

**IN THE HIGH COURT OF SINDH CIRCUIT COURT
HYDERABAD**

Criminal Appeal No.S-86 of 2017

Appellants: Sikandar and Hajan through Mr. Waqar Ahmed Memon, advocate.

Respondent: The State through Ms. Rameshan Oad, Assistant Prosecutor General Sindh.

Complainant: Muhammad Umer Lashari through Mir Sarfaraz Ali Talpur, advocate.

Date of hearing: 08.12.2023.
Date of decision: 11.12.2023.

J U D G M E N T

KHADIM HUSSAIN TUNIO, J,- Through instant criminal appeal, the appellants have challenged the judgment dated 08.04.2017, passed in Sessions Case No. 18 of 2013 (“**impugned judgment**”), by the learned 1st Additional Sessions Judge, Umerkot which emanated from FIR No. 05/2013 registered at Police Station Shadi Pali for the offences punishable under sections 302, 324 and 34 of the Pakistan Penal Code (“**PPC**”). By way of the impugned judgment, the appellants have been convicted for the offence punishable under section 302(b) PPC and sentenced to rigorous imprisonment for life and to pay Rs. 100,000/- (Rupees one lac) each to the legal heirs of deceased Anwer as compensation u/s 544 of the Code of Criminal Procedure (“**CrPC**”) and in default whereof, the appellants were to further undergo simple imprisonment for six months. They were also convicted for the offence punishable under section 337-D PPC and sentenced to suffer rigorous imprisonment for ten years and to pay arsh of Rs.50,000/- (Rupees fifty thousand) to Abdul Majeed. The appellants were also extended benefit of section 382-B CrPC.

2. The incident stems from a farm dispute between the appellants Sikandar, Hajan and Muhammad Umer Lashari (“**the**

complainant”). The complainant and his brother Anwer (“**the deceased**”) owned an agricultural land in Deh Gurki, Pithoro adjacent to which the appellants resided and used to graze their cattle on the same land, which did not sit well with the deceased who had restrained them in the past as the cattle caused damage to his land. On 26.02.2013, the deceased was accompanied by Abdul Majeed (“**the injured**”) on a motorcycle after leaving the field of his brother (the complainant) while the complainant was close behind and was accompanied by Sajad. That is when he [the complainant] saw the deceased and the injured get gunned down by two persons with pistols. The complainant came close and identified the assailants as the appellants as they were running away. Anwer lost his life at the spot while Abdul Majeed received treatment and survived.

3. After registration of the case, investigation ensued where the Investigating Officer (“**IO**”) examined the dead body in presence of mashirs; got the postmortem conducted, visited the place of wardat, took blood stained earth from there along with two empties and prepared requisite mashirnamas. Both the appellants were arrested and recoveries of a pistol each were also made which were sent to the Forensic Science Laboratory (“**FSL**”) for examination. Following conclusion of the investigation, challan was submitted before the competent Court against the appellants where cognizance was taken and then a formal charge was framed against them to which they pleaded not guilty and claimed trial. In order to substantiate the charge, prosecution examined in all nine witnesses namely, Muhammad Umer Lashari (the complainant), Sajad Ali (witness), Abdul Majeed (witness and the injured), Hamzo (Tapedar), Achar (mashir), Dr. Hari Kirshan (conducted post-mortem of the deceased), SIP Altaf Hussain Shah (conducted investigation of the case), Inspector Ali Bux (conducted investigation of the case) and Dr. Ved Parkash (treated the injured), thereafter prosecution closed its side.

4. Statement of appellants under section 342 CrPC were recorded, in which they denied the prosecution case and claimed

to have been falsely implicated on the pretext of enmity with one Ghulam Hyder Lashari and also claimed that the pistols had been foisted upon them while stating that police arrested their father and uncle, as such they were handed to the police at the police station voluntarily by their elders instead. According to their version, in their statement on oath under section 340(2) CrPC, they claimed that some unknown assailants had attacked the deceased while they were present in the vicinity, rushed to the place of incident and were communicated this information. They claimed that one Uris Lashari was on inimical terms with them and that when police came with tracking dogs at their houses, the village elders handed them over to the police. To corroborate their version, they examined Murtaza Khan who stated that he had handed the appellants to the *Sobedar* to help with tracking foot prints and Yar Muhammad, the other defence witness, corroborated Murtaza's story.

