IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 265 of 2015

Appellant	:	Abdullah Gopang through Ms. Abida Parveen Channar, Advocate
Respondent	:	The State through Ms. Anila Malik, APG

JUDGMENT

Omar Sial, J.: Abdullah Gopang was accused of murdering Majno Thahim on 28.10.2011. After a trial, the learned 2nd Additional Sessions Judge, Thatta vide his judgment dated 30.5.2015 sentenced Abdullah under section 302(b) P.P.C. for an imprisonment for life as well as pay a compensation of Rs.200,000 (or in default of payment spend another six months in jail). Abdullah Gopang has impugned the said judgment against him in these proceedings.

2. The prosecution story in this case is that Abdullah borrowed Rs. 10,000 from Achar and at 9:00 p.m. on 28-10-2011 he called Achar to come to his house so that he could return Achar's money. Achar, his brother Majno and their friend Akber Thahim then went to Abdullah's house. Abdullah kept them waiting for a long time and at about midnight gave them Rs. 3,000 and refused to return the remaining Rs. 7,000. An altercation broke out between the parties in which Abdullah pulled out a pistol and shot Majno on his arm. Majno died subsequently and on 29-10-2011 at 1800 hours an F.I.R. No. 79 of 2011 under sections 302 and 504 P.P.C. was registered at the Jeti police station on the complaint of Achar.

3. **Achar Thahim**, the complainant of the case was examined as the first prosecution witness. **Akbar Thahim** s/o Mitho was examined as the second prosecution witness. According to the prosecution, Akbar was an eye witness to the incident but according to Akbar himself he was not present on the scene that night. The third prosecution witness was **Mohammad Rahim Thahim**. He testified that Abdullah had confessed to him that he had killed Majno. The fourth prosecution witness was **Dr. Ghulam Qadir** who conducted the post mortem examination of the deceased. **Usman Thahim** was the fifth prosecution witness. He was said to be a witness to the inspection of the place of incident as well as the recovery of the crime weapon. At trial he

completely denied that he was witness to either. **Mumtaz Parheri** was examined as the sixth prosecution witness. He was the tapedar who had prepared the sketch of the scene of incident. The seventh prosecution witness was **Inspector Noor Mustafa** who was the investigating officer of the case. **Ali Nawaz Thahim** was the eighth witness who testified that Abdullah had confessed to the murder of Majno to him. Uris Thahim was examined as the last prosecution witness. He was the witness to the memos of inspection of the scene of incident as well as the arrest of Abdullah and the recovery of the crime weapon made subsequently from him.

4. The appellant recorded his statement under section 342 Cr.P.C. on 21-4-2015 and pleaded innocence. He also examined himself on oath under section 340(2) Cr.P.C. The version Abdullah gave of the incident was that he was sleeping inside his house when at about 1:00 a.m. he heard the sound of an intruder in his house which happened to be Majno. Abdullah then heard a gunshot being fired from the outside his house which shot hit Majno. Majno was then taken away by Achar.

5. I have heard the learned counsel for the appellant as well as the learned A.P.G. and examined the record with their able assistance. The complainant failed to effect an appearance in spite of notices. My observations are as follows.

6. One piece of evidence which the prosecution relied upon at trial was that Achar (the brother of the deceased and the complainant) and Akber Thahim s/o Mitho (a friend of Achar's) were eye witnesses to the crime. Achar's testimony with regard to the place where the incident occurred is sketchy and confusing. He testified that the four of them were sitting in the otaq of Abdullah's house on the date of the incident but that the firing incident occurred inside the house of Abdullah. In a conservative rural setting, the guests sitting in the otaq and not entering the private space of their host makes absolute sense. Achar in his testimony confirmed that "*the incident of this crime took place inside the house of accused Abdullah.*" Achar also testified that when he was taken along by the police and the two witnesses to the memo of inspection of place of incident "*I did not go inside the house of the accused while mashirs Uris and Usman entered in the house of the accused and pointed out the place wherefrom the fire shot was made by the accused.*" Why were Uris and Usman going inside the house to inspect the place of incident and Achar remained outside is not explained nor is it explained as to how Uris and Usman would know what happened the fateful night when they themselves were not even present. It also appears that Achar during his cross examination on this aspect of the incident implicitly suggested as if the fire shot was made from inside the house of Abdullah whereas Majno was on the outside. This

implicit version was not what Achar had narrated in the F.I.R. or as a matter of fact in his examination-in-chief at trial. I also observe that Mohammad Rahim testified that it was he who had informed Achar about the murder of Majno and that Achar had reached the spot later at about 2:00 a.m. Mohammad Rahim's testimony was accepted by the prosecution. Needless to say when two versions of whether Achar was present or not on the spot were recorded and accepted without challenge, doubt was created as to the credibility of the witnesses. I am not satisfied that Achar was even present at the time of the murder as he recorded in the F.I.R. and his testimony at trial.

