IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 92 of **2021**

(*Zameer Ahmed Mahar versus The State*)

Dates of hearing : **09.10.2023**, **30.10.2023** & **20.11.2023**

Date of announcement : **01.12.2023**

M/s Qurban Ali Malano, Israr Ahmed Shah and Syed Naimat Ali Shah, Advocates for appellant.
Mr. Hidayatullah S. Baloch, Advocate for complainant.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J.– This appeal is filed by appellant Zameer Ahmed S/o Muhammad Jummo Mahar, challenging a judgment dated 10.11.2021, passed by learned Additional Sessions Judge-I / MCTC-I, Sukkur in Sessions Case No.129 of 2015 (Re: The State versus Mulla Sulleman and others), emanating from Crime No.11 of 2014 registered at Police Station 'C' Section, Sukkur under Sections 302, 148, 149, 337-H(2) PPC, whereby he has been convicted and sentenced U/S 302(b) PPC with life imprisonment as Ta'zir with fine of Rs.2,00,000/- as compensation, to be paid to the legal heirs of deceased in terms of Section 544-A CrPC, or in default, to suffer imprisonment for three months. However, benefit of Section 382-B CrPC has been extended to him.

2. Complainant Ghazi Malang, father of deceased Israr Ahmed, reported to Police Station 'C' Section, District Sukkur incident of murder of his said son on 11.01.2014 on account of previous murderous enmity with accused including appellant Zameer Ahmed Mahar. As per story in brief, when complainant with his said son Israr Ahmed, nephew Haji Khan and maternal grandson Zakariya, after attending a case at Sessions Court, Sukkur, were coming to their village on a motorcycle on 11.01.2014, and reached outside Banking Court near District Jail, they were waylaid by seven (07) accused including appellant, riding on motorcycles, at about 0930 hours. The accused, after surrounding, started beating them. Meanwhile, accused Mullan Sulleman (since acquitted) and accused Imamuddin Mahar instigated others to not spare them. Upon which, accused Abdul Qadir and Rasoolo held his son from behind and accused Zameer/appellant, Aamil and Sami fired directly upon his son, hitting his head and other parts of body, and as a result critically injuring him. When

remaining members of the complainant party beseeched them in the name of Allah, the accused left the scene of incident. After their departure, Israr Ahmed died within sight of complainant party. After informing the police about the incident, getting the postmortem of his deceased son conducted from relevant hospital and his burial, the complainant appeared at Police Station and registered the FIR on 13.01.2014, after two days of the incident.

3. Although the appellant and other accused were nominated in FIR, but no arrest was effected. Hence, no recovery of incriminating articles could be made. Appellant Zameer Ahmed was arrested after six years on 22.07.2020, and after him, co-accused Sulleman (since acquitted) appeared in the Court after getting pre-arrest bail. Hence, an amended charge was framed against the appellant and him on 10.10.2020. They pleaded not guilty and claimed trial. Therefore, prosecution examined as many as eight witnesses, who produced all the relevant documents to support the case including inquest form, postmortem report, receipt for receiving dead body, memo of examination of place of incident, recovery of empty shells, blood stained earth and examination of dead body, inquest report, memo of recovery of clothes and shawl of deceased, entry No.12, a letter issued to Mukhtiarkar for preparation of sketch, letters for seeking/granting permission to send empties of TT pistol and a piece of lead (سیسہ), chemical report of blood stained earth and clothes of deceased, receipt of dead body of deceased by complainant, etc.

4. After which, statements of appellant and co-accused Sulleman were recorded U/S 342 CrPC. They denied the charge against them. However, appellant produced a certified true copy of FIR bearing No.16 of 2013, registered by him against Jatoi community/complainant party for committing robbery of buffalos and murdering Sher Muhammad and one of their own accomplices, namely Abdul Rauf, and copies of medical certificates to establish their innocence. But the trial Court vide impugned judgment, while acquitting accused Mullan Sulleman, has convicted and sentenced the appellant in above terms; hence, this appeal.

