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FOR REPORTING

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:
Mr. Justice Mohammad Karim Khan Agha

Cr. Jail Appeal No.S-73 of 2012.

Allah Dino Khaskheli

Versus

The State

Appellant : Allah Dino Khaskheli	Through Ms. Nasira Shaikh, Advocate
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, A.P.G.
Date of hearing	17.04.2017.
Date of judgment	18.04.2017

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Allah Dino Khaskheli was tried by learned Ist. Additional Sessions Judge, Shaheed Benazirabad, in Sessions Case No.201/2007, arising out of crime No.64 of 2007, registered at Police Station Taluka Nawabshah, for offence under sections 302, 504 PPC. Accused / appellant was found guilty by judgment dated 27.01.2012 (the impugned judgment) and was convicted and sentenced to suffer life imprisonment and to pay fine of Rupees one lac. In case of default of payment of fine, the accused / appellant will undergo R.I. six months more. The accused / appellant was also directed to pay compensation u/s 544-A Cr.P.C. of Rupees two lac to the legal heirs of deceased Khan Muhammad. In case of default in payment of compensation, accused / appellant to undergo six months R.I. more. Benefit of Section 382-B Cr.P.C. was also extended to him. The appellant has challenged the impugned judgment through instant appeal.

2. The brief facts of the prosecution case as disclosed in the F.I.R. lodged by Mst. Imam Khatoon on 18.07.2007 at 2330 hours, are that she has six sons, out of whom Khan Muhammad was fifth in number. They have old murderous enmity with Allah Dino Khaskheli. On the day of incident at sunset time, Allah Dino Khaskheli alongwith two

unidentified persons came to her house in Rikshaw and inquired from her about her son Khan Muhammad. She replied that he has gone towards Brick kiln. Thereafter, they went towards Brick Kiln and after short while she heard cries and alongwith her sons Faiz Muhammad and Ahmed went towards that place and saw Allah Dino alongwith two unidentified persons running away in rikshaw while giving abuses and hakals. Complainant party saw her son was having sustained knife injuries; they immediately took injured to hospital, however, he succumbed to injuries. Thereafter, she went to Police Station and lodged the report.

3. After completing the usual investigation, police submitted the challan against above named accused.

4. Formal charge against the accused was framed by trial court. Accused pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined as many as 08 witnesses and thereafter side of the prosecution was closed vide statement Ex.15.

6. The statement of accused was recorded under section 342 Cr.P.C, in which he denied the allegations of the prosecution. According to him, he has been implicated falsely and the murder weapon (Churri) has been foisted upon him. He however neither examined himself on oath nor led any evidence in his defence.

7. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the appellant/accused as stated above through the impugned judgment.

8. The facts of this case as well as evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Ms. Nasira Shaikh, learned counsel for the appellant has contended that the impugned judgment should be set aside and the appeal may be allowed for the following reasons; that there was a five hour delay in lodging the FIR; that there was an old enmity between the parties which had lead to the fabrication of the FIR; that the distance between the place of the murder and the house of the

complainant was over one acre; that the complainant was not an eye witness to the incident; that there was a 2 day delay in recording the S.161 Cr.PC statements; that the chemical report was sent after a delay of 15 days and thus for all the above reasons a doubt had been created in the prosecution case the benefit of which had to be extended to the appellant who as such was entitled to be acquitted.

10. In support of her contentions learned counsel placed reliance on the following authorities' **Zaman v. The State** (PLD 1985 Lahore 566), **Muhammad Irshad v. The State** (2002 P. Cr. L. J 1541), **Arshid and another v. Shaman-ud-Din and another** (2015 P. Cr. L. J 1123), **Pathan v. The State** (2015 S C M R 315), **Irfan Ali v. The State** (2015 S C M R 840), **Muhammad Razzaq v. The State** (2008 P. Cr.L J 376)

11. On the other hand, learned A.P.G. fully supported the impugned judgment which according to him was well reasoned and had covered all aspects of the case. He further contended that in support of the prosecution case that there was no undue delay in registering the FIR; that there were two eye witnesses; that the appellant had a motive to murder the deceased; that the medical and chemical evidence supported the prosecution case and corroborated the other ocular prosecution evidence and that it was not relevant that there was a 15 day delay in sending the chemical samples for analysis; that the recovery of the murder weapon had been made from the appellant as such the prosecution has proved its case beyond a reasonable doubt and the impugned judgment should be upheld and the appeal dismissed. In support of his contentions, learned A.P.G. has relied upon the case of **Muhammad Zaman V State** (2014 SCMR 749) in terms of the FIR not amounting to a substantive piece of evidence.

12. I have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

13. Turning to the first contention of learned counsel for the appellant based on the facts and circumstances of this case I do not consider a delay of 5 hours in lodging the FIR to be fatal to the prosecution case. In this case the complainant reached the place of incident as her son was dying from stab wounds and as such, in my view, it was quite natural for her to immediately assist in arranging transport to take him to hospital and accompanying him to hospital so that he might be saved before contemplating the registration of an FIR. I agree that

there was enmity between the parties however as explained by the complainant and as corroborated by PW's Faiz Mohammed and Ahmed Khan (both son's of the complainant) the appellant was pressurizing them to compromise a murder case in connection with the murder of one of the complainants other son's whereby a relative of the appellant was convicted. Hence the appellant also had a motive to murder the deceased.

14. I do not think that the distance between the place of the incident being approximately one acre from the complainants house to be that relevant bearing in mind that from such a distance the complainant would be able to hear the screams of her son being stabbed which she attested to and was corroborated by her sons PW's Faiz Mohammed and Ahmed Khan who were with her in the house at the time of the incident and quite naturally followed their mother as per their evidence to the place of the incident having been aware of the fact that the appellant had gone to look for her son/their brother. Considering that the deceased was receiving multiple stab wounds this would also give the complainant and her sons additional time to reach the place of the incident before the appellant could escape the scene.

