

Sole Eye witness retained

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PRESENTED ON.....

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IN THE HIGH COURT OF SINDH, CIRCUIT
COURT AT HYDERABAD.

Cr. Appeal No. - 8 - 153 of 2009.

AZAM ALIAS CHIKNA

S/o Muhammad Bashir @ Muhammad Shabbir,

B/c Ghori, Adult Muslim, (At Present confined,

At Central Prison Hyderabad).....APPELLANT.

V E R S U S

The State.....OPPONENT.

FIR No. 99/2001

U/S: 302,34 PPC.

PS Pinyari ..

ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Cr. Appeal No.S-153 of 2009

DATE	ORDER WITH SIGNATURE OF JUDGE(s)
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31-10-2023

M/s. Aijaz Shaikh and Kamran Baig advocates for the appellant.
Ms. Rameshan Oad, Assistant Prosecutor General, Sindh.
Appellant is present on bail.

I have heard learned counsel for the appellant and learned Assistant
Prosecutor General. Reserved for judgment.

Irfan

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Cr. Appeal No. S- 153 of 2009

Azam alias Chikna

Versus

The State

Appellant : Azam alias Chikna s/o Muhammad Bashir @ Muhammad Shabbir (present on bail)	Through M/S Aijaz Shaikh and Kamran Baig, Advocates.
Respondent : The State	Through Ms. Rameshan Oad, Assistant Prosecutor General, Sindh
Date of hearing	31.10.2023
Date of judgment	09.11.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 31.07.2009, passed by the learned 4th Additional Sessions Judge, Hyderabad, in Sessions Case No. 552 of 2001 (re: The State versus Azam @ Chikna and others), emanating from Crime No.99 of 2001, registered at Police Station Pinyari, under sections 302, 34 PPC, whereby the appellant Azam @ Chikna has been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life for committing the murder of deceased Muhammad Asif Qureshi. He was also directed to pay Rs.100,000/- as compensation to the legal heirs of deceased Muhammad Asif Qureshi as provided u/s 544-A Cr.P.C; and in case of non-payment of said compensation, the appellant shall further undergo SI for 06 months more. The benefit of Section 382-B Cr.P.C was also extended to the appellant. Whereas co-accused Muhammad Saleem Arain was acquitted of the charge by

extending him benefit of doubt however, the case of absconding accused Pervaiz Arain was kept on dormant file.

2. The brief facts of the prosecution case are as under:-

"On 17.10.2001 at 2130 hours complainant Umer Daraz appeared at Police Station Pinyari and lodged FIR alleging therein that on 16.10.2001 his son namely Asif went out of the house at 09-30 p.m, on a call by his friend Dr. Afzal Arain, informing the complainant that he alongwith his friend was going to Hotel situated at Hussaini Chowk to have a cup of tea, on the motorcycle of his friend. After half an hour complainant's another son Muhammad Umer also went towards Hotel side to fetch meals. After having tea, Asif and his friend Muhammad Afzal Arain came out of the hotel and found the motorcycle punctured. Muhammad Afzal went to Bilal Autos for getting puncture mended and Asif stopped at a distance of ten feet from his friend Afzal Arain, saw that Azam Ghori @ Chikna having pistol was making straight fires at Asif, which hit Asif at his belly and he fell down on the ground. Two unknown persons having pistols were also accompanying accused Azam Ghori and they were also making fires. Due to firing so many people gathered at the scene of offence and the accused persons in the meantime made their escape good while making fires in the air. Muhammad Umer, who was returning home after purchasing meals, also saw the culprits making firing upon his brother Asif. After that injured Asif was removed to LMCH Hospital, Hyderabad for first aid but he succumbed to injuries at 11-00 p.m in the Hospital. After burial on the next day, complainant on the basis of narration of his son Muhammad Umer and Afzal Arain went to P.S and lodged the report. As per FIR two days prior to the incident deceased Asif and Azam Ghori and his two unknown companions had exchanged hot words with each other and on the day of incident the occurrence took place."

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed charge against the accused/appellants, to which they pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined 9 witnesses and exhibited numerous documents and other items. The statements of accused were recorded under section 342 Cr.P.C whereby they denied the allegations leveled against them and claimed their false implication by the complainant. However, neither they examined themselves on oath nor led any evidence in their defence.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the present appellant Azam @ Chikna as stated in the

preceding paragraph of this judgment and acquitted co-accused Muhammad Saleem Arain.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. It is noted that complainant in this case has expired however, his son Muhammad Umar had appeared and reposed his full faith and confidence on learned A.P.G vide order dated 23.01.2023.

8. Learned advocate for the appellant has contended that the appellant is innocent and has been falsely implicated in this case hence the delay in lodging the FIR; that the evidence against the appellant is based on only one eye witness whose evidence cannot be believed as he is related to the deceased; that the co-accused was acquitted on the same set of evidence; that no recovery was made from the accused and as such for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed his reliance on the cases of **Allah Bachaya and another versus The State** [PLD 2008 Supreme court 349], **Mst. Sughra Beghum and another versus Qaiser Pervez and others** [2015 SCMR 1142] and, **Muhammad Rafiq versus The State** [2009 YLR 1279].

9. Learned Assistant Prosecutor General Sindh on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has supported the impugned judgment. In particular she has contended that the sole eye witness' evidence can be safely relied upon which is corroborated by the medical evidence and as such the appeal be dismissed. In support of her contentions, she placed reliance on the cases of **Farman Ali and another versus The State and another** [2020 SCMR 597] and, **Muhammad Bashir and another versus The State and others** [2023 SCMR 190].

