

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 100 of 2019
(*Nadir Ali Khaskheli & others versus The State*)

Date of hearing : **25.09.2023**

Date of decision : **25.09.2023**

Mr. Shabbir Ali Bozdar, Advocates for appellants.
Mr. Ali Ahmed Khan, Advocate for complainant.
Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Through this Appeal, appellants have impugned a judgment dated 22.06.2019, passed by learned 1st Additional Sessions Judge/Model Criminal Trial Court (MCTC), Naushahro Feroze in Sessions Case No.311 of 2013 (*Re: The State versus Nadir Ali and others*), arising out of Crime No.10 of 2012 U/S 302, 147, 148, 149, 114, 504, 337-A(i) PPC, registered at Police Station Kot Mitha Khan, District Naushahro Feroze, whereby they have been convicted and sentenced in the following terms:

- For offence U/S 302(b) r/w 149 PPC to suffer R.I for life as Tazir and to pay Rs.1,00,000/- (One lac) each as compensation U/S 544-A CrPC to the legal heirs of deceased with fine of Rs.50,000/- (Fifty thousand) each, in case of default in payment of fine they shall undergo SI for six months more;
- For offence U/S 147 PPC to suffer R.I for two years and fine of Rs.5000/- each, in case of default in payment of fine they shall undergo SI for one month more;
- For offence U/S 148 PPC to suffer R.I for three years and fine of Rs.10,000/- each, in case of default in payment of fine they shall undergo SI for two months more;
- For offence U/S 504 r/w 149 PPC to suffer R.I for two years and fine of Rs.5000/- each, in case of default in payment of fine they shall undergo SI for one month more;
- Accused Gulzar & Meer Khaskheli are further convicted and sentenced for offence U/S 337-A(i) PPC to suffer R.I for two years and Rs.10,000/- each, as “Daman”.

The above sentences have been ordered to run concurrently, with benefit of Section 382-B CrPC extended to the appellants.

2. As per FIR, there was a running dispute between complainant party and appellants over agricultural land. On the day of incident viz. 26.10.2012 at about 08:00 p.m. when complainant, his brothers Nawab & Zafar Ali and his nephew Shaban (*son of Zafar Ali*) were returning from Mithiani City on two motorcycles, and reached Katcha Path/Road near land of Ghulam Hussain Mastoi, they were waylaid by five (05) persons duly armed with different weapons: hatchet, pistol, guns etc. They were identified in the headlights of motorcycles and moonlight as Nadir, Punhal, Shahbaz (*mentioned in FIR as Shahbazi*), Gulzar, all sons of Mir Khaskheli and Mir Khaskheli himself. No sooner they came, than they started abusing complainant party, and then, appellant Mir instigated his sons not to spare complainant party, upon which appellant Gulzar caused a *lathi* blow to nephew of complainant, namely, Shaban on his head and appellant Mir caused a butt blow of his gun to complainant's brother Zafar Ali on his head. Meanwhile, all remaining appellants overpowered the complainant party and then appellants Punhal and Gulzar dragged complainant's brother Nawab towards the agricultural land where appellant Nadir inflicted him a hatchet blow on his neck, critically injuring him. Complainant party raised cries which attracted PW Aijaz Ali and others, who also identified the appellants. Seeing them, appellants left the scene. Complainant party found injured Nawab in a serious condition, and within their sights, he succumbed to his injuries and died. Thereafter, complainant party took him to hospital for postmortem and appeared at Police Station Kot Mitha Khan, District Naushahro Feroze for registration of FIR.

3. During investigation, appellants Nadir and Punhal were arrested on 30.10.2012. From appellant Nadir, a blood stained hatchet was recovered on 02.11.2012 and from appellant Punhal, a pistol of .30 bore along with four (04) live bullets was recovered on 04.11.2012 on their disclosure to possess the same. The hatchet then was sent to chemical lab for analysis. Appellant Mir was also arrested on 04.12.2015.

