

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Criminal Appeal No. 618 of 2019
Confirmation Case No. 31 of 2019
Criminal Appeal No. 619 of 2019
Criminal Appeal No. 620 of 2019

Appellants: Mujahid son of Wahid and Raheem
son of Ali Muhammad through Mr.
Habib-ur-Rehman and Mr.
Muhammad Hanif, advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General, Sindh.

Criminal Appeal No. 644 of 2019
Criminal Appeal No. 645 of 2019

Appellant: Shoukat alias Pera son of Liaquat Ali
through Mr. Habib-ur-Rehman,
advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General, Sindh.

Date of hearing: 20.01.2022

Date of Judgment: 01.02.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- By this common judgment, we intend to dispose of captioned criminal appeals filed by the appellants Mujahid, Raheem and Shoukat challenging two separate judgments passed by the learned trial Court in S.C No. 1127, 1127-A, 1128, 1129 and 1130 of 2016 dated 28.09.2019 (*impugned judgments*) and Confirmation Case No. 31 of 2019 for confirmation or otherwise of death sentence awarded to the appellants Mujahid and Raheem as they are the outcome of one and same incident. Through the impugned judgments, the appellants were convicted for offences punishable u/s 302(b) PPC, 397 PPC and S. 23(1)(a) of the Sindh

Arms Act 2013 (SAA 2013), and were sentenced as follows with the benefit of S. 382-B Cr.P.C:-

1. "Accused Mujahid s/o Wahid is convicted for committing an offence under section 302(b) PPC and awarded Death penalty. He would be hanged by neck till death and he is also directed to pay fine of Rs.200,000/- to the legal heirs of the deceased under section 544-A Cr.P.C and [in] default thereof, he would also suffer SI [for] One (01) year more. Accused Mujahid s/o Wahid is also convicted for committing an offence punishable under section 397 PPC, to suffer RI for 10 (ten) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more. Accused Mujahid s/o Wahid is also convicted for an offence under section 23(1)(a) of Sindh Arms Act 2013 and sentenced to suffer RI [for] 14 (Fourteen) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more.

2. Accused Raheem s/o Ali Muhammad is convicted for committing an offence under section 302(b) PPC and awarded Death penalty. He would be hanged by neck till death and he is also directed to pay fine of Rs.200,000/- to the legal heirs of the deceased under section 544-A Cr.P.C and [in] default thereof, he would also suffer SI [for] One (01) year more. Accused Raheem s/o Ali Muhammad is also convicted for committing an offence punishable under section 397 PPC, to suffer RI for 10 (ten) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more. Accused Raheem s/o Ali Muhammad is also convicted for an offence under section 23(1)(a) of Sindh Arms Act 2013 and sentenced to suffer RI [for] 14 (Fourteen) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more.

3. Accused Shoukat @ Pera s/o Liaquat Ali is convicted for committing an offence under section 302(b) PPC and [I] sentence him to Life Imprisonment, as awarding punishment of death to a juvenile offender is barred under section 12 of Juvenile Justice System Ordinance. The accused is also directed to pay fine of Rs. 200,000/- to the legal heirs of the deceased under section 544-A Cr.P.C and [in] default thereof, he would also suffer SI [for] One (01) year more. Accused Shoukat @ Pera s/o Liaquat Ali is also convicted for committing an offence punishable under section 397 PPC, to suffer RI for 10 (ten) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more. Accused Shoukat @ Pera s/o Liaquat Ali is also convicted for an offence under section 23(1)(a) of Sindh Arms Act 2013 and sentenced to suffer RI for 14 (Fourteen) years and he is also directed to pay fine of Rs. 50,000/- and in default thereof, he would also suffer SI for 06 (six) months more."

