

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. D – 272 of 2019
(*Riaz Ahmed Banbhan & 02 others versus The State*)

Confirmation Case No. D – 21 of 2019
(*The State versus Riaz Ahmed & others*)

Present:

Mr. Muhammad Iqbal Kalhoro, J.
Mr. Arbab Ali Hakro, J.

Dates of hearing : **30.08.2023, 26.09.2023 & 25.10.2023.**

Date of announcement : **21.11.2023.**

Mr. Shoukat Ali Phul, Advocate for appellants.
Mr. Irshad Hussain Dharejo, Advocate for complainant.
M/s Syed Sardar Ali Shah Rizvi, Additional Prosecutor General
and Shafi Muhammad Mahar, Deputy Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – By means of instant Appeal, appellants have impugned a judgment dated 18.11.2019, passed by learned Additional Sessions Judge/MCTC, Mirwah in Sessions Case No.173 of 2018, arising out of Crime No.234 of 2017 under Sections 302, 324, 337-F(i), 337-F(ii), 337-F(iii), 337-H(2), 34, PPC, registered at Police Station Mirwah, District Khairpur, whereby they have been convicted and sentenced in the terms as below:

- U/S 302(b) PPC to death for the murder of deceased Waheed Ali son of Liaquat Ali Banbhan, to be hanged by their neck till they are dead, with fine of Rs.1,00,000/- (Rupees one lac) each, or in failure thereof, to suffer six months more simple imprisonment;
- U/S 302(b) PPC to death for the murder of deceased Jamshed Ali son of Liaquat Ali Banbhan, to be hanged by their neck till they are dead, with fine of Rs.1,00,000/- (Rupees one lac) each, or in failure thereof, to suffer six months more simple imprisonment;
- U/S 324 PPC with 10 years rigorous imprisonment;
- U/S 337-F(i) PPC for one year;
- U/S 337-F(ii) PPC for two years;
- U/S 337-F(iii) PPC for two years; and
- U/S 337-H(2) PPC for two months.
- They have been extended benefit of Section 382-B CrPC.
- They have been imposed compensation of Rs.10,00,000/- (Rupees ten lac) in terms of Section 544-A CrPC, to be paid to the legal heirs of the deceased persons equally and proportionally, and in case of failure, the same shall be recovered as land revenue arrears.

2. As per precise recap, there was an ongoing matrimonial dispute between complainant, his cousin Sajid Ali Banbhan and Muhammad Kamil Banbhan. The complainant used to advise Muhammad Kamil, due to his familial bond, to settle the matter amicably with the other side. But, Muhammad Kamil got angry and warned him that he had no right to interfere in his affairs. On 03.10.2017, in the evening time, complainant and PW Sajid Ali were returning on a motorcycle from their land at Maroro to home at Liaqatabad. He was driving the motorcycle, while Sajid Ali was sitting behind him. As they approached Muhammad Kamil's house at about 2000 hours, they saw, in the headlight of motorcycle, Muhammad Kamil with a repeater, Nabi Bux alias Naban having a rifle, Zaheer with a gun and Riaz with a hatchet. Muhammad Kamil flagged them down. No sooner they stopped than the accused surrounded them. Then the accused physically assaulted them with intention to teach them a lesson for meddling in their affairs. Riaz struck the complainant with a hatchet injuring his right arm, while co-accused attacked upon Sajid Ali. As Sajid Ali attempted to escape, Muhammad Kamil fired at him critically injuring him. They raised cries, which attracted brothers of complainant, namely, Jamshed Ali & Waheed Ali and his cousin Muhammad Din, who came running. Muhammad Kamil immediately fired at Jamshed Ali, Nabi Bux at Waheed Ali, Riaz attacked upon Muhammad Din with a hatchet and Zaheer (since dead) also fired at the latter. The attackers then went away firing shots into the air to intimidate the complainant party. Then villagers arrived at the scene, who arranged transportation to take the injured to government hospital, Thari Mirwah, where complainant's brothers Jamshed Ali and Waheed Ali succumbed to their injuries and died; hence FIR.

3. After investigation, arrest of the accused Riaz and framing of a formal charge, the trial was commenced. Prosecution examined as many as eight (08) witnesses. They have produced all necessary documents such as FIR, various memos: injuries, dead bodies, site inspection, seizure of clothes of the deceased, arrest of accused Riaz & recovery of hatchet from him, and other documents containing *danishnamas*, sketch, police letters, provisional and final medico legal certificates of injured witnesses: Arshad Ali, Sajid Ali & Muhammad Din, postmortem reports, chemical report etc.

