

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 11 of 2020
(*Shahid Ali Memon versus The State*)

Cr. Jail Appeal No. S – 12 of 2020
(*Ghulam Murtaza alias Nadeem Memon versus The State*)

Dates of hearing : **11.09.2023**

Date of decision : **11.09.2023**

Mr. Rukhsar Ahmed M. Junejo, Advocate for appellants.
Mr. Khan Muhammad Sangi, Advocate for complainant.
Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Appellants, having been convicted through impugned judgment dated 04.02.2020, passed by learned Additional Sessions Judge-I (MCTC), Ghotki in Sessions Case No.402 of 2014 (*Re: State v. Ghulam Murtaza and others*), emanating from Crime No.76 of 2014 under Sections 364, 302, 201, 148, 149, PPC, registered at Police Station Sarhad, District Ghotki, and sentenced under Section 364 read with Section 34, PPC to suffer R.I. for ten years and to pay fine of Rs.100,000/- each, and in case of non-payment of fine, to undergo S.I. for three months more; under Section 302(b) read with Section 34, PPC to suffer R.I. for life as *Ta'zir* and to pay compensation of Rs.500,000/- each to the legal heirs of deceased, as provided under Section 544 CrPC, and in case of non-payment of compensation, to suffer S.I. for six months more, however, with benefit of Section 382-B CrPC, have filed this Appeal challenging the same.

2. As per brief facts, in presence of complainant and PWs Sheral and Ghulam Hyder, his son namely Saeed Ahmed was abducted by appellants and other co-accused on the show of weapons on 30.07.2014 at about 02:00 p.m., when they were standing in a graveyard near their village, for the purpose of murder, as they were annoyed with the abductee for stopping them from having relations with criminals. Complainant and PWs due to fear of weapons remained silent and did not intervene. He, however, on phone informed the police about the incident, which kept entry No.08 on the same day, which has been produced by PW-12, who is Inspector of Police Station Sarjani Town, in his deposition. The complainant, meanwhile, mounted a search for his

son and on the same day at about 08:00 p.m. was informed by PWs Bashir Ahmed and Akbar Ali that while they were standing at City Point (Bridge) over Rice Canal, they saw appellants, Qutubuddin, Aamir and Nizamuddin alighting from the car, throwing his son in Rice Canal and making their escape good. On receiving such information, he again intimated the police, which only kept entry No.20 on the same day about such fact, but did not register the FIR or sprung into action to locate the body or arrest the accused who were ostensibly implicated for murdering the deceased, which does not appeal to the common sense. But in any case, the complainant and his relatives then made a search about the dead body of his son, and found it on 02.08.2014 at a place called as 'Ruk Pull', District Shikarpur. He brought the dead body of his son at Civil Hospital, Sukkur in a Datsun and informed the police official concerned, who visited the hospital, gave a letter for postmortem and completed all other formalities. Complainant thereafter appeared at Police Station and registered FIR against appellants and co-accused named above.

3. During investigation, appellants were arrested on 18.08.2014, and on 22.08.2014, in interrogation, they admitted the guilt and caused recovery of 30 bore pistols from the places of their knowledge. On appellant Shahid's source, not only a pistol, allegedly used by him at the time of abduction of the deceased, but his university card and a mobile phone, which, however, was not subjected to forensic examination, were recovered from a field of sugarcane, which admittedly is not owned by him. After usual investigation, the Challan was submitted and appellants were referred to the trial, where a formal charge against appellants and co-accused Nizamuddin, who is shown to be along with the appellants at the time of abduction and throwing the abductee to Rice Canal, was framed.

4. Prosecution then led evidence of all the relevant witnesses, 12 in number, who produced all the relevant papers including FIR, memos of place of incident, arrest and recovery of incriminating articles from the appellants etc. The Medico Legal Officer has produced postmortem report of the deceased opining that the deceased died due to asphyxia by way of drowning. But he has confirmed that the body of the deceased did not bear any external mark of violence. After the prosecution led the entire evidence, the appellants' statements under Section 342 CrPC were recorded. They have denied the allegations and pled their

innocence without leading any evidence in defence or examining themselves on oath.

