

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

**Cr. Appeal No.D-92 of 2015  
Confirmation Reference No.12 of 2015**

**Present:  
MR. JUSTICE NAIMATULLAH PHULPOTO  
JUSTICE MRS. RASHIDA ASAD**

Date of hearing: 18.08.2020

Date of judgment: 17.09.2020

Appellant: Sikandar through Syed Tariq Ahmed Shah  
Advocate

Respondent: The State through Mr. Shahzado Salim Nahyoon  
Deputy Prosecutor General Sindh

**JUDGMENT**

**Mrs. Rashida Asad J.** –The legality of the judgment dated 30.09.2015, pronounced by the learned Additional Sessions Judge, Tando Allahyar has been questioned in this appeal, who had convicted Sikandar appellant under section 302(b) P.P.C., and had sentenced him death subject to confirmation of death sentence by this Court and further ordered to pay Rs.200,000/-as compensation to the legal heirs of the deceased as provide under section 544-A Cr.P.C., or in default thereof, to six months' R.I.

2. Facts leading to lodging of the instant appeal, as disclosed by the complainant Gul Munir in his evidence are that on 18.09.2009 his brother Mushtaq (deceased), villagers Ahmad Ali, Haji Jumman and he were chit chatting in his Otaq. At about 1:00 a.m, accused Sikandar came there and took Mushtaq on the pretext of some work while P.Ws Ahmed Ali and Haji Muhammad Jumman also left the Otaq to go to their home. After some minutes, on hearing commotions he rushed towards the Otaq of Irfan and found his brother Mushtaq, lying there in serious condition having injuries on his abdomen and fingers of right hand. P.Ws Ahmed Ali

and Haji Jumman also met him and informed that accused and deceased Mushtaq were walking ahead them and were exchanging hot words, and at the Otaq of Irfan, accused Sikandar took out Katti (sharp edge weapon) from the fold of his Shalwar and caused injury on the abdomen of Mushtaq, however, on resistance, Mushtaq also received injuries at his fingers and fell down. The accused ran away. Complainant saw that blood was oozing from the injuries. Complainant party made arrangement of vehicle and took the injured to the Civil Hospital Tando Allahyar after obtaining letter for treatment from the police station the injured was referred to the Civil Hospital Hyderabad. On 20.09.2009 his injured brother Mushtaq succumbed to his injuries and thereafter, he lodged the FIR bearing Crime No.245/2009 for offence under section 302 P.P.C., at Police Station Tando Allahyar. The motive as alleged in the FIR was that the complainant prior to the incident suspected accused/appellant that he had stolen their bullock.

3. After the registration of FIR, P.W ASI Muhammad Bux on the pointation of complainant proceeded to the crime scene, inspected the place of incident and prepared such sketch/map. He also secured blood stained earth from the crime scene through recovery memo and also sealed the wearing clothes of deceased. The investigating officer recorded the statements of P.Ws Ahmed Ali and Haji Muhammad Jumman. On 24.09.2009, he addressed a letter to the concerned Mukhtiarkar for preparation of sketch/map of the place of incident. On 26.09.2009, he arrested the accused Sikandar Khaskheli from Mir Wah Mori at about 1200 hours in presence of mashirs and prepared such memo of arrest. On 27.09.2009, during interrogation accused agreed to produce the crime weapon and thereafter, accused led the police party to his house and from the surrounding hedges he produced big knife which was sealed in presence of mashirs. On 01.10.2009, he produced witnesses before the concerned Magistrate where their statements under section 164 Cr.P.C were recorded. I.O also sent blood stained clothes of deceased, blood stained earth and blood stained churri and received positive report. During the course of investigation, Investigating Officer arrived at a conclusion that accused Sikandar committed the murder of deceased Mushtaq. On the conclusion of investigation, he submitted report under section 173, Cr.P.C.

4. Trial court framed charge against accused under section 302 P.P.C to which accused did not plead guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-01 complainant Gul Munir at Ex.3, P.W-02 Ahmed Ali at Ex.4, P.W-03 Haji Muhammad Jumman at Ex.5, P.W-04 Abdul Wahid at Ex.6, P.W-05 Riaz Hussain at Ex.7, P.W-06 Dr. Abdul Latif at Ex.8, P.W-07 Dr. Abdul Samad at Ex.13, P.W-08 Tapedar Muneer Ahmed at Ex.15, P.W-09 Investigating officer Muhammad Bux at Ex.16, who produced the relevant documents on record. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under section 342, Cr.P.C. at Ex.18, in which he denied the prosecution allegations and claimed his false implication in this case. However, he did not lead evidence in defence and declined to examine himself on oath in disproof of prosecution allegations.

