

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.S-108 of 2007.

Ambio Versus The State

Cr. Jail Appeal No.S-1042 of 2007.

Arjun & another Versus The State

Ms. Nasira Shaikh and Mr. Inam Ali Malik,
Advocates for the appellants.

Mr. Shahid Ahmed Sheikh, APG for State.

Date of hearing: 22.06.2017.

Date of judgment: 22.06.2017.

J U D G M E N T

SALAHUDDIN PANHWAR, J.- Through the instant judgment captioned *two* appeals, as having arisen out of common judgment dated 08th May 2007 recorded by Additional Sessions Judge, Sanghar in SC No.297 of 2002 Re-S/v Arjan and others whereby convicted the appellants for offence u/s 302/34 PPC and sentenced them to suffer imprisonment for life with fine of Rs.100,000/- each to be paid to legal heirs of deceased and in default to suffer R.I for one year more; the appellants were also convicted for offence u/s 201/34 PPC and were sentenced to suffer RI for seven years with fine of Rs.50,000/- each as compensation u/s 544-A Cr.PC and in default to suffer RI for six months. The sentences were ordered to run concurrently and benefit of section 382-B Cr.P.C was awarded.

2. Precisely, facts of the prosecution case are that on 22.9.2002 complainant Gamano Bheel lodged the FIR at 1400 hours with PS Perumal stating therein that he is a *peasant* of landlord Allah Dino Rajar while deceased Bhoru son of Gango Bheel is hari of landlord Akbar Bugti of Baluchistan. Bhoru Bheel had come to his brothers-in-law namely Arjan and Gasio Bheel since last week who had told complainant about 2/3 days back that he has come to take back his wife Mst. Kareeman but his brother-in-law is not allowing her. On the night of 21.9.2002 there was turn of water of complainant. Sanwal son of Mitho Rajar and Ravo Bheel. It was moon night when at 10/11 pm they heard the cries coming from the northern side of the sugarcane field of Allah Rakhio Rajar and they rushed there and saw accused Arjan, armed with hatchet, accused Ambio alias Arboo Bheel armed with lath who were causing hatchet and lathi blows to Bhooro while accused Ghasio was catching hold of his arms. The complainant party challenged the accused persons as to why they are killing Bhooro whereupon they threatened them not to come near them and due to fear they did not go near them. Meanwhile Bhooro Bheel fell down on ground and died away. In the early morning of the day of report i.e 22.9.2002 complainant was going towards his house when on the way, accused Arjan Bheel met and disclosed that he, his brother Ghasio and Ambio after causing the murder of deceased Bhooro, cut off his head and then the headless body was buried in cotton crops, one block away and that complainant should not disclose this fact to any body else it would not be good for him. Thereafter, complainant disclosed the facts of incident to zamindars Allahdino Rajar who advised him to go and lodged the FIR and then FIR was lodged.

3. After completing the report was submitted thereby appellants were sent up to face their trial. At the trial, prosecution examined following witnesses:

- 1) Complainant Gamano at Ex.6 who produced the FIR at Ex.6/A;
- 2) PW-2 Sanwal at Ex.7 who produced his 164 Cr.PC statement at Ex.7/A;
- 3) PW-3 Revo as Ex.8 who produced his 164 Cr.,PC statement at Ex.8/A;
- 4) PW-4 T.P.O Sujjan Singh Takur at Ex.9;
- 5) PW-5 Qalander Bux as Ex.10;
- 6) PW-6 LHC Muhammad Hayat at Ex.11 who produced mashirnama of producing clothes of deceased at Ex.11.A;
- 7) PW-7 Dr. Dayal Dass, MO LMCH Hyderabad at Ex.12 who produced letter of police, post5 mortem report, inquest report, receipt of handing over clothes of deceased to police at Ex.2/A to 12/D;
- 8) PW-8 WHC Abdul Razzaque of PS Perumal at Ex.14 who produced mashirnama of arrest of accused Arjan, Ghasio and Ambio, mashirnama of vardat, mashirnama of identification of dead body, mashirnama of recovery of hatchet and lathis from accused Arjan and Ambio, inquest report, letter of police addressed to Magistrate for recording 164 Cr.PC statements of witnesses, sketch of place of vardat and report of chemical examiner at Ex.14/A to Ex.14/H respectively;
- 9) PW-9 mashir Hussain at Ex.15
- 10) PW-10 Tapedar Muhammad Farooque as Ex.16 who produced sketch in triplicate as Ex.16/A;

Thereafter, prosecution side was closed vide statement at Ex.17.