2. The brief facts of the prosecution case are that on 18.08.2016, deceased Bakhti Rehman and his cousin Irfanullah were

present at the deceased's shop, Usman Oil Depot, located at Street No. 9, Nayabad, Lyari when at about 01:45, midday, three young assailants of Baloch ethnicity entered the shop and held them up, asking for cash. On resistance from the deceased, one of the assailants opened fire at him, hitting him once on his chest and once on his abdomen. Then, the assailants managed to get the cash available in the shop and fled on their motorcycle when one of the assailants fired in the air while escaping. The complainant, brother of the deceased, was informed over the phone of the incident and was told that the deceased, who was still injured at the time, was shifted to Civil Hospital Karachi. The complainant reached at the hospital and found his injured brother, his other brother Sher Khan and relatives available at the hospital. Bakhti Rehman underwent treatment in the Operation Theatre where he succumbed to his injuries. Police arrived at the hospital and the complainant got his statement u/s 154 Cr.P.C recorded at 06:30 p.m. on the same day.

3. After completion of investigation, Investigating Officer (IO) submitted a challan against the present appellants. Necessary documents were provided to them u/S 265-C Cr.P.C. and then formal charge was framed to which they pleaded not guilty and claimed to be tried. In order to substantiate its case, prosecution examined eleven witnesses namely PW-1 **Muhammad Ayaz**, PW-2 **Muhammad Tufail**, PW-3 **MLO/Dr. Noor Ahmed**, PW-4 **Irfanullah**, PW-5 **Ishtiaq Hussain**, PW-6 **SIP Arshad Khan**, PW-7 **PC Aamir Khan**, PW-8 **Sher Khan**, PW-9 **RMO/Dr. Raheel Soomro**, PW-10 **Judicial Magistrate Mr. Nizamuddin**, PW-11 **IO/SIP Ansar Mahmood** and produced a number of documents and other items. Statement of accused were recorded under section 342 Cr.P.C. wherein they denied the allegations levelled against them and claimed their innocence. Although, they did not examine themselves on oath nor produced any evidence to disprove the charge against them.

4. Trial Court, after considering the material available before it and hearing the counsel for respective parties, passed the impugned judgments and sentenced the appellants as stated supra.

5. Learned counsel for the appellants have contended that in his statement u/s 154 Cr.P.C, the complainant nominated unknown accused persons for the crime; that the complainant did not witness the incident; that the eye-witnesses of the incident are interested; that the appellants are innocent and have been falsely implicated in the present case by the police due to ulterior motives; that the complainant has failed to mention the names of any eye-witnesses in his 154 Cr.P.C statement; that the appellants were not arrested from the spot; that there were no independent witnesses at the time of recovery of crime weapons; that no specific role has been assigned to any of the appellants; that the impugned judgments are arbitrary and are liable to be set aside. In support of their contentions, they have referred to the case law reported as *1995 SCMR 1345, AIR 1938 Cal. 220, 2017 PCrLJ 114, 2017 SCMR 486, 2019 SCMR 301, 2019 SCMR 652, 2020 PCrLJ 839, 2021 SCMR 23* and *2021 SCMR 1373*.

6. Conversely, learned Additional Prosecutor General Sindh supported the impugned judgments while contending that the appellants were identified by eye-witnesses through identification parade before a Judicial Magistrate; that crime weapons were also recovered from the possession of the appellants at the time of their arrest; that the appellants have failed to prove any ulterior motives or malafide on the part of the police for their false implication; that the prosecution has proved its case against the appellants beyond reasonable doubt as such impugned judgments do not call for any interference. In support of his contentions, he has cited the case law reported as *1992 SCMR 2066, 2006 SCMR 1786, 2011 SCMR 460, 2015 SCMR 856, 2019 PCrLJ 1778* and *2021 SCMR 1387*.

7. We have heard the arguments advanced by the learned counsel for the appellants as well as learned Additional Prosecutor General Sindh and have gone through the entire evidence available on the record.