7. Learned trial Court after hearing the learned counsel for the parties and assessment of the evidence, vide judgment dated 30.09.2015 convicted the appellant and sentenced him to death as stated above. Hence, appellant filed this appeal. We intend to dispose of the aforesaid appeal as well as Confirmation Reference No.12 of 2015 made by trial court bearing a common thread by this single judgment.

8. Syed Tariq Ahmed Shah, learned counsel for the appellant argued that there was three days unexplained delay in lodging of the FIR for which no plausible explanation has been furnished by the complainant; that prosecution has failed to examine any guest who was according to the prosecution version was present at the Otaq of the complainant at the time of incident; that the eye witnesses, who are actually chance witnesses and their presence at the place of incident could not be established by the prosecution; that the I.O has also mentioned in the memo of incident that foot prints marks of two persons were available at the crime scene; that even in the sketch of the place of incident the location of the eye witnesses has not been mentioned; that according to eye witnesses they witnessed the incident on the light of bulb, but surprisingly, no blub was secured by the I.O and even no blub was noticed by the Tapedar who prepared the sketch of the place of incident;

that statement of witnesses under section 164 Cr.P.C were recorded after 11 days of the incident; that Irfan in whose Otaq the alleged incident was taken place has not been examined by the prosecution; that Magistrate who recorded 164 Cr.P.C statements of the P.Ws has not been examined by the prosecution; that churri was recovered after eight days of incident and thereafter, it was sent to the chemical examiner after delay of one month and fifteen days; that motive has not been established in the present case and that there are material contradictions in the evidence of the prosecution witnesses. He relied upon the cases reported as **2008 SCMR 95** (LIAQUAT ALI versus THE STATE), **2017 SCMR 344** SARDAR BIBI and another versus MUNIR AHMED and others), **2017 SCMR 486** (MUHAMMAD ASIF versus The STATE), **2017 SCMR 622** (USMAN alias KALOO versus The STATE), **2018 SCMR 506** (G.M. NIAZ versus The STATE), **2018 SCMR 153** (NADEEM alias KALA versus The STATE and others), **2019 MLD 1491** (HAKEEM ALI MOMIN versus GHULAM NABI and 6 others) & **2020 SCMR 321** (Dr. WAQAR HAMEED versus The STATE and another).

9. Conversely, Mr. Shahzado Salim Nahyoon, learned DPG argued that prosecution has successfully established its' case beyond any reasonable doubt by producing confidence inspiring ocular evidence which is supported by medical evidence; that motive has also been fully established by the prosecution; that three witnesses who had seen the whole episode of incident have fully established the prosecution case by giving straightforward evidence; that the eye witnesses have also explained their presence at the time of incident. However, he frankly conceded that source of identification of the accused i.e. blub was not secured nor produced before the trial Court. He supported the impugned judgment and prayed for dismissal of the appeal filed by the appellant.

10. We have carefully heard the learned counsel for the parties at length and minutely scanned the entire evidence available on record.

11. In order to prove the unnatural death of deceased Mushtaq, prosecution has firstly examined Dr. Abdul Latif, Senior Medical Officer, Civil Hospital Tando Allahyar, who deposed that on 19.09.2009 he was posted as Senior Medico Legal Officer at Civil Hospital Tando

Allahyar and at about 2:30 a.m, one injured namely Mushtaq Ahmed aged about 27 years was brought in serious condition having sharp edged injuries. He noted following injuries:

1. A skin into muscle into cavity deep incised wound  $2\frac{1}{2} \times 1\frac{1}{2}$  in size in epigastria region.
2. A skin deep incised wound crossing over palmer aspect of middle finger, ring finger and little finger 3 cm x 2 mm in size of right hand.

12. He further deposed that injury No.1 was reserved for expert opinion and injury No.2 was declared as Jurh Ghar Jaifahh Damiyah. He referred the injured to the Civil Hospital Hyderabad due to his critical condition. The injured was admitted to Civil Hospital Hyderabad but on the next day i.e. on 20.09.2009 he succumbed to his injuries and died. Prosecution examined Dr. Abdul Samad, Senior Medico Legal Officer LUHM Hyderabad, who conducted the postmortem of the deceased Mushtaq. He deposed that on 20.09.2009 he was posted at Medico Legal Section LU Hospital Jamshoro, Hyderabad as Senior MLO when at about 12:05 p.m, he received dead body of Mushtaq Ahmed for conducting postmortem. Duration between death and injuries was about 34 to 35 hours. The rigor mortis were present in the eye lids and lividity was present in dependent parts. On external examination he found the following injuries:

1. Stitched incised wound size 6 c.m in length almost upper part in front abdomen (epigastrium region) with coincliding 2 cm x 0.10 cm x surpetical skin deep to incised wound at its lower and left side.
2. Incised wounds crossing over palmer aspect of middle finger (2<sup>nd</sup> phalanx) ring finger (2<sup>nd</sup> phalanx) little finger (proximal phalanx) skin deep of right wound.
3. Stitched surgical incised wound size 18 cm in length in the mid line of abdomen.
4. Two surgical wound size 1.5 c.m in length at pelvic and right side abdomen for drainage purpose.

