

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Jail Appeal No.S-186 of 2018

Date of hearing: 08.06.2023 and 15.06.2023.
Date of decision: 23.06.2023.
Appellant: Azizullah s/o Ahmed Jatoi,
Through Mr. G.M. Laghari advocate.
The State: Through Mr. Nazar Muhammad Memon,
Addl.PG and Mr. Imran Ali Abbasi, Assistant PG.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- By means of impugned judgment dated 01.08.2018 passed by learned 1st Additional Sessions Judge Dadu in Sessions Case No.727 of 2014, appellant Azizullah has been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life and so also to pay Rs.1,00,000/- as compensation u/s 544-A CrPC, in default thereof, to suffer further 06 months SI with benefit of section 382-B CrPC duly extended to him, while co-accused Khamiso, Ahmed and Ali Hassan have been acquitted, however, the case against absconding accused Abdul Rehman alias Papu has been kept on dormant file till his arrest.

2. As per brief facts, complainant Sahib Khan reported the matter of murder of his brother Mohbat Ali to PS B-Section Dadu on 05.07.2014 at 1630 hours alleging that there is an old enmity between his family and family of appellant over the land on account of which family of appellant would often issue threats to them. On 04.07.2014 his brother set out for selling crop of ladyfinger in Sabzi Mandi Dadu as per routine. After some time, he, his cousin Muhammad Ayoob and nephew Shamsuddin, on a motorcycle, also left village for Dadu. At about 06:30 a.m. when they reached near Tubewell/Boring of Idrees Mallah, Markhpur Dadu, they saw his brother ahead of them going on his bicycle. Meanwhile, five persons, identified as Appellant Azizullah armed with pistols, Abdul Rehman alias Papu armed with pistol, Ahmed son of

Muhammad Hassan all by caste Jatui (since acquitted) and two unidentified persons emerged from southern side on two motorcycles and stopped his brother Mohbat Ali. Meanwhile, complainant party came a bit closer to his brother. First, the accused abused complainant party and then accused Ahmed instigated his son, appellant Azizullah, to not spare his enemies. Upon which appellant Azizullah made five straight fires upon Mohbat Ali who got seriously injured and fell down on the road. When complainant party tried to intervene, the accused also fired upon them but luckily it did not hit them. Thereafter, all the accused left on the said two motorcycles. Complainant party came over the injured and noted multiple firearm injuries on his person. They first brought him at Police Station B-Section Dadu, got a letter for treatment and reached Civil Hospital Dadu, from where, due to his serious condition, he was referred to Liaquat Medical University Hospital Hyderabad. But on the way he succumbed to his injuries. At about 08:45 a.m. complainant party brought his dead body again to Civil Hospital Dadu for postmortem. After which, they went to their village for burial and next day complainant appeared at Police Station and registered FIR as above.

3. Usual investigation followed FIR, necessary documents including memo of place of incident, wherefrom 08 empties of 30 bore pistol were recovered, and memo of injuries and inquest report were prepared. Finally, Challan was submitted in the court which framed the charge in which accused pled not guilty and claimed trial.

4. Prosecution in order to prove the charge has examined Medical Officer Civil Hospital Dadu Niaz Ahmed as PW-1 at Ex.19, who had conducted postmortem of the deceased on 04.07.2014 at 11:30 a.m., whom he had first attended as an injured at about 06:30 a.m., and found four firearm injuries on different parts of his torso with exit wounds. In cross examination, he has verified that the deceased had sustained firearm injuries from a distance of 4/6 feet. He has produced postmortem report in his evidence. Next witness is Tapedar Aijaz Ali (Ex.20). He had prepared site plan/ sketch and has produced the same in his evidence along with a letter from Mukhtiarkar Dadu directing him to do so. Complainant has been examined as PW-3 (Ex.21). He has reiterated the facts disclosed by him in FIR, and has produced its copy in his evidence. Fourth witness examined by prosecution is Muhammad Ayoob (Ex.22), a cousin of complainant and deceased, who was with the complainant on the day of incident as alleged. He has supported the