4. The statement of accused persons were recorded under section 342 Cr.PC at Ex.18 to 20 respectively wherein they denied prosecution allegations and claimed innocence however none of them examined himself on Oath nor led any evidence in defence.

5. In consequence of completion of trial, the arguments were heard and appellants were convicted vide impugned judgment which has been assailed through instant *two* criminal jail appeals.

6. Learned counsel for the appellants have argued that the case of the prosecution was never worth sustaining a conviction because the prosecution story was even not worth believing; the witnesses so examined were *chance* witnesses and they never proved their presence at spot; motive was not established; manner of recovery even was not safe to hold conviction and there are material contradictions hence it would be in the interest of the justice to allow the appeal.

7. On the other hand, learned APG , while availing his turn, stoutly opposed the appeal while maintaining that conviction is proper and result of proper reasoning hence the same is not open to an exception.

8. I have heard the respective sides and have also gone through the available record *carefully*.

9. According to *ocular* account, so brought onto record by the prosecution, the prosecution claims that witnesses of *ocular* account saw the appellants committing murder of deceased *Bhooro Bheel* at night time who *however* went away to their works on asking of appellants/ accused party and then in *morning* complainant when complainant was going to his house, the appellant Arjun met him on the way and again threatened not to disclose incident else to be killed. It was after such *threat* the instant FIR was recorded.

10. Before going into acceptability of such *piece* or *otherwise* , let have a direct reference to evidence of the witnesses of ocular account which is:

Complainant Gamano in his examination-in-chief states as:

.. Deceased Bhoro Bheel had told me that he had arrived in the house of his brother-in-laws namely Arjan and Ghonisho to take back his wife Mst. Karima, who had come to their brothers namely Arjun and Ghanisho due to her annoyance with him. The incident took place on 21.9.2002. At the time of incident I was on the land. PWs Sawan and Revio were also with him. We were irrigating the land. The incident night was moon lit, it was about 10/11 p.m when we heard cries. On cries we rushed to the place of incident and saw that accused Arjan was armed with hatchet, accused Ambio was armed with lathi and accused Gonisho was holding the hands of deceased Bhoro Bheel and accused Arjan and Gonisho were causing the hatchet and lathi blows to Bhoro Bheel. We enquired from the accused persons that why they are killing the Bhoro Bheel, who told us that we should returned back, otherwise we will be killed. Thereafter we due to fear went back to our land. We had also seen that Bhoro Bheel due to hatchet and lathi injuries fell down on the ground and died on the spot. On the next day of the incident, in the morning I was returning to my house, the accused Arjan met me on the way and told me that I should not disclose the facts of this incident to any one, otherwise I would be killed. Accused Arjun further disclosed that the dead body of Bhoro without neck has been buried in the Sugar Cane crop and his neck has been buried in the cotton crop. I then went to my village and disclosed the facts of this incident to my zamindars Allah Dino Rajar, who advised me to lodge the report.

In his cross examination he admits that "We had not call the co-villagers because they were residing at the distance of two acres from us at the time of incident. I had gone to my village on the next day at the sunrise time.

PW SANWAL in his examination-in-chief stated as:

"...It was moon lit night of 14th of Moon. It was about 10/11 PM (night). When we heard the cries on the western side of the sugarcane crop of one Allah

Rakhio Rajar. We then rushed to the place of cries, where we saw that accused Gonesho Bheel had tied the arms of deceased Bhoro Bheel on his back. Accused Arjun was armed with hatchet, and accused Ambio was armed with lathis who were causing the hatchet and lathi blows to Bhoro Bheel who fell down on the ground and died on the spot. We enquired about the killing of the Bhoro Bheel from the accused persons who disclosed that we should returned back otherwise we would also be killed. After that , we returned back to our lands. On the next day of the morning complainant was going towards his village, where on the way accused Arjun met with complainant who told him that he should not disclose the facts of this incident to any one, otherwise he will be killed.

In his cross-examination he admitted that “...In between our village and our land all the lands were cultivated with cotton crop. We all were empty handed at the time of hearing the cries. The place of cries is situated at the distance of about half or one Jeraib away from us. The incident took place inside the sugar cane crop but the same was thin. When we had seen the incident, we due to fear did not raise cries. We had not sent any messenger to our village to inform the incident to our co-villagers.”

