

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No. S – 02 of 2021

(*Sono Thebo and others versus The State*)

Date of hearing : 23.04.2024

Date of decision : 23.04.2024

Mr. Rukhsar Ahmed M. Junejo, Advocate for appellants Sono, Ghulamuddin alias Deeno and Ehsan

None present for appellant Muhammad Khan.

Mr. Ghulam Ali Bozdar, Associate of Mr. Achar Khan Gabol, Advocate for legal heirs of deceased.

Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J.– Appellants stood a trial in a Sessions Case No.95 2020 (*Re: The State versus Sono and others*), emanating from Crime No.113 of 2019 of Police Station Salehpat u/s 302, 114, 311, 147, 148, 149 PPC, and have been convicted and sentenced by impugned judgment dated 08.01.2021 to suffer life imprisonment as Ta'zir u/s 302(b) PPC and to pay fine of Rs.2,00,000/- each as compensation to legal heirs of deceased as provided u/s 544-A CrPC, and in default, to suffer simple imprisonment for six months, with benefit u/s 382-B CrPC, which they have challenged by way of this appeal.

2. As per facts, the charge against appellants is that on 02.12.2019 at 04:00 am at village Deen Muhammad Thebo, they along with four acquitted accused, namely Abdullah, Malook, Latif Dino and Riaz and one juvenile accused Momin Thebo in prosecution of their common intention and object, after forming an unlawful assembly, committed murder of deceased Ghulam Abid Bhanbhro on allegation of *karap*, by way of throttling his mouth and neck besides causing him *lathi* injuries at the instigation of Abdullah (acquitted). The incident took place, as stated above, on 02.12.2019 at 04:00 am, whereas FIR thereof was recorded on 03.12.2019 at 1000 hours by one ASI Gulab Khan Chang of Police Station Salehpat on behalf of the State. His narration of events is that he along with his team was on patrol duty on the fateful day, when at about 04:30 am he reached RD-145 came across a motorcyclist PW Ali Hassan, who disclosed entire chain of events culminating at murder of

deceased at the hands of appellants and acquitted accused. Per such story, the said PW, after getting free from work on agricultural land, along with deceased Ghulam Abid and PW Imam Dino was returning to home on a motorcycle. When they reached near village Deen Muhammad Thebo at about 04:00 am saw and identified in the headlight of motorcycle all the accused named above. Out of whom, two accused namely Sono and Muhammad Khan were having *lathis*. They waylaid them, exchanged hot words with deceased by labeling him a *karo* and at the instigation of Abdullah, the four appellants strangulated him for about 15 to 20 minutes, caused him *lathi* blows and murdered him at the spot. After which, they left the scene, and he, leaving PW Imam Dino over the dead body, was coming to police station for giving such information, and came across them: policy party on the way. After receiving such information, the ASI with his team went to the place of incident, inspected dead body of deceased Ghulam Abid lying on the sand, completed required formalities and sent the dead body to Taluka Hospital, Rohri for postmortem. But when heirs of deceased, despite assurance to him, did not turn up to lodge the FIR, he did so on behalf of the State.

3. After that, 161 CrPC statements of PWs Ali Hassan and Imam Dino were recorded on the same day: 03.12.2019. Then, during the course of investigation, appellants were arrested and from them incriminating *lathis* were recovered. At the end of such course, the Challan was submitted, followed by framing of a formal charge against the accused. They pleaded not guilty and claimed a trial, in which prosecution examined eight witnesses and produced all necessary documents. After prosecution's evidence, 342 CrPC statements of all the accused including appellants were recorded. They denied the charge and professed innocence. The trial Court, however, found appellants guilty of the offence and convicted and sentenced them in the terms as above, and acquitted remaining four accused named in Para No.1 of this judgment. By means of this appeal, they have challenged the same.

4. Learned Counsel in defense has argued that appellants are innocent, have been falsely implicated in this case. There is absolutely no evidence against them. Complainant's evidence is based on hearsay. The two independent

witnesses, who claimed to be close relatives of deceased, had failed to turn up at the police station to lodge the FIR. The claim of complainant ASI that no one was willing to come to police station for the FIR is belied from the record showing both the independent PWs' statements u/s 161 CrPC were recorded on the same day of FIR. No one from close family of deceased came forward to register the FIR against the accused casts a serious doubt over the story. The incident occurred at 04:00 am in December, a pitch-dark night, in an area littered with sand dunes, therefore, identification of the appellants is doubtful, and the case against them has consequently become weak and unbelievable.

5. His arguments have been rebutted by learned Counsel for legal heirs of deceased, who has stated that sufficient evidence against the appellants has come on record, which shows their involvement in the case. Learned Additional Prosecutor General has, however, not supported the impugned judgment and has stated that the story does not inspire confidence due to several lacunas in the prosecution case, as highlighted by the Counsel in defense.

6. I have considered submissions of the parties and perused material available on record. The FIR of this case was registered by one ASI after 30 hours of the actual incident (02.12.2019 at 04:00 am) on 03.12.2019 at 1000 hours. Although he claims that he was informed of the incident by PW Ali Hassan, who already was present there and was coming to police station to intimate the police about it, and at his instance and disclosure, they had reached the place where deceased was done to death. But it is strange to note that when complainant himself claims that PW Ali Hassan was coming to police station for giving such information, then why at his instance FIR was not registered. Then it is equally baffling to note that ASI / complainant was able to recall every bit and piece of such information which he ultimately succeeded in incorporating in the FIR with such a precise detail. Therefore, root of the very story that PW Ali Hassan had informed the police of the incident is doubtful and it seems that the story was contrived by the police and made part of the FIR, the evidence of which was later made available.