5. The trial Court by means of the impugned judgment has convicted the appellants in the terms as above, whereas, acquitted co-accused Nizamuddin, who apparently is held equally responsible by the complainant and his witnesses in the alleged offences. Purportedly, on the only distinction of recovery of pistols from the appellants, which were not used by them as is apparent from above facts except that allegedly, at the time of abduction of the deceased, they were armed with them. Since the pistols recovered from the appellants were not used for firing, they were not sent for forensic examination, and no report is otherwise available that these are the same weapons the appellants were armed with at the time of incident. More so, it is reported that appellants have been acquitted from the case of such recovery, although, against such acquittal, appeals have been filed against the appellants as well as co-accused Nizamuddin.

6. Learned defence Counsel has pleaded innocence of appellants and submits that there is delay of 03 days in registration of FIR although as per its contents and evidence of complainant he had identified all the accused at the spot; that the entry, showing conveying of information by the complainant to the police of such incident, does not disclose name of any of the accused. The witness, who revealed that he had seen appellants throwing the abductee in Rice Canal, is a chance witness; he is originally resident of District Ghotki and he has not explained about his presence at the time of above incident. More so, his conduct, suspicious as it is, does not tally with the story in that he did not take any effort to save the deceased or raise alarm to attract the people to save the deceased from drowning or taking him out immediately; that appellants' case is on identical footing to that of acquitted accused Nizamuddin, but the learned trial Court has failed to appreciate this fact; that in the daily diary No.20, recording information of throwing of the deceased in the Rice Canal, only name of accused Shahid is disclosed although the witness is said to have identified all the accused.

7. On the other hand, learned Counsel for the complainant, supporting the impugned judgment, has contended that names of appellants are mentioned in the FIR with specific role. The deficiency in investigation would not ruin the case of complainant, who has fully

implicated the appellants in the offence. Acquittal of co-accused will not work out in favour of appellants as the acquittal appeal has been filed.

8. Learned Additional Prosecutor General, however, submits that there are loopholes in the prosecution case in that the FIR without a proper explanation has been registered after 03 days and only after recovery of the dead body, and only thereafter names of accused were disclosed by the complainant.

9. I have considered arguments of parties and perused material available on record. Prosecution in order to establish its case has examined complainant as a first witness who has produced FIR, and PW-2 namely Ghulam Hyder who has supported him insofar as contents of FIR and other developments ensuing FIR, as revealed above, are concerned. PW-3 Akbar Ali, who is originally resident of a village in Taluka in District Ghotki is said to be present at the bridge of Rice Canal at about 07:45 p.m. along with PW Bashir Ahmed and saw appellants and co-accused alighting from a car and throwing Saeed Ahmed in it: Rice Canal. He has confirmed that he had conveyed such information to the complainant. PW-4's evidence, who is Medico Legal Officer, is confined to conducting postmortem of the deceased, which he has produced. PW-5 is the Tapedar, who under the instructions of Mukhtiarkar, had sketched the site plan which he has produced accordingly. PW-7 is the first Investigating Officer of the case, who had recorded 161 CrPC statements of the witnesses. PW-8 is Ali Abbas Bharo, he is the *mashir* and witnessed preparation of memos by the police at every nook and cranny of the prosecution case. He has confirmed these facts in his evidence and has produced the relevant documents. The remaining witnesses are the police officials, either related to investigation or completing certain other formalities such as postmortem, producing the relevant daily diaries and confirming the fact that complainant had conveyed the information of the incident on the same day to the police, etc.

10. A scanning of their evidence shows that complainant and two eyewitnesses had identified the appellants and other accused clearly at the time of first two incidents: abduction of the deceased occurring at 02:00 p.m. on 30.07.2014 and throwing of the deceased in the Rice Canal later in the day at 08:00 p.m. Although these two incidents occurred on the same day, the perpetrators were identified. But surprisingly, FIR was not registered, no action was taken by the police