version of the complainant in his evidence. PW-5 is Shah Nawaz (Ex.23). He is the mashir, in whose presence injuries of the deceased were inspected by the police, and later on inspection of dead body on same day viz. 04.07.2014 also took place in his presence. Both the documents he has produced in his evidence. In addition, he has produced memo of clothes of deceased prepared in his presence, memo of place of incident, visited in his presence, wherefrom blood stained drops and 08 empty rounds were secured. He is also witness to the arrest of co-accused Khamiso, and has produced such memo in his evidence.

5. PW-6 is ASI Sajjan Ali (Ex.24). He was the duty officer on the day of incident when complainant appeared before him and got a medical letter for treatment of his brother Mohbat Ali after disclosing the incident. Later on, on the same day he again appeared and informed him that while they were proceeding to Hyderabad for treatment of his brother, he succumbed to his injuries and died. His body was brought back to Civil Hospital Dadu for postmortem. This officer made relevant entries in the daily diary and visited Civil Hospital Dadu for inspection of dead body and referred him to Medico Legal Officer for postmortem. He has also confirmed in his evidence that after postmortem he had handed over dead body to HC Manzoor who then under the receipt handed over it to complainant Sahib Khan. He has deposed that on the same day he had visited the place of incident, secured 08 empties of 30 bore pistol so also blood stained drops from there in presence of mashirs which he duly sealed for chemical examination and report and prepared such memo. Next day, as per verbatim of complainant, he registered FIR.

6. ASI Muhammad Ameen, posted at CIA Center Dadu, has been examined as PW-7 (Ex.25). His evidence is limited to receiving papers from in charge CIA Center Dadu for further investigation. He had recorded further statement of complainant on 21.07.2014 in which he had named Ali Hassan and Khamiso, shown two unidentified persons in FIR, as accused in the case, and had arrested Khamiso in presence of mashirs. At his instance, Mukhtiarkar Dadu moved Tapedar for preparation of sketch / site plan of place of incident. He has confirmed submission of Challan before the court after completion of investigation.

7. After such evidence, all the accused including appellant were examined by the trial court u/s 342 CrPC. They have denied incriminating evidence produced against them by the prosecution and have insisted upon their innocence. The trial court, however, found only

the appellant guilty of the offence, and vide impugned judgment has convicted and sentenced him in the terms as stated in para No.1 and acquitted all the co-accused.

8. Learned defense counsel has argued that appellant is innocent and has been falsely implicated in this case; prosecution has failed to prove the case against appellant beyond a reasonable doubt; there are material contradictions in the evidence of witnesses which have not been considered by the trial court; the trial court has erred in holding appellant guilty of the offence without any substantial evidence against him; the complainant party did not succeed in producing any evidence of previous enmity to support such part of the story narrated by complainant in FIR which renders the entire prosecution case as doubtful; there is difference between medical evidence as well as ocular account furnished by the witnesses; no one from the witnesses was injured at the place of incident although they were fired at, creates doubts over their presence; PW Shamsuddin who is said to be eyewitness has not been examined which gives rise to adverse inference that had he been examined he would not have supported the prosecution story; there is a mention of five injuries in evidence of the witnesses but the postmortem reports shows that the deceased had sustained four (04) injuries; there is a delay of 03 days in sending the clothes of the deceased to chemical analysis without any explanation; in medical evidence there is no mention of eyewitnesses. Learned counsel in order to support his contentions has relied upon 2015 SCMR 1142, 2022 SCMR 393, 2018 SCMR 344, 2023 SCMR 670, 2022 SCMR 1515, 2021 YLR Note 161, 2018 YLR 1515, 2018 YLR 216, 2020 YLR Note 79, 2017 YLR Note 177, 2019 YLR Note 28, PLJ 2022 Cr.C. 397 (DB), 2022 MLD 1712, 2020 MLD 1492, 2021 PCr.LJ 1654, 2023 PCr.LJ 25, 2022 PCr.LJ Note 101, 2023 PCr.LJ 25, and 2020 PCr.LJ Note 31.

