IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Appeal No. S – 04 of 2019

(*Illahi Bux alias Gurglo Qambrani versus The State*)

Date of hearing : **14.05.2024**

Date of decision : **14.05.2024**

Mr. Shabbir Ali Bozdar, Advocate for appellant.
Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Initially, the appellant and four (04) other accused were charged for committing murder of deceased Lal Bakhsh with common intention by means of firearm injuries in Town Naseer Faqeer Jalalani, near a shop of Ghulam Shabbir Wassan on 01.06.2007 at 06:00 pm. FIR (*Crime No.85 of 2007 of Police Station Kotdiji, District Khairpur u/s 302, 148, 149 PPC*) was registered on the same date at about 1930 hours after about 01 and half hour of the incident. Complainant in it has referred to a running enmity between the accused and his side as a motive for the offence. He has revealed that five (05) accused armed with pistols including the appellant accosted deceased Lal Bakhsh when he was present at the pointed place and directly fired upon him. He, however, sustained a through and through firearm injury on his chest from the fire made by the appellant from a country-made pistol and died as a result.

2. In the investigation, only appellant was arrested on 22.06.2007, and from him alleged crime weapon was recovered on 29.06.2007. Hence, he was booked in Crime No.120 of 2007, registered at Police Station Bagreji, District Sukkur u/s 13(e) of Pakistan Arms Ordinance, 1965.

3. After submission of Challan, all the accused joined trial, and during its pendency, all were granted bail including appellant. To a formal charge, they pled not guilty; hence, prosecution examined as many as seven (07) witnesses. Out of these witnesses, witness No.1, 2 and 3 (*Mir Khan, Muhammad Hassan and Ghulam Nabi*) are the eyewitnesses. The witnesses otherwise have produced all the relevant documents in proof of the charge. Thereafter, statements of appellant and others u/s 342 CrPC were recorded. They have denied the charge and professed innocence. At the end of the trial, by impugned judgment dated 14.06.2013, all the accused were acquitted except appellant. He was awarded sentence of imprisonment for life u/s 302 (sic). PPC

and direction to pay compensation of Rs.1,00,000/- (*Rupees one lac*) to the legal heirs of deceased Lal Bakhsh, or in default thereof, to suffer one year more RI.

4. He challenged the same by filing an appeal (*Cr. Jail Appeal No. S-40 of 2013*) before this Court. His case on hearing was remanded on 03.07.2017 with directions to the trial Court to conduct cross-examination of PW-4 Qadir Bux and PW-5 SIO Abdul Sami Waseer afresh, and to record statement of accused u/s 342 CrPC strictly in accordance with law by putting all incriminating pieces of evidence to him including motive, for his explanation / reply. At the same time, the prosecution was set at liberty to produce the chemical and ballistic reports before the trial Court through IO. The accused was also allowed to cross-examine the prosecution witnesses with regard to above documents. The compliance was made and again vide judgment dated 27.11.2018, impugned here, passed by learned Additional Sessions Judge-I, Khairpur, Sessions Case No.294 of 2007, the appellant has been returned guilty verdict and visited with the same punishment: imprisonment for life u/s 302(b) PPC and Rs.2,00,000/- (*Rupees two lac*) as compensation to be paid to the legal heirs of deceased Lal Bakhsh, as required u/s 544-A CrPC, or in default thereof, to undergo SI for three months more, with benefit of Section 382-B CrPC.

5. I have heard learned Counsel for the appellant and learned Additional Prosecutor General, and perused the paper book with their assistance. The jail roll of the appellant, called on 14.05.2024, exhibits that he had remained in jail for 13 years, 08 months & 17 days, has earned remissions of 10 years, 02 months & 21 days, and his unexpired portion was only 01 year, 03 months & 22 days.

6. Complainant, in his evidence, has stated that all five (05) accused armed with pistols had directly fired upon deceased, and in second breath has disclosed that the deceased had died on receiving fire shot injury by the appellant Illahi Bux. PW-2 Muhammad Hassan, who is also an eyewitness, in his examination-in-chief, has stated that within their sight appellant Illahi Bux had made a direct fire upon deceased Lal Bakhsh. He does not say that all the accused had directly fired upon the deceased, as has been claimed by the complainant and revealed in FIR. Whereas, PW-3 Ghulam Nabi, who is also an eyewitness, has stated in evidence that all the accused had made direct firing upon deceased Lal Bakhsh. However, the fires shot made by accused Illahi Bux had hit deceased Lal Bakhsh. He does not say that a single fire but **fires** were made by accused Illahi Bux, and they had hit deceased Lal Bakhsh. This is not even the prosecution’s case that Illahi Bux, who was armed with a country-

made pistol, had made more than one fire hitting the deceased, who had sustained only a single firearm injury.