4. After usual investigation, Challan was submitted in the Court, on the basis of which, the Charge was framed against the appellants, but they pleaded not guilty and claimed a trial, which prompted the prosecution to produce evidence of witnesses and it in all examined ten (10) witnesses including the ones who had seen the incident firsthand. After the prosecution evidence, statements of appellants were recorded under Section 342 CrPC. They have denied the case therein, but have

not examined themselves on oath or led any defence evidence. At the conclusion of trial, the trial Court has convicted and sentenced the appellants in the terms as stated above; hence, this Appeal.

5. Learned Defence Counsel has argued that appellants are innocent, have falsely been implicated in this case; that there are certain contradictions in the evidence, which have not been appreciated by the trial Court; that in fact this is an unseen incident and appellants have been implicated on the basis of enmity only; that otherwise it is highly improbable for complainant to register FIR within 45 minutes of the incident, keeping in view the distance between Police Station and the place of incident and the fact that initially the deceased was taken to hospital for postmortem report.

6. On the other hand, learned Counsel for the complainant and Additional Prosecutor General both have supported the impugned judgment to the extent of appellant Nadir, who has been assigned specific role of causing death of deceased Nawab. Insofar as the case against remaining appellants is concerned, both have admitted that from the documents and evidence available on record, their presence at the spot appears to be not without a suspicion.

7. I have considered submissions of the parties and perused material available on record. Prosecution has examined complainant as PW-1, he has produced FIR in his evidence, Zaffar as PW-2 and Shoban Ali as PW-3. They are eyewitnesses of the incident and have confirmed in their evidence contents of FIR and the role assigned to each of the appellants, as detailed therein. PW-4 Anwar Ali is the *mashir*, before whom the injuries of the injured persons were inspected and such memo was prepared, which he has produced in his deposition along with relevant memos including arrest of the appellants, recovery of incriminating articles from them etc. PW-5 is the Police Constable, namely, Ali Nawaz, who on receiving information about murder of Nawab, along with SHO, had visited hospital, prepared necessary documents including inquest report/*lash chakas* form etc. and had handed over, under a police docket, dead body of the deceased to complainant party after postmortem.

8. PW-6 is the Tapedar, who on source of complainant had prepared a site plan under the directions of Mukhtiarkar concerned. He has produced the same in his evidence. PW-7 is the Medico Legal Officer,

who had not only examined the injured, but had conducted postmortem of the deceased, which he has produced in his evidence accordingly along with medical certificates of the injured, which show that injured had received minor injuries opined by him as *Shajjah e Khafifah*, bailable and punishable for only two years. PW-8 is the SHO/SIP Hafiz Ali Akbar, who had recorded FIR as per verbatim of the complainant, which he has verified in his evidence and the fact of ensuing investigation including arrest of the appellants, as named above, effecting recovery from them, visiting place of incident, sending the incriminating articles including blood stained earth to chemical lab for a report. PW-9 is ASI Arbab Ali, who had arrested appellant Mir. And PW-10 is Police Constable CIA Muhammad Hassan, who had acted as *mashir* in the arrest of appellant Mir. The appellants in their 342 CrPC statements have simply denied the prosecution case, and have not taken any specific plea in defence.

9. Insofar as role of the appellant Nadir of inflicting a hatchet blow to the victim Nawab on his neck is concerned, the same has been established from the evidence of three (03) eyewitnesses available at Ex.16, 17 and 18. They have convincingly described the details of his role executed by him at the time of incident, which is further supported from the recovery of a blood stained hatchet from him on 02.11.2012 on his disclosure from eastern side of his house. The recovery of incriminating weapon and positive lab report in regard to human blood on it are fundamentally additional pieces of evidences lending support to direct evidence, and which confirm the role of the appellant at the time of incident. There is no ambiguity in this regard, nor any has been alluded by the defence Counsel in his arguments.

