

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 268 of 2015

Appellants : Khamiso & Misri
through M/s. Muhammad Akbar Khan & Falak
Sher Khan, Advocates.

Respondent : The State
through Mr. Talib Ali Memon, A.P.G.

Date of hearing : 21st September, 2022

JUDGMENT

Omar Sial, J.: On 26.05.2011, F.I.R. No. 14 of 2011 under sections 302 and 34 P.P.C. was registered at the Chauhar Jamali police station on the complaint of one Muhammad Nooh. Nooh recorded that earlier that day he along with Sulaiman Jamali, Ali Gul Jamali and Haroon Jamali had gone to work on their field. They found Zameer alias Gogi and Misri already present on the spot. Water which was being pumped out by a machine owned by the landlord was being allowed to flow into a jungle by the 2 men. Upon the complainant party objecting to the water being wasted, an altercation occurred between the parties. After an exchange of harsh words between Zameer and Sulaiman Jamali, Zameer hit him with the spade he carried whereas Misri hit Sulaiman with the hatchet he had. Sulaiman subsequently died.

2. The real name of accused Zameer alias Jogi turned out to be Khamiso alias Jogi and he was arrested on 29.05.2011 along with the spade he used to hit Sulaiman. Misri was arrested on 02.06.2015 when he himself surrendered to the police.

3. Both the accused pleaded not guilty and claimed trial. The prosecution examined 11 witnesses to prove its case. Who these witnesses were and what did they testify at trial is discussed below. In their respective

section 342 Cr.P.C. statements, both the accused denied any wrong doing and termed it a false case against them.

4. At the end of the trial the learned 2nd Additional Sessions Judge, Thatta on 27.05.2015 convicted both accused to a life in prison and further directed them to pay a fine of Rs. 200,000 each (or spend another six months in prison). It is this judgment that has been challenged through this appeal.

5. Learned counsel for the appellants has argued that the occurrence was all of a sudden and was therefore not pre-meditated; that the appellants have been in jail for 9 years; that the defence plea of an enmity between the parties being the cause of the false case, was not taken into account by the learned trial court and that the complainant had already forgiven the appellants; that the case property was sent for analysis after 9 days of seizure. To the contrary the learned APG argued that 3 eye witnesses of the incident had fully implicated the appellants; that the medical evidence reconciles with the ocular evidence; that a blood stained spade was recovered; that there was no possibility of a misidentification; no reason for the claimed enmity was given; that the trial court had rightly convicted the accused. None appeared on behalf of the complainant despite notice.

6. I have heard the learned counsels and re-appraised the evidence with their able assistance. My observations and findings are as follows.

Eye Witnesses

7. There are 3 eye witnesses to the incident: (i) **Muhammad Nooh (PW-1)** (ii) **Muhammad Haroon (PW-2)** and (iii) **Ali Gul Jamali (PW-3)**.

8. All 3 narrated what was said in the F.I.R. i.e. on 26.05.2011 at about 8:00 a.m. the 3 eye witnesses and the deceased had gone to their land where they saw that water was being wasted by the 2 appellants and that after an exchange of harsh words between the deceased and the 2 appellants, the 2 had proceeded to hit Sulaiman with the spade and the

hatchet they had with them at that time. No exaggeration or contradiction was found in or between their statements at trial in this regard. They perfectly corroborated each other on the date, time and place of incident as well as what exactly happened between the parties that day.

9. The incident is said to have occurred at 8:00 a.m. on 26.05.2011 however the F.I.R. was registered by **PW-6 A.S.I. Muhammad Anwar** on 26.05.2011 at 11:30 p.m. The delay of nearly 15 hours in the lodging of the F.I.R. was explained by PW-1 Nooh. He recorded that immediately after the incident, the injured Sulaiman was taken to a hospital in Chuhar Jamali. Nooh had left the other 2 eye witnesses, Haroon and Ali Gul Jamali with Sulaiman at the hospital and he himself had gone to the police station to inform the police of what had happened. A difference of opinion occurred between the police stations of Chuhar Jamali and Ladiun as to which police station had jurisdiction, however the Ladiun police station officials had visited the Civil Hospital and seen the injured as well as inspected his injuries. Sulaiman was in a serious condition so he was referred to a hospital in Karachi for further treatment where at about 2:30 p.m. on 26.05.2011 he expired. Sulaiman was buried after a post mortem. The F.I.R. was then registered. A perfectly reasonable and logical explanation was given by Nooh for the nearly 15 hour delay in the lodging of the F.I.R. I find the explanation believable and the delay not having being caused in order to manipulate the events that had occurred.

