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ORDER SHEET
**HIGH COURT OF SINDH CIRCUIT COURT,
HYDERABAD**

Cr. Jail Appeal No.D-200 of 2019

[Confirmation Case No.47 of 2019]

DATE

ORDER WITH SIGNATURE OF JUDGE

09.03.2023

Mr. Ashfaq Ahmed Lanjar, advocate for appellant

Mr. Shahzad Saleem Nahiyoona Additional P.G a/w Ab.
Hameed brother of Complainant

We have heard the learned counsel for the appellant as well as learned
Additional P.G. Reserved for judgment.

Sajjad Ali Jassar

Delay in FIR explained

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Jail Appeal No.D- 200 of 2019
[Confirmation Case No.47 of 2019]

Qurban Ali

Versus

The State

Appellant : Qurban Ali S/o Muhammad Ibrahim Jakhro	through Mr. Ashfaq Ahmed Lanjar Advocate
Respondent : the State	through Mr. Shahzad Saleem Nahiyoan, Additional Prosecutor General, Sindh
Complainant : Abdul Majeed (present in person on 07.03.2023 and 09.03.2023) showed full confidence in learned A.P.G	
Date of hearing	09.03.2023
Date of judgment	15.03.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-This criminal jail appeal is directed against the judgment dated 02.10.2019, passed by the Model Criminal trial Court-II / IVth Additional Sessions Judge, Hyderabad, in

Sessions Case No. 296 of 2013 (re: The State V Qurban Ali and another), emanating from Crime No.80 of 2013, registered at Police Station Hussainabad, Hyderabad, under section 302, 34 PPC, whereby the accused / appellant Qurban Ali S/o Muhammad Ibrahim Jakhro has been convicted u/s 302(b) PPC and sentenced to death as ta'zir; however, subject to confirmation by this Court. The appellant was also directed to pay compensation of Rs.500,000/- to the legal heirs of the deceased Waheed Ali as provided under section 544-A Cr.P.C; and, in case of default whereof, he shall suffer S.I for 06 months more. However, benefit of section 382-B Cr.P.C was extended to him; while, co-accused Manzoor Ali was declared as proclaimed offender and case against him was ordered to be kept on dormant file till his arrest.

2. The facts of the prosecution case as per FIR lodged by complainant Abdul Majeed on 22.05.2013 at 2345 hours, are as under:-

"That he (complainant) serves as driver in Milaks Company. There is a cabin of his brother namely Waheed Ali in between Unit No.2/6 Chowk Latifabad and so also dispute with the owner of said cabin in between Waheed Ali and Manzoor and others. Today i.e. 22.05.2013 complainant went to his duty at Zeal Pak when his father-in-law namely Imam Bux informed him on phone that Qurban Ali who is serving as constable in Hyderabad police, and his brother Manzoor Jakhro have committed murder of brother Waheed Ali by causing firearm injuries and asked the complainant to arrive at Shah Bhitai Hospital, Unit No.4, Latifabad. On such information, complainant directly arrived at Hospital, where found his brother dead. Thereafter, relatives of complainant namely Majid Ali Jakhro and Photo Jakhro informed him that at 1120 hours they were sitting alongwith Waheed Ali in the Cabin situated at Unit No.2/6 Chowk, meantime both brothers Qurban Jakhro and Manzoor Jakhro came there, out of them, Qurban Jakhro was holding official Kalashnikov and as soon as they came, Manzoor raised hakal upon Waheed Ali by stating that do not open the Cabin as he is owner of the cabin, then they got down Waheed Ali on footpath, then Qurban Ali opened straight fires upon Waheed Ali with intention to commit his murder, resultantly one bullet hit to his left arm and second bullet hit at left armpit, which gone through and through, due to which, Waheed Ali was writhing at the footpath and blood was oozing excessively. Thereafter, they cried "murder murder" whereupon many persons gathered there, then accused persons immediately made their escape good to their house. After that, they were removing the injured to Shah Bhitai Hospital but injured succumbed to his injuries on the way. Thereafter Police of Police Station Hussainabad, arrived at the Hospital and handed over the dead body of deceased to complainant party after getting completed legal formalities, then complainant after funeral and burial, appeared at Police Station and registered present FIR that accused

Qurban Ali and his brother Manzoor Ali together murdered his brother by causing firearm injuries of Kalashnikov."

