

## IN THE HIGH COURT OF SINDH AT KARACHI

### Criminal Appeal No. 309 of 2012

Appellants : Muhammad Essa and Nazeer Ali  
through M/s. Qurban Ali and Raham Ali Rind,  
Advocates

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

Complainant : through Mr. Shabbir Ahmed Kumbhar, Advocate.

Date of hearing : 14<sup>th</sup> September, 2022

### JUDGMENT

**Omar Sial, J:** F.I.R. No. 35 of 2006 was registered under sections 302, 337-H(2), 504 and 34 P.P.C. at 8:30 p.m. on 25.05.2006 on the complaint of one **Muhammad Rafique (PW-1)**. Rafique recorded that on 28.05.2006 he along with his brother Khan Mohammad were opening a watercourse while his relatives **Muhammad Sulaiman (PW-2), Ghulam Haider (PW-3)**, and Mohammad Younus were standing close by. A speeding car with loud music playing driven by one Nazeer Ali passed by and splashed muddy water on the complainant party. The complainant party objected and told Nazeer to lower the volume of the music he was playing. A brief exchange of harsh words occurred after which Nazeer Ali drove away. A little while later at about 4:30 p.m. Nazeer returned to the spot but this time he was armed with a pistol and was accompanied by Ramzan Ali Thahim and **Muhammad Essa, the appellant**. The latter two men were armed with a 7 mm rifle and a double barrel shot gun respectively. After a heated altercation, Nazeer shot at and hit Mohammad Khan on his forehead. Nazeer's 2 companion's made ineffective fires from their weapons and hit **Muhammad Sulaiman** with the butt of their weapons. The accused then left the scene.

2. **Inspector Muhammad Yaqoob (PW-5)** was the police officer who first responded to the news of the incident and registered the F.I.R. He was the first person to examine the injuries sustained by Muhammad Sulaiman as well as by the deceased Khan Mohammad in the presence of **Muhammad Hanif (PW-8)** and Jan Mohammad. The injured Muhammad Sulaiman was taken to the Rural Health

Clinic in Gharo for medical treatment where he was examined by **Dr. Nizamuddin Khaskheli (PW-4)**. The dead body of Khan Muhammad was taken to Civil Hospital in Thatta where **Dr. Inayat Rasool Baloch (PW-6)** conducted the post mortem. The case was investigated by **S.I. Khan Muhammad Shar (PW-7)** who examined the place of incident on 29.05.2006 in the presence of Muhammad Hanif and Jan Mohammad. The appellant Muhammad Essa (holding a shotgun) and his companion Ramzan Ali Thahim (holding a rifle) were arrested from close to Muhammad Essa's house at 5:00 p.m. on 05.06.2006; whereas Nazeer Ali was arrested on 08.06.2006. The car in which the assailants had driven was registered in the name of Nazeer Ali and was also seized by the police.

3. Towards the end of the trial, the prosecution moved an application seeking amendment of the charge as the charge initially framed did not mention that Muhammad Sulaiman had been injured. The application was allowed and an amended charge was framed. No witness was recalled or re-examined by either the prosecution or the defence nor was any application moved seeking a re-call by either side. The prosecution therefore closed its side on 14.12.2010.

4. Both the accused, Essa and Ramzan professed their innocence in their respective section 342 Cr.P.C. statements and further stated that the false implication was due to an old enmity between the parties over a piece of land. The appellant Muhammad Essa as well as co-accused Ramzan and Nazeer also recorded a statement under section 340(2) Cr.P.C. in which they further expanded on the enmity between the parties and gave their version of the incident and its aftermath. The accused also brought in as witnesses **Muhammad Thahim (DW-1)**, **Azeem Bikak (DW-2)** and **Darya Khan (DW-3)** to support the stance taken by them. Before judgment could be announced accused Ramzan Ali Thahim disappeared and was declared an absconder on 10.05.2012.

5. The learned Sessions Judge, Thatta on 23.10.2012 announced her judgment in terms of which Nazeer Ali was sentenced to a life in prison for having committed an offence punishable under section 302(b) P.P.C. and was also directed to pay a fine of Rs. 200,000 or spend another 6 months in prison. Both, Muhammad Essa and Ramzan (in absentia) were held guilty of having committed offences under section 337-A(ii) and 337-H(2) P.P.C. and were sentenced to 5 years in prison as well as pay 5% of the diyat amount as compensation or spend another one month in prison. The sentences were to run concurrently.

6. The learned counsel for the appellant has argued that the real cause of death was aerial firing in a marriage ceremony in which a stray bullet had hit the deceased. He also referred to a part of the investigating officer's testimony that he had been forced to register the F.I.R. on political grounds. He argued that the weapons allegedly seized were not sent to the forensics expert for analysis and that the expert reports which were introduced by the prosecution came after the end of the trial. Learned counsel in support of his argument that the incident as narrated by the prosecution had not even taken place at the spot it was said to have taken place submitted that the people who had shown the investigation officer the place of incident themselves were not witnesses to where the incident occurred.

7. On the other hand the learned APG has argued that all actions were taken with promptitude; the 4 hours delay in lodging the F.I.R. has been logically explained; that the defence of aerial firing fails for the simple reason that the injury sustained by the deceased had blackening on the wound of entry; the accused were convicted in the case arising from possessing illegal weapons; medical evidence corroborates the ocular; the enmity that the accused referred to happened in the year 1980. He therefore supported the impugned judgment.

8. I have reviewed the evidence led at trial and have heard the learned counsels. My observations and findings are as follows.

Delay in lodging the F.I.R.