8. It is a matter of record that identification parade was conducted in the present case by PW-4 Irfanullah. In his examination in chief, he deposed that *"On 25.08.2016, I return[ed] to Karachi. On 28.08.2016, police came to me and gave me notice u/s 160 Cr.P.C for my appearance before the court on 29.08.2016 for identification of accused. On 29.08.2016, I appeared before the court and identification parade was held during which I correctly identified three accused persons separately. Firstly I identif[ied] accused Mujahid, who made firing upon deceased Bakhti Rehman. Then I identified Raheem Langra, who made aerial firing and lastly I identified the third accused who was minor and was of small height, who took out all the money from the wooden drawer. I produce three memos of Identification Parade of accused Mujahid, Rahim and Shiukat Ali..."* PW-5 Ishtiaq Hussain, another eye-witness of the incident deposed in his cross-examination that *"I used to work in Khayam Bakery situated at Nayabad, Karam Bai Karim Jee Road, Lyari Karachi. Usman Oil Depot is situated adjacent to Khayam Bakery. On the same date, I was present at Khayam Bakery, it was about 1345 hours when three culprits came on one motorcycle and they went to Usman Oil Depot. Two of them took out their TT pistols and on the force of weapons they demanded money from Bakhti Rehman, who was owner of Usman Oil Depot, but he offered resistance to them, whereupon one accused namely Mujahid made firing upon Bakhti Rehman who sustained bullet injuries to his body. One of the accused, who was present outside [the] shop was lame and probably was having an artificial wooden leg, also made aerial firing in order to harass the people while third accused being minor/younger took out all the money from the drawer and thereafter they fled away. After about ten days i.e. on 28.08.2016, SIP Ansar served notice under section 160 Cr.P.C upon me for appearance before the Court on 29.08.2016 for identification parade of the accused, which notice I produce. I went to court for identification parade.*

During separate identification parade of each accused I identified them correctly. I also signed three memos of identification parade. Perusal of the identification parade conducted by the PW-10 Judicial Magistrate also shows that all the legal procedures were followed while conducting the same and his cross-examination also supports the version furnished by PW-4 and PW-5 with regard to the identification of the appellants. A prudent perusal of the evidence available on the record brings the Court to the conclusion that prosecution has undeniably proven its case against the appellants for the offence alleged against them by examining numerous witnesses whose evidence remained un-shattered on material aspects of the case even after lengthy cross-examinations. Per eye-witness accounts of the incident, the deceased Bakhti Rehman was done to death by appellant Mujahid who fired at him with his pistol by causing firearm injuries on his chest and one on his abdomen. The complainant got his statement u/s 154 Cr.P.C recorded on the same day roughly five hours after the incident when the police arrived at the hospital. The appellants were arrested on 25.08.2016 by SIP Arshad Khan who firstly apprehended appellant Mujahid from whom he recovered a loaded 30 bore pistol with five bullets for which he produced no license. Then, appellant Mujahid agreed to lead the police to his accomplices who were hidden in an under-construction building. SIP Arshad Khan apprehended them as well and recovered a 9mm pistol from Rahim with six bullets and a 30 bore pistol from appellant Shoukat with four bullets. None of the appellants were able to present a license for their weapons which were sealed on the spot and the appellants were arrested. In that regard, the FSL report (Ex. 17/K) is also in positive and confirms that the weapons so recovered from the appellants were in fact the weapons used in the commission of the offence and matched two 9mm empties and one 30 bore empty recovered from the place of incident. PW-3 Medico-Legal Officer Dr. Noor Muhammad also

deposed in his examination-in-chief that he found two injuries on the person of the deceased which also corroborates the version provided by the eye-witnesses. As such, medical evidence is also in full conformity with the ocular account.

