

**IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Appeal No. 174 of 2017

Appellants : Fateh Ali & Raza Ali  
through M/s. Asadullah Memon & Jamshed Iqbal,  
Advocates

Respondent : The State  
through Mr. Muntazir Mehdi, Addl.P.G.

Date of hearing : 9<sup>th</sup> December, 2022

**JUDGMENT**

**Omar Sial, J.** F.I.R. No. 661 of 2010 was registered on 09.09.2010 under sections 148, 149, 324, 452, 354, 504, 337-H(ii) and 427 P.P.C.. The F.I.R. was registered at the Shah Latif Town police station by Mohammad Muzaffar who reported an incident that had occurred the previous day i.e. on 08.09.2010. Muzaffar reported that Mohammad Yousuf Butt resides in the Radio Pakistan Colony along with his sons Mohammad Ali, Raza Ali and Fateh Ali and that they often quarreled with Muzaffar and his family. On 08.09.2010 Muzaffar was informed over the phone by his elder brother Mohammad Akhtar that Mohammad Yousuf along with his 3 sons as well as some others had inflicted bullet injuries to their 2 brothers, namely Mazhar and Mudassir. When the complainant reached the hospital where his brothers had been taken by then, Mudassir told him that at 11:15 p.m. he had witnessed that Mohammad Yousuf Butt and his 3 sons as well as about 40 other persons had shot at Mazhar and when Mudassir went to save him, he too sustained bullet injuries. All the accused had then entered their house and created a ruckus and damaged property inside and outside the house.

2. Mohammad Yousuf Butt, his 2 sons, namely, Fateh Ali and Raza Ali, and 3 others, Moin Akhtar, Mohammad Faheem and Shujat Ali were finally charged on 19.06.2012. They all pleaded not guilty and claimed trial. At trial

the prosecution examined **PW-1 Mohammad Mazhar Hussain**, the injured brother of the complainant. **PW-2 Mohammad Mudassir**, the injured brother. **PW-3 Zahid Hussain** claimed to be an eye witness. **PW-4 Dr. Nasreen Qamar** came to trial to identify the signatures of Dr. Hussaini Zeeshan who had provided medical treatment to the 2 injured but who had died by the time of the trial. **PW-5 S.I. Mohammad Ilyas** registered the F.I.R. **PW-6 S.I. Mohammad Hussain** was the investigating officer.

3. The accused all professed innocence in their section 342 Cr.P.C. statements. At the end of the trial the learned 3<sup>rd</sup> Additional Sessions Judge, Malir on 08-04-2017 convicted Fateh Ali and Raza Ali for an offence under section 324 and 337-H(ii) PPC and sentenced them to a 5 year prison term and ordered them to pay a fine of Rs. 10,000 each. If they did not pay the fine they would have to spend another one month in prison. All other accused were acquitted.

4. Fateh Ali and Raza Ali have challenged their conviction through this appeal whereas Criminal Acquittal Appeal No. 217 of 2017 was filed by Muhammad Mazhar Hussain against the acquittal of Muhammad Yousuf, Moin Akhtar, Muhammad Faheem and Shujat Ali. The acquittal appeal was dismissed as withdrawn on 03-12-2019.

5. I have heard the learned counsels for the appellants as well as the learned Additional Prosecutor General. The learned counsel for the appellant has argued that there was not an iota of evidence against the appellants and that as Muhammad Yousuf Butt had been acquitted, the same concession was due to the remaining accused as their case was on a better footing than that of their fathers. The appellant's counsel has also filed written arguments which are a part of the record and therefore for the sake of brevity are not being reproduced. The learned Addl. Prosecutor General very candidly conceded that the case of the 2 appellants was on a better footing than that of their father Muhammad Yousuf Butt. No one has effected an appearance on behalf of the complainant despite notice. My observations and findings are as follows.

6. An unusual thing in this case was that the complainant of the case i.e. Mohammad Muzaffar himself did not come at trial to testify. Neither his own brothers nor the investigating officer of the case could locate him and finally a statement was filed in court that he was untraceable.

#### Injured persons

7. PW-1 Mohammad Mazhar Hussain was ostensibly one of the injured persons. In his examination-in-chief he said that while he was sitting with his friend Zulfikar he saw that Mohammad Yousuf Butt, Ali Butt, Fateh Butt, Raza Butt and Adnan Butt were all firing at him. He stated that a bullet hit on the right side of his back and he fell down whereas Zulfikar ran away. According to this witness, when his brother Mohammad Mudassir came to save him the same people also fired at him which fire hit Mudassir on the left of his chest. Mazhar said that he was taken to Abbasi Shaheed Hospital for treatment and it was after "some days" that the police recorded his statement.

8. Mazhar's testimony was highly unreliable and sketchy. He also seemed to have had made massive improvements at trial from what he had recorded in his section 161 Cr.P.C. statement. While a number of such improvements were reflected in his cross examination, one of the most important one was that in his section 161 Cr.P.C. statement he had recorded that he did not know whose fire had hit him. In his statement Mazhar had said that he received 2 bullet injuries whereas at trial, perhaps he forgot what he said earlier, and said that he received one injury. Mazhar appears to be a dishonest witness. A person who was hit by 2 bullets would never ever in his life forget the number of injuries he had sustained. I find it odd that Mazhar did not remember. In his cross examination he recorded that his statement was recorded 8 to 10 days after the incident. No reason was given for this delayed recording by either him or the investigating officer. This witness also recorded that no inhabitant of the house in which it was alleged that the accused had entered and damaged property was recorded. The Supreme Court of Pakistan has held that a delayed recording

of a section 161 Cr.P.C. statement by an eye witness without any plausible or logical reason for the delay reduces its evidentiary value to zero. Reference in this regard may be made to **Sajid Hussain alias Jogi vs The State (PLD 2021 SC 898)**, **Abdul Khaliq vs The State (1996 SCMR 1553)**, **Noor Mohammad vs The State and another (2020 SCMR 1049)** and **Muhammad Asif vs The State (2017 SCMR 486)**.