5. After hearing the respective parties, learned trial Court convicted and sentenced the appellants which decision stands challenged.

6. Learned counsel for the appellants has contended that appellants are innocent and falsely implicated in the case by the complainant at the instance of Uris Lashari; that despite people gathering at the place of incident, no one witnessed the alleged incident nor was cited as a witness; that the 161 CrPC statements of witnesses were delayed by 16 days; that the sketch prepared by the tapedar does not show the location of availability of the complainant and the witnesses; that the complainant is a chance witness and his presence is highly doubtful; that there are various contradictions in the evidence of the prosecution witnesses; that the recovery of the crime weapons was made on 08.03.2013 and 11.03.2013 whereas the same were referred to the FSL for examination on 14.03.2013; that it is uncertain as to who caused a fatal injury to the deceased. Summarily, he prayed for the acquittal of the appellants while citing the cases of "Zafar v. State" (2018 SCMR 326), "Hashim Qasim v. The State" (2017

SCMR 986), “Muhammad Bux v. Abdul Aziz” (2010 SCMR 1959), “Imtiaz alias Taj v. The State” (2018 SCMR 344), “Muhammad Irshad v. Allah Ditta” (2017 SCMR 142), “Muhammad Idrees v. The State” (2021 SCMR 612), “Ghulam Mustafa v. The State” (2021 SCMR 542), “Nadeem alias Kala v. The State” (2018 SCMR 153), “Mst. Sughra Begum v. Qaiser Pervez” (2015 SCMR 1142), “Mst. Mir Zalai v. Ghazi Khan” (2020 SCMR 319), “Khuda-e-dad alias Pehlwan v. The State” (2017 SCMR 701), “Nawab Siraj Ali v. The State” (2023 SCMR 16), “Amir Muhammad Khan v. The State” (2023 SCMR 566), “Mehboob v. Sajjad Ahmed” (PLD 2008 Peshawar 69), “Jan Muhammad v. Allah Warrayo” (2020 PCrLJ Note 48), “Mushtaq Ahmed alias Mustafa v. The State” (2011 YLR 303), “Sher Ali v. The State” (2018 YLR 1836), “Mir Hassan v. The State” (2020 YLR 2514), “Ghulam Sabir v. The State” (2020 PCrLJ Note 80), “Muhammad Islam alias Bolla v. The State” (PLD 2019 Lahore 597), “Murad Ali v. The State” (2011 PCrLJ 1133), “Abdul Ghaffar v. The State” (2023 PCrLJ 769), “Raesuddin v. The State” (1990 PCrLJ 506), “Abdul Aziz alias Teny alias Chhoto v. The State” (1989 PCrLJ 1072), “Faiz Muhammad v. The State” (1985 PCrLJ 2132) and “Ghulam Shabbir v. Bachal” (1980 SCMR 708) in support of his arguments.

7. Learned Assistant Prosecutor General supported the impugned judgment while stating that prosecution established the case against the appellants by ocular account furnished by the eye-witness and the injured, medical evidence with respect to the deceased and the injured receiving firearm injuries and circumstantial evidence in the shape of recovery of crime weapons i.e. pistols, as such, learned trial Court rightly convicted and sentenced the appellants. She, therefore, prayed for dismissal of instant criminal appeal while referring the cases of “Nasir Ahmed v. The State” (2023 SCMR 478), “Ghaffar Mahesar v. The State” (2022 SCMR 1280), “Muhammad Ashraf v. The State” (2020 SCMR 1841) and “Javed Akhtar v. The State” (PLD 2020 SC 419). Arguments of the learned counsel for the complainant were also in the same line who further cited the

following cases: “Muhammad Faryad v. The State” (2010 SCMR 166), “Asad Mahmood v. Akhlaq Ahmed” (2010 SCMR 868), “Muhammad Mansha v. The State” (2016 SCMR 958), “Rafaqat Ali v. The State” (2016 SCMR 1766), “Rehmatullah v. The State” (2015 PCrLJ 1163), “Muhammad Latif v. The State” (2008 YLR 619) and “Muhammad Nadeem alias Demi v. The State” (2008 YLR 1681).

