

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.249 OF 2021

Appellant:	Mian Suleman Shah s/o Mian Hussain Shah through Mr. Rehman Ghani, Advocate.
Respondent/State:	Through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh
Date of hearing:	07.03.2024
Date of announcement:	18.03.2024

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Mian Suleman Shah has preferred this appeal against the impugned judgment dated 08.04.2021 passed by the learned Additional Sessions Judge-III/MCTC Malir, Karachi in Sessions Case No.645/2012 under F.I.R. No.362/2012 u/s. 302/324/34 PPC registered at PS Quaidabad, Malir Karachi; whereby the appellant was convicted u/s.265-II(ii) Cr.P.C punishable under Section 302(b) PPC, and awarded life imprisonment for committing murder with direction to pay compensation to the legal heirs of deceased u/s. 544-A Cr.P.C. in the sum of Rs.5,00,000/- and in default thereof, he was ordered to suffer SI for 06 months more. However, the benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the case are that on 19.07.2012 at about 2245 hours Complainant Sher Wali Khan has lodged F.I.R, at Police Station Quaidabad, stating therein that his son Qismat Ali was running a Shoes Shop of BATA at Dawood Chowrangji while his other son Sadiq Ali Khan was also running a Medical Store at New Muzafarabad Colony, Rehri Road. On 18.07.2012, complainant went to see his sick relative at Rab Medical Centre Gulshan-e-Iqbal. At about 09:00 P.M, his son Sadiq Ali Khan informed him that his hot words have been exchanged with Haider Ali of same vicinity upon his repeatedly visiting to the Doctor, sitting at Zafar Medical Centre. At about 10.15 P.M. again accused Haider Ali along with his brother accused Sulman, both sons of Mian Khan @ Dollar came at Medical Store duly armed with pistols. In the meantime, after shutting down Shop, the younger brother Qismat Ali also reached there, accused Haider Ali instigated present accused Sulman do not spare them today

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on such accused Sulman started firing with his pistol with intention to kill him and one bullet hit at the neck of deceased Qismat Ali who fell down after receiving firearms injuries. Haider Ali also made firing, which hit to passerby Inamullah S/o Hareef-ullah and a boy Ali Haider S/o Muhammad Umer Khan who became injured. This incident was witnessed by Muhallah people and uncle Shar Ali Khan and Anar Gul, both uncles had brought the injured Qismat Ali to the Jinnah Hospital by Cheepa Ambulance for treatment who succumbed to the injuries and expired. On such information he reached at the mortuary of Jinnah Hospital where dead body was lying on the stretcher in blooded condition. Therefore, complainant received dead body of deceased for burial ceremony and after formalities lodged FIR against above named accused persons, hence this case.

3. After completion of usual investigation charge was framed against the appellant/accused to which he pleaded not guilty and claimed to be tried.

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 prosecution allegations and claimed trial. 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 08.04.2021 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 one day in lodging the FIR which gave the chance for the complainant party to cook up a false case against the appellant; that the evidence of the eye witnesses cannot be safely relied upon as it was dark and dishonest improvements have been made in their evidence; that the best

witnesses i.e the injured eye witnesses were withheld by the prosecution; that no pistol (murder weapon) was recovered from the appellant 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 *Iftikhar alias Bhola v The State* (2003 YLR 2486), *Rizwanullah v The State* (P.L.D 2005 Peshawar 204), *Abdul Razzaq v The State* (2011 YLR 1580), *Mir Alam v Amroz Khan* (P.L.D 2015 Peshawar 125), *Sarfraz Masih v The State* (2017 P Cr. L. J 280), *Pervez Iqbal v The State* (2023 P Cr.L J Note 16), *Farooq v The State* (2022 P Cr.L J Note 49), *Muhammad Rafique v The State* (2010 SCMR 385), *Ibrar Hussain v The State* (2020 SCMR 1850), *Usman alias Kaloo v The State* (2017 SCMR 622), *Shaman alias Shamoo v The State* (2013 P Cr. L J 1829) and *Kaiser v The State* (2017 P Cr. L J 327).

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 eye witnesses evidence was trust worthy, reliable and confidence inspiring and could be safely relied upon; that the medical evidence supported the ocular evidence; that the appellant had absconded and was declared a proclaimed offender in this case and did not surrender to the police but was arrested in another case after 8 years of the incident and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of *Zulfiqar v The State* (1991 SCMR 326), *Qasim Shahzad v The State* (2023 SCMR 117), *Muhammad Sadiq v The State* (2022 SCMR 690), *Nasir Iqbal v The State* (2016 SCMR 2152) and *Khadim Hussain v The State* (P.L.D 2010 SC 669).

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 empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Qismat Ali (the deceased) was murdered by firearm on 18.07.2012 at 2215 hours at Rehri Road

new Muzafarabad Colony opposite Sher Shah Wali Medical Store Landhi Quaidabad Karachi.

