

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Appeal No.S-94 of 2022
(*Ali Hassan Bhayo v. The State*)

Appellant : **Ali Hassan Bhayo**, through Mr.
Rukhsar Ahmed M. Junejo, Advocate

The State : Through Mr. Shafi Muhammad Mahar,
Deputy Prosecutor General

Date of hearing(s): **25-03-2024**

Date of decision: **25-03-2024**

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- Appellant stood a trial in Sessions Case No.514 of 2020, arising out of Crime No.05 of 2020, registered at Police Station, Sadhuja under sections 302, 396, 392, 398, 148, 149 & 337H(2) PPC and vide judgment dated 02.11.2022, passed by learned Additional Sessions Judge-1/MCTC, Sukkur, has been convicted and sentenced as under:-

- i. For offence u/S. 302(b) PPC, he has been sentenced to suffer imprisonment for life as Ta'azir with compensation of Rs.500,000/- to be paid to legal heirs of deceased and default thereof, to suffer S.I for six months more.
- ii. For offence u/S. 392 PPC, he has been sentenced to suffer R.I for seven years with fine of Rs.50,000/-and in default thereof, to suffer S.I. for two months.
- iii. For offence u/S. 398 PPC, he has been sentenced to suffer R.I for seven years.

All the sentences were directed to run concurrently with benefit of section 382-B CrPC, duly extended to the appellant.

2. Facts of the prosecution in brief are that on 08.04.2020 complainant Gul Bahar lodged an FIR alleging that on the said date, he, his cousin Zaheer Ahmed and relative Shaman Ali were going on a motorcycle towards home. When at about 04:30 p.m, they reached Shaheed Bridge, they saw accused Ali Hassan, Mir Hassan @ Miro, Ghulam Hussain with Kks and an unknown accused armed with a TT

pistol riding on two motorcycles. They signaled them to stop which they obliged due to fear of weapons. The accused then robbed his motorcycle and escaped. He informed his brother Barkat Ali and villagers of the incident through a phone. Then complainant party with the help of villagers chased the accused. It was at about 05:00 p.m, on a road near home of Pathan Chachar and Shahoo Oghai, when Barkat Ali and Muhammad Mithal intercepted the accused. Upon which, accused Ali Hassan Bhayo made a straight fire shot from KK rifle at Barkat Ali murdering him at the spot. Remaining accused also made fires upon the complainant party, but they ducked down and saved themselves. Then all the accused made their escape good along with robbed motorcycle. Complainant party saw that Barkat Ali had a through and through firearm injury, profusely bleeding, on left side of chest on boob. He was then shifted to PS, where with the help of police, he was taken to Taluka Hospital Pano Akil for postmortem. After funeral rites, complainant appeared at PS and lodged the FIR on 09.04.2020 at 04.30 p.m.

3. Following a formal charge, the trial against the appellant was commenced and the prosecution examined as many as ten witnesses, who produced all necessary documents including FIR, relevant memos, postmortem report, lab reports regarding blood stained earth and clothes of deceased etc. On conclusion of their evidence, statement of appellant in terms of section 342 CrPC was recorded, in which he has denied the charge and has pled innocence. However, neither he examined himself on oath nor produced any witness in his defence. The trial Court in consideration of evidence of PWs found the appellant guilty and convicted and sentenced him as above, which the appellant has challenged by means of this appeal.

4. Learned counsel in defense has argued that appellant is innocent and has been falsely implicated in this case; that there are material contradictions in the evidence of witnesses which have rendered entire prosecution case unbelievable; that medical evidence is in conflict with the evidence of eyewitnesses which in fact confirms absence of witnesses at the spot; that in 342 CrPC statement of appellant, he was not confronted with incriminating pieces of evidence; hence, the same cannot be used against him; that there is delay of one day in registration of FIR which has not been explained. To support

his contentions, learned counsel has relied upon the case law reported as Muhammad Imran v. The State (2020 SCMR 857)

