

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Criminal Appeal No.S-240 of 2019

Appellants : Hussain Bux and Ameer Bux both sons of Allahdino and Ghulam Ali son of Khuda Bux through Mr. Wazeer Hussain Khoso, Advocate.

Complainant : Abdul Razzaque through Mr. Afzal Karim Virk, Advocate.

Respondent : The State through Mr. Imran Ahmed Abbasi, A.P.G Sindh.

Date of hearings : 03.02.2023, 20.02.2023 & 27.02.2023

Date of decision : 17.03.2023

J U D G E M E N T

KHADIM HUSSAIN TUNIO, J.- The appellants have challenged the judgment dated 05.09.2019, passed by learned Additional Sessions Judge-I /Model Criminal Trial Court, Mirpurkhas in Sessions Case No.286 of 2014 arising out of FIR No.80 of 2014, registered under sections 302, 341, 506(ii) and 34 PPC at PS Kot Ghulam Muhammad, whereby they were convicted under Section 265-H(ii) Cr.P.C and sentenced to life imprisonment as Ta'zir directing them to pay Rs.500,000/- (Rupees five hundred thousand) each as compensation under section 544(a) Cr.P.C to the legal heirs of deceased Nazar Muhammad and Saddam Hussain and in case of default thereof they were ordered to suffer simple imprisonment for one more year, however, appellants were extended benefit of Section 382-B, Cr.P.C.

2. Facts pertaining to the prosecution case as per FIR lodged by the complainant Abdul Razzaque on 04.08.2014 at 2230 hours at Police Station Kot Ghulam Muhammad are that on 02.08.2014, due to death of relative of complainant in village Obhayo Khaskheli, he was accompanying his sons Nazar Muhammad, Saddam Hussain and Niaz Muhammad, his wife Mst. Bhagbhari and his nephew Hussain and they went there on two motorcycles and stayed there in the night. On the next day i.e. 03.08.2014, the complainant boarded on a motorcycle with his sons Nazar Muhammad and Saddam Hussain, while his wife Mst. Bhagbhari, his other son Niaz Muhammad and his nephew Hussain boarded on another motorcycle and were returning to their village. When they reached at Abid Petrol pump, complainant's son Niaz Muhammad and his nephew Hussain went towards Petrol pump to fill petrol, while

complainant along with his aforesaid sons were slowly moving towards their village. At about 12:30 noon, they reached at Halepoto Bus Stop situated at Kot Ghulam Muhammad to Samaro road when suddenly from the Northern side of the road, co-accused Inayat Khoso & Misri Khoso as well as appellant Hussain Bux all armed with pistols and from Southern side of the road appellants Ameer Bux and Ghulam Ali along with co-accused Pandhi also armed with pistols along with two unknown persons having a repeater and gun in their hands were standing at some distance from the road, with whom the complainant party is alleged to have old enmity; they got the motorcycle of the complainant party stopped and made the complainant stand at the side then co-accused Inayat, Misri and appellant Hussain Bux made straight fires with their weapons upon his son Saddam Hussain with intention to kill him and appellants Ameer Bux and Ghulam Ali along with co-accused Pandhi made straight fires with their pistols upon his other son Nazar Muhammad who due to sustaining bullet injuries fell down on the earth and then complainant also fell on them, meanwhile complainant's son Niaz Muhammad, his wife Mst. Bhagbhari and his nephew Hussain Bux after filling petrol also reached there on motorcycle. They were restrained by the assailants on gun point and wife of complainant Mst. Bhagbhari while crying also fell down upon her injured sons. Co-accused Inayat snatched licensed pistol of 30 bore No.31166162 from the complainant and then aforesaid culprits while extending threats of murder went away. Thereafter, complainant party saw that both sons of complainant namely Nazar Muhammad and Saddam Hussain succumbed to their injuries. By that time, police reached there then shifted both the dead bodies of sons of complainant to Taluka Hospital Kot Ghulam Muhammad, where after completion of legal formalities, dead bodies were brought to village and after burial, the complainant appeared at P.S and lodged the FIR.

3. After usual investigation, the challan was submitted and the appellants were sent-up to face trial except co-accused Inayat, Misri and Pandhi who after completion of legal formalities were declared as proclaimed offenders and the proceedings u/s 87 & 88 Cr.P.C were also carried out against them. Charge was framed to which appellants did not plead guilty and claimed to be tried.