9. The contention of the learned counsel for the appellants regarding the prosecution witnesses being related to the complainant and deceased inter-se and interested is of little, if any, assistance to the appellants. Despite the close relationship of the complainant and P.Ws with the deceased, their evidence after careful consideration is found trustworthy. It is a settled principle of law that mere relationship with the deceased is not a ground to discard otherwise trustworthy evidence provided that there is no ill will or enmity between the witnesses and the accused which was not present in this case. Reliance in this respect is placed on the case of *Nasir Iqbal @ Nasra and another v. The State (2016 SCMR 2152)*. Moreover, the deceased was murdered in the presence of his cousin. It is unusual for him to set free the real culprit and nominate innocent persons instead and that too without any justifiable reason or rhyme. It appears extremely unreasonable to even consider such a fact. Reference is made to the case of *Islam Sharif v. The State (2020 SCMR 690)*, wherein it has been held by the Hon'ble Apex Court that:-

“There appears no earthly reason for the witnesses to swap the assassin of their elderly father with an innocent.”

10. Even if the evidence of other related and “interested” witnesses is taken out of consideration, the evidence of PW-5 Ishtiaq Hussain, an independent labourer who worked in a shop adjacent to the deceased's is consistent, straight forward, confidence inspiring and trustworthy and his presence at the time of incident has been explained, therefore his evidence alone is sufficient to hold the appellant guilty of the charge. Even otherwise, the Hon'ble Apex

Court has upheld conviction in the case of *Niaz-ud-Din and another v. The State* (2011 SCMR 725) on the basis of solitary statement of the complainant alone. The case of the prosecution is firmly structured on ocular account, furnished by the witnesses, viewed from any angle, natural and trust-worthy. Duration of the injury coincides with the fatality that befell the deceased. Wounds on the person of deceased are consistent with the weapon used and allegedly recovered. The witnesses are in comfortable unison on all the salient aspects of the incident as well as details collateral therewith. The cross-examination remained inconsequential inasmuch as nothing adverse could be solicited from the witnesses except for a volley of suggestions, vehemently denied. These various pieces of evidence are inexorably pointing to the appellants' guilt with no space to entertain any hypothesis of innocence or substitution.

11. After proper assessment and evaluation of evidence, this Court concurs in the conclusion regarding the guilt of the appellants having been proven to the hilt. The point now requiring consideration before this Court is whether there are any mitigating circumstances which could justify the sentences awarded to any of the appellants being modified. Appellant Mujahid, being the main culprit, opened fire on the deceased and was solely responsible for his death after multiple accounts furnished by the eye-witnesses. Besides pleading his innocence, he raised no defence in his statement of accused and there appear no mitigating circumstances to show any lenience to him and he fully deserves the death sentence by way of deterrent in order to counter the rapid rise of street crime in Karachi which mercilessly and cold bloodedly, without a second thought for life, leads to murder. Similarly, appellant Shoukat was already awarded the sentence of imprisonment for life and there appear no mitigating circumstances to award him a lesser sentence as he played an active role of taking money from the drawer after appellant Mujahid shot the deceased down. However, the sentence awarded to

the appellant Raheem appears, in our view, rather harsh for the role assigned to him. While his vicarious liability is undeniable, he had remained outside of the shop and fired in the air to create harassment and to deter onlookers from coming to the rescue. It is well-established principle of law that even a single mitigating factor can be considered sufficient by the Court to award a lesser sentence. The Court can exercise its discretion where a case qualifies for awarding of both, imprisonment for life or death penalty, in the presence of a mitigating circumstance to award a lesser sentence. We are fortified in our view by the case law titled *Ghulam Mohy-ud-Din alias Haji Baby and others v. The State (2014 SCMR 1034)*. As such, keeping in view of said factor, sentence awarded to appellant Raheem is modified from death sentence to life imprisonment.

12. In view of the above discussion, circumstances and the ratio of case law referred above, we are of the considered view that the prosecution has proven its case against the appellants and the view taken by the learned trial Court is just and appropriate, which does not call for any interference. Resultantly, impugned judgments are upheld, the conviction awarded to the appellants is maintained with the modification to the sentence of only appellant Raheem. The sentence of fine and sentence in default of fine, however, is maintained.

13. Consequently, Confirmation Case No. 31 of 2019 is answered in the affirmative for appellant Mujahid, but is answered in the negative to the extent of appellant Raheem.

14. Captioned appeals and confirmation case stand disposed of in the above terms.

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