10. The 3 witnesses perfectly corroborated each other; they had a valid reason to be on the place of incident; their testimony is confidence inspiring and trustworthy with a ring of truth to it. Their narration of how the events unfolded post incident was further corroborated by **Shoukat Ali Jamali PW-4**, who had reached the hospital immediately upon coming to know that Sulaiman had been injured and was taken to the Civil Hospital.

Section 161 Cr.P.C. statements of the eye witnesses

11. The incident occurred on 26.05.2011 whereas the eye witnesses recorded their section 161 Cr.P.C. statements on 29.05.2011. There is a

slight delay in the recording of the section 161 Cr.P.C. statements. Keeping in view however that the F.I.R. was registered a little before midnight on 26.05.2011, the section 161 Cr.P.C. statements seem to have been recorded within 48 hours of the registration of the F.I.R. Ideally, the statements should have been recorded quicker, however, I do not find the delay intentional or caused as a consequence of framing a false story as to what happened. It is also to be kept in mind that the eye witnesses were extremely simple, illiterate and poor persons who were completely reliant on the police to do its duty faithfully and competently. One cannot attribute the delay in the recording of the statements to the malafide of the eye witnesses.

Recovery

12. Blood stained earth was recovered by the investigating officer **S.I. Noor Ahmed Memon (PW-7)** on 27.05.2011 i.e. the very next day of the incident. On 29.05.2011, Khamiso was arrested along with the spade that he had used to hit the deceased. The recovery was made from inside the house of Khamiso. I notice that the witness to the recovery PW-4 Shoukat Ali stated at trial that though he was a witness to the arrest and recovery, he had not gone into the house of Khamiso when recovery of the spade was effected. Once again, though not the ideal situation, keeping in view the strong conservative and rural setting where women are not exposed to most men, it was probably because of the respect of the womenfolk that Shoukat had not gone into Khamiso's house. His not entering the house, in these circumstances, cannot be held against the prosecution. To the contrary, Shoukat admitting that he had not gone inside the house, to me makes his testimony more trustworthy. If he was misrepresenting at trial, there was nothing stopping him from claiming that the spade was recovered in front of him.

Medical Evidence

13. PW-1 Mohammad Nooh stated that Sulaiman was hit by Khamiso and Misri several times on his head and body with the spade and hatchet

which they carried respectively. He further elaborated in his cross examination that it was Misri who had hit Sulaiman twice with his hatchet, once on his head and the second time on his left arm. Khamiso hit Sulaiman on his head twice with the spade he carried. His version was corroborated by PW-2 Muhammad Haroon. PW-3 Ali Gul also corroborated the version but did not specifically state the seat of injury as far as the blows given to Sulaiman by Misri were concerned. He did however say that Misri hit Sulaiman with his hatchet twice. **S.I. Nazir Ahmed (PW-5)** when examining the injuries of the deceased had noted 4 injuries. **Dr. Abdul Hussain (PW-11)** who was the doctor at the local health clinic where Sulaiman was initially taken for medical aid recorded 4 injuries. However, the Inquest Report prepared by **S.I. Arab Hussain Awan (PW-9)** reflected 3 injuries on the deceased. One was on his left arm whereas one each was present on his head and left ear. **Dr. Noor Ahmed (PW-10)**, when he examined the body found 4 injuries on the deceased; 2 were on the head and 2 on his left arm. There is a minor discrepancy between what the F.I.R. and the Inquest Report recorded compared to what the doctor had seen. In the heat of the moment and blood flowing from the body of the deceased, it would not be impossible that the seat of one injury was not precisely noted. The difference is not material. The medical report reconciles substantially with the ocular evidence.

Defence Plea

14. Khamiso in his section 342 Cr.P.C. statement said that he had nothing to do with the incident and that he had been framed by the complainant due to an enmity. They both asked that 2 persons be summoned as their witnesses. One, **Abdul Ghafoor (DW-2)** and the other **Sacho (DW-1)**. Both defence witnesses stated that Misri was with them when the incident happened. Both however, admitted that they could not give the date when Misri was with them. I am sure that as they were all friends, they would have probably met each for tea many times, but that would not ipso facto mean that they were also having tea together when the incident occurred. Abdul Ghafoor in his cross examination admitted that though the case

against Misri was a false one, he had not informed anyone of the same except some notables of the area. He did not specify who these notables were neither did such a notable come to give evidence which would have corroborated Ghafoor's statement nor was any person from the tea shop summoned as witness where Misri, Abdul Ghafoor and Sacho were having tea together. It is pertinent to point out that neither of the defence witnesses even attempted to provide an alibi for Khamiso. The defence witnesses have been vague and their narration somewhat sketchy and doubtful. When put in juxtaposition with the prosecution case, it is the prosecution case that appears more convincing and believable.

