IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No. S-01 of 2023
Criminal Appeal No. S-13 of 2023
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Appellants:	Mumtaz son of Muhammad Bachal and Ashique Ali son of Nabi Bux both by caste Kalhoro, through Mr. Riaz Ali Shaikh and Mr. Muhammad Ali Dayo, Advocates
State through:	Syed Sardar Ali Shah, Additional Prosecutor General Sindh
Date of hearing:	**26.02.2024**
Date of decision:	**29.03.2024**

J U D G M E N T

Zulfiqar Ali Sangi, J.– The appellants/accused named above have preferred respective captioned appeals, whereby they have impugned the judgment dated ***04.01.2023*** passed by Additional Sessions Judge-II Naushehro Feroze, in Sessions Case No. 153/2019 (Re. The State v. Ashique Ali Kalhoro and others) arising out of FIR No. 26/2019 offence u/s 302, 452, 109 r/w Section 149 PPC registered at Police Station Bhiria City, District Naushehro Feroze, whereby they were convicted and sentenced as under:-

Sr. No.	Offence under section	Sentences
1.	302 PPC	Accused Ashique Ali son of Ghulam Nabi Kalhoro is convicted under section 265-H (2) Cr.PC for the offence punishable under section 302 (b) PPC and sentenced him to suffer life imprisonment as Tazir for the commission of murder of deceased Habibullah. Accused Ashique Ali shall also be liable to pay Rs.500,000/- (In words rupees five lac) as compensation to be paid by him to the legal heirs of the deceased Habibullah. In case of failure to pay the compensation amount, he shall also suffer SI for two years more.
2.	302 PPC	Accused Mumtaz son of Muhammad Bachal Kalhoro is convicted under section 265-H(2) Cr.PC for offence punishable U/S 302 (b) PPC r/w Section 109 PPC and sentenced him to suffer life imprisonment.
3.	452 PPC	Accused Ashique Ali son of Ghulam Nabi Kalhoro and Mumtaz son of Muhammad Bachal Kalhoro are further convicted under section 265-H(2) Cr.PC for offence punishable U/S 452 PPC and sentenced them for suffer RI for four years and to pay fine of Rs. 50,000/- (in words Fifty thousand rupees)each. In case of default to pay fine amount they shall also suffer SI for one year each.

The benefit of Section 382-B Cr.P.C was extended to the appellants/accused, hence they preferred the captioned appeals respectively.

2. Precisely, the case of prosecution as unfolded in the FIR lodged by complainant Mst. Khanzadi are that the brother of complainant namely Habibullah purchased (10) waisa land from one Papo. On such purchase their maternal cousin Ashique Ali annoyed and asked her brother to sell such land to him, otherwise he will face problems but her brother refused to do so. On 27.03.2019 she was available in her house, where at about 07.00 p.m, accused persons namely Ashique Ali, Akbar, Sajjan, Ali Nawaz duly armed with pistols, Bakhshal armed with gun, Fareed duly armed with pistols came there and overpowered. Accused Ashique Ali asked Habibullah that since he has not sold out land to him therefore, he will not be spared. Saying so accused Ashique Ali within sight of house inmates made straight fire shots from his pistol with intent to commit murder of Habibullah, which hit him on his abdomen and legs, who while raising cries fell down, on cries and reports of fire shot their cousin Attur and other co-villagers came running towards place of incident and seeing them, accused persons making slogans went away. The complainant party found Habibullah injured and alive, so immediately he was taken to Government Hospital Bhiria for treatment but on the way he succumbed to the injuries. Such information was given to the police and with the help of police post mortem of the deceased was conducted and after fulfillment legal formalities, the dead body of deceased was handed over to complainant. The complainant party brought the dead body at their village, wherefrom complainant went to PS and lodged FIR stating therein that above named accused persons duly armed with deadly weapons, committed rioting by committing criminal trespass in the house and on abatement of accused Mumtaz accused Ashique Ali made straight fire and committed Qatl-i-Amd of deceased Habibullah.

3. On the conclusion of usual investigation, challan was submitted against the appellants/accused and others for offence U/S 302, 452, 109 r/w Section 149 PPC.

4. After completing legal formalities, the trial Court had framed charge against the accused to which they pleaded not guilty and claimed to be tried.

5. In order to prove the accusation against appellant/accused, the prosecution has examined in all 10 witnesses, they have produced certain documents and items in support of their evidence. Thereafter, the side of the prosecution was closed.

