IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Jail Appeal No. S-69 of 2018

Niaz Hussain Soomro
Versus
The State

Pauper Appellant Niaz Hussain Soomro	:	Through Mr. Ghulam Rasool Narejo Advocate.
The State	:	Through Mr. Ali Anwar Kandhro, Additional Prosecutor General, Sindh.
For the complainant	:	Nemo.

Date of Hearing : 11.04.2022.
Date of Judgment : 11.04.2022.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J: Appellant, Niaz Hussain Soomro, was tried for an offence under sections 302, 337-H(2), 114, 148 and 149, PPC and was sentenced to imprisonment for life vide impugned Judgment dated 10.08.2018, passed by Sessions Judge, Kamber-Shahdadkot at Kamber, in Sessions Case No.482 of 2012, which is impugned by the appellant by filing instant criminal appeal.

2. Facts of the case, in nutshell, are that on 10.08.2012, complainant Liaquat Ali, his brother Mashooque Ali, aged about 27/28 years, their cousins Liaquat Ali S/o. Juman and Abdul Rasheed, went at Magsi Petrol Pump to take fuel, where accused Niaz Hussain (the appellant) and Ghulam Abbas, armed with pistols, Nadir with repeater, Nanger Khan (father of the appellant) empty-handed and two unidentified persons with guns, came there on two motorcycles. Nangar asked them why they were not giving them private 'Faisla', as they have declared the cousin of the complainant, namely, Hussain Ali as "Karo".

Thereafter, Nanger instigated co-accused to kill Mashooque Ali, on which appellant Niaz Hussain fired at Mashooque Ali, which hit him and he fell down. Accused Ghulam Abbas also fired at Mashooque Ali, which hit him at his leg. Accused Nadir and unidentified accused persons fired in the air. Complainant party raised cries, which attracted people, due to which the accused went away on their motorcycles. The injured was taken to Taluka Hospital Miro Khan, from where he was referred to CMCH, Larkana, where the injured succumbed to his injuries at 6.00 p.m. The dead body was brought at PS Mirokhan and FIR was lodged.

3. After registration of FIR, SIP Ghulam Asghar Khokhar, conducted investigation. He went at Taluka Hospital, Miro Khan, where dead body of deceased Mashooque Ali was lying. He prepared it's mashirnama and Danistnama. He handed over the dead body to PC Aftab Ahmed Korai for autopsy. He visited the place of incident, wherefrom he collected blood-stained earth and empties of pistols and guns. On 22.08.2012 he arrested accused Nangar Khan. He recorded statements of PWs u/s 161 Cr.P.C. He sent blood-stained earth to chemical examiner. He also arrested accused Niaz Hussain from District Prison, Larkana, who was confined there in another crime. After observing legal formalities, he submitted charge-sheet of this case before court of Civil Judge & JM, Miro Khan. The case being sessions trial was sent up to the Sessions Court, Kamber-Shahdadkot at Kamber.

4. During trial, accused Ghulam Abbas having obtained pre-arrest bail joined the trial, whereas fourth accused Nadir was declared proclaimed offender.

5. Accused Nangar, Ghulam Abbas and Niaz Hussain stood their trial. Charge against them for offence under sections 302, 337-H2, 114, 148-149, PPC was framed at Exh.7, to which they pleaded 'not guilty' and claimed to be tried. During trial, legal heirs of deceased Mashooque Ali entered into compromise with accused Ghulam Abbas. They moved applications under sections 345(2) and 345(6), Cr.P.C. After observing legal formalities both the applications were allowed. Ultimately, accused Ghulam Abbas was acquitted by the trial court, vide order dated 07.03.2016, in terms of section 345(6), Cr.P.C. However, prosecution proceeded with the case against accused Nangar and Niaz Hussain.

6. To prove its case, prosecution examined complainant Liaquat Ali S/o. Muhammad Khan as Exh.8, who produced FIR as Exh.8/A, PW Liaquat Ali S/o. Juman as Exh.9, Dr. Sikandar Ali as Exh.10, who produced Lash Chakas Form and postmortem notes of deceased Mashooque Ali as Exh.10/A & Exh.10/B, corpse bearer PC Aftab Ali as Exh.11, who produced receipt as Exh.11/A, PC Safeer Hussain as Exh.12, who produced mashirnama of imaginary arrest of accused Niaz Hussain as Exh.12/A, Tapedar Abdul Waheed was examined as Exh.15, who produced sketch of vardhat in triplicate as Exh. 15/A; 1.O/SIP Ghulam Asghar as Exh.16, who produced roznamcha entries Nos.I8 & 19, mashirnamas of inspection of dead body, place of vardhat and arrest of accused Nangar, Danistnama of dead body, report of Chemical Examiner of blood-stained earth as Exh.17/A to Exh.17/G respectively and mashir Muharram Ali was examined as Exh.17. Thereafter, learned State counsel closed side of prosecution case vide his statement as Exh. I8.

