

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cx Appeal 03/13 a/w Cx. Rev 23/13

M. Amin vs. The State

HIGH COURT OF SINDH

Composition of Bench: S. B./D. B.

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Abdul Mobeen Lakhro

Date(s) of Hearing: 17-01-2020 & 20-01-2020

Decide on: 23-01-2020

(a) Judgment approved for reporting:

Yes



CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- 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) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

PRESENTED
05-01-2013

Dy. Registrar (Jud.)

IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Appeal No. 03 2013

Mohammad Amir
S/o Mohammad Ishaque Awan,
Presently lodged at Central Prison,
Karachi.....Appellant

V e r s u s

The State.....Respondent

FIR No.26/2008
U/s 302 PPC,
P.S, Orangi Town,
Karachi.

APPEAL U/S 410 Cr.P.c

Being aggrieved and dissatisfied by the Judgment dated 22-12-2012, passed by the Vth Additional District And Session Judge, Karachi (West) in Session Case No.137/2008, whereby the learned Judge has convicted the Appellant U/s 302 PPC Read With Section 265-A for the murder of Mst. Khalida to undergo life imprisonment with fine of Rs.100,000/- and in default to undergo S.I. for 06 months and for the murder of Mst. Lubna in addition of imposition of Dayat Under Sub-Section 2 of Section 308 PPC and awarded the sentence of 20 years R.I. both the sentence will run concurrently and benefit of Section 382B Cr.Pc is also awarded to the

PRESENTED

13-02-2013

Dy. Registrar (Judl.)

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IN THE HIGH COURT OF SINDH AT KARACHI.

Cr. Revision No. 28 of 2013.

Saleem Khan s/o. Syed Khan,
Muslim, adult, resident of
House No.447, Sector 2/C,
Bukhari Colony, Orangi Town,
Karachi.

..... Applicant.

Versus.

1. The State.

2. Muhammad Aamir Awan
s/o. Muhammad Ishaque Awan,
Presently in custody / convict,
Confined at Central Prison,
Karachi.

..... Respondents.

CRIMINAL REVISION U/S. 435/439 / 561-A CR.P.C.
FOR ENHANCEMENT OF SENTENCE OF THE
RESPONDENT NO.2.

Applicant being mainly aggrieved and dis-satisfied with the
quantum of sentence awarded by learned Vth Additional District &
Sessions Judge Karachi (West) while passing Judgment dated
22.12.2012 in S.C. No. 137 / 2008 Re: State. Vs. Muhammad
Aamir, being outcome of F.I.R. No.26 / 2008, under section 302
PPC, registered at Police Station Orangi Town, Karachi, whereby

1372/13
JUDGE GENERAL
SINDH

Eye witness Believed

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N THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.03 of 2013 **alongwith**
Criminal Revision Application No.28 of 2013

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Abdul Mobeen Lakho.

Appellant	Mohammad Amir son of Mohammad Ishaque Awan through Mr. Asif Ali Pirzada, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Applicant in Crim. Revision Appl.	Nemo
Date of hearing	17.01.2020 and 20.01.2020
Date of Announcement	23.01.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Mohammad Amir in the instant appeal has assailed the impugned judgment dated 22.12.2012 passed by Vth Additional Sessions Judge, Karachi West in Sessions Case No.137 of 2008, F.I.R. No.26 of 2008 under Section 302 PPC registered at P.S. Orangi Town, Karachi whereby the appellant was convicted under Section 302 read with Section 265 H(ii) to undergo life imprisonment with fine of Rs.1,00,000/- (One Lac Only) and in default of payment of fine he shall undergo S.I for six months and for murder of his wife Lubna in addition to imposition of Diyat under sub Section (2) of Section 308 PPC the accused Muhammad Amir Awan s/o Muhammad Ishaque Awan is awarded sentence for (Twenty) 20 years R.I. Both the sentences were ordered to run concurrently.

2. The brief facts of the case as narrated in the FIR are that on 02.02.2008 at about 0400 hours the complainant Saleem Khan son of Saeed Khan was sleeping in his house when his nephew Tauqir Ahmed aged 17 years came to his house and informed him that his sister Khalida and niece have been murdered by the firing made by accused Amir who had fled away. The complainant along with him went to the house of his

deceased sister where they saw the dead bodies of both the women lying in separate rooms and blood was oozing from their heads. His nephew Basharat told him that he was sleeping in the house of his aunty Khalida when Amir first fired at Lubna Baji by pistol and thereafter fired at Aunty Khalida. He also fired at the lock of the door to open it and make his escape good. He was seen running away by Tauqir and Basharat. The information was given at PS and police came on the spot along with the complainant and conducted necessary proceedings and dead bodies of both deceased were sent to Abbasi Shaheed Hospital through Edhi Ambulance. FIR was then lodged.

3. After completion of the usual investigation challan against the accused was submitted in the concerned court. The charge was framed against the accused to which he pleaded not guilty and claimed trial.

4. The prosecution in support of its case examined 08 PWs and submitted numerous documents and other items in order to prove its case. The statement of accused was recorded under Section 342 Cr.P.C. He recorded his statement on Oath and called DW's in support of his defense case which in effect was that he had been falsely implicated in the case as he was not present at the time of the incident and took the plea of alibi.