3. After usual investigation, police submitted formal challan of the case before the concerned court. After completing necessary formalities, learned trial court framed charge against the accused, to which he pleaded not guilty and claimed trial.
4. At trial, in order to prove its case, the prosecution examined 06 witnesses and exhibited numerous documents and other items and thereafter prosecution side was closed. The statement of the accused / appellant was recorded under Section 342 Cr.P.C in which he denied the prosecution allegations leveled against him and claimed his false implication in the commission of alleged crime. However, neither he examined himself on oath in disproof of the prosecution case nor led any evidence in his defence.
5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the accused / appellant vide impugned judgment, as set out in the earlier para of this judgment, hence the appellant has preferred this appeal against his conviction.
6. The evidence produced before the trial court finds an elaborate mention in the impugned judgment, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.
7. Learned counsel for the appellant has contended that he is innocent of any wrong doing and that he has been falsely implicated in this case by the police at the instance of complainant party due to enmity; that there is unexplained delay in lodgment of the FIR; that none of the eye witnesses was present at the scene of the incident and they have falsely implicated him on account of relationship with each other; that there are material contradictions in the PW's evidence which renders their evidence unreliable; that all material PW's are interested hence their evidence cannot be safely relied upon; that the FIR should have been investigated by a person not below the rank of a DSP as the accused was a police officer which was not done; that the medical evidence contradicts the oral evidence; that the alleged crime weapon

has been foisted upon the appellant by the police 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 learned counsel for the appellant has placed reliance on the case of **Kashif Ali alias Kalu V The State and another** (2022 SCMR 1515).

8. On the other hand, learned Additional Prosecutor General Sindh has fully supported the impugned judgment and contended that all the material witnesses have been examined by the prosecution, who have fully implicated the appellant in the commission of the alleged offence; that the complainant and the prosecution witnesses had fully supported the entire episode and thereby implicated the appellant in the murder of the deceased in a brutal manner; that the eye witnesses have corroborated the medical evidence; that the murder weapon SMG (KK) was recovered from the appellant on his arrest; that the chemical report relating to the bloodstained earth secured from the place of incident, bloodstained clothes of the deceased and the FSL report were all positive and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and the conviction and sentence awarded to him be maintained and the confirmation reference answered in the affirmative due to the cold blooded brutal nature of the crime. In support of his contentions he placed reliance on the cases of **Muhammad Nadeem alias Deemi V The State** (2011 SCMR 872) and **Muhammad Mansha V The State** (2916 SCMR 958).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the medical evidence, the blood stained earth and empties recovered at the scene of the crime we find that the prosecution has proved beyond a reasonable doubt that on 22.05.2013 at about 11.20am at a cabin situated at Chowk of unit No.2/6 Latifabad Hyderabad Waheed Ali (the

deceased) was murdered by firearm and expired en route to hospital as a result of his firearm injuries.

11. The only question left before us therefore is whether it was the appellant who murdered the deceased by firearm at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted and sentenced keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That the FIR was lodged within 12 hours of the incident. This slight delay in lodging the FIR we find based on the particular facts and circumstances of this case has been fully explained. This is because the complainant first had to take his deceased brother to the hospital where legal formalities were carried out by the police before a post mortem was performed on the dead body which was then taken home and prepared for burial and then the burial took place and thereafter the complainant immediately returned to the PS and lodged the FIR. It has also come in evidence that the police came to the hospital and were aware of the incident much before the FIR was lodged and the complainant had even told the police that he would return and lodge the FIR after the funeral of the deceased which he did on the same day and as such based on the particular facts and circumstances of this case we do not find that the delay in lodging the FIR is fatal to the prosecution case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi** (Supra).