4. In order to prove its case, prosecution examined in all seven (07) witnesses namely PW-1 complainant Abdul Razzaque, PWs-2 & 3 eye-

witnesses Hussain Bux and Niaz Muhammad, PW-4 Tapedar Ravjee, PW-5 mashir Abu Bakar, PW-6 MO Dr. Jan Muhammad and PW-7 Investigating Officer SIP Meeran Khan and numerous documents were exhibited in evidence, however, learned ADPP gave-up P.W Mst. Bhagbhari vide statement at Ex.14 and then prosecution side was closed vide statement at Ex.18.

5. Statement of appellants/accused under section 342, Cr.P.C. were recorded wherein they denied the allegations leveled against them by the prosecution while stating that son of complainant and his cousin Munawar had committed murder of their relative Ismail and such FIR bearing Crime No. 80 of 2013 was lodged by co-accused Misri wherein accused party were the witnesses of that case and during trial complainant's son Ghulam Muhammad and Munawar absconded away so also it was stated that on 08.08.2014 Faiz Muhammad and Gul Muhammad along with their father Abdul Razzaque tried to kidnap Hussain Bux, but on failure caused him firearm injuries and injured Hussain Bux were shifted to hospital where police arrested them. However, they neither examined themselves on oath under Section 340(2) Cr.P.C nor adduced any other evidence in their defence.

6. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellants as mentioned above. Appellants being aggrieved and dissatisfied with the judgment has filed the instant appeal.

7. Learned counsel for the appellants, *inter alia*, contends that impugned judgment is bad in law and facts inasmuch as the learned trial Court did not appreciate the evidence on record in line with the applicable law and surrounding circumstances and based its findings as a result of misreading and non-reading of evidence as well arrived at a wrong conclusion in convicting the appellants; that there is delay of more than one day in lodgment of FIR; that post-mortem report was issued by MLO after four days of conducting the post-mortem of deceased; that the complainant and PWs deposed that they had shifted dead bodies to the hospital whereas police officials deposed that the dead bodies were shifted to hospital by police; that doctor deposed that dead bodies were identified by father and brother of the deceased; that none has seen the alleged incident; that father and brother of the deceased reached at hospital after conducting the post-mortem of the dead bodies by the Doctor; PWs-1, 2

and 6 deposed that injuries were caused to the deceased with firearm from the distance of 1 to 2 feet whereas doctor deposed that injuries were caused at the distance of 2 to 3 feet; that there is one injury is blackening on the dead body of deceased Nazar Muhammad out of four injuries; that only two injuries on the person of deceased Saddam Hussain are of blackening whereas remaining six injuries were without blackening; that as per prosecution case the injuries alleged to have been caused to the deceased persons by discharge with pistols; that the doctor has recovered one pellet from the dead body of deceased Saddam Hussain while conducting his post-mortem; that there was no allegation of causing injuries by discharge of gun; that no empty cartridge has been recovered from place of incident by I.O; that the complainant was standing between the deceased at the distance of four feet but he did not receive any injury at the time of commission of alleged incident; that complainant did not fire at accused party though he was armed with pistol; that it has not been explained by the prosecution as to why the complainant has not been killed by the accused though they have alleged to have murdered his two sons; that PWs-2 Hussain and 3 Niaz Muhammad have deposed that they had seen the commission of alleged incident whereas PW-1 Abdul Razzaque complainant deposed that accused persons had gone away then his son Niaz Hussain and nephew Hussain arrived at place of incident though that PWs Niaz Hussain and Hussain claim to be eyewitness of the occurrence; that recovery has been foisted upon the appellants; that only one person namely Abu Bakar has been made mashir in all the memos; that complainant deposed that they have gone to Mirwah whereas PW-3 has deposed that they have gone to village Obhayo Mirwah; that PW-6 has deposed that deceased received head injury and no head injury has been shown in the post-mortem report on the dead body of deceased Nazar Muhammad; that the complainant has deposed that deceased persons received injuries in the standing position whereas doctor has deposed that it was possible that deceased have received injuries in sitting position; that there is 13 days delay in recording 161 Cr.P.C statements of PWs; that the medical as well as ocular evidence is conflicting to each other which creates serious dent in the prosecution case; that all the witnesses are relatives to complainant as well as deceased so independent witness is lacking in the instant case; that there are material contradictions in the evidence of mashir and complainant in the prosecution case, therefore,

impugned judgment of the Trial Court is liable to be set-aside. Learned counsel prays for acquittal of the appellants from charge.

