

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.314 of 2020

Present:

Mr. Justice Mohammad Karim Khan Agha

Appellant:

Ali Nawaz S/o Ghulam Rasool
Through Mr. Mamoon A.K. Shirwany, Advocate.

Complainant:

Muhammad Ali S/o Fakir Muhammad present in person.

Respondent/State

Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh

Date of hearing:

07.02.2024

Date of announcement:

15.02.2024

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Ali Nawaz son of Ghulam Rasool has preferred this appeal against the impugned judgment dated 11.07.2019 passed by the learned IV-Additional Sessions Judge, Karachi East in Sessions Case No.2055/2017 under F.I.R. No.293/2017 U/s. 302/34 PPC registered at P.S. Awami Colony, Karachi; whereby the appellant was convicted and sentenced under Section 302(b) PPC to undergo R.I. for life imprisonment and to pay fine of Rs.50,000/- and in case of default in payment of fine, he shall suffer S.I. for six months. The benefit of Section 382-B was also extended to the appellant.

2. The brief facts of the prosecution case as per FIR lodged by complainant Muhammad Ali through his statement recorded U/s 154 Cr.P.C. are that he resides at the above address mentioned in the FIR along with his family and is doing private job. It is further alleged that on 27.08.2017 he went to meet his younger brother M. Qasim Abbasi aged about 40 years at his office situated near civic center building No.1 ground floor, shop No.181, Korangi No.5 who was running the office in the name of Al-Qasim International. At about 4.30 p.m.

5

when he reached near the office he heard the voice of firing and saw that three persons out of them one was armed with pistol, one seemed to be *Khawaja Sara* along with one companion came out from the office in running condition to which he can identify if produced before him. It is further alleged that when he entered in the office of his brother he saw his bhabhi Ruba @ Rubi was present there while dead body of his brother Muhammad Qasim was lying on floor and there was bullet mark on the upper side of nose and blood was oozing from there. After some time police reached there and he with the help of police brought the dead body at JPMC for conducting postmortem. It is further alleged that after conducting postmortem he received the dead body of his brother for funeral and after funeral he came at PS for recording his statement. It is further alleged that his bhabhi Ruba @ Rube informed him that prior to engagement with Muhammad Qasim she remained in the engagement of Ali Nawaz S/o Ghulam Rasool for about 02 years. During the said engagement accused Ali Nawaz was remanded to jail for the commission of dacoity and she contracted marriage with Muhammad Qasim. After being releasing from jail Ali Nawaz was extending threats to her and her husband for dire consequences and asked her to take Talaq from Muhammad Qasim and asked her husband to give Talaq to her. It is further alleged that they complained this matter to the father of Ali Nawaz and on 27.08.2017 when she was available in the office of her husband along with him then Ali Nawaz along with his companions forcibly entered in the office and knocked her down by giving kick blow and Ali Nawaz caught hold of her husband with neck and committed his murder by way of firing. Thereafter, on the basis of such statement, the instant FIR was registered.

3. After completion of usual investigation charge was framed against the accused, to which he pleaded not guilty and claimed for trial.

4. In order to prove its case the prosecution examined 07 witnesses who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The statement of the appellant/accused was recorded under Section 342 Cr.P.C. wherein he denied the allegations of the prosecution leveled against him and claimed his false implication in this case. However, the appellant neither examined himself on oath nor produced any witness in his defence.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court vide judgment dated 11.07.2019,

convicted and sentenced the appellant as stated above, hence this appeal has been filed.

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 appellant is innocent and has been falsely implicated in this case on account of enmity hence the unexplained delay of two days in lodging the FIR which gave the chance for the complainant party to cook up a false case against the appellant; that the complainant was not present at the time of the incident; that the evidence of the sole eye witness could not be safely relied upon as she had enmity with the appellant and her evidence should be discarded; that the pistol recovered on the pointation of the appellant had been foisted on the appellant by the police and that 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 PLD 2008 Supreme Court 1 (*Mushtaq and 3 others vs. The State*), 2019 SCMR 1156 (*Asad Rehmat vs. The State and others*), 1992 MLD 1448 (*Mumtaz and another vs. The State*), 1989 PCRLJ 1093 (*Shadoo alias Shahzado vs. The State*) and 1995 SCMR 1345 (*Tariq Pervez vs. The State*).