6. The appellants/accused was examined under section 342 Cr.PC, wherein they had denied the allegations leveled against them and pleaded their innocence. After hearing the parties and assessment of the evidence against the appellants/accused, the trial Court convicted and sentenced them as stated above, against the said conviction they preferred captioned appeals respectively.

7. Learned counsel for appellants/accused contended that the appellants/accused have falsely been implicated in present case by the complainant; that the manner in which the murder of deceased taken place has not been substantiated in the circumstances as disclosed by the prosecution witnesses; that evidence adduced by the prosecution at the trial is not properly assessed and evaluated by the trial Court which is insufficient to warrant conviction against the appellants/accused; that the trial Court has failed to appreciate factual as well as legal aspects of the case while convicting appellants/accused; that the material contradictions appear in the statements of prosecution witnesses on crucial points, but those have not been taken into consideration by the learned trial Court while passing impugned judgment; that the judgment passed by the trial Court is perverse and liable to be set-aside. Lastly, he prayed that the appellants/accused may be acquitted by extending them the benefit of doubt.

8. Conversely, learned Addl. P.G appearing for the State opposed the appeal on the ground that prosecution has successfully proved its case against the appellants/accused beyond a reasonable doubt and all the witnesses have fully implicated the appellants/accused in their evidence recorded by the trial Court; that all the necessary documents memos, FIR including post mortem repot have been produced; the offence weapon was also recovered on the indication of accused Ashique Ali; that medical evidence is consistent with the ocular version; that during cross-examination learned counsel had not shaken their evidence; that there are no major contradictions in the evidence of prosecution witnesses. Lastly, he submitted that appellants/accused were rightly convicted by the trial Court and prayed that appeal of appellants/accused may be dismissed.

9. I have heard learned counsel for the appellants/accused, learned Addl. P.G for the State and have examined the record carefully with their able assistance.

10. On evaluation of the material brought on the record, it appears that the case of prosecution mainly depends upon the ocular testimony furnished by the prosecution in shape of statements of complainant Khanzadi (PW-1) and Mst. Fatima (PW-2), which is corroborated by the evidence of medical officer Dr. Muhammad Aslam (PW-3) including circumstantial evidence of rest of witnesses only against the appellant/accused Ashique Ali. It is borne out from the record that on 27.03.2019 it was about 07.00 p.m, accused persons duly armed with pistols came there and overpowered upon the complainant party. Accused Ashique asked Habibullah that since he has not sold out land to him therefore, he will not be spared. Saying so appellant/accused Ashique Kalhoro within sight of house inmates made straight fire shots from his pistol with intent to commit murder of Habibullah, which hit him on his abdomen and legs, who

while raising cries fell down, on cries and reports of fire shot Attur and other co-villagers came running towards place of incident and seeing them coming accused persons by making slogans went away. The complainant party found Habibullah injured alive, so immediately he was taken to Government Hospital Bhiria for treatment but on the way he succumbed to his injuries. The dead body was inspected and post mortem of the deceased was conducted with the help of police. The version of the complainant was supported by PW-2 Mst. Fatima, she has deposed almost the same story in her examination-in-chief as deposed by the complainant. In the instant matter, the eye-witness has sufficiently explained the date, time and place of occurrence as well as each and every event of the occurrence in clear cut manners. The ocular account furnished by above said eye-witness is substantiated with the medical evidence adduced by medical officer PW-3 Dr. Muhammad Aslam with regard to the injuries, date, time of incident and weapon used in the commission of offence. The prosecution has also examined PW-05 Muhammad Sajjan who is mashir, in whose presence the memo of inspection of dead body of the deceased, securing of last worn clothes of deceased, place of incident, recovery of blood stained earth and empties were prepared. The prosecution has also examined PW-6 ASI Sikandar Ali who at the first instance inspected the dead body of deceased, prepared danistnama, inquest report so also recorded FIR of the complainant per her verbatim. The recovered blood stained earth and empties were sent to FSL for its analysis purpose and such report was received in positive, which is available at Exh. 27/A and Exh.27/B. PW-09 HC Muhammad Ameen mashir of recovery was examined at the trial who also supports the contents of mashirnama of recovery of weapon which was used by the appellant Ashique Ali in commission of offence. He verified the mashirnama of recovery to be the same containing his signature. The investigation officer SIP Mansoor Ali was expired before recording his evidence in the instant case however, PW- 10 being well conversant with his signature etc was examined who testifies the signature of IO over the memos. The perusal of record shows that the complainant party had no malafide or reason to falsely involve the appellant/accused Ashique Ali. While recording the statements u/s 342 Cr.P.C, when a question was put to the appellant/accused Ashique Ali that why the PWs have deposed against him, he simply answered that they are interested. Lastly, he prayed that he is innocent. No any cogent proof has been brought by the appellant/accused Ashique Ali which supports his version.