8. Learned counsel for complainant has contended that alleged incident took place in daytime; that both the parties known to each other; that there is no chance of mistaken identification of the appellants; that since last 15 to 20 years parties known to each other; that there is no denial on the part of appellants that the complainant was not present at place of commission of alleged incident; that appellants / accused have not denied that they have not caused any injury to deceased; that accused have not alleged or proved any enmity with complainant party due to which they have falsely been implicated by the complainant; that delay in lodgment of FIR has been plausibly explained by the complainant; that MLO has deposed in his deposition that he has prepared rough notes while conducting the post-mortem of dead bodies of deceased then prepared post-mortem reports; that presence of the appellants / accused has been established as the complainant informed the police about commission of incident within ten (10) minutes; that the dead bodies were shifted from place of wardat to Hospital within half an hour; that on same day at about 03:30 p.m. place of incident was visited by I.O; that 12 crime empties of pistol as well as mud were secured from place of incident; that the weapons alleged to have been used in commission of incident were recovered on the pointation of appellants / accused; that the MLO has deposed that empty bullet was secured from dead body of deceased Nazar Muhammad and same was referred by I.O to FSL Forensic Science Laboratory; that the deceased Nazar Muhammad had received injury at his head at the hands of accused; that there is no conflict in between ocular account and medical evidence. In support of his contentions, learned counsel has placed reliance upon the cases of Qasim Shahzad and another Vs. The State and others [2023 SCMR 117], Muhammad Bashir and another Vs. The State and others [2023 SCMR 190], Sharafuddin alias Sharfoo and another Vs. The State [2022 YLR 324], Farman Ali and another Vs. The State and another [2020 SCMR 597], Javed Ishfaq Vs. The State [2020 SCMR 1414], Muhammad Rashid and another Vs. The State [2022 YLR 119], Abdul Khalique Vs. The State [2020 SCMR 178], Asfandiyar Vs. The State and others [2021 SCMR 2009], Ali Bux and others Vs. The State [2018 SCMR 354], Gulzar Vs. The State [2022 YLR Note 17], Muhammad Iqbal and others Vs. Muhammad Akram and another [1996 SCMR 908], Azhar Hussain and another Vs. The State and others [2022 SCMR 1907], Sajid Mehmood Vs. The State [2022 SCMR 1882] and Shamsher Ahmad and another Vs. The State

and another [2022 SCMR 1931].

9. In contrast, learned Assistant Prosecutor General Sindh has contended that four empties bullets alleged to have been recovered from the place of incident matched with pistol allegedly recovered from the possession of appellants / accused; however, he has adopted the same arguments as advanced by the learned counsel for complainant. He has relied upon the cases of Ghaffar Mahesar Vs. The State through P.G Sindh and others [2022 SCMR 1280], Farman Ali and another Vs. The State and another [2020 SCMR 597] and Aurangzeb Vs. The State [2020 SCMR 612].

10. I have heard the learned counsel for the appellants, counsel for the complainant, learned Assistant Prosecutor General and perused the record available before me.

11. Perusal of record and evidence available brings the Court to the conclusion that prosecution has undeniably proven its case against the appellants for the offence alleged against them by examining numerous witnesses whose evidence remained un-shattered on *material* aspects of the case even after lengthy cross-examination. Both the deceased had been done to death by the appellants by causing multiple firearm injuries on various parts of their bodies. The delay in the lodging of FIR has also been explained by the complainant by stating that he had waited until the funeral processions were over whereafter he appeared at the police station to lodge the FIR. Moreover, the PW-7 Inspector Meeran Khan who visited the place of incident deposed that *"I received information from one Abdul Razzak on phone that his sons Nazar Muhammad and Saddam Hussain have been killed by the accused Inayat & others at Bus Stop Halepoto Rasti/Path Taluka Kot Ghulam Muhammad. I then kept such entry No.07 in Roznamcha of P.S and then I along with my subordinate staff left P.S in police mobile and reached at the pointed place."* Not only this, the delay would be of no effect to the case of the prosecution as the initial inquiry was carried out by PW-7 Inspector Meeran Khan and the necessary documentation was prepared on the same day of the incident who admitted the same while deposing that *"We reached at the pointed place. I then shifted both dead bodies to Taluka Hospital Kot Ghulam Muhammad where I inspected both the dead bodies and prepared its memo, separate Lash Chakas forms and danishtnamas of both the deceased at hospital in presence of mashirs Abu Bakar and Akbar... M.O then handed over both the dead bodies of said deceased and last wearing clothes to me under receipt for burial purpose... Thereafter on the same date I also inspected the place of incident on the pointation of Abdul Razzak and collected blood stained earth and 12 empties of 30 bore*