7. While Achar's version at trial was that Majno and Akbar Thahim s/o Mitho had accompanied him to Abdullah's house and that all three were witnesses to the crime, at trial Akbar Thahim s/o Mitho gave a completely different picture. He denied that he had ever visited Abdullah's house along with Majno and Achar that night nor that he saw Abdullah shoot at Majno. Instead, Akbar testified that on the night of 28-10-2011 he was woken up by one Mohammad Rahim and one Akbar s/o Ibrahim who told him that Majno had been killed. He went to the police station where he was informed that Abdullah was already inside. Akbar also denied that the police had ever recorded his statement under section 161 Cr.P.C. The prosecution declared Akbar to be a hostile witness and cross examined him but Akbar said nothing which would support the prosecution case in any manner.

8. Achar said at trial that Uris and Usman had witnessed the inspection of the place of incident and that he (Achar) had identified the same to the police. Usman (who was also said to have witnessed the arrest of Abdullah and recovery of the crime weapon) did not support the prosecution case and testified that he was not a witness to the inspection of the scene of the crime; that the first time he saw the appellant was at the police station on 29-10-2011; that the crime weapon was not recovered in his presence; that the police had merely shown him the recovered gun at the police station; and that the police had made him sign a bunch of papers at the police station. Contrary to what Achar had testified, Uris testified that the place of incident was identified by him to the police.

9. The conclusion of the foregoing observations to me is that the prosecution could not establish that the eye witnesses of the crime actually witnessed the incident.

10. The post mortem of the deceased was conducted by Dr. Ghulam Qadir. His report shows that two firearm injuries were found on the body of the deceased, which is contrary to Achar's testimony that the accused fired one shot from his shotgun and that

of Uris (witness to the dead body inspection who testified that the deceased had sustained one firearm injury on his back) supporting yet again the fact that Achar was not present on the spot when the incident occurred and had wrongly at trial claimed to be an eye witness. Whether Uris was present is also debatable, especially in light of the testimony of his co-witness to the memos as well as him testifying one injury less than actual and stating that the deceased wore a brown shalwar kameez when he actually wore a blue one. The description of the injuries given by the doctor does not seem to support the fact that a shot gun was used from some distance, however, the doctor in his testimony stated that he had recovered pellets from the body of the deceased, which pellets were sealed and handed over to the police. It appears that the said bottle with the pellets was not produced at trial. What corrodes the evidentiary value of the post mortem conducted is that doctor himself admitted at trial that "*It is correct to suggest that I was not MLO at that time when I conducted the post mortem of the deceased, it is correct to suggest that I have not got training of MLO.*"

11. It was the prosecution case that on 9-11-2011, Abdullah, who was in police custody then volunteered to produce the shot gun with which he had killed Majno. He told the police that after killing Majno he had wrapped the shotgun and its license in a plastic bag and had hid it in a ditch behind his house. The memo of recovery notes that the shotgun was found with one red colored used cartridge inside it and that the barrel of the gun was smelling of ammunition powder. Although the recovery was made on 9.11.2011, the same was not sent to the Forensic Science Laboratory till 3-5-2012 i.e. after a period of six months. Why the delay took place, where was the case property stored safely in the interim and whether it reached the FSL in an untampered condition was not explained at trial nor evidence led at trial to establish the same.

12. Another piece of evidence on which the prosecution relied was the confession of Abdullah Gopang to Mohammad Rahim and Ali Nawaz Thahim that he had killed Majno. The "confession" made to these two individuals by Abdullah will fall within the ambit of what are termed as extra-judicial confession as the same were admittedly made to private persons and before a magistrate or in court. Superior courts have consistently held that for any confession to be taken into account to convict a person the same must be free and voluntary and made in a fit state of mind. While an extra judicial confession should be treated with great care and caution, the same may be relied on, unless specifically barred by the Qanun-e-Shahadat Order, 1984, and form basis of conviction if they pass the test of credibility. It must be seen whether the witness who testifies that the confession was made before him is neutral, credible, truthful, unbiased and that he

has no reason or motive to attribute an untruthful statement to the accused. The words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime. It is against the backdrop of the foregoing conditions that I have examined the confession made by Abdullah.

