

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Cr. Jail Appeal No.D- 113 of 2008
[Confirmation Case No.10 of 2008]

Amjad Ali

Versus

The State

Appellant Amjad Ali;	through Hameedullah Dahri Advocate
Respondent the State;	through Mr. Fayaz Hussain Saabki, A.P.G Sindh
Complainant Muhammad Ismail;	through Mr. Bilawal Ali Ghunio Advocate
Date of hearing;	09.06.2021
Date of judgment;	15.06.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-This criminal jail appeal is directed against the judgment dated 29.10.2008, passed by learned Additional Sessions Judge, Kotri, in Sessions Case No.34 of 2002 (Re: The State V Amjad Ali and others), emanating from Crime No.42 of 2002, registered at Police Station Kotri, under sections 302, 324, 337-A(i), 337-F(i), 337-F(ii), 504, 34 PPC, whereby the accused / appellant has been convicted u/s 302(a) PPC and sentenced to death subject to confirmation by this Court. He was also convicted under sections 337-F(ii) and 337-F(i) PPC and sentenced to pay daman of Rs.10,000/- to injured Saleem and was also punished with imprisonment of one year as Tazir for the offence punishable under section 337-F(ii) PPC. He was also directed to pay daman of Rs.10,000/- to injured Saleem and was

punished with imprisonment of one year as Tazir for the offence punishable under section 337-F(i) PPC. He was also convicted and sentenced for causing injuries to P.W Haroon, in the manner as mentioned in Point No.6 of the impugned judgment. He was also extended the benefit of section 382-B Cr.P.C.

2. The facts of the prosecution case as stated in the F.I.R, registered by complainant Muhammad Ismail on 15.03.2002 at 0300 hours at Police Station Kotri are that, on 14.03.2002 he (complainant), his sons Muhammad Raheem, Muhammad Saleem, Muhammad Haroon and Rashid all by caste Gopang were sitting in the hotel situated in village Saeed Khan Gopang, when at 2315 hours, accused Amjad Ali armed with dagger, Riaz Ali armed with hatchet, Saeed Ali and Arshad Ali both armed with dandas, came there. On arrival, they used abuses, Amjad Ali told complainant party that Saleem Gopang had fought with their brother Riaz Ali as such they would not spare them. On saying so, Amjad Ali caused incised blow with dagger to Muhammad Raheem blow the left side ribs, another blow on the left side of his chest as a result of which, he fell down and started bleeding. Accused Amjad also caused dagger blow to Haroon on his left armpit and another blow on his side buttock and he also fell down and accused Amjad Ali inflicted blow with knife to Saleem Gopang which caused one injury at right side above kidney and one injury caused to left side above the buttock, he became injured and fell down. Accused Riaz Ali caused blunt side hatchet blow to Rashid Ali Gopang on the left side of his head over the ear, who also fell down. Thereafter, accused Saeed Ali and Arshad Ali caused danda blows to complainant party. On their cries, villagers came there and on seeing them, accused left the place. Then complainant brought the injured at Taluka hospital, where Muhammad Raheem son of complainant could not survive the injuries and died. The complainant while leaving the other injured at hospital came at Police Station and lodged the report.

3. Police arrested the accused / appellant Amjad Ali and other co-accused and after usual investigation, submitted the challan before the concerned court. After completing necessary formalities, learned trial court framed charge against the accused / appellant, to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution has examined as many as 10 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed his false implication due to old enmity. He gave evidence under oath and relied upon the specific defence of alibi in that he was with his parents at the time of the incident. The accused however did not call any DW's in support of his defence case.