*pistol from there and then prepared its memo at the spot in presence of same mashirs. On 04.08.2014 the complainant Abdul Razzak arrived at PS and disclosed the facts of a cognizable offence, hence I registered the FIR No. 80 of 2014” Such inquiry is conducted in terms of S. 174 Cr.P.C read with Rule 25.31 of the Police Rules, 1934 which mandates that the Officer in-charge of a police station or any other officer, on receiving information regarding the unnatural or sudden death of a person, shall immediately proceed, after sending information to the nearest Magistrate, to the place where such body was found and shall act as prescribed under Rule 25.33 of the Police Rules 1934 and S. 174 Cr.P.C so as to prevent destruction of evidence, draw up a report regarding the apparent cause of death, wounds, marks or any bruises found on the body or any weapons recovered that were possibly used in the commission of offence. Such exercise having been occurred in the present case shadows the benefit arising from the delay in the lodgment of F.I.R. Besides, delay alone can never be fatal to the prosecution case if it has been reasonably explained. In this respect, reliance is placed on the case of *Abdul Khalique v. The State (2020 SCMR 178)*.*

12. The depositions of the PWs are in line with each other in terms of who shot and killed the deceased. The complainant PW-1 Abdul Razzak has deposed that *“Accused Inayat, Misri and Hussain Bux got down my son Saddam Hussain from the motorcycle and accused Ameer Bux, Ghulam Ali and Pandhi got down Nazar Mohammad from motorcycle and accused Inayat, Misri and Hussain Bux made straight fire shots on my son Saddam Hussain with their pistols while Ameer Bux, Ghulam Ali and Pandhi made straight fire shots on my other son Nazar Mohammad. They were doing firing and I raised cries. Accused Inayat, Misri and Hussain Bux did eight fire shots which hit to my son Saddam Hussain on left side of his chest and shoulder. Accused Ameer Bux, Ghulam Ali and Pandhi made four fire shots out of which three fire shots hit to my son Nazar Mohammad on right side of his chest and shoulder while one fire shot hit on his forehead.”* To support his version, PW-2 Hussain Bux who was the nephew of the complainant and was at some distance deposed that *“As soon as we proceeded further/went ahead we saw that six persons namely Misri, Inayat, Hussain Bux, Ameer Bux, Ghulam Ali, Pandhi all armed with pistols and two unknown accused out of whom one was armed with repeated and one with gun at about 12:30 p.m (Noon). We also saw that accused Misri, Hussain Bux and Inayat made fire shots on Saddam Hussain while accused Ghulam Ali, Pandhi and Ameer Bux made fire shots on Nazar Muhammad. We were at a distance of about 25/30 paces away from above named injured when we saw that*

they fell down and we attempted to proceed further, but accused persons made aerial firing due to which we could not reach closer to the injured." PW-3 Niaz Ahmed, the complainant's son and the brother of the two deceased deposed that *"we reached at the distance of about 30 paces away from the place of incident we saw that accused Inayat, Misri and Hussain Bux did straight fire shots with their pistols on Saddam Hussain while accused Ameer Bux, Ghulam Ali and Pandhi made straight fire shots with their pistols on Nazar Mohammad. Two unknown accused persons out of whom one had repeater and other had gun were standing at the side of the road. We saw that my both above named brothers fell down after firing and we stopped there."* As far as the contradictions in the evidence of the prosecution witnesses regarding the distance at which appellants were standing being 1 to 2 feet and the report of the Medico-Legal Officer stating that the distance was 2 to 3 feet is inconsequential primarily because the difference is merely of 1 (one) feet which the naked eye can mistake easily. Needless to say that such contradictions or variations may well be due to mere lapse of memory or confusion caused in the mind of a witness by a relentless cross-examiner because the incident pertains to the year 2014 whereas the witnesses were examined in the year 2017. As far as the witnesses failing to mention how many shots each appellant fired separately, the Hon'ble Apex Court has been pleased to observe in the case of *Sajid Mehmood v. The State (2022 SCMR 1882)* that:-

"The medical evidence available on the record corroborates the ocular account so far as the nature, time and impact of the injury on the person of the deceased is concerned. So far as the argument of learned counsel for the appellant that the medical evidence contradicts the ocular version is concerned, we may observe that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. It is settled that casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. During turmoil when live shots are being fired, witnesses in a momentary glance make only tentative assessment of points where such fire shots appeared to have landed and it becomes highly improbable to mention their location with exactitude."

