

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 74 of 2020
(*Ghulam Sarwar Lashari versus The State*)

Date of hearing : **23.10.2023**

Date of decision : **23.10.2023**

Mr. Qurban Ali Malano, Advocate for appellant.
Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Through instant Appeal, appellant Ghulam Sarwar S/o Ali Dino Lashari, has impugned judgment dated 26.11.2020, passed by learned Additional Sessions Judge-IV, Khairpur in Sessions Case No.499 of 2015 (Re: The State versus Ghulam Sarwar Lashari and others), arising out of Crime No.183 of 2014, registered at Police Station Kotdiji under Sections 364, 302, 34 PPC, whereby he has been convicted U/S 302(b) PPC read with Section 34 PPC and sentenced to suffer R.I for life as Ta'zir with fine of Rs.1,00,000/- (Rupees one lac), to be paid to the legal heirs of deceased Ahmed Khan. In case of default in payment of fine, he has been ordered to suffer S.I for six months more. Appellant has also been convicted U/S 364 PPC and sentenced to suffer R.I for ten years with fine of Rs.50,000/- (Rupees fifty thousand), to be paid to the legal heirs of deceased Ahmed Khan. In case of default in payment of fine, he has been ordered to suffer S.I for six months more. However, benefit of Section 382-B CrPC has been extended to him.

2. As per brief facts in FIR, Ahmed Khan aged about 26/27 years, younger brother of complainant had restrained Ghulam Sarwar Lashari from grazing the cattle in their lands and from visiting their neighbourhood as he had terms with criminals and was of a bad character. He however got annoyed with him and had threatened him of dire consequences. On 22.10.2014, marriage of complainant's brother Ahmed Khan was scheduled. For discussing its arrangement, complainant, his nephew Moula Bakhsh, his relative Mumtaz Ali and his brother Ahmed Khan were sitting in their *Otaque* on 20.10.2014, when at about 0130 hours four armed

persons came inside. One of them was identified as Ghulam Sarwar S/o Ali Dino, the appellant. He was armed with a repeater, while three unknown persons had repeater, gun and rifle, respectively. The accused pointing out their weapons to the complainant party asked them to keep silent. Thereafter, all the accused, with intention to commit murder, took away complainant's brother Ahmed Khan on motorcycles towards western side via Mohabat Wah Top. Commotion in the wake of which raised by the complainant party attracted complainant's brother Dost Ali and others. The complainant along with them and others followed the accused on motorcycles. When at about 0145 hours, they reached the link road leading from Dhup-Waro to Mahars, they saw in the headlights of motorcycles and torches that Ahmed Khan was struggling to let go of him from grip of the accused. The accused persons seeing complainant party approaching got Ahmed Khan off the motorcycle, and then accused Ghulam Sarwar Lashari, with intention to commit his murder, made a straight fire upon him. He fell down crying. All the accused then fled away on motorcycles towards Mahar-Jo-Daro. Complainant party came over Ahmed Khan and found him having a through and through firearm injury on his back. He died within their sight. They communicated such information to Police Station Kotdiji. The police came at the spot and brought the dead body to Taluka Hospital Kotdiji, which after postmortem was handed over to his heirs. After burial etc. they remained in search of unidentified accused persons but could not succeed; hence, FIR on 29.10.2014.

3. The complainant then appeared at Police Station on 05.12.2014 and recorded further statement disclosing names of two out of three unknown accused as Saeed Ahmed and Nisar Shah. After the proceedings, accused Nisar Shah was declared proclaimed offender. In the trial, a formal charge was framed against appellant and co-accused Saeed Ahmed. They pled not guilty and opted for a trial. During pendency of the trial, accused Saeed Ahmed was acquitted by way of a compromise U/S 346(6) CrPC.

4. The prosecution then led the evidence of as many as ten (10) witnesses to prove the case, which included complainant, PW-1 Ali Sher Mari. He produced FIR, further statement and receipt of dead body of deceased; two eyewitnesses PW-2 Moula Bakhsh and PW-3

Mumtaz Ali; mashir PW-4 Latif Dino, who has produced memos of sites inspection, danishnama, memo of receiving last worn clothes of deceased, memo of arrest and recovery; PW-5 SIP Habibullah; PW-6 ASI Nizakat Ali, who has produced memo of arrest; PW-7 ASI Datar Dino, who has produced a Form to Accompany Body or Injured Person sent for Medical Examination (police letter to Medico Legal Officer); Tapedar PW-8 Khair Bakhsh, who has produced sketch and letter of SHO; Medico Legal Officer PW-9 Dr. Syed Hassan Naimat Shah, who has produced postmortem report of deceased; and PW-10 WHC Barkat Ali, who has produced letter of SHO and report of chemical examiner.

