

Defence Case prevailed being believable
2 Separate versions

S82

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CRIMINAL APPEAL NO. S-39 OF 2013
SHAH FAISAL V/S THE STATE

SINDH HIGH COURT, CIRCUIT COURT HYDERABAD

COMPOSITION OF BENCH

HON'BLE MR. JUSTICE MOHAMMAD KARIM KHAN AGHA

(S.B.)

Date of last hearing (heard/reserved): 13-12-2023

Decided on: 20-12-2023

(a) Judgment approved for reporting YES

KAg 2

C E R T I F I C A T E

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

- NOTE:
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the Judgment.
 - (iii) Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

17/5/13
17/4/13

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17-04-2013
17/4/13

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No. S-39 of 2013.

Shah Faisal S/O Haji Lal Shah,

By caste Syed, Adult, Muslim,

Resident of Muslimabad Mirpurkhas,

Presently confined in Central Prison

Hyderabad Sindh.....

Appellant/accused.

Versus

The State.....

Respondent.

Crime No. 95 of 2008.

Police Station Satellite Town Mirpurkhas.

Under Section 302, 324, 337-D, 336 PPC.

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ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Cr. Appeal No.S-39 of 2013

DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of main case.

13.12.2023.

Mr. Zainuddin Baloch, Advocate for appellant.

Ms. Sana Memon, Asst. Prosecutor General, Sindh.

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I have heard the learned counsel for the appellant and the learned

A.P.G. Reserved for judgment.

Hafiz Fahad

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Defence Case prevailed being liable
2 Defence version

HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

Criminal Appeal No.S-39 of 2013

[Shah Faisal versus The State]

Appellant : Through Mr. Zainuddin Baloch, Advocate
Complainant : None present but service held good.
State : Through Ms. Sana Memon Assistant P.G
Date of hearing : 13.12.2023
Date of Judgment : 20.12.2023

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA J.- Through this appeal the appellant Shah Faisal has impugned the Judgment dated 30.03.2013 passed by learned Sessions Judge, Mirpurkhas (**Trial Court**) in Sessions Case No.103 of 2008 [**The State versus Shah Faisal**], outcome of Crime No.95 of 2008 registered at P.S Satellite Town Mirpurkhas for offence punishable under Section 302, 324, 337-D and 336 PPC, whereby for offence u/s 302(b) PPC he has been convicted and sentenced to suffer imprisonment for life with further directions to pay Rs.3,00,000/- as compensation to legal heirs of deceased Mir Ali Bux and in case of default in payment thereof he has to suffer S.I for six months; whereas for offences u/s 324 PPC he has been convicted and sentenced to suffer rigorous imprisonment for six years with fine of Rs.5,000/- and in case of failure in payment of fine he has to suffer S.I for six months; he has also been convicted and sentenced u/s 337-D PPC to suffer rigorous imprisonment for six years with directions to pay 1/3rd of Diyat as Arsh amount while for offence u/s 336 PPC he has been convicted and sentenced to suffer rigorous imprisonment for six years and also to pay Arsh amount in lump sum of Rs.1,00,000/- to injured P.W Saddam Hussain. However, all the sentences of rigorous imprisonment have been ordered to run concurrently and benefit to Section 382-B Cr.P.C has been extended to the appellant.

2. Complainant Mir Nazeer Ahmed Talpur lodged the aforesaid FIR by stating therein that he used to run private school; that his sister Mst. Nighat was married with one Ali Bux in the year 2000 while his other sister Mst. Parveen was married with Shah Faisal about one and half year back of this of this incident; that out of said wedlock Mst. Parveen has two daughters; that after some time of marriage some dispute arose between Shah Faisal and his sister Mst. Parveen and Shah Faisal ousted Mst. Parveen from his house alongwith minor daughters as such his sister Mst. Parveen started residing with him and thereafter Shah Faisal started issuing them threats on phone, then his sister Mst. Parveen filed a family suit for dissolution of marriage before the Court Civil Judge-II Mirpurkhas; on 12.07.2008 he, his father Mir Maqbool Ahmed, brother Mir Zafarullah, cousin Mir Saddam Hussain , cousin Mir Ali Bux and his step brother Javaid were present at their house alongwith other inmates when at about 0915 hours their house's door was knocked on which his cousin Saddam Hussain opened the door and Shah Faisal immediately entered in the house; they saw that Shah Faisal was having pistol in his hand, who immediately made fire upon Saddam Hussain and Ali Bux with intention to kill them, which hit at left side of stomach of Saddam Hussain while on the left side of chest and left arm of Mir Ali Bux, who raised cries and then Shah Faisal went away on black coloured motorcycle; thereafter they brought the injured persons at Civil Hospital Mirpurkhas where Mir Ali Bux expired.

