

# **IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD**

Criminal Jail Appeal No.S-45 of 2016

Pauper appellant Ashfaque Abbasi: Through Mr. Waqar Memon, Advocate.  
The State: Through Ms. Rameshan Oad A.P.G. Sindh.  
Complainant: Nemo.  
Date of hearing: 28.02.2022.  
Date of Judgment: 28.02.2022.

## **JUDGMENT**

**MUHAMMAD SALEEM JESSAR, J.**- The appellant, Ashfaque Abbasi S/o Akber Abbasi, feeling aggrieved by the judgment dated 16.02.2016 passed by II<sup>nd</sup> Additional Sessions Judge, Tando Muhammad Khan in Sessions Case No.319 of 2010, emanating from FIR No.37 of 2010 registered under section 302, PPC at Police Station Bulri Shah Kareem, whereby he was convicted and sentenced to life imprisonment and was also directed to pay fine of Rs.100,000/- which, on recovery, was to be paid to the legal heirs of the deceased Ghulam Haider and, in default thereof, the appellant was to undergo R.I. for six months more, has assailed the same through instant criminal jail appeal. Benefit of section 382-B, Cr.P.C. was allowed to the appellant.

2. Since the appellant, being a pauper, was not in a position to bear the cost of engaging a counsel, therefore, in order to meet the ends of justice, Mr. Waqar Memon, advocate was appointed as his counsel vide order dated 03.09.2019.

3. The facts of the case, as narrated in the impugned Judgment, are that on 13.04.2010, complainant Mir Muhammad lodged FIR No.37 of 2010 at PS Bulri Shah Kareem, alleging therein that on 12.04.2010 complainant's cousin Ghulam Hyder and his friend Ashfaque Abbasi went to attend an invitation at Village Jinhan Soomro. Thereafter Khabar Mallah came to the house of the complainant and informed him that at 09:30 PM he heard sound of fire coming from Simnali (saline drain) Pattri (bank of drain) adjacent to Village Gulan Mallah and also heard cries, upon which he and his son Gul Hassan rushed there and saw one person was running and on source of torch light identified him as Ashfaque Mallah, armed with Pistol, who was running towards Dadoon city, when they reached at Simnali and found Ghulam Hyder was lying on earth and blood was oozing from his back side. The injured disclosed that *"I and Ashfaque Abbasi went for invitation at Jinhan Soomro and returning back when they reached at Simnali at 09:30 PM, Ashfaque Abbasi took out Pistol from his shalwar and made straight fire upon him (deceased) which was hit on his back side and then Ashfaque fled away with pistol"*. On receiving the above information the complainant Ali Muhammad rushed

there and the injured Ghulam Hyder disclosed same facts, which he narrated to Khabar. They immediately brought the injured to Taluka Hospital Bulri Shah Kareem and injured Ghulam Hyder succumbed to his injuries and died at the hospital.

4. During investigation the investigating officer visited place of wardat and secured blood stained earth and one empty cartridge. On 14.04.2010 the complainant produced the blood stained green shirt of deceased and on 16.04.2010 the appellant / accused was arrested at Dado Pacco Stop and from his possession one pistol of 12 bore and two live cartridges and one note of Rs.50/- were recovered. The accused / appellant failed to produce valid license for the pistol and he disclosed that he fired from the pistol and caused murder of Ghulam Hyder who died subsequently.

5. After completing investigation the police submitted challan on 03.05.2010. Charge against accused Ashfaque Abbasi was framed on 13.07.2011 to which the accused pleaded not guilty at Exh. A-4/A (Page 44 of paper book) and claimed to be tried.

