

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 85 of 2021

(*Saalim Kalo versus The State*)

Date of hearing : **27.11.2023**

Date of decision : **27.11.2023**

M/s Sardar Akbar F. Ujjan and Mahmood Ahmad Ujjan, Advocates for appellant.

Mr. Shafi Muhammad Mahar, Deputy Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – This appeal is filed by appellant Saalim S/o Muhammad Siddique Kalo, challenging judgment dated 06.10.2021, passed by learned 1st Additional Sessions Judge, Naushahro Feroze in Sessions Case No.170 of 2018 (*Re: The State v. Saalim Kalo and another*), arising out of Crime No.01 of 2018, registered at Police Station Tagar, District Naushahro Feroze, under Sections 302, 324, 337-A(i), 337-A(ii), 337-F(iii), 34 PPC, whereby he has been convicted and sentenced as under:

- For offence U/S 302(b) r/w 34 PPC to suffer R.I for life as Ta'zir and to pay Rs.2,00,000/- (two lac) as compensation U/S 544-A CrPC to the legal heirs of deceased with fine of Rs.50,000/- (Fifty thousand), in case of default in payment of fine he shall undergo SI for six months more.
- For offence U/S 324 PPC to suffer RI for five years and fine of Rs.30,000/- in case of default in payment of fine he shall undergo SI for three months more.
- For offence U/S 337-A(i) PPC to suffer SI for one year and Rs.10,000/- as Daman to be paid to injured Sanaullah.
- For offence U/S 337-A(ii) PPC to suffer RI for three years and Rs.2,00,000/- as arsh to be paid to injured Sanaullah, in case of default he shall undergo SI for six months more.
- Benefit of Section 382-B CrPC is extended to him and all sentences shall run concurrently.

2. Allegedly, appellant along with his brother Waseem (absconder) and one unknown accused, duly armed with *lathis* and a gun accosted complainant party, on account of a previous dispute, when they were present on their agricultural land and cutting grass on 03.03.2018 at about 07:00 p.m. Appellant Saalim, armed with a *lathi*, inflicted its blows to brother of complainant Sanaullah. Unknown accused inflicted *lathi* blows to complainant. During ensuing scuffle, appellant Saalim also

sustained injuries on his head. Meanwhile, absconder accused Waseem, armed with a shotgun, fired at complainant, his father Allahando and brother Sanaullah, causing them multiple firearm injuries. Father of complainant was seriously injured, and he was taken to Police Station first for a letter for treatment and then to a government hospital, Tharu Shah, from where he was referred to a government hospital, Naushahro Feroze, where he succumbed to injuries and died, whereas, brother of complainant Sanaullah was referred to government hospital, Nawabshah for treatment. Police was duly informed, and after postmortem and burial, complainant appeared at Police Station and registered the FIR on 04.03.2018 at 1600 hours, as above.

3. Appellant, during investigation, was arrested on 06.03.2018, unknown accused could not be identified and his brother Waseem could not be arrested. Due proceedings against him were held and he was declared proclaimed offender. Thereafter, trial against the appellant started. Towards a formal charge he pled not guilty; hence, prosecution examined as many as nine witnesses, who have produced all the necessary evidence. In 342 CrPC statement, appellant has denied the allegations and submitted that he is innocent. However, he did not examine himself on oath or led any defence evidence. At the culmination of the trial, the trial Court vide impugned judgment has convicted and sentenced the appellant as above. Hence, this appeal.

4. Learned Counsel for the appellant at the very outset has submitted that the role assigned to the appellant is of causing *lathi* blows to PW Sanaullah, who has received in all five injuries. Injuries No.1, 2, 3 & 4 are minor in nature U/S 337-A(i) PPC, punishable for 02 years, whereas, injury No.5 U/S 337-A(ii) PPC, is punishable for 05 years. There is no evidence that he had instigated the main accused to commit murder of deceased Allahando. The case is completely silent that the appellant, in any way, had facilitated the main accused to commit murder of deceased. The incident had happened in fact at the lands of accused where the complainant party had come. In the incident, appellant Saalim also got injured, which fact is borne out of the evidence of Medico Legal Officer, and his certificate of injuries is also available at Page No.253. This fact shows that there was a free fight between the parties and absconder accused Waseem fearing for his life, had fired upon the deceased. Learned Deputy Prosecutor General has supported the impugned judgment, and submits that the appellant is vicariously liable for committing murder of deceased Allahando.

