

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.S-296 of 2019

Date of hearing: 07.08.2023

Date of decision: 07.08.2023

Appellants: Mehar Ai and Naib Ali,
Through M/s Mehfooz Ahmed Awan,
Farhan Ali Shaikh & Mukhtiar Hussain
Katpar, advocates.

Complainant: Allah Warrayo,
Through Mr. Shafique Ahmed Leghari,
advocate.

The State: Through Mr. Aftab Ahmed Shar,
Additional P.G.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J.- By means of impugned judgment dated 09.12.2019 passed by learned 3rd Additional Sessions Judge/MCTC-II, Sukkur in Sessions Case No.200 of 2018, appellants have been convicted and sentenced u/s 302(b)/34 PPC to suffer imprisonment for life as Ta'zir and to pay compensation of Rs.300,000/- each to be paid to legal heirs of deceased in terms of section 544-A CrPC, in default thereof to suffer SI for six months more, with benefit of Section 382-B CrPC, duly extended to them.

2. As per prosecution story, on 12.12.2017, when complainant in the company of his father Muhammad Mithal and PWs Muhammad Paryal and Mehar Ali was heading towards village Trimonhi by foot at about 1:00 p.m, and reached Arore Minor close to watercourse of Syed Ghulam Rasool Shah, they were intercepted by four accused including appellants. Appellant Mehar Ali was empty handed, whereas appellant Naib Ali was armed with a hatchet so also remaining two accused namely Nawaz Ali and Karam Ali. Allegedly, there was already a dispute between the parties over allegation of KARAP. No sooner the accused came than appellant Mehar Ali instigated other accused not to spare Muhammad Mithal, who had illicit relations with Mst. Sharma.

Upon which appellant Naib Ali aimed his hatchet at complainant party; and co-accused, the proclaimed offenders and not yet arrested, caused hatchet blows on different parts of body of Muhammad Mithal injuring him critically. Then both the aforesaid absconder accused held him from arms, legs and threw him in the watercourse. Complainant and PWs raised cries, and in the meanwhile all the accused decamped. After their departure, complainant and witnesses pulled out Muhammad Mithal from watercourse and found him dead. Hence, his body was brought at P.S and after obtaining a necessary letter was taken to Taluka Hospital, Rohri for postmortem report. Then, after necessary formalities, complainant appeared at P.S and registered FIR, as above.

3. In subsequent investigation, appellant Mehar Ali was arrested and he was referred to the Court for a trial under the charge of committing murder of deceased, whereas, appellant Naib Ali was let off by the police under section 497 CrPC and his name was placed in column-II of the Challan. But, the trial Court did not agree with the I.O and issued BWs against him, hence he joined the trial. However, from none of them, any incriminating weapon was recovered.

4. In the formal charge, appellants pleaded 'not guilty' and claimed trial. Prosecution in order to substantiate its case examined as many as 06 witnesses. They have produced all necessary documents: postmortem report, FIR, sketch, memo of dead body, inquest report and dead body inspection form, all the relevant memos, etc. In statements, recorded u/s 342 CrPC, the appellants have denied the allegations and pleaded innocence. Then, after hearing the parties, the trial Court vide impugned judgment has convicted and sentenced the appellants in the terms, as stated above.

5. I have heard learned counsel for the appellants who has contended that the appellants are innocent and have falsely been implicated in this case, there is delay of 24 hours in lodgment of FIR, for which no plausible explanation has been furnished, no

specific role has been assigned to them, relation of appellant Mehar Ali with Mst. Sharma, alleged KARI, has not been established, therefore, there is no substance to believe his part of instigating main accused to commit the offence; that although in FIR appellant Naib Ali is alleged to have aimed his hatchet at the complainant party in order to deter them from intervening but in evidence, both eyewitnesses have not supported this part of allegation against him and instead have stated that he had raised *Lalkara*, which is distinguishable to what has been alleged in FIR. Learned Additional P.G has not supported the impugned judgment citing lack of connecting evidence against appellants except a word of complainant and eyewitnesses about their presence at the spot.

6. Learned counsel for the complainant, however, has half-heartedly supported the impugned judgment.

7. I have considered submissions of parties and perused material available on record. In the case, prosecution has examined two eyewitnesses PW-1 Allah Warrayo (Exh.5), who is complainant and son of the deceased and PW-2 Muhammad Paryal (Exh.6), who is younger brother of the deceased. Both these eyewitnesses have not ascribed any active role to the appellants except their presence at the spot. During investigation, complainant had recorded a further statement stating that on account of misunderstanding, he had given name of appellant Naib Ali, who was in fact innocent. And this was the reason he was exonerated by the police and his name was placed in column-II. Nevertheless, the trial Court took cognizance of offence against him and joined him in the trial. In the evidence, both the eyewitnesses, contrary to what has been ascribed in FIR, have stated that he had raised *Lalkara*. None of the eyewitnesses has stated that he had aimed at or pointed his hatchet to the complainant party in order to deter it from intervening and saving the deceased. His case, therefore, apparently is not free from doubt.

8. Although, presence of appellant Mehar Ali at the spot has been shown, and he is stated to have instigated both absconder accused to commit the offence. But his relation either with accused

or alleged KARI Mst. Sharma has not been alluded at all. It has not been hinted by the prosecution as to why and on what basis and for what reason, he had instigated the main accused, when apparently he had got no connection with alleged Kari Mst. Sharma to feel provoked for. His relation with the main accused has also not been established either by the prosecution to lend some credence to his role.

9. Besides, the prosecution has not produced any evidence to show that in fact the main accused, who were grown up men, had acted under the influence of present appellant and on his instigation had committed murder of the deceased and not independently by being provoked by allegation of KARO-KARI against the deceased. The evidence of eyewitnesses further shows that he had not taken any active part in the incident. Even, throwing of injured Muhammad Mithal in the watercourse has been alleged against the main absconder accused. Therefore, not only his presence at the spot but his role of instigating the main accused is not free from a doubt. In absence of any cogent and reliable evidence connecting appellant Mehar Ali either with alleged KARI Mst. Sharma or with the absconder accused and the motive prompting him to instigate the main accused to commit the offence, he cannot be held vicariously liable for murder of deceased Muhammad Mithal along with main absconder accused. The evidence of remaining witnesses, insofar as role of both the appellants is concerned, is formal in nature and does not improve the case against them any further. Medical evidence at the most could be used against absconder accused to establish their part, who are not before the Court.

10. Therefore, I am of the view that the case not only against appellant Naib Ali but against appellant Mehar Ali also is not free from doubt. It is settled that once a doubt seeps in the prosecution case, its benefit has to go to the accused not as a matter of grace but as a matter of right.

11. For foregoing discussions, I am of the view that the prosecution has not been able to prove the case against the

appellants beyond a reasonable doubt, and they are entitled to its benefit. By means of a short order dated 07.08.2023, this appeal was allowed and the appellants were acquitted of the charge. They were ordered to be released from the jail forthwith, if not required in any other custody case. The above are the reasons of the same.

The appeal is accordingly disposed of.

JUDGE

Ahmad