7. Statements of accused under section 342, Cr.P.C were recorded as Exh.19 & Exh.20, wherein they denied allegations of prosecution leveled against them and claimed their innocence. However, they neither examined themselves on oath as provided under section 340(2), Cr.P.C. nor led any evidence in their defence.

8. The trial Court framed following points for consideration:

I) Whether deceased Mashooque Ali died un-natural death?

II) Whether accused Niaz Hussain did commit murder of deceased Mashooque Ali by causing him firearm injuries, on date, time and place, as alleged by prosecution?

III) Whether accused Nangar instigated and shared his common object with co-accused in committing murder of deceased Mashooque Ali, on date, time and place, as alleged by prosecution?

IV) What should the judgment be?

9. After hearing learned ADDP for State and learned counsel for the accused as well as the complainant, the trial Court acquitted accused Nangar, however, it convicted and sentenced the appellant, as stated above. As a result, the appellant has filed instant criminal appeal to impugn the above conviction and sentence.

10. Learned counsel for the pauper appellant submitted that the F.I.R in instant case was delayed by about 12 hours, though the distance between police station and place of occurrence was only two furlongs; that PWs are related to each other; that PW Liaquat Ali S/o. Juman was resident of Dokri Taluka, some 40 Kilometers away from the place of incident, hence his presence at the place of incident at the relevant time was doubtful. He further went on to say that tapedar Abdul Waheed (Exh-1) has contradicted the place of incident; besides, the prosecution gave up PW Abdul Rasheed and mashir Nabi Bux. He further submitted that co-accused Nangar has been acquitted on same set of evidence; however, the appellant has been convicted. He, therefore, submitted that the prosecution has failed to establish the charge against the appellant, hence appellant may also be acquitted of the charge by extending benefit of doubt to him. In support of his contentions, he placed his reliance upon the cases reported as *Muhammad Akram v. The State* **(2009 SCMR 230)**, *Pathan v. The State* **(2015 SCMR 315)** and *Najaf Ali Shah v. The State* **(2021 SCMR 736)**.

11. Mr. Ali Anwar Kandhro, learned Addl. P.G. appearing for the State, opposed the appeal on the ground that delay in lodgment of the F.I.R was fully explained by the complainant. He further submitted that ocular testimony has been supported by the medical evidence and both PWs viz. the complainant and PW Liaquat have deposed very consistently to the extent of role attributed to the appellant and though both the said PWs were subjected to the lengthy cross-examination, even then their evidence was not shattered by the defence. Learned Addl. P.G. further submitted that the appellant remained absconder and was arrested subsequently by the police from jail on 06.05.2013, therefore, offensive weapon was not recovered from him. As far as acquittal of co-accused Nangar is concerned, learned Addl. P.G. submitted that Nangar was assigned the role of instigation only, whereas the appellant has been assigned specific role of causing firearm injury to deceased Mashooque Ali Gadehi, which resulted in his death. In support of his contentions, learned Addl. P.G. placed reliance upon the cases reported as *Abdul Khalique v. The State* **(2020 SCMR 178)**, *Iqbal alias Bhala and 2 others v. The State* **(1994 SCMR 1)** and case of *Arshad Beg v. The State* **(2017 SCMR 1727)**. While concluding

his arguments, the learned Addl. P.G. submitted that normal penalty for Section 302, PPC is death; however, the trial Court has already taken lenient view by awarding the lesser punishment to the appellant, therefore, no case for interference is made out. He, therefore, prayed for dismissal of instant criminal appeal.

12. I have heard learned counsel for pauper appellant and learned Additional Prosecutor General Sindh for the State and have gone through the record and the case-law cited before me.

13. The first objection raised by the learned counsel for the appellant to the impugned judgment is with regard to delay in registration of the FIR. Learned counsel submitted that though the police station was at distance of about two furlongs from the place of incident, even then the FIR was lodged with the delay of about 12 (twelve) hours. Reliance was placed on the case of *Muhammad Akram v. The State* **(2009 SCMR 230)**.