6. The prosecution, in order to prove the guilt of the accused / appellant examined PW-1 complainant Mir Muhammad Mallah at Ex:06, who produced FIR Ex:6/A. PW-2 Dr. Abdul Rehman Samoon, examined at Ex:7, who produced police letter, inquest report, postmortem report and receipt of body at Ex:7/A to Ex:7/D respectively. PW-3 Khabar Mallah was examined at Ex:8. PW-4 Gul Hassan Mallah examined at Ex:9. PW-5 mashir Ameer Bux Mallah examined at Ex:10, who produced memo of injuries, memo of dead body, memo of cloth (shalwar), memo of place of incident and memo of cloths (Khamiz and Ganji) at Ex:10/A to Ex: 10/E respectively. PW-6 SIP Muhammad Iqbal Sathio examined at Ex:11, who produced memo of arrest and recovery, roznamcha entry No. 10 and report of chemical examiner of three parcels of Shalwar, Qameez with Banyan (Ganji) and earth with small stones at Ex: 11/A to Ex:11/C. Thereafter learned ADPP for the State closed the prosecution side vide statement dated 2.11.2015 at Ex.12

7. Statement of the accused Ashfaque Abbasi, as provided under section 342 Cr. P.C, was recorded at Ex. 13. He denied to examine himself on oath or produce any witness in his defense. However, in his defence he stated that the present case is false and fabricated and he is innocent. He further stated that private PWs wanted the shop wherein his father namely Akber was working as carpenter, therefore, due to this enmity, he has falsely been implicated in this case.

8. Learned counsel for appellant submits that offence is unseen and source of identification of the accused by the PW, as disclosed by the PWs, was torchlight which was neither produced nor recovered by the police during investigation. He next submits that FIR is delayed by about 17 hours for which no plausible explanation was furnished and the complainant is also not an eyewitness. Learned counsel submits that

at the time of its examination by the medico legal officer, the eyes of deceased were semi open, hence, such condition of the dead body shows that the deceased has already expired when the complainant reached at the place of occurrence. In support of such his Contention, he places reliance upon the case of MUHAMMAD ASIF versus The STATE (2017 SCMR 486). Learned counsel further submits that per prosecution case, the deceased as well as appellant had gone to attend marriage ceremony; however, at the time of its autopsy the dead body was having shalwar only. He focused upon the evidence of PW-I mashir Amir Bux who deposed that I.O. did not obtain his LTIs over the parcel of the case property. Moreover, per learned counsel the corps bearer who brought the dead body and prepared memo of Lash Chakkas Form, namely, ASI Muhammad Jumman Palijo as well as father of deceased who identified the dead body were not examined before the trial court. In support of his contention, he placed reliance on the case of MUHAMMAD ILYAS versus MUHAMMAD ABID alias BILLA and others (2017 SCMR 54). Learned counsel next submitted that alleged case property was sent to the laboratory after about 38 days which too is defective and in support of such his contention he placed reliance upon the cases of SADAM HUSSAIN versus The STATE (2018 MLD 1025) and Mst. SUGHRA BEGUM and another versus QAISER PERVEZ and others (2015 SCMR 1142). Lastly, submitted that bloodstained shirt of deceased was produced by the complainant on following day of the FIR and the Tapedar who was required to visit the site and prepare sketch plan was also not examined. As far as FIR is concerned, the same, according to him, was recorded after due consultation and deliberation, therefore, was also fatal for the prosecution. In support of his Contention he places reliance upon the case of NADEEM alias KALA versus The STATE and others (2018 SCMR 153). Learned counsel pointed out that per claim of the prosecution the appellant and deceased allegedly had gone to attend a marriage ceremony but none from the marriage hosts or participants was examined by the I.O. as well as trial court to believe that the appellant as well as deceased had gone to some village for attending marriage ceremony, hence, purpose of the deceased as well as appellant for proceeding towards the place of alleged incident had not been established. He further submitted that alleged offensive weapon was sent to chemical laboratory after arrest of appellant, hence, was inconsequential. In support of such his contention he placed reliance upon the case of MUHAMMAD IRSHAD versus ALLAH DITTA and others (2017 SCMR 142). He, therefore, submitted that in view of above lacunas, the prosecution case against the appellant has become doubtful, hence, submitted that he may be acquitted by extending benefit of doubt to him.