8. I have heard the submissions of the parties available and perused the record prudently with their assistance.

9. The appellants have been booked with the allegations that on the incidental day, they opened fire at the deceased and the injured with their pistols. The ocular account of the incident is furnished by three eye-witnesses; the complainant Muhammad Umer Lashari (PW1), Sajad Ali (PW2) and the injured, Abdul Majeed, (PW3). As per the version furnished by the eye-witnesses Umer Lashari and Sajad Ali, they were on their motorbike following the deceased who was on a motorbike with the injured Abdul Majeed who was driving it when at about 03:15 p.m. they saw the deceased and the injured get shot at from the tree line. When they got close, as per their version, they identified the assailants to be the present appellants. For safe administration of justice and in view of the contention raised regarding contradiction in the evidence of the PWs, I find it proper to reappraise the same. Sajad deposed that “... *my uncle Anwar Ali and Abdul Majeed came at our land... and at about 03.00 PM they left our land on motorcycle. I and complainant also left our land and proceeded towards Mirpurkhas. At some distance two persons fired at my uncle with intention to commit murder, when I and my uncle complainant reached near them the accused after seeing us went away towards eastern side. We saw and identified them as Hajan and Sikandar who were already known to us.*” Complainant Muhammad Umer Lashari disclosed the motive behind the incident alongside what had occurred on the day of the incident while stating that “... *we used to cultivate ourselves. Adjacent to our land accused Sikandar and Hajan are residing*

who usually got my crop damaged through their cattle... on 26.02.2013 my brother Anwar, nephew Abdul Majeed came on my land. It was about 03.00 PM of same day, my brother Anwar and nephew Majeed were going on motorcycle from my land, then I and my nephew [Sajad] were following them on another motorcycle. At about 03.15 PM we saw that accused Hajan and Sikandar fired with intention to commit murder of my brother who after sustaining fire arm injury fallen down on the road and we saw the accused while running away towards eastern side.” The injured, Abdul Majeed, also provided his account of the incident while deposing that “... I along with my uncle Anwar had gone to look after the land. Muhammad Umer and Sajad Ali were already present on the land. After visiting the land, we returned to Mirpurkhas. After our departure my uncle Muhammad Umer and Sajad left the land on motorcycle. When we [covered] a little distance we saw accused Hajan and Sikandar Shar were sitting in lai trees, when we reached on motorcycle near them, they stand up from the lai trees and directly fired from us. I sustained fire arm injuries... and my uncle Anwar received fire arm injuries on his back. My uncle fallen down from the motorcycle. I stopped the motorcycle and fallen down.” Learned counsel for the appellants contended that several contradictions had been made by the eye-witnesses in their evidence, however perusal of the above do not show any contradictions which only goes to show that the witnesses are in comfortable unison on all the salient aspects of the incident. Even the cross-examination of all three witnesses remained inconsequential. There may be minor variations such as the omission to disclose where the deceased received his injury at the first instance or the omission to disclose the distance at which the assailants stood, these variations often occur due to lapse of memory especially when the incident pertains to a horrific assault of one’s own relative. Such contradictions cannot be deemed material should not be taken to be a ground to reject the prosecution evidence fully as held in the cases of *Zakir Khan vs. The State (1995 SCMR 1793)* and