9. The incident occurred at 4:15 pm on 25.05.2006. F.I.R. was lodged the very same day at 8:30 pm. The complainant has explained that the delay in lodging the F.I.R. occurred as the complainant party, after the injured Khan Mohammad had been given first aid, by a local health care unit, was told that the condition of the injured Khan Mohammad was serious and that he should be taken to Karachi. The complainant party was enroute to Karachi when Khan Mohammad died. The local health clinic was 25 kms away from the place of incident and an hour was consumed reaching it. 30 minutes were taken by the doctor there. The remaining time was taken in attempting to take the deceased to Karachi and then returning to the police station because he died enroute. The reasoning is both logical and believable. Obviously the first consideration of the complainant was that medical aid be provided to the injured and he did everything he could to do so.

Immediately upon returning to their own area, the F.I.R. was registered. There was no room in this whole episode for any manipulation. The F.I.R. in the circumstances was not delayed; to the **contrary** it was lodged with reasonable promptitude.

#### Eye witnesses

10. There are 3 eye witnesses in this case, which also include an injured Sulaiman. The incident occurred at 4:30 p.m. and Sulaiman was medically examined at 7:30 p.m. Sulaiman's statement was recorded the same day (though in his cross examination this witness said that it was recorded on 30.05.2006). He told the court that when Nazeer had shot Khan Mohammad he (Sulaiman) had wanted to intervene but that he was stopped by Ramzan Ali Thahim and Mohammad Essa who hit him with the butts of the weapons they held. The doctor who was examined by the prosecution i.e. Dr. Nizamuddin Khaskheli, testified that Sulaiman was brought to him at 7:40 p.m. and that the injuries he had sustained were with hard and blunt weapons. Sulaiman's testimony cannot be brushed aside lightly. There was no reason for him to falsely accuse the appellants Ramzan and Essa of hitting him if it was somebody else who had caused the hurt. The injuries on his body could not have been self-sustained. The eye witnesses have perfectly corroborated the version of events and though minor lapses were made in the timing of events, the said lapses are not of a nature which would justify upsetting the conviction awarded to them. I find the testimonies of the eye witnesses to be reliable, trustworthy, confidence inspiring and not exaggerated. The parties knew each other well and it was a day time incident so it could not be a case of misidentification.

#### Testimony of S.I. Khan Mohammad Shar

11. The testimony of this witness is the one that has been highlighted by the learned counsel for the appellants to show that the appellants are innocent. It is true that his statements during his cross examination are odd. He admitted that he did not seal the blood stained earth he had collected from the spot nor sent it for chemical analysis; that he did not produce the forensics report or the chemical report; that he did not associate any independent person as witness; that he cited witnesses Jan Muhammad and Muhammad Hanif on the instructions of the complainant; that he did not prepare a sketch of the place of

incident. Finally he made a statement that *"it is correct that I have conducted the investigation being influenced by political (sic) voluntarily added that in fact the F.I.R. was also lodged on the basis of political (sic)."* S.I. Khan Mohammad Shar was an incompetent investigator to say the least. However, his admission to the F.I.R. and investigation being politically influenced does not ipso facto mean that the incident did not happen in the manner that it was said to have happened and that the accused were not the culprits. In view of the other evidence recorded at trial, I am not inclined to hold the testimony of the investigating officer to be such that would vitiate the entire prosecution case. He was the same officer who prepared the challan and submitted it in Court. The awakening of his conscious seems to have occurred at a very late stage because till the time he gave his testimony he had not indicated in any manner that the investigation was tainted. To the contrary, I am of the view that it was his testimony at trial that was tainted. In either case, if this officer is still in service, his conduct in this case should be made a basis of disciplinary proceedings being initiated against him.

#### Recovery of empties from the place of incident

12. Blood stained earth was recovered from the place of incident. 2 empties of a pistol, 4 empties of a 7mm rifle and 5 cartridges of a gun were also recovered. The recovery is in line with the prosecution version as to the kind of weapons that the accused carried. While the investigating officer did not produce the ballistic expert report when he was examined at trial, the reports were submitted subsequently and do show that the empties collected were from the weapons seized from the accused.

#### Medical Evidence

13. The medical evidence is in line with the ocular version. The only place where there is a slight discrepancy is that the bullet entry wound on the deceased had blackening. Blackening mostly occurs when a fire is made from a maximum of 2 to 3 foot. The witnesses have placed Nazeer at a slightly further distance than that when making the fire. I am however not satisfied that this discrepancy is sufficient to upset the conviction. In the situation that had developed it would be unfair to expect the complainant party to give exact measurements of the distance between the players. What does emerge from a

review of the evidence is that the witnesses were unanimous that the fire was made from a relatively short distance.

### Conclusion

14. After having evaluated the evidence, led at trial holistically, I see no reason to interfere with the conviction and sentence given to Nazeer Ali by the learned trial court. I understand from the jail roll, as well as a confirmation from the learned APG, that Nazeer Ali has already been released from jail after having completed his sentence.

15. As far as Muhammad Essa is concerned, keeping in view the general allegations against him and Ramzan Ali Thahim of inflicting butt blows to Muhammad Sulaiman, in which it is not clear as to who caused the injury on the head of Muhammad Sulaiman, as well as the 17 years he has faced the agony of trial, and to his credit that while Ramzan Ali Thahim chose to abscond he has been present diligently, I am inclined to give him the benefit of doubt as far as the conviction given to him by the learned trial court for having committed an offence under section 337-A(ii) P.P.C. is concerned. He is therefore acquitted for that offence. I however, uphold his conviction under section 337-H(2) P.P.C. but reduce his sentence to a fine of Rupees 5000. Once the fine is paid to the satisfaction of the Nazir the bail bonds may be discharged and surety returned to its depositor.

16. The appeal is disposed of in the above terms.

JUDGE