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the accused/appellant, to which he pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined seven (07) witnesses and exhibited numerous documents and other items. The statement of accused was recorded under section 342 Cr.P.C whereby he denied the allegations leveled against him and claimed his false implication in the case. Appellant also examined himself on Oath under Section 340(2) Cr.P.C and produced two DW's in support of his defense case.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated earlier in this judgment. Hence the appellant has filed this appeal against his conviction.
6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.
7. It is noted that despite service on the complainant he chose to remain absent and as such service on him was held good vide Order dated 07.11.2023. Since the appellant had already been in jail for a large period of time and the interest of the complainant could be looked after by the learned State Counsel, as such in the interest of justice I proceeded with this old appeal of 2013 and have decided the same through this judgment.
8. Learned counsel for the appellant contended that there was a family dispute between the complainant side and the accused and this is why he was falsely implicated in this case; that the eye witnesses were all related and had enmity with the appellant and thus their evidence could not be safely relied upon; that the pistol was foisted on him by the police; that there were material contradictions in the evidence of the witnesses which rendered their evidence unreliable; that the appellant had already been acquitted in the connected illegal weapons case and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the reported cases of **MUHAMMAD ALI versus The STATE** [2017 SCMR 1468], **NADEEM alias KALA versus The STATE and others** [2018 SCMR 153], **MUHAMMAD ASHRAF and another versus The STATE and others** [2022 YLR Note 31] and, **Master MUHAMMAD NASEEM versus The State** [2022 YLR 469].
9. Learned Assistant P.G vehemently opposed the appeal and prayed for its dismissal by arguing that appellant himself has admitted his presence at the place of incident; that all the eyewitnesses including complainant have fully implicated the appellant with the commission of

the offence; that the prosecution eye witnesses have fully supported the version of FIR and can their evidence can be safely relied upon; that there is no contradictions in the evidence of the PW's; that the medical evidence supports the ocular evidence; that parties are known to each other as such there is no question of mistaken identity especially as this was a day light incident and the pistol was recovered from the accused on his pointation and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of her contentions, she placed reliance on the reported case of **MAZHAR ELLAHI versus The STATE** [2020 SCMR 586].

10. I have heard the learned counsel for the appellant as well as learned A.P.G and have also perused the material available on record and the case law cited at the bar.

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports and recovery of empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Mir Ali Bux (the deceased) was murdered by firearm and Saddam Hussain was injured fire arm on 12.07.2008 at about 9.15am in the complainants house situated in Al-Ata Town Mirpurkhas.

12. The only question left before me is whether it was the appellant who murdered the deceased by fire arm and injured Saddam Hussain by firearm at the said time, date and location?

13. After my reassessment of the evidence I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

- (a) No doubt the FIR was lodged with promptitude within 2 and ½ hours of the incident and all the eye witnesses are named in the FIR and the accused is given the specific role of murdering the deceased and injuring Saddam Hussain by firearm.
- (b) No doubt the prosecution called three eye witnesses being PW 1 Mir Nazeer Ahmed who was also the complainant in the case, PW 2 injured eye witness Saddam Hussain and

complainant's house to collect his wife and children. DW 2 who was a close friend of the complainant who saw him in the morning on the fateful day gave evidence that the appellant had told him that his wife had asked him to collect her and that he was going to collect her and that he was unarmed.

- (iii) Thus, the presence of the appellant is not denied by him at the crime scene. In fact it is an admitted position. In essence there are two different versions of what happened at the complainant's house on that fateful day. One by the complainant's side and one by the appellant's side. The question is can the complainant's version be believed beyond a reasonable doubt in the light of the defence case and evidence. Keeping in view that from the word go the appellant cross examined every eye witness with regard to his defence case, which, he repeated in his Section 342 Cr.PC statement which he confirmed under oath and was supported by two DW's?
- (iv) I have also alluded to the fact that all the complainant eye witnesses were related to each other and in my view each had enmity towards the appellant as he wanted to take Parveen his wife away who was related to all the eye witnesses which puts me on caution as to their evidence. It appears that eye witness Javed was a **chance witness** as he did not live in the complainant's house and according to him he stayed over on account of a birthday however there is no evidence that it was any one's birthday and this fact was **not** mentioned in the FIR. The fact that so many male relatives of the complainant were all present in the morning of the incident at least one of which was a chance witness suggests that they may have all been called together so that they could murder the appellant on his arrival in the morning hence the phone call to him to collect his wife might not have been entirely innocent and lends support to the defence case.
- (v) If the defence case is to be believed this explains how eye witness Saddam Hussain became injured and how the deceased died. Saddam Hussain being closely related to the complainant and living in his house had every reason to give false evidence in order to support the complainant's case as if the defence case is true he wanted to save the complainant from the legal consequences of murdering the deceased and injuring him, albeit by accident/mistake, just like chance eye witness Javed. Interestingly PW Zafarullah who was the mashir of all memo's was also an eye witness but without any explanation he gave no evidence about the incident and only about his role as mashir which also puts me to caution as to the truth of the of the eye witness evidence and whether PW Zafarullah was present at the time of the incident as alleged in the FIR and was used as the complainant's inside man for dealing with the mashirnama's especially in relation to the recovery of the pistol on the alleged pointation of the appellant.