9. On the other hand, learned APG Sindh appearing for the State opposed the appeal on the ground that mere delay in lodgment of FIR as well as sending of

property to laboratory with certain delay was immaterial. She argued that the prosecution has proved its charge against him, therefore, the appellant is not entitled for acquittal. In support of such her contention, she placed reliance upon the case of MAZHAR ELLAHI versus The STATE (2020 SCMR 586). She; however, admitted that the IO had left many lacunas including non-examination of the corps bearer as well as the person who identified the dead body. She also admitted that Tapedar of the beat was not examined nor he prepared sketch plan of the site where the incident is said to have taken place.

10. I have heard learned counsel for the appellant and learned APG for the State and have perused the record with their assistance.

11. The trial Court, after setting out the facts of the case, has formulated two points for determination:

- i) *Whether the deceased died unnatural death?*
- ii) *Whether on 12.04.2010 at 2130 hours at Simnali patri, adjacent to the village Gullan Mallah, accused with intention to commit murder, made fire upon Ghulam Hyder (deceased) which was hit on his back side and injured himself disclosed fact of incident to PWs Khabar Mallah, Gul Hassan and the complainant, thereafter the injured succumbed to injuries and died at Hospital?"*

12. After discussing the evidence on record, the trial Court has answered the Point No.1 as proved and Point No.2 as "Accordingly" and under Point No.3 convicted the accused under section 265-H(2), Cr.P.C.

13. The first point, quoted above, was easily decided by the report of PW-2, Dr. Abdul Rehman (Exh.07 at page 50 of the paper book). The report says "*I am of the opinion that cause of death is profuse hemorrhage and shock leading to cardio-respiratory failure caused by injury No.1 resulting by fire arm injury.*" This statement of the PW-2 does not leave any doubt that the deceased Ghulam Haider died unnatural death. However, the finding that the deceased died unnatural death ipso facto does not connect the appellant with the murder in any manner. The allegations leveled against him have to be examined with care and caution so that an innocent person does not suffer. Thus, for convicting and sentencing the appellant, Point No.2 is of primal importance.

14. Point No.2 is a compound point which raises many questions as under:

- (a) *Whether on 12.04.2010 at 2130 hours at Simnali patri, adjacent to the village Gullan Mallah, accused with intention to commit murder, made fire upon Ghulam Haider (deceased) which was hit on his back side?*

(b) Whether the injured himself disclosed the fact of incident to PWs Khabar Mallah, Gul Hassan and the complainant?

(c) Whether the injured Ghulam Haider, thereafter, succumbed to injuries and died at Hospital?

15. I will take up part (a) of Point No.2 first which is as under:

(a) Whether on 12.04.2010 at 2130 hours at Simnali patri, adjacent to the village Gullan Mallah, accused with intention to commit murder, made fire upon Ghulam Haider (deceased) which was hit on his back side?

16. The trial Court, at para 10 of the impugned Judgment, has stated, “*The ocular evidence supported by prosecution witnesses PW-3 namely Khabar Mallah and his son PW-4 Gul Hassan, who were eye witnesses at the time of fire shot sound heard and they rushed there and saw the accused with pistol running on source of torch light”.*

17. The term “ocular evidence” simply means the evidence of a person or persons who has / have seen the actual incident by his / their own eyes. In this case the incident is not the sound of fire but, the incident is the fire itself which hit the deceased and caused his death. Is there any witness produced by the prosecution who claim that he saw the incident of firing by Appellant by his own eyes?

18. It is an admitted position that PW-1, the complainant, Mir Muhammad, is not an eye witness of the incident as he was at his home when PW-3 Khabar went to him and informed him about the incident.

