhancement of sentence is dismissed and accordingly disposed of.

JUDGE

JUDGE