5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellant/ accused as mentioned earlier in this judgment vide Judgment dated 29.10.2008 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 judgment dated 29.10.2008 passed by the 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 he is innocent of any wrong doing and that he has been falsely implicated in this case by the complainant party on account of enmity; that none of the PW eye witnesses was present at the scene of the incident and have falsely implicated him on account of enmity; that even if the eye witnesses were present they could not have possibly identified him as it was a night time incident and there was no source of light; that there are material contradictions in the PW's evidence which renders their evidence unreliable; that PW's, even if they were present, are all related and as such their evidence cannot be safely relied upon; that the ocular evidence is contradicted by the medical evidence; that the appellant's confession before the magistrate was not voluntarily made and as such no reliance can be placed upon it; that the murder weapon (churri/ dagger/knife) was foisted upon the appellant by the police; that the appellant had a solid alibi at the time of the incident and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **Ghulam Abbas and another V The State and another** (2021 SCMR 23), **Sufyan Nawaz and another V The State and others** (2020 SCMR 192), **Shafi Muhammad and another V The State** (2011 PCr.LJ 1756), **Muhammad Shah V The State** (2010 SCMR 1009), **Qaddan and others V The State** (2017 SCMR 148), **Ahmed Khan and 2 others V The State** (2018 YLR 1515), **Sheer Muhammad V The State** (2020 PCr.LJ 864) and **Fazal Hussain alias Fageera and others V The State** (2020 PCr.LJ 311).

8. On the other hand learned Addl. Prosecutor General and the complainant have fully supported the impugned judgment and contended that the three eye witnesses to the incident were reliable and confidence inspiring and had fully implicated the appellant in the murder of the deceased and causing injury to two other persons with a knife; that the eye witnesses were corroborated by the medical evidence; that the appellant confessed to the crime before a judicial magistrate which confession was

voluntary and truthful and as such could be safely relied upon; that the appellant produced the murder weapon on his pointation which was hidden in a secret place which only he could have known about; that the chemical report relating to the blood stained earth recovered at the wardat, blood on the recovered knife and blood on the deceased clothes and the appellant's clothes were all positive and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and his conviction and sentence maintained. In particular they stressed that due to the cold blooded and unprovoked attack on three persons one of whom died as a result of the attack by the appellant the death sentence was fully attracted in this case. In support of their contentions they have placed reliance on the case of **Muhammad Riaz V The State** (2006 SCMR 954).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the PW eye witnesses two of whom were injured in the attack and the medical evidence of PW 8 Dr. Saiful Malook, post mortem and other medical reports, and recovery of blood at the wardat which lead to a positive chemical report we find that the prosecution has proved beyond a reasonable doubt that on 14.03.2002 at 23.15 hours in front of hotel situated in village Saeed Khan Gopang Muhammad Raheem (deceased) was stabbed to death and that Muhammad Haroon and Saleem Gopang received stab injuries.

11. The only question left before us therefore is who murdered the deceased by stabbing him to death and who caused the stab wounds to the injured Muhammad Haroon and Saleem Gopang at the said time, date and location.

12. Before proceeding further to reassess the evidence on record we have noted that numerous pieces of evidence which were relied upon to convict the appellant were not put to him for his explanation during the recording of his S.342 Cr.PC statement. It is well settled by now that any piece of evidence which is not put to the accused for his explanation whilst recording his S.342 Cr.PC Statement cannot be used to convict him. We are not inclined to remand the case back to the trial court for the rerecording of the accused S.342 Cr.PC statement which will only enable the prosecution to fill in the lacuna's in its case to the prejudice of the appellant who has already spent about 19 years in custody. As such we hereby exclude the following pieces of evidence from

our reassessment of the evidence on record. The judicial confession of the appellant, post mortem report and chemical report.

13. After our reassessment of the **remaining** evidence after excluding the evidence mentioned above we 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 with promptitude within one hour of the incident. Any slight delay is explained by the fact that the complainant took the injured to the hospital, which was his immediate priority, where the deceased expired and thereafter he immediately came to the PS and lodged his FIR and as such there was no time for him to cook up a false case against the appellant and the other co-accused who were named and given specific roles in the FIR. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant party which would motivate them to lodge a false case against him.