Sentencing

15. The learned counsel has fleetingly argued that the murder was not pre-meditated. While in my view it is a case of blowing hot and cold at the same time as on the one hand the learned counsel argues that the appellants were not even present on the spot while on the other he says the murder was not pre-meditated, I have, nonetheless, looked at this area closely.

16. As mentioned in the beginning of this opinion, the learned trial judge came to the conclusion that both appellants had committed an offence punishable under 302(b) P.P.C. If the learned counsel's argument has weight, the impact of the same could be that the conviction to the appellants be converted to one under section 302(c) P.P.C., which may then entail a lesser punishment.

17. In the case of **Ali Ahmed and another vs The State and others (PLD 2020 SC 201)** it was said that the "Doctrine relating to provocation depended on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice which was the formation of an intention to kill or to inflict grievous bodily harm, was negated. The proportionality of the reaction to the provocation was tested on the touchstone of the reaction expected from a reasonable person. What a reasonable man would do in certain circumstances depended upon various

factors including the customs, traditions, social and cultural values, and way of life of the society to which he belonged. No abstract standard of reasonableness could be laid down, in this regard." In this case it was also observed by the Honorable Supreme Court that "Provocation in law thus consisted mainly of three elements: (i) the act of provocation, (ii) the loss of self-control, and (iii) the retaliation/reaction proportionate to the provocation. The relationship of these elements to each other, particularly in point of time, was of the foremost importance to determine whether there was time for passion to cool and reason to resume."

18. A similar thought was expressed by the Supreme Court of Pakistan in the case of **Bashir Ahmed and another vs The State and another (2022 SCMR 1187)** when it observed that "There are mainly four elements which need to be established to avail the defence of provocation i.e. (i) the provoking circumstances, (ii) the accused's loss of self-control resulting from the provoking circumstances, whether reasonable or not; (iii) whether the provocation could have caused an ordinary person to lose self-control, and (iv) the retaliation was proportionate to the provocation. Whether the accused's loss of self-control was a result of the provoking circumstances is a subjective test. To prove the element of provocation, there are two more conditions i.e. it should be prompt, and retaliation is without inordinate delay."

19. In essence the above cited judgments stipulate that in order to prove the defence of "grave and sudden provocation" it should be shown that:

- (i) the provoking circumstances,
- (ii) the accused's loss of self-control resulting from the provoking circumstances, whether reasonable or not;
- (iii) whether the provocation could have caused an ordinary person to lose self-control, and
- (iv) retaliation was proportionate to the provocation.
- (v) the proximity in time of the provoking act and retaliation.

20. I have analysed the present case in light of the criteria laid down by the Honorable Supreme Court.

21. Historically it has been seen that in rural set ups the provision of water to fields and its' unlawful, and in cases even its lawful diversion, is indeed a sensitive issue and has served as a catalyst for the commission of a large number of offences. Keeping that in mind, I am of the view that the altercation between the parties in all probability had the potential of provoking the accused.

22. It are the conditions listed at (ii), (iii) and (iv) above, that in my opinion are not fulfilled in the present case. While verbal abuse and manhandling the perpetrator may have been a reasonable reaction if provoked to such an extent the fact that 2 men hit Sulaiman, twice each, and at least 3 blows were directed with the sharp sides of the instruments they carried on his head is a reaction which one could not expect from a reasonable person provoked. When blows were repeated, a vital part of the body targeted, not with the blunt side of the hatchet and spade but with their sharp edges, it can also not be said that the retaliation was proportionate to the provocation.

23. Throughout the trial, the appellants never even suggested that they were provoked, to the contrary till the last minute, which is evident from the defence witnesses they produced, they pleaded that they were not even present at the scene let alone being involved in the incident in any manner. It was only during the hearing of the appeal that a vague argument was made on this ground whereas the entire argument preceding it was to convince the court that the appellants had not committed the murder. In the event the appellants wanted to make their case fall within the ambit of "grave and sudden provocation" the burden of proof was on them and not the prosecution. They did not discharge this burden at trial. The plea raised in appeal seems to be an afterthought. I am therefore not convinced that the act of the appellants would fall within section 302(c).

Complainant having forgiven the appellants

24. As regards the learned counsel's argument that the appellants have been forgiven by the complainant, there is no evidence on record to show the same. No application under the relevant provisions of law was filed either in the learned trial court or before this court. The argument is therefore meaningless.

Opinion of the Court

25. The prosecution proved its case against the appellants successfully beyond reasonable doubt. The appeal stands dismissed.

JUDGE