

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Criminal Appeal No.D-65 of 2021

[Confirmation Case No.14 of 2021]

Before:

Mr. Justice Khadim Hussain Tunio

Mr. Justice Arbab Ali Hakro

Appellant : Adam Khan son of Khamiso Khan through Mr. Asif Ali Talpur, Advocate.

Complainant : Muhammad Ali son of Muhammad Hashim through M/s. Farhad Ali Abro and Shoukat Ali Kaka, Advocates.

The State : Through Mr. Nazar Muhammad Memon, Additional P.G Sindh.

Date of hearing : **18.07.2023**

Date of Judgment : **02.08.2023**

JUDGEMENT

ARBAB ALI HAKRO, J.- In this Criminal Appeal, the appellant challenges the judgment dated 28.5.2021, passed by the 1st Additional Sessions Judge/M.C.T.C Tando Allahyar in Sessions Case No.102 of 2015, arising out of F.I.R No.42 of 2015, registered at Police Station B-Section Tando Allahyar for offences punishable under Sections 302, 324, 504 P.P.C. After a full dressed trial, appellant was awarded death sentence under Section 302(b) P.P.C subject to the confirmation by this Court. Appellant was also directed to pay compensation of Rs.500,000/- to the legal heirs of deceased Asad Ali Nahiyoon as required under section 544-A, Cr.P.C. The appellant was also convicted under Section 324 P.P.C and sentenced to suffer R.I. for six years and to pay a fine of Rs.20,000/- and in case of default, appellant was directed to suffer S.I. for two months more and convicted under Section 504 P.P.C and sentenced to suffer R.I. for two years and to pay fine of Rs.20,000/- and in case of default he shall suffer S.I. for one month more. However, benefit of Section 382-B Cr.P.C was also extended to the appellant.

2. The backdrop of the case, as reflected from the record, is that on 16.08.2015 at 2045 hours Muhammad Ali son of Muhammad Hashim Nahiyoon, lodged FIR at PS B-Section Tando Allahyar to the effect that he is a landlord by profession and had a dispute over family matters with Adam Khan S/o Khamiso Nahiyoon, such faisla was held. On 16.08.2015 at evening, the complainant along with his brother Asad Ali Nahiyoon and nephew Altaf Hussain came at Tando Allahyar city on motorcycle and after getting free from there, they came at a mechanic shop of Abid Hussain for changing of motorcycle oil. Complainant, his brother and nephew named above sat on a wooden bench in front of the shop during which they saw constable Adam Khan Nahiyoon crossed from their side. After a while, at about 0845 hours, Adam Khan Nahiyoon duly armed with official Kalashnikov came there attired in official uniform and started hurling abuses to the complainant party, aimed his rifle towards them and made straight fires upon them which hit on the neck and other parts of complainant's brother Asad Ali who died on the spot. Head constable Abdul Rasheed Bhayoon and Constable Muhammad Hashim Khaskheli arrived there as well who held/grabbed Adam Khan Nahiyoon and made him sit in the police vehicle. Thereafter, the complainant found that his brother Asad Ali had sustained fire-arm injuries on right side of neck, one injury on left side of hip, one injury on right side of the back below the shoulder, and one injury on the right back side above the flank/kidney. The dead body was then shifted to Civil Hospital Tando Allahyar. Meanwhile, SIP Rehmatullah Saddar also came there and after observing formalities and post-mortem examination, the dead-body was made over to the complainant for its burial who, after getting free from its burial, formally reported the incident to Police.

3. Upon the conclusion of the investigation, a report in accordance with Section 173 Cr.P.C. was submitted before the trial court. The prosecution, aiming to substantiate its case, presented a total of nine witnesses. In his statement recorded under Section 342 Cr.P.C, the appellant firmly asserted his innocence and vehemently denied all charges brought against him. Nevertheless, the appellant did not appear as his own witness on oath as provided under Section 340(2) Cr.P.C, thereby failing to provide evidence to counter the allegations made against him. Nevertheless, as part of his defence, the appellant gave the names of Lakha Dino, Mumtaz, Riaz Ahmed Soomro, and Wasif (a clerk employed at Central Prison Hyderabad) as

defence witnesses. Subsequently, the appellant submitted an application to the trial Court, containing an assertion that his private defence witnesses have experienced harassment, consequently rendering them unwilling to attend the Court for evidence. Therefore, the statements provided by officials DWs Wasif Ali and Riaz Ahmed were recorded.