10. Appellant is related to the complainant party and very well known to them, his identity in the light of motorcycles and moonlight, which learned defence Counsel has tried to dispute, is a foregone conclusion discarding any chance of suspicion over it. The witnesses have clarified in their evidence, without any demur from opposite side, that they had identified the appellants in the headlights of motorcycles plus there was sufficient moonlight. This assertion of the witnesses has not been challenged in the cross-examination substantially and nothing material either diluting or obliterating its effect has come on record. There is no reason even otherwise, for the complainant party to substitute a real culprit in a murder case, even otherwise a rare phenomenon, with

someone innocent simply on the basis of a dispute over agricultural land unless such dispute has become bloody one and has resulted into murder of some person(s) on either side. The arrest of appellant Nadir and his admission of the offence before the police, not admissible in evidence although, but leading to recovery of the incriminating weapon on his pointation, which is relevant U/A 40 of Qanun-e-Shahadat Order, are the points pointing out finger to his guilt. Although the witnesses have been subjected to a lengthy cross-examination, but in my view, insofar as the role of appellant Nadir is concerned, no material contradiction or discrepancy has come on record to give its benefit to him. He was present at the spot armed with a hatchet is established and within the sight of complainant party had caused a fatal blow to deceased Nawab's neck, as is borne out of the record, which the medical evidence further confirms as is perceivable from a perusal of the postmortem report. He appears to be guilty of the offence and insofar as conviction and sentence awarded to him by the trial Court is, no misappreciation of evidence or wrong assumption has been indulged to justify interference by this Court. I see therefore no reason to reverse the findings of the trial Court insofar as determination of the act of appellant Nadir and the consequence he has been visited with by the trial Court is concerned.

11. Notwithstanding, the case against the remaining appellants is not free from a doubt. The memo of place of incident (*Ex.20/C*) clearly indicates that there were footmarks of only five (05) persons. The complainant party has stated that they were four (04) persons and they were waylaid by five (05) persons, duly armed with weapons. If this statement is assumed to be correct, there should be footprints of at least nine (09) persons. But as the memo reflects there were footmarks of only five (05) persons. Implying therefore to the fact that apart from complainant party, consisting of four (04) persons, there was only one (01) person, who was armed with some weapon and who killed deceased Nawab. The complainant party has tried to establish the case against the remaining appellants by making them responsible for the injuries caused to PWs Shaban and Zafar Ali, but the Medico Legal Officer, in his evidence, has clarified that both the persons were examined by him on 26.10.2012 at 10:30 a.m., which is before the incident, which is said to have taken place at about 08:00 p.m. on the same date. Along with his deposition, he has also produced copies of Provisional Medical Certificates, wherein also, the time of examination of the injured is

marked as 10:30 a.m. and not after the registration of FIR at 08:45 p.m. Although on prosecution's request, the Doctor was declared hostile, but no relevant question over these facts was asked from him, as admitted by learned Counsel for the complainant and Additional Prosecutor General to shed any light on this important aspect of the case. His being declared as hostile witness has not worked out in favour of prosecution in any manner, but on the contrary, it has reinforced the suspicion that these injuries were manipulated and assigned to remaining appellants to show their presence at the place of incident, which, from the memo of place of incident, does not seem to align with the story. This appears to be the reason why even the learned Counsel for the complainant and Additional Prosecutor General both have not supported the conviction and sentence awarded to them.

12. Hence, I am of the view that as far as appellant Nadir Ali is concerned, the prosecution has proved its case against him beyond a reasonable doubt by leading not only direct evidence against him which to his extent has remained unchallenged, but also circumstantial and supporting evidence in the form of recovery of incriminating articles from him and medical reports. Nonetheless, as far as the case against remaining appellants is concerned, I am of the view that prosecution has not proved its case against them beyond a reasonable doubt, as discussed above. It is settled that when a doubt is created in the prosecution's case in respect of role of any of the accused, then it becomes his right to be given benefit thereof. Therefore, while **dismissing** this appeal to the extent of appellant Nadir Ali S/o Mir Khaskheli and maintaining his conviction and sentence as recorded by the trial Court, the appeal in respect of remaining four (04) appellants is **allowed**. Their conviction and sentence awarded by the trial Court are **set aside**. Consequently, appellants (i) Punhal (ii) Shahbaz (iii) Gulzar, all sons of Mir Khaskheli and (iv) Mir S/o Ghazi Khan Khaskheli are **acquitted** of the charge. They shall be released forthwith by jail authorities, if not required in any other custody case. These are reasons of my short order dated 25.09.2023, whereby this Appeal in above terms was partly allowed and partly dismissed.

The appeal is **disposed of** in the above terms.

J U D G E