

THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.368 of 2019
Conf. Case No. 14 of 2019

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah

Appellant:	Jehanzeb Khan son of Naimat Khan Through M/s. Mehmood A. Qureshi, Irfan Ahmed Memon and Jamshed Iqbal Advocates.
Respondent:	The State through Zafar Ahmed Khan, Additional Prosecutor General.
Complainant	Rabnawaz son of Khuda Bux Awan Through M/s. Ahmed Ali Dewan and Shuhabuddin Channa, Advocates.
Date of hearing:	07.09.2021.
Date of Judgment:	14.09.2021.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Jehanzeb Khan has preferred this appeal against the impugned judgment dated 22.06.2019 passed by the learned Additional Sessions Judge/MCTC, Karachi Central in S.C.No.170 of 2013, arising out of FIR No.36 of 2013, registered at PS Khawaja Ajmer Nagri, Karachi, for offences punishable under Sections 302/324/34 PPC. After full-dressed trial, appellant Jehanzeb Khan was awarded death sentence under Section 302(b)/34 PPC subject to the confirmation by this Court. Appellant was also directed to pay compensation of Rs.10,00,000/- to the legal heirs of deceased Malik Saeed Awan as required under Section 544-A Cr.P.C. In case of default he was ordered to suffer R.I. for five months more. The appellant was also convicted under section 324/34 PPC and sentenced to suffer R.I. for five years and to pay fine of Rs.50,000/- and in case of default appellant was directed to suffer R.I. for one month more.

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2. The brief facts of the prosecution case as disclosed by complainant Rabnawaz Awan are that on 02.02.2013 at about 05:45 p.m. a quarrel took place between Jahanzaib and Saeed which was settled by him and others. Thereafter, the complainant while asking from Saeed about the matter, a white color car stopped near Jahanzaib, which was being driven by an unknown person. Accused Jawaid and Farooq real brothers of Jahanzaib got down from the car. Accused Jawaid was armed with repeater while Farooq was armed with pistol. Both the accused asked Jahanzaib as to who quarreled with him, he pointed out towards Saeed and accused Jahanzaib also took out a pistol. All the accused persons made firing upon Saeed and complainant Rabnawaz. Saeed fell down on the ground. Both the injured were brought at Abbasi Shaheed Hospital, where during treatment Saeed Awan succumbed to his injuries. Hence the aforesaid FIR was lodged.

3. The investigation was entrusted to Inspector Liaqat Ali who inspected the place of incident and secured three empties of 30 bore pistol and two cartridges of 12 bore in presence of mashirs. On 04.02.2013, he sent the empties to the FSL for report. On 15.06.2015, SIP Mehtab Alam arrested appellant Jahanzaib and recovered one pistol from his possession, which was sent to FSL for examination. The two empties were matched with the pistol. Thereafter, I.O submitted the report u/s 173 Cr.P.C. before the competent court of law. The trial court framed charge against the accused to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. Thereafter, statement of accused was recorded under Section 342 Cr.PC in which he denied the allegations and claimed his false implication due to enmity. The accused examined himself on oath and raised the defence of alibi in that he was not there at the time of the incident and he was going to see his wife. He did not call any witness in support of his defence case.

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 appellant/accused as mentioned.

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earlier in this judgment hence the appellant has filed this appeal against his conviction.

6. Learned counsel for the appellant contended that there was an unexplained delay of 4 hours in lodging the FIR which was fatal to the prosecution's case; that the appellant was not present at the scene of the incident and that the eye witnesses are put up ones; that even if the appellant was present at the scene of the incident the eye witness evidence cannot be safely relied upon as their evidence is neither truth worthy, reliable or confidence inspiring as there has been major improvements in the same; that the injuries to the complainant have not been proved through any medical certificate; that the FSL report whereby the empties which matched with the recovered pistol could not be relied upon as the recovery of the pistol has not been proven and the particular FSL report with regard to the empties was not put to the appellant whilst recording his S.342 Cr.PC statement therefore same had to be excluded from consideration and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt or in the alternative his sentence should be reduced from death to life imprisonment. In support of his contentions he has placed reliance on the cases of **Naveed Asghar and two others v. The State** (A recent unreported Supreme Judgment in Jail Petition No. 147 of 2016 dated 07.12.2020), **Imran Ashraf and 7 others v. The State** (2001 SCMR 424), **Abdul Rehman and others v. The State** (1983 SCMR 958), **Mst. Sabeeha v. Ibrar and others** (2012 SCMR 74), **Mir Muhammad alias Miro v. The State** (2009 SCMR 1188) and **Ghulam Mohy-ud-din alias Haji Babu and others v. The State** (2014 SCMR 1034)