14. There is no cavil with the proposition that delay in lodging of the FIR is fatal to the prosecution case. However, every delay in lodgment of the FIR is not fatal to the prosecution case. It is only the unexplained delay which creates doubt in the prosecution case and benefit of such doubt has to be given to the accused, not as matter of grace but as a matter of right. In the present case, the delay in lodging of the FIR has been fully explained, as the deceased after sustaining injuries was shifted to Police Station Miro Khan, wherefrom a letter for his treatment was obtained then he was rushed to Taluka Hospital, Miro Khan and the M.L.O, keeping in view his condition, referred him to CMCH Larkana, where he breathed his last. In such a situation, when a person is fighting for his life, it cannot be expected that his relatives would leave him in such a precarious condition and would go to the police station and lodge an FIR. Even, in that case, it would be difficult to lodge a proper FIR, as the fate of the injured is yet to be determined i.e. whether he survives the assault or he succumbs to his injuries. Therefore, the delay so occasioned in lodgment of F.I.R in the present case has been fully explained and this plea is not helpful to the appellant.

15. The case of *Muhammad Akram v. The State* **(2009 SCMR 230)**, cited by the learned counsel has no relevance to the facts of instant case, as in the cited case there was unexplained delay of six months in lodging of the FIR and there were also other lacunas in the prosecution case.

16. The next objection raised by the learned counsel for the appellant was with regard to acquittal of co-accused Nanger on the same set of facts. In this regard a perusal of FIR clearly shows that the complainant has stated that accused Nanger was unarmed and the only accusation against him is that he instigated the other co-accused to kill the deceased. The trial court has also dilated on this point and has stated that accused Nanger was about 65 years of age at the time of incident and keeping in view his health condition, the trial Court observed that it was hardly possible that he would come to the place of wardat just to instigate co-accused for committing the offence. When a party of about six persons was coming with a common intention to kill a person, it makes no sense that although each member of the party was duly armed with some type of weapons, but one of them was empty-handed. The complainant himself stated that while the other five members of the accused party were fully armed with firearm weapons, the acquitted accused Nanger was unarmed. Apart from this, the complainant has also given specific role to the appellant that he fired at deceased Mashooque Ali, which hit him in his head and the bullet went through and through. However, no such overt role has been attributed to acquitted accused Nanger. Therefore, it cannot be said that on the same set of facts one accused has been acquitted while the other has been convicted and sentenced. While it has been proved by prosecution witnesses and medical as well as circumstantial evidence that appellant fired the fatal shot, which killed the deceased, there is nothing against the acquitted accused Nanger. Therefore, it cannot be said that the case of the two accused was identical. It is settled law that on the same set of facts one accused cannot be convicted while the other accused is being acquitted. However, in the present case, the facts with regard to both the accused are entirely different, as one was duly armed i.e. he had the intention to kill, while the other was not armed, therefore, such intention cannot be attributed to him; otherwise the question would arise as to

why he was not armed like other members of the party. In this view of the matter, acquittal of Nanger would be of no help to the present appellant, as the role assigned to the two is entirely different. At the same time, the trial court was of the opinion that even presence of accused Nanger at the place of wardat was doubtful. Therefore, it would not be just and proper to say that on the same set of facts, one accused was acquitted and the other was convicted.

17. Adverting to the contention of learned counsel for the appellant that the witnesses are near relatives of the deceased and are interested witnesses, therefore, their evidence cannot be relied upon. This contention is also devoid of any force, as the eye-witnesses have sufficiently explained the date, time and place of occurrence as well as each and every event of the occurrence. Where the witnesses fall within the category of 'natural witnesses' and narrate the details of the incident in a confidence-inspiring manner, then only escape available to the accused/ appellant is to satisfactorily establish that witnesses are not the witnesses of truth, but "interested" ones. An interested witness is not the one who is relative or friend of the deceased, but is the one who has a motive to falsely implicate the accused. No substance has been brought on record by the appellant to justify his false implication in this case at the hands of the complainant party. Even no suggestion was put to the prosecution witnesses that they have falsely implicated the appellant in the instant case on the basis of some enmity with them. The Hon'ble Supreme Court in the case of **Lal Khan v. State** (2006 SCMR 1846) has held as under:-

> "The mere fact that a witness is closely related to the accused or deceased or he is not related to either party, is not a sole criteria to judge his independence or to accept or reject his testimony rather the true test is whether the evidence of a witness is probable and consistent with the circumstances of the case or not. Thus, mere relationship of these eye-witnesses with the deceased alone is not enough to discard the testimony of the complainant and his witnesses."