8. Learned Additional Prosecutor General Sindh who was also representing the complainant who was present in person during the hearing after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, he contended that if there was any delay in lodging the FIR this had been fully explained; that the sole eye witnesses evidence was trust worthy, reliable and confidence inspiring and could be safely relied upon; that the medical evidence supported the ocular evidence and that the murder weapon (pistol) had been recovered on the pointation of the appellant which produced a positive FSL report and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of their contentions, he placed reliance on the cases of 2023 SCMR 117 (*Qasim Shahzad and another vs. The State and others*), 2023 SCMR 1568 (*Maskeen Ullah and another vs. The State and another*), 2017 SCMR 283 (*The State/ANF vs. Muhammad Arshad*), 2017 SCMR 713 (*Muhammad Ismail vs. The State*), 2011 SCMR 872 (*Muhammad Nadeem alias Deemi vs. The State*), 2006 SCMR

1857 (*Muhammad Ehsan vs. The State*) and PLD 2010 Supreme Court 669 (*Khadii Hussain vs. The State*).

9. I have heard the learned counsel for the appellant as well as learned APC and have also perused the material available on record and the case law cited at the bar.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence, recovery of blood and empty at the crime scene I find that the prosecution has proved beyond a reasonable doubt that M.Qasim (the deceased) was murdered by firearm on 27.08.2017 at about 4.30pm inside shop 181 Al-Qasim International Office Civil Centre building No.1 ground floor Korangi.

11. The only question left before me therefore is who murdered the deceased by firearm 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 after a delay of two days. Such delay in such like cases can be fatal to the prosecution case **unless** the delay is explained. In this case the complainant arranged for the deceased to be taken to hospital where a post mortem was performed after which funeral arrangements were made and the body was buried and there after the complainant came and lodged the FIR. Thus based on the particular facts and circumstances of this case I find that the delay in lodging the FIR has been adequately explained and as such is not fatal to the prosecution case. 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 FIR with the specific role of murdering the deceased by firearm. 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 appellaht and the complainant or any PW which would motivate him/them to lodge a false case against the appellant.
- (c) The prosecution's case rests on the sole eye witness to the murder whose evidence I shall consider in detail below;
 - (i) Eye witness PW 4 Rubi. The deceased is her husband. According to her evidence the incident took place on 28.08.2017. Earlier she was married to Shakil but he pronounced Talaq to her. Thereafter she got engaged to the appellant but came to know that he was a criminal and had been to jail several times hence she discontinued her

engagement with the appellant. She then married the deceased but when the accused was released from jail the appellant started threatening her husband/deceased. She complained about the appellant's behavior to his father. On the day of the incident she was present with her husband/deceased in his office at the civic centre in Korangi when the appellant and two other persons entered the office and hit her foot which led to her falling down. She saw the appellant fire from his pistol which hit her husband in between eye and nose and blood started oozing. Thereafter the accused persons escaped. Her brother in law Muhammed Ali (the complainant) reached the office. Her husband/deceased died on the spot and she became unconscious.

Admittedly the eye witness was related to the deceased who was her husband 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 knew the appellant before the incident as she was engaged to him earlier and saw the appellant from a few feet away firing his pistol at her husband/deceased which hit his face which led to his death and as such there is no case of mistaken identity and no need to hold an identification parade especially as at 4.30pm inside the office light was not an issue. The accused is also named with specific role in the FIR. In this respect reliance is placed on the cases of *Amanullah v State* (2023 SCMR 527) and *Qasim Shazad V State* (2023 SCMR 117). This eye witness is not a chance witness as she was with her husband/deceased working with him at his office which she usually did as per her evidence. No other employee was present as it was a Sunday which was a holiday. She is named in the FIR as an eye witness. She gave her S.161 Cr.PC statement with promptitude which was not materially improved upon during her evidence. I have discounted her S.164 Cr.PC statement as the appellant despite being arrested was not produced before the magistrate during the recording of her S.164 statement. In this respect reliance is placed on the cases of *Mumtaz* (Supra) and *Shadoo* (Supra). She had no enmity or ill will with the appellant in fact the position was the other way around. Namely, that the appellant had enmity with her husband as the witness had broken off the engagement with the appellant because he was a criminal and in jail as evidenced by his CRO which is on record and instead married her husband/deceased who the appellant was jealous of as per the FIR. She gave her evidence in a natural manner and was not dented during cross examination. I find her evidence to be reliable, trust worthy

and confidence inspiring and believe the same and place reliance on it.