7. On the other hand learned Addl. Prosecutor General for the State and learned counsel for the complainant fully supported the impugned judgment and contended that the evidence of the three eye witnesses to the incident was reliable, trustworthy and confidence inspiring and it had fully implicated the appellant in the murder of the deceased one of whom was an injured eye witness whose presence at the scene could not be doubted and for whom the appellant had been charged with attempting to murder; that the eye witnesses were corroborated by the medical

evidence; that the appellant was arrested with the murder weapon (pistol) in another separate case under the Sindh Arms Act 2013; that the FSL report matched empties when fired from the recovered pistol 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 his conviction and sentence maintained. In particular they stressed that due to the cold blooded murder of the deceased by the appellant the death sentence was fully attracted in this case. In support of their contentions they have placed reliance on the cases of **Malik Amir Muhammad Khan through L.Rs. and others v. Muzaffar Jan alias Muzaffar Khanum and others** (2008 SCMR 705), **Muhammad Waris v. The State** (2008 SCMR 784), **Takdir Samsuddin Sheikh v. State of Gujarat and another** (2012 SCMR 1869), **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872), **Zakir Khan and others v. The State** (1995 SCMR 1793), **Haji Khan and 2 others v. The State and others** and (1991 P.Cr.L.J 2110 Federal Shariat Court), **Khizar Hayat v. The State** (2011 SCMR 429), **Muhammad Ehsan v. The State** (2006 SCMR 1857), **Khadim Hussain v. The State** (2010 SCMR 1090), **Ashfaq Ahmed v. The State** (2007 SCMR 641), **Muhammad Mansha v. The State** (2001 SCMR 199) and **Sikandar Ali Lashari & another v. The State** (SBLR 2020 Sindh 981).

8. 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.

9. Based on our reassessment of the evidence of the PW's, especially the PW eye witnesses, PW 8 Dr. Zahoor Ahmed, PW 10 Dr. Aijaz Ahmed post mortem, other medical reports, death certificate of Saeed and MLC of Rab Nawaz and recovery of empty and blood stained earth at the scene which lead to both positive FSL reports and chemical report we find that the prosecution has proved beyond a reasonable doubt that Malik Saeed Awan (the deceased) was murdered by firearm at about 1800 hours on 02.02.2013 inside street near Milk shop, Shah Medical store, Shahnawaz Bhutto Coloney, Sector 1-A/4 North Karachi and that firearm shots were

made on Rab Nawaz with intention to kill him at the same time, date and location.

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10. The only question left before us therefore is who murdered the deceased by firearm and attempted to commit the murder of Rab Nawaz by firearm at the said time, date and location?

11. 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 for the following reasons;

(a) That the FIR was lodged with promptitude within 4 hours of the murder and attempt to commit murder based on the particular facts and circumstances of the case. During this period the complainant who was injured had been taken to the hospital along with the deceased where his S.154 Cr.PC Statement was recorded at the hospital on the arrival of the police and thereafter his FIR was lodged and thus there was no unexplained delay in the lodging of the FIR which would give the opportunity to the complainant or the police to cook up a false case against the appellant for which the prosecution gained no advantage. In this respect reliance is placed on the case of **Muhammed Nadeem** (Supra). Even otherwise no specific/proven enmity has come on record between the appellant and the complainant which would motivate him to lodge a false case against the appellant.

(b) The appellant is named in the FIR with a specific role along with his absconding co-accused and other PW eye witnesses by the complainant who was also injured at the scene of the incident by firearm which FIR as discussed above was filed with promptitude.

