IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.289/2019

Appellant : Ghulam Ali,
Mr. Aftab Ahmed Ghulam Nabi advocate.

Respondent : The state,
Ms. Seema Zaidi, DPG.

Date of hearing : 19.05.2021.

Date of order : 19.05.2021.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellant has impugned judgment dated 24.04.2019 in S.C.No.231/2015 arising out of FIR No.39/2015 u/s 302, 504/34 PPC, PS Mirpur Bathoro, whereby trial court convicted the accused/appellant to suffer R.I. for 14 years and to pay *Diyat* of Rs.18,80,270/- to legal heirs of deceased, in default to be detained in jail till recovery of *Diyat* amount or he may apply for bail u/s 331 PPC on furnishing security in like amount.

2. Facts of prosecution case are that complainant side does not have good terms with Ghulam Hussain Parhyar; that on 06.04.2015 complainant, his uncle Aijaz Hussain and Ghulam Rasool were available on their land and his uncle Ashique Hussain was visiting the land near R.D No.141 adjacent Karo Gungro; meanwhile at about 1000 hours they saw that Ghulam Ali s/o Ghulam Hussain Parhyar having iron rod, Ghulam Hussain s/o Mehwasayo and Nazir s/o Ghulam Hussain Parhyar attacked upon Ashique Hussain with intention to kill him, accused Ghulam Ali caused iron rod blow at abdomen of Ashqiue Hussain, while accused Ghulam Hussain and Nazir caused kicks and fists blows to him, resultantly he fell down; thereafter accused persons went away to their houses. Complainant

arranged a vehicle and took the injured to P.S Mirpur Bathoro and after obtaining letter for medical went to Taluka Hospital Mirpur Bathoro, wherefrom injured was referred to Karachi, but on the way he succumbed to his injuries. They brought the dead body to Taluka Hospital Mirpur Bathoro where his postmortem was conducted, after funeral complainant lodged the FIR.

3. Challan was submitted showing accused Ghulam Ali and Ghulam Hussain in custody while accused Nazeer as absconder who was declared proclaimed offender. Both accused denied the charge framed against them and claimed trial.

4. Prosecution examined PW-1/complainant at Exh.5 who produced receipt of dead body at Exh.5/A, FIR at Exh.5/B and sketch of place of incident at Exh.5/C; PW-2 Aijaz Hussain at Exh.6; PW-3 Ghulam Rasool at Exh.7; PW-4/mashir Shah Nawaz at Exh.8 who produced mashirnama of injury at Exh.8/A, mashirnama of dead body at 8/B, mashirnama of clothes at 8/C, mashirnama of place of incident at 8/D, mashirnama of arrest at 8/E and mashirnama of recovery at 8/F; PW-5 Dr. Wali Muhammad at Exh.9 who produced police letter at Exh.9/A, provisional medico legal certificate at Exh.9/B, police letter for postmortem at Exh.9/C, lashchakas form at Exh.9/D, postmortem report at Exh.9/E and receipt of last worn clothes of deceased at Exh.9/F; PW-6 Tapedar Shoaib at Exh.10, he produced police letter at Exh.10/A and sketch of place of incident at Exh.10/B; PW-7 Inspector Moula Bux at Exh.11, he produced letter for treatment at Exh.11/A, letter for postmortem at Exh.11/B, danistnama at Exh.11/C and entries at Exh.11/D to Exh.11/I and prosecution closed its side. On application filed by counsel for accused, Dr. Muhammad Ali was called as Court

witness examined at Exh.13, he produced OPD Register at Exh.13/A and certificate at Exh.13/B.

5. Accused in their statements u/s 342 Cr.P.C. deposed that they have been falsely implicated in this case by the complainant party; the accused did not lead defence evidence nor examined themselves on oath. In consequence to conclusion of trial, the learned trial court convicted the present appellant while other *two* accused persons were acquitted by one and same judgment.

6. Learned counsel for appellant/accused contended that there is delay of one day in lodgment of FIR hence deliberation/consultation in lodgment of FIR cannot be ruled out; that no incident as alleged had taken place; that deceased died due to heart attack but the complainant side because of the enmity with accused persons managed the documents and lodged a false FIR; that Dr. Muhammad Ali Memon confirmed that Ashique Hussain was brought before him and after first aid, he referred him to another hospital; that this is a case of political victimization where complainant side is very influential belonging to ruling party; that trial court failed to determine as to whether deceased died natural death having heart attack; that medical officer of Sujawal Hospital deposed that deceased was brought to him at cardio OPD with complaint of chest pain and ECG was conducted showing acute anterior wall myocardial infraction hence was referred to NICVD Karachi and deceased did not complaint of any injury; that post mortem report is fabricated showing different age of deceased; that prosecution miserably failed to prove its case against present accused beyond reasonable shadow of doubt.