15. As per the contradiction in her FIR of the complainant not being an eyewitness and her evidence where she claimed to be an eye witness. The FIR is no doubt an important document as it is made immediately after the event but as was held in the case of **Muhammad Zaman** (Supra) an FIR cannot take the place of evidence given under oath. It may however be of value in terms of contradiction and of undermining the evidence of the witness during cross examination. However, in this case vis a vis this contradiction what seems to be of primary importance, in my view, is that even in the complainant's FIR she stated that she was accompanied by her two sons Faiz Mohammed and Ahmed Khan both of whom as PW's have given evidence under oath that they were eye witnesses to the incident and have corroborated the complainant's evidence. Thus, there are at least two, if not three, eye witnesses to the incident all of whom corroborate each other concerning the incident and all of whom gave evidence under oath and in my considered opinion none of whom was demolished during cross examination. With regard to them not intervening at the time in my view this is explainable by the fact that the murder was being committed by three men who threatened to murder the complainant and her two sons before the assailants quickly fled the

scene by rickshaw and the primary concern of the mother and two sons would be for their son/brother who at that time was seriously injured and had not yet died and thus the urgent need to get him to hospital to try and save his life rather than intervening or giving chase to the fleeing assailants especially as they knew one them i.e. the appellant prevailed upon them. The complainant and PW's Faiz Mohammed and Ahmed Khan were not chance witnesses. It may be that their arrival on the scene prevented the appellant and his accomplices from killing the deceased on the spot as opposed to only leaving him in a scriously injured condition as they were compelled to flee by the arrival of the complainant and her two sons.

16. The FIR was lodged at 2330 on 18-07-2007, the postmortem was started within 2 hours on 19-07-2007, on 19-07-2007 the place of incident was inspected by the IO and sealed blood stained earth in the presence of mashirs and on 20-07-2007. the statements of the complainants .sons PW's Faiz Mohammed and Ahmed Khan was recorded. Based on this chain of events I do not consider a one to two day delay in recording the statements of PW's Faiz Mohammed and Ahmed Khan to be fatal to the prosecution's case.

17. The appellant was arrested by the IO on 20-07-2007 as per the memo of arrest and recovery and a blood stained Churri/like knife was recovered from him which was in a plastic bag which was sealed on the spot in the presence of Mushirs which along with blood stained earth was sent for chemical analysis which report was positive. It is true that the blood samples of the earth and Churri/like knife were sent for chemical analysis after 13 days of the arrest of the accused but in my view this is not fatal to the prosecution case. What in my view is significant is whether these blood samples could have been tampered with. In my view both samples were seized and sealed at the spot in the presence of Mushirs and that there is no evidence to show that such samples were tampered with before being sent for chemical analysis. In fact this suggestion is not even made during cross examination of the IO. Rather the suggestion that the Churri/like knife was foisted on the appellant has only been made.

18. It is correct that there are some discrepancies in the evidence however in my view none of these discrepancies are of a material or major nature so as to effect the findings in the impugned judgment especially bearing in mind that evidence was recorded between 3 to 4

years after the incident which can lead to slight lapses on the part of the witness which will not be fatal to the prosecutions case. In this respect reference may be made to the cases of **Zakir Khan & others v. The State** (1995 SCMR .1793).There also appear to be some minor procedural lapses on the part of the police during the investigation process as shown by the cross examination of the IO however none of these minor procedural lapses in my view is fatal to the prosecution case. It is also correct that some of the star witnesses are inter related but it is settled law that this will not in and of itself rule out a conviction. In such circumstances, in my view, the whole evidence must be considered in its entirety and in a holistic manner keeping in view the facts and circumstances of each particular case to see if it meets the required standard of proof. Furthermore, if the plan of the complainant was to falsely implicate the appellant on account of old enmity what was the need to include two other accomplices? Simply the appellant could have been named. This very fact in my view tends to give further credibility to the prosecution's version of events

19. In my view the medical evidence and in particular as explained by PW Yar Ali who carried out the post mortem is consistent with the deceased being killed by a Churri/like knife and in particular the knife recovered form the appellant as explained by him though his evidence and in particular his cross examination and tends to corroborate the ocular evidence along with the chemical report.

20. I entirely agree with learned counsel for the appellant that the accused should be entitled to the benefit of the doubt in criminal cases which is a well settled legal principle however I am guided in this respect by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

> "It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

21. In this case I am of the view that when the evidence is read in totality there would be no doubt in a reasonable and prudent person's mind that the appellant was guilty of the offense for which he has been

charged not with standing the few minor procedural irregularities and minor contradictions in the evidence of the PW's which even otherwise are not fatal to the prosecutions case.

22. On the whole I find that the prosecution evidence is confidence inspiring and shows a consistent and logical train of events from the appellant knocking on the complainants door to find out the whereabouts of her deceased son, to the complainant following up on the close by screams, the eye witnessing of the last part of the attack on her deceased son by the appellant and two other accused (absconders), the rush to take her seriously injured son to hospital, his death at the hospital, the subsequent registration of the FIR, appointment of IO, postmortem, IO's visit to wardat, IO's taking of S.161 Cr.PC statements, arrest of the appellant, recovery of blood stained Churri/like knife and the positive chemical report along with corroborative medical evidence when placed in juxtaposition with the oral evidence of the PW's.

23. Thus, for the above reasons I find that the prosecution has proved its case beyond a reasonable doubt, up hold the impugned judgment and hereby dismiss this appeal.

Hyderabad
18.04.2017