

Commonsense that if you go out in the dark you will take a torch

6387
27/11/2010

PRESENTED ON 27.12.20
Additional Registrar

IN THE SINDH HIGH COURT CIRCUIT BENCH HYDERABAD

Criminal Appeal No. ^{S=}430 OF 2010.

1. Ahsan S/O Yakoob Ali,
 2. Yaqoob Ali S/O Muhammad Ismail, *(Abdul)* vide order dt: 01.09.2015
 Both by caste Khaskheli and R/O Village Muhammad Ismail Khaskheli,
 Taluka Shahadadpur, District Sanghar.
 (Presently Confined at Central Prison Hyderabad)Appellants
Versus
 State.....Respondents

Common sense that if you go out in the dark ³⁸³
you will take a torch

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Cr. Appeal No. S- 430 of 2010

Ahsan Khaskheli and another

Versus

The State

Appellant : Ahsan is present on bail.	Through Mr. Ayaz Khaskheli, Advocate.
Respondent : The State	Through Ms. Sana Memon, Assistant Prosecutor General, Sindh
Date of hearing	06.11.2023
Date of judgment	14.11.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This Criminal Appeal is directed against the judgment dated 29.10.2010, passed by the learned Additional Sessions Judge, Shahdadpur, in Sessions Case No. 123 of 2007 (re: The State versus Ahsan and others), emanating from Crime No.06 of 2007, registered at Police Station Lundo, under sections 302, 34 PPC, whereby the appellants Ahsan and Yakoob Ali have been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life for committing the murder of deceased Arbab Ali. They were also directed to pay fine of Rs.100,000/- [Rupees One Lac] each; and, in case of non-payment of fine, both the appellants shall further undergo S.I for one (01) year more. However, benefit of Section 382-B Cr.P.C was also extended to the appellants. Whereas co-accused Gada Hussain was acquitted of the charge by extending him benefit of doubt.

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

"On 04.05.2007 at 0610 hours complainant Ali Nawaz appeared at Police Station Lundo and lodged FIR alleging therein that he look after the land of Zanwar Ghullam Hyder, his younger brother namely Arbab Ali aged about 25 years is cultivating the lands of Zamindar Pandhi Zardari. Some days ago his neighborer namely Yakoob Khaskheli informed the complainant that his brother Arbab Ali is looking towards their Women folks with evil eyes and to Sanjhao him. On the preceding night the complainant, his brother Khadim Hussain, his cousin, Haji Khan s/o Ghullam Muhammad along with family members were sleeping in their houses whereas Arbab Ali was watering the lands near to the house of the complainant. At about 03:00 am, they heard hakals outside, on which complainant, his brother Khadim Hussain and cousin Haji Khan went out of the house carrying torch and on the light of torch they saw the accused each Ahsan s/o Yakoob Khaskheli having Gun, Yakoob Ali son of Ismail armed with pistol, Gada Hussain s/o Shoukat Ali armed with hatchet and 2 unknown persons armed with lathis (to be identified when seen) gave hakals to Arbab Ali and said that as to why he is looking towards their women folks and saying so Ahsan and Yakoob Khaskheli straight away fired from their respective weapons at his brother Arbab Ali with intention to kill him, Arbab Ali sustained fire arm injury and fell down. The complainant and witnesses raised hakals on which all the five persons ran away towards their respective houses along with weapons. Thereafter, they saw that Arbab had received fire arm injuries at his back right side of right buttock and blood was oozing. Arbab died within their sight. Thereafter, they informed their Zamindar Zanwar Ghulam Hyder who came at the place of incident and then directed the complainant to lodge the F.I.R, hence this case."

3. After usual investigation police submitted the challan before the Court concerned showing the accused / appellants Ahsan and Gada Hussain in custody while accused / appellant Yakoob as absconder. After completing necessary formalities, learned trial Court initially framed charge against the accused/appellants Ahsan and Gada Hussain to which they pleaded not guilty and claimed trial respectively. However, later on, accused / appellant Yakoob surrendered himself before the trial Court through his counsel and an amended charge was framed against all the three accused to which they all plead not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case has examined 8 witnesses and exhibited numerous documents and other items. The statements of accused were recorded under section 342 Cr.P.C respectively, 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 appellants Ahsan and Yakoob as stated earlier in this judgment.