(b) It is true that the complainant was not an eye witness to the incident and his FIR is based on the narration of events by eye witness PW 2 Imam Bux who is related to him but the appellant is named in the FIR with a specific role and eye witness PW 2 Iman Bux gave evidence at trial.

(c) We find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether we believe their evidence especially in connection with the correct identification of the appellant whose evidence we shall consider in detail below;

(i) **Eye witness PW 2 Imam Bux. He is related to the deceased and the appellant.** According to his evidence on 22.05.2013 he along with PW Photo, PW Majid and the deceased were present at the place of the incident. At about 11.15/11.30am he saw absconding accused Manzoor grapple with the deceased which lead to the deceased falling

on the ground. He then saw the appellant make two fire shots with a KK on the deceased which caused his death. One bullet hit the deceased on the left hand whilst the other hit him in the ribs. Absconding co-accused and the appellant ran away and he took the dead body of the deceased by rickshaw to Shah Bhitai hospital. PW's Majid and Photo had followed in another Rickshaw. At the hospital he called the complainant who was the brother of the deceased who arrived at the hospital where the police also came. The post mortem was carried out and the body was handed over to them at 3pm for burial purposes where it was taken to Matiari village. After the burial at 11.45pm on the same day he accompanied by the complainant and Photo and Majid went to the PS where the complainant recorded his FIR.

This eye witness is related to the deceased however he is also related to the appellant. There seems to be some enmity between him and the appellant concerning a matrimonial dispute and as such we are put on caution as to the trust worthiness of his evidence.

This eye witness **knew the appellant before** the incident as he was related to him which occurred at about 11.20/30 in the morning in broad day light close to where the eye witness was standing. The incident went on for about 5 minutes and the eye witness was close to the incident and would have got a good look at the appellant who he already knew. Thus, there is no case of mistaken identity and no need to hold an identification parade in order to determine the identity of the appellant. His presence at the scene of the incident is corroborated by PW Photo and PW Majid Ali who were also present at the time of the incident.

This eye witness was not a chance witness as he is related to the deceased living in the same area and on the day of the incident he was informed by the deceased that the absconding co-accused and the appellant wanted to sell his cabin which he was in dispute with them over and as such it was natural that he accompanied the deceased to the cabin along with his other relatives Photo and Majid Ali who were also related and lived close by in order to support him. He gave his Section 161 Cr.PC statement on the same day whereby he named the appellant with a specific role and no material improvements were made in his evidence from his Section 161 Cr.PC statement which also formed part of the FIR as he informed the complainant about the incident. He gave his evidence in a natural manner and was not dented at all during a lengthy cross examination and as such we find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the appellant who murdered the deceased.

We can convict on the evidence of this eye witness alone though it would be of assistance by way of caution if there is

some corroborative/ supportive evidence. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) and **Muhammad Ismail vs. The State** (2017 SCMR 713). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality and believe the same. **In this case however there is more than one eye witness.**

(ii) **Eye witness PW 3 Photo. He is also related to the deceased.** His evidence corroborates that of **PW 2 Imam Bux** in all material respects. He knew the appellant from before the incident which was in day light and he saw the appellant fire on the deceased twice from a short distance so would have been easily able to recognize him. He is named as an eye witness in the FIR. He has no relationship or enmity with the appellant and had no reason to implicate the appellant in a false case. He gave his Section 161 Cr.PC statement on the same day of the incident which was not materially improved upon during the course of his evidence. He was also not a chance witness as he lived in the locality, was related to the deceased and had gone with him and the other eye witness PW's on account of the dispute over the cabin in order to back up the deceased. His evidence was not dented despite a lengthy cross examination. We believe his evidence in respect of the incident and in particular the correct identification of the appellant as the person who shot the deceased twice. The same considerations apply to his evidence as the evidence of **PW 2 Imam Bux**.

