

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

**Criminal Appeal No.338 of 2019
Confirmation Case No.13 of 2019**

Appellant:	Muhammad Nadeem S/o. Muhammad Nasir Jamal through Mr. Ali Abbas Khan, Advocate
Complainant:	Rashid Ali through Mr. Nazar Iqbal, Advocate.
For State:	Mr. Muhammad Iqbal Awan, Additional Prosecutor General.
Date of hearing	21.09.2021
Date of Announcement	28.09.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Nadeem in the instant appeal has assailed the judgment dated 29.05.2019 passed by Learned Additional District & Sessions Judge-I, Karachi East in a Sessions Case No.1394 of 2009 arising out of Crime No.419 of 2009 U/s. 302/34 PPC P.S. Awami Colony, Karachi whereby the appellant was convicted under Section 302(b) PPC and sentenced to death subject to confirmation by this court. The appellant was also directed to pay compensation amount of Rs.500,000/- to the legal heirs of the deceased Farooq as required under section 544-A Cr.P.C. and in default of payment he has to undergo simple imprisonment for six months.

2. The brief facts of the prosecution case are that complainant Rashid Ali son of Ali Sher (complainant) registered FIR at PS Awami Colony, stating therein that on 22.08.2009, he and his brother Farooq were going to Abid Garments Factory behind Habib Bank Korangi No.4, and he called his friend Muhammad Faizan Ali where at about 10 O'clock two persons young age came on motorcycle to rob his brother Farooq. One of them alighted from the motorcycle came near his brother Farooq and during a scuffle opened fire on him due to which his brother was injured seriously

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and they all remained silent due to fear. The person who fired upon his brother put his hand in the pocket of his brother and took out all the things and escaped away, thereafter, he informed his brother Asif at home and when he reached at the spot, he saw that his brother had sustained injury upon abdomen. They took their injured brother to Sindh Government Hospital Korangi No.5, where doctors referred them with the injured to Jinnah Hospital (JPMC). As such they took the injured through ambulance to JPMC however the injured succumbed to his injuries en route to JPMC. After reaching JPMC he took his brother's dead body to his home without any proceedings, thereafter the SHO Police Station Awami Colony came at their home and asked for conducting postmortem and the dead body was taken through ambulance back to JPMC and after completing all the legal formalities the dead body of the deceased was handed over to his brother, hence such FIR was lodged against the above named accused.

3. After completion of the usual investigation the appellant was challoned and charge was framed against accused him on 06.03.2010 to which he denied the allegations and claimed to be tried.

4. The prosecution in order to prove its case examined 09 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He did not examine himself on oath however he called his brother as a DW in support of his defence.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal 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 dated 25.09.2019 passed by the trial court and, 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 the appellant is completely innocent and has been falsely implicated in this case by the complainant in collusion with the police; that the identification of the

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appellant by the eye witnesses cannot be safely relied upon especially as there was no identification parade; that there are material contradictions in the evidence of the eye witnesses which makes their evidence unreliable; that the pistol was foisted upon the appellant by the police and that for any of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he has placed reliance on the cases reported as **Muhammad Imran v. The State** (2020 SCMR 854) and **Abdul Jabbar alias Jabbari v. The State** (2017 SCMR 1155).

8. On the other hand learned Additional Prosecutor General appearing on behalf of the State and learned counsel for the complainant have fully supported the impugned judgment. They have contended that the prosecution eye witness' evidence was trustworthy, reliable and confidence inspiring and that they have correctly identified the appellant as the person who shot the deceased during the course of robbery by the appellant; that based on the particular facts and circumstances of the case no identification parade was required; that the medical evidence supports the prosecution's case as do the recovery of the pistol on the appellant's arrest which matched with the empties recovered at the scene through a positive FSL report and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and the appeal should be dismissed and the confirmation reference be answered in the affirmative. In support of their contentions, they placed reliance on the cases reported as **The State/ANF v. Muhammad Arshad** (2017 SCMR 283), **Muhammad Ilyas and others v. The State** (2011 SCMR 460), **Ghazanfar Ali @ Pappu and another v. The State** (2012 SCMR 215), **Asim and another v. The State** (PLD 2004 Quetta 123), **Muhammad Afzal and another v. The State** (1982 SCMR 129), **Kanwar Anwaar Ali, Special Judicial Magistrate: in the matter of Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018** (PLD 2019 Supreme Court 488), **Mian Sohail Ahmed and others v. The State and others** (2019 SCMR 956) and **Jehangir Khan v. The State** (1986 SCMR 156).

9. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and learned counsel for the complainant, gone through the entire evidence which has

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been read out by learned counsel for the appellant along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar

10 Based on our reassessment of the evidence especially of the PW eye witnesses, the other PW witnesses, PW 2 MLO Dr. Dilip Khatri and the medical reports including the post mortem of the deceased, recovery of empties and blood stained earth at the scene of the offence we find that the prosecution has proved beyond a reasonable doubt that Muhammed Farooq (the deceased) during a robbery was shot by firearm at about 10am on 22.08.2009 behind Habib Bank Korangi No 4 in Abid Garment Factory Korangi whereby he was seriously injured and later died en route to JPMC on the same day on account of the serious firearm injury which he sustained during the course of the robbery.

11 The only question left before us therefore is who seriously injured the deceased during the course of robbery by firearm which lead to his death (murder)?

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 for the following reasons;

(a) That the FIR was lodged with promptitude being 6 hours after the robbery and shooting of the deceased which lead to his death. If this can be seen as any delay based on the particular facts and circumstances of this case this delay has been explained by the complainant in his evidence in that immediately after the incident the deceased was taken to Korangi Hospital for treatment who then referred him to JPMC due to his serious injuries where he died on en route. The body after initially being taken home was then returned to JPMC for legal formalities where after the complainant who was the brother of the deceased lodged the FIR. This gave the complainant no time to cook up a false case against the appellant with the police especially as the complainant had no enmity with the appellant and had no reason to implicate him in a false case. Even in his S.342 Cr.PC statement the appellant has admitted that he has no enmity with any of the eye witnesses. Furthermore, during this slight delay the prosecution obtained no benefit

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

(i) Eye witness PW 1 Rashid Ali. He was also the

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complainant in the case and the brother of the deceased. According to his evidence at 9.45am on 22.08.2009 he was with the deceased when they went to the Garment factory situated at Korangi for some personal work. His brother was standing near the gate of the factory and he and Faizan were 10 paces away when two persons came on motor bike. One of the accused dismounted and took out his pistol which he pointed at the deceased's abdomen in order to snatch the deceased's mobile phone where upon he fired upon the deceased who fell down where after the accused took out all the things in his front pocket. He then took his injured brother to Korangi Hospital and then JPMC where he had already died. Later in the evening he was called to the PS where he, his brother Shahid and Fizian identified the appellant who had robbed and fired upon the deceased. The FIR was then lodged by the complainant who named the appellant in the FIR with a specific role as he had identified him at the PS. No hulia was given in the FIR as he had already identified the appellant 8 hours after the incident just before he lodged the FIR. Although the complainant did not know the appellant it was a day light incident at 10am in the morning and he was only ten paces from the appellant at the time of the robbery and shooting and as the incident lasted a few moments he would have got a good look at the appellant who he recognized in the police lock up only 8 hours after the incident and thus under these circumstances we find that we can rely on the correct identification of the appellant by the complainant especially as he had no reason to falsely implicate him in this case. It is true that generally when an unknown person is an accused an identification parade would be the preferred course to prove identification however based on the particular facts and circumstances of this case as mentioned above e.g closeness to accused (10 paces), daylight incident, long close look at the appellant, no enmity with the appellant and his identification within 8 hours of the incident we find that an identification parade was not mandatory and that we can safely rely on the correct identification of the appellant by the complainant. In this respect reliance is placed on Ghazanfar Ali v. State (2012 SCMR 215) where it was held at P.224 Para 13 as under;

"Even otherwise the holding of identification parade is not mandatory and it is merely a corroborative piece of evidence. If the statement of a witness qua the identify of an accused even in Court inspires confidence, if he is consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, the absence of holding of identification parade would not be fatal to the prosecution. In Harbajan Singh v. State of Jammu and Kashmir (1975) 4 Supreme Court Cases 480), The Court upheld the conviction where no identification parade had been held and observed that the failure to hold identification parade would not be fatal in cases where enough corroborative and conclusive evidence was available. A similar view was taken in Jadunath Singh v. State of U.P. (1970) 3 Supreme Court Cases 518)".

