

## IN THE HIGH COURT OF SINDH, KARACHI

*Present:*

*Mr. Justice Mohammad Karim Khan Agha*

*Mr. Justice Abdul Mobeen Lakho,*

**Criminal Appeal No.577 of 2019**

**Confirmation Case No.30 of 2019**

<b>Appellant</b>	Naveed Iqbal son of Javed Iqbal through Raja Rashid Ali, Advocate
<b>Respondent</b>	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
<b>Complainant</b>	Through Abdul Wali, Advocate
<b>Date of Hearing</b>	07.04.2021
<b>Date of Announcement</b>	13.04.2021

### JUDGMENT

**MOHAMMAD KARIM KHAN AGHA, J:-** The appellant Naveed Iqbal S/o. Javed Iqbal has assailed the impugned judgment dated 18.09.2019 passed by learned Ist Additional Sessions Judge/Model Criminal Trial Court (MCTC-I), Karachi Central in Sessions Case No.488 of 2013 arising out of Crime No.219 of 2013 under Section 302/34-PPC registered at PS Taimoria, Karachi whereby the appellant was convicted under section 265-H(ii) Cr.P.C. for offence under Section 302 (b) P.P.C. and sentenced to death for two counts for intentional murder of (1) Mst. Anega and (2) Sheikh Waseem Ahmed as Ta'zir, subject to confirmation from the High Court. Appellant Naveed Iqbal was further directed under section 544-A Cr.P.C. to pay compensation to the legal heirs of both deceased to the sum of Rs.10,00,000/- each (Rupees one million only) and in case of default thereof, he was ordered to suffer SI for six months more.

2. The brief facts of the prosecution case as per FIR are that on 30.05.2013 at 07:45 PM the complainant was present at his house when one neighbor of his sister namely Nadeem Bhai came at his house and stated

that his brother-in-law Waseem Ahmed and sister Aneqa have been injured by firing. On such information he reached at the house of his sister where he saw people were gathered. He, on enquiry, came to know that neighbor Naveed Iqbal son of Javed Iqbal resident of Flat No.A/21, United Apartment, Block-M, at 07:30 pm. due to unknown reason, entered into the flat of his sister and made firing with TT Pistol, as a result his sister and brother-in-law became seriously injured. He reached at Abbasi Shaheed Hospital where he saw dead body of his sister Aneqa wife of Shaikh Waseem Ahmed. His brother-in-law Shaikh Waseem Ahmed was in Operation Theater in critical condition (who later died). Thus FIR was lodged against the accused u/s. 302, 324 PPC.

3. During investigation I.O. visited the place of incident, prepared such memo and recorded the statement of PWs u/s. 161 Cr.PC. Accused Naveed was arrested and one TT pistol and two live rounds were recovered from his possession. After completing all the legal formalities, IO submitted report u/s.173 Cr.P.C. against accused before the concerned trial court which was accepted by learned trial court, who sent up the case to the Model Criminal Trial Court/ Addl. Sessions Judge, Malir Karachi for trial. The charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution to prove the charge examined 09 PW's, who exhibited various documents and other items in support of the prosecution case, where after the prosecution closed its side. The statement of accused was recorded under S. 342 Cr.P.C, in which he denied the allegations leveled against him by the prosecution witnesses and claimed false implication in this case. The accused neither examined himself on oath nor led any evidence in his defence.

5. Learned Judge, trial court, after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 18.09.2019, convicted and sentenced the appellant, as stated above, hence this appeal against conviction has been filed by the appellant.

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 evidence of the child witness cannot be safely relied upon due to her tender age and should be discarded; that the medical evidence does not corroborate the prosecution case; that there are major contradictions in the prosecution case and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt or in the alternative his sentence should be reduced to life imprisonment if we find that there is sufficient evidence to uphold the appellants conviction. In support of his contentions he has placed reliance on **Ulfat Hussain v. The State** (2010 SCMR 247), **Muhammad Ismsil v. The State** (2017 SCMR 713), **Qaddan and others v. The State** (2017 SCMR 148), **Saifullah v. The State** (2017 SCMR) 2041), **Razzaq Ahmad v. The State** (2012 YLR 1616), **Ashfaq alias Shaka v. The State and others** (2017 P. Cr.LJ 359), **Ghulam Haider v. The State** (2016 YLR Note 80), **Muhammad Aslam v. The State** (2017 MLD 14), **Bhai Khan v. The State and another** (2015 YLR 959) and **Ghulam Mohy-ud-Din alias Haji Babu and others v. The State** (2014 SCMR 1034).