(b) In our view the prosecution's case rests on the eye witnesses to the murder and stabbings whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Muhammed Ismail.** He is the complainant in the case and the father of the deceased. According to his evidence on 14.03.2002 at 2315 hours he, the deceased, Haroon, Saleem and Rashid Gopang were sitting at his hotel when appellant Amjad Ali duly armed with a knife along with his co-accused came to the hotel. Amjad Ali stated that since Saleem had fought with their brother Riaz they would not spare him. After appellant Amjad said this he saw Amjad Ali inflict knife blows on the lower abdomen and chest of the deceased. He also saw appellant Amjad cause injuries to Saleem in lower part of his abdomen and his hip and on Haroon on his hip and on his left arm. Other people arrived at the scene on hearing the cries and the accused escaped. He took the injured to Taluka Hospital Kotri where the deceased died from his injuries and then registered the FIR at PS Kotri.

As mentioned above the FIR was lodged with promptitude keeping in view the facts and circumstances of the case and the accused was named in the FIR with a specific role.

He knew the appellant as he was his neighbor and although it was a night time incident PW 10 Liaquat Ali Shah who was the tapedar who made a sketch of the wardat gave evidence that there was a light pole at the wardat with working light bulbs. Since the incident of the appellant stabbing the three persons was close to the eye witness when it occurred there is no case of mistaken identity and no need to hold an identification parade especially as the incident took place over a few moments and the eye witness would have got a good look at the appellant. The appellant was also named and given the same specific role in the FIR lodged promptly after the incident. The fact that he could see the incident clearly was corroborated by the evidence of the other eye witness PW's who also saw the appellant attack the three persons with his knife. Admittedly the eye witness was related to the deceased 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. Reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152)

The complainant is **not** a chance witness as he was sitting at his own hotel with his son, cousin and friends who were attacked by the appellant and others. The appellant also lived close by and therefore was likely to be in the vicinity.

His evidence reflects that of his FIR and there have been no significant improvements in the same so as to render his evidence unreliable. He had no proven enmity with the appellant and had no reason to falsely implicate him in the murder of his son. His evidence was not dented despite lengthy cross examination. He did not intervene in the attack because he was unarmed and he did not give chase as his priority was to take his seriously injured son to hospital. We find his evidence to be reliable, trust worthy and confidence inspiring and we can convict on this evidence alone provided that there is some supportive evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917), what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

(ii) **Eye witness PW 2 Rashid Ali.** He is the cousin of the deceased and an injured eye witness. In his evidence he states that he saw **appellant Amjad Ali** give knife blows to the **deceased** on the lower part of his abdomen and his chest. He also saw the **appellant causing injuries to Saleem and Haroon with his knife.** He states in his evidence that he was hit over the head by the backside of a hatchet by co-accused Riaz and he was also hit on different parts of his body by danda's by other co-accused. Due to his injuries he recorded his eye witness S.161 Cr.P.C statement after 3 days and his S.164 Cr.P.C statement after 5 days. No material improvements were made in his evidence. **He corroborates eye witness PW 1 Muhammad Ismail in all material respects.** He is named in the FIR as an eye witness which FIR was lodged with promptitude. There has not been any significant improvements in his evidence so as to render it unreliable and the same considerations apply to him as to **PW 1 Muhammad Ismail.**

(iii) **Eye witness PW 3 Muhammad Haroon.** In his evidence he states that appellant Amjad came to the hotel with a knife and other co-accused. **Appellant Amjad Ali stated that Saleem had fought with Riaz and he would not spare us. He saw appellant cause knife injuries to the deceased at his lower abdomen and chest. He also saw appellant Amjad cause injuries to Muhammad Saleem. Appellant Amjad stabbed him at his left under arm and hip.** He recorded his S.161 statement within 3 days of the incident and his S.164 statement after 5 days of the incident and no material improvements were made. He corroborates eye witnesses **PW 1 Muhammad Ismail and PW 2 Rashid Ali in nearly all material respects.** He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.P.C eye witness statement shortly after the incident which left no room for concoction and the same considerations apply to him as to eye witness **PW 1 Muhammad Ismail and eye witness PW 2 Rashid Ali.**

Thus, based on our believing the evidence of the 3 PW eye witnesses what other supportive / corroborative material is there against the appellant?