PW Revo in his examination-in-chief stated as:

... About two years back this incident took place. The night of incident was moon lit. It was about 10 or 11 pm (night). At the time of the incident I was irrigating my land. PW Sanwal and complainant were also available with me in their lands. We heard cries in the Sugarcane crop which was standing on the Western side of our harap land. We rushed to the place of incident where I saw that accused Arjun was armed with hatchet and Ambio was armed with lathi and the third accused namely Gonesho was holding from the arms of Bhoro Bheel and the accused Ambio and Arjun were causing the hatchet and lathi blows to Bhoro Bheel, who fell down on the ground and died on the spot. When we reached at the place of incident, we enquired from accused persons that why they killed the Bhoro Bheel, on this they told us that we should go back , otherwise, we would also be killed then we went away to our land. On the next day of the morning , complainant was going towards the house on the way the accused Arjun met him and told him that he should not disclose the facts of this

incident to any body otherwise he will also face the consequences.

In his cross examination he admitted as “..The place of incident is situated at the distance of four acres away from our land. .. We had enquired about the incident from the accused for about five minutes at place of wardat. **We had not raised cries when we had seen the incident, nor had informed any body in our village.** On the next day of the incident at about 12-00 noon complainant had told me that accused Arjun had disclosed before me that the facts of this incident may not be disclosed before any body otherwise he will also be killed.

11. The above *ocular* account is apparently unbelievable on *two* counts which run contrary to the common human behaviours. It is unbelievable that the witnesses of ocular account saw the incident at night time and remained performing their duty near place of incident without making an attempt to inform any body and even did not notice the accused persons burying the chopped off head and body at different places. Such conduct, being neither, natural nor confidence inspiring, was never worth believing particularly to hold a conviction. Reference in this regard may well be made to the case of *Muhammad Ismail v. State* 2017 SCMR 898 wherein it is observed as :

4. The *Waj-takar* evidence was provided by Muhammad Arshad (PW9) who ordinarily resided about 100 miles away from the place of occurrence and the stated reason for his presence in the village of occurrence during the fateful night had remained far from being established through any independent evidence whatsoever. The prosecution had produced Haq Nawaz (PW4) and Abdul Shakoor (PW5) who had claimed to have seen some of the appellants throwing two dead bodies in a well during the fateful night which throwing of the dead bodies had statedly been seen by them in the light of a torch. *The conduct displayed by the said witnesses has been found by us to be far from being satisfactory, usual or even natural because on their own showing the said witnesses had, after witnessing throwing of the dead bodies in a well,*

gone to their own houses and had slept during the night and when they returned to the relevant place in the morning the local police had already reached there.

12. The *other* aspect to disbelieve such *ocular* account is that such *piece* also runs contrary to the normal behaviour of the accused persons as no accused of *murder* would *normally* let a witness go free despite knowledge that he (such a witness) may depose against him particularly if such a witness was at *mercy* of such accused. As per prosecution case, the witnesses of the *ocular* account have not claimed to be armed with any weapon rather reached to witness *brutal* murder with empty hands and even they (witnesses) enquired with accused persons who admittedly were armed with hatchets. The manner in which the murder was committed *brutally*; head was chopped off and body and chopped off head were buried at different places was sufficient to indicate that the *culprits* made every efforts to keep the *crime* buried hence leaving as many as *three* persons with a possibility of deposing / disclosing such *crime* was never believable. Thus, blessing of such unbelievable courtesy and mercy shown by accused was never worth believing. I am guided in such conclusion with the case of *Rukhsana Begum V. Sajjad* 2017 SCMR 596 wherein it is observed as:

“15.The site plan positions would show that, he and the other PWs were at the mercy of the assailants but being the prime target even no threat was extended to him. Blessing him with unbelievable courtesy and mercy shown to him by the accused knowing well that he and the witnesses would depose against them by leaving them unhurt, is absolutely unbelievable story. Such behaviour, on the part of the accused runs counter to natural human conduct and behaviour explained in the provisions of Article 129 of the Qanun-e-Shahadat , Order 1984 therefore, the Court is unable to accept such unbelievable proposition.

Further, there is another interesting aspect that complainant claimed in his FIR as well in his examination-in-chief as:

“On the next day of the incident, in the morning I was returning to my house, the accused Arjan met me on the way and told me that I should not disclose the facts of this incident to any one, otherwise I would be killed. Accused Arjun further disclosed that the dead body of Bhoru without neck has been buried in the Sugar Cane crop and his neck has been buried in the cotton crop.”

It is unbelievable that appellant Arjun not only reiterated his demand of not disclosing *crime* though the complainant and witnesses from their conduct till *next-morning* had proved to be not interested; further there was also no *reason* for appellant Arjun to disclose even chopping of head and burying of chopped off head and body separately. This also makes the *ocular* account unbelievable, illogical and even against human conduct.