(c) In our view the prosecution's case rests on the eye witnesses to the murder whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Rab Nawaz.** He is the complainant in the case and was also injured at the scene at the time when the deceased was murdered. According to his evidence on 02.02.2013 at about 1745 hours he was present at the scene along with others when a quarrel/altercation took place between the accused and the deceased. He and others intervened and patched up the quarrel however when he was standing asking the deceased what the quarrel was all about he saw a white car enter the street and stop by the accused whereupon the two brothers of the accused Javed with a pistol and Farooq (who was also a policeman) with a repeater came out of the car. He heard the accused tell Javed and Farooq that the deceased had fought with him and pointed out the deceased. He saw the accused draw his pistol whereupon he saw all three brothers (including the

accused) fire upon the deceased who sustained bullet injuries. He also sustained a bullet injury on his right hand and right thigh on account of the firing. Dr. Saleem, Shahnawaz and Javed witnessed this incident who put him and the deceased in a car which took him and the deceased to Abbassi Shaheed Hospital. Whilst he was being treated in the emergency during his treatment he came to know that the deceased had died.

He knew the appellant, it was a day light incident and he was not far away when the appellant shot the deceased so there is no case of mistaken identity and no need to hold an identification parade even after a period of two years especially as he named the accused with specific role in the promptly lodged FIR. The fact that he could see the incident clearly was corroborated by the evidence of the other eye witness PW's who also saw the appellant shoot the deceased and the complainant. Since it was a day light incident as mentioned earlier and the complainant and other eye witnesses knew the appellant they would have had no difficulty in identifying him especially as the attack went on for a few moments and they were close to the appellant at the time of the shooting.

Admittedly the eye witness was related to the deceased who was his cousin however it is well settled by now that evidence of related witnesses cannot be discarded unless there is some ill will or enmity between the eye witnesses and the accused which has not been proven in this case by any reliable evidence. Reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152) and **Ashfaq Ahmed** (Supra)

The complainant is **not** a chance witness. He lived in the same mohalla as the accused and deceased and other eye witnesses and all knew each other so he had every reason to be where he was at the time of the incident. He was also shot at the scene at the time of the murder which is corroborated by his medical certificate which was duly exhibited and other medical treatment record and even PW 4 Sarfraz who was a police officer who returned the dead body to Jawaid and saw this eye witness admitted in hospital and being treated and as such we have no doubt that he was present at the scene at the time of the shooting. As mentioned earlier he lodged his FIR with promptitude and named the other eye witnesses in the FIR along with the accused with a specific role. Any delay in registering the FIR is fully explained by the complainant in his evidence. His evidence reflects that of his FIR and there have been no significant improvements in the same so as to render his evidence unreliable. He had no proven enmity with the appellant and had no reason to falsely implicate him in the murder of the deceased or even

of his own shooting at the scene. His evidence was not dented despite lengthy cross examination. He did not intervene in the attack because he was unarmed and wounded and the accused and his co-accused had already made their escape good by car. He was a former soldier and his composure and the accuracy and quality of his evidence reflects his professional training. We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same and we can convict on his evidence alone. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917), 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. As was held in the case of **Muhammed Mansah** (Supra) at P.205 Paras 7 and 12.

"A bare perusal would reveal that the language as employed in the said Article 17(1)(b) is free from any ambiguity and no scholarly interpretation is required. The provisions as reproduced hereinabove of the said Article would make it abundantly clear that particular number of witnesses shall not be required for the proof of any fact meaning thereby that a fact can be proved only by a single witness "it is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality witnesses, case where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the Presiding Judge come into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. The Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving facts". (Principles and Digest of the Law of Evidence by M. Monir, page 1458.

Para 12. It may not be out of place to mention here that she sustained bullet injuries as a result of firing made by Muhammad Mansha (appellant) and thus, her presence at the spot cannot be doubted which otherwise was never challenged during cross-examination. We are conscious of the fact that "the fact of witness being injured and such,

injuries not self-suffered is not by itself indicative of witness having told truth". (1981 SCMR 795) but in the case in hand the statement of Mst. Razia has not been taken into consideration merely on the ground that she sustained injuries but sufficient incriminating material had come on record showing that the alleged firing was made by none else but by Muhammad Mansha (appellant). How weighty the statement of an injured witness should be and up to what extent it can be relied upon depends upon the circumstances of each case. It, however, lends corroboration to the factum of presence of injured witness at the place of occurrence and if some corroboratory and confirmatory material is available such statement cannot be discarded".