7. Learned DPG argued that all prosecution witnesses have fully supported the case of prosecution; fully implicated the accused with commission of the crime; that medical evidence is corroborated with the ocular evidence; that accused themselves admitted the incident by deposing that during scuffle they also received injuries and treated however did not produce any document to prove their plea; that defence has taken three defence pleas *viz* deceased fallen down from motorcycle, scuffle taken place between the parties and that deceased died due to heart attack; that evidence of Dr. Muhammad Ali Memon is also not for any help to the appellant/accused as neither he mentioned the caste of patient nor the age of patient examined by him is correct; moreover, he deposed that he does not know that cause of death; that present appeal is liable to be dismissed.

8. I have heard the respective sides *carefully* and have also examined the available material with *able* assistance of respective counsel (s).

9. *Prima facie,* it is an admitted position that the learned trial court itself while disbelieving the same set of evidences for co-accused persons namely Ghulam Hussain and Nazir, believed the same to *extent* of present appellant / convict.

10. For such a situation, the legal position as affirmed in the recent judgment of honourable Apex Court in the case of *Tarique Mehmood v. State* 2021 SCMR 471 is that:-

> "5. ….Fractional reliance to maintain appellant's solitary convicition on the statements of witnesses disbelieved qua their own assailants is an option fraught with potential risk of error and as such inconsistent with the principle of sale administration of criminal justice.…

I am conscious that the *only* exception provided for sifting the grain from chaff is also settled and reaffirmed which stood detailed in the

recent judgment of honourable Apex Court recorded in the case of *Munir Ahmed v. State* 2019 SCMR 79 that:-

> 4. .... The question which requires consideration by this Court is as to whether the evidence which has been disbelieved to the extent of three co-accused of the appellant who have been acquitted by the learned courts below can be believed to the extent of the appellant? By now it is well settled that principle of *falsus in uno falsus in omnibus* is not applicable in our system designed for grain from the chaff in order to reach at a just conclusion. **If some independent and strong corroboration is available the set of witnesses which has been disbelieved to the extent of acquitted co-accused of the appellant can be believed to the extent of the appellant**. ..

The perusal of the available record does not show any other *independent* evidence which could satisfy departure to *normal* course to be adopted by the Criminal Court (s) in such like matter i.e ***"in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made for conviction qua the convict".*** This principle of safe administration of justice stood reiterated in the case of *Sughra Begum v. Qaiser Pervez* 2015 SCMR 1142 that:-

> 23. After the acquittal of Muhammad Ilyass co-accused, to whom same and similar role was attributed like the appellant and because some of the crime empties did not match with the pistol attributed to the appellant but he was given benefit of along with Babu Muhammad Javed, the latter being a moving spirit behind the whole tragedy then how, in the absence of strong corroboratory evidence, the appellant could be convicted on the same qualify of evidence, which was disbelieved qua the co-accused. In this regard this court in the case of ***Ghulam Sikander v. Mamraz Khan (PLD 1985 SC 11)*** , has laid down a guiding principle to the effect that when case of the convict is not distinguishable from that of the acquitted accused and the evidence is indivisible in nature then in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made for conviction qua the convict. This rule of law has been followed since long without any exception.

In the instant matter, the allegation against appellant and that of acquitted co-accused to extent of their arrival and assault was one and same thereby meaning that **'common object'** of all was pleaded one and same. The *only* difference was that appellant *allegedly* caused iron rod blow while acquitted co-accused caused kicks and fists blows. Where the **'common object'** of more than one is *pleaded* as **'common'** then mere different action (s), at the spot, would not necessarily effect the **'common object / intention'.** I would *add* that because of such *legal* position, there has been insisted strong *independent* corroboration for making an exception to *general* rule.

12. I would not hesitate that where the ***charge*** is of causing ***murder*** the medical evidence is material *least* to extent of substantiating the ocular evidence regarding receipt of injuries, nature of the injuries, kind of weapons, date and time of incident (injuries resulting into death). In the instant matter, the medical evidence, on perusal thereof, appears to be not providing support to ocular account rather was / is causing dents. Here it would be pertinent to refer relevant part of cross examination of the doctors examined:-