19. In his behalf the deposition of PW-3 Khabar is very important and needs careful appreciation. He stated as under:

*“On 12.04.2010 at 9.30 p.m. the incident took place. I alongwith my son Gul Hassan was present in my house. We heard the sound of fire arm, on which we came out alongwith torch light from our house and went towards Sim Nala, where we saw one Ghulam Haider was lying injured and he was bleeding and nobody was there.”*

20. Thus, PW-3 clearly says that when he reached the place of incident he saw the injured bleeding and **NOBODY WAS THERE.** This is a clear contradiction with the statement of the complainant who says that PW-3 Khabar informed him that “*Ashfaque was having pistol in his hands.*”

21. PW-4 Gul Hassan, who is son of PW-3 Khabar, in his deposition stated as under:

*“On 12.4.2010 at 9.30 p.m. the incident took place. I alongwith my father was present in our house. We heard the sound of fire. My father left the house 10 minutes before me and thereafter I left my house alongwith torch light.”*

22. From the above, apart from other contradictions, it is crystal clear that when the incident took place at Sim Nala of firing on deceased Ghulam Haider, both the

PW-3 Khabar and PW-4 Gul Hassan were available in their house and were not present at the place of incident.

23. At the time of arrest of the appellant, it is alleged that a pistol was recovered from his possession with two live cartridges. However, this pistol was never sent to the Forensic Laboratory for examination. Thus, a very important piece of evidence was ignored by the prosecution for which no explanation has been given. The trial Court on this point stated as under:

*“The learned defense advocate also cross-examined the I.O. has failed to produce ballistic report of recovered Pistol and one empty of cartridge. Learned ADPP contended that PW-3 Khabar and PW-4 Gul Hassan heard sound of firearm, which clearly shows that fire was made and PW-2 (doctor) supported their version and due to fire arm injuries, the deceased was died, therefore, investigation officer failed to send the recovered weapon and one empty to ballistic expert for their examination, it does not mean the offence was not committed.”*

24. Thus, the trial Court has given a unique and novel reason for not sending the pistol and two live cartridges recovered from the appellant for ballistic expert’s opinion. The prosecution witnesses, PW-3 and PW-4 heard fire shots and, PW-2 (doctor) supported their version and due to fire arm injuries he (deceased) has died, therefore, in the opinion of the trial Court, it was not necessary to send the pistol and the live cartridges allegedly recovered from the appellant for ballistic expert’s examination. How the trial court reached this conclusion is beyond comprehension. In a case of murder by fire arm injury, the recovered weapon from the accused is the most important piece of evidence once the ballistic expert reports the deceased died from the fire of the recovered weapon. When the pistol was not produced during evidence then how it can be said that the same was recovered from the appellant.

25. The Hon’ble apex Court in the case of Nadeem v. The State (2018 SCMR 153) held that *“Even otherwise, the said recovery is inconsequential because report of Forensic Science Laboratory was not put to the appellant while examining him under section 342, Code of Criminal Procedure.”* In the present case even the pistol was not sent to Forensic Science Laboratory at all. Therefore, the recovery of pistol from the appellant become inconsequential.

26. In view of the above statements of PW-3 Khabar and PW-4 Gul Hassan, it can be safely held that the contention of learned counsel for the appellant that the incident is unseen is correct and there is no eye witness of the actual incident of firing on deceased Ghulam Haider.

27. In view of the above discussion, it cannot be held that appellant had fired at deceased Ghulam Hyder which resulted in his death as there is not a single eye witness

who saw appellant Ashfaque firing at deceased Ghulam Hyder nor the pistol, which was allegedly recovered from the appellant with two live bullets, was sent for ballistic expert's examination. Thus, the finding of the trial Court on this issue is based on no evidence at all.

