Evidence not Subject to Cross Can Sometimes 13
be Considered

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Mohammad Karim Khan Agha

Criminal Appeal No.71 of 2019

Appellant	:	Abdul Raheem @ Dada S/o. Ghulam Hussain Janwari through M/s. Jahangir Rahuju and Ubed Ullah Malik, Advocates
Complainant	:	Muhammad Ibrahim S/o. Muhammad Ibrahim through Mr. Muhammad Yousuf Kalhoro, Advocate
Respondent.	:	The State, through Mr. Abrar Ali Khichi, Addl. Prosecutor General Sindh.
Date of Hearing	:	18th January, 2024
Date of Judgment	:	24th January, 2024

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Being aggrieved and dissatisfied with the judgment dated 05.12.2018 passed by learned Additional Sessions Judge, Sujawal in Sessions Case No.42 of 2013 arising out of the FIR No.04/2013 for the offence under Sections 302, 324, 337-H(ii), 337-A(i), 337-F(i), 114, 504, 34 PPC registered at PS Bannu; whereby the appellant was convicted under Section 265-H(ii) Cr.P.C. for the commission of offence under section 302(b) PPC and sentenced to imprisonment for life as Tazir and to pay amount of Rs.100,000/- as compensation required under Section 544-A Cr.P.C. which shall be paid to the legal heirs of deceased Muhammad Anwer the appellant has filed this appeal against his conviction. In case of default of the payment he shall suffer SI for six months more. The benefit of Section 382-B Cr.P.C. was also extended to him.

2. The brief facts of the prosecution case as per FIR are that on 29.01.2013 complainant Muhammad Ibrahim lodged FIR at police station Bannu stating therein that his brother Muhammad Anwer used to reside in village Waledion Kandara since 10/12 years and cultivates his land. The complainant party had dispute with accused Allah Bachayo and others over path/passage. On 29.01.2013 the complainant, his brother Muhammad Juman alias Dada and his cousin Yar Muhammad came at Bannu Town for some work. After finishing

work they along with Muhammad Anwer were going by foot towards his house through Bannu-Abral road. At about 07:30 p.m. when they reached at Government Hospital, they noticed that four accused armed with weapons were available there. They identified them as Allah Bachayo with hatchet, Abdul Raheem alias Dada armed with repeater, Muhammad Hassan alias Golo armed with pistol and Muhammad Khan armed with pistol. The accused Allah Bachayo while abusing, asked the complainant party that they have restrained them from passing the passage/road and today they will not be spared. The complainant party asked them to be gentle and not to abuse. In the meanwhile, accused Allah Bachayo instigated co-accused to kill the complainant party. On the instigation of accused Allah Bachayo, the accused Abdul Raheem alias Dada made straight fire through his repeater on deceased Muhammad Anwer, which hit him on his chest and he fell down on the ground. The remaining accused also made straight fires upon the complainant party, but they managed to save themselves by falling on ground and the accused persons also caused butt and blunt side hatchet blows to the complainant and PW Yar Muhammad. They raised cries and the accused ran away while conducting aerial firing. The complainant party arranged a vehicle, took the injured/deceased Muhammad Anwer at PS Bannu, obtained letter for treatment, but on the way injured Muhammad Anwer succumbed to his injuries and expired. They returned back at PS Bannu where police completed formalities and after postmortem the dead body was handed to the complainant party. The complainant after funeral ceremony appeared at PS and hence, the instant FIR.

3. After completing the usual investigation, charge against the appellant and his co-accused was framed to which they plead not guilty and claimed trial.

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 they all denied all the allegations levelled against them and claimed to be innocent and falsely implicated in this case. None of the accused gave evidence on oath or called any DW in support of their defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted and sentenced the appellant as set out earlier in this judgment however the co-accused were all acquitted 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 05.12.2018 passed by the learned 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 applicant is completely innocent and has been falsely implicated in this case on account of enmity hence the delay of one day in lodging the FIR which gave the complainant side time to cook up a false case against the appellant; that the complainants evidence needs to be excluded as the complainant was not subject to cross examination; that the other eye witnesses are related to the complainant and the deceased whose evidence is completely unreliable; that it was a night time incident and no source of light was recovered; that the repeater was foisted on the appellant; that the co-accused were acquitted on the same set of evidence and the appellant is entitled to the same treatment and as such for any or all of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Haleem and others v. The State** (2017 SCMR 709), **Mst. Mir Zalai v. Ghazi Khan and others** (2020 SCMR 319), **Muhammad Ilyas and another v. Ameer Ali and another** (2020 SCMR 305), **Ali Gul v. The State** (2020 MLD 952), **Muhammad Imran v. The State** (2020 SCMR 857), **Samar Abbas v. The State** (2022 P Cr.LJ 385), **Mst. Yasmeen v. Javed and another** (2020 SCMR 505), **Muhammad Asif and others v. The State and others** (2021 MLD 1360), **Muhammad Ibrahim and another v. The State** (2019 P Cr.LJ 1378) and **Mst. Arbab Khatoon v. Imam Bakhsh and 3 others** (2021 MLD 1286).

