

## IN THE HIGH COURT OF SINDH AT KARACHI

**Criminal Appeal No. 08 of 2021**

*Muhammad Usama vs The State*

**Criminal Appeal No. 14 of 2021**

*Abdul Sami vs The State*

**Criminal Jail Appeal No. 82 of 2021**

*Saifullah vs The State*

**Criminal Jail Appeal No. 83 of 2021**

*Saifullah vs The State*

Appellants : through Mr. Zia Hussain Shah and  
M/s. Waqar Alam and Kamil, Advocates

Respondent : through Mr. Talib Ali Memon, APG

Complainant : In person

Date of hearing : 10<sup>th</sup> October, 2022

### **JUDGMENT**

**Omar Sial, J.:** Early in the morning of 07.05.2017, Abdul Rehman was sitting in a coaster playing a game on his mobile phone, waiting for his friends to all gather so that they could proceed for a picnic. 2 boys on a motorcycle came near the coaster and one of those boys, who had a pistol, tried to snatch Rehman's phone from him. Upon Rehman's resistance, the robber shot and killed Rehman. The 2 boys then left the scene. Rehman's father, a gentleman by the name of Mushtaq Ahmed, was informed over the phone about the incident and when he reached the hospital, he saw Rehman in a critical condition. F.I.R. No. 161 of 2017 was registered the same day on the complaint of Mushtaq Ahmed under section 394 and 34 P.P.C. Rehman, unfortunately, succumbed to his injury and thus an offence punishable under section 302 P.P.C. was also added in the charge sheet.

2. All 3 appellants i.e. Saifullah, Abdul Sami and Muhammad Usama were arrested on 13.06.2017 when all 3 were riding a motorcycle. All 3 pleaded not guilty and claimed trial. At trial the prosecution examined 12 witnesses to prove its case. **PW-1 Mushtaq Ahmed** was the complainant of the case. **PW-2 Obaid Ahmed** was Rehman's brother and had accompanied his father to the hospital upon hearing that his brother had been shot at. **PW-3 Muhammad Ismail** was the driver of the coach in which the incident occurred. He was an eye witness as

Rehman was sitting next to him when the incident occurred. **PW-4 Muhammad Hasan** was a friend of Rehman, who also reached the hospital after the incident. **PW-5 Muhammad Talal Siddiqui** was the tour operator who had arranged the picnic for the boys. He too was informed of the incident after its occurrence. **PW-6 S.I. Aamir Mehmood** was the police officer who first responded to the information of the shooting and who also registered the F.I.R. on PW-1 Mushtaq Ahmed's complaint. **PW-7 Syed Irshad Ahmed** was a person who claimed to be an eye witness. **PW-8 H.C. Aslam Jan** was the policeman who witnessed the arrest of all 3 accused. **PW-9 Anam Kazmi** was the medical officer who attended to Abdul Rehman when he was brought to the hospital in an injured condition. **PW-10 Shah Wali Khan** was the learned magistrate who conducted an identification parade in order for the 3 accused to be identified by PW-3 Muhammad Ismail and PW-4 Muhammad Hasan. **PW-11 Muhammad Khalid** was the doctor who did the post mortem of the deceased. **PW-12 S.I. Zulfiqar Ali** was the investigating officer of the case.

3. In their respective section 342 Cr.P.C. statements, all 3 accused professed innocence and denied all wrong doing. Neither one of the 3 examined himself on oath nor produce any witness in his support. The learned 5<sup>th</sup> Additional Sessions Judge, Karachi East on 09.12.2020 convicted all 3 accused under sections 302(b) and 34 P.P.C. to a life in prison and also directed them to pay a compensation of Rs. 200,000 each to the legal heirs of the deceased. All 3 were also convicted under section 397 and 34 P.P.C to 7 years in prison. As a pistol was also recovered from Saifullah he was convicted under section 23(1)(a) of the Sindh Arms Act, 2013 and sentenced to 7 years in prison as well as directed to pay a fine of Rs.50,000 or spend another 3 months in prison.

4. I have heard the learned counsels for the appellants as well as the learned APG. The complainant was present during the hearings and confirmed that he did not wish to be represented by a counsel and that he would rely on the arguments of the learned APG. All the appeals arise from the same incident and therefore will be disposed of through this common judgment. For the sake of brevity the respective arguments of the counsel are not being reproduced but are reflected in my observations and findings below.