5. Learned defence Counsel has argued that appellant is innocent, has been falsely implicated in this case; that there are material discrepancies in the evidence of prosecution witnesses, which have not been considered by the trial Court; that initially, on the very same day, complainant had reported the matter to the Police Station, recorded in daily diary No.12 at about 0940 hours, in which only names of witnesses are mentioned and

not of any accused; that in the said diary, there is a tempering over the name of Haji Khan; that since the names of the accused in the daily diary are not taken by the complainant, the entire case against the appellant is doubtful; that complainant, in his evidence, has shown presence of PW Siraj Ahmed at the time of incident, who is a *mashir* of the case, and who, admittedly, was not present. He has not taken the name of PW Haji Khan, the only witness examined by the prosecution in support of the case. Such discrepancy in the evidence of the complainant is fatal to the prosecution case; that medical evidence is in conflict with the ocular account furnished by the witnesses; that in the FIR and 161 CrPC statements, no specific role of the appellant and other accused has been mentioned, but in the evidence, specific role with locale of injury has been described by the complainant and witness, which is an unholy improvement undermining truthfulness of the entire case; that although it is stated that recovery of four (04) empties of TT pistol was effected, but the forensic opinion in this regard is not available on record. The doctor's evidence shows that from the clothes of deceased, one pallet was recovered, which belies the entire prosecution case; that in 342 CrPC statement of the appellant, necessary questions have not been asked; that there are improvements in evidence, what is stated in FIR is not revealed in evidence. More so, motive has not been proved and no evidence in this regard has been put forth. There is contradiction between two eyewitnesses. Tapedar has not been examined in this case and no sketch/ site plan has been produced. There is two days' delay in registration of FIR, which has not been explained. Since no recovery was effected from appellant, his case is covered by the element of suspicion. The case is full of contradictions, and appellant is entitled to a benefit of doubt. He has relied upon the cases of *Muhammad Yaqub v. Munawar Sher and others* (**1999 SCMR 1323**), *Iftikhar Hussain and others v. The State* (**2004 SCMR 1185**), *Saeed Ahmad v. Muhammad Nawaz and others* (**2012 SCMR 89**), *Muhammad Sharif and 2 others v. The State and others* (**2020 SCMR 1818**) and *Dilawar and another v. The State* (**2020 P Cr. L J 619**).

6. On the other hand, learned Counsel for the complainant and learned Additional Prosecutor General both have supported the impugned judgment. They submit that complainant, who after evidence died, was 90 years old when his evidence was recorded, not taking the name of Haji Khan as such cannot be given much importance, and taking the name of Siraj Ahmed instead, who is, otherwise, in fact, a witness in this case, will not undermine the intrinsic value of the prosecution case. They further

submit that even in FIR the role has been attributed to three accused, which has been reiterated by both the witnesses in their evidence before the Court in detail. From a person of 90 years, a lengthy cross-examination was conducted, but nothing injuring the probative value of his evidence has come on record. They have relied upon the cases of *Farman Ali and another v. The State and another* (**2020 SCMR 597**) and *Muhammad Bashir and another v. The State and others* (**2023 SCMR 190**).

7. I have considered submissions of the parties and perused material available on record including the case law cited at bar. Prosecution has examined as a first witness, HC Nisar Ahmed, he is author of the FIR, and has given details about it that on 13.01.2014, he was present on duty when complainant had appeared and narrated the incident. He registered the FIR and entrusted it to ASI Ghulam Nabi Shaikh for investigation. He has produced the FIR in his evidence. Complainant Ghazi Malang has been examined as PW-2. He has described the entire incident as disclosed by him in FIR. He has given correctly the date of incident, time of incident and place of incident, where his son was murdered. He has also given the names of each accused and has specifically stated that it was basically three accused, namely Aamil, Zameer/appellant and Sami, who had fired upon his son directly. These are the same three accused, who have been named by him in FIR for firing upon his son. In his evidence, he has covered entire incident from reaching place of incident at about 0930 hours, seeing the accused on three motorcycles armed with deadly weapons, hitting his son by fires due to previous enmity to taking his son to hospital for postmortem.