8. On the other hand, learned DPG and learned counsel for the complainant have fully supported the impugned judgment and contended that the accused was identified by a child witness who had sufficient intelligence for her evidence to be safely relied upon; that the accused was arrested along with an unlicensed pistol which matched with the recovered empties at the scene which resulted in a positive FSL report; that the medical evidence supported the prosecution case 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 support of their contentions they have placed reliance on **Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another** (PLD 2020 Supreme Court 146), **Ijaz Ahmad v. The State** (2009 SCMR 99), **Muhammad Waris v. The State** (2008 SCMR 784), **The State v. Khushal Khan alias Bajju** (2002 SD 112), **Rustam Ali Kaskheli and**

another v. The State (SBLR 2021 Sindh 202) and Zatoon Bibi and another v. The State (1998 P. Cr.LJ 1680).

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. After our reassessment of the evidence 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 on the same day with promptitude (within 2 hours and 30 minutes of the incident) keeping in view that he rushed from his house when informed about the incident to the house of his deceased and injured relatives and then to the hospital where they were taken where his S.154 Cr.PC statement was recorded which formed the basis of the FIR and as such there was no unexplained delay in lodging the FIR which gave no time for the complainant in league with the police to concoct a false FIR against the accused. There was also no enmity between the complainant and the accused and thus the complainant had no reason to implicate him in a false case.

(b) The appellant is named in the FIR with a specific role.

(c) The main plank of the prosecution case rests on whether we believe the evidence of the sole eye witness PW 2 Manahil Waseem who was 11 years old at the time of the incident especially in terms of her identification of the appellant as being the person who shot her mother and father and as such we will consider her evidence in detail.

With regard to child evidence it was held in the recent Supreme Court case of *Khurram Ali Khan* (Supra) at P.172 as under;

44. A child, irrespective of his age, is competent to be a witness, subject to his fulfilling the conditions precedent provided under Articles 3 and 17 of the Qanun-e-Shahadat Order, 1984 (Order). The said provisions read:

### "3. Who may testify

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age,

disease, whether of body or mind, or any other use of the same kind:

Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:

Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:

Provided further that the Court shall determine the competence of a witness in accordance with the qualification prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming the Court may take the evidence of a witness who may be available.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

#### **"17. Competence and number of witnesses**

(1) The competence of a person to testify and the number of witness required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

(2) Unless otherwise provided in any law relating to the Enforcement of Hudood or any other special law:

- (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and
- (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant." (emphasis provided)

45. A close reading of the above provisions reveals that the essential conditions for a child, or for that matter any person, to appear and testify as a witness, is that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto. This threshold has been referred to as passing the "rationality test", and the practice that has developed with time in our

jurisdiction is for the same to be carried out by the presiding Judge prior to recording the evidence of the child witness. Moreover, we have noted that in our jurisdiction, the judicial acceptance of a child witness, as a safe piece of evidence, has been rather hesitant and cautious. This Court in the case of The State through Advocate General, Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1), by a majority decision, while dilating upon the competence and evidential value of a child witness, opined that:

"Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved. **In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record.**"(bold added)

Based on the rationality test as mentioned in the above cited judgment we are of the firm view that the child eye witness had the capacity and intelligence of understanding the questions put to her and was also able to rationally respond thereto and that her evidence may be considered by us.

For ease of reference her evidence in chief is set out below;

#### EXAMINATION IN CHIEF

The witness is minor and in order to ascertain about her understanding she has been asked some questions.

Q. No.1. Where do you stand?

Ans. I am standing in a court.

Q. No.2. Why have you come in court today?

Ans. I have come to give evidence in this case.

Q. No.3. Do you know the facts of this case?

Ans. Yes I know the facts of this case.

To Mrs. Shahana Parveen, A.D.P.P. for the State.