13. Mohammad Rahim testified that he was Achar's neighbor and that there is a distance of one and a half kilometers between the house of the accused and the village. On 28-10-2011, at about 11:30 p.m. he received a phone call from his younger brother Ali Nawaz that Abdullah had killed a person. Both Rahim and Ali went to Abdullah's house where Abdullah confessed that he had killed a person who was lying some distance away. Rahim accompanied Ali and Abdullah to the place where the dead body was lying and the two then identified the dead as being Majno. Rahim however admitted that the police had not recorded his statement. Ali Nawaz, who was not a prosecution witness in the case when the final report under section 173 Cr.P.C. was filed by the police, was summoned as witness by the prosecution at trial after moving a section 540 Cr.P.C. application. Ali Nawaz admitted at trial that the police had not recorded his section 161 Cr.P.C. statement and that he had not disclosed the facts which he was testifying in court to the police prior to his appearance in court nor had the police inquired from him about the same. It seems odd that the investigating officer did not deem it necessary to include these two witnesses in his investigation as they were the most material for the prosecution. These two witnesses not having being examined during investigation has to be kept in mind in the back drop of an F.I.R. registered by Abdullah a few hours prior (being F.I.R. No. 78 of 2011) to the F.I.R. from which this case arises (being F.I.R. No. 79 of 2011). It was the prosecution version that Abdullah had himself registered this F.I.R. in which he had recorded that he lives with his daughter Aisha; that Majno was a man of bad character; on 28-10-2011 the family was sleeping in the courtyard of their house when at past midnight (29-10-2011) he heard a sound and saw a person with a hatchet standing next to the bed of Aisha. The intruder threatened Abdullah with the hatchet upon being caught in the house upon which Abdullah opened fire on him with his gun. The intruder ran away. Abdullah phoned Allah Bachayo Thahim and his son Lohar Thahim and disclosed the incident to them. They came to his home and in torch light traced footsteps of the intruder which led them to the dead body of Majno. It is this F.I.R. that appears to have weighed heavily on the learned trial court in convicting the appellant. I have given the contents of this F.I.R anxious thought from the perspective of whether the appellant could have been convicted for the murder of the Majno based on this F.I.R. In my opinion, the fact that the F.I.R. was lodged with a different version will not suffice as a "confession", as has been argued by the learned

A.P.G. My reasons for not so holding are that the version given in the F.I.R. does not contain a categorical confession of by the appellant that he had murdered Majno; secondly, the F.I.R. gives a completely different version of what happened that night compared to what the prosecution in this case has alleged; thirdly, the police after investigating the matter reached the conclusion that the F.I.R. should be dismissed in C Class; in the said F.I.R. it is stated by the appellant that he had called Allah Bachayo and Lohar Thahim and told them about the incident whereas the prosecution case was that it was Mohammad Rahim and Allah Nawaz who had been contacted by the appellant; the appellant was not confronted with the F.I.R. in his section 342 Cr.P.C. statement. The prosecution which is relying on the F.I.R. as a "confession", itself had earlier held it to be false but it appears that after the lacunas in the case were created at trial, in appeal the same ground is being raised.

14. Keeping in mind the aforementioned observations, the recovery of the crime weapon allegedly on the identification of the appellant also becomes suspicious. The pellets that were ostensibly recovered from the body of the deceased were not matched with the cartridge that was in the gun. The FSL report merely states that the pellets were of a gun cartridge but it does not say that they were pellets of the same cartridge that was sent for analysis. I also find it strange that the appellant would bury his gun along with his license. Usman, being a witness to the recovery did not support the same. As mentioned above, the case property was sent to the FSL after six months of being seized. I find the explanation (in his section 342 Cr.P.C. statement) given by the appellant as to the recovery made to be more credible than the one given by the prosecution.

15. The circumstances under which the appellant was arrested are also doubtful. The official prosecution version was he was arrested on 29-10-2011 at 1920 hours. Witnesses have not supported this version. As mentioned above, Usman (witness to the memo) did not support the prosecution case whereas Uris (the other witness to the memo) testified that the appellant was arrested at 10:00 a.m.

16. It appears to me that the investigating officer of the case has tinkered with the manner in which events that led to the death of Majno unfolded and appears to have created a story about the presence of eye witnesses at the time the incident occurred and the circumstances in which it occurred. In his exuberance to create witnesses he perhaps let go of conducting a fair investigation on the information that was given by the appellant in the earlier F.I.R that he lodged. The effect of the maneuvering has

impacted the present case and has led to the creation of doubt, the benefit of which must go to the accused.

17. To conclude: the testimony of the witnesses is doubtful; the presence of the complainant on the spot is doubtful; witnesses have not supported the prosecution case in material aspects; the “confessions” made by the appellant are vague and not corroborated; the manner in which the arrest of the appellant took place is doubtful; the manner in which the alleged recovery was made is doubtful; the accuracy of the post mortem conducted is doubtful; the case property being sent for analysis after six months without any evidence as to its safe keeping makes the reports doubtful; possible manipulation of facts by the investigating officer makes the entire case doubtful. The Hon’ble Supreme Court in a number of cases has held that even one doubt is sufficient to acquit an accused. This is a case where several doubts existed, the benefit of which should have gone to the accused.

18. For the above mentioned reasons I am left with no option to allow the appeal and acquit the appellant of the charge. He may be released forthwith if not required in any other custody case.

JUDGE