8. He has been materially supported by PW-4 (Ex.13) Haji Khan. He has also narrated the entire incident in detail in his evidence including motive part of the story that it was on account of murderous enmity, the son of complainant was murdered. He has also given right time and date and right place, where the incident took place, and has identified each accused specifically, including appellant, with a role played by each one of them. Evidence of both the witnesses, in essence, is on the same lines and no material discrepancy is available, which may materially debunk the story setup by the prosecution from the very inception.

9. PW-3 is the Medico Legal Officer whose evidence is available at Ex.12. He had conducted postmortem of the deceased, and has narrated such facts in his deposition that on 11.01.2014, when he was available on his duty at GMC Hospital, Sukkur, the dead body of deceased Israr

Ahmed was brought along with inquest report for postmortem, which he conducted accordingly, and found at least seven (07) firearm injuries. Out of which, injury No.2, 4 and 6 were exit injuries. He has further described that there was no blackening and charring surrounding the injuries, and the probable time between death and injury was instantaneous. At Ex.14 has been examined PW-5 Hafeezullah. He is *mashir* and has revealed in his evidence that on the day of incident when he was present at Shalimar for running an errand, he saw a mob of people including police officials present at the spot, and then saw complainant Ghazi Malang and deceased Israr Ahmed lying on the road. As per his evidence, police inspected dead body of the deceased in his presence and in presence of co-*mashir* Siraj, and after noting all the injuries on his person, had prepared the *mashirnama*, which he has produced in his evidence. He also confirmed recovery of four (04) empties of pistol from the spot as well as one piece of lead (سیسہ). He has produced all the relevant memos in his evidence.

10. SIP Ghulam Nabi, first IO of the case, has been examined at Ex.16 as PW-6. He has given entire account of investigation, right from reaching the place of incident on the day of incident, conducting legal formalities there and at hospital in respect of inspecting the dead body of deceased and postmortem to visiting place of incident in presence of *mashirs*, recording statements of witnesses U/S 161 CrPC, issuing letters for preparation of sketch/site plan, seeking permission to send empties of TT pistol for forensic examination etc. He has produced all the relevant letters of official communication in his evidence. At Ex.17 has been examined PW-7 Inspector Khalid. He was second IO of the case, who had conducted further investigation. His evidence is to the extent of recording statements of witnesses and exonerating co-accused Mullan Sulleman (since acquitted) and Imamuddin, having received chemical report in respect of blood stained earth and clothes of deceased, which he has produced in his evidence. At Ex.18 has been examined PW-8 PC Muhammad Wasal, corpse-bearer. His evidence is to the effect that on the day of incident he was handed over inquest report and dead body of deceased Israr Ahmed for postmortem report. He brought the dead body of deceased to the Civil Hospital for the same purpose and handed over the same to Medical Officer of Civil Hospital, Sukkur. After postmortem, the dead body was handed over to him, and he handed over the same to complainant Ghazi Malang.

11. These all witnesses have been subjected to a lengthy cross-examination. The eyewitnesses, namely complainant Ghazi Malang and Haji Khan in their cross-examination have not revealed any material undermining alignment of facts of the incident set up by them in their examination-in-chief. Complainant's age in the evidence is recorded as 90 years, and it was recorded on 15.02.2021, after more than seven years of the incident. Yet he had withstood rigor of cross-examination without contradicting himself on any of the material facts constituting the chain of events culminating at the specific role of appellant and others in causing murder of the deceased. I find no improvement in his evidence discrepant with the FIR. In FIR, he has attributed main role to three accused, namely Aamil, Zameer and Sami to cause firearm injuries to his son Israr Ahmed. The same role he has described in detail in his evidence, which does not militate against what he has stated in this respect in FIR. The FIR is never considered a substantial document containing all the minute details of the incident. It cannot be cited as a reference for adverse-comparison with the evidence of the witnesses, if the same is in some detail but in harmony with the FIR and not materially changing the story. The complainant is not required to give every tiny piece of detail in FIR constituting the incident. He is only required to give in it outlines of the incident, if he is an eyewitness, which shall include names of witnesses, if any, names of accused, if they are known to him, place of incident, date of incident and time of incident and the motive part, if he is aware of it. Then it is for Investigating Officer to improve upon such information and find out the truth in investigation. Here in this case, it may be noted that the Investigating Officer had found the appellant and other accused guilty of the offence and had submitted Challan against them.

