THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Jail Appeal No.D-**37** of 2021
(***Ayaz Ali Abro v. The State***)

Confirmation Case No.D- **05** of 2021
(***The State v. Ayaz Ali Abro***)

Crl. Acquittal Appeal No.S-**94** of 2021
(***Mst. Sanna Abro v. Abdul Raheem & others***)

Present
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Arbab Ali Hakro.

Ms. Rizwana Jabeen Siddiqui, Advocate for appellant in Crl. Jail Appeal No.D-37 of 2021 and for appellant/complainant in Crl. Acquittal Appeal No.S-94 of 2021.

Mr. Qurban Ali Malano, Advocate for appellant in Crl. Jail Appeal No.D-37 of 2021.

Mr. Naeemuddin Chachar, Advocate for complainant in Crl. Jail Appeal No.D-37 of 2021.

Mr. Zulfiqar Ali Jatoi, Additional P.G for the State.

Date of hearing(s): **15.05.2024**
Date of decision: **30.05.2024**

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- Appellant Ayaz Ali and his father Abdul Latif (since dead) were charged for committing *Qatl-i-Amd* of deceased Asmatullah, aged about 17 years near house of complainant, his father, situated in Deh Adilpur-Ghotki by causing him lathi and firearm injures on 09.04.2015 at 1700 hours. They were tried against the said charge by learned 1st Additional Sessions Judge (MCTC), Ghotki and have been returned guilty verdict in the terms, whereby appellant Ayaz Ali has been convicted and sentenced to death under section 302(b) PPC and to pay compensation of Rs.5,00,000/- under section 544-A CrPC. Whereas, his father Abdul Latif has been condemned to imprisonment for life under section 302(b) PPC vide impugned judgment. They both separately filed jail appeals before this Court, which were admitted and decided to be taken up along with Confirmation Case No.05 of 2021, sent in terms of section 374 CrPC by the trial Court.

2. During pendency of the appeals, father of appellant Ayaz Ali, namely, Abdul Latif died in jail and such report was submitted in the

Court by jail authorities on 27.02.2022. In the light whereof, the appeal against him was abated under section 431 CrPC vide order dated 30.03.2022 and disposed of accordingly. Hence, appeal filed by appellant has been heard along with Confirmation Case and Crl. acquittal appeal No.S-94 of 2021, filed by wife of appellant against a judgment rendered by the same Court on the even date viz. 03.04.2021, whereby it has acquitted accused (the complainant party) in Sessions Case No.511 of 2015, Crime No.32 of 2015 of P.S, Adilpur, purported to be a counter case to the case registered against the appellant and his father.

3. Complainant has alleged in FIR registered on 10.04.2015 at about 1700 hours that accused party had a dispute with his son Asmatullah, and they had threatened him of dire consequences. On 09.04.2015, when he along with his said son, Jahangir another son, and nephew Siraj Ahmed were standing outside their house at about 5:30 pm. accused Abdul Latif armed with a lathi and appellant armed with a gun came over there and referred to their on-going dispute with Asmatullah. And then, accused Abdul Latif caused him lathi blows on different parts of his body, meanwhile, appellant made straight fires upon him. He fell down and both the accused left the scene. Complainant seeing his son critically injured with firearm injuries on different parts of his body took him to P.S for a letter and thereafter went to Taluka Hospital, Ghotki for his treatment. But due to his serious condition, he was referred to Sukkur Hospital. While he was being taken there, he succumbed to injuries and died on his way. Complainant conveyed such information to the police and brought his dead body at Taluka Hospital, Ghotki for a postmortem. After such procedure, he went to his village, buried his son and then appeared at PS to file a report as above.

4. In investigation, both the accused were arrested on 14.04.2014 and 15.04.2015 and from them a lathi and a DBBL gun, alleged crime weapons, were recovered respectively. After the Challan submitted in the Court, a formal charge was framed against the accused, they denied it and opted for a trial. Hence, the prosecution has examined ten witnesses, who have produced all necessary documents viz. FIR, different memos, postmortem report, FSL report, site plan etc. After their evidence, statements of appellant and his

father Abdul Latif were recorded. They denied the charge and in defence examined themselves on oath, besides, examining Ms. Sanna, wife of appellant, as a defence witness.

