IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Appeal No. S – 112 of **2018**
(*Akbar Shah and others versus The State*)

Dates of hearing : **07.08.2023**, **21.08.2023** and **04.09.2023**

Date of announcement : **15.09.2023**

Mr. Amanullah G. Malik, Advocate for appellants.
Mr. Ubedullah Ghoto, Advocate for complainant.
Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Appellants, having been convicted and sentenced in the terms as mentioned below in Sessions Case No.24 of 2012 (*Re: State versus Akbar Shah and others*) arising out of FIR bearing Crime No.330 of 2011 under Sections 302, 324, 337-H(2), 114, 147, 148, 149, PPC registered at Police Station Ubauro, by impugned judgment dated 08.09.2018 passed by learned Additional Sessions Judge, Ubauro, have called into question such conviction and sentence by means of Appeal in hand.

2. Appellants, namely, Akbar Shah, Asghar Shah, Rizwan Shah and Safdar Shah have been convicted and sentenced to imprisonment for life, whereas appellant Inayat Shah has been sentenced to R.I. for 14 years. All the appellants have also been sentenced under Section 148, P.P.C. to undergo R.I. for two years. Besides, each of them has been directed to pay Rs.100,000/- as compensation to the legal heirs of the deceased as provided under Section 544-A, CrPC, or in default to suffer imprisonment for a period of six months, however, with benefit of Section 382-B, CrPC.

3. As per brief facts in FIR, there was a dispute between complainant party and accused over ownership of a shop and a plot situated at Ubauro Town. On 04.09.2011 at about 1100 hours, when complainant was present in his house along with his brother Muhammad Akhtar Shah, an Advocate, his sons namely Shabbir Hussain Shah and Adnan Shah, and his mother Mst. Bani alias Fatima Bibi, appellants along with 10 other accused, out of whom 06 are named in FIR, whereas 04 are described as unknown, barged into his house. Then, at the instigation of appellant Safdar Hussain, who himself

was armed with a pistol, they started firing at brother of complainant, namely, Akhtar Shah hitting several parts of his body critically. Allegedly, in the firing of appellant Inayat Shah, mother of complainant, namely, Mst. Bani also got injured. Then every one of the accused made aerial firing in jubilation to cause harassment, which inadvertently hit Safdar Shah and Kamran Shah, both members of their party, who were taken away by them. After the accused left, complainant came over his brother Akhtar Shah, found him alive and with multiple firearm injuries on his body. Mst. Bani was also found to have received firearm injuries over her ribs and backside. Complainant brought both the injured to Taluka Hospital, Ubauro after receiving letters from police for such purpose. Wherefrom, Mst. Bani was referred to Taluka Hospital, Ghotki for want of a Women Medical Officer and brother of the complainant was taken to a hospital in Rahim Yar Khan, Punjab for better treatment, but there he succumbed to his injuries and died. Hence, his body was brought back at Taluka Hospital, Ubauro, where his postmortem was conducted. Ultimately, he was buried in the village. And after which, the complainant appeared at Police Station and registered FIR, as above.

4. In investigation, appellant Akbar Shah, Asghar Shah, Rizwan Shah and Inayat Shah were arrested and from them the incriminating weapons i.e. pistols and repeaters were recovered. After conclusion of investigation, the Challan was submitted under Section 173, CrPC in the Court against the arrested accused, who at the time of framing of charge pleaded not guilty. However, before the trial could be commenced, co-accused Uffan Shah and Rooman Shah (since acquitted) joined the trial and hence an amended charge was framed, to which they pled not guilty. Finally, appellant Safdar Shah was also brought into the trial, and after usual formalities, once again the amended charge was framed against all the accused.

5. Prosecution in order to prove the case has examined complainant as PW-1; he has exhibited FIR registered by him, further statement recorded on the same day containing the correct time of the incident as 1100 hours and not 1330 hours recorded allegedly inadvertently in FIR. PW-2 Mst. Bani Bibi, an injured and eyewitness, Syed Sabir Hussain Shah, PW-3; he is also one of the eyewitnesses. PW-4 is Dr. Sarfraz A. Shah, who initially attended the deceased as injured in earlier part of the day viz. 04.09.2011, and conducted his postmortem on the same day in late hours viz. 06:30 p.m. He has produced Provisional Medico

Legal Certificate of the deceased and his postmortem report. PW-5 is Dr. Razia Begum; she is the one who had attended to injured Mst. Bani Bibi and had issued such medical certificate, which she has produced in her evidence. PW-6 is ASI Anwar Ali, who had, after registration of FIR, arrested appellants Inayat Shah, Akbar Shah, Asghar Shah and Rizwan Shah; he has produced memo of arrest of the appellants in his evidence.

