IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Jail Appeal No.S-38 of 2022

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Present:
Mr. Justice Zulfiqar Ali Sangi.

Appellant: Qaimuddin son of Bakhtaro @ Bakhat Ali by caste Samejo
Through Mr. Tanveer Abbas Shah, Advocate

State through: Mr. Zulfiqar Ali Jatoi, Addl. P.G. assisted by Mr. Ubedullah Ghoto advocate for complainant

Date of hearing: **19.02.2024**
Date of decision: **22.03.2024**

J U D G M E N T

Zulfiqar Ali Sangi, J.– The appellant/accused has preferred instant Crl. Jail Appeal through Superintendent Central Prison and C.F Sukkur wherein he has impugned the judgment dated 18.04.2022 passed by the 1st Additional Sessions Judge/MCTC Ghotki, in Session Case No. 102/2014 (Re-State vs. Qaimuddin and others) arising out of FIR No. 218 of 2013 for offence u/s 302, 337-H (ii) & 34 PPC registered at Police Station Daharki, whereby appellant/accused Qaimuddin was convicted and sentenced for offence U/S 302 (b) r/w Section 34 PPC to suffer RI for life as Tazir and to pay compensation of Rs. 500,000/- to the legal heirs of deceased Rab Nawaz in terms of Section 544-A Cr.PC. In case of default of payment of compensation amount, the appellant/accused shall undergo S.I for six months more. The appellant/accused Qaimuddin was also convicted and sentenced for the offence U/S 337-H(ii) r/w Section 34 PPC to suffer SI for two months as with the benefit of 382-B Cr. P.C, hence he has preferred instant appeal.

2. Precisely, the case of prosecution as unfolded in the FIR lodged by complainant Mst. Rabia at PS Dharki on 18.12.2013 at 1210 hours are that Rabnawaz was her husband, from whom his nephew Qaimuddin was demanding share of land, but her husband refused to give undue share to him as according to Faisla of brothery there was no share of Qaimuddin, on that he was annoyed and issued threats of dire consequences. On 16.12.2013 in the evening, when her husband was available outside of the house, it was about 05.30, she heard noise, hence she along with nephew of her husband namely Khalid Hussain and relative Khair Muhammad came out of house, where they saw and identified accused ***Qaimuddin Samejo (appellant)***, Amanullah Samejo armed with pistols, Nooruddin Samejo having lathi and an un-known person having pistol arrived. Accused Qaimuddin asked the complainant party not to come near to them and they will commit murder of Rabnawaz, therefore complainant party due to fear of weapons remained silent. Then accused

Amanullah fired from his pistol with intention to commit murder, which hit Rabnawaz on his left leg, while accused Qaimuddin fired from pistol upon Rabnawaz which hit him on left side of back, who after receiving injuries fell down. The un-known accused stated that Rabnawaz is still alive and he be murdered, upon this the accused Nooruddin caused lathi blow which hit him near his left eye, thereafter accused went away while restoring aerial firing to create harassment. Complainant party saw that Rabnawaz had received one firearm injury on his left side of back, with its exit from nipple, one firearm injury on his left leg through and through, whereas they found one lathi injury on upper portion of left eye, there was bleeding and the injured succumbed to injuries on spot. Complainant with the help of PWs shifted the dead body to Taluka Hospital Daharki where post mortem of the deceased was conducted and dead body was handed over to the complainant party. After burial and on completion of funeral ceremonies complainant went to PS and lodged the FIR as stated above.

3. On the conclusion of usual investigation, challan was submitted against the accused for offence U/S 302, 337-H(ii) & 34 PPC.

4. After completing legal formalities, the trial Court had framed charge against appellant/accused to which he pleaded not guilty and claimed to be tried.

5. In order to prove accusation against accused, the prosecution has examined 09 witnesses, they have produced certain documents and items in support of their evidence. Thereafter, the side of the prosecution was closed.

6. The appellant was examined under section 342 Cr.PC, wherein he has denied the allegations leveled against him and pleaded his innocence. After hearing the parties and assessment of the evidence, the trial Court convicted and sentenced the appellant/accused as stated above, against the said conviction appellant/accused has preferred this appeal.

7. Learned counsel for appellant/accused contended that the appellant has been falsely implicated in the present case by the complainant party due to admitted dispute over share of property; that the witnesses being closely related to the deceased are interested witnesses hence they have falsely deposed against the appellant /accused; that the evidence adduced by the prosecution at the trial is not properly assessed and evaluated by the trial Court which is insufficient to warrant conviction against the appellant/accused; that the trial Court has failed to appreciate the factual as well as legal aspects of the case while convicting the appellant/accused; that the material contradictions appeared in the statements of prosecution witnesses on crucial

points, but those have not been taken into consideration by the learned trial Court while passing the impugned judgment; that the judgment passed by the trial Court is perverse and liable to be set-aside. Lastly, he prayed that the appellant/accused may be acquitted by extending him the benefit of doubt.