18. The guilt of the appellant is further strengthened by the fact that co-accused Ghulam Abbas, who was assigned role of causing firearm injury from his pistol to deceased, later entered into compromise with the

complainant party, hence he was acquitted by way of compromise. This demonstrates that the co-accused had admitted his guilt and he knew his fate if he had faced the trial on merit.

19. The prosecution case mainly rests on the ocular testimony of eye-witness Liaquat Ali S/o. Muhammad Khan, who is complainant of the case and PW- Liaquat Ali S/o. Juman. PW-Liaquat Ali S/o. Muhammad Khan has stated in his evidence that when they were taking fuel at Magsi Petrol Pump the accused arrived there and appellant Niaz Hussain fired at deceased Mashooq Ali, which hit him on his right side of temple and the bullet exited from his forehead. He also stated that accused Abbas also fired at the deceased Mashooque Ali, which hit his right side of lower leg. Same version of the incident was given by another PW, Liaquat Ali S/o. Juman. There is not a least contradiction between the versions of two eye-witnesses of the incident. Both these prosecution witnesses deposed on the same line and their evidence could not be shattered while they were subjected to cross-examination.

20. The above ocular evidence of the two eye-witnesses is fully supported by the medical evidence, as PW-Dr. Sikandar Ali, who conducted the postmortem on the dead body of deceased Mashooque Ali, stated that the deceased sustained following injuries:

i) Lacerated punctured wound measuring about I cm x l cm skull deep at right temporal of skull (wound of entrance).

ii) Lacerated punctured wound 1 ½ cm x 1 ½ cm skull deep at frontal lobe of skull (wound of exit).

iii) Lacerated punctured wound 10 cm x 10 cm mussel deep at mid of right lower [leg] laterally (wound of entrance).

iv) Lacerated punctured wound I cm x 1 cm at mid of right lower leg medially (wound of exit).

21. Above evidence of the MLO fully corroborates the ocular evidence furnished by PWs Liaquat Ali S/o. Muhammad Khan and Liaquat Ali S/o. Juman. Both these witnesses were subjected to lengthy cross-examination, however, their testimony remained unshaken and un-shattered. They were consistent and unshaken in their evidence. The

learned counsel for the appellant could not point out a single contradiction or discrepancy in the evidence of these two eye-witnesses.

22. In the case of SHAFQAT ALI and others Versus THE STATE **(PLD 2005 Supreme Court 288)**, the Hon'ble Supreme Court of Pakistan, on the question of ocular account getting corroboration from medical evidence, was pleased to hold as under:

> "It may be noted that as far as medical evidence or expert's opinion is concerned, it is always treated to be confirmatory in nature and if there is ocular account fully reliable then the minor contradictions in medial and ocular evidence can be outweighed. In this behalf we are fortified with the judgment in the case of Muhammad Hanif v. The State (PLD 1993 SC 895)."

23. Apart from above, the alleged incident took place at about 8.30 a.m. in the month of August (2012), when there is ample light and the appellant was also known to the complainant party, therefore, no question of mistake in identity of the appellant arises. It is also not possible that the complainant party would nominate innocent persons for the murder of their relative and would allow the real culprit(s) to go scot-free when there is no doubt that deceased Mashooq Ali died unnatural death as proved by the medical evidence, which has gone unchallenged.

24. In the case of DADULLAH and another versus The State **(2015 SCMR 856)**, the Hon'ble Supreme Court has held as under:

> "The statements of all the above said witnesses fully connect the appellants with the commission of crime. They have narrated the story in a natural manner. All the witnesses remained consistent and corroborated each other. No mala fide could be attributed by the learned counsel for the appellants towards the witnesses as to why the appellants have been falsely involved in the present case and the actual culprits have been let off."

25. Furthermore, the I.O. had also secured empties from the place of incident, which corroborated the contents of F.I.R, hence the prosecution has very successfully established it's charge against the appellant by adducing strong ocular as well as medical and circumstantial evidence. The trial Court has rightly convicted and

sentenced the appellant and has also rightly acquitted the co-accused Nanger.

26. So far as the recovery of the weapon is concerned, it has come on record that the appellant was fugitive from law for a long period and as such the weapon could not be recovered from his possession. However, other evidence i.e. ocular evidence supported by medical and circumstantial evidence, produced by the prosecution is so strong and unimpeachable that the guilt of the appellant has been proved beyond any shadow of doubt. Same is the position with regard to given-up witness. In a case where guilt of the accused is proved by cogent and reliable ocular evidence and is supported by medical and circumstantial evidence, he cannot be acquitted on mere ground that one of the many witnesses was not examined by the prosecution.