4. In statements U/S 342 CrPC, the accused have denied the allegations and have pleaded innocence. Accused Riaz has filed certain

documents viz. postmortem report of deceased Zaheer Ahmed, FIR bearing Crime No.245 of 2017 lodged by one Muhammad Azam, Criminal Misc. Application U/S 22-A & 22-B CrPC, Criminal Misc. Application No.3782 of 2017, Petition No. S-1164 of 2017, Private Complaint No.01 of 2019, statement of Mst. Sasui and an order in Criminal Misc. Application No.2091 of 2018 in support of his case. However, neither they examined themselves on oath nor led any evidence in defence. After hearing the parties, learned trial Court vide impugned judgment has convicted and sentenced the appellants in the terms as above; hence this appeal, taken up and heard along with Reference No. D-21 of 2019 sent by learned trial Court under Section 374 CrPC for confirmation of death sentence of the appellants.

5. Learned Counsel for appellants has argued that appellants are innocent, have been falsely implicated in this case; that no reliable evidence has been led against them; that there are material contradictions in the evidence, which the trial Court has totally ignored to appreciate; that the incident happened in front of the house of the accused party, where appellants had arrived duly armed to assault them and to abduct Mst. Sasui. The mother of Mst. Sasui, namely, Mst. Satbai had filed a Direct Complaint against complainant party alleging an attempt by them to abduct Mst. Sasui. That, incendiary as it was, had led to the offence committed inside the house of accused Zaheer whom the complainant party had murdered; that in the case proper investigation was not conducted and the responsibility was not fixed upon the complainant party of murder of Zaheer. He, however, admitted that the direct complaint filed by Mst. Satbai was dismissed at preliminary stage and the Revision Application filed against that order before this Court also did not succeed. He, further, disowned contents of FIR bearing No.245 of 2017 registered at Police Station Mirwah regarding murder of deceased Zaheer, claiming that the story was contrived by the complainant, a brother of the deceased, who was not even present at the spot at the time of incident. Learned Counsel for the complainant and Deputy Prosecutor General both have supported the impugned judgment.

6. It is clear from the record that the occurrence and place of occurrence in front of the house of appellant Kamil both are not disputed. The stance of the appellants however is that complainant party was aggressor. They had come to attack them and abduct Mst. Sasui from the house of deceased Zaheer, which was resisted by them

and which led to the encounter between them in which from firing of complainant party, deceased Jamshed Ali and Waheed Ali had died. And when they inflicted *lathi* blows to the owner of house, namely Zaheer, he also died.

7. For death of deceased Zaheer, the record testifies, an FIR bearing No.245 of 2017 was registered by Muhammad Azam, a brother of the deceased, against members of the complainant party, namely, Sajid Ali, Arshad Ali and Muhammad Din. They, after due investigation, were referred to the Court for a trial, but at the time of evidence, the witnesses did not adhere to their position and not supported the story revealed in FIR. Consequently, all the accused were acquitted. Against that acquittal, Muhammad Azam had filed a Criminal Acquittal Appeal No. D-21 of 2020 before this Court, which was connected with the Appeal in hand, but on 26.09.2023, at the very start of the arguments, learned Counsel for the appellants did not press the said appeal, which as such was dismissed as not pressed vide order dated 26.09.2023, and disposed of. Record further shows that the incident took place at about 08:00 p.m. on 03.10.2017, and the FIR was registered on the same day only after two hours, when complainant leaving behind the injured and dead in the hospital, appeared at Police Station and narrated the entire story. The promptitude, with which the FIR was registered, rules out a chance of substituting the real culprits by the complainant for the present accused, a rare phenomenon even otherwise in murder cases.

8. The prosecution, as per record, has examined complainant, who himself was injured, Sajid Ali and Muhammad Din, who too were injured in the incident. All these witnesses are the eyewitnesses and have in detail described all the links of chains constituting the incident. The role of each appellant has been categorically specified by them. Appellant Riaz Ahmed caused hatchet blows with intention to murder PW Muhammad Din on his head and back. The said injuries have been certified by the Medico Legal Officer in his evidence (Ex.14) and he has produced the relevant medical certificates to vouch for his statement. Appellants Nabi Bux and Muhammad Kamil are specifically said to have fired on Waheed Ali and Jamshed Ali from their weapons respectively, critically injuring them. They were taken to Civil Hospital, Mirwah for treatment but could not survive and died.

9. PW-2 Sajid Ali, in his evidence, without wavering on any material fact has given a consistent account of the incident in line with the evidence of the complainant. According to him, when he and

complainant were returning from their lands on a motorcycle and reached near house of appellant Muhammad Kamil, he, armed with a repeater, Nabi Bux, armed with a rifle, Riaz, armed with a hatchet and Zaheer (since dead), armed with a gun flagged them down. As soon as they stopped, appellant Muhammad Kamil initially started hitting them with a butt of his repeater and shouting that he wanted to teach them a lesson for interfering in his matrimonial affairs. This witness sustained a firearm injury on his back in ensuing mayhem and, according to him, on their cries when deceased Waheed Ali and Jamshed Ali along with PW Muhammad Din came running from the house for their rescue, appellant Muhammad Kamil fired from his repeater upon Jamshed and appellant Nabi Bux fired upon Waheed. Both were critically injured and later on died in the hospital.