28. The next part of Point No.2 is **“Whether the injured himself disclosed the fact of incident to PWs Khabar Mallah?”**

29. PW-1 in his deposition stated as under:

*“I alongwith Khabar went to place of incident, where the injured disclosed me that accused Ashfaque caused him firearm injury.”*

30. PW-3, Khabar, in his deposition stated as under:

*“We asked the injured as to who had caused him injury, who disclosed that he (injured) alongwith Ashfaque were going to attend some invitation and when they reached near Sim Nala, Ashfaque caused him fire arm injury with his pistol.”*

31. PW-4, Gul Hassan, who is son of PW-3 Khabar, in his deposition disclosed as under:

*“I reached at Sim Nali, where my father was present. I saw that deceased Ghulam Hyder was lying injured and unconscious.”*

32. From the above quoted depositions of three PWs, PW-1 says that the deceased disclosed to him that Ashfaque fired at him, PW-3 states that the deceased told him that Ashfaque fired at him while the third witness i.e. PW-4, who spent more time with the deceased than any other PW before his shifting to Police Station, do not say that the deceased said anything to them. On the contrary, he stated that the deceased was lying unconscious.

33. The trial Court in the impugned Judgment has observed as under:

*“It is very clear position that firstly PW-3 Khabar reached to injured and who disclosed facts as mentioned in the FIR narrated by complainant that **“I and Ashfaque Abbasi went for invitation at Jinhani Soomro and returning back when they reached a Simnali at 9.30 p.m. who took out pistol from his shalwar and made straight fire upon me which was hit on my back side and then Ashfaque fled away with pistol.”**”*

34. Thus, the trial Court, relying on the deposition of PW-1 and PW-3, has held that deceased Ghulam Haider has disclosed the fact of the incident to the PWs. However, once again there is clear contradiction in the deposition of PW-1 and PW-3 on the one side and PW-4 on the other side.

35. Keeping in view the nature of injury, as disclosed by PW-2 Dr. Abdur Rehman, who stated that the fire injury has caused the following damage to the body of the deceased:

*“... There is fracture of 11<sup>th</sup> and 12<sup>th</sup> ribs and there is rupture of the liver, portal vein and venacava and huge amount of blood collected in the peritoneum cavity, there is rupture of right kidney.”*

36. Thus, the bullet injury caused rupture of two vital parts i.e. liver and kidney and the said PW-2 in his cross admitted that the injury received by the deceased was sever and a person after receiving severe injury becomes unconscious. Therefore, it can be safely said that when the PWs reached the place of incident the deceased was unconscious, as stated by PW-4 Gul Hassan, and was not in a position to tell anything to the PWs. This is also a grave contradiction in the statements of PW-1 and PW-3, who say that the deceased disclosed to them that Ashfaque Abbasi has fired on him, and the statement of PW-4 Gul Hassan, who says that the deceased was unconscious. The medical report supports the statement of PW-4 and not that of PW-1 and PW-3.

37. The last part of Point No.2 is *“Whether the injured Ghulam Haider, thereafter, succumbed to injuries and died at Hospital?”* The case of the prosecution is that the deceased was alive and was first taken to PS Bulri Shah Kareem and from there he was taken to Taluka Hospital, Bulri Shah Kareem where he was admitted and succumbed to his injuries after some time.

38. On this point, PW-1 (the complainant) has made this categorical statement:

*“I alongwith Khabar and his son Gul Hassan brought the injured at police station Bulri Shah Kareem. Police accompanied us to at Taluka Hospital, Bulri Shah Kareem where the injured was admitted and after some time he succumbed to his injuries.”*

39. On the above point, PW-3 Khabar Mallah, during his cross examination stated as under:

*“The injured was died in the way when he was being taken to the hospital.”*

40. Apart from the above clear contradiction in the deposition of two prosecution witnesses i.e. PW-1 the complainant and PW-3 Khabar, there is also the report of the MLO which goes against the prosecution’s case that the deceased died at the hospital.