8. On the other hand, learned Addl. P.G. Sindh as well as learned counsel for the complainant supported the impugned judgment and contended that the prosecution had proved its case beyond a reasonable doubt based on the eye witness evidence which was reliable; the promptly lodged FIR; the recovery of the murder weapon from the appellant on his own pointation and corroborative medical evidence and as such the appeal be dismissed. In support of their contentions they placed reliance on the cases of **Arbab Tasleem v. The State** (PLD 2010 Supreme Court 642), **Muhammad Asif and another v. Mehboob Alam and others** (2020 SCMR 837), **Abdul Khalique v. The State** (2020 SCMR 178), **Nasir Ahmed v. The State** (2023 SCMR 478), **Qasim Shahzad and another v. The State and others** (2023 SCMR 117) and **Roohul Amin and another v. The State and others** (2014 SCMR 348).

9. I have heard the learned counsel for the appellant as well as learned Addl. P.G. Sindh and the complainant and perused the material available on record.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence, recovery of blood and empties at the crime scene which lead to both positive chemical and FSL reports I find that the prosecution has proved beyond a reasonable doubt that Muhammed Anwar (the deceased) was murdered by firearm on 29.01.2013 at about 7.30pm at the link road leading from Banno to Abral pacca road near Government Hospital Rahothin taluka Bathoro Thatta.

11. The only question left before me therefore is who murdered the deceased at the said time, date and location?

12. After my reassessment of the evidence on record, I 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 within a day of the incident and based on the particular facts and circumstances of the case I do not find such delay to be fatal to the prosecution case. This is because after the witnessing the injury/murder of the deceased the deceased was transported to PS for medical certificate, after leaving the PS the deceased died en route to the hospital and once again the complainant returned to the PS where legal formalities were carried out on the deceased and then the body was transported to hospital for post mortem, as corroborated by PW 9 Muhmmed Ayoub and PW 3 Ali Muhammed along with Roznamcha entries, after post mortem the body was returned to the relatives for burial who after the burial immediately lodged the FIR as such any delay in lodging the FIR has been fully explained. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872).

(b) The appellant is named in the promptly lodged FIR with the specific role of murdering the deceased by repeater/shotgun fire. Thus there was no time for the complainant to cook up a false case against the appellant. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant or any PW which would motivate her/them to lodge a false case against the appellant.

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

(i) **Eye witness PW 1.Mohammed Ibrahim.** He is the

complainant and brother of the deceased. He is an eye witness to the murder of the deceased who stated that he saw the appellant make straight fire on the deceased with a repeater which lead to his death. At the time of the incident he was also accompanied by PW's Yar Muhammed and Muhammed Juman one of whom was also injured on the spot by other co-accused.His evidence is in line with his promptly lodged FIR.