6. It is noted that during proceedings of this appeal, the appellant Yaqoob Ali s/o Muhammad Ismail had expired on 16.11.2012 and such report has also been filed by SHO PS Lundo, therefore, the proceedings against him were abated vide order dated 01.09.2015.

7. It is also noted that complainant namely Ali Nawaz had appeared and reposed his full faith and confidence on learned A.P.G vide order dated 20.03.2023.

8. Learned trial Court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

9. Learned advocate for the appellant has contended that the appellant is innocent and has been falsely implicated in this case as there is enmity between the parties; that it was a night time incident and no source of light was recovered from the complainant and as such the identification of the appellant cannot be safely relied upon; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable and as such based on all or any of the above reasons the appellant be acquitted by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Hakim Ali and 4 others versus The State and another** [1971 SCMR 432], **Tariq Pervez versus The State** [1995 SCMR 1345], **Sheral alias Sher Muhammad versus The State** [1999 SCMR 697], **Amin Ali and another versus The State** [2011 SCMR 323], **Liaqat Ali versus The State** [2011 SCMR 910], **Khalid @ Khalidi and 2 others versus The State** [2012 SCMR 327], **Muhammad Ali versus The State** [2017 SCMR 1468], **Naseeb-ur-Rehman and 3 others versus The State and another** [2016 P.Cr.L.J Note 17], **Sardar Bibi and another versus Munir Ahmed**

and others [2017 SCMR 344], **Khalil versus The State** [2017 SCMR 960], **Asad Khan versus The State** [PLD 2017 Supreme Court 681], **Muhammad Ashraf alias ACCHU versus The State** [2019 SCMR 652], **Abdul Jabbar and another versus The State** [2019 SCMR 129], **Mansab Ali versus The State** [2019 SCMR 1306] and **Najaf Ali Shah versus The State** [2021 SCMR 736].

10. 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 placed reliance on the eye witnesses whose evidence according to her can be safely relied upon; the corroboratory/supportive medical evidence and the recovery of the gun (murder weapon) on the pointation of the appellant and as such the appeal be dismissed. In support of her contentions, she placed reliance on the cases of **Muhammad Afzal versus The State** [2021 SCMR 289] and **Qasim Shahzad and another versus The State and others** [2023 SCMR 117].

11. I have heard the arguments of the learned counsel for the appellant, learned APG 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.

12. - Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, tapedar's evidence/sketch and recovery of blood and empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Arbab Ali (the deceased) was murdered by firearm on or about 04.05.2007 at 3am on the lands of Pandhi Zardari.

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

14. 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 hours of the incident keeping in view the fact that the PS was 4/5 Km from the complainants house and as such there was no delay in lodging the FIR which could have lead to concoction or consultation to falsely implicate the appellant in the case.
- (b) That the appellant is named in the promptly lodged FIR with a specific role.
- (c) I find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether I believe their evidence whose evidence I shall consider in detail below;
 - (i) **Eye witness PW 1 Muhammed Nawaz. He is the complainant and brother of the deceased.** According to his evidence on 04.05.2007 at about 3am he was sleeping in his house with his brother Khadim Hussian and Haji Khan. He heard noise in the street and came out side and under torch light he **saw** the appellant with a gun, since expired appellant Yakoob with a country made pistol and acquitted co-accused Ghada Hussain with a hatchet. He **saw the appellant and the expired appellant fire on the deceased** one of which shots hit the deceased on the back whilst the other hit him on the hip. The appellants and Ghada Hussain all ran away.

The witness is the brother of the deceased however he appears to have some enmity with the expired appellant Yacoob who apparently refused to give his daughter's hand in marriage to the deceased **however** there is no proven enmity with the appellant thus the complainant's 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) and **Qasim Shazade** (Supra). I am however put on caution regarding the complainant's evidence.