11. As a rule of criminal jurisprudence, prosecution evidence is tested on the basis of quality not the quantity of evidence. It is not relevant that who is giving evidence and making statement but only relevant is that what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged. ***In case of Niaz-ud-Din vs. The State (2001 SCMR 725***), it was held that conviction in a murder case can be based on the

testimony of a single witness, if court is satisfied that he is reliable and it is the quality of evidence and not the quantity which matters. The evidence of PW-1 complainant and PW-2 Mst. Fatima is sufficient to sustain conviction of the appellant/accused Ashique Ali. Both the prosecution witnesses were subjected to lengthy cross-examination by the defence counsel but nothing favourable to the appellant/accused Ashique Ali or adverse to the prosecution could be brought on record. They remained consistent on each and every material point in as much as they made deposition exactly according to the circumstances happened in this case, therefore it can safely be concluded that the ocular account furnished by prosecution witnesses is reliable, straightforward and confidence inspiring. The above PWs have reasonably explained their presence at the place of occurrence. The medical evidence available on the record corroborates the ocular account so far as the nature, time locale and impact of the injury on the person of the deceased is concerned. Even otherwise, it is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is to be given preference over medical evidence and the same is sufficient to sustain conviction of an accused. ***In case of Muhammad Iqbal v. The State (1996 SCMR 908)*** the Supreme Court candidly held as under:-

> *"ocular testimony being wholly reliable, conviction could even be safely based on the same without further corroboration"*

In another case of Naeem Akhtar v. The State (PLD 2003 SC 396) the Supreme Court observed as under:-

> *"Eye-witness who was a doctor and victim of the occurrence had narrated the incident in each detail without any omission and addition and his evidence being of unimpeachable character is alone sufficient to the charge which was amply corroborated by medical evidence, motive and incriminating recoveries"*

12. As far as the question that witnesses of the ocular account are related to the deceased, therefore their testimonies cannot be believed to maintain conviction of the appellant/accused Ashique Ali is concerned, it is established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses specially when the relationship with the assailant is so close. The appellant/accused Ashique Ali is maternal cousin of complainant and deceased. Learned defence counsel could not point out any reason as to why the complainant has falsely involved the appellant/accused in present case and let off the real culprits. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprits who murdered her brother and falsely involve appellant/accused without any rhyme and reason. The parties are related to each other, therefore there is no chance of

misidentification. Learned defence counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on specific query he could not point out any major contradiction, which could shatter the case of prosecution. It is a well settled proposition of law that as long as the material aspects of the evidence have a ring of truth, courts should ignore minor discrepancies in the evidence. If an omission or discrepancy goes to the root of the matter, the defence can take advantage of the same. While appreciating the evidence of a witness, the approach must be whether the evidence read as whole appears to have a right of truth. Minor discrepancies on vital matters not affecting material consideration of the prosecution case ought not to prompt the courts to reject evidence in its entirety. Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. To prove the motive part of the prosecution story, the witnesses of the ocular account appeared in the witness box and deposed against the appellant/accused Ashique Ali. The perusal of the record reflects that neither the defence seriously disputed the motive part of the prosecution story nor the PWs were cross examined on this aspect of the matter. Therefore, I am constrained to hold that prosecution has successfully proved the motive against the appellant/accused. The investigation officer collected four crime empties of the pistol from the place of occurrence. The appellant was arrested on 31.01.2019, during interrogation, he confessed his guilt and voluntarily produced the offence weapon viz pistol of 30 bore on 04.04.2019 in presence of mashirs. The appellant/accused Ashique Ali also did not place on record any evidence to show that the investigation officer was inimical towards him and forced to confess his guilt and to produce crime weapon. According to the Article 119 of the Qanun-e-Shahadat Order, 1984 the burden of proof to any particular fact lies on the person who wishes the court to believe its existence. There is no denial to this fact that prosecution has to discharge the burden of proving the case beyond reasonable doubt. However, once the prosecution becomes successful in discharging said burden, it is incumbent on the accused who had taken a specific defence plea to prove the same certainty. There is sufficient material available on record in shape of unbiased and unimpeachable ocular account supported by medical evidence, motive and recovery of crime weapon to sustain conviction against the appellant/accused Ashique Ali. The appellant/accused Ashique Ali was also convicted in the arms case and sentenced to suffer R.I for seven (07) years and to pay fine f Rs. 100,000/-