10. I have heard the arguments of the learned counsel for the appellant, and learned APG on behalf of the State and gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports and recovery of blood at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Muhammad Asif Qureshi (the deceased) was murdered by firearm at about 2130 hours on 16.10.2001 at Asharaf Road, Hussaini Chowk Pretabad Hyderabad.

12. The only question left before me therefore is whether it was the appellant who murdered the deceased by firearm at the said time, date and location?

13. After my reassessment of the evidence I find that the prosecution has proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

- (a) That the FIR was lodged within a day of the incident however such delay has been fully explained by the complainant and PW 4 Muhammed Umar in their evidence. This is because after the shooting of the deceased he was taken to hospital and after receipt of a police injury letter a postmortem was carried out before the body was returned to the complainant who then arranged the burial of the body and then came to the PS to lodge the FIR within 23 hrs of the incident. As such any delay in lodging the FIR has been fully explained and is not fatal to the prosecution case based on the particular facts and circumstances of this case. In this respect reliance is placed on the case of **Muhammed Nadeem alias Deemi versus The State** (2011 SCMR 872).
- (b) That the appellant is named in the FIR with a specific role albeit based on hearsay evidence which was provided to the complainant by his son PW 4 Muhammed Umar whose evidence at trial was corroborative of the FIR.
- (c) I find that the prosecution's case primarily rests on the evidence of the sole eye witness to the murder of the deceased

and whether I believe his evidence whose evidence I shall consider below;

- (i) **Eye witness PW 4 Muhammed Umer. He is the brother of the deceased.** According to his evidence on 16.10.2001 at about 9.30pm Dr. Afzal came to his house where he, the deceased and the complainant (father) were sitting. Dr. Afzal and the deceased left his house for taking tea at Hussaini Chowk. About 30 minutes later he left for Hussaini chowk for taking meals. After his meal when returning home he heard fire reports near the cabin of a pan walla. He saw the accused making straight fire on the deceased. Two other persons (one acquitted co-accused and the other an absconder) who were present made aerial firing and then all the accused escaped from the crime scene whilst Dr. Afzal was crying out for help. He took his brother to civil hospital who died from his injuries.

The witness is the brother of the deceased however he had no proven enmity or ill will towards the accused and had no reason to implicate him in a false case and thus the eye witness' mere relationship to the deceased is no reason to discard his evidence which has to be judged on its own worth. In this respect reliance is placed on the cases of **Amal Sherin v The State** (PLD 2004 SC 371) and **Dildar Hussain v Muhammad Afzaal alias Chala** (PLD 2004 SC 663).

This eye witnesses **knew** the accused **before** the incident and he saw him from close range and thus there is no case of mistaken identity and no need to hold an identification parade in order to determine the identity of the accused. This eye witness was not a chance witness as he lived in the same area as his father and deceased and all of them were together at his house prior to the incident which is not far from the scene of the crime. His evidence up to the shooting is corroborated by the complainant in his evidence. He gave his Section 161 Cr.PC statement with relative promptitude which was not materially improved on during the course of his evidence. He is named in the FIR which was also lodged by the complainant with relative promptitude on his narration of the events. He gave his evidence in a natural manner and was not dented at all during cross examination and as such I find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the accused.

""I can convict on the evidence of this sole eye witness alone though it would be of assistance by way of abundant caution if there is some corroborative/ supportive evidence. 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 witness to be of good quality and believe the same.

Thus, based on my believing the evidence of the PW eyewitness **Muhammed Umar** what other supportive/corroborative material is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784) which held 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"

- (d) That it does not appeal to logic, common sense or reason that a father and brother would let the real murderer of their son/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 medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased died from four bullet injuries.
- (f) That although Dr. Afzal was not examined I do not find this of huge significance as he had left his residence and the police were unable to locate him. Thus, there was an explanation for the prosecution dropping him as a witness.
- (g) The fact that no weapon was recovered from the accused I do not find to be of much significance as he had plenty of time to discard the pistol prior to his arrest. In this respect reliance is placed on the case of **Muhammed Bashir** (Supra)
- (h) The fact that the co-accused was acquitted of the charge is of no assistance to the appellant as the evidence against the co-accused was entirely different. Namely, the acquitted co-accused was only given the role of aerial firing and not of direct firing on the deceased like the appellant.
- (i) That it has not been proven through evidence that any particular police witnesses had any enmity or ill will towards the appellant and had no reason to falsely implicate him in this case and in such circumstances it has been held that the evidence of the police witnesses can be fully relied upon and as such I rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).
- (j) That nearly all required police memo's and entries have been exhibited which fully support the evidence of the PW's and the prosecution case.

- (k) That through his cross examination of the witnesses the appellant does not appear to deny his presence at the crime scene at the relevant time.
- (l) That all the PWs 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 time the deceased left his house to take tea with Dr. Afzal at Hussiani chowk to the eye witness seeing the appellant shoot the deceased to the deceased being declared dead at the hospital on account of fire arm injuries to the arrest of the accused.
- (m) 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 but gives no reason for such false implication as he had no enmity or ill will with any of the witnesses. He did not give evidence on oath and did not call any DW in support of his defence case. Thus I disbelieve the defence 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.

14. Thus, based on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eye witness evidence and other corroborative / supportive evidence mentioned above, 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 and as such his appeal is **dismissed** and his bail is recalled and he shall be arrested and returned to Central Prison Hyderabad in order to serve out the remainder of his sentence. A copy of this judgment shall be sent to SHO PS Pinyari and SSP Hyderabad for compliance.