IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 105 of 2012

Appellant : Taj Muhammad
through Mr. Muhammad Bilal Rashid, Advocate

Respondent : The State
through Mr. Talib Ali Memon, APG

Date of hearing : 26th October, 2022

JUDGMENT

Omar Sial, J.: Muhammad Yameen along with his uncle Muhammad Ayoub were cutting trees at 7:45 a.m. on 09.05.2008 when 3 men identified as Taj Mohammad (the appellant) armed with a gun, Abdul Latif armed with a pistol and Muhammad Ali holding an iron bar came to them and objected to the tree cutting. An altercation between the 2 parties occurred during which Taj Mohammad fired from his weapon on Muhammad Yameen, which shot hit him on his head and killed him. Abdul Latif fired and hit Muhammad Ayoub on his leg whereas Muhammad Ali also beat Ayoub with the iron bar. The commotion attracted 2 other persons nearby who were Mir Muhammad and Abdul Ghani. Both these men tried to intervene and pacify the attackers however the damage was done. The 3 attackers then left the scene. F.I.R. No. 23 of 2008 was registered under sections 302 and 34 P.P.C. at the Darro police station at 11:15 p.m. the same day.

2. The accused pleaded not guilty and claimed trial. After a full dress trial, the leaned Sessions Judge, Thatta, on 21-2-2012 found Taj Mohammad guilty for the murder of Yameen. He was convicted under section 302(b) P.P.C and sentenced to a life in prison. He was also directed to pay a Rs. 300,000 compensation to the legal heirs of the deceased, and if he failed to do so he would have to spend another year in prison.

3. The counsels have informed me that Muhammad Ali and Abdul Latif have already been released after completing their sentences and that both

these gentlemen did not file appeals against their conviction and sentence. It is therefore only Taj Muhammad who filed this appeal. I have therefore not taken into consideration the evidence recorded against the former 2 accused.

4. I have heard the learned counsel for Taj Muhammad as well as the learned APG. The complainant did not engage a counsel. His brother was however present in person as the complainant according to the counsel had died. The brother too, declined to engage a counsel had put his faith in the learned APG. The arguments of the counsel are not being reproduced for the sake of brevity but are reflected in my observations and findings below.

Eye witnesses

5. Apart from the injured complainant Ayoub, there were 2 other eye witnesses; Mir Muhammad and Abdul Ghani. Learned counsel has argued extensively that both these gentlemen were not really present and had been created as eye witnesses to strengthen the prosecution case. In order to support his submission he first argued that both the eye witnesses were related to Ayoub and thus were interested witnesses. Learned counsel was also of the view that all 3 eye witnesses have given different accounts of where they were placed when the incident occurred and what role did they play. According to Ayoub the 2 eye witnesses had arrived immediately after the incident and that they had also pleaded with the attackers not to hurt Ayoub and Yameen; PW-2 Mir Mohammad said that when the 2 eye witnesses came to the scene the attackers along with the weapons left the scene. He did not say that there was an exchange of dialogues between the 2 witnesses and the attackers; PW-3 Abdul Ghani said that he and Mir Mohammad came to the scene after hearing the commotion and saw the incident take place. Learned counsel has relied on the foregoing to show that the eye witnesses were not present on the spot.

6. With much respect I am not convinced with the argument given by the learned counsel. He is correct to the extent that there is a contradiction

between the versions given by the 3 witnesses, however, the contradiction is of such a trivial nature that it can hardly be said to have an iota of an adverse impact on the prosecution case. The eye witnesses have all corroborated and supported each other on all material points of the incident. Their relationship with the complainant, without any reason being attributed, cannot be the basis of discarding their entire testimony. I find all 3 eye witnesses to be truthful and their testimonies confidence inspiring and trustworthy. Nothing said by any other witness or they themselves was of such a nature that would impact negatively their credibility.

Medical Evidence

7. Learned counsel first submitted that Dr. Rafique Ahmed Soomro, who had conducted the post mortem could not be believed as he was an interested witness being on "*dining terms*" with Ayoub. He was also of the view that blackening was found on the entry wound of the deceased. This, according to him, would suggest that the fire was made at a very short range but that Ayoub in his evidence had said that Taj Mohammad was at a distance of "5 or 6" feet from Yameen when he had fired at him. Further, counsel was of the view that the medical opinion does not reconcile with the ocular version. Why he argued this was because Ayoub, at trial, said that the pellets hit Yameen on his head although in the F.I.R. he had recorded that the fire hit Yameen on his forehead. PW-2 Mir Mohammad said at trial that the fire hit Yameen on his forehead whereas PW-4 Dr. Rafiq Soomro said that the injury was on the right eye and ear region.