5. After completion of evidence, statement of appellant/accused U/S 342 CrPC was recorded, he denied the allegations and pled innocence. He, however, neither examined himself on oath nor presented any witness in his defense. This process ended in the trial Court's judgment dated 26.11.2020, resulting in conviction and sentence of appellant as stated above, but keeping the case against absconding accused on a dormant file until his arrest or surrender. Hence, this appeal has been filed by the appellant.

6. Learned defence Counsel has argued that incident is unseen one; that the witnesses have been introduced in the case after delay of 9-10 days in that the incident happened in the night between 20.10.2014 and 21.10.2014, but FIR was registered on 29.10.2014 after delay of 09 days and 161 CrPC statements of the witnesses were recorded after that; that there are material contradictions in the evidence of eyewitnesses, which the trial Court has not properly appreciated; that evidence of police officials suggests that dead body of the deceased was found abandoned by them and only later on the story in FIR was contrived; that medical evidence is in conflict with the oral account furnished by the eyewitnesses.

7. Learned Additional Prosecutor General, on the other hand, has supported the impugned judgment, but has not disputed the fact that there are variations in the evidence of witnesses. He seems to suggest that contention of learned defence Counsel: the incident was not seen by anyone at the relevant time, is probably correct.

8. I have heard the parties and perused material available on record. In the case, prosecution has examined at least three eyewitnesses: the complainant, PW Moula Bakhsh and PW Mumtaz Ali (Ex.8, 9 and 10, respectively). They have disclosed that on the night of incident they were present in the *Otaque* of deceased Ahmed Khan Mari along with other persons, when at about 01:30 a.m., appellant along with three unknown accused duly armed with the weapons stormed in and abducted deceased Ahmed Khan Mari for the purpose of his murder. They did not intervene fearing reprisal from the appellant and unknown accused, who were armed with deadly weapons. But then as soon as they left, some of them followed them on motorcycles, and some by foot. At about 01:45 a.m., on a road leading to the village of Mahar's, they spotted the accused taking away the abductee on motorcycles. He struggled to come down from the motorcycle but then accused Ghulam Sarwar fired from repeater upon him, which hit his back causing a through and through injury. When they came over him, he was still struggling for his life but then died. They then informed the police on phone, who came and brought the dead body to the hospital for postmortem, and after postmortem lodged FIR on 29.10.2014.

9. From such evidence, it is obvious that complainant and PWs had identified the appellant at the spot at the time of abduction and they also saw him firing at the deceased subsequently. The complainant thereafter although called the police to come at the spot. And they came, completed formalities viz. preparing necessary documents and shifted the dead body to the hospital for a postmortem. But strangely, during this entire time none from the complainant party informed the police about appellant and his direct role in causing murder of the deceased. Until only after lapse of nine (09) days, on 29.10.2014, the complainant appeared at the Police Station with the story implicating the appellant and three unknown accused.

10. Next, evidence of eyewitnesses suggests that there were at least 15 to 20 persons available in the *Otaque* of the deceased, when four accused barged into it and abducted the deceased. But strangely, none of them offered any resistance or tried to save the abductee and allowed the four persons to take away him smoothly.

But, then, at the distance of two and a half kilometer from the *Otaque*, at the place of incident i.e. a road leading to Goth Ali Gohar, they murdered the deceased when they saw the complainant and other witnesses approaching them. If the intention of the appellant and co-accused was to murder the deceased and to do so in presence of the persons i.e. complainant *et al*, then what was the need to bring him two kilometers away at some place and then murder him, not least when at the time of his abduction, no one from the complainant party, consisting of 15/20 persons, had put up any struggle or tried to intervene. There the appellant and his accomplices could have easily murdered the deceased and escaped, if their plan was to do so. Then, the question is when the complainant party did not dare intervene at the time of abduction of the deceased, and had been proved as toothless. Then spotting them approaching, how and why the appellant and his accomplices got panicked and disposed of the abductee by killing him.

