IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.S-49 of 2019

Present:

Mr. Justice Zulfiqar Ali Sangi.

Appellant:	Nooruddin son of Imam Bux by caste Samejo Through, Mr. Shabbir Ali Bozdar and Syed Tanveer Abbas Shah, Advocates for appellant
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. Appeal wherein he has impugned the judgment dated 29.03.2019 passed by the Court of Sessions Judge Ghotki in Session Case No. 102/2014 (Re-State vs. Nooruddin and others) arising out of FIR No. 218 of 2013 for offence u/s 302, 337-H (ii) & 34 PPC registered at P. S Daharki, whereby appellant/accused Nooruddin 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 fine of amount of Rs. 200,000/- (two lac) to the legal heirs of deceased Rab Nawaz in terms of Section 544-A Cr.PC. In case of default of payment of fine amount, the appellant/accused shall undergo S.I for six months more. The appellant/accused Nooruddin 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 Tazir with 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, Amanullah Samejo armed with pistols, ***Nooruddin Samejo having lathi (appellant***) 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 08 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 specific role of causing lathi injuries upon the person of deceased; 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, assisted by 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 has lodged FIR by following the post mortem report of deceased. Apart from above, the complainant in her cross examination admitted that local landlords intervened, hence FIR was delayed by her, who promised that they will help her in arresting the culprits and getting faisla from them. 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. The allegation against the appellant Nooruddin Samejo is that he being armed with lathi was available at the place of incident along with co-accused who have directly fired upon the deceased Rabnawaz. Complainant Mst. Rabia though named appellant/accused in FIR so also in her evidence with said rule however, same role has not been supported by the medical evidence. The injury as mentioned in the post mortem of the deceased Rabnawaz for which the Dr. Parmanand PW-4 stated that he is unable to clarify the said injury. It is strange to note that the narration of facts by the complainant and eye witness is not in line with the injuries observed by Dr. Parmanand PW-4 on the person of deceased. PW Khair Muhammad also not supported the version of complainant in respect of the motive and deposed that he in his statement recorded by the police stated that he disclosed to the police about the brothery faisla in which he also participated, which was conducted by Jam Liaquat about 2/3 years prior to the incident. PW Khair Muhammad also deposed that Mst. Nazan was wife of present accused Nooruddin and was the sister of deceased Rab Nawaz and there was dispute on her divorce. These facts have been concealed by the complainant. 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 which shows his presence at the scene of offence. 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. Moreover, complainant in her cross-examination has deposed that ***PW Khalid had filed affidavit in connection with the bail application who exonerated the present accused. Voluntarily she deposed that said PW was won over by the present accused***. It is surprising to note that said PW Khalid has not been brought at the trial however, he was examined by the accused as defence witness wherein he deposed ***that at about 05.30 p.m, he heard noise of fires from place of occurrence, where reached and see that about 100 neighbors gathered and he saw Rab Nawaz was lying dead by facing earth. At that time the complainant and witnesses shown in the FIR were not available***. It is settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. After reappraisal of entire evidence available on record, reached at the conclusion that there is unexplained delay in lodging of FIR, the presence of eye witnesses is not established, there are irreparable dents in the case of the prosecution, the ocular account is belied by the medical evidence, the motive behind the incident is far from being proved and almost non-existent, the learned trial Court fell in gross error in awarding the conviction to the appellant particularly in the capital charge. In the circumstance and after an independent evolution of evidence available on record, I have no manner of doubt in my mind that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt.

12. It is settled law that the Court (s) must never be influenced with severity of the offence while appreciating evidence for finding guilt or innocence because severity of an offence could only reflect upon quantum of punishment. Therefore, even such like tragic cases, the Court (s) are always required to follow the legally established position that it is intrinsic worth and probative value of the evidence which plays a decisive role in determining the guilty or innocent and not heinousness or severity of offence. 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 lathi has not been recovered from the possession of appellant/accused.

13. Thus, in my view even when taking the prosecution case as a whole, and at its best, in terms of un-seen and un-witnessed incident. A murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event conviction cannot safely be recorded, especially on a capital charge. In the present case, chain is incomplete. Therefore, I am unable to rely upon such type of evidence.

14. The rule of benefit of the doubt is essentially a rule of prudence which cannot be ignored while dispensing justice following the law. The conviction must be based on unimpeachable evidence and certainty of guilt and doubt arising in the prosecution case must be resolved in favour of the accused. The said rule is based on maxim. "**It is better that ten guilty persons be acquitted rather than one innocent be convicted"** which occupied a pivotal place in the Islamic Law and is enforced strictly because of the saying of the Holy Prophet (**PBUH)** that the "**mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."** 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 casted upon the accused to prove his innocence. It is also been held by the Superior Courts that the conviction must be based and found on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. Reliance is also placed on case of **Naveed and 2 others vs. The State (PLD 2021 SC 600).**

15. 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 a settled principle of law that for extending the benefit of the doubt there do not need to be multiple circumstances creating doubt. If a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of titled as ***Muhammad Akram v. The State (2009 SCMR 230)*** wherein at page 236 it has been held as under:-

> "*It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as*

matter of right and not of grace. It was observed by this Court in the case of ***Tarique Parvez v. The State 1995 SCMR 1345*** *that for giving the benefit of doubt, it was not necessary that there should be many circumstance creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right"*

16. 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 appeal is allowed. The conviction and sentence recorded against the appellant vide judgment dated 29.03.2019 passed by the Court of Sessions Judge Ghotki, in Sessions case No.102/2024 Re State vs. Nooruddin and others 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.

J U D G E

M.Ali/steno*