13. The upshot of above discussion is that the prosecution has successfully established its case against the appellant/accused ***Ashique Ali*** through ocular account furnished by eye-witnesses, which is corroborated by the medical evidence coupled with motive, circumstantial evidence in shape of recovery of offence weapon. Learned counsel for the appellant ***Ashique Ali*** has failed to point out any material illegality or serious infirmity committed by the learned

trial Court while passing the impugned judgment, which in my humble view is based on appreciation of the evidence and same does not call for any interference by this Court to the extent of case of appellant/accused ***Ashique Ali***. Thus, the conviction awarded to the appellant/accused ***Ashique Ali*** by learned trial Court in Sessions case No. 153/2019 Re-state vs. Ashique Ali Kalhoro and others vide judgment dated ***04.01.2023*** is hereby maintained and appeal No. 13/2023 of the appellant/accused ***Ashqiue Ali*** is dismissed.

14. So far as the case of appellant/accused ***Mumtaz Kalhoro*** is concerned, admittedly he is nominated in FIR but he was neither present at scene of offence nor he actively participated in the commission of offence. During investigation, no incriminating evidence to support words of complainant was collected by the investigating agencies. There no convincing evidence is brought at the trial against appellant/accused with regard to his presence at the scene of offence, therefore the question of criminal trespass into the house of complainant does not arise. The learned trial Court has committed unpleasant injudiciousness while awarding conviction to the appellant/accused Mumtaz for the offence U/S 452 PPC. The specific role of causing firearm injuries to the deceased Habibullah is assigned to appellant/accused Ashique Ali and same is established. The case of appellant/accused ***Mumtaz Kalhoro*** is totally on different footings to that of appellant/accused Ashique Ali. In the FIR his presence at the time of offence has not been shown by the complainant but it was stated by the complainant that murder was committed by the co-accused on the instigation of accused Mumtaz. The complainant during recording her evidence make improvement in respect of the presence of accused Mumtaz and deposed that he was present at the place of incident but empty handed which dishonest improvement makes the case against the accused Mumtaz Kalhoro doubtful. The concept of benefit of doubt to an accused person is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused will be entitled to the benefit not as a matter of grace or concession but as a matter of right. The reliance is placed on the case of ***Muhammad Masha Vs. The State (2018 SCMR 722)***, wherein the Honourable Supreme Court of Pakistan has held that:-

> *"Needless to mention here that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt, if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim, "it is better that ten guilt persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervaiz Vs.*

The state (1995 SCMR 1345).Ghulam Qadir and 2 others Vs.The state (2008 SCMR 1221), Muhammad AkramVs.The state (2009 SCMR 230) and Muhammad ZamanVs.The state (2014 SCMR 749)".

In another case titled as ***Ayoub Masih vs. The (PLD 2002 SC 1048)*** in which it has been held as under:-

"*Rule of benefit of essentially rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Doubt must be reasonable and not imaginary. Said rule was based on maxim, " it is better that ten guilty persons be acquitted rather than one innocent person be convicted and occupied a pivotal place in the Islamic Law and inforce rigorously in view of the saying of Holy Prophet (PBUH) that " mistake of Qazi(judge) in releasing a criminal is better than a mistake in punishing an innocent"*

15. Keeping in view the above circumstances, ***appeal bearing No.01/2023*** of appellant/accused ***Mumtaz Kalhoro*** is allowed. The conviction and sentence recorded against the appellant/accused ***Mumtaz Kalhoro*** vide judgment dated **04.01.2023** passed by the Court of Additional Sessions Judge-II Naushehro Feroze, in Sessions case of No.153/2019 Re-State vs. Ashique Ali Kalhoro and others U/S 302, 452, 109 r/w Section 149 PPC is set-aside. Resultantly, appellant/accused ***Mumtaz Kalhoro*** is hereby acquitted of the charges. He is confined in jail, therefore jail authorities are directed to release him forthwith if he is not required in any other custody case/crime.

16. Office is directed to place the signed copy of this judgment in the connected captioned appeal.

J U D G E

M.Ali/steno*