5. Learned Additional Sessions Judge No.V, (West) Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 22.12.2012, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the eye witnesses are unreliable, that the appellant was not present at time of the incident and that he has been falsely implicated in this case as all the witnesses were interested witnesses and as such the appellant should be acquitted of the charge by extending him the benefit of the doubt.

8. On the other hand learned DPG appearing on behalf of the State fully supported the impugned judgment and in particular contended that the eye witnesses were reliable, trust worthy and confidence inspiring; that the medical evidence supported the eye witness evidence, that the recoveries supported the prosecution case and as such the appeal against conviction should be dismissed. When asked by the court whether this was a case which justified the enhancing of the sentence of life imprisonment to one of death he was of the view that it was not as no motive had either been alleged nor made out by the prosecution. In support of his contentions he placed reliance on **Ijaz Ahmad V The State** (2009 SCMR 99), **Sheraz Khan V. The State** (2010 SCMR 1772), **Anwar Shamim V. The State** (2010 SCMR 1791), **Zulfiqar Ahmad V The State** (2011 SCMR 492), **Muhammad Fazal V. The State** (2003 SCMR 1678),

9. None appeared to argue the Criminal Revision Application and we were informed by the applicant's former counsel Mr. Kaleemullah Hassan Siddiqui, Advocate that the applicant had taken the file away from him and dispensed with his services some years ago. It appears from the record that no other counsel has been engaged by the applicant. Since the appellant has already been in jail for about 9 years we deemed it in the interests of justice to proceed with this matter as the learned DPG could assist us vis s vis the enhancement application which we could also consider ourselves based on the particular facts and circumstances of the case.

10. 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 and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. In our view after our reassessment of the evidence based on the evidence of the PW eye witness, PW MLO, post mortem reports and other medical evidence, PW police witnesses and IO, recovery of empties on the spot, recovery of pistol from the appellant on his arrest and positive chemical reports we are satisfied that the prosecution has proved beyond a reasonable doubt that on 02.02.2008 at about 4am in the early morning inside House No. LS-112 Sec.7/C Ghazi Colony Karachi Mst Khalida (deceased) and Mst. Lubna (deceased) were murdered on account of firearm injuries.

12. The only issue therefore, in our view, left before us is whether it was the appellant or some other third party who shot the deceased by firearm which lead to the deaths of both of the deceased.

13. In our view after our reassessment of the evidence we find that the prosecution has proved its case against the appellant beyond a reasonable doubt and hereby uphold the convictions in the impugned judgment for the following reasons;

(a) In our view there has been no lengthy unexplained delay in lodging the FIR. The incident took place at 4am on 02.02.2008 and by 4.30am an initial police report had been lodged in respect of the incident, the police proceeded to the place of incident where the bodies were found and then sent to hospital, the S.154 statement was given by the complainant Saleem Khan at 8am on the same day and was registered in the FIR book at 9am. Thus, there was no time for the complainant along with the police to cook up a false case against the appellant. Furthermore, the appellant is specifically nominated in the S.154 statement with a specific role which was confirmed by the eye witnesses during their evidence.

(b) The key witnesses in this case in our view are eye witnesses PW 2 Basharat, PW 4 Tauqeer and PW 5 Khatoon Tabassum hence we will consider the evidence of these eye witnesses in turn.

(i) **PW 2 Basharat** was 11 years old at the time of the incident. He was given the required test to determine his competence and understanding which satisfied the Judge and in our view even today would meet the requirements as laid down in the recent supreme court case of **Raja Khurram Ali Khan V Tayyab Bibi** in Crim.App.120-122/2019 dated 10.01.2020 concerning the evidence of child witnesses but even then have considered it with extra care and caution. He was not a chance witness as he was sleeping in his house with his aunt Khalida (deceased) at the time of the incident in his is house. He knew and was related to the appellant so there is no question of him misidentifying him especially as at the time there was sufficient light and he was wide awake having been woken by the earlier gun fire sound which lead to the death of Ms Lubna. **He states in his evidence that he saw the appellant fire two shots at the deceased Khalida and thereafter the appellant ran away down the stairs and he fired on a lock which enabled him to escape from the house. He states in his evidence that his brother Tauqeer (PW4) and his mother Tabbasum (PW 5) also arrived at the scene. He heard only one fire from Lubna's room. He gave his S.161 Cr.PC statement on the same day and also gave a S.164 Cr.PC statement and was subject to cross examination by the accused at the time when he made his S.164 Cr.PC statement. He has no enmity with the appellant and had no reason to implicate him in a false case. Despite lengthy cross examination he remained unshaken and despite his tender**

age we find no reason to disbelieve his evidence which we find reliable, trust worthy and confidence inspiring.