8. I am not entirely convinced with the argument of the learned counsel that the medical evidence does not reconcile with the ocular version. Simply because the doctor had "*dining terms*" with Ayoub would not *ipso facto* mean that he would draw up a wrong report. It would be the likely behavior of a person who had been exposed to such a trauma as Ayoub had, to seek solace from professionals known to him. There was nothing which came in evidence that would even remotely indicate that the report given by Dr. Soomro was incorrect. There is nothing in the report to be

incorrect about. Yameen was shot in the head and that is what the doctor reported. All witnesses testified the same thing. Learned counsel's argument that the seat of injury, according to the witnesses, ranged from the forehead to the top of the head to the right of the forehead carries no weight. Witnesses, exposed to such trauma, cannot be expected to give a precise spot where the bullet hit a deceased. The seats of injuries given by the witnesses and the doctor, at best, are at a deviation of a couple of inches, however all testified that he was hit on the top of his head. As regards the blackening, once again, how close or far the shooter was, cannot be measured precisely and is an approximate indication of the distance. Usually a shot made from a distance of 2 to 3 feet is said to cause blackening at the point of entry, however, the approximate distance given by Ayoub i.e. 5 to 6 feet would be very close to 2 to 3 feet if one kept into mind the length of a double barrel shot gun as well as the extension of the shooters arm. It is also pertinent to mention that the blackening was also found on the injury sustained by Ayoub, which reconciles perfectly with the eye witnesses statement that Ayoub has been shot at a very close range. Contrary, to the learned counsel's argument, I am of the view that the medical evidence reconciled perfectly with the ocular version given by the eye witnesses.

The sketch of the place of incident made by PW-7 Tariq Hussain Magsi

9. In addition to what is stated in the preceding paragraph, learned counsel has passionately argued that the sketch of the place of incident does not reconcile with the medical report (as far as blackening is concerned) because the players are positioned very far away from each other in the map. Learned counsel submitted that the place of incident was pointed out to the revenue officer (tapedar) by the complainant himself and thus this fact alone is sufficient to discredit the entire eye-witnesses testimony. Learned counsel is correct, and the learned APG also admits that he is correct, that the sketch made by the tapedar to the extent of the positions of the characters does not reconcile with the prosecution case.

10. The incident occurred on 09.05.2008. The sketch was made nearly 3 years later on 15.04.2011. There is no requirement in the Code that a sketch of the place of incident must mandatorily be made during investigation. Rule 25.13 of Chapter XXV of Volume III of the Police Rules, 1934 however provides that in all important cases 2 plans of the scene of the offence be prepared by a qualified police officer or some other suitable agency. 1 copy of the map is to be submitted along with the final report (the challan). What exactly is an "important case" is not explained in the Rules and it seems that the same is left to the discretion of the police officer. It is however clarified in this Rule that in cases of, inter alia, murder, the police officer, if he considers that an accurate map is required, summon to the scene of the crime the patwari of the circle in which the murder occurred and cause him to prepare 2 maps. 1 for the production in court and the other for the purposes of the investigation. In the former references relating to the facts observed by the police officer are to be entered. The Rule further provides that patwaris will not in any case be required by a police officer to make a map of an inhabited enclosure or of land inside a town or village.

11. It is clear from the above mentioned Rule that it is the investigating officer himself who has to determine whether a map is required in a case and if it is, it is he who has to supervise the proceedings for its preparation. He can himself make it or in cases of heinous offences and murder require a patwari/tapedar to do it. 2 sets of the map have to be made and the requisite comments made by the police officer on what he observed are to be put on the copy of the map put in court.

12. In the present case, it is clear that the investigating officer may not have been aware of his responsibilities pursuant to the Police Rules. A map of the crime scene prepared after 3 years of the incident, may not have been accurate due to the possible change in the geography of the scene. It is also debatable whether a map was even required as the land where the incident occurred was inside a village. The investigating officer very conveniently remained absent throughout the process of the making of the

sketch. Memories fade and after 3 years the complainant himself have erred in pointing out the exact places where the attackers, the deceased and witnesses were. It is also pertinent to note that the complainant in his testimony did not even mention that he had accompanied the tapedar for the purpose of making the map. No questions were asked of the witnesses to explain the contradiction in their estimate of the distances and the ones stated on the map. A site plan in any case is not a substantive piece of evidence so as to contradict ocular evidence. Reference in this regard may be made to **Shamim Akhtar vs Faiz Akhtar (PLD 1992 SC 211), Muhammad Iqbal vs Muhammad Akram (1996 SCMR 908), Taj Mohammad vs Muhammad Yousuf (PLD 1976 SC 234)**.

13. I am not satisfied that the contradiction which the site plan created with witness testimony was of such a nature which would upset his conviction.

Delay in lodging the F.I.R.