5. Learned trial Court after hearing both the parties and appreciating the evidence rendered the impugned judgment in the terms as stated above, which the accused challenged by filing two separate jail appeals, but due to death of convict Abdul Latif, one has already been disposed of.

6. Learned defense counsel have argued that the prosecution case is full of inconsistencies and contradictions; the complainant in cross-examination has revealed a story which is in conflict with the version he has disclosed in FIR; the charge does not contain necessary particulars and hence is in violation of section 222 CrPC; there is delay of one day in registration of FIR, which has not been explained by the complainant; title of FIR shows the time of incident as 1700 hours on 09.04.2015, whereas, as per evidence of complainant and other witnesses, incident had taken place at 1730 hours, which makes the case from the very inception: registration of FIR as doubtful and manipulated; the medical evidence runs contrary to oral version of the incident; there are inconsistencies and incongruities over local of injuries between medical evidence and oral account; motive part of the story has not been established; the IO has failed to find out real owner of the gun allegedly recovered from the appellant because as per defense version deceased had died from firing of one Abdul Raheem, his accomplice, who had attacked the accused party inside the house, but instead of hitting them had hit the deceased; so many contradictions in evidence of witnesses have made the prosecution case highly doubtful.

7. They further submitted that recovery of allege gun has been foisted upon the appellant as nothing was recovered from him, and he has no concern with the offence. According to them, a counter FIR No.32/2015 u/s, among others, 364, 324, 452 & 382 PPC was got registered by wife of the appellant against complainant party disclosing the facts that they had barged into house of appellant and one Abdul Raheem had fired upon appellant and other inmates that however had hit deceased Asmatullah. Thereafter her husband/ appellant had approached the police for FIR, but it was not recorded

under influence of complainant party. Hence, this case being of two versions, one put forward by the appellant, he is entitled to such benefit. They further submitted that version of Mst. Sanna, wife of appellant is established from admission of complainant and witnesses in this regard in their own evidence. In support of their contentions, they have relied upon the cases reported as **2000 SCMR 1859, 1980 SCMR 225, 2001 SCMR 424, 2000 SCMR 683, 1996 SCMR 167, 2017 SCMR 596, 2021 SCMR 736, PLD 1995 SC 526, PLD 1963 805, 1980 SCMR 126, 2006 YLR 359, 2000 PCrLJ 367, 2003 YLR 1607, 2000 PCr.LJ 850, 2000 SCJ 248, PLJ 2000 SC 491, 1984 PCrLJ 331, 2006 NLR CrLJ 492, 2003 NLR A.C 770 & 1995 PCrLJ 765.**

8. On the other hand, leaned counsel appearing on behalf of complainant and learned Additional P.G have opposed the arguments in defence and have submitted that there is unimpeachable evidence against the appellant. There are no major contradictions in the evidence of witnesses and the inconsistencies highlighted by learned defense counsel in arguments are minor in nature which transpired due to lapse of time between the incident having occurred in the year 2015 and the evidence recorded in the year 2020, after five years. They have relied upon **2001 SCMR 726, 2015 SCMR 864, 2015 SCMR 423, 2008 SCMR 1228, PLD 2005 SC 40, 1998 SCMR 1823, 2011 SCMR 872, 2007 SCMR 91, 1995 SCMR 1776, PLD 2015 SC 145, 2018 YLR 1702 & 2007 PCrLJ 173**.