Khadim Hussain vs. The State (PLD 2010 SC 669). The contention with respect to relation of the witnesses with the deceased and it being sufficient to find them as interested witnesses is incorrect as well. Their depositions were, after careful and prudent consideration, found trustworthy and reliable as such mere relationship could not invalidate the same nor is there any cavil to such a proposition. Reference, if any required, is made to the case of *Nasir Iqbal alias Nasra and another v. The State (2016 SCMR 2152)*. It was also observed by the Supreme Court in the case of *Imran Mehmood v. The State (2023 SCMR 795)* that as long as the presence of the related witnesses at the time of occurrence appears natural, their testimony can safely be relied upon. Even otherwise, it has time and again been recognized that in cases involving murders of blood relatives, it is very often improbably to involve innocent individuals. Reference is made to the cases of *Islam Sharif v. The State (2020 SCMR 690)*, *Shamsher Ahmed v. The State and others (2022 SCMR 1931)*, *Nasir Ahmed v. The State (2023 SCMR 478)*, *Muhammad Abbas v. The State (2023 SCMR 487)*, *Amanullah v. The State (2023 SCMR 527)*, *Ali Asghar alias Aksar v. The State (2023 SCMR 596)*, *Aman ullah v. The State (2023 SCMR 723)*, *Imran Mehmood v. The State (2023 SCMR 795)*, *Aqil v. The State (2023 SCMR 831)* and *Muhammad Ijaz v. The State (2023 SCMR 1375)*. And even if the evidence of these “interested” witnesses was taken out of consideration, the admission by both the appellants regarding their presence in close proximity to the place of incident coupled with circumstantial evidence in the shape of two crime empties matching the pistol recovered from appellant Hajan would be sufficient to convict him. With that, it would be proper to come to the distinguishing factor in the culpability of the appellant Sikandar and the appellant Hajan. The FSL report with respect to the two recovered pistols is available at pg. 85 of the paper book (Exhibit 10/J) which was presented in the trial Court by the IO, SIP Altaf Hussain Shah. Undoubtedly, all the witnesses placed

both the appellants at the place of incident, duly armed, but they all collectively assigned them the role of firing as they were hidden in the tree line and the witnesses had only seen them from some distance. When the FSL examiner's report is perused coupled with the fact that a total of two shots were fired, one at the injured Abdul Majeed and the other at the deceased Anwar and the subsequent recoveries of two empties from the place of incident, one can invariably come to the conclusion that the FSL report should ascertain who was responsible; if one empty each matched the pistols, both the appellants had used their pistols. The pistol recovered from appellant Hajan was marked as 'A' by the FSL examiner and in his opinion, the two 30 bore crime empties which he marked as 'C1' and 'C2' were **both** fired from the pistol he had marked as 'A' which was recovered from the appellant Hajan. As such, neither of the two empties had matched Sikandar, the only logical conclusion being that he never shot. Undoubtedly, his presence is established, but he did not play any active role in the commission of murder and was only present at the place of incident, duly armed. As for the safe custody of the pistols, the parcels in which pistols were received from the Superintendent of Umerkot Police were sealed and all the requisite entries for their recovery, deposit and transmission are available on the record. A Division bench of this Court in the case of *Noor Ahmed and others v. The State* (**PLD 2005 Karachi 177**) had rendered similar observations while acquitting one set of accused who were assigned no overt act and convicting the ones assigned an overt act. For that reason, the conviction of the appellant Sikandar cannot sustain as despite being armed with a pistol, he did not shoot.

10. Needless to say, the charge against the appellant Hajan of committing the murder of deceased Anwar and injuring Abdul Majeed has been proved, however it would be proper to adjudge the defence plea raised by him. Suffice it to say that the defence plea raised at trial lacks credence and has also been changed time and again. At first instance while getting the

statement under section 342 CrPC recorded, it was stated that the appellants had enmity with one Ghulam Hyder Lashari while in the statement recorded under section 340(2) CrPC, it was stated that the enmity was with one Uris Lashari. Then, in the 342 CrPC statement and the 340(2) CrPC statement, it was stated that the appellants were handed over to the police at the police station after their father and uncle were arrested, but this version was contradicted by the two defence witnesses who instead stated that they were given to the Subedar who brought tracking dogs for help at their houses and not at the police station. As such, the defence plea is of no help to the appellant Hajan.

11. For what has been discussed above, the guilt of the appellant Hajan has been proven to the hilt with respect to committing murder of the deceased Anwar and causing injuries to the injured Abdul Majeed. However, as no active role was played by the appellant Sikandar despite his presence with a pistol, common intention could not be established. For these reasons, the conviction and sentences awarded to the appellant Hajan are maintained whereas the appellant Sikandar is acquitted of the charges levelled against him. The criminal appeal is partly allowed to the extent of appellant Sikandar and the impugned judgment is maintained only to the extent of appellant Hajan. Appellant Sikandar shall be set free unless he is required in any other custody case.

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

JUDGE