10. Evidence of PW Muhammad Din is also in complete conformity with the detail of events revealed by complainant and PW Sajid Ali. This PW was also injured in the incident. He has described that after hearing cries coming from the side of house of appellant Muhammad Kamil, when he along with deceased Jamshed and Waheed reached the place. Appellant Muhammad Kamil made a straight fire upon Jamshed hitting his chest near shoulder, and appellant Nabi Bux made a fire from his rifle upon Waheed hitting left side of his chest near belly. They both were critically injured from such firing. When he tried to save himself, Zaheer (since dead) fired on him causing him a firearm injury. He has also said that after intervention of villagers when the assailants decamped, complainant Arshad took all the injured to Mirwah Hospital, where Waheed and Jamshed died, and thereafter, he went to the Police Station to lodge the FIR.

11. Against such description of events, these three witnesses have been subjected to a lengthy cross-examination, but nothing impairing the account of the incident has come on record. All the witnesses in a persistent manner have withstood rigor of cross-examination and have not wavered on any material aspects of the case which may go in favour of the appellants and help in forming an opinion about their false implication. Their evidence, devoid of any material inconsistency and variation, is found by us confidence inspiring and reliable. The probative value of which is also confirmed by the report of the investigation. The Investigating Officer found the appellants guilty of the offence as alleged. The IO was successful in arresting appellant Riaz Ahmed on 10.10.2017, and on the same day, on his pointation,

effecting recovery of a blood stained hatchet from his house situated in Village Liaquatabad, Taluka Thari Mirwah. His arrest and recovery of blood stained hatchet have been documented in the relevant memos, which *mashir*/PW-4 Naveed Ali in is evidence has produced.

12. The evidence of eyewitnesses is further supported by the evidence of PW-5 Asif Ali, who is Tapedar and who, under instructions of Mukhtiarkar concerned, had visited the place of incident and prepared its site plan, which he has produced in his evidence. He has identified all the relevant points in the site plan, where the incident took place and where the deceased had got injuries. Nothing substantive injuring evidentiary value of his evidence has come on record in his cross-examination and, therefore, place of incident and the exact points, where the offence was committed have been established beyond a reasonable doubt. Evidence of PW-6 SIP Ghulam Asghar is to the extent of recording FIR as per verbatim of complainant, and evidence of PW-7 PC Nadir Ali is to the effect of getting the postmortem of deceased Waheed Ahmed and Jamshed Ali conducted through a police letter, which he has produced in his evidence. Their evidence covering certain aspects of the investigation has not been undermined in cross-examination and those aspects stand established.

13. At Ex.14 is the evidence of Dr. Nasrullah, who had attended to injured Arshad Ali, Sajid Ali and Muhammad Din, and had conducted postmortem of deceased Waheed Ali and Jamshed Ali. He has produced the Medico Legal Certificates of the injured and postmortem reports of the deceased. His evidence has confirmed discourse of the incident brought up by the complainant through his evidence and FIR. He has confirmed that deceased died because of receiving firearm injuries on their vital organs. He has further opined, apparently contrary to what the complainant and witnesses have said, that the time between their death and injury was spontaneous. Nevertheless, this finding cannot be given much importance for doubting truthfulness of evidence of the complainant and two eyewitnesses that the deceased had died in the hospital. For, the complainant and the witnesses, being laymen, are not experts in medical science to determine the exact time of death of the deceased after firearm injuries and say it in FIR or evidence. The deceased after sustaining firearm injuries described to be through and through would not be in a conscious position to presume complainant and witnesses were misled about their death in the hospital. It was natural for complainant and the eyewitnesses to assume them alive until

they were pronounced dead by the doctors in the hospital. This presumption, being of a nonprofessional, coupled with declaration by the doctor, had only led them to believe that their death had occurred at the hospital. There could not be any other explanation of such anomaly because presence of complainant and both the eyewitnesses at the spot, or else, cannot be doubted as all of them were injured in the incident and the injuries sustained by them have been certified by the doctor.