The main issue with the evidence of this witness is that it was not subject to cross examination by any defence counsel in this capital case. The witness gave his evidence in chief on 14.10.2015 where after the learned defence case, as is usual, sought an adjournment to prepare and then carry out his cross examination on the next date of hearing which request was allowed. The witness then died on 05.05.2016 without being cross examined. Learned APG has relied on the case of **Arbab Tasleen** (Supra) for the proposition that the evidence in chief which was not subject to cross examination was admissible and could be relied upon by the trial court. I have considered the above case in juxta position with the facts and circumstances of this case. **Arbab's Tasleem's case** (Supra) seems to stand for the proposition that an uncross examined witness' evidence can be relied upon if it was found that the defence counsel was deliberately avoiding to cross examine the witness. In this case I have reviewed the diary sheets from the date of the evidence in chief of this witness until his death. The diary sheets reveal that no adjournment was sought on the part of the defence counsel to cross exam this witness. Either the witness was not present, his counsel was not present or the complainant filed for an adjournment .On 18.11.15 BW's for the complaint were even issued. The PO was on leave or the appellant was not produced from jail. In explicably on 30.06.16 the PO recorded the evidence in chief of PW 2 Juman without proceeding with the cross examination of the complainant. Taking into consideration the dairy sheets I find that it cannot be said that the appellant was deliberately avoiding to proceed with the cross examination of this witness rather the fault lay with this witness for not regularly presenting himself for cross examination. Even otherwise the case of **Arbab Tasleem** (Supra) was decided before Article 10 (A) was inserted in the Constitution following the 18th Amendment which guarantees the right to a fair trial. Thus I find the case of **Arbab Tasleem** distinguishable on the particular facts and circumstances of this case and place no reliance on the evidence of this witness the reliability of which was not tested through cross examination by defence counsel. It is also noted that in this case this witness is not the sole eye witness.

(ii) **Eye witness PW 2 Muhammed Juman.** He is the brother of both the complainant and the deceased. According to his evidence on 29.01.2013 he, the complainant and Yar Muhammed went to Bannu town where they met the deceased. They then were all returning home by foot. At about 7.30pm near Rahuth Government Hospital they saw

on torch light the appellant and the co-accused who they knew from before. The appellant had a shot gun and the co-accused had other types of weapons. The co-accused abused them and stopped them from passing as there was apparently a dispute over the pathway they were on which lead to an exchange of words between them. One of the co-accused instigated the other co-accused and the appellant to kill them. He saw the appellant make straight fire with his repeater at the deceased which hit him on his chest and the deceased fell down. They took cover and were not hit by gun fire. He saw the co-accused cause hatchet and butt blows to the head of the complainant and PW Yar Muhammed. The accused all escaped while making aerial firing. He called PW 3 Muhammed Ali and the deceased was shifted to PS for medical letters as corroborated by PW 3 Muhammed Ali.

This eye witness knew the appellant before the incident, and saw the appellant from a few feet a way murdering the deceased by repeater and the other co-accused injuring the complainant and Yar Muhammed by hatchet and but blows. He saw the appellant and co-accused by torch light. Admittedly the torch was not recovered but I do not find this to be fatal to the prosecution case in this day and age because as a matter of common sense and ground realties in rural areas where people are travelling to their villages at night where there is often no light they naturally carry a source of light with them. Earlier it was usually by torch but today it is more commonly by mobile phone. It just does not appeal to logic, reason or common sense that people would roam around in the dark without a source of light. The fact that the IO failed to take the torch into custody is hardly the fault of the witness who being illiterate do not even know that they ought to hand over the torch to the police. In deciding cases and appreciating the evidence we must consider the environment where the incident occurs and the ground realties provided that a miscarriage of justice is not caused. As such there is no case of mistaken identity and no need to hold an identification parade. The accused is also named with specific a role in the promptly lodged FIR of making direct fire on the deceased who fell down after being hit by such fire. In this respect reliance is placed on the cases of **Amanullah v State** (2023 SCMR 527), **Qasim Shazad V State** (2023 SCMR 117).

Admittedly the eye witness was related to the deceased who was his brother 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. In this respect reliance is placed on the cases of **Ijaz Ahmed V The State** (2009 SCMR 99) **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152), **Ashfaq Ahmed v. The State** (2007 SCMR 641) and **Abdul Wahid** (Supra),

This eye witness is not a chance witness as he was residing

in the village with the complainant and was related to the deceased who lived close by so they had every reason to travel back together once they met up in town which was close by. This witness gave his S.161 Cr.PC statement promptly which was not materially improved on at trial. He is named in the FIR as an eye witness. His evidence is corroborated by PW Yar Muhammed whose evidence we will turn to next. He gave his evidence in a straight forward manner which was not dented despite a lengthy cross examination and I find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in terms of the correct identification of the appellant.

It is well settled by now that I can convict the accused on the evidence of a sole eye witness provided that I find his evidence to be trust worthy reliable and confidence inspiring. 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 I find the evidence of this eye witnesses to be of good quality and believe the same.

However there is yet another eye witness.