9. We have considered submissions of parties and perused material available on record including the case law cited at bar. Prosecution has examined at least three eyewitnesses in this case. First is complainant, father of deceased, second is Jahangir, a brother of deceased, and third is Siraj Ahmed, a cousin of deceased. Complainant in his evidence has reiterated all the facts disclosed by him in FIR that on the day of incident viz. 09.04.2015 at about 5:30 pm. when he along with PWs and deceased was standing outside of their house in the street, the appellant and his father armed with a gun and a lathi respectively accosted them and called Asmatullah out due to previous dispute between them over the street. Then they cautioned everyone stating they will not spare him. Saying so, accused Abdul Latif caused lathi blows on his forehead and thumb of

right foot. Whereas, appellant directly made fires from his gun hitting different parts of his body i.e. thigh of right leg, head and knee of his left leg. He has also deposed that when accused left, he took the injured first to PS Adilpur for a letter and from there to Taluka Hospital Ghotki for treatment. When, due to his critical condition he was referred to Civil Hospital, Sukkur, he took him there, but on the way, he succumbed to injuries and died. After which, he brought the dead body to Taluka Hospital, Ghotki for a postmortem and completion of other procedural formalities.

10. Complainant's evidence has materially been supported by PWs Jahangir and Siraj Ahmed on all important facts. They have repeated the same story in evidence without swerving on any crucial point. Their lengthy cross-examination has not yielded any aberration casting doubt over the version of the incident. There are no material contradictions in their evidence eroding essence of the scene and the role ascribed to appellant and his late father. They all are spot on in describing the manner of scene as it unfolded before them right from arrival of the appellant and his father, challenging the deceased and causing him fatal injuries to registration of FIR. Learned defense counsel emphasized that complainant in cross-examination has admitted to so many discrepancies that are contrary to version in FIR. It may be said that he in replies to different suggestions in cross-examination has given a detail of the story which otherwise does not find place in the FIR. Learned defense counsel has tried to depict the same as contradictions by saying that these facts are neither mentioned in FIR or in 161 CrPC. Needless to say, purpose of FIR is to record firsthand information as it is received and then set the law at motion to verify its correctness or otherwise. It is neither considered a substantial document, nor is it required to have all the minute detail of the incident. Hence, facts revealed in replies to questions in cross-examination-- not found specifically incorporated in FIR-- would not reduce authenticity of such document. Nor the same would be treated as contradiction to the facts contained in the FIR.

11 Further, on the point, it is said that examination-in-chief of a witness is mainly confined to narration rooted either in FIR or statement u/s 161 CrPC. While scope of cross-examination is wider

that than. In cross-examination, suggestions extraneous to facts are sometimes made to the witness and in reply they make statements with no concern with the facts in the FIR or 161 CrPC statements. But, it does not mean that defense can be allowed to turn around and say: look at these facts, there are not mentioned in the FIR and therefore shall be treated as contradictions. A disclosure made in reply to irrelevant suggestions in cross examination different than the fact in FIR or 161 CrPC statement would not be construed as a contradiction obliterating authenticity of FIR or the version recorded in examination-in-chief.

12. Next question raised by learned defense counsel is over time of incident recorded as 1700 in the FIR. It does not appear to be material one either. This time has been recorded by scriber of FIR, a police official, and has nothing to do with the facts informed by the complainant to him. The version of the scene narrated by complainant appears in the body of FIR and it is actually what is important for determining actual time of the incident. In this case, complainant has described the time of incident as 1730 hours in FIR. He and his witnesses have stuck to this timing in their evidence also. There is nothing to show that any ambiguity was created by the complainant while narrating the facts of the case for FIR over timings of incident, nor anything has been suggested in his cross-examination to establish the same. Seen thus, mention of 1700 hours on the top of FIR by its scriber is held to be immaterial and irrelevant having no nexus with merits of the case or time of its happening. Further on the basis of such irregularity, sanctity of FIR cannot be suspected or entire prosecution case set up in the wake of such FIR considered as doubtful.