27. The learned counsel for the appellant placed reliance on the case of Muhammad Akram v. The State **(2009 SCMR 23)**, to argue that it is not necessary that there should be many circumstances creating doubts in the prosecution case to entitle the accused to benefit of doubt. If a slightest doubt is found in the prosecution case, the benefit of such doubt must go to the accused. I totally agree with this legal proposition. However, the learned counsel was unable to point out a slightest doubt in the present case, of which benefit could be extended to the appellant. Therefore, this case as well as the other cases relied by the learned counsel for the appellant are not helpful to him, as they are distinguishable on facts.

28. In the case reported as MUHAMMAD BAQIR Versus The STATE and another **(2022 SCMR 363)**, following observations made by the Hon'ble Supreme Court are fully applicable on various points raised in the present case viz. delay in lodging FIR, previous enmity between the parties, the identification of the accused and the ocular evidence corroborated by medical evidence:

> "Although the matter was reported to the Police after about 4 hours but keeping in view the inter se distance between the place of occurrence and the police station i.e. 18 kilometers and the fact that in such like situations, the people firstly try to save the life of injured, the same would be considered a promptly lodged FIR. Previous enmity between the parties is not denied.

> The instant occurrence has taken place in broad daylight whereas the parties are known to each other, therefore, there is no chance of mis-identification. The injury ascribed to the respondent is fully supported by medical evidence."

29. So far as the objection raised by the learned counsel for the appellant with regard to given-up witnesses, it may be pointed out that withholding of important evidence leads to an adverse inference against the prosecution keeping in view Article 129(g) of Qanun-e-Shahadat Order, 1984; however, this suggestion is not helpful to the appellant, as the prosecution has brought concrete material to prove it's charge against the appellant and nothing adverse has been proved to discard the evidence produced by the prosecution.

30. Learned counsel for the appellant also argued that witness Liaquat Ali S/o. Juman was resident of Taluka Dokri, which is some 40 Kms away from the place of incident, hence his presence at the spot is doubtful. A perusal of the FIR shows that the complainant has also been shown as former resident of Dokri town and now living in Miro Khan. Even otherwise, since the said witness, Liaquat Ali S/o. Juman, is admittedly cousin of the complainant and the deceased, therefore, he cannot be termed as chance witness, as a cousin can always visit his family members living at distance.

31. The trial Court has also observed that "*the accused neither could courage to make statement on oath in terms of section 340(2), Cr.P.C. nor produced witness in his defence."* I do not agree with this observation of the trial court. It is a trite law that prosecution had to stand on its own legs to prove its case beyond reasonable doubt and in this regard reference cannot be made to the non-examination on oath by the accused under section 340(2), Cr.P.C. or failure of the accused to lead evidence in his defense. In case the appellant declined to examine himself on oath under section 340(2), Cr.P.C. or he did not produce any evidence in his defense, it does not mean that he is guilty. It is the bounden duty of the prosecution to prove its case against the accused beyond any reasonable doubt. In the present case, the prosecution has been able to discharge its duty vis-à-vis proving the charge against the appellant beyond any shadow of doubt. There was no need to make

reference to section 340(2), Cr.P.C. in the above sense, as no adverse inference can be made against an accused if he has not examined himself on oath under the above provision of law.

32. It also transpires from the record that the appellant remained absconder for considerable time, while one of the co-accused was declared proclaimed offender and his case was separated from this case. In the cases reported as *Awal Khan and others v. The State* **(PLD 1985 SC 402)** and *Raza Khan v. State* **(2013 MLD Peshawar 810)** it was held that it is settled law that fugitive from law loses some of the normal rights granted by the procedural and substantive law and noticeable abscondence disentitles the absconder to the concession of bail notwithstanding merits of the case. Thus, if a person absconds from law and remains a fugitive then a negative inference can be made against him, unless his abscondence is explained.

33. In view of the above discussion, I find no merit in this appeal, which is dismissed and the conviction and sentence awarded to the appellant vide the impugned judgment is hereby maintained to the extent of the appellant only.

34. This criminal appeal was heard on 11.04.2022 and was dismissed by a short order in the following terms:

> "Heard arguments. Perused the evidence available on record. For the reasons recorded to be later on, instant appeal is hereby dismissed. Consequently impugned judgment dated.10.08.2018 handed down by Sessions Judge, Kamber Shahdadkot at Kamber in Sessions Case No.482 of 2012 to the extent of appellant only, is hereby maintained."

35. Above are the detailed reasons for my short order dated 11.4.2022.

Larkana, the 14th April, 2022. Judge