13. It needs no special emphasis to state that every contradiction cannot take place of a material contradiction and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. In this respect, reliance is placed on the case of *Zakir Khan and others v. The State (1995 SCMR 1793)*, wherein it has been observed

that minor discrepancies found in the evidence of the witnesses, which generally occur, are to be overlooked. The contention of the learned Counsel for the appellants regarding the prosecution witnesses being relatives and interested is also baseless. Despite their friendship with the complainant and deceased, their evidence after careful consideration is found trustworthy. Reliance in this respect is placed on the case of *Nasir Iqbal @ Nasra and another v. The State (2016 SCMR 2152)*. Moreover, the deceased was murdered in the presence of his father, mother, brother and cousin. It is unusual for them to set free the real culprits and nominate innocent persons instead and that too without any justifiable reason or rhyme. It appears extremely unreasonable to even consider such a fact. Reference is made to the case of *Allah Ditta v. The State (PLD 2002 SC 52)*, *Islam Sharif v. The State (2020 SCMR 690)* and to the case of *Shamsher Ahmed and another v. The State and others (2022 SCMR 1931)*, wherein it has been held that:-

“Learned counsel for the petitioner/convict could not point out any reason as to why the complainant has falsely involved the petitioner/convict in the present case and let off the real culprit, who has committed murder of his real son. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his son and falsely involve the petitioner without any rhyme and reason.”

14. The case of the prosecution is firmly structured on ocular account, furnished by the witnesses, viewed from any angle, natural and trust-worthy. Duration of the injuries coincides with the fatality that befell both the deceased. Wounds on the person of the two deceased are consistent with the weapons alleged to have been used. The witnesses are in comfortable unison on all salient aspects of the incident as well as details collateral therewith. The cross-examination of the witnesses remained inconsequential inasmuch as nothing adverse could be solicited from the witnesses except for a volley of suggestions, vehemently denied. The medical evidence fully supported the ocular account in terms of the injuries on the body of the deceased Nazar Muhammad and Saddam Hussain. PW-7 Inspector Meeran Khan also recovered 12 bullet empties from the place of incident which supports the deposition of the eye-witnesses who stated that a total of 12 shots were fired. As far as the question of blackening of wounds is concerned, the distance from which the fires were made were 2 to 3 feet in the opinion of the doctor and some wounds are shown with blackening while some are not. This alone does not create doubt, rather there are many circumstances where shots even from a close distance many not cause blackening. It has been observed by the Hon’ble

Apex Court in the case of *Javed Ishfaq v. The State (2020 SCMR 1414)* that:-

Burning/blackening, though a predominant factor to determine distance inter se the assailant and the victim, nonetheless, is not the conclusive indicator; it depends upon factors more than one i.e. quality of munition and process of combustion that may possibly vary the impact of combusted gun powder; a smudging shot may cause deceptive appearance as well, therefore, in the absence of other qualifying evidence, hypothesis of inter se distance cannot be constructed with empirical exactitude on the presence of burning alone (Parikh's Text Book of Medical Jurisprudence and Toxicology, 1989 Edition, Pages 280/282). Even otherwise, site plan has never been considered as a substantive piece of evidence nor any benefit may be extracted therefrom unless the witnesses are duly confronted with the purported anomaly or discrepancy therein; no such attempt has been undertaken by the defence.

15. These various pieces of evidence are inexorably pointing to the appellants with no space to entertain any hypothesis of their innocence or substitution. The learned trial Court has already taken a lenient view by considering the mitigating circumstances and awarded the lesser punishment of life imprisonment instead of the death penalty to the appellants.

16. For what has been discussed above, the prosecution has proven its case against the appellants to the hilt and as such, the impugned judgment whereby the appellants were convicted and sentenced does not call for any interference. Resultantly, the same are upheld and judgment impugned herein is maintained. Instant criminal appeal is dismissed being meritless.

JUDGE