13. The evidence of other witnesses including Mashirs, Medico-Legal Officer, IO of the case, and Tapedar is also found up to the mark. There is no vagueness in them. PW-4 Muhammad Ishaque, a *Mashir* has revealed in evidence about preparation of all relevant memos. He has further confirmed that in his and other *Mashir*'s presence, all the formalities were completed, injuries of deceased were inspected by the police, and in Taluka Hospital, Ghotki, Danishnama etc. were reduced in writing. In evidence, PW-5 SIP Muhammad Ayoub, first I.O, at Exb.11, has confirmed preparation of

all necessary documents in presence of mashirs, visiting hospital for inspection of dead body and completing all requirements there. PW-6, HC Qurban Ali, corpse bearer, has revealed in evidence relevant facts including handing over dead body of deceased to complainant after postmortem. PW-7 SIP Roshan Ali Seelro, the second IO has conducted entire investigation: examining witnesses u/s 161 CrPC, arresting the accused, recovering three empty cartridges from the place of incident, preparing the memos, sending recovered gun to a lab at Larkana for FSL report. He has produced all such documents in evidence including all lab reports. PW-8, HC Muhammad Ramzan, is the one in whose presence IO had arrested appellant and recovered a DBBL gun from him. Evidence of PW-9 Tapedar Abdul Ghafoor Shaikh is to the extent that he had visited place of incident in presence of *Mashirs* and prepared such report and a sketch. Since Medico-Legal Officer concerned had died, his colleague CMO, Dr. Asif Hakeem has been examined as PW-10 at Exh.16. He has produced postmortem report of deceased containing at least five injures, out of which three have been described to have been caused to him by firearm, whereas, remaining two are lacerated wounds on his forehead and big toe of right foot.

14. Evidence of all such witnesses has been recorded by prosecution to support eye account furnished by complainant and the witnesses. These all witnesses have also been subjected to a lengthy cross-examination, but have not waivered or faltered on any of aspects of the case performed by them in investigation to induce an element of suspicion over the chain of events starting from the actual incident to filing of the Challan in the Court. Every one of them has satisfactorily stuck to his role and has adduced evidence relevant to input contributed by him in his respective position supporting essentially the prosecution case. Their act is confined to collecting relevant material in the investigation for weighing prosecution story. The inconsistencies or contradictions, highlighted by defence counsel, are minor in nature and do not have any impact over merits of the case or the salient features of the prosecution story.

15. There is no shocking or unconscionable contradiction made by any of the witnesses in evidence which can make the prosecution

case as doubtful. The minor discrepancies like as to who had gone with complainant to PS for registration of FIR or who had taken deceased to the hospital or PS for obtaining a letter for treatment etc., highlighted in arguments, do not make prosecution story unreliable or having been manipulated against the appellant. Not the least, when the appellant does not deny its happening. The fact that wife of appellant happened to lodge an FIR claiming that deceased had died with firing of one Abdul Raheem, his collaborator, on the very day at the same time inside her house would imply that the incident is not disputed. However, her assertion that deceased had died mistakenly from firing of Abdul Raheem has been proved neither by her in the trial, nor by the appellant despite examining himself on oath and his wife as a defence witness.

16. Learned defense counsel has also laid much emphasis on this story and argued that deceased had died from the firing of his own man namely Abdul Raheem. But he did not offer any tenable proof in this regard. The trial arraigning the complainant party on these facts has already been lost. Defense evidence led on such narration by the appellant in this case has not inspired confidence of the Court either. Therefore, we do not find such argument persuasive. More so, deceased had not sustained only one firearm injury-- but three firearm injuries-- to think he was hit by mistake by accomplice in some scuffle with the appellant party. A person can by mistake hit his partner in crime once but not thrice. It would not appeal to common sense that he would fire three times from his gun on his adversary and all the times he would hit his fellow instead of his rival and then would leave the scene without causing any scratch to him. The deceased had three firearm injuries on his person, not a single one to assume that it might have been caused to him by his accomplice namely Abdul Raheem.

17. Further, claim of appellant and his wife that incident happened inside their house is not born out of any record. All the relevant memos show that incident had happened outside in the street, wherefrom all the relevant recoveries: empties, bloodstained earth at al. were made. It may be mentioned that appellant and complainant party are closely related. It was stated by learned defense counsel that appellant is a real son of a sister of complainant and their

houses are situated adjacent to each other. Therefore, naturally the area outside the house of accused would be the same area outside the house of complainant. Making a reply in cross-examination to a suggestion that the incident had happened outside the house of accused by the complainant, argued by defense counsel to be a contradiction, would not make occurrence and its place different than the one as described by the prosecution and such revelation as a contradiction.