8. Conversely, learned Addl. P.G. appearing for the State assisted by Mr. Ubedullah Ghoto, learned counsel for complainant has opposed the appeal on the ground that appellant/accused has assigned the specific role of causing firearm injuries to the deceased Rabnawaz; that medical evidence is consistent with the ocular version; that all the necessary documents memos, FIR including post mortem report have been produced; that prosecution has successfully proved its case against the appellant/accused beyond a reasonable doubt and all the witnesses have fully implicated the appellant/accused in their evidence recorded by the trial Court; that during the cross-examination the learned counsel had not shaken their evidence; that there are no major contradictions in the evidence of prosecution witnesses. Lastly, he submitted that appellant/accused was rightly convicted by the trial Court and prayed that appeal of appellant/accused may be dismissed.

9. I have heard learned Counsel for the appellant/accused, learned Additional P.G. for the State as well as learned counsel for the complainant and have examined the record carefully with their able assistance.

10. As per the case of prosecution occurrence in this case, took place on 16.12.2013, at 05.30 p.m, the matter was reported to police on 18.12.2013, at 1210 hours. The distance between police station and place of occurrence is about 3/4 kilometers. No explanation whatsoever has been furnished by the complainant with regard to delay in registration of FIR. Soon after the occurrence the dead body was brought at hospital where post mortem of the deceased was conducted and after post mortem the report was issued on 17.12.2013, subsequent thereto complainant lodged FIR by following the post mortem report of deceased. ***In case of Muhammad Asif vs the State (2008 SCMR 1001),*** it has been held by Hon'ble apex Court that:

> *"…..yet there is a delay of about two hours which has not been explained. Similarly P.W.7 stated during cross-examination that the police reached the spot at twelve noon and about half an hour was consumed in conducting inquest proceedings and thereafter the dead body was sent to the hospital. He further stated that he accompanied the dead body which was taken in a wagon to the hospital and that it took only 15 or 20 minutes in reaching the hospital. In that case the dead body would have been received at the hospital by 1-00 p.m. On the contrary, the doctor, who is an independent witness, stated that he immediately started post mortem examination after the receipt of body and the time of post-mortem given by him was 4-50 p.m. that means that the body remained at the spot for quite some time. The F.I.Rs which*

are not recorded at the police station suffer from the inherent presumption that the same were recorded after due deliberations….."

11. I have reassessed the entire evidence of prosecution witnesses with the assistance of defence counsel and the prosecutor and found major contradictions in their evidence which rendered the case of prosecution doubtful. Complainant deposed that she had not consulted any of the persons before registration of FIR while PW-2 Khair Muhammad deposed that they had consulted with their Waderas for registration of FIR. Complainant deposed *that about 10/12 houses are situated in their village*, while PW-2 Khair *Muhammad deposed that more than 100 houses are situated in the village.* Complainant deposed that at that time, her husband was standing on eastern side of house at the distance of about 40 feet away from them, while *accused were away from her for about 10 to 12 feet,* while PW-2 Khair Muhammad deposed that at the time of incident deceased Rab Nawaz was available on the western side at the distance of about 40 feet away from the house of complainant. *At that time accused were standing at the distance of 30 to 40 feet.* Complainant in her cross-examination deposed that police on their own accord came at the place of incident while PW-2 Khair Muhammad deposed that they shifted the dead body to Taluka Hospital Daharki, where police had arrived. PW-2 Khair Muhammad deposed that mashirs Ghulam Hyder *and Sajjan came along with them from the place of incident to the hospital*, while mashir Sajjan deposed that after the incident, he was available in his village where he came to know about the incident. *He deposed that co-mashir Ghulam Hyder was already available in the hospital.* Complainant deposed that she alone went for registration of FIR, while PW-2 Khair Muhammad deposed that Ghulam Hyder went together with complainant for registration of FIR. Complainant deposed that on the day of inspection of the place of incident, *she along with police came from the PS but in different vehicles, as she was riding on the motorcycle of mashir Sajjan*, while mashir Sajjan deposed that when they brought the dead body at village *thereafter, he remained throughout in the village.* The presence of PW Khair Muhammad at the place of incident is also doubtful as he deposed that he had gone to the house of complainant because of friendship with Rab Nawaz *but no purpose for visiting the house of Rabnawaz has been disclosed by the said PW. He further deposed that he was only caste fellow of the complainant party and except this there was no other relationship in between them.* If the witness was present on the spot then why he remained on the spot despite the fact that his friend after receipt fire shot had died and in such eventuality the prime purpose with a friend present on the spot would be nothing. This witness has shown an unnatural conduct and the way be behaved could not impress this Court to stamp him as truthful witness, rather he can be termed as interested and

chance witness with the sole purpose to implicate the appellant for the commission of offence, that too to fulfill his wishes. Chance witness, in legal parlance, is one who claims that he was present on the crime spot at the fateful time, albeit his presence there was a sheer chance as in the ordinary course of business, he was not supposed to be present on the spot, but should have been present at the place where he resided, carries on business and runs day to day life affairs. It is in this context that the testimony of chance witness ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanation appealing to prudent mind of his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspected evidence and cannot be accepted without pinch of salt. The evidence brought on record, insufficient to hold accused guilty in absence of any evidence incriminating, connecting the accused with the commission of offence. Admittedly, the complainant and PW-2 have come forward with the severe material contradictions thereby have brought clouds over prosecution story as narrated by them. One, whose presence become under a slightest doubt then it is never to believe his words. Reference may be made to the case of ***Mst. Rukhsana Begum and others vs. Sajjad (2017 SCMR 596)*** wherein is it held as under:-

> *"A single doubt reasonably showing that a witness/witnesses's presence on the crime spot was doubtful when a tragedy take place would be sufficient to discard his/their testimony as whole"*

12. Though the medical evidence is supportive to ocular account but it only prove the factum that death of the deceased person was caused by firearm weapon; it does in no way indicate who had fired upon the deceased person. The medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat and nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of offence. It is settled proposition of law that when substantive evidence fails to connect the accused person with

the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself proves the prosecution case.