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/her evidence to be trust worthy reliable and confidence inspiring and in this case I have found the evidence of this eye witness to be trust worthy reliable and confidence inspiring, especially in respect of the correct identification of the appellant and as such I believe the same and place reliance on it. In this respect reliance is placed on the case of *Muhammad Ehsan v. The State* (2006 SCMR 1857), *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).

(ii) Eye witness Muhammed Ali: He is the complainant in this case and the deceased is his younger brother. According to his evidence on his way home he went to meet his brother/deceased in his office but at about 4.30pm when he was close to his brother/deceased office he heard one fire shot and saw three persons running out of the office one of whom was armed with a pistol. He then went to the office of his brother where he saw his brother in a pool of blood on the floor and eye witness PW 4 Rubi was standing over him. He saw that one bullet had hit his brother between nose and ear and had died on the spot. He then went out outside the office and called an ambulance. PW 4 eye witness Rubi told him that the appellant had shot her husband/deceased in the office which hearsay evidence was incorporated in the FIR.

Admittedly he is not an eye witness to the murder. Instead he came just after the incident and saw 3 persons escaping one of whom had a pistol. He lodged the FIR with relative promptitude based on the particular facts and circumstances of the case with any delay already being explained above. He did not make any material improvements in his FIR during the course of his evidence. He was not a chance witness as his route to his house went past his brother's office where according to his evidence he usually visited. In any event he would have been alerted by hearing the firearm shot from his brother's office. He did not pretend to be an eye witness to the murder of his brother which he could easily have done in order to strengthen the prosecution case against the appellant as such I find him to be an honest witness. He had no enmity with the appellant and had no reason to implicate him in a false case. He confirms the presence of PW 4 eye witness Rubi at the scene of the murder and that three persons were involved one of whom was armed with a pistol. Although he is related to the deceased since he has no enmity with the accused I can rely on his evidence if I find it to be trust worthy, reliable and confidence inspiring which I do and as such I believe his evidence.

Having believed the eye-witnesses evidence I turn to consider the corroborative/supportive evidence whilst keeping in view that 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 2 PW 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 wife would let the real murderer of her husband 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.
- (f) 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 pistol 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 cross examination whose evidence of arrest and recovery is supported by the mashir's evidence.
- (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) A pistol empty was recovered at the wardat.
- (i) The motive for the murder has come on record in both the FIR and the evidence of eye witness PW 4 Rubi. Namely, that Rubi who was earlier engaged to the appellant had broken off their engagement whilst he was in jail as he was a criminal, as supported by CRO of the appellant, and as such he was jealous of Rubi's husband/deceased who he had earlier threatened as he had married PW 4 Rubi instead of him which had both angered and humiliated him.
- (j) 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 (Supra). The evidence of the PW's provides a believable corroborated unbroken chain of events from the accused coming to the Office of the deceased to take his revenge from the deceased who had married the lady who he was engaged to to the appellant shooting the deceased with a pistol to the recovery of the empty at the crime scene to the death of the deceased to the appellant's arrest on the basis of eye witness evidence and the appellant recovering the pistol on his pointation which lead to a positive FSL report when matched with the empty recovered at the crime scene.

- (k) 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 cast 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 to enmity however no enmity between the deceased and the appellant has come of record. The eye witness PW 4 Rubi was happily married to her husband/deceased and therefore had moved on from her broken engagement with the appellant as he was a criminal as evidenced by his CRO. In fact, as mentioned above the appellant was the one who had enmity with the deceased and had the motive to murder PW 4 Rubi's husband out of jealousy, revenge and humiliation. Thus, he has not proven any enmity with any PW. Furthermore, the accused did not give evidence on oath and did not call a single witness in support of his defence case. 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.
- (l) It should be noted that in reaching my finding I have excluded the evidence of the recovery of the pistol on the pointation of the appellant and the positive FSL report as these aspects of the case were not put to him in his S.342 Cr.PC statement for him to explain and it is well settled by now that if any piece of evidence is not put to an appellant during recording of his S.342 Cr.PC statement it cannot be used to convict him.

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 offence for which he has been convicted and sentenced in the impugned judgment and as such his appeal is dismissed.