

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah*

Criminal Appeal No. 180 of 2019
Confirmation Case No. 01 of 2019

Appellant	Arshad Hussain through Mr. Iftikhar Ahmed Shah, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Additional Prosecutor General
Complainant	Through Mr. Tarique Mahmood, Advocate
Date of hearing	16.08.2021
Date of announcement	24.08.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, I:- The appellant Arshad Hussain has challenged the impugned judgment dated 15.02.2019, passed by learned IX-Additional Sessions Judge, Karachi West in Sessions Case No. 1151 of 2015, arising out of FIR bearing Crime No. 37/2015 for offences under Sections 302, 392, 396, 397, 34 PPC, registered at P.S Peerabad, Karachi, whereby the appellant was convicted under section 302(b) PPC and sentenced to death as Tazir, subject to the confirmation by this Court. The appellant was ordered to pay compensation of Rs.200,000/- to the legal heirs of the deceased as provided under Section 544-A Cr.P.C. The appellant was further convicted under Section 397 PPC and sentenced to suffer seven years R.I with direction to pay fine of Rs.100,000/- to the legal heirs of deceased, in case of default, he was ordered to suffer six months' S.I more. Case of absconding accused was ordered to be kept on dormant file.

2. The facts in a nutshell as disclosed in the FIR are that on 09.02.2015 the complainant was present at his home, when his son Amir informed him on phone that Javed (younger brother of the complainant) had received bullet injury in the shop, who had been taken to hospital for treatment. The complainant immediately reached at Abbasi Shaheed

Hospital, where injured was in operation theatre (who during treatment died). One Shamsher employee in the shop informed the complainant that at about 1530 hours, two boys entered into the shop, pointed their pistols at Javed and demanded money. The accused snatched money from Javed and demanded more money and on his refusal, fired at him. On hearing fire shot, people gathered at the spot and tried to catch the accused persons, out of whom one accused was apprehended by the people, whereas the other made his escape good. Police of PS Peerabad arrived at the spot and took the custody of apprehended accused. On inquiry accused disclosed his name as Arshad and disclosed the name of his accomplice as Bashir. From the possession of accused, police recovered one 30 bore pistol along with two live rounds loaded in the magazine. Such memo was prepared at the spot in presence of mashirs. Thereafter accused and case property were taken to the Police Station where the above referred FIR was lodged against him.

3. During investigation I.O visited the place of incident, secured one empty of 30 bore and prepared such memo in presence of mashirs. I.O recorded the statement of PWs under section 161 Cr.PC. On 10.02.2015, I.O sent crime weapon, live bullets and empty to FSL for examination and report. After completing all the legal formalities, IO submitted report under Section 173 Cr.P.C against accused before the concerned trial court. The trial court framed charge against the accused to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 08 prosecution witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the prosecution allegations and claimed false implication. The accused declined to give statement on oath under section 340(2) Cr.P.C in disproof of the prosecution allegations and did not produce any witness in support of his defence case.

5. After appreciating the evidence on record the trial court convicted and sentenced the appellant as set out earlier in this judgment. 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 impugned judgment dated 15.02.2019 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 the appellant is completely innocent and has been falsely implicated in this case; that this is a case of mistaken identification and an identification parade was not held to confirm the identity of the accused; that there are major contradictions in the evidence of the PW's and as such their evidence cannot be safely relied upon; that the ocular evidence does not accord with the medical evidence; that the pistol was foisted on him; that the fact that there was no exit wounds casts doubt on the prosecution case and for any of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Akbar Khan and another v. The State and another** (2005 P. Cr. L.J 1459), **Bahlol Khan Kasi v. Azmatullah Kasi and another** (2020 P. Cr. L.J 1633), **Munir Ahmad v. The State and another** (2014 SCMR 1669), **Muhammad Hussain v. The State** (2011 SCMR 1127) and **Kanwar Anwaar Ali, Special Judicial Magistrate in the matter of Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018** (PLD 2019 Supreme Court 488).

8. On the other hand learned Additional Prosecutor General appearing on behalf of the State has fully supported the impugned judgment. He has contended that the appellant was arrested on the spot in a day light incident and thus there was no need for any identification parade; that the eye witness evidence fully implicates the appellant in the offence which is trust worthy, confidence inspiring and can be fully relied upon; that the pistol was recovered from the accused on his arrest; that the empty which was recovered from the scene lead to a positive FSL report when matched with the recovered pistol and as such the prosecution had proved its case beyond a reasonable doubt and as such the appeal should be dismissed and the confirmation reference should be answered in the affirmative. Learned counsel for the complainant adopted the arguments of the learned APG. In support of their contentions, they placed reliance on the cases of **Abdul Majeed v. The State** (2008 SCMR 1228),

Muhammad Rizwan v. The State and another (1998 P. Cr.LJ 746), **Aijaz Nawaz alias Baba v. The State** (2019 P. Cr.LJ 1775), **Dadullah and another v. The State** (2015 SCMR 856), **Muhammad Ilyas and others v. The State** (2011 SCMR 460), **Muhammad Farhan alias Irfan v. The State** (2021 SCMR 488) and **Sikandar v. The State and another** (2006 SCMR 1786).

9. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and learned counsel for the complainant and gone through the entire evidence which has been read out by 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.

10. Based on our reassessment of the evidence of the PW's, especially PW 2 eye witness Shemsher Ali, the other PW witnesses, PW 7 Dr. Muhammed Javaid (MLO) (who stated in his evidence that he found 2 gun shot wounds on the body of the deceased one of which was over the abdomen) and PW 8 Dr. Abid Haroon (MLO) (who found the cause of death to be due to cardio respiratory arrest as a result of gunshot over abdomen) medical reports (including report regarding examination of dead body, inquest report and Medico legal report), recovery of empty at the scene which lead to a positive FSL report we find that the prosecution has proved beyond a reasonable doubt that Jawaaid (the deceased) was shot by firearm at about 15.30pm on 09.02.2015 at Jawed Deco Paint shop near Shell Petro, Pump, Qasba Coloney Karachi during the course of a robbery at the shop and died on account of his gunshot wounds the next day. The fact that no blood was recovered from the scene we find as inconsequential and in this respect reliance is placed on the case of **Abdul Majeed** (Supra).

11. The only question left before us therefore is who robbed the aforesaid shop and murdered the deceased by firearm at the said time, date and location?

12. 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 with promptitude being within 1 hour and 30 minutes of the robbery and the murder which gave the complainant no time to cook up a false case against the appellant with the police especially as the complainant had no enmity with the appellant and had no reason to implicate him in a false case.

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

(i) Eye witness PW 2 Shamsher Ali. He was working in the shop at the time of the incident. According to his evidence on 09.02.2015 he was present at the shop at about 15.30 hrs when two persons arrived at the shop having weapons in their hands and demanded money from the deceased whereupon one of them shot the deceased in abdomen after quarreling with them. That when the robbers tried to escape due to the hue and cry the local people were able to apprehend the appellant and seize pistol from him a few feet from the spot who they handed over to the police a few moments later who arrested him.

Although he did not know the appellant it was a day light incident and the appellant and his accomplice were before the eye witness in the shop for some time during their robbery and quarrel with unmuffled faces when the appellant shot the deceased and as such he would have got a good look at him and identified him in court. Even otherwise the appellant was captured immediately after he left the shop along with his pistol and was then handed over to the police. Thus, based on the particular facts and circumstances of this case when in effect the appellant was arrested red handed on the spot there was no need for an identification parade and as such we find the identity of the appellant as one of the persons who robbed the shop and murdered the deceased to be proven from the evidence. In this respect reliance is placed on **Dadullah's** case (Supra) Furthermore, the eye witness had no reason to falsely implicate the appellant in this false case and the people of the locality had no reason to just grab a by stander and foist a pistol on him and then say that he was the culprit. Such conduct does not appeal to logic, common sense and reason. More so in Pakistan where it is quite common for the public to catch hold of a criminal who is caught in the act and then hand him over to the police.

The eye witness is not related to the deceased and is not a chance witness as he worked in the shop of the deceased as corroborated by the evidence of the complainant PW 1 Habibullah who even names him as being in the shop when the incident took place in his FIR.

He gave his S.161 Cr.PC eye witness statement on the same day which left no room for concoction. His evidence reflects

that of his S.161 statement and the FIR and there have been no significant improvements in the same during his evidence 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 robbery and murder of the deceased. His evidence was not dented despite lengthy cross examination. We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same and can convict on this evidence provided that there is some corroborative/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.

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

(c) That the medical evidence and reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased was brought to the hospital suffering from two gunshot wounds (one to the abdomen as stated in the evidence of the eye witness) where he died a day later on account of the gunshot wound to his abdomen. In the face of the medical evidence and medical reports already referred to above and the eye witness evidence which we believe we find that although no post mortem was exhibited based on the particular facts and circumstances of the case and the medical evidence referred to its absence cannot cast any doubt on the cause of death and weapon used to murder the deceased and as such its absence is inconsequential. In this respect reliance is placed on **Aijaz Nawaz** (Supra). The fact that there was no exit wound we do not find particularly relevant based on the particular facts and circumstances of this case as there is no evidence that the firing was from close range. For example, there is no blackening around the wounds.

(d) That the appellant was arrested on the spot and a pistol was recovered from him and as such there is no question of the pistol being foisted on him or of misidentification.

(e) That the appellant was convicted by a separate trial court for having an unlicensed pistol under S.23 SAA in respect of the pistol which was recovered from him in this incident against which he has not filed an appeal, which is now time barred.

(f) That the empty recovered at the wardat when matched with the recovered pistol lead to a positive FSL report.

(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 robbing of the shop to the shooting and murder of the deceased to the appellant being arrested on the spot with a pistol by the public to the recovery of the empty at the scene to the positive FSL report.