12. Much emphasis was laid by the defence Counsel over daily diary No.12 dated 11.01.2014, in which, according to him, although the names of the witnesses are given, but not of the accused. Per him, the entire case has become doubtful, therefore. I am afraid that I don't find myself persuaded by this argument. The report and its contents in the daily diary are made by the duty officer. This report, although, is inspired by some information, but is never recorded as per verbatim of the informer, nor is bound to reflect the information in its exact form. The NC is not the FIR more so and it cannot be treated as one. In this case it was not even required to be made. NC means non-cognizable (offence), cannot be treated as a substitute of the FIR, is always recorded in the offences which are non-cognizable. Here, the matter reported was cognizable offence, and

if the duty officer was of the view that the information was sufficient to make out a cognizable offence, he should have recorded FIR instead of NC. Hence, NC recorded in this matter, albeit not required, has no value in the eyes of law, and on the basis of a report (NC) made by a police official, the prosecution case cannot be thrown out of the window, not least when the same has been established beyond any reasonable doubt. More so, no question regarding NC to determine its evidentiary value was asked from any of the witnesses. The medical evidence is in complete conformity with the evidence of eyewitnesses for good measure. The eyewitnesses have correctly described number of the injuries and their locale on the deceased, which the Medical Officer in his evidence has confirmed. He has stated that deceased was fired from the distance of three feet, which is the same distance more or less described by the witnesses in their evidence.

13. Learned defence Counsel in his contentions also raised the point that no incriminating recovery was effected from the appellant, and hence, his case is doubtful. There is a reason behind non-recovery of weapon from the appellant. The appellant was arrested after six years of the incident in the year 2020. During investigation, he remained absconder. He did not surrender himself nor the weapon allegedly used by him for matching with the empties recovered from the spot. Although absconsion ipso facto is never considered a piece of evidence determining guilt of the accused. But in the present peculiar facts of case, the long abscondence coupled with the unimpeachable evidence points out to the guilt of the appellant and his involvement in the case as accused. Appellant has been assigned the role of causing main injury on left temporal region of the deceased. Although the doctor has given opinion that death of the deceased occurred due to intracranial hemorrhage and hemorrhagic shock is a result of injuries, but looking at the locale of injury No.1 on his left temporal region caused by appellant, it can safely be held that this injury must have been instrumental primarily in causing death of the deceased.

14. As to the argument in defence that no lab report in regard to empties of TT pistol recovered from the spot is on record, suffice it to say that due to abscondence of appellant and other nominated accused, no recovery of incriminating weapon could be effected. The forensic expert's report in regard to empties is helpful only when the recovery of the weapon is effected, as both are examined by the lab to determine whether the empties were fired from the same weapon or not. Non-production of such report, when there is no weapon to match with is not of much help to the accused either to give him its benefit. Accused was absconding for

six years and did not subject himself to investigation or produce the weapon, so that the same could have been compared with the empties recovered from the spot. At this stage, he cannot take a U-turn and say that regarding empties recovered from the spot no forensic report has been submitted -- which even submitted in above circumstances would not have helped the prosecution -- therefore he is innocent. Another argument raised in defence in the same context was that one pallet was recovered from the clothes of the victim, which shows that he was fired at by a shotgun, and not by pistols as alleged by the prosecution. This contention is belied by lack of any material showing that victim was fired at from a shotgun and not a pistol. The piece of lead (سیسہ) is not a pallet but it is a piece of bullet fired from a pistol and recovered from the clothes of the victim. The piece of lead (سیسہ) cannot be stated to be a piece of pallet, and more so, no suggestive question in cross-examination has been asked from the witnesses to precipitate examination of the relevant material to form an opinion about it, nor there is any documentary material available to establish the same and help me in forming that opinion.

15. The prosecution from all four corners has established the case against the appellant beyond a reasonable doubt. He is the one who had been rightly identified by the witnesses to have fired along with other two accused on the victim causing his murder. No case for acquittal has been made out. Accordingly, instant appeal is **dismissed** maintaining the conviction and sentence awarded to the appellant by the trial Court.

J U D G E

Abdul Basit