4. At the very outset, learned counsel for the appellant contended that the incident took place at 8:45 p.m. and the appellant has been produced at Police Station at 9:00 p.m. and his arrest has been shown in presence of private mashirs; that time is not mentioned in the memos prepared by the I.O.; that as per post mortem notes, time between death and occurrence is about 2 to 3 hours; that there is delay in lodging of the F.I.R.; that post mortem was finished at 11:45 p.m.; that the P.W.s are interested and inimical; that no independent witness has been cited by the prosecution; that police officials namely PCs Riaz Gul and Ashique Ali, Incharge Malkhana as well as Incharge Police lockup have not been cited in the case as prosecution witnesses; that P.W HC Abdul Rasheed has been declared hostile by the prosecution; that names of P.W.s HC Abdul Rasheed and D.P.C Muhammad Hashim and mechanic Abid have not been mentioned in interim challan produced by appellant through statement under Section 342, Cr.P.C.; that as per evidence of Doctor, the firearm injury was caused by different directions; that wife of deceased is sister of PW Altaf Hussain; that there are material contradictions and discrepancies in the evidence of PWs; that there is no mention of wall situated at the place of incident in the sketch prepared by the Tapedar; that false story has been cooked up by Police party at the instance of PW Nasreen, complainant Muhammad Ali and SIP Rehmatullah; that weapon produced/alleged to have been recovered from the appellant is Rifle whereas empties /cartridges have been referred to F.S.L.; that none from the P.W.s have received any injury. In support of his contentions, he relied upon case law reported in **2010 SCMR 1009, 2023 MLD 156, 2019 YLR 1146, 1992 MLD 551, 2017 P Cr. LJ 280, 2017 P Cr. LJ 1113 and 2022 Y.L.R. Note 185.**

5. Learned Additional Prosecutor General Sindh contended that the appellant had made four (04) shots at the deceased; that appellant had misused the official weapon; that appellant is a Police official and that he misused the official weapon while committing the alleged offence; that there is no chance of mistaken identity of the

appellant or substitution of the accused; that the appellant was arrested at the spot by the Police party with whom he was on duty and F.I.R. was lodged promptly.

6. Learned counsel for the complainant contends that DWs have not supported the defence plea as they have disclosed all the facts before the trial Court in their evidence; that prosecution version has been supported by all the PWs through their evidence as well as by medical evidence; that complainant party has produced copies of certain documents through statements in respect of motive alleged by the complainant party in the F.I.R.; that S.S.P., Tando Allahyar, conducted one enquiry against the appellant and has been removed from service; that five empties have been recovered from the place of scene.

7. The learned counsel for both parties has presented their arguments at considerable length and we have thoroughly examined the available evidence on record with their able assistance.

8. Upon careful perusal of the record, it becomes apparent that the regrettable occurrence resulting in the demise of the complainant's brother occurred on 16.8.2015 at 8:45 p.m. The incident in question was promptly reported to the Police, resulting in the lodging of F.I.R. that very day at 11:00 p.m, a mere two hours and fifteen minutes following the incident. The *inter-se* distance between the place of occurrence and the Police Station measured two kilometers. This aspect of the case effectively demonstrates the prompt reporting of the matter to the Police without any undue delay, shows the truthfulness of the prosecution case, and excludes the possibility of deliberation and consultation. Since the parties were already familiar with each other, there was no possibility of misidentification. In this case, Muhammad Ali the complainant (PW-01) and Altaf Hussain (PW-02) furnished the ocular account. Both these witnesses had clearly mentioned that the appellant had an official weapon i.e. *Kalashnikov (rifle)*, with which he fired upon the deceased which resulting in his death. The deceased's injuries were borne out from the post-mortem report, and a crime weapon was also secured from the appellant. During the trial, the above prosecution witnesses underwent a lengthy cross-examination conducted by the defence. However, no evidence was elicited that could be deemed beneficial to the appellant or detrimental to the prosecution. The deposition of both witnesses remained consistent in every essential aspect as they

provided accounts that aligned precisely with the circumstances of this case. Consequently, it is reasonable to infer that the prosecution's ocular testimony is reliable, forthright and imbued with a sense of confidence. The accounts of both eye-witnesses unequivocally assert that they accompanied by the deceased Asad Ali, arrived in Tando Allahyar City on a motorcycle and subsequently visited the shop of PW-Abid Hussain (the place of occurrence) with the intention of having the motorcycle's oil changed. The testimonies provided by the eye witnesses, as mentioned above, have been corroborated by an independent witness, Abid Hussain, who is the proprietor of the shop where the eye-witnesses, in the company of the deceased Asad Ali, sought oil changing and motorcycle tuning services. According to PW Abid Hussain, on the evening of August 16, 2015, from approximately 8:00 to 8:30 p.m, he was present at his workshop when three individuals, identified as Asad Nahiyoon (now deceased), Muhammad Ali, and Altaf Nahiyoon (the eye-witnesses as mentioned above), arrived at his workshop on a 125-Motorycle to have their vehicle tuned and its oil changed. Hence, the presence of the eye-witnesses on the spot at the relevant time was also proved. It is matter of record that the presence of the deceased as well as prosecution witnesses at the place of incident has been established by the prosecution. The prosecution has successfully established that the presence of the appellant at the place of incident along with Rifle bearing No.35025784 and firing upon the deceased with such official weapon. It is also proved on record that blood-stained clothes and blood-stained earth were sent for chemical examination and on chemical examination, it was proved through Chemical Report dated: 07.9.2015 that the clothes of the deceased and the earth secured from the place of incident contained human blood. The prosecution has successfully proved that five empties of 7.62 mm bore were secured from the place of incident "C/1" to "C/5" and sent to the Ballistics Expert for matching with the crime-weapon. The prosecution has produced Ballistic Expert's Report dated 24.8.2015 as Exh.10/J, which established that the said empties were fired from the Rifle bearing No.35025784 carried by the appellant and it was further mentioned in the Ballistic Expert's report that the striker pin marks, breech face marks and ejector marks etc. were found to be similar. The appellant has never denied his presence at the spot along with official rifle; firing with the said weapon.