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 one day. Such delay 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 appellant 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 three eye witnesses to the murder whose evidence I shall consider in detail below;

(i) **Eye witness PW 7 Sadique. The deceased is his brother.** According to his evidence on 18.07.2012 he was sitting at his medical store opposite the clinic of Dr. Zafar Iqbal who he used to visit regarding prescriptions. On the fateful day absconding co-accused came to his store and asked him why he was visiting the Doctor so much and wasting his time. He threatened him and told him not to go to the Doctor again. Absconding accused along with his brother the appellant came to his shop at 10.15pm armed with a pistol. The deceased then reached the medical store whereupon the appellant started firing on him and the deceased. The deceased was hit in the neck and two passersby also received bullet injuries namely Inanullay and Ali Haider. His uncle Sher Ali, Anar Gul and others reached at the spot. They took the deceased to hospital but he died on the way.

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)** and **Ashfaq Ahmed v. The State (2007 SCMR 641)**.

This eye witness knew the appellant before the incident as he used to come to his store regularly. Although it was a night time incident and the electricity was not working his generator was running and as such he was easily able to see and identify the appellant who he saw from close range firing at him and the deceased which lead to the death of the deceased through firearm injury in his neck as such there is no case of mistaken identity and no need to hold an identification parade. He is named in promptly lodged FIR as an eye witness and indeed narrated the facts of the case to the complainant which formed the basis of the FIR. This eye witness is not a chance witness as he was running his own medical store where the incident took place. He gave his S.161 Cr.PC statement within a day of the incident which was not materially improved upon during his evidence. He had no proven enmity or ill will with the appellant which would lead him to give false evidence against the appellant. He gave his evidence in straightforward manner and was not damaged during cross examination. I find his evidence to be reliable, trust worthy and confidence inspiring especially in relation to the identification of the appellant 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 cases 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)** **Muhammad Ismail vs. The State (2017 SCMR 713)** and **Muhammed Sadiq (Supra)**

(ii) **PW 3 Anar Gul**. The deceased is his nephew. He gave evidence that he was out walking with **PW 3 Sher Ali** who was his younger brother when he heard the fire shots and then saw the absconding co-accused and the appellant both armed running away from the crime scene. He does not give evidence that he saw the appellant actually shooting the deceased.

He is named in the promptly lodged FIR as an eye witness and his S.161 Cr.PC statement was not materially improved

upon during the course of his evidence.

However I find him to be a chance witness and as it was dark, although the generator lights of the shop were on in which he could have seen the appellant running away from the crime scene and for these reasons I only give a little weight to his evidence in terms of identifying the appellant as running away from the crime scene who he knew from before and hence in this respect corroborating the evidence of eye witness PW 7 Sadique.

(iii) Eye witness PW 2 Sher Ali Khan. The deceased was his nephew. According to his evidence he was out walking with his brother PW 3 Anwar Gul when he saw the appellant shooting the deceased and then making his escape good. He then assisted taking the deceased to hospital.

Although he is named in the FIR as an eye witness. I find, like PW 3 Anwar Gul, him to be a chance witness. He saw the shooting of the deceased from 50 to 100 furlongs away however PW 3 Anwar Gul who was accompanying him did not see the shooting. He also made material improvements in his evidence from his S.161 Cr.PC statement and as such I give little, if any weight, to his evidence regarding the actual shooting of the deceased and only give it some weight as to seeing the appellant running away from the crime scene who he saw on the shop lights and who he knew from before and hence in this respect corroborating the evidence of eye witnesses PW 3 Anwar Gul and PW 7 Sadique.

Having believed the evidence of the sole eye witness to the murder and having given some, albeit little weight, to the corroborative evidence of the two eye witnesses evidence who saw the appellant running away from the crime scene with a pistol 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 sole eye witness as to the murder and 2 PW eye witnesses as mentioned above in terms of seeing the appellant fleeing the crime scene armed with a pistol what other supportive/corroborative material is there against the appellant?

- (d) That it does not appeal to logic, commonsense or reason that a real brother would let the real murderer of his real 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) The promptly recorded S.154 Cr.PC statement of the complainant which became the FIR was not materially improved on during the complainant's evidence and he was not damaged in cross examination. Admittedly, his evidence is only hearsay but it is also fully corroborative of the eye witness evidence
- (f) That the medical evidence, post mortem report and MLC 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 eye witnesses i.e his neck
- (g) 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. 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.
- (h) Three pistol empties were recovered at the wardat in respect of the deceased and the two other injured passers by.
- (i) The motive for the murder has come on record in both the FIR and the evidence of eye witness PW 7 **Sadique** who explained that following his argument with the absconding co-accused over his keep seeing the Doctor in the clinic opposite and being threatened the absconding co-accused came back with his brother who was the appellant who then on account of this dispute/quarrel shot the deceased and fired at him and others.
- (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) 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 accused coming to the medical store after with his brother (the absconding co-accused) quarrel/dispute with PW 7 **Sadique** and then trying to kill PW 7 **Sadique** but instead shooting the deceased in the neck which lead to his death to the recovery of the empties at the crime scene to the absconsion of the accused and his ultimate arrest in another case.
- (k) The fact that the appellant had absconded for 8 years and been declared a Proclaimed offender can be used as a piece of circumstantial evidence against him. In this respect reliance is placed on the case of **Zulfiqar** (Supra)
- (l) The fact that the injured eye witnesses were given up I do not find of huge significance based on the particular facts and circumstances of this case where the prosecution produced three other eye witnesses.

- (m) The fact that no pistol was recovered from the appellant I find of no huge significance as the appellant absconded for eight years and would have quite naturally got rid of the pistol during this period.
- (n) 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. 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.

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.