> **Cross examination of Dr. Wali Muhammad, M.O, DHO Office, Sujawal:**
>
> It is correct to suggest that I am permanent resident of Darro Town. It is incorrect to suggest that in the Thatta District two political groups Sheerazi and PPPP usually contested the elections. It is correct to suggest that usually MNAs and MPAs elected from those two political groups. It is incorrect to suggest that in my student life I was office bearer of SPSF group. (Note. The learned counsel is advised to ask the question related to the present case and not about personal life of doctor). It is correct to suggest that I am senior doctor and not specialist. **It is correct to suggest that I have not produced final medical certificate. It is correct to suggest that medico legal case number is 25 dated 07.04.2015, as mentioned in provisional medico legal certificate. It is correct to suggest that in postmortem report medico legal case number is 21 dated 07.04.2015.** It is correct to suggest that medico legal case number mentioned in postmortem report is 21 dated 07.04.2015. It is correct to suggest that in

> provisional medical certificate date and time is mentioned as 10:30 A.M on 06.04.2015. **It is correct to suggest that date and time is mentioned as 12:30 P.M on 06.04.2015**. I have provided first aid to injured and he remained for 20 to 25 minutes at Taluka Hospital Mirpur Bathoro. It is correct to suggest that we usually refer patients to Hyderabad. I have not seen any sign of cardio disease to the injured at the time of examination. It is correct to suggest that I have not produced referral letter. Voluntarily says: it is available in our record. It is incorrect to suggest that in the human body spleen available on the back side of abdomen. It is correct to suggest that I have not taken visra of deceased at the time of postmortem. Voluntarily says; I do not need to take the same. It is incorrect to suggest that I have violated the laws of medical that I should take visra from dead body of deceased. **It is correct to suggest that there were no mark of violation on the body of deceased except one injury.** It is incorrect to suggest that deceased was heart patient and I have referred him to Civil Hospital Sujawal. It is incorrect to suggest that I referred deceased to Sujawal and from Sujawal doctor provided him treatment and then referred to Civil Hospital Karachi. It is incorrect to suggest that deceased was died due to heart attack and I have issued false postmortem report due to political affiliation with Sheerazi group. It is incorrect to suggest that accused also came at Hospital being injured before arrival of deceased and I have provided treatment to accused persons. It is incorrect to suggest that I have written word "received" at Ex.9/C today in the Court. It is incorrect to suggest that I am deposing falsely.

The above reproduction, *prima facie,* shows that medical officer *himself* admitted that final medical certificate was not produced; the case number, mentioned in post mortem report, is different from the one mentioned in the ***medico legal*** case number of the deceased as was given in ***provisional medico legal certificate.*** Not on this, but the time was also different in both such document (s). This *prima facie* was / is showing that such post mortem report was never *safe* to be relied upon. If such post mortem report is excluded then the position would become the same as was found sufficient for extending the benefit of doubt by honourable Apex Court in recent case of *Gul Muhammad v. State* 2021 SCMR 381 that:-

> "…. Another very crucial point which requires determination is that only provisional external examination of the dead body of the deceased was conducted without any postmortem report available on the record and it is not evern claimed by the prosecution that the autopsy was conducted over the dead body of the deceased. **The finding of the Medical Officer qua the cause of death only from external observation has no lgal sanctity.** It is the requirement of law that the finding qua the cause of death, time of

> death and manner of death cannot be substantiated without post-mortem examination..... **...**

Here, it is material to add that another Medical Officer (Dr. Muhammad Ali Cardiologist, Taluka Hospital Sujawal) was also examined in the case. Relevant to refer cross examination of such medical officer which is:-

> It is correct to suggest that in civil hospital there is separate cardiologic ward. It is correct to suggest that only the heart patients are to be examined in OPD. It is correct to suggest that in civil hospital there is general OPD. The general patient are to be examined there. The emergency ward is separate. The serious patients are to be brought in emergency. I had examined he patient Ashique at about 1.00 pm. **He had the history of chest pain since last ½ hours.** It is correct to suggest that the ECG was also taken at the time examination. The entire investigation was conducted. ECG is obtained after taking over the shirt of the patient. ECG is to be conducted by the ECG technician and after taking the ECG they handed over to me for diagnosing the illness patient. In ECG report there was heart attack/heart pain of the deceased. **Due to serious attack I had referred patient to Karachi after giving first aid**. There is no certain time for sustaining the attack.

The above evidence, if compared to what was deposed by Dr. Wali Muhammad, M.O, DHO Office, Sujawal, is sufficient to hold that medical evidence to *extent* of proving the cause of death was never safe to be relied upon. The same, if is excluded, leave nothing on record to restrain the forceful application of general rule of giving benefit of doubt where one same set of evidence the co-accused persons already stood acquitted.

13. Accordingly, this case is not free from doubt hence instant appeal was allowed as a result whereof impugned judgment was set aside vide order dated 19.05.2021; these are the reasons of that order.

J U D G E