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In support of the above position reliance is also placed on the cases of **Asim** (Supra) and **Muhammed Afzal** (Supra)

He is not a chance witness as he was going to the garment factory with his brother. His presence at the scene was not challenged during cross examination and his version of events has been corroborated by two other PW's whose evidence we will reassess below.

Furthermore, although the eye witness is closely related to the deceased it is well settled that his evidence cannot be simply discarded on this basis alone unless some enmity, ill will or reason to falsely implicate the appellant has come on record and nothing of the kind has come on record in this case. On the contrary the appellant has admitted in his S.342 Cr.PC statement that he has no enmity with any of the eye witnesses including the complainant. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152)

In fact in some cases the superior courts have held that based on the particular facts and circumstance of the case related witnesses may be more reliable as they want to see justice done for their relatives by ensuring that the correct person is held to account.

He lodged his FIR and recorded his S 161 Cr PC eye witness statement on the same day which left no room for concoction. His evidence reflects that of his FIR and S.161 Cr.PC statement and there have been no significant improvements in the same during his evidence so as to render his evidence unreliable. His evidence was not dented despite lengthy cross examination. He gave his evidence in a natural and straightforward manner. You are unlikely to forget the face of the person who murdered your brother before your eyes. In this respect reliance is placed on the case of **Mian Sohail Ahmed** (Supra). He could not intervene in the attack otherwise he would also have been shot. He arranged for his brother to be taken to hospital at the earliest which was his priority rather than chasing the accused who had already escaped on a motor bike. We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same especially in terms of his correct identification of the appellant and can convict on this evidence provided that there is some corroborative/supportive evidence. 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) and **Niaz-ud-Din V The State** (2011 SCMR 725), (Supra), 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.

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(ii) **Eye witness PW 7 Muhammed Faizan Ali.** According to his evidence he used to work with the deceased. On 22.08.2009 at about 10 to 10.15am he went to the Garments Factory where he saw the deceased and PW 1 Rashid. He saw two persons come on a motor bike who pointed pistols at himself and the deceased. The deceased resisted which lead to them going inside the factory. During the resistance he saw the accused shoot Farooq from 10 to 15 paces which fire hit Farooq on the abdomen. He and an employee of the Garments factory (PW 6 Muhammed Saeed) took Farooq to the hospital. He was an independent witness and not a chance witness as he worked with the deceased in the garment trade hence their reason to be at the garments factory on that day. He recorded his S.161 eye witness Cr.PC statement on the same day and there was no major improvements in the same during his evidence. He was named as an eye witness in the FIR which was registered with promptitude. There was no reason for him to give a hulia of the appellant in his S.161 Cr.PC statement of the appellant as he had recognized the appellant in police custody within 8 hours of the incident and before he gave his S.161 Cr.PC statement. He had no reason to falsely implicate the accused. He saw the accused from close range from 10 to 15 paces in broad day light for a considerable period of time whilst the scuffle and then shooting took place. He also identified the accused at the police lock up within 8 hours of the incident. We find him to be a reliable, trustworthy and confidence inspiring witness who based on the particular facts and circumstances of the case correctly identified the appellant within a relative short period of time after the incident and hence there was no need for an identification parade.

(iii) **Eye witness PW 6 Muhammed Saeed.** He was working in the Garments factory at the time of the incident. He is an independent and natural witness. According to his evidence a person who he later came to know was the deceased was followed in the factory by another person who made two fire shots on the deceased. One hit him in the abdomen while the other missed. He along with another took the injured person to Korangi hospital who was then referred to JPMC hospital. He recorded his S.161 Cr.PC eye witness statement on the same day. He was 6 feet way from the accused when the incident took place and once again it was broad daylight and he would have plenty of time to see and identify the accused and was a completely independent witness who had no reason to falsely implicate the accused. He was not dented despite lengthy cross examination. He was not a chance witness as he worked at the factory and as such we have no reason to disbelieve his evidence and we believe the same as we find his evidence to be reliable, truthful and confidence inspiring however we give his identification evidence lesser weight as he only identified the accused in court although it does strengthen the identification evidence of **Eye witness**

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PW 1 Rashid Ali and eye witness PW 7 Muhammed Faizan Ali.