(ii) **Eye witness PW 2 Shahnawaz Awan.** He is the brother of PW 1 Rab Nawaz. According to his evidence on 02.02.2013 at 5.45 he heard cries from the main street about 15 to 20 feet away where he went and tried to calm down the accused and deceased. He returned to the chowk when he saw at about 6pm a white color car in the street. He saw Farooq with a pistol and Javed with a repeater get out of the car. They asked the accused who had quarreled with him and he saw the accused point out the deceased. Eye witness PW 1 Rab Nawaz was also standing there. They stated not to spare the deceased and Rab Nawaz where upon he saw all three person's open fire on the deceased and PW 1 Rab Nawaz from about 10/15 feet. Both the deceased and PW 1 Rab Nawaz sustained fire arm injuries on account of such shots. The culprits made there escape good whilst he requested Saleem and Jawed to take the injured to hospital. He went home and later PW Sarfraz brought the dead body to his house. He took IO Randhawa to the wardat where he acted as mashir when the empties (pistol and cartridges) and blood stained earth was collected. His evidence corroborates PW 1 Rab Nawaz in all material respects. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement promptly which left no room for concoction and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 1 Rab Nawaz**. He also identified the accused in the police lock up who he already knew following his arrest after two years of absconsion.

(iii) **Eye witness PW 3 Jawaid.** He is the brother of PW 1 Rab Nawaz. He corroborates eye witnesses PW 1 Rab Nawaz and PW 2 Shahnawaz in all material respects. He even corroborates Shahnawaz that he took the injured to the hospital where Rab Nawaz was admitted in emergency and the deceased died. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement promptly which left no room for

concoction and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 1 Rab Nawaz** and **PW 2 Shahnawaz**.

Having believed the eye-witness evidence we find that the authorities cited by the appellant are of little, if any, assistance to him since they mainly relate to mitigation in terms of sentencing. With regard to corroborative/supportive evidence it was held in the case of **Muhammed Waris** (Supra) at P.786 para 4 as under;

"Corroboration is only a rule of caution and is not a rule of law and if the eye witness account is found to be reliable and trust worthy there is hardly any need to look for any corroboration"

Like wise in the case of **Sikandar Ali Lashari** (Supra) it as held as under at P.1026 Para 4;

"Each criminal case has its own peculiar facts. If eye witness account is found trustworthy then there is hardly any need for corroboration"

Thus, based on our believing the evidence of the 3 PW eye witnesses by way of abundant caution what other supportive/corroborative material is their against the appellant?

(d) That the evidence of the 3 eye-witnesses is corroborated by PW-4 Sarfraz who was a police officer who was informed that two of his relatives had sustained fire arm injuries by the accused, Farooq and Jawed and as such he rushed to Abbassi Shaheed Hospital where he saw PW 1 Rab Nawaz being treated in emergency and saw the dead body of the deceased which was handed over to him. PW 5 Muhammed Shabbir who was an independent witness also corroborates PW 4 Sarfraz's evidence. In addition PW 5 Muhammed Shabbir states that he saw the gun shot wounds on the deceased body which ties in with the PW eye witness evidence. He was also mashir to the S.174 Cr.PC report and states that some of the gunshot wounds were caused by bullets whilst others were caused by pellets which ties in with the Memo of examination of dead body of which he was mashir. He also recorded his S.161 Cr.PC statement on the same day which left no room for concoction and also corroborates the fact that the appellant according to the eye witnesses fired on the deceased with a pistol as opposed to a repeater.

(e) That the medical evidence and post mortem report of PW 8 Dr. Zahoor Ahmed fully supports the eye-witness/ prosecution evidence as he confirms that the deceased inquest report was carried out by PW 7 Mohib Ali which he received from him in the hospital prior to carrying out the post mortem of the deceased and PW 7 Mohaib Ali has not only stated in his evidence that he was called to the hospital on account of gun shot wounds to the

deceased and Rab Nawaz but has also exhibited such entry in respect of the same.