(c) That the medical evidence of PW 8 Dr. Saiful Malook fully supports the eye witness / prosecution evidence as he states in his evidence that he carried out the post mortem of the deceased where he was found to have two stab wounds on the parts of the body as the eye witnesses gave in their evidence. He also examined and treated PW eye witness Muhammad Haroon and Saleem who were also found to have incised wound injuries which are consistent with knife injuries like the deceased. Eye witness Rashid Ali was also examined and treated for a head wound which is consistent with his evidence concerning his injury. PW eye witness Muhammad Haroon's injury is also consistent with his evidence of being stabbed.

(d) That the evidence of the 3 eye-witnesses is supported by PW-6 Muhammad Juman who was the police officer who recorded the FIR of the complainant at 12.30am on 15.03.2002 at PS Kotri which supports the complainant's version that after leaving the hospital he went straight to the PS to register his FIR as corroborated by the other PW eye witnesses in their evidence.

(e) PW 9 Mehr Ali who was the IO of the case also fully corroborates the evidence of the 3 PW eye witnesses except that he did not witness the incident. He did however give evidence of going to the hospital where he saw the eye witnesses, the dead body and the wardat where he carried out other legal formalities such as collecting blood samples and then recording S.161 Cr.PC statements of the PW's etc. He arrested the appellant 3 days after the incident based on spy information in the presence of an independent Mashir PW 4 Muhammad Nadeem.

(f) The appellant took the police to where he had hidden the murder weapon i.e the knife which was hidden in his house at a place which only he could have known about and as such could not have been foisted by the police. The knife was stained with blood. Again PW 4 Muhammad Nadeem acted as an independent mashir. No enmity has been suggested against any police officer and or the mashir and as such neither the police nor the mashir had any reason to falsely implicate the accused in this case and as such their evidence can be safely relied upon. If the police had wanted to falsely implicate the appellant they would have planted the knife on him at the time of his arrest rather than going through a time consuming charade of recovery on pointation of the appellant.

(g) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we 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 *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 stabbing of the deceased and other persons who survived by the appellant to the lodging of the FIR to the arrest of the appellant to the recovery of the murder weapon on the pointation of the appellant.

(h) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up his arrest or foisting the knife on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on *Mustaq Ahmed V The State* (2020 SCMR 474).

(i) That it does not appeal to reason, logic or commonsense that a father who was an eye witness would let the murderer of his son go scot free by substituting him with an innocent person (the appellant). In this respect reliance is placed on *Allah Ditta V State* (PLD 2002 SC 52).

(j) 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 based on enmity which has not been substantiated whatsoever by the appellant and alibi yet the appellant failed to produce a single alibi witness in his defence despite the alibi witnesses allegedly being his parents. Even the appellant's own cross examination of crucial PW's tends to suggest his presence at the scene. For example,

Cross of PW 1 Muhammad Ismail,

"It is incorrect to suggest that incident had taken place between Saleem and Amjad and no other accused was involved."

Cross of PW 2 Rashid Ali,

"It is incorrect that the fighting had taken place only with Amjad and that his other brothers were not present there."

Cross of PW 3 Muhammad Haroon,

"It is incorrect to suggest that accused Riaz, Saeed and Arshad were not present there (co-accused) and that incident took place all of a sudden when the accused Amjad was going to his house."

Thus, for the reasons mentioned above we disbelieve the defence case as an afterthought. Thus, in the face of three reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) has not at all dented the prosecution case.


14. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted hereby maintain his and conviction.

15. With regard to sentencing a plethora of Supreme Court authorities have held that unless the motive is asserted and proved by the prosecution in a murder case this is a ground which justifies a reduction in sentence from the death penalty to the alternate sentence of life imprisonment especially where the appellant has spent a long period in custody as in this case where the appellant has been in custody for over 19 years.

16. Thus, since the prosecution has failed to prove the motive for the murder and the long time which the appellant has already spent in jail amounting to 19 years to date, we hereby reduce his sentence for the murder of the deceased from death to the

alternate sentence of life imprisonment. Apart from the above modification in sentence all the other sentences including fines etc in the impugned judgment shall remain in tact. The confirmation reference is answered in the negative.

17. The appeal stands dismissed except as modified above in terms of sentencing.


JUDGE 15/06/21.


JUDGE