9. As against it, Assistant Prosecutor General has supported the impugned judgment and has pointed out that there is no material contradiction in the evidence to be given benefit of to the appellant.

10. I have considered submissions of parties and perused material available on record including the case law relied in defense. Account of the incident, without a perceptible dissent on any material part, is furnished by two eyewitnesses Sahib Khan, brother of the deceased, who is complainant, and Muhammad Ayoob (PW-4), a cousin of complainant. They have been subjected to a reasonably lengthy cross

examination but no contradiction or discrepancy worth mentioning, or impairing intrinsic value of the prosecution story, has come on record. On salient features of the case, their evidence is in line with each other and with what has been revealed in FIR, which reinforces their presence on the spot. They have identified unequivocally role of the appellant murdering the deceased without making any slightest deviation. Their evidence is to the effect that on the day of incident viz. 04.07.2014 after the deceased had left for selling crop of ladyfingers in the market on a bicycle, they along with PW Shamsuddin left for Dadu on a motorcycle to run an errand. On the way, when they reached the place of incident viz. Boring of Haji Idrees Mallah, they spotted the deceased going ahead of them, and meanwhile five persons including appellant emerging from southern side. No sooner they came closer to the deceased than they started abusing him. Then appellant Azizullah at the instigation of acquitted accused Ahmed fired five times from his pistol upon the deceased. The other accused (since acquitted) tried to hit them by making fires from their respective pistols but missed the target. And after the accused escaped on the motorcycles, they came over Mohbit Ali, found him injured and took him to Civil Hospital Dadu for treatment after obtaining a letter from the police in this regard. However, due to his serious condition, he was referred to Liaquat Medical University Hospital Hyderabad. While he was being taken away there, he succumbed to injuries and died. Hence, the complainant party returned to Civil Hospital Dadu, got his postmortem conducted, gave such information to the police and next day had FIR registered.

11. PW-6 ASI Sajjan Ali was the duty officer on the relevant day. He is the one who had also conducted partial investigation until it was transferred to PW 7 ASI Muhammad Ameen. In his evidence he has produced both the entries: entry No.38 recorded at 0715 on 04.07.2014 hours referring to first arrival of the complainant at PS with injured for obtaining a letter for his treatment and entry No.9 at 0945 hours on the same day recording information of death of the deceased on the way to Hyderabad. These two documents have not been disputed by the defense and come a long way to support presence of the complainant on the spot at the relevant time i.e. 0630 hours., with a simple comparison of his arrival at Police Station at about 0715 hours. This witness has also given account of investigation: visiting hospital for inspecting dead body of the deceased, issuing a letter for post mortem, visiting place of the incident, collecting 8 empties and blood drops from there, recording statements of

the witnesses u/s 161 CrPC, sending clothes etc. to chemical lab for examination. His evidence lends support to prosecution story qua its integral details: place and time of incident, crime weapon used, manner of commission of crime, identity of the deceased, etc.

12. The evidence of the eyewitnesses is further supported by evidence of Medico Legal Officer PW-1 who has confirmed death of the deceased by firearm injuries on his person. Both the eyewitnesses have disclosed in cross examination that deceased was fired at by the appellant from a distance of, more or less, 3/4 feet. Their assertion, qua distance, has been confirmed by the Medico Legal Officer who in his cross examination has stated that deceased was fired at from a distance of 4/6 feet. The probable time between death and injuries given in the postmortem report as 2½ hours is in complete synchronization with the story narrated by the eyewitnesses regarding time of occurrence of incident, the events occurring in between, and producing the dead body finally in hospital for a postmortem. Confirmation of place of incident narrated by them has further been enforced by PW-2 Tapedar who on the source of complainant and the eyewitness visited the same and prepared its site plan/sketch identifying all the points where the deceased as compared to the accused and witnesses was present and got hit by the appellant. From the place of incident, at least 08 empties of 30 bore pistol were recovered, which IO in his evidence has identified to be of 30 bore pistol and secured by him in the manner as stated in investigation, which further boost up the prosecution case over the details described by the eyewitnesses in this regard.