7. Memo of place of incident and inspection of dead body purportedly prepared at 04:50 am on 02.12.2019 has apparently been verified by PWs Ali

Hassan and Imam Dino. The entire story, as reproduced in FIR, has been reiterated therein. What is, however, incomprehensible is that despite the fact that the witnesses were with the police all that time and particularly when such memo containing entire story of FIR was being prepared. Then, why they chose not to come forward and register the FIR against the appellants is a question that cannot be overlooked. Till the FIR was registered after 30 hours of the incident, virtually on record, there had come no word from the witnesses in confirmation of the story on the basis of which appellants have been held guilty by the trial Court and convicted and sentenced in the terms as stated above.

8. Evidence of PWs Imam Dino and Ali Hassan, the eyewitnesses, is that after getting off the work on their land, they both were returning with the deceased on a motorcycle and were waylaid by the appellants and other accused. In the headlight of motorcycle, they had identified the appellants, who murdered the deceased. Neither the said motorcycle was made as a case property, nor produced in the Court in substantiation of such claim: identification of the appellants in its headlight. The area, admittedly, was without a source of light, being a desert. It was only the headlight of motorcycle providing illumination to the given spot for the witnesses to identify the appellants. Production of the said motorcycle in the trial therefore was a must in order to prove this part of the story, very vital for establishing identification of the appellants. If the factum of presence of the motorcycle is taken out of consideration, the very identity of the appellants would become doubtful. Because, otherwise, there was no source of light for the PWs to verify identity of the accused and notify the alleged part played by them in the offence.

9. When for more than 30 hours, the purported PWs, who claimed to have seen the incident and were with deceased at the time of his murder, remained silent and did not come forward to make such facts be a part of the record officially, their testimony naming the appellants as accused only when the FIR was registered by the police would be looked into with extra care and caution. Because, except the evidence of these two witnesses snaring appellants in the case, there is nothing on record to show that in fact they had committed the murder of deceased.

10. Evidence of complainant, PW-4 HC Noor Khan, PW-5 PC Ali Dost, both members of the patrolling team, is a hearsay account. They had not seen the incident. It is their claim that they were apprised of the incident by PW Ali Hassan on the very day when he was going to the police station to give its information. Then why he was not made the complainant and why the police got obligated to register the FIR, an unusual conduct on their part, is a mystery which the prosecution has not assisted the Court properly to resolve. Law does not recognize hearsay evidence worthy of reliance for maintaining conviction against the accused in any criminal case, let alone the case carrying capital punishment of death / life imprisonment. As noted above, except the evidence of two private witnesses, there is absolutely no evidence leading to an inference of guilt against the appellants. The evidentiary value of their evidence has already been discussed in part, and which, in my view, does not inspire confidence.

11. Further, their presence with the deceased at the relevant time is not without a doubt as their conduct raises suspicion. There were only two accused out of all who were armed with *lathis*, not with any deadly weapons. As per evidence, the accused continuously for 15 to 20 minutes kept on strangulating the deceased and causing him *lathis*. But these witnesses neither tried to put up some resistance or made struggle aiming to save the deceased, nor even raised a hue and cry to attract the people living in nearby village. The accused were not armed with any deadly weapons to think that fear of which might have held back these witnesses from mounting any resistance or making some effort to save the deceased. If the accused were 08 in number, the complainant party were 03 at least. Any assault by eight persons to three persons would not go without a hectic struggle by the latter to save themselves. But here, these two witnesses except watching the entire episode, as silent spectators, against the human nature, did nothing to save the deceased. Therefore, their presence at the time of incident and watching the deceased being murdered by the appellants is not without a doubt, not the least when they failed to even substantiate presence of the motorcycle at the spot, the only source of conveyance for them to return to their village and the light to identify the

appellants. Even the memo of place of incident does not indicate marks of tyres over the spot or any struggle to vouch for presence of the witnesses there.

12. Medical evidence, in the circumstances, is not helpful to the prosecution case either as it only establishes unnatural death of the deceased and does not point out to the appellants as culprits. Except injury No.1 establishing throttle, and bruising on neck, face and mouth, the remaining injuries are abrasions that do not align with *lathi* injuries as narrated by the PWs in their evidence. With such evidence, weak in several respects and doubtful on many counts, the conviction and sentence of the appellants in my view cannot be maintained. It is a cardinal principle of law that that when there is a single circumstance creating a reasonable doubt, the benefit of which is to be extended to the accused not as a matter of grace but as a matter of right.

13. In view of above discussion, the appeal is **allowed**. Conviction and sentence awarded to appellants Sono S/o Jiand Thebo, Muhammad Khan S/o Ali Gohar Mirbahar, Ghulamuddin alias Deeno S/o Ghulam Qadir Thebo and Ehsan S/o Jhangal Thebo vide impugned judgment are set aside. Consequently, the above named appellants are **acquitted** of the charge and they shall be released forthwith by jail authorities, if they are not required in any other custody case.

These are the reasons of my short order dated 23.04.2024.

J U D G E

Abdul Basit