6. At Ex.25 is the evidence of PW-7 Talib Hussain Shah, who is *mashir* of inspection of injuries of Akhtar Shah (the deceased) and injured Mst. Bani Bibi, inspection of dead body of deceased Akhtar Shah, inspection of place of incident and recovery of blood stained earth and empty shells, recovery of blood stained clothes of the deceased, arrest of accused Inayat Shah, Akbar Shah, Asghar Shah and Rizwan Shah, recovery of a 12 bore repeater from appellant Asghar Shah, a 30 bore pistol from appellant Inayat Shah and a 12 bore repeater from appellant Akbar Shah etc., memos of which he has produced in his evidence. PW-8 is Tapedar Abdul Karim, who has produced site plan of the place of incident, which he had sketched under the directions of Mukhtiarkar Ubauro and on the source of complainant. PW-9 Muhammad Tayab Hussain is also the *mashir*, before whom recovery of a 30 bore pistol from appellant Rizwan Shah was effected, and which he has confirmed in his evidence (Ex.28); he has produced such memo of recovery in his evidence.

7. PW-10 SIP Sibghatullah is the SHO, Police Station Ubauro, who in his evidence has revealed receiving information on phone about the fight between complainant and accused, reaching the place of incident in response and then visiting hospital where the injured were taken to, inspecting their injuries and noting the same in the relevant memos, issuing letters for their medical treatment. He has further disclosed that he was subsequently informed about death of the deceased, which prompted him to visit once again Taluka Hospital Ubauro for inspecting the dead body and issuing a letter for his postmortem. He has further endorsed recording statement of complainant under Section 154, CrPC (FIR), visiting place of incident, preparing relevant memos, collecting blood stained earth, thirteen empties of 30 bore pistols and nine empties of 12 bore guns.

8. He has further disclosed that on 06.09.2011, he had arrested accused Inayat Shah, Akbar Shah, Asghar Shah and Rizwan Shah in

presence of *mashirs*, and during interrogation, on 07.09.2011, appellant Rizwan Shah had led to recovery of a repeater from a place in his custody. On 09.09.2011, on the source of Inayat Shah, a TT pistol was recovered from the place of his custody. On 11.09.2011, a TT pistol from Akbar Shah was recovered on his information. And on 12.09.2011, recovery of a repeater of 12 bore was effected on the source of appellant Asghar Shah from the place in his custody. He has produced all relevant documents including a lab report regarding samples of blood stained earth, matching report of ballistic expert about weapons recovered from the appellants and the empties found at the place of incident. PW-11 Munir Ahmed is Police Constable, who after postmortem, had handed over dead body of the deceased to complainant under a valid receipt, which he has produced in his evidence.

9. After closure of prosecution evidence, the appellants were examined under Section 342, CrPC Appellant Inayat Shah has produced documents including a sale agreement and a sale deed of the disputed property. The appellants have denied their guilt in their statements. But they did not examine themselves on oath under Section 340(2) CrPC and have examined one witness in defence, namely, Khalil-ur-Rehman, who has endorsed only sale agreement between him and one Syed Rehmat Shah, and stated that appellant Inayat Shah was the son of Rehmat Shah and was in possession of the disputed property.

10. At the end of trial, learned trial Court has decided the case by convicting and sentencing the appellants in the terms as state above, which they have assailed by means of instant appeal.

11. Learned Defence Counsel, in his arguments, has stated that appellants have been implicated in this case falsely on account of enmity admitted by the complainant party in FIR; that there are multiple contradictions in the oral account and medical evidence; that the narration of the incident set up by the complainant does not inspire confidence; that in the FIR, the time of incident is recorded as 1330 hours, whereas the examination of injured and relevant memos show the time of their preparation before the time of incident i.e. around 1100 hours, and which negates the entire incident; that the incident happened in the heart of city where so many shops etc. are situated, but no independent person was introduced in the prosecution case to vouch for the occurrence; that there is variation in evidence of *mashirs*