5. I have heard the parties and perused material available on record. The prosecution has examined three eyewitnesses: complainant Sartaj (PW-4 at Ex.7), Naeem Kalo (PW-5 at Ex.8) and Sanaullah (PW-7 at Ex.10). Giving the account of incident, they all have attributed to appellant role of causing *lathi* injuries to Sanaullah. None of them has stated that appellant Saalim had, in any manner, facilitated the main absconder accused Waseem in committing murder of deceased Allahando. None of the witnesses has hinted in evidence that appellant and other two accused had come with a common intention to commit murder of the deceased. All of them have stated that they were present on their lands and cutting grass, when appellant and other accused arrived there and asked them as to why they were cutting grass, given the dispute between them over agricultural land, and then they started inflicting blows to them. From such evidence, it is apparent that every accused acted independently, and did not facilitate each other in inflicting blows to their victims, nor instigated others to commit the crime and murder the deceased ultimately. At no stage, it has been suggested by any of the witnesses that appellant Saalim had facilitated the main accused by either pointing out to the deceased to be their main enemy or holding him responsible for the ongoing dispute between them. There was no reason to the accused party to target the deceased particularly and murder him which is suggestive of the fact that it was a free fight between the parties. This is further fortified from the *mashirnama* of place of incident, that shows that the incident took place on the lands of accused party and not on the lands of complainant party, in which appellant himself was injured, as is evident from the evidence of Medico Legal Officer (PW-8 at Ex.11). This also suggests that there was no preplanning by the accused party, and incident took place when the complainant party decided to accost the accused party when they were present on their lands.

6. In such circumstances, when the confidence inspiring evidence to establish sharing of common intention by the appellant is lacking, the appellant cannot be held vicariously liable for murder of the deceased Allahando. No doubt, he was part of the team and by the unlawful action of which one person lost his life and two persons were injured including complainant. But the fact that injured received only minor injuries at the hands of appellant, and appellant was not carried away by the pull of situation and caused any injury to the deceased would at least show that at the nick of moment when the incident had happened, his intention was

not in alignment with absconder accused Waseem in murdering the deceased.

7. A person, who is part of the attacking team but has performed a minor role, cannot be automatically held vicariously liable just because he is a member of the attacking party, unless confidence inspiring evidence redolent of the fact that he had come with predetermined mind to commit murder of the victim, and that during incident had materially facilitated the main accused in committing murder of the deceased comes on record. Therefore, I find the argument of learned defence Counsel carrying weight in the given facts and circumstances of the case, not least when nothing of the sort pointing to sharing of common intention by the appellant has been suggested by the witnesses. The appellant, in the circumstances, would be held responsible only for injuries inflicted by him on victim PW Sanaullah. As per medical evidence, Sanaullah had received five injuries as detailed above. The maximum punishment for injuries falling U/S 337-A(ii) PPC is 05 years.

8. The jail roll of the appellant, received on 17.11.2023, reflects that appellant has remained in jail substantially for 05 years, 08 months & 11 days, has earned remissions of 07 years, 07 months & 19 days, his unexpired portion is 12 years & 11 months including sentence for failure to pay compensation. The appellant therefore has already undergone 13 years & 04 months, although the maximum punishment U/S 324 PPC is up to 10 years.

9. For foregoing discussion, the appeal on merits is **dismissed** along with pending applications. However, the conviction and sentence awarded to appellant under Sections 302, 34 PPC are **set aside**, and the conviction and sentence under Sections 324, 337-A(i), 337-A(ii) PPC are **maintained** and **converted** into the period already undergone by the appellant. The appellant shall be released if he is not required in any other custody case, however, on payment of *Daman* of Rs.10,000/- U/S 337-A(i) PPC and *Arsh* of Rs.2,00,000/- U/S 337-A(ii) PPC to victim Sanaullah, or in case of default in latter payment, after undergoing SI for six months more.

Above are the reasons of my short order dated 27.11.2023.