All injuries were ante-mortem.

Abdomen: After removing stitches, abdominal cavity found filled blood and clotted blood. On removing it stomach filled and scanty amount of fervid at normal intestinal mucosal folds. Two

incised stitched cut each 3 cm and 2 cm seen over right lobe of liver. Third incised stitched cut size 2 cm seen on pancreatic surface. Seepage of blood seen from both cuts of liver seen. The peritoneal cavity also seen filled at blood and clotted blood to the rib of right side seen also fracture.

Remarks/special comments: Two operations were performed. 1<sup>st</sup> operation as expletory was conducted by Surgeon Dr. Muneer Memon at indication of stab wound on 19.09.2009 and 2<sup>nd</sup> also on 19.09.2009 under General Anesthesia. Total (10) pint of blood damfusion was injected to injured but after full support of treatment, injured succumbed to his injuries on 20.09.2009 at about 1:45 a.m. The deceased was admitted in Surgical Ward-2.

M.O was of the opinion that the cause of death was due to damage of liver and pacer ease resulted from stab wound (incised penetrating wound) of sharp weapon, leading into severe bleeding and hemorrhage irreversible shock cardio respiratory failure and death. Injury No.1 was sufficient to cause death in ordinary course of nature.

13. It is clear from medical evidence that deceased Mushtaq died his unnatural death. No question was raised regarding the efficiency and integrity of the Doctor, therefore, we are of the view that the deceased died his unnatural death as described by the Medical Officer. Finding of trial court on this point requires no interference.

14. The prosecution, in order to prove its case against the appellant examined complainant and P.Ws Ahmed Ali and Haji Muhammad Jumman. P.W-01 complainant in his evidence deposed that on 18.09.2009, some guests from village Dad Jawar visiting him. The complainant along with his brother Mushtaq Ahmed (now deceased) and co-villagers Ahmed Ali and Haji Juman were chit chatting with the guests in the Otaq of complainant. It was at about 1:00 a.m, accused Sikandar came there and took Mushtaq on the pretext of some work. P.Ws Ahmed Ali and Haji Muhammad Jumman also left to go to their home. After some minutes, the complainant heard commotions and rushed towards the Otaq of Irfan and found his brother Mushtaq in serious condition, having injuries on his abdomen and fingers of right hand. P.Ws Ahmed Ali and Haji Jumman also met him and informed that accused and deceased Mushtaq were walking ahead of them and were exchanging hot words with each other and at the Otaq of Irfan, accused Sikandar took out Katti (sharp edge weapon) from the fold of his Shalwar and caused injury on the abdomen of Mushtaq, however, Mushtaq tried to resist and he also received injuries at

his fingers and thereafter fell down and the accused ran away. Complainant saw that blood was oozing from the injuries. Complainant party made arrangement of vehicle and thereafter took the injured to the Civil Hospital Tando Allahyar after obtaining letter for treatment from the police station where after giving first aid to the injured he was referred to the Civil Hospital Hyderabad. On 20.09.2009 his brother injured Mushtaq succumbed to his injuries and thereafter, he lodged the FIR.

15. P.W-02 Ahmed Ali deposed that on 18/19.09.2009 it was about 1:00 a.m, he was at the Otaq of Gul Munir Jarwar with Haji Juman, some guests and brother of complainant. They were exchanging thoughts. Accused came there and took away deceased Mushtaq with him on the pretext of some work. He and Haji Juman also left the Otaq, and when they reached at Otaq of Irfan Jarwar, they heard noises. He saw that present accused took out Katti from the fold of his shalwar and inflicted injuries at the abdomen of deceased Mushtaq. Deceased resisted with his hands so he also received injuries at his finger. He and P.W Haji Juman tried to catch hold accused but he succeeded to run away. Complainant, his guests and brother also reached there. Complainant arranged the vehicle and they took injured Mushtaq towards Tando Allahyar and thereafter he was brought at Civil Hospital Hyderabad where on 20.09.2009, he expired. Police recorded his statement. After 5/6 days his statement was recorded before Magistrate.

16. P.W-03 Muhammad Juman deposed the same story / incident as deposed by