11. Further, the complainant in evidence says that when he came over the abductee after he was hit by the appellant, he found him struggling for life, he does not say that he died. Whereas PW-2 Moula Bakhsh states in his evidence that they saw the blood was oozing from the injuries of the victim and he succumbed to injuries and died. PW-3 Mumtaz Ali, in his cross-examination, has disclosed a different story that when they arrived at the place of scene, deceased Ahmed Khan had already died. The story in the FIR shows that the deceased had died within sight of complainant and PWs within no time of their arrival. This account that deceased had died immediately after being hit by the appellant is belied by the evidence of Medico Legal Officer, PW-8 (Ex.16). He has described the time between death and injury as one hour in his examination-in-chief and has confirmed it in his cross-examination in reply to a question about the time between death and injury. Further, the distance, from which the fire was made to the deceased has been described by him, is more than four (04) feet. Whereas, the evidence of the witnesses posits that the deceased was with the appellant and others on two motorcycles close to each other, and when he struggled to let himself go, he was shot at by the appellant suggesting that it was a close fire.

12. PW-6 ASI Datar Dino, in his evidence, has disclosed that the complainant had informed him at about 01:30 a.m. on 21.10.2014 about abduction of his brother by appellant and others, and then at about 05:00 a.m., he received the message on phone from him that appellant had murdered his brother Ahmed Khan. It is strange to note that the said police officials after having received information at about 01:30 a.m. about abduction of the deceased did not take any initiative or launched a hunt to recover him and arrest the appellant, although he had been identified. Or even to make such information a part of daily diary, as none has been produced, and set the law at motion. Further, we fail to understand that if information of abduction was given to the police right at the time viz. 01:30 a.m. when it allegedly took place, then why information of murder of the deceased at 01:45 a.m. after 15 minutes, was not given to the police immediately, and why it was given at 05:00 a.m. after 03 hours. This tends to show strongly that the witnesses were not present when the incident took place and they came to know of the dead body of deceased in the morning at about 05:00 a.m. and gave such information to the police. And since, however, the complainant and witnesses were not aware about the names of the culprits, they did not name anyone to the police, and after nine (09) days, narrated the above story.

13. Not only the conduct of the police on receiving information of abduction of the deceased is suspicious, as they did not steal away to chase the culprits, but also the account of eyewitnesses to be present at place at the given time is not free from a doubt. The delay of nine (09) days in FIR has further lent support to such a view cutting the roots of very story narrated by the complainant.

14. Then, on 05.12.2014, the record reflects, the complainant got his further statement recorded and identified two (02) out of three (03) unknown accused who, per him, were with the appellant and had participated in the incident. This further statement, as is clear, was recorded after more than one and a half month of the incident and does not disclose the source through which the complainant had come to know of the names of co-accused. The FIR delayed by 09 days, naming only appellant, and further statement delayed by one and half month naming two unknown

accused has indeed dented credibility of the complainant's position in the case and the chain of facts built by him to frame the accused in the case.

15. The contradictions in the evidence of the eyewitnesses plus the delay in FIR, and the above stated anomalies in the case, strongly suggest absence of the witnesses at the spot and the fact that the incident was not seen by them. And that only after finding the dead body of the deceased at about 05:00 a.m. they conveyed information to the police or the police found the dead body and conveyed such information to the complainant party who arrived there at late stage. This fact further appears to be strengthened from evidence of ASI Nizakat Ali, PW-5 (Ex.13), who in his cross-examination, has disclosed that they had come to know about the dead body of the deceased available at the place of incident by someone who had disclosed the same fact to ASI Datar Dino. They had left the Police Station at about 05:30 a.m. and arrived at the place of incident at 06:00 a.m. Only they, the police officials, had arrived at the place where the dead body was lying and that he had brought the dead body at the hospital. And that they had remained at the hospital the whole day and only in the evening at about 04:00 p.m. delivered the dead body to his heirs.

16. From foregoing discussion, it is apparent that a doubt has been created in the prosecution case, and it is a settled proposition of law that when there is a doubt in the prosecution case, its benefit is to go to the accused as a matter of right. Therefore, this appeal is **allowed**. Conviction and sentence awarded to appellant Ghulam Sarwar S/o Ali Dino Lashari vide impugned judgment dated 26.11.2020 are **set aside**. Consequently, the appellant is **acquitted** of the charge and shall be released forthwith by jail authorities, if he is not required in any other custody case. These are the reasons of my short order dated 23.10.2023.