On 30.05.2013 this incident took place. On the same date I along with my father, mother and younger sister Laiba were present in our house. On the same date the mother in law of accused Naveed

5



Iqbal, Taji came at our house at afternoon time and informed that Micro wave oven had fallen from the hands of her daughter Mst. Aisha and asked my mother as to what to do when the accused Naveed come in house on which my mother asked her that it was their own matter and they should solve themselves. At Zohar time when my mother was offering prayer the accused Naveed Iqbal started abusing her from the door of his house. In the evening time the accused Naveed Iqbal came at the door of our house and started firing towards our house as a result my father sustained injury. When my mother came to close the door of the house then accused Naveed Iqbal again fired which cross from the wood of door and hit to my mother. Thereafter the accused also made firing which hit to my father and mother. I witnessed this incident as I was completing my homework. When I came out then saw that the accused had succeeded to escape away. Thereafter I made hue and cry which attracted neighbours of flats. When the neighbours reached there my mother had already succumbed to her injuries while my father was lying injured who was taken away to hospital by neighbours. The police had recorded my statement U/s. 161 Cr.P.C. The accused Naveed Iqbal present in the court is same".(Bold added)

From the manner in which she has given evidence in a straightforward way and her able handling of the questions which were put to her in cross examination which was unable to dent her evidence we regard her evidence as being reliable, trust worthy and confidence inspiring and place reliance on it. Furthermore, she was not a chance witness and had no enmity with the accused and no reason to implicate him in a false case. Her eye witness S.161 Cr.PC statement was taken on the same day and no improvements were made in it from her evidence in court.

In particular we place reliance on her evidence in terms of correctly identifying the accused who shot both her parents. This is because she knew the appellant who was her neighbor and she saw him shoot both her parents in good light and was able to get a good look at him from close range through the originally open door of the flat for a reasonable period of time and was therefore easily able to identify him and thus there was no need for an identification parade.

As noted above her evidence being a child witness must be considered with great care and caution and it must be corroborated/supported by independent evidence.

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

(d) that the medical evidence corroborates the eye witness evidence in that according to PW 6 Dr. Shiraz, PW 7 Dr. Yasmin and PW 9 MLO Jaleesi both the deceased were killed by firearm injuries.

(e) that the appellant was arrested within one day of the incident on spy information from which an unlicensed pistol was recovered

(f) that the empties recovered at the scene of the crime matched the pistol which had been recovered from the accused on his arrest as was evidenced by a positive FSL report.

(g ) 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 pistol on him. 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).

(h) 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).

(i) that the evidence of the PW's provides a believable corroborated unbroken chain of events from the murder of the deceased by the accused to his arrest and recovery of the murder weapon from his possession to a positive FSL report to the deaths of the deceased as corroborated by medical evidence to his eventual conviction.

(j) that it does not appeal to reason, logic or commonsense that the child who was the eye witness would let the murderer of her own mother and father 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).

(k) 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 simpliciter. The appellant did not give evidence on oath or call any DW in support of his defence case. Thus, for the reasons mentioned above we disbelieve the defence case as an afterthought. Thus, in the face of a reliable, trust worthy and confidence inspiring



eye witness evidence which is fully corroborated/supported by other pieces of evidence the defence case (which we disbelieve) has not at all dented the prosecution case.

11. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence albeit from a child 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 offences for which he has been convicted and hereby maintain his conviction.

12. With regard to sentencing we note that the sole eye witness is a child witness whose evidence must be viewed with caution, that there is a minor contradiction concerning the date of arrest of the accused (though having nothing to do with his identity and not enough to create reasonable doubt in our mind of his guilt) and the fact that the prosecution has neither asserted or been able to prove a motive we hereby reduce the two death sentences handed down to the appellant to two life sentences which shall run concurrently. In this respect reliance is placed on **Ghulam Mohy-ud-Din alias Haji Babu and others (Supra)** and **Muhammed Ismail (Supra)**. The appellant shall also have the benefit of S.382 B Cr.PC and any legally permissible remission. The appeal stands dismissed apart from the above modification in sentence although all the other fines and compensation (if any) in the impugned judgment shall remain applicable and the confirmation reference is answered in the negative.

13. The appeal and confirmation reference stand disposed of in the above terms.

  
JUDGE

  
JUDGE 13/04/21