5. On the other hand, learned Deputy P.G for the State has supported the impugned judgment.

6. I have heard parties and perused material available on record. FIR shows date of incident as 08.04.2020 at 04:30 p.m to 05:00 p.m and its registration on the next date at 04.30 p.m. Complainant Gul Bahar in his evidence (Exh.7) has alleged that appellant and others had robbed a motorcycle from him when he was with PWs Shaman Ali and Zaheer Ahmed. He gave such information to his brother Barkat Ali on a mobile phone, hence his brother chased the accused. When he intercepted them at katchi sarak Ghan Chachar, appellant Ali Hassan made a fire shot hitting his chest and thereby murdering him. Their cousin Mithal was also with Barkat Ali. Thereafter, they returned to house, made some arrangements and shifted dead body of his brother Barkat Ali to P.S, Sadhuja.

7. PW-3 Shaman Ali has deposed that four unknown persons, he does not take name of any one, had robbed a motorcycle from complainant, when he was with him who then informed his brother Barkat Ali. As a result his brother followed the accused. They were behind them at the distance of 30 minutes and when reached the place of incident, they saw Barkat Ali lying dead. Then they shifted his dead body to Taluka Hospital, Pano Akil. His evidence, as is obvious, is materially different from complainant. He does not say that he and complainant had actually seen the incident of murder. Per him, they were at least at the distance of 30 minutes from deceased Barkat Ali who was chasing the accused. His evidence does not show either that PW Mithal, who claimed to have accompanied the deceased, was even available with him. He neither supports the complainant over the fact that after the incident, they had first gone to the village for arranging the vehicle, nor the fact that initially the dead body of deceased Barkat Ali was taken to P.S. Instead, he states that his dead body was taken to Taluka Hospital, Pano Akil, directly (for postmortem).

8. PW-4 Zaheer Ahmed has although supported the complainant, but claims in his evidence that out of four robbers, three were armed with KKs and one was armed with a pistol. The complainant on the

other hand says in evidence that one was armed with a KK and the remaining three were armed with pistols. According to him, after robbery of motorcycle from complainant Gul Bahar by the accused, whom he has duly named, he had informed his brother Barkat Ali and he along with PW Muhammad Mithal had chased the accused. They were behind them and saw that when deceased Barkat Ali waylaid the accused, appellant Ali Hassan made a fire shot murdering him at the spot. He says that after the incident, all the accused while making aerial firing had made their escape good. Then they took dead body on a private vehicle and arrived at P.S, Sadhuja – not that they had first gone to the village for arranging the vehicle – where police inspected dead body and prepared such Mashirnama.

9. However, relevant memo (Exh.10/B) indicates that dead body was inspected by the police in mortuary of Taluka Hospital, Pano Akil and not at P.S, as claimed by PW-Zaheer Ahmed in his evidence. In fact, there is no document showing that after the incident, the dead body of deceased was first taken to P.S for inspection and a letter for postmortem. On the contrary, documents show that the first time the police saw the dead body was at mortuary of Taluka Hospital Pano Akil. Further, in cross-examination, PW- Zaheer Ahmed has revealed the facts which are not in alignment with the story in FIR. For instance, he has disclosed that incident took place when they were at the house of Shaman, which is situated at the distance of half an hour from the place of incident. They went to place of incident on motorcycle from the house of Shaman, meaning thereby they were not behind deceased Barkat Ali in chasing the accused, as claimed by the complainant. Further, they reached the place of incident within 35/40 minutes. When they reached the place of incident, they saw dead body of Barkat lying on katchi sarak. These disclosures signify absence of the witnesses at the spot at the time of incident. In fact, his cross-examination seems to be in complete consonance with evidence of PW Shaman that they had reached the place of incident after 30 minutes and had seen the deceased lying dead. That means that before their arrival, the accused had already committed murder of deceased.