9. The story of how Mazhar saw his brother Muddasir get shot was also unbelievable. According to Mazhar when he got shot he fell down on the ground and became unconscious. He corrected himself by saying that he had gone in a shock and that within that period his brother had come out and hence he saw him get shot to. If true, Mazhar indeed did have exceptional qualities of observation. He claimed that his brother Akhtar and a neighbor Naseem came to help both injured brothers. None of these persons, Zulfiqar (who ran away when Mazhar got shot), Akhtar (Mazhar's brother) or Naseem (Mazhar's neighbor) were witnesses at trial. While in appropriate cases one can understand the reluctance of people to act as witnesses, this was a case where Mazhar could not even get his own brother, friend and neighbor to testify in his support.

10. Whether Mazhar was even injured was not proved at trial. Mazhar while saying that he had been taken to Abbasi Shaheed Hospital immediately upon being injured, admitted that he could not produce any evidence to show that he was indeed taken to the hospital. He further admitted that on the same day but earlier Mohammad Yousuf Butt had lodged F.I.R. 662 of 2010 against him. Mazhar appeared to be a dishonest witness. Even otherwise he admitted that he had not seen who fired at him.

11. PW-2 Mohammad Mudassir also claimed to be injured in the incident. This witness apart from stating that he saw Mohammad Yousuf Butt, Raza Butt, Fateh Butt and Adnan along with 30 or 35 other people all firing on Mazhar and then Mohammad Yousuf Butt also fired at him (i.e. Mudassir) and he sustained a bullet injury on his chest. This witness

introduced 2 other characters, both his brothers, who had taken the injured brothers to the hospital; these were Mohammad Azhar and Mohammad Mudabbir. Both these brothers themselves did not come and testify. This witness also said that he was taken to Abbasi Shaheed Hospital when injured; however; he too could produce no evidence to back it up. His dishonesty is shown by the fact that at trial he completely took a somersault and said that Faheem, Naeem and Shujaat (the remaining accused) who he had expressly nominated in his section 161 Cr.P.C. statement as firing upon the 2 brothers, were innocent. Apart from a vague allegation that about 40 persons had fired at his brother PW-1 Mohammad Mazhar, it was Mohammad Yousuf Butt who had solely fired and hit him. As mentioned above, Mohammad Yousuf Butt was acquitted.

#### Eye witness

12. It was claimed by PW-3 Zahid Hussain at trial that he was an eye witness to the incident. This witness had a different story. According to him he saw that Mohammad Yousuf Butt was the person who fired and injured Mohammad Mazhar. He explained his presence on the spot by saying that he was visiting a friend named Asghar and was having tea with him at 11:15 p.m. when he witnessed the incident. Asghar, of course did not record a statement corroborating what Zahid said at trial. Upon hearing the firing Asghar had gone inside the house whereas Zahid had hid behind a tree and watched the scene. This man too, like the 2 witnesses before him, had been nominated in an F.I.R. by the accused party in which one Adnan had been injured. He also admitted to a number of improvements in his testimony from what he had recorded in his section 161 Cr.P.C. statement. While I do not believe this witness too. At best, he too said that it was Mohammad Yousuf Butt who fired at Mazhar.

#### Investigation

13. PW-6 Mohammad Hussain stated at trial that none of the prosecution witnesses had stated in their section 161 Cr.P.C. statements any particular role of any of the accused nor had they told him as to what

weapons they carried. He acknowledged that he had not recorded the statement of any doctor who had treated the injured; that he had not prepared a memo of description of injuries; that the memo of site inspection he made did not show that there was blood at the place of occurrence; that in the memo of site inspection he had prepared it was written that Mazhar had received 2 firearm injuries and that in the medical certificate issued only one injury was shown; that even the injury shown on the medical certificate was an exit wound; that he had not investigated anybody else and had relied upon the witnesses who were produced before him by the complainant himself; that though it was a walled compound with one gate, he had not even questioned the watchman; he acknowledged that the medical certificate did not have a stamp of the doctor on it. What PW-6 Mohammad Hussain did cannot be called investigation from any stretch of imagination. It was claimed by the prosecution that at least 40 people had entered the Radio Pakistan Colony, a gated community, and had resorted to indiscriminate firing and causing extensive damage to houses and cars and other property; yet, apart from the 2 injured brothers and an associate of theirs nobody else in the entire colony was questioned or statements recorded by the investigating officer. Not even one case of anything being damaged was shown at trial. The witnesses were dishonest. Improved materially their statements at trial. Important witnesses did not testify at trial and no cogent reason for their absence was given. A vague, generalized and what also appears to be false, allegation was raised against the appellants. No witness attributed a specific role to the appellants. The weapons which they had allegedly brought were not identified by any witness let alone recovered. Medical evidence was dubious. No recovery was made. Finally, the only person who was assigned somewhat of a direct role i.e. Mohammad Yousuf Butt, was acquitted by the learned trial court as well as this court. Evidence suggests that he was also implicated falsely in this case.

14. In view of the above, I am of the view that the prosecution did not prove its case at all let alone not proving it beyond reasonable doubt. I have no qualms in setting aside the impugned judgment and allowing the appeal. The appellants are acquitted of the charge. They are on bail. Their bail bonds stand cancelled and sureties discharged.

**JUDGE**