The case against Abdul Sami and Muhammad Usama

5. I will first attend to the case against Sami and Usama. The prosecution case is that 2 boys had come on a motorcycle but that 1 boy tried to snatch Rehman's phone and upon his resistance, shot him dead. How then did these 2 get involved with the case? PW-3 Muhammad Ismail is witness to the foregoing. Ismail, at trial, said "*I saw only one dacoit who was armed with a pistol.....while the other was behind my coaster and therefore I could not see him.*" Ismail also identified only Saifullah in the identification parade that was held after the arrest of the 3 accused. It seems that the Sami and Usama were made accused in this case on the statement of PW-7 Syed Irshad Ahmed. Irshad was in the business of exporting fruits and vegetables. He explained his presence on the scene by saying that he too was departing on a tour at that same time, though to a different destination and in a different bus. He claimed he saw 2 boys come on a motorcycle, one of them dismounted and went to snatch Rehman's phone and then shot him on resistance. The shooter then sat on the motorcycle with his already sitting companion, and rode off whereas there was another motorcycle which also drove off behind the first motorcycle. It was after the arrest of the 3 accused that Irshad went and identified them in the identification parade. Irshad's assertion that he was an eye witness to the incident, was dubious to say the least. For starters, I find his explanation as to what he was doing at 7:15 a.m. in the morning at the place of incident doubtful as no witness corroborated the same. To the contrary when questioned on this aspect he changed his statement to say that he had not booked the coaster and that he had come there to make a booking. He also admitted that in his section 161 Cr.P.C. statement he had not told the police the reason for him being present in the scene that day. Secondly, though claiming to be standing near the coach in which Rehman was shot, he said at trial that at the time of the incident it was only Abdul Rehman sitting in the coaster. There was no mention of the driver Muhammad Ismail. Thirdly, the concerned citizen did not record a statement with the police till 8 days later i.e. till 15.05.2017. Even then, the investigating officer of the case negated Irshad's claim when he admitted at trial that "*It is a fact that the statement of PW Irshad first recorded on 15.06.2017.*" In the interim, he did not tell anyone as to what he had seen. The 30 days delay for his conscience to arise was not explained, as a matter of fact even if one accepts Irshad's version that his statement was

recorded after 8 days, even that delay was not clarified or explained. The Supreme Court of Pakistan, as indeed this Court, has repeatedly held that unexplained delay in the recording of the section 161 Cr.P.C. statement 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)**, **Mohammad Asif vs The State (2017 SCMR 486)**. At trial, he also seemed not too sure as to where his statement was recorded by the police. On the one hand he said that he had gone to the police station himself while on the other he said that his statement was recorded on the spot of the incident. This would effectively mean that the Irshad first went to the police station from where he accompanied the police to the place of incident and then stood there and recorded his statement. It simply does not happen that way. Perhaps a weak grasp on the English language, but it seems from Irshad's testimony that the accused were mixed with the dummies in front of him at the identification parade – *"When I was called by the Magistrate and I was shown the dummies one accused was mixed up with the dummies at that time."* Irshad also admitted that in his section 161 Cr.P.C. statement he had told the police, contrary to what he stated at trial, that *"after the commission of offence by the two culprits and running on motorcycle from the place of incident meanwhile two other culprits riding on another motorcycle also arrived there and followed the said two culprits who committed the offence and these culprits looked to be companion of those culprits."* The two subsequent motorcyclists who had appeared after the first set of riders had left cannot be held guilty of common intention to murder Abdul Rehman, simply on the statement of Irshad that they *"looked to be companions"*.

6. Coming to the identification parade. I have found the testimony of Muhammad Ismail, driver of the coaster to be trustworthy. His presence on the scene was also natural. He only identified Saifullah from amongst the 3 accused. Usama and Sami were identified only by Irshad. Malafide of Irshad and the investigating officer is obvious from the fact that although Irshad's claim was that he had come to make a coaster booking when the incident unfolded in front of his eye, the memo of the identification parade records that after having identified accused Usama, Irshad described his role as follows: *"The witness stated that on the day Sunday on 07.05.2017 at about 7:00 or 7:30 a.m. at*

*morning, he along with other boys of the locality were ready to go on picnic as we were gathered at Usmania Restaurant on service road where some of the boys were came at the spot and they were waiting for remaining friends meanwhile the present suspect came on motorcycles along with his other companions....”*

This was in complete contradiction to what the prosecution case was. A similar faux pas occurred in the identification of accused Sami. Further, Usama at the time of the identification told the magistrate that he had been shown to Irshad in the police station and that Irshad had also taken a photo of his at the station prior to the parade. I have no doubt in my mind that Irshad was “created” as a witness by the prosecution in order to implicate Sami and Usama in the crime. The learned magistrate also appears to have not taken much interest in the conduct of the parade. A copy, paste job seems to have been done for all 3 identifications. The Supreme Court of Pakistan in **Kanwar Anwaar Ali, Special Judge Magistrate, In the matter of (PLD 2019 SC 488)** gave extensive guidelines on the conduct of an identification parade which were not complied with by the learned magistrate. No sanctity can be attached to such an identification parade.