In his evidence PW 8 Dr. Zahoor Ahmed gave the following evidence in material part;

"Surface injuries:-

- i. *Firearm wound of entry of 0.5 cm diameter, inverted margin, over left upper chest laterally, no blackening. It is corresponding wound of exit over left side of umbilical/left lumbar anterior.*
- ii. *Firearm wound of entry over epigastric region, with its corresponding wound of exit over umbilical region.*
- iii. *Firearm punctured wound 4 x 3 cm in size, left the thigh with no wounds of exit, however, the crime bullet recover from left thigh medial.*
- iv. *Firearm wound of entry over left elbow laterally over left arm medially.*

All injuries are ante mortem, duration of injuries were from 2 to 3 hours. Duration of death is also 2 to 3 hours. Suggestive of death occurred spontaneously".

The significance of this evidence by referring to size of entry wounds is that it proves that the deceased was hit by at least one bullet and pellets and it is relevant that the appellant was seen firing a pistol at the deceased by the eye witness which indicates that his pistol shot hit the deceased and as such corroborates the prosecution eye witness evidence. Likewise the fact that no blackening was found around any of the wounds supports the prosecution case that the firing was not made from a very close range.

(f) that on his arrest approx 2 years later a pistol was recovered from the accused which matched with pistol empties which were recovered at the scene of the crime. Even otherwise if it is disputed that the pistol was not recovered it was held in **Muhammed Nadeem's case** (supra) as under at P.875;

"Even otherwise, the recovery of a crime weapon in a criminal case is not at all material. It can only be a piece of supporting evidence. If other evidence goes to prove the case (as in this case) it is not essential at all" (Bold added)

(g) That the blood stained earth recovered at the wardat and clothes recovered from the deceased were sent for chemical examination which report found the blood recovered at the scene and on the clothes to be human blood.

(h) 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 effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **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 shooting of the deceased and PW 1 Ran Nawaz by the appellant and the absconding co-accused to the deceased being taken to the hospital where he expired and Rab Nawaz being treated at the hospital for gun shot wounds to the lodging of the FIR to the arrest of the appellant to the recovery of the murder weapon and matching FSL report.

(i) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up his arrest or foisting the pistol on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(j) The appellant remained an absconder for over two years. He did not surrender himself for trial and was arrested in another criminal case before being linked to this case which is not the conduct of an innocent man.

(k) 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 as set out by the appellant during his evidence under oath was that of alibi which could have been supported by his wife and a friend who he stayed with however not only were the PW's not cross examined on this point but his alibi witnesses which included his wife did not give evidence in support of his defence. Otherwise his defence is one of false implication on the basis of a dispute over a plot of land and a telecom tower being constructed thereon for which the appellant was receiving rental payment however no document has been brought on record to prove this aspect of the case. His own brother was a serving police officer so is not believable that he could be victimized. The fact that he absconded for over two years and was arrested in another case in Karachi also does not support his innocence or alibi of moving away from Karachi. We find his defence case when placed in juxta position with the prosecution case to be an afterthought and we disbelieve the same. Thus, in the face of three reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) has not at all dented the prosecution case.

12. 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 for the offences for which he has been convicted and hereby maintain his convictions.

13. With regard to sentencing the prosecution has not asserted and has not been able to prove through evidence the motive for the appellant murdering the deceased or attempting to murder Rab Nawaz and it is also unclear whether it was the appellant's pistol shot which caused the fatal wound on the deceased which caused his death and in such type of cases usually the superior courts reduce the death penalty to life imprisonment. As such based on the particular facts and circumstances of the case we hereby uphold the sentence under S.324 PPC but reduce the sentence under S.302 (b) PPC from the death sentence to one of life imprisonment. All other fines and compensation shall remain in place. The sentences shall run concurrently and the appellant shall have the benefit of S.382 (b) Cr.PC.

14. The appeal stands dismissed subject to the above modification in terms of sentencing and the confirmation reference is answered in the negative.