13. The eyewitnesses' claim of 5 (five) fires made upon the deceased by the appellant as against 04 firearm injuries found on his person in medical evidence is of little consequence. For they have not said specifically that all the five fires had hit the deceased firstly, and secondly, even if such implication is read in their evidence, it is not possible for an eyewitness to calculate, in an intense and charged moment like the one above in which his dear and near one is being murdered within his sight, exact number of fires made by the assailant on the victim and their precise location. Therefore, the difference of one fire as highlighted in defense between oral account and medical evidence does not make the case doubtful against the appellant or the entire story fabricated. Appellant's alleged role of firing directly from his pistol at the deceased injuring him fatally on the spot, as disclosed by the

eyewitnesses, is not only supported by the medical evidence but by the inspection of place of incident by the investigation officer who was able to obtain bloodstained drops from the earth apart from 8 empties of the pistol used in the offence.

14. The appellant initially concealed himself and remained absconder. The incident took place in July 2014 and the appellant was arrested after two years in the year 2016. Learned defense counsel insisted on precariousness of prosecution case by emphasizing non-sending of 8 empties to lab for examination as having debilitating effect. In a backdrop, when, due to abscondence of appellant, no recovery of pistol from him could be effected and it was therefore not available to the IO, sending or non-sending of empties would not make much difference because it was not going to improve prosecution case any further. The empties are sent to lab for determining their matching with the crime weapon and to find out whether they have been fired from it or not. In absence of any crime weapon, it was not possible to obtain such an opinion. But, nonetheless, long abscondence of appellant after the incident seen in peculiar facts of the case: his direct role etc. goes to strengthen his involvement in the offence as alleged, on the contrary.

15. It is always prerogative of the prosecution to examine as many witnesses as it wishes on a particular point for proving that point against the accused. In this case, the prosecution has examined the complainant and one witness to give eye account of the incident. Evidence of PW Shamsuddin, who was with them on the fateful day, is on the same facts. His evidence, on the same point, was not therefore of much help or mandatory, so to speak, to prove that point already highlighted by the aforesaid witnesses. Hence, in my humble view, non-examination of PW Shamsuddin would not render the eye account of the incident furnished by two witnesses any weak or cause an adverse inference to be drawn against the prosecution case.

16. In their 342 CrPC statements appellant and acquitted accused have produced a Photostat copy of a news item, published in daily Kawish dated 05.07.2014 reporting a purported claim of the complainant that they had no enmity with anyone, to press that the incident is unseen and they have been falsely implicated in this case. Suffice it to say, that mere producing a Photostat copy of a news item will not put the direct account of the incident furnished by eyewitnesses in peril or any less truthful. Then, neither the correspondent who reported

the news nor the source thereof was presented for examination in the trial, as required, by the appellant to support truthfulness of the said news item. Sans such detail, news of newspaper cannot be given preference over the direct account of the eyewitnesses identifying the appellant with the role of murdering the deceased by firing upon him. Nothing cogent is in fact available on record to introduce a reasonable doubt in prosecution case qua role of the appellant, which has been proved beyond a reasonable doubt.

17. As a consequence of discussion, finding no merit in the contentions of defense, and no material favorable to it, and agreeing with the reasons given by the trial court while recording conviction and sentence of the appellant, I dismiss the appeal and maintain the conviction and sentence awarded to the appellant.

The appeal is disposed of.

JUDGE