13. Adverting to the circumstantial piece of evidence relied upon by prosecution i.e recovery of blood stained earth, last worn attires of the deceased and empties from the place of incident. No doubt the blood stained earth material and last worn clothes of deceased have been opined to be stained with human blood, as per Chemical Examiner Report at Exh.21/A but it itself does not connect accused with the commission of offence. Moreover the alleged pistol used in the commission of offence has not been recovered from the possession of appellant/accused. Moreover, the place of incident was visited by Tapedar Muhammad Aslam PW-6. As per sketch produced at Exh.9/A the place of incident was visited on the pointation of PC Asghar Ali. Record does not reflects the presence of said PC Ashgar Ali at the place of incident at any time even at the time of visiting the place of incident by the IO. The said PC Asghar Ali was also examined at the trial at Exh.8, who nowhere deposed about the fact that on his pointation the place of incident was visited by Tapedar or he himself firstly visited the place of incident. The sketch of the place of incident is also silent with regard to the presence of complainant and PWs at any point so also is quiet about the presence of accused at the place of incident at any point.

14. Admittedly, the ruthless and ghastly murder of a innocent person is a crime of heinous nature; but the frightful nature of crime should not blur the eye of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. The rule is that the cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. The gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable. No matter how heinous the crime is the constitutional guarantee of fair trial under Article 10-A cannot be taken away from the accused. It is, therefore, duty of the Court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principle of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the

allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It is well settled law that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidences and certainty of guilt, and doubt arising in the prosecution case must be resolved in favour of accused. In case of ***Wazir Muhammad vs. The State (1992 SCMR 1134)*** it was held by Supreme Court of Pakistan that ***"In the criminal tried it is the duty of the prosecution to prove its case against accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of prosecution"*** The Supreme Court of Pakistan in another case of ***Shaman alias Shama v The State (1995 SCMR 1377)*** held that "the prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against accused, entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Before, the case is established against the accused by the prosecution, the question of burden of proof on the accused to establish his plea in defense does not arise.

15. Admittedly, the appellant/accused remained absconder for sufficient long time, but mere absconsion of accused is not conclusive guilt of an accused person, it is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicious after all are suspicious, the same cannot take the place of proof, the value of absconsion therefore, depends on the facts of each case. Abscondance alone cannot be made the basis for conviction on a capital charge when the other evidence of the prosecution is doubtful. In this respect, cases reported as ***Muhammad Sadiq v. The State (2007 SCMR 144) Muhammad Salim v. Muhammad Azam and another (2011 SCMR 474) and Rohtas Khan v. State (2010 SCMR 566)*** can also be referred.

16. After reassessment of the evidence, I have found that in the present case there are also a number of legal infirmities /lacunas, which have created serious doubt in the prosecution case. It is also a well settled principle of law that for the purpose of extending benefit of doubt to an accused, more than one infirmity is not required, but a single infirmity creating reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge makes the whole case doubtful. Under the stated circumstances of this particular case, the prosecution has failed to prove its case beyond all

reasonable doubt. The reliance is also placed on the case of ***Saghir Ahmed Vs. The State and others (2023 SCMR 241)***, wherein the Honourable Supreme Court of Pakistan has held that:-

> *"Mere heinousness of the offence if not proved to the hilt is not a ground to punish an accused. This is an established principle of law and equity that it is better than 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer. "Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer". The above report of the Forensic Science Laboratory is sufficient to cast a shadow of doubt on the prosecution case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1995 SCMR 1345) and AyubMasib v.The State (PLD 2002 SC 1048). "The same view was reiterated in Abdul Jabbar v. State (2019 SCMR 129) when this Court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution case is to be resolved in favour of the accused. However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt"*

17. In the circumstances and in view of the discrepancies and lacunas as stated above, the prosecution story cannot be believed to maintain conviction against the appellant. Consequently, instant Jail Appeal is allowed. The conviction and sentence recorded against the appellant vide judgment dated 18.04.2022 passed by the Court of 1st Additional Sessions Judge (MCTC) Ghotki, in Sessions case No. 102/2014 Re State vs. Qaimuddin Samejo U/S 302 PPC is set-aside. Resultantly, appellant/accused is hereby acquitted of the charges. He is confined in Central Prison Sukkur, therefore jail authorities are

directed to release him forthwith if he is not required in any other custody case/crime.

JUDGE

M. Ali/steno*