- (vi) Furthermore, I find that the key to determining beyond reasonable doubt as to what transpired at the complainant's house on the fateful day lay with Ms Parveen who was also present in the house who could have given evidence as to whose version of events was true i.e the complainant's side or the defence case which would have settled the matter. However despite her being available to give evidence and being present in the house at the time of the incident and having her S.161 Cr.PC statement recorded she was dropped from the witness list without any explanation. Thus, the prosecution has deprived the court of some of the potentially best and most important evidence in determining the truth in this case. Under these circumstances it is well settled by now that under such circumstances under Article 129 (g) Qanoon-e-Shahadat Ordinance 1984 the court can draw the adverse inference that Ms Parveen who was at the centre of the dispute would not have supported the prosecution case in respect of the actual incident which casts doubt on the eye witness evidence especially as her evidence was deliberately withheld from the court despite her S.161 Cr.PC statement being recorded and being on the list of witnesses. In this respect reliance is placed on the case of **Muhammed Rafique V State** (2010 SCMR 385) which held as under;

"The prosecution without realizing the fact that he was the most important witness on the issue of conspiracy but did not examine him on the plea that he was unnecessary witness. Thus the best evidence of conspiracy was the statement of P.W. Amir Ali which has been withheld by the prosecution. It is well settled that if any party with holds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129(g) of Qanun-e-Shahadat Order can fairly be drawn that if P.W. Amir Ali would have been examined, his evidence would have been unfavorable to the prosecution".(bold added)

A similar view was taken in the cases of **Khalid @Khalidi V State** (2012 SCMR 327), **Muhammed Naeem Khan V Maqadas Khan** (PLD 2022 SC 99) and **Ahmed Ali v State** (2023 SCMR 781)

- (vii) The medical evidence supports the complainant's and appellant's version of events so is of little, if any, assistance to the prosecution.
- (viii) Both the complainant and the appellant had a motive for the murder and thus they cancel themselves out
- (ix) The IO who gave evidence that the murder weapon (pistol) was recovered on the pointation of the appellant was a neighbor and friend of the complainant as such the appellant's contention that the pistol was foisted on him

cannot be ruled out which in turn makes the recovery of empties at the scene inconsequential especially if the appellant's version is believed as the recovered pistol would have been the murder weapon which would have matched the empties as the complainant would have given the pistol to the police to foist it on the appellant with his relative and allegedly eye witness PW Zafarullah acting as the trusted Mashir. In any event the appellant has already been acquitted in the separate illegal arms case.

- (x) It does also not appeal to logic, commonsense or reason that if the appellant had brutally murdered the deceased and injured eye witness Saddam Hussain in the presence of other eye witnesses who knew him that he would simply go home and allow himself to be arrested. Instead the natural human conduct would have been for him to run away if he committed the offence under the circumstances as alleged by the complainant.
- (xi) That the recovery of the motor bike at the appellant's house is of no consequence as the appellant admitted going by this motorbike to the complainant's house in order to collect his wife.
- (xii) Thus, when I consider the defence case in juxtaposition with the prosecution case I find doubt in the prosecution case especially in respect of what actually transpired at the complainant's house on the fateful day. In this respect I placed reliance on the case of **Sabir Ali V State** (2011 SCMR 629 which held as under in material part;

"13. At this juncture, reference to the case Abdul Haque v. The State (PLD 1996 SC 1) may be made, where the appellant therein had taken the plea of provocation, it was observed by Sajjad Ali Shah, C.J. (as he then was) that "In this case Abdul Haque, who is accused of murder, claims the plea of grave and sudden provocation and states that he was deprived of power of self-control. In criminal jurisprudence general principle is that prosecution is to prove the case against the accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it. If there is any room for benefit of doubt in the case of prosecution, the same will go to accused and not to prosecution. Section 105 of the old Evidence Act came up for detailed examination in the case of Safdar Ali v. The Crown (PLD 1953 FC 93) and it was held that it is the duty of the Court to review entire evidence that has been produced by the prosecution and defense and after examination of the whole evidence if the Court is of the opinion that there is reasonable possibility that the defense put forward by the accused might be true, then such view would react on the whole prosecution case and accused would be entitled to benefit of doubt not as a matter of grace but as a right because prosecution has not proved its case beyond reasonable doubt".(bold added)

A similar view was taken in the case of **Raza V State** (PLD 2020 SC 523) which held as under in material part;

"15. In a criminal trial, it is now jurisprudentially settled that the proper course for the court is to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of the evidence. In case where the accused has taken a specific plea the court is to appreciate the prosecution evidence and the defence version in juxtaposition in order to arrive at a just conclusion." (bold added).

14. Thus, based on the prosecution withholding the most crucial evidence of Ms Parveen who could have given evidence as to which version, complainant's or appellants, was correct/the truth, the fact that the defence case when placed in juxtaposition with the prosecution case has caste doubt on the prosecution case and based on the above discussion I hereby acquit the appellant of the charge by extending him the benefit of the doubt which he is entitled to as of right as opposed to concession and set aside the impugned judgment, **allow** the appeal with the result that the appellant shall be released unless he is wanted in any other custody case.

15. The appeal stands disposed of in the above terms.

Sajjad Jessar/P.A.