(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 pistol 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) In a kidnapping for ransom case in order to deter such crimes, as is the need to deter robberies which turn into murders (like in this case), the supreme Court held that **courts need to take a dynamic approach in assessing the evidence**. In the case of **Advocate General Sindh, Karachi v. Farman Hussain and others** (PLD 1995 SC 1), in a kidnapping for ransom case it was observed as under:-

"It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice". (bold added).

(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 at the behest of the rangers who had kept him in custody before hand however not a shred of evidence has come on record to support this defence. The appellant did not give evidence on oath or call any DW in support of his defense case which was basically false implication simpliciter. Thus, for the reasons mentioned above we disbelieve the defense 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.

(k) the fact that it appears that the court closed the prosecutions side rather than the prosecution itself we find to be irrelevant as the prosecution made no such complainant and at the time and as such can be deemed to have accepted the closing of its side by the court as it had already adduced enough evidence to bring home a conviction which turned out to be the case. In any event it is not

justified under these circumstances to remand back the case to the trial court only to enable the prosecution to potentially strengthen its case (when it had objection to the closure of the case at the time) which might prejudice the accused.

13. 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 and hereby maintain his conviction.

14. With regard to sentencing the motive for the murder has been proved which was quite simply robbery of a shop and when the deceased refused to hand over the money or more money he was murdered in cold blood. Crimes of robbery and murdering those who resist are on the rise in Karachi and such crimes need to be dealt with by an iron hand and as such we are of the view that a deterrent sentence is an appropriate one. In this respect reliance is placed on **Dadullah's case** (Supra) which held as under;

"10. This Court in Noor Muhammad v. State (1999 SCMR 2722) has also adverted to this aspect of the matter and has observed as under:-

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences".

15. As such the appeal is dismissed, the conviction and sentences are maintained and the confirmation reference is answered in the affirmative.

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

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ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.180 of 2019
Confirmation Case No.01 of 2019

Arshad Hussain Appellant
Versus
The State Respondent

IRSHAD ALI SHAH, J:- I have gone through the Judgment written by my brother Mohammed Karim Khan Agha (Judge), with utmost regard and respect I do not find myself in agreement with the conclusion which his lordship has drawn, therefore, I have decided to append my note separately.

2. The facts of the case need not to be repeated as those has been elaborately disclosed by his lordship in his Judgment. Admittedly, PW Shemsher is the only eye witness to the incident. It is settled by now that the conviction could be awarded on the basis of solitary evidence of the witness, provided it is found to be trustworthy. PW Shemsher was employee of deceased Javed. It has inter alia been stated by him that the deceased sustained one bullet wound on his abdomen it was caused to him by the culprits during course of robbery, the deceased was taken by them to the Hospital, one of the culprit made his escape good while other (the appellant) was apprehended by the people available in locality after severe maltreatment, from him was secured the Pistol and he then was arrested formally by the Police. On examination as per medical officer Dr. Muhammad Javed, the deceased was found sustained two fire shot wounds with no exit. By stating so, he belied PW Shemsher that the

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deceased was caused single fire shot injury at his abdomen. It was further stated by the said Doctor that the deceased was brought at the Hospital through Chhipa ambulance by Driver Nisar and none of his relative was found present at that time. By stating so, he belied PW Shemsher that they took the deceased to the Hospital. The circumstances suggest that the PW Shemsher has been introduced in investigation subsequently by the Police to strengthen the case of Prosecution. In that situation, it would be unsafe to rely upon his solitary evidence to maintain the conviction which is found to be doubtful and untrustworthy. None from public who allegedly apprehended the appellant after incident has been examined by the Prosecution, such omission could not be lost sight of. As per SIO SIP Rooh-ul-Ameen Shah, no blood mark was found at the place of incident. It goes to suggest that the incident has occurred at the place other than the one claimed by the complainant party. No postmortem has been conducted on the dead body of the deceased. The production of death certificate could hardly be dubbed to be substitute of postmortem report. There is no recovery of alleged robbed money. Nothing has been brought on record in shape of memo of injuries or medical certificate which may suggest that the appellant was apprehended by the public after severe maltreatment. In these circumstances, it would be unsafe to maintain the conviction against the appellant on the basis of recovery of pistol, which too in first instance was allegedly recovered by the person other than the Police official.

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3. The discussion involved a conclusion, that the Prosecution has not been able to prove the involvement of the appellant in the instant case beyond shadow of doubt and to such benefit he is found entitled.
4. In case of Muhammad Mansha vs The State (2018 SCMR 772), it has been held by the Hon'ble Apex Court that;

"4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

5. In view of above, the conviction and sentence awarded to the appellant by learned trial Court by way of impugned Judgment could not be sustained, it is set-aside consequently, the appellant is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court. He shall be released in present case forthwith, if he is not required to be detained in any other custody case.
6. The instant appeal and reference are disposed of in above terms.