18. As we have already observed above that the occurrence is not disputed by the appellant. It is the manner in which it happened has been called into question by him. It is settled that burden to prove charge is upon the prosecution. But when a particular plea is taken up by accused in defense casting cloud over the very story set up against him by the prosecution, the proof of the same is upon him to establish. Here, the appellant accepts the incident but blames one Abdul Raheem, an alleged accomplice of complainant party for it. But he has miserably failed to prove the same. The case registered by wife of the appellant on the basis of such assertion has ended in acquittal. Against which, an acquittal appeal has been filed that although has been heard together with the case in hand, but nothing, as pointed out by her counsel, tends to indicate mis-appreciation of evidence by learned trial Court or it losing sight of some incriminating material while acquitting the accused to justify interference by this Court in the shape of upsetting such findings, particularly when due to acquittal already a double presumption of innocence runs in favour of the respondents.

19. Learned counsel in defense also raised a question over validity of the charge against the appellant by arguing that it does not contain necessary particulars as mandated by Sec. 222 CrPC and therefore the trial against the appellant is vitiated. The *ibid* provision of law mandates that the charge shall contain particulars as to time, place of the alleged offence and the person against whom or the thing against which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. A perusal of charge in this case shows that all these fundamental have been incorporated therein in such a manner, which is reasonably sufficient to give notice of the crime to the appellant he has been charged with.

He did not appear to have been misled in understating the offence, he was required to defend, nor did his conduct in the trial, at any stage, indicate overtures pointing to his having any difficulty in putting up defense on account of any ambiguity in understating the charge. Be it cross-examination of the witnesses, or leading his own defense or examining the defense witness, the appellant seems to conduct such questions and make such statements that are sufficient to depict his befitting and adequate knowledge of the facts pertaining to crime he was called upon to defend in the charge. Furthermore, there is clear-cut scheme u/s 537 CrPC: no finding, sentence order passed by a competent court of law shall be reversed on account of any error, omission or irregularity in the mode of trial, including any misjoinder of charges unless such error, etc. has in fact occasioned a failure of justice. In presence of such arrangement in law when the appellant has failed to point out that either he was misled in understating the charge or that such misunderstanding has in fact occasioned failure of justice qua his guilt, the sentence order recorded by the trial court against him is not liable to be reversed and converted into his acquittal.

20. Learned Additional P.G, however, in his arguments has conceded that the prosecution has failed to prove motive part of the story and it shall be considered in favour of the appellant while determining quantum of the sentence. In support, he has relied upon a judgment of Supreme Court reported as *Amanullah and another v. The State and others* **2023 SCMR 723** and stated that when the motive is not proved and the parties are closely related to each other, maintaining of death penalty to appellant would be harsh and not justified. This does not seem to us to be unconscionable proposition in the given facts and circumstances of the case, not the least when it has not been heartily opposed by counsel of the complainant.

21. Consequently, in the light of above discussion and while following the dictum laid down in the cases of *Amanullah and others* (**supra**), we maintain conviction of the appellant u/s 302(b) PPC but alter his sentence of death and convert it to imprisonment for life. He is directed to pay compensation of Rs.5,00,000/-(Five Lac), as determined by the trial Court, to the legal heirs of the deceased under Section 544-A CrPC, and in case of default, he shall undergo SI for

six months more, as ordered by learned trial Court. However, benefit of section 382-B CrPC is extended to him. With such modification in the quantum of sentence to appellant Ayaz Ali Abro, Crl. Jail Appeal No.D-**37** of 2021 is **dismissed**. Consequently, death reference (Confirmation Case No.D-**05** of 2021) is hereby replied in negative and is accordingly **disposed of**. Whereas, Crl. Acquittal Appeal No.S-**94** of 2021 is accordingly **dismissed.**

Office to place a signed copy of this judgment in captioned connected matters.

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