13. Further, per the prosecution case, all the appellants were arrested within 45 minutes of lodgment of the FIR i.e next morning of the alleged night of *crime* . It is also quite illogical that accused persons, having committed a *brutal* murder in the night; having chopped off head and buried the chopped off head and body at different places, were busy in normal and routine works though they also knew that as many as three persons saw them committing such *crime*.

14. Further, it is also evident that the *culprits* admittedly selected a place inside the *sugarcane* which *prima facie* no other purpose but to conceal the *crime* however the later disclosed prosecution story shows that accused never cared this aspect which is also against human conduct thereby makes such piece unbelievable. Reference may be made

to the case of Muhammad Asif v. State 2017 SCMR 486 wherein it is held as:

“17. It is, normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy such piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story rather after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other places and no circumstances would have chosen to preserve it in his own shop if believed so because that susceptible to recovery by the police.”

Further, it is material to refer evidence of Tapedar Muhammad Farooque which says that:

*“POINT C : Denotes the place where PW Sanwal was irrigating the land and standing **which is 1320 feet** away at Eastern and southern angle where Roohjo was also present.*

and said witness admits in his cross that *“one can not see from the sugarcane crop at the distance of 1320 feet.”* This was also not properly appreciated by the learned trial court judge while convicting the appellants. The deceased Bhooro was undisputed a young man hence if it is believed that he (deceased Bhooro) had accompanied the accused persons to place of *crime* . If so, it shall negate plea of such *serious* enmity which required the accused persons to chop off head to satisfy the grievance. If it is presumed that the deceased was forcibly brought then there must have been resistance from a young man to save his life which also does not appear from non-attracting of other persons, residing at short distance. Either presumption goes harming the prosecution story.

The *ocular* account was never worth believing hence a conviction *legally* cannot sustain on such account.

15. The *motive*, as alleged by prosecution was also never established because witnesses though claimed that there wife of deceased *Bhoro* was annoyed with deceased and had come to her brothers i.e appellants. This *motive* was also never appearing to be disclosed to witnesses of ocular account as shall become evident from cross examination of said witnesses which is:

Complainant Gamano.

"..I do not know whether deceased Bhoro and his father Sangho were residing in village Bhit Bhiti or not. I do not know they were the haries of Sohrab Khan Mari or not. I do not know the cases of dacoity and murder were registered against deceased. "

PW Sanwal.

*"..I do not know whether deceased Bhoro Bheel was residing in village Bhit Bhiti or not. **I knew deceased Bhoro Bheel prior to 4/5 days of this incident.***

PW Revo

*" I knew deceased Bhoro Bheel about 10/12 days prior to this incident. **Deceased Bhoro met me once during these days...** I do not know whether he was residing in Bhit Bhiti or not.*

The above admissions, made in the cross examination, are sufficient to indicate that these witnesses have no *direct* relation and nexus with the deceased and even claim to have met recently and even '*once*' therefore, it also does not appear to be acceptable that during such meeting the deceased had disclosed such a *personal* thing. Even otherwise, the witnesses or any other person never claimed to have witnessed any

threat by appellants to deceased or even exchange of hot words rather admitted act of deceased Bhooro to have come to accused persons was sufficient to presume that the deceased Bhooro and appellants were not at *dagger's* drawn. Even otherwise, there came no *independent* evidence which could corroborate such *motive*.

16. The recovery of blood-stained hatchet and *laths* after five days of the incident from compound of houses of the accused was never worth believing in view of the observation, made in the case of *Sardar Bibi & another v. Munir Ahmed & Ors* 2017 SCMR 344 (Rel. P-350) wherein it is observed as:

“... So far recovery of Toka from Qamar Abbas appellant is concerned, we observed that such recovery effected after about one month of occurrence and Talib Hussain PW-4 admitted that the place of recovery was collectively inhabited by all the accused so the place of recovery is a joint house and was not in the exclusive possession of Qamar Abbas appellant. Allegedly, the recovery was effected after about one month of the occurrence and **it is not expected from an accused person to keep such weapon (stained with blood) as souvenir because during the said period there was ample time to destroy or at least washout the said weapon.**

17. The discussions, made hereinabove, make it quite safe to conclude that the prosecution never established its case beyond shadow of reasonable doubt hence the appellants were entitled for acquittal. These are the reasons of the short-order dated 22.6.2017 whereby the appeal was accepted. In consequence whereof the judgment of trial court was set-aside and appellants were acquitted of the charge with direction for their release, if not required in any other case crime.

Sajid