7. There is apparent confusion in the evidence of all three eyewitnesses over this point. Complainant says that all accused had made direct firing upon the deceased, but a fire made by appellant had hit the deceased, whereas, PW-2 states that there was only one fire made at the place of incident upon the deceased. His testimony shows that although the other accused were present and armed with pistols, but they had not resorted to any firing, which is contradictory to story of the FIR. On the other hand, PW-3 claims in evidence that although the fires were made by all the accused, but the fires (**plural**) made by accused Illahi Bux had hit the deceased. But be that as it may, it has not been explained how the witnesses were able to identify and follow trajectory of bullets / pallets and assert that the fire of appellant had hit the deceased on his chest. It would not be humanly possible for a witness to identify a particular bullet / pallet from among five bullets / pallets shot by five (05) different persons simultaneously and say that it was that particular bullet / pallet fired by that specific accused, which had hit the deceased. The trial Court, while appreciating the evidence, has completely overlooked this inherent weakness in the prosecution's case and recorded conviction against the appellant.

8. Next, although it is alleged that recovery of a pistol was effected from the appellant, but there is no FSL report issued by a lab identifying the said pistol with the only cartridge recovered from the place of incident. Recovery of only one cartridge from the place of incident also runs against prosecution's story in that the complainant and PW-3 have assigned the role of direct firing on the deceased to all the accused, five (05) in number. By this calculation, there ought to have been five empties available at the spot. When the empty casings of bullets, allegedly fired by four (04) other accused, were not found at the place of incident, it would make such pat of story: all the accused had made firing upon the deceased highly doubtful. And it would show that there was only a single accused present at the spot. But the complainant and other witnesses by alluding to presence of five accused have tried to make improvement in the case and thrown a wide net to include as many people as possible who, as a result, in fact went through entire rigor of the trial and acquitted by the trial Court only on its culmination. It is apparent that either complainant and other witnesses are not the truthful witnesses in describing the story or they were not present at the spot at the relevant time.

9. Further, the case was remanded by this Court to the trial Court to record among others statement of appellant u/s 342 CrPC in accordance with law. But

it seems that such directions fell on deaf ear of the trial Court. Unnatural death of the deceased established through the postmortem report is an important and substantial piece of evidence, as it is the only evidence which confirms murder of the deceased. But this very question has not been asked from the appellant in his 342 CrPC statement.

10. Further, the recovery of empty from the scene, the important piece of evidence supporting the prosecution's case vis-à-vis firearm injury made by a country-made pistol has not been put to the appellant in his 342 CrPC statement. Further, the motive part of the story that this offence was committed because there was a previous enmity between parties and the deceased had committed murder of a person from the side of accused party has neither been established in evidence by the prosecution by producing relevant record, nor it was confronted to the appellant at the stage of recording of his statement u/s 342 CrPC. It is settled that if a certain piece of evidence is not asked or confronted to the accused in his statement u/s 342 CrPC for the purpose of seeking his explanation, it would not be considered as an incriminating evidence for recording conviction against him. In the present case, the trial Court while recording conviction and sentence to the appellant has relied upon unnatural death of deceased, which can only be established through postmortem report and recovery of one cartridge from the place of incident, but it has not confronted the same to the appellant.

11. The evidence of remaining witnesses i.e. IO as well as Medico Legal Officer or *mashir* is only supportive in nature. Such evidence neither identifies the appellant as a culprit, nor improves the case against him beyond what is stated by the eyewitnesses. The finding of IO holding the appellant guilty in the investigation is mainly based on 161 CrPC statements of the eyewitnesses whose evidence, as discussed above, does not inspire confidence insofar as role of appellant, presence of acquitted accused, firing by them all at the deceased simultaneously, and their claim that it was a fire of only appellant which had hit the deceased is concerned. When a holistic view of such evidence is taken, the case against the appellant appears to be suspicious, not free from a doubt.

12. It is settled principle of law that if there is a single circumstance creating doubt, its benefit has to be extended to the accused not as a matter of grace but as a matter of right. Here, in the present case, the above discussion shows that there are a number of factors creating doubts in the story prosecution has set up in order to bring home charge against the appellant. When considered all

these facts and circumstances, case of the prosecution against the appellant does not appear to be free from a doubt.

13. Accordingly, this appeal is **allowed**. Conviction and sentence awarded to appellant vide impugned judgment are **set aside**. Consequently, the above named appellant is **acquitted** of the charge and he shall be released forthwith by jail authorities, if he is not required in any other custody case.

These are the reasons of my short order dated 14.05.2024.

J U D G E

Abdul Basit