41. The report of the MLO tells a different story. This witness produced the letter of police as Exh.7/A (page 52 of paper book). This letter clearly mentions that a deceased is being sent for postmortem. It is also worth noting that if the deceased was alive when the PWs reached him, the PWs would have taken him direct to the hospital for treatment in emergency ward but since he had died therefore he was taken to police station first and therefrom, after preparing the letter (Exh.7/A), the deceased was taken



to hospital for postmortem. Apart from this, the report of the MLO (Exh.7 at page 50 of the paper book) also reveals that the doctor received the dead body of deceased Ghulam Haider for postmortem. It is also noted that no document from hospital proving admission of the deceased in hospital has been produced either by the private witnesses or by the MLO. Therefore, it can be safely said that the deceased died before reaching hospital and most probably, keeping in view the nature and severity of the injuries, he died on the spot. This observation is based on the postmortem report which says that the probable time elapsed between injury and death is within 30 minutes. The distance between the house of PW-1 and PW-3 is two acres and the distance between the house of PW-3 and Sim Nala is again two acres. Therefore, considerable time would have been consumed covering this distance in darkness. This means that when the incident took place at 9.30 p.m. then injured may have died at 10.00 p.m. as stated by the MLO that he received dead body of the deceased Ghulam Haider.

42. Therefore, it can be safely said that the deceased died either on the spot or he died on the way but he never reached the hospital alive as proved by the above evidence of PW-2 and PW-3.

43. Learned counsel for the appellant submitted that there is unexplained delay of 17 hours in lodging of the FIR. In this regard, the complainant had admitted in his cross examination that *“It is correct that on the next day of death of Ghulam Haider, after consultation I lodged the FIR.”* Delay in lodging of the FIR is fatal to the case of the prosecution. In the case of Sabir Hussain V. The State (2022 YLR 173), it was held as under:

*“9. The complainant has knowledge about missing of the deceased on 13.07.2019, but despite that, the complainant did not lodge the report, and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the report of missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at 10:30 a.m., with a delay of four hours from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant creates a reasonable doubt in the prosecution case. Reliance in this behalf is placed in the case of Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127).”*

44. Thus, the delay in lodging the FIR in present case also creates doubt in the prosecution case more so when the complainant, PW-1 himself stated in his cross examination that he lodged the FIR on the next day after consultation.

45. The learned counsel also submitted that alleged case property (cloths of the deceased) was sent to the laboratory after about 38 days delay which is also fatal to the case of the prosecution, he relied on the case of Sadam (supra). In the cited case it was observed that *“Significantly, as noted above there was an unexplained delay of seven*

days from the recovery of the charas to sending it to the chemical examiner and nothing has come on record to show that the recovered charas was kept in safe custody during this period.... And as such there is likelihood that such sample may have been tampered with / interfered with after its recovery and before it was sent to the chemical examiner which would mean that the report of the chemical examiner cannot be safely relied upon...”

46. Last but not the least, the prosecution has given no motive for the murder of the deceased by the appellant. The PWs have said that the deceased informed them about the firing by the appellant as well as the time of the incident, although the same has not been believed for obvious reasons, but the deceased did not give the reason for such assault by the appellant on him although they went for an invitation together.

47. In view of the above discussion, I am of the firm opinion that the incident in this case was an unseen incident of which there is no eye witness; the recovery of pistol from the appellant in the absence of forensic report is very doubtful and of no help to the prosecution; there was delay in filing the FIR which weakens the prosecution case; case property was sent to chemical examiner after a delay of 38 days and there are many contradictions between the statements of PWs as mentioned above, the prosecution has not been able to prove its case against the appellant beyond reasonable doubt. Accordingly, vide short order dated 28.02.2022, this appeal was allowed as under:

For the detailed reasons to be recorded later on, instant Criminal Jail Appeal No.S-45 of 2016 is hereby allowed. Consequently, the impugned Judgment dated 16.02.2016 penned down by the 2nd Additional Sessions Judge, Tando Muhammad Khan / trial court vide Sessions Case No.319/2010 (Re: State versus Ashfaq Abbasi) being outcome of Crime No.37/2010, u/s 302 P.P.C. P.S. Bulri Shah Karim, is hereby set aside. Resultantly, appellant Ashfaq; who is in custody, is hereby acquitted of the charge. The appellant; who is in custody, is hereby directed to be released forthwith if his custody is no longer required by the jail authorities.

48. These are the reasons of my short order dated 28.02.2022.

Hyderabad, the 28<sup>th</sup> February, 2022.

JUDGE