10. PW-5 Muhammad Mithal in his evidence has disclosed that on receiving information of robbery of motorcycle from his brother Gul Bahar, Barkat Ali approached to accompany him for capturing the

accused. When they reached village Shaho Ogai, Pathan Chachar and saw the accused including appellant Ali Hassan, Barkat Ali tried to stop their motorcycle, appellant Ali Hassan made a straight fire shot murdering him at the spot. Accused then made their escape good after making aerial firing. The fact of aerial firing as alleged by PWs Muhammad Mithal and Zaheer Ahmed is not born out of any record including memo of place of incident, which shows that only two empties of KK were recovered from them. According to him, after the incident, they brought dead body of Barkat to P.S, Sadhuja, from where to hospital. However, as stated above, this fact is not established from any document that dead body of the deceased was brought to the P.S first. Further, a perusal of his cross-examination gives a different story line of the incident. He states that "We reached within 20/25 minutes at the place of vardat. When we reached at the place of vardat, we saw Barkat Ali was lying on katchi sarak. We immediately reached at the place of vardat. Fire shot was made at the distance of one pace. We were standing near to Barkat Ali when fire shot was made. One fire shot was made on us but we fell down in wheat crop. Such fire shot was made from the distance of 03/04 paces".

11. The above disclosures give impression that he was not with the deceased Barkat Ali at the crucial moment when he was done to death but had reached there afterwards, as evidenced from his statement that when he reached the place of incident, complainant and PWs were present there and that he saw Barkat Ali was lying (dead) at katchi sarak. His assertion that deceased was fired from the distance of one pace has also been contradicted by PW-9 Medico-Legal Officer (Exh.15), when he in reply to a suggestion in cross-examination states that it is a fact that if somebody says fire was made at the distance of one pace means he was telling a lie. And then he voluntarily adds that fire was made (at the deceased) from more than 10 feet. These variations and discrepancies in the evidence of eyewitnesses indicate that they were not present at the spot and they reached there afterwards. This fact further gets confirmed from the fact that FIR was registered after a considerable delay of one day which in view of claim of the witnesses that they had seen the incident and had then taken dead body of Barkat Ali directly to P.S is strange and unbelievable. The appellant was known to the complainant party and they had

committed the offence within their sight. Delaying registration of FIR in such circumstances, therefore, assumes importance and cannot be brushed aside. When the complainant party was aware of names of accused and it had first come at P.S with dead body within a short while, the question as to why they did not report the matter against the accused known to them then and there has not been properly answered by the prosecution and it creates a reasonable doubt in the mind.

12. Learned Deputy P.G while pointing to recovery of robbed motorcycle from the appellant tried to argue that such recovery would be sufficient evidence against the appellant to connect him with the alleged offence. Memo of recovery (Exh.10/E) dated 10.04.2020 indicates that alleged robbed motorcycle was recovered from the appellant when he was riding on it and was available at Chhitti Dhandh, and was going to his house. His availability in the same area after two days with the robbed motorcycle is highly questionable first as it does not cross the mind that the accused instead of disposing of the robbed motorcycle would enjoy its riding in the same area before the same people, and second this recovery was effected in presence of PWs who are relatives of complainant and were introduced by him in the case.

13. Further, at the time of recording 342 CrPC statement of appellant, he was not confronted with recovery of alleged motorcycle from him on 10.04.2020, nor even any question about his arrest on the very day with the robbed motorcycle was asked from him. Even medical evidence and unnatural death of deceased as a result of fire shot has not been put up to him in his 342 CrPC statement. As these questions regarding incriminating evidence have not been asked from him. The settled principle – when an incriminating piece of evidence is not confronted to accused in his 342 CrPC statement, the same cannot be used against him while recording conviction and sentence – would be applicable.

14. Furthermore, absence of recovery of any weapon effected from appellant to connect him with the offence is an additional circumstance going in favour of him. Therefore, recovery of two empties of KK from the place of incident cannot improve the case of

prosecution against him. All these factors disclosed above show that the prosecution has not been able to establish the case against the appellant beyond a reasonable doubt. It is settled that once a doubt sets in the prosecution case, its benefit has to go to the accused not as a matter of grace but as a matter of right. Consequently, appeal is **allowed** and the appellant is acquitted. By means of a short order dated 25.03.2024, the fact of appeal being allowed was recorded and the appellant was acquitted of the charge. He was ordered to be released from the jail forthwith, if not required in any other custody case. The above are the reasons of the same.

The appeal is accordingly **disposed of**.

JUDGE

Ahmad