(iii) **Eye witness PW 4 Yar Muhammed.**His evidence corroborates the evidence of **PW 2 Muhammed Juman in all material respects.** He was also injured by a hatchet and butt blows as supported by the medical evidence of the MLO PW 5 Abdul Raheem who examined him on 31.01.2013 and proven by a medical certificate. Admittedly the injury was found to be about 48 hours old which ties in with his medical examination on 31.01.13 which was about 2 days after the incident however the fact that he received the injuries on 29.01.2013 is confirmed by police roznamcha entries as he appeared before the PS immediately after the incident. It is settled by now that the evidence of an injured eye witness is of greater evidentiary value than an ordinary eye witness. In this regard reliance is placed on the case of **Aquil V State** (2023 SCMR 831).He gave his S.161 Cr.PC statement with promptitude which was not materially improved on in his evidence. He is named in the FIR as an eye witness. He gave his evidence in a straight forward manner which was not dented despite a lengthy cross examination. The same considerations apply to his evidence as to the evidence of PW 2 Muhammed Juman and as such I believe the evidence of this eye witness especially in terms of the identification of the appellant and reply upon the same.

Having believed the eye-witnesses evidence I turn to consider the corroborative/supportive evidence whilst keeping in view

that it was it was held in the case of **Muhammad Waris v. The State** (2008 SCMR 784)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"*

Thus, based on my believing the evidence of the eye witnesses as mentioned above what other supportive/corroborative material is their against the appellant?

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

(e) That the medical evidence and post mortem report fully support the eye-witness/ prosecution evidence that the deceased died from receiving a firearm injury on the part of his body as mentioned by the eyewitnesses and the injured eye witness Yar Muhammed was injured by hatchet/butt blows and not firearm. Furthermore pellets were recovered from the body of the deceased which indicates that he was killed by a repeater/shotgun which the eye witness's state was fired at the deceased by the appellant who was the only one of the accused who was carrying such a weapon. The others had a pistol, hatchet etc.

(f) That after his arrest only a day after the incident the accused confessed to the police and lead the police to the murder weapon (repeater/shotgun) on his own pointation which was hidden in a place which only he could have known about.

(g) That the empty cartridge recovered at the crime scene when matched with the recovered repeater/shot gun lead to a positive FSL report. Any delay in sending the empty and repeater/shot gun to FSL would not undermine the prosecution case. In this regard reliance is placed on the case of **Muhammad Ashraf versus The State** [2011 SCMR 1046]

(h) That there was no ill will or enmity between the police and the appellant and as such they had no reason to falsely implicate the appellant in this case, for instance, by foisting the shot gun/repeater on him. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474).Thus, I believe the evidence of the IO and other police witnesses who were not dented during a lengthy cross examination whose evidence of arrest and recovery is supported by the mashir's evidence.

(i) 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.

(j) The motive for the murder has come on record. Namely, that the deceased had been warned not to use the path which he sought to use and when he entered into an argument with the appellant and the co-accused over this issue following abusive language the appellant shot the deceased.

(k) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I 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 the cases of **Zakir Khan V State** (1995 SCMR 1793) **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669) and **Maskeen Ullah and another versus The State and another** [2023 SCMR 1568].The evidence of the PW's provides a believable corroborated unbroken chain of events from the eye witness coming home with the deceased to the appellant and co-accused abusing them to the appellant making straight fire on the deceased which lead to his death to the appellant after his arrest leading the police to the murder weapon (repeater/shotgun) at a hidden place on his own pointation to the empties recovered at the crime scene matching the recovered repeater /shot gun through a positive FSL report.

(l) That the fact that the co-accused were acquitted of the charge is of no assistance to the appellant this is because there case is on a different footing. The case against the appellant is that he made straight fire on the deceased with his repeater/shot gun which caused the death of the deceased. The case against the other co-accused is only that they caused hatchet/ butt injuries to other PW's and did not cause any injury to the deceased. The court believed the evidence against the acquitted co-accused but took a lenient view on account of the relatively minor injuries on the eye witness and that there case fell within a case of in effective firing as discussed in the impugned judgment **whilst the case of the appellant based on the evidence was one of clear cut murder of the deceased by him and him alone.**

(m) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but I have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The defence case as set out by the appellant is that he was falsely implicated in this case due enmity. However the accused did not give evidence under oath and did not call any DW to support this defence case. Even in his S.342 Cr.PC statement he offers simple denials. Thus, in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other supportive/corroborative evidence discussed above I disbelieve the defence case which has not at all dented the prosecution case.

13. Thus, based on the above discussion, I find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and sentenced in the impugned judgment and as such his appeal is **dismissed**.