9. The medical evidence presented in the documented materials supports the ocular testimony in terms of the specific details related to the nature, timing, location and consequences of the injury sustained by the deceased. Even otherwise, it is well established legal principle of law that in cases where ocular evidence is deemed reliable and instills confidence, it is accorded greater weight than medical evidence. In the case of **MUHAMMAD IQBAL v THE STATE (1996 SCMR 908)**, the Apex Court held that "*ocular testimony being wholly reliable, conviction could even be safely based on the same without further corroboration.*" In the case of **FAISAL MEHMOOD AND ANOTHER v THE STATE (2010 SCMR 1025)**, it was held that "*reliable ocular testimony did not need any corroboration to lose conviction*". Similar was the view of Apex Court in the case of **MUHAMMAD ILYAS v THE STATE (2011 SCMR 460)**, wherein it was held that "*it is not medical evidence to determine question of guilt or innocence, but it is ocular version which is required to be taken into consideration at first instance*".

10. As far as the question that the witnesses of the ocular account are related to the deceased, therefore, their testimonies cannot be believed to sustain a conviction of the appellant is concerned, it is by now a well-established principle of law that mere relationship between the prosecution witnesses and the deceased does not suffice as a basis for disregarding the credibility of their testimonies. The counsel representing the appellant could not provide any credible justification for the complainant's false accusation against the appellant in the present case while neglecting to implicate the actual perpetrator responsible for the murder of his real brother. In this context, I am fortified with the case of **IMRAN MEHMOOD v THE STATE (2023 SCMR 795)**, wherein Apex Court has held as under: -

"However, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses out-rightly. If the presence of the related witnesses at the time of occurrence is natural and their evidence is straight forward and confidence inspiring then the same can be safely relied upon to award capital punishment."

11. Regarding the argument advanced by learned counsel for the appellant that the eye-witnesses remained unhurt during the alleged firing, it is imperative to assert that the mere circumstance of

the witnesses managing to escape unhurt should not be considered satisfactory grounds for discarding their evidence. In the case of **IQBAL ALIAS BHALA v THE STATE (1994 SCMR 1)**, the Apex Court has held as under:--

"In assessing the value of evidence of eye-witnesses it is necessary to examine whether in the facts and circumstances of the case their presence at the scene of occurrence in such a situation as would make it possible for them to witness it should be believed and further that whether there is anything inherently improbable or unreliable in their evidence. In Din Muhammad v. Crown 1969 SCMR 777 it was observed that to test the testimony of a witness Court should not only consider whether there is consistency in the narrative, but should also consider whether the version is probable or not'."

12. The motive set up in the F.I.R. was over a brotherly feud between the appellant and the deceased, which was also established. Neither the defence seriously disputed the motive part of the prosecution story nor the P.Ws were cross-examined on the issue of motive.

13. The upshot of the above discussion is that the prosecution has successfully established its case against the appellant Adam Khan son of Khamiso Khan Nahiyoon, through ocular account furnished by the eye-witnesses, which is corroborated by the medical evidence coupled with circumstantial evidence, chemical report and Ballistic Expert's Report. Learned counsel for the appellant has failed to point out any material illegality or serious infirmity committed by the trial Court while passing the impugned judgment, which in our humble view, is based on a correct appreciation of the evidence and the same does not call for any interference by this Court. Thus, the conviction awarded to the appellant by the trial Court is hereby maintained and the instant appeal filed by the appellant merits no consideration, which is hereby **dismissed**; the death penalty handed down to the appellant Adam Khan son of Khamiso Khan Nahiyoon, is confirmed. Confirmation Reference sent by the trial court is, therefore, answered in the **"Affirmative"**.

JUDGE

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