(iii) **Eye witness PW 4 Majid Ali. He is also related to the deceased.** His evidence corroborates that of **PW 2 Imam Bux and PW 3 Photo** in all material respects. He knew the appellant from before the incident which was in day light and he saw the appellant fire on the deceased twice from a short distance so would have been easily able to recognize him. He is named as an eye witness in the FIR. He has no relationship or enmity with the appellant and had no reason to implicate the appellant in a false case. He gave his Section 161 Cr.PC statement on the same day of the incident which was not materially improved upon during the course of his evidence. He was also not a chance witness as he lived in the locality, was related to the deceased and had gone with him and the other eye witness PW's on account of the dispute over the cabin in order to back up the deceased. His evidence was not dented despite a lengthy cross examination. We believe his evidence in respect of the incident and in particular the correct identification of the appellant as the person who shot the deceased twice. The same considerations apply to his evidence as the evidence of **PW 2 Imam Bux and PW 3 Photo**.

Thus, based on our believing the evidence of the 3 eyewitnesses what other evidence/material supportive/corroborative or other wise is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(d) That PW 1 Abdul Majeed's evidence, who was the complainant in this case, although not an eye witness, fully corroborates the eye witness evidence in all material respects.

(e) That it does not appeal to logic, commonsense or reason that a real relative would let the real murderer of his real relative get away scott free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammad Ashraf V State** (2021 SCMR 758)

(f) That the medical evidence and medical reports fully support the eye-witness/ prosecution evidence in that the deceased received two fire arm injuries which lead to his death.

(g) That the murder weapon namely the SMG (KK) was recovered from the appellant on his arrest one day after the incident which was his official police weapon.

(h) That the empties which were recovered from the crime scene when matched with the SMG (KK) recovered from the appellant lead to a positive FSL report in that the recovered empties were fired from the recovered SMG (KK).

(i) That it has not been proven through evidence that any particular police witness had any enmity or ill will towards the appellant and had any reason to falsely implicate him in this case for instance by foisting the SMG (KK) on him and in such circumstances it has been held that the evidence of the police witnesses can be fully relied upon and as such we rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(j) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to affect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the time the deceased came to the house of PW Imam Bux and told him about the dispute over the cabin with the absconding co-accused and the appellant to the eye witnesses accompanying the deceased to the cabin to the appellant shooting the deceased dead to the deceased being taken to hospital to the arrest of the appellant and recovery of the murder weapon SMG

(KK) which matched with the empties recovered at the scene through a positive FSL report.

(k) That the motive for the murder has been proven throughout in the evidence which is the dispute which the absconding co-accused and the appellant had with the deceased over the ownership of the cabin which the appellant wanted to sell.

(l) The fact that the investigation was carried out by an officer below the rank of DSP we find to be inconsequential and at best is only an irregularity which is curable and not an illegality. In any event the law prefers cases to be decided on merit as opposed to technicalities. In this respect reliance is placed on the cases of **Ashfaq Ahmed V State** (2007 SCMR 641) and **Sastay Khan Masood V State** (2004 SCMR 1766)

(n) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is simply false implication on account of enmity over a matrimonial dispute however the appellant did not examine himself on oath in this respect and did not call any DW in this respect or even produce a shred of evidence in support of his defence case. Thus, for the reasons mentioned above we disbelieve the defence case of false implication as an after thought in the face of reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

13. Thus, based on the above discussion we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and hereby maintain his conviction.

14. With regard to sentencing we note that the motive for the crime has been proven as being on account of the appellant's desire to take over and sell the cabin which was in the use and ownership of the deceased, that the crime was premeditated and a particularly brutal one carried out in broad day light whereby the appellant fired two shots on the deceased whilst he was on the ground in front of his relatives, that the appellant was a police officer whose duty was to uphold the law not to cause pre meditated murder with his official weapon and thereby deliberately break the very law which he was meant to uphold, that there are absolutely no mitigating factors rather only aggravating ones and thus based on the reasons mentioned above and the particular facts and circumstances of this case we find this a fit case to hand

down the death sentence by way of deterrence and as such uphold the death sentence handed down to the appellant in the impugned judgment.

15. As such the appeal is dismissed and the confirmation reference is answered in the affirmative.