of recovery and investigating officer insofar as the date of recovery is concerned, and the nature of weapon recovered from each appellant compared to what they are stated to be armed with at the time of incident in FIR; that application to correct the time of incident from 1330 hours to 1100 hours was filed by the complainant after two years of the commencement of trial; that there is delay of one day in registration of FIR, which has not been properly explained; that PW Mst. Bani has admitted in her evidence that she is too old and her eyesight is weak, hence, her evidence identifying appellant Inayat Shah hitting her with his firearm is weak type of evidence; that initially, on the person of deceased, 06 injuries were found by the Medico Legal Officer and mentioned in Provisional Medical Certificate, but subsequently, 09 injuries are shown noted by him in the postmortem report, which creates a doubt over the manner in which the prosecution case has been set up; that the disputed house is an empty house and nobody was living in the same, therefore, claim of prosecution that complainant was residing in the same house is not correct and non-sustainable; that in the site plan, the injured's position is noted outside of the house in a street, whereas the complainant party has claimed the incident to have happened inside the house, which creates a doubt over the prosecution case. He has relied upon the cases of *Muhammad Ashfaq v. The State* (**1995 SCMR 1321**), *Sardar Bibi and another v. Munir Ahmed and others* (**2017 SCMR 344**), *Muhammad Mansha v. The State* (**2018 SCMR 772**), *Muhammad Imran v. The State* (**2020 SCMR 857**), *Waris and another v. The State and others* (**2020 SCMR 2044**) and *Mst. Fareeda and another v. The State* (**2021 YLR 1828**).

12. On the other hand, complainant's Counsel and learned Additional Prosecutor General have supported the impugned judgment. Learned Counsel for complainant has relied upon the cases of *Gulab and another v. The State* (**1986 P Cr. L J 1297**), *Muhammad Mushtaq v. The State* (**PLD 2001 Supreme Court 107**), *Abdul Rauf v. The State and another* (**2003 SCMR 522**), *Arif v. The State and 2 others* (**PLD 2006 Peshawar 5**), *Mazhar Hussain v. The State* (**2007 YLR 57**), *Muhammad Raziq Khan and another v. The State and another* (**2009 MLD 1113**), *Ansar Mehmood v. Abdul Khaliq and another* (**2011 SCMR 713**), *Taj v. The State* (**2012 SCMR 43**), *Nawab Ali v. The State* (**2014 P Cr. L J 885**), *Mst. Naseeban Khatoon and another v. The State* (**2014 YLR 899**), *Muhammad Ismail v. The State* (**2017 YLR 39**), *Muhammad Anwar v. The State* (**2017 SCMR 630**), *Abid Ali v. The State* (**2017 SCMR 662**),

Muhammad Ahsan v. The State and others (**2017 P Cr. L J 1331**), *Muhammad Riaz and another v. The State and others* (**2017 SCMR 1871**), *Rehmat Khan and another v. The State and others* (**2017 SCMR 2034**), *Nasir Ahmed v. The State* (**2023 SCMR 478**), *Amanullah and another v. The State and others* (**2023 SCMR 723**) and *Ali Taj and another v. The State* (**2023 SCMR 900**).

13. I have considered submissions of the parties and perused material available on record and taken guidance from the case law cited at bar. In order to describe the details of the incident, the prosecution has examined Muhammad Athar Hussain, who is complainant; PW Mst. Bani, an injured and eyewitness, and Syed Sabir Hussain Shah, the other eyewitness. They in their evidence have identified the appellants with their respective weapons and causing firearm injuries to the deceased and Mst. Bani, who herself in her evidence, has stated that appellant Inayat Shah had caused her firearm injuries. Their evidence, insofar as identity of the appellants armed with firearm weapons is concerned, has not suffered from any discrepancy worth mentioning and strong enough to undermine authenticity thereof to give its benefit to the appellants. The eyewitnesses though subjected to a lengthy cross-examination have not revealed any mis-declaration of facts or variation on the salient features of the case. They have remained consistent in describing the manner of incident and the place where had it taken place.

14. The controversy raised in defence regarding time of incident to be either 1330 hours or 11:00 a.m. has indeed been dispelled by appellant Inayat Ali Shah himself in his 342 CrPC statement (Ex.38), when he, in a reply of a question, has expressed that it was about 11:00 a.m. when he saw dozens of people duly armed with deadly weapons: complainant Athar Shah, his brothers *et al* entering the disputed plot and occupying the same. And he in the wake of which conveying such information to the appellants, their arrival at the place of incident, and the occurrence. This admission in regard to correct time is sufficient to cast out any misconception about it. Further, the complainant on the very day made a further statement, after realizing wrong time stated in FIR, quoting correct time of the incident. Subsequently, on his application, the correct time was noted down in the trial, which was never challenged by the appellants in any proceedings.

15. The role assigned to appellant Inayat Shah causing injury to PW Mst. Bani is not only described by the injured herself, but by the complainant and the eyewitness. Therefore, the argument, in defence, that evidence against Inayat Shah, given by injured, an old lady, is not reliable, is not sustainable either. Not only the injured herself but the complainant and the eyewitness have specifically saddled appellant Inayat Shah with injuring Mst. Bani. Such oral account given by the witnesses is further supported by the medical evidence and there appears no discrepancy in this regard. The controversy regarding wrong time noted in the medical record about arrival of Mst. Bani in the hospital for examination as 04.09.2011 at 06:45 a.m. which is before the incident, is not of much help to the appellants as the same appears to be a result of some human error committed at the time of making relevant notes, not least when appellants, noted as above, are not denying the occurrence and its time. Besides, all the papers including memos show the time of incident as 11:00 a.m., and therefore mere an improper and inadvertent mention of time in provisional medical certificate will not derail the whole prosecution case otherwise built on satisfactory evidence.