7. Apart from Irshad identifying the Sami and Usama, the investigating officer in order to justify their arrest gave a convoluted story of how a SIM was used in the phone of the deceased; which SIM was traced to one Safya, who happened to be the aunt of Usama; the SIM was then used in the phone which Usama was carrying at the time of his arrest. The prosecution had no evidence that the phone of the deceased was even taken by the shooter after the incident nor did it have any proof that the phone in which the SIM was used was actually owned by the deceased. The investigating officer also admitted that the phone recovered from Usama at the time of his arrest was not the phone of the deceased. He also admitted that he had not sealed the phone ostensibly recovered from Usama at the time of his arrest. It appears that the investigating officer has been dishonest and has brought within the ambit of the crime, both Sami and Usama, without any cogent evidence against them. A day before their identification parade, Irshad was created as a witness in order to implicate these 2 accused.

8. I find the evidence against Usama and Sami to be unsatisfactory to uphold a conviction for murder against them. No role except presence, at best, was assigned to them and not an iota of evidence is on record to show common intention which they allegedly shared with Saifullah. It is also pertinent to point

out that the legal heirs of the deceased have compounded the offence under section 302(b) P.P.C. with Usama. The requisite applications have been filed. However, as I am of the view that the prosecution was unable to establish its case against Usama, the applications are dismissed as having become infructuous. In view of the foregoing and the above observations, I am of the view that the prosecution failed to prove its case against these 2 accused. Their respective appeals are therefore allowed and they are acquitted of the charge. They may be released forthwith if not required in any other case.

#### The case against Saifullah

9. The case against Saifullah was on a completely different footing. He was identified by Mohammad Ismail, the driver. The crime weapon was also recovered from his possession and the empty recovered from the scene of the crime was also matched with that pistol. During the proceedings in this appeal, applications were filed seeking leave of the court to compound the case as well as seeking acquittal of Saifullah on that ground (being **Cr. Misc App. Nos 122925 and 12926 of 2021**). The documents were sent to the learned trial court in order to determine the genuineness of the compromise. The learned trial judge vide his report dated 14.05.2022 concluded that the compromise was genuine and that Rehman had died leaving behind his father and mother as the only legal heirs. The mother is mentally incapacitated. Accordingly an application under section 345(4) Cr.P.C. was also filed by her husband Mushtaq Ahmed seeking permission of the court to act as his wife's guardian for the purpose of the compromise (being **Cr. Misc. Appl No. 12927 of 2021**). Mushtaq Ahmed was summoned several times in this court to re-confirm that he had forgiven Saifullah. Each time he said that he has forgiven all 3 accused. He did not look under duress or under pressure while making the repeated statement. If the parents of the deceased have forgiven Saifullah and the others, for the murder of their son, it leaves very little room for this court to decide otherwise. In view of the fact that the offence under section 302(b) P.P.C is compoundable and that the legal heirs of the deceased have without any pressure forgiven Saifullah, the CrI. Misc. App No. 12925, 12926 and 12927 of 2021 are allowed and Saifullah pursuant to section 345 (6) Cr.P.C. is acquitted of the charge against him under section 302(b) P.P.C.

10. Saifullah has also been convicted under section 397 P.P.C. and section 23(1)(a) of the Sindh Arms Act 2013. Both offences are non-compoundable. He

was sentenced to 7 years in prison for an offence under section 397 P.P.C. whereas he was also convicted and sentenced to 7 years in prison for the offence under the arms legislation. In the latter he was also directed to pay a fine of Rs. 50,000 or suffer another 3 months in prison. The jail roll sent by the Senior Superintendent Central Prison, Karachi shows that Saifullah has served out 13 years (including remissions) in prison. In view of the fact that Saifullah has served out the sentence given to him for offences under section 397 P.P.C. and 23(1)(a) Sindh Arms Act, 2013, the learned counsel for Saifullah does not press the appeals. They are therefore dismissed as not pressed.

### Conclusion

11. In summary:

- (i) Criminal Appeal No. 08 of 2021 (Muhammad Usama vs The State) is allowed. The appellant is acquitted of the charge. He may be released forthwith if not required in any other case.
- (ii) M.A. Nos. 12922 of 2021, M.A. 12923 of 2021, M.A. No. 12924 of 2021 and M.A. 4821 of 2021 filed by Muhammad Usama are dismissed as having become infructuous.
- (iii) Criminal Appeal No. 14 of 2021 (Abdul Sami vs The State) is allowed. The appellant is acquitted of the charge. He may be released forthwith if not required in any other case.
- (iv) Criminal Jail Appeal No. 82 of 2021 (Saifullah vs The State) is partially allowed. M.A. No. 12925 of 2021, M.A. No. 12926 of 2021 and M.A. No. 12927 of 2021 are allowed. Saifullah is acquitted under section 345(6) Cr.P.C. in the case under section 302(b) P.P.C. against him. As far as the offence under section 397 P.P.C. is concerned, he has undergone the sentence and as his counsel has not pressed his appeal to that extent, it is dismissed to that extent.
- (v) Criminal Jail Appeal No. 83 of 2021 (Saifullah vs The State) is dismissed as not pressed.

The 3 appellants may be released if not required in any other custody case.

JUDGE