14. The incident occurred on 09.05.2008 at 7:45 a.m. whereas the F.I.R. was registered the same day but at 11:15 p.m. The delay which took place was explained by PW-1 Mohammad Ayoub. Ayoub recorded that about 30 minutes after the incident the police, which had been informed by the complainant party, had reached the spot. The deceased Yameen was taken to the local hospital in Darro whereas the complainant was taken to the Civil Hospital in the nearby city of Hyderabad. Ayoub was discharged from the hospital at 9:00 p.m. after which he had gone to the police station in Darro and lodged the F.I.R. A perfectly reasonable, logical and plausible reason was given for the nearly 15 hour delay. There was no room for the facts of the incident to be manipulated by the injured complainant Ayoub due to the delay.

Presence of Noor Mohammad

15. Learned counsel was of the view that as PW-2 Mir Mohammad said at trial that Ayoub's son Noor Mohammad was present with him while Abdul Ghani said that he was not, and because Noor Mohammad was not

examined at trial, would necessarily mean that the prosecution case was false. He argued that if the son of the complainant was present it was strange that he did not play any role in the entire incident and its aftermath.

16. As strange as Noor Mohammad's absence might be, I am not convinced with the argument of the learned counsel. It is not the quantity of the evidence but the quality which is important. How old was Noor Mohammad, even if present, was not revealed at trial. The family may not have wanted him to be exposed to the rigors of investigation and trial. It was up to the prosecution to decide who it would examine at trial. In view of the 3 eye witnesses being very clear in their testimony, the absence of Noor Mohammad at trial, in the circumstances of the present case would not have an adverse impact on the prosecution case. Had Noor Mohammad been included as a witness and then declined to come to record his testimony have attracted Article 129 of the Qanun-e-Shahadat Order, 1984, but admittedly this is not what happened in the present case.

Sequence of events

17. Incident occurred on 09.05.2008 at 7:45 a.m. The police was informed immediately and arrived by 8:30 a.m. on the scene. Blood stained earth and 2 empties were recovered at 8:30 a.m. PW-4 Dr. Rafiq Ahmed Soomro began medical examination of Ayoub at 9:15 a.m. and the post mortem of the deceased at 9:45 a.m. he opined that the duration between death and post mortem was about 2 hours. F.I.R was lodged at 11:15 p.m. Eye witness statements were recorded the very next day i.e. 10.05.2008. All steps were taken with reasonable promptitude leaving little room for manipulation. The delay in the recording of the F.I.R. has been addressed above.

Other witnesses

18. Apart from the witnesses mentioned above, the following witnesses were also examined at trial. **PW-5 Manzoor Ahmed Soomro** had reached the place of incident after the incident and witnessed the preparation of

the Inquest Report. **PW-6 Muhammad Qasim** also reached after the incident and witnessed the inspection of the dead body. He also served as a witness to the recovery of the crime weapon at Taj Mohammad's pointation. **PW-8 S.I. Hamir Khan** was the investigating officer of the case. **PW-9 Inspector Agha Salahuddin** was the police officer who first responded to the information of the murder and arrested the accused. **PW-10 H.C. Ghulam Ali** handed over the body of the deceased to his relatives after the post mortem. **PW-11 P.C. Sultan Ahmed** witnessed the arrest.

Recovery

19. 2 empties and blood stained earth was recovered from the place of incident. Subsequently, on 17.05.2008, Taj Mohammad took the police to his house from where the double barrel gun he used was recovered. The gun together with the empties were sent to the Forensic Science Laboratory, which opined that the empties were of cartridges fired from the recovered gun. A perusal of the section 342 Cr.P.C. statement however shows that the report of the Forensic Division was not put to the accused. In such circumstances the contents of the report cannot be used as evidence against the accused.

Sentence

20. Although not argued by either counsel, the sentence passed by the learned trial court, is an area that I have looked at closely. The learned trial judge in the sentencing portion of the judgment has concluded that the incident took place without any pre-meditation and at the spur of the moment. I tend to agree with the learned judge that evidence led at trial was not of a nature which could conclusively prove pre-meditation. In such a situation it would be appropriate if the conviction given to the appellant is converted from that under section 302(b) P.P.C. to 302 (c) P.P.C. Keeping in view the fact that the appellant is 76 years old, potentially suffering from prostate cancer and was arrested on 10.05.2008 and since that date has been suffering the agony of these proceedings for 15 years, it may be appropriate to reduce his sentence to 10 years. The jail roll shows that he

has served 10 years and I month in prison to date. The appeal is therefore dismissed however the sentence is reduced to 10 years. The appellant shall however pay Rs. 300,000 as compensation to the legal heirs of the deceased. He has been on bail since 2015. His bail bonds shall remain intact and surety will not be discharged until he has provided evidence that the compensation has been paid.

JUDGE