timely to save the abductee and round the accused (duly identified) up to thwart the commission of the offence. Except the daily diary (No.08 dated 30.07.2014) which does not, however, disclose name of any of the accused, nothing has been brought on record to show that the incident in the manner as alleged had happened, it was witnessed as alleged and was reported to the police accordingly. The reported offence was a cognizable offence: Section 364 PPC, punishable for life imprisonment insofar as first incident is concerned, and purportedly was committed by the accused known to the complainant, and their respective roles were clearly seen, but at the time of conveying information to the police about it, the complainant did not disclose name of any of the accused or their respective role, till the dead body was discovered on 02.08.2014 by him. About which, he, however, did not first inform the police, so that the police could document and preserve the same for a future reference, and brought it on his own to the hospital. His remaining silent for 03 days, and not reporting the matter and revealing names of the appellants to the police is baffling and does not inspire confidence about the story, he has narrated. It conveys a strong impression that until the dead body was discovered, the complainant and the police were in dark, and after that they sprung into action, and all formalities including FIR, daily diary and 161 CrPC statements were covered and made part of the case.

11. The third witness namely Akbar Ali, who is said to have witnessed appellants and acquitted accused coming off the car and throwing abductee in Rice Canal, is originally resident of District Ghotki and is related to the complainant. He did not explain the exact circumstances behind his presence at the given time on the spot. His conduct is not normal in that although he saw the appellants throwing abductee in the Rice Canal, but did not try to save him with the assistance of Bashir Ahmed, who allegedly was with him or to raise even alarm to attract the people available to save the deceased or at least to take out of the water his body. Further, it is pointed out in the arguments that the place i.e. City Point Bridge is a very busy place and remains open round the clock with cart pullers selling fruits, vegetables etc. and vendors available with a rush of people. That being a busy place, noticing the incident only by persons, who are somehow related to the complainant, beggars belief and does not inspire confidence.

12. Throwing the abductee by the accused in presence of witnesses and other people itself is not without a suspicion. It is the case of the

prosecution that appellants had abducted the abductee in order to murder him somewhere else away from the sight of people. At the time of abduction, they were armed with deadly weapons, but did not use to murder him in the face of no resistance from the complainant party, is also indicative of this fact: murder him somewhere else away from the people. But strangely, the appellants and other accused kept the deceased with them unharmed for 08 hours (the postmortem report shows that the deceased was not harmed and there was no external injury mark on his dead body) and then came at the busy place of the city to throw him in Rice Canal in order to murder him in presence of witnesses and other people. If intention was to murder the abductee in presence of the people, then the question which troubles mind is that why they did not murder him at the first instance and what was the purpose of his abduction, and why they brought him at a busy place to do what they could have easily done at the time of first incident. These facts and circumstances show that evidence of PW Akbar Ali, who in addition to above, did not even convey information to the police but to the complainant, and the complainant only partially intimating the police, and the police remaining inactive, is not reliable. He is a chance witness and his presence at the spot is not without a doubt. Except the evidence of these 03 witnesses, no incriminating evidence qua nature of allegations and identity of the appellants has come on record to entail any discussion on this point. More so, the case of the appellants is not different than the case of co-accused Nizamuddin, who has already been acquitted by the trial Court on a benefit of doubt.

13. The recovery of pistols from the appellants, as stated above, does not show their involvement with the offences either when the same were admittedly not used/fired by them. The recovery of a mobile phone and university card of the deceased allegedly from appellant Shahid from a field of sugarcane which is not owned by him would not prove the charge against him of abduction and murdering the abductee/deceased. More so, this recovery was made after 04 days of arrest of the appellant in presence of witnesses, who are related to the complainant and were introduced to the prosecution case only after registration of FIR lodged on the 4th day of the incident, without any explanation. This makes such recovery itself unreliable. Therefore, the case against the appellants is not free from doubt. It is settled that when there is a single circumstance creating a reasonable doubt, the benefit of which is to be extended to the accused not as a matter of grace but as a matter of right.

14. I, in view of above discussion, giving benefit of doubt to the appellants Shahid Ali S/o Nizamuddin Daudpoto/Memon and Ghulam Murtaza alias Nadeem S/o Amir Hamzo Memon, acquit them of the charge, **allow** instant appeals, set aside their conviction and sentence, and order their release forthwith if not required in any other custody case. These are reasons of our short order dated 11.09.2023.

Both appeals are **disposed of** in the above terms. Office is directed to place a signed copy of this judgment in the captioned connected appeal.

Abdul Basit

J U D G E