(ii) **PW 4 Tauqeer** was 17 years of age at the time of the incident. The deceased Khalida was his aunt. He was not a chance witness and was sleeping in his house at the time of the incident in his house. He knew and was related to the appellant so there is no question of him misidentifying him especially as at time there was sufficient light and he was wide awake having been woken by the earlier gun fire sound which lead to the death of Ms Lubna. **He states in his evidence that he and his mother (PW 5 Tabbasum) proceeded downstairs and he saw the appellant firing at Khalida and when he saw them the appellant fired on the lock of the door and ran away.** He went to Lubna's room and saw that she was dead. He gave his S.161 Cr.PC statement on the same day and also gave a S.164 Cr.PC statement and was subject to cross examination by the accused at the time when he made his S.164 Cr.PC statement. He has no enmity with the appellant and had no reason to implicate him in a false case. **He fully corroborates the evidence of eye witness PW 2 Basharat in all material respects.** Despite lengthy cross examination he remained unshaken and we find no reason to disbelieve his evidence which we find reliable, trust worthy and confidence inspiring.

(iii) **PW 3 Khatoon Tabassum.** Again is not a chance witness as she is residing in the house where the incident took place. She knew and was related to the appellant so there is no question of her misidentifying him especially as at time there was sufficient light and she was wide awake having been woken by the earlier gun fire sound which lead to the death of Ms Lubna. **She corroborates the evidence of coming down the stairs with PW 4 Tauqeer when she heard the gun shot and although she did not see the appellant shoot Khalida she did see the appellant shoot the lock of the door and escape from the scene and in this respect fully corroborates the evidence of PW's 2 Basharat and PW 4 Tauqeer.** She also saw Lubna lying dead. She gave her S.161 Cr.PC statement shortly after the incident. She had no enmity with the appellant and had no reason to implicate him in a false case. **She fully corroborates the evidence of eye witness PW 2 Basharat and PW 4 Tauqeer in seeing the appellant shoot the lock on the door and escape from the house.** During cross examination she remained unshaken and we find no reason to disbelieve her evidence which we find reliable, trust worthy and confidence inspiring.

(c) It is settled law that we can convict if we find the direct oral evidence of one eye witness to be reliable, trust worthy and confidence inspiring. In this respect reliance is placed on **Muhammad Ehsan V The State** (2006 SCMR 1857). In this case we find 3 eye witnesses to be fully corroborative and reliable, trust worthy and confidence inspiring. Never the less by way of abundant caution we will consider below whether any

corroborative /supportive evidence is available in respect of the direct oral eye witness evidence.

(d) The medical evidence through PW 7 Dr. Yasmeem Qamar and her post mortem reports corroborate/is supportive of the oral eye witness evidence as she opines that Khalida was shot twice by firearm which was the cause of her death, whilst Lubna was shot once by firearm which was the cause of her death. Again there was no delay in carrying out the post mortems which could have lead to any concoction of any false case against the appellant through consultation between the PW's and the police.

(e) The memo of examination of dead body and inspection of place of occurrence also supports the prosecution case which was made on the day of the incident in that;

(i) it confirms the dead bodies in the house with firearm injuries

(ii) the recovery of 2 empties of 30 bore from Ms Khalida's room which ties in with the number of shots which the eye witnesses saw and heard

(iii) the recovery of one empty of 30 bore from Ms Lubna's room which ties in with the number of shots which the eye witnesses heard.

(iv) Recovery of pieces of lock and one empty by the door which ties in with the eye witnesses evidence of how the appellant made his escape good after he murdered Ms Khalida and Ms. Lubna.

(f) a pistol was recovered from the appellant at the time of his arrest.

(g) positive chemical reports showing that the blood gathered at the scene and on the clothes of the deceased was human blood

(h) That all the PW's are consistent in the 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 effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793). Their evidence provides a believable corroborated unbroken chain of events from the murder of the deceased in the house to the arrest of the appellant.

(i) It is well settled by now that police witnesses are as reliable as any other witness unless any ill will or enmity has been attributed to them which has not been done in this case. Like wise it is well settled that simply because a witness is related does not make him an interested witness and unreliable unless he has reason to falsely implicate the accused, or he is biased, partisan or inimical to the accused which there is no evidence of in this case. In this respect

reliance is placed on **Ijaz Ahmed's case** (Supra)

(j) The appellant has in effect taken the plea of alibi namely that he was at Sewan Sharif at the time of the incident and that the deaths resulted after a theft went wrong at the house and that he has been falsely implicated as there was a family dispute between the parties. We note that the appellant did not put the fact that he was at Sewan Sharif at the time of the incident to any PW during cross examination, that the issue of theft was never put to any PW during cross examination and that the bus ticket could easily have been arranged. As such we are of the view that the defense case is without merit and is an after thought on the part of the appellant in order to save his skin.

14. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt.

15. With regard to the enhancement of the sentence we agree with learned DPG that this is not a case of enhancement despite the accused committing two brutal murders of two women since as the learned DPG has rightly pointed out that when the prosecution fails to allege a motive for the murder and prove that motive as in this case the superior courts usually give the lesser sentence of life imprisonment. In this respect reliance is placed on **Amjad Shah V State** (PLD SC 2017 P.152)

16. Thus, the appeal against conviction is dismissed and the criminal revision application seeking enhancement of the sentence is also dismissed.

17. The appeal and criminal revision application stand disposed of in the above terms.