It is clear from this eye witnesses evidence that **he knew** the appellant **before** the incident and that he saw him on **torch light** from relatively 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. His presence at the scene is corroborated by PW 2 Haji Khan. It is true that the police did not recover any torch but we must also consider the ground realities and the particular facts and circumstances of each case. If you live in the interior of Sindh in a small house in a small village where there is frequent prolonged load shedding then before sleeping nearly every person keeps a torch or some source of light (now a days usually it is a mobile phone which also has a

torch in it) by his bed just in case he has to get up in the middle of the night to use the washroom or for any other reason during loading shedding. In 2007 it would most likely have been a torch. It also does not appeal to logic, reason or common sense that if you heard a noise outside your house at 3am when it was dark that you would go outside without a torch or some other source of light as what is the point in simply going out in the dark as you would not be able to see or do anything. I cannot simply ignore the prevailing environment based on the particular facts and circumstances of each case along with ground realities.

This eye witness was not a chance witness as he lived in house and if he heard a cry in the night outside his house it would be quite natural for him to see what was going on outside. He gave his S.154 Cr.PC statement with promptitude which was not significantly improved on during his evidence. He named the accused in his FIR along with the other eye witness with the specific role of making direct fire on the deceased with the expired appellant before they ran away under cover of the dark. He gave his evidence in a natural manner and was not dented at all during cross examination and as such we find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the appellant.

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. **In this case however there is more than one eye witness.**

- (ii) **Eye witness PW 2 Haji Khan.** He corroborates the evidence of the complainant in all material respects. He saw the appellant under torch light who he knew from before. He saw the appellant make direct firing on the deceased. He is not a chance witness and his evidence was not dented during cross examination and as such the same considerations apply to the evidence of this witness as to the evidence of the complainant as discussed above.

Thus, based on my believing the evidence of the PW eyewitnesses 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).

- (d) That it does not appeal to logic, common sense or reason that a father 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 medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased died from fire arm injury from relative close range.
- (f) That after his arrest the appellant took the police on his pointation to a secret place where he had hidden the gun which no one else could have known about and was recovered on his pointation by the police.
- (g) That when the gun recovered by the appellant on his pointation was matched with the empties recovered at the crime scene it produced a positive FSL report which means that the recovered empties matched the recovered gun making it the murder weapon.
- (h) 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 for instance by foisting the gun on him 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).
- (i) That the motive for the murder has been revealed in the FIR in that the deceased was looking with an evil eye on the women folk of the appellants and even a kidnapping case has been lodged by the appellants side against the complainant's side.
- (j) 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 was accused of looking at the appellant's women folk with an evil eye to the appellant shooting the deceased with a gun which lead to the deceased's death on the spot to the appellant being arrested and leading the police to the gun which produced a positive FSL report when matched with the empties recovered at the crime scene.
- (k) That the acquittal of co-accused Ghuda Hussain is of no assistance to the appellant as the case of the acquitted co-accused was on a different footing. Namely, he was only present with a hatchet and no eye witness saw him attacking the deceased with a hatchet whereas the eye witnesses saw the appellant and the expired appellant make direct firing on the

↳

deceased with fire arms which shots hit him and was the cause of his death.

- (1) 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 on account of enmity since apparently the complainants side had kidnapped expired appellant Yakoob's daughter however the appellants side failed to produce Yakoob's daughter as a DW who would have been the star witness in their defence and who was readily available and failed to record their evidence on oath or call any DW at all. Thus I disbelieve the defence case 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.

15. 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 hereby maintain his convictions and sentences and uphold the impugned judgment whilst **dismissing** the appeal. The appellant on bail shall be arrested by SHO PS Lundo and returned to Central Prison Hyderabad in order to serve out the remainder of his sentence. A copy of this order shall be sent to SSP Sanghar for compliance.

Hafiz Fahad

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Cr. Appeal No.S-430 of 2010

DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of main case.

06.11.2023

Appellant Ahsan is present on bail.

M/s. Ayaz Khaskheli and Muhammad Waris, Advocate for appellants.

Ms. Sana Memon, Asst. Prosecutor General, Sindh.

=

I have heard the learned counsel for the appellants as well as learned Asst. Prosecutor General, Sindh. The complainant had already reposed his full faith and confidence in learned A.P.G. Reserved for judgment.

Hafiz Fahad