16. The next plea in defence is that it was the complainant party which had launched attack upon appellants when they were present in the house, and from their own firing, Akhtar Hussain Shah (deceased) and others had received injuries. It may be mentioned that the appellants have taken the same plea in their 342, CrPC statements that from the fires made by the complainant party, deceased Akhtar Shah got injured and so also Safdar Shah and Kamran Shah, who were then taken to Civil Hospital for treatment. From such projection, declaring themselves although innocent, the dispute between the parties over the plot and shop leading to alleged occurrence appears to be admitted by the appellants. It is settled proposition of law that burden to prove an offence is always on the prosecution. The prosecution has to lead confidence inspiring evidence to show that the incident has happened in the manner and the mode as described in the relevant papers. Nonetheless, when a special plea, contrary to narration qua occurrence and blaming the complainant for it, is propounded by the accused to plead his innocence, the burden is shifted to him and he comes under the liability to prove the same. In this case, although the special plea has been taken by the appellants that the complainant himself murdered his brother Akhtar Hussain Shah, injured his mother and

two men from their party, but nothing has been produced on record in support of such plea. Not even a witness with such assertion or any detail about their effort to establish the same through him at the time of investigation or in the trial has been brought by them on record. They even utterly failed to lead any defence evidence in this regard and examine themselves on oath in support of such plea. Besides, in the course of investigation in which they were found guilty, the appellants did not plead contra version, which they have taken in the trial, to stir widening of scope of investigation to include such facts leading to formation of some opinion about it by the Investigating Officer.

17. Next, the contention in defence that there is a contradiction in the nature of weapons recovered from the appellants and the one shown against them in FIR. In the FIR, if some appellant is shown to be armed with a pistol, from him a repeater is shown to have been recovered, and if some appellant is shown to be armed with a repeater, from him a pistol is shown to have been recovered. Suffice it to say that the complainant party is not claimed by accused to be expert in firearms to identify the nature and bore of every weapon and give its precise description in evidence. They are common folk and this mingling of pistol with repeater and vice versa by them is but insignificant and cannot be given much currency to doubt the entire incident. Then, in the heat of moment and being attacked by the accused party consisting of many persons, it was not understandably possible for them, or any human-being for this matter to, exactly identify the nature and bore of weapons each accused was armed with and name it accurately in the FIR. Therefore, such variation, even if it is presumed to be correct, is of no help to the appellants, and cannot be counted in their favour.

18. The fact that the weapons were recovered from the appellants has not been rendered ineffective in any manner. And that these are the weapons which were used by the accused has been established from the lab report demonstrating matching of empties found at place of incident with them, which is an additional corroborating evidence confirming presence and role of the appellants in the incident.

19. Further, the argument by defence Counsel that in Provisional Medico Legal Certificate, the Doctor had noted only 06 injuries, is not factually correct as on back page of the Provisional Medico Legal Certificate of the injured, available at Page No.223 of the Paper Book, 03 more injuries are noted, which due to inadvertent lapse, the Medico

Legal Officer at the time of deposition, could not tell. But, when it came to the final medical certificate, he has given a full account of the injuries, which are 09, and which subscribed to all the injuries noted by him.

20. Next point raised by the Defence Counsel to confound the prosecution case is the site plan prepared by the Tapedar, which purportedly shows the position of the injured to be outside of the house and in the street. Be that as it may, it is settled by now that the site plan is not a substantial piece of evidence and cannot be given preference over the direct account furnished by the witnesses. Not only there is a direct account of the witnesses supporting place of incident to be inside the house but the relevant recoveries duly recorded in the police docket are shown from inside the house. Besides, the relevant memo of place of incident and recovery, which was prepared on the very same day, also reflects the place of incident to be inside the house. In presence of such overwhelming direct and documentary evidence, the site plan prepared by the Tapedar after 09 days, cannot be counted to have undermined the prosecution story qua place of the incident.

21. In view of the above discussion, I am of the view that learned trial Court has not committed any error in convicting and sentencing the appellants in the terms as stated above. I, therefore, finding no merit in the appeal **dismiss** it and uphold the impugned judgment.

The appeal is accordingly **disposed of** in above terms.

J U D G E

Abdul Basit