14. It was also raised in defense that as no weapon was recovered from appellants Nabi Bux and Muhammad Kamil, it would cast a shadow over the prosecution case. But this is not without an elucidation, to wit: they both had disappeared after the crime and were declared proclaimed offenders. And only after more than one year on 12.10.2018, when their application for pre-arrest bail was dismissed, they were taken into custody. They did not subject themselves to the investigation, nor attempted to cooperate with the IO at any time to put up their version of the incident and produce weapons allegedly used by them. Instead, they preferred to remain at large. The non-recovery of any weapon from them is, in such a context, of no consequence and no benefit of which therefore can be extended to them. The case of prosecution from the eye account furnished by the three witnesses, without wavering on any of salient features and supported by the medical evidence, has been established against the appellants.

15. The defence version set out in the counter case bearing Crime No.247 of 2017 in respect of death of Zaheer has already failed up to this Court. The nominated accused in that FIR were acquitted by the trial Court and the acquittal appeal No. D-21 of 2020 has already been withdrawn by the complainant. During the course of hearing, it was also informed that the direct complaint which was filed against the complainant party for committing murder of deceased Zaheer, had also met with failure up to this Court. The burden to prove defense/special plea upon the appellants has not been discharged by them, and we do not have any material before us to think otherwise, and declare the complainant party as aggressor.

16. Nonetheless, it may be stressed, appellant Riaz Ahmed is assigned the role of causing hatchet injuries on head and back of PW Muhammad Din. He is not assigned any injury to the deceased. The learned trial court just considering him vicariously liable has awarded him death penalty, which both the learned Counsel for the complainant and learned DPG have not disputed, given his role, is harsh, and hence

readily agreed to its conversion to imprisonment for life. As to death penalty of other two appellants, in spite of failure of cross version, by appellant party charging complainant party for death of Zaheer Ahmed in the same incident, to impress any court to act on it. It may be noted that his presence at the spot is admitted even by the complainant and his witnesses and they all have assigned him role of firing at PW Muhammad Din. His presence at the spot has further been cemented by the doctor, who in his evidence at exb.14 has revealed that said Zaheer Ahmed was brought before him on the same day in an injured condition. He found on his person, among other injuries, *'one lacerated wound of size 7cm X 2cm into bone exposed on right frontal area of head and extending towards temporal area, clinically fracture of bone'*, which from its nature i.e. fracture of bone, and local i.e. temporal region appears to be serious one. The doctor's evidence is an integral part of the case and establishes the fact of said Zaheer Ahmed having been critically injured in the same incident. As he has deposed that he too was referred by the police through a letter to him for a treatment on the same day. He has further disclosed that he had issued his provisional medical certificate and referred him to a Radiologist for a report.

17. These facts have not been revealed by the complainant party in the entire case right from FIR to evidence which means that certain particulars surrounding the incident have been concealed by it. This, in turn, raises a serious question over happening of chain of events in the manner as has been alleged by the prosecution to have ensued. The IO of the case did not take pains either at the time of investigation to look into this aspect of the case: death of Zaheer Ahmed in the same incident and give findings in this respect in the Challan for the court to appreciate. Material qua death of Zaheer Ahmed out of injuries sustained by him in the same incident is there though but how it occurred has not been informed by the prosecution, for it to be weighed in juxtaposition with its part of story and decided accordingly. However, despite such a mystery that is a result of prosecution's decision to remain modest with the truth, one thing can be clearly deducted from above cited pieces of information that it was a free fight-- rather than a pre-meditated conspiracy by the appellant to murder some members of the complaint party-- in which both the parties sustained injuries. This scenario, knitted on evaluation of material available on record, has sufficiently instituted element of extenuating circumstances in the case of appellant Nabi Bux and Muhammad Kamil too and their death penalty does not seem to be justified.

18. The incident, otherwise, as reflected from above discussion, was heinous one in which two persons from the complaint's side lost their lives and three were critically injured. There are no circumstances, otherwise, creating a doubt over culpability of the appellants to give them its benefit and acquit them altogether. Learned trial court, while discussing the evidence, has given cogent reasons in support of forming an opinion declaring the appellants as guilty of the offence: conviction. But while sentencing them to death it has completely disregarded existence of mitigating circumstances, as noted above, in favour of the appellants.

19. Therefore, the appeal is **dismissed**, the conviction of the appellants Riaz Ahmed, Nabi Bux and Muhammad Kamil is maintained. But their death penalty is converted into imprisonment of life with benefit of section 382(b) CrPC duly extended to them. Further, as directed by the trial court, all the three appellants have to pay compensation amount of Rs.10,00000/- each to legal heir of each deceased u/s 544 CrPC. Failure to pay the same shall expose the appellants to simple imprisonment of one year more. But, in any case, even after undergoing such simple imprisonment, when compensation amount is not paid, the same shall be recovered from the appellants' estate as land revenue in accordance with law within a period not later than three months after their release from jail on completion of terms of sentences, as detailed above. Resultantly, the death Reference is replied in **negative**.

Instant appeal and the confirmation reference are accordingly **disposed of** in above terms.

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