Thus, based on our believing the evidence of the PW eye witnesses and their correct identification of the appellant what other supportive/corroborative material is their against the appellant?

(c) That the medical evidence and reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased was brought to the hospital suffering from one gunshot wound to the abdomen and he died on account of the gunshot wound as evidenced by his post mortem and death certificate. That there was also blackening surrounding the wound which supports the prosecution case that the deceased put up resistance to the robbery and was thus shot at close range during the struggle.

(d) Although the appellant was not arrested on the spot he was arrested a few hours later in a separate robbery case and at the time of his arrest a pistol was recovered from him by the police.

(e) That the empties recovered at the wardat which were sent for FSL matched with the recovered pistol from the appellant and lead to a positive FSL report.

(f) Significantly, on his arrest in the other case of robbery a few hours later the CNIC of the deceased was recovered from the possession of the appellant. This is also mentioned in the FIR.

(g) That according to the appellants own defense witness who was his bother the bike recovered from the appellant at the time of his arrest belonged to the defence witness who in evidence admitted that the appellant (his brother) often took his bike without his permission. The documents of the bike were also recovered from the appellant on his arrest along with the bike which recovery also links him directly to the offense as he came on his brothers motor bike to rob the deceased which escalated to him shooting and murdering the deceased when the deceased put up resistance to the robbery.

(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 robbery and shooting of the deceased by the appellant to the deceased being taken to hospital to recovery of the empties and blood at the scene to the death of the deceased on account of the gunshot wound to the medical evidence and medical reports to the arrest of the appellant from whom a pistol was recovered along with the CNIC belonging to the robbed deceased which lead to a positive FSL report in respect of the recovered empty to the correct identification of the appellant by the eye witnesses 8 hours after the robbery and shooting.

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(i) That the police PW's had no proven enmity or ill will towards the appellant and 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) That it does not appeal to reason, logic or commonsense that a brother who was an eye witness to the murder of his own blood brother would let the real murderer of his blood brother go scot free by substituting him with an innocent person (the appellant). In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

(k) In a kidnapping for ransom case in order to deter such crimes, as is the need to deter robberies which escalate into murders (like in this case), the supreme Court held that **courts need to take a dynamic approach in assessing the evidence**. In the case of **Advocate General Sindh, Karachi v. Farman Hussain and others** (PLD 1995 SC 1), in a kidnapping for ransom case it was observed as under:-

"It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice".
(bold added).

(l) 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 one of false implication at the behest of the police who wanted to implicate the appellant in a narcotics case but instead implicated him in this case. The appellant did not give evidence under oath whose only DW is his brother who in effect states that the appellant was a drug addict and had been falsely implicated in this case by the police without giving any cogent reason for such false implication and as such we find his evidence not to be particularly relevant. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought in the face of a 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 especially in the face of reliable, trust worthy and confidence inspiring eye witnesses evidence and

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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 offence for which he has been convicted and hereby maintain his conviction.

14. With regard to sentencing the motive for the murder has been proved which was the robbery of the deceased of his mobile phone and when the deceased resisted the appellant had no hesitation in shooting him in cold blood which gunshot wound lead to his death virtually on the spot. As we have noted before street crimes such as robbery and murdering those who resist are on the rise in Karachi and such crimes need to be dealt with by an iron hand and as such we are of the view that a deterrent sentence is an appropriate one. In this respect reliance is placed on the case of **Dadullah and another v. The State** (2015 SCMR 856) which held as under;

"10. This Court in *Noor Muhammad v. State* (1999 SCMR 2722) has also adverted to this aspect of the matter and has observed as under:-

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences".

15. As such the appeal is dismissed, the conviction and sentence is maintained and the confirmation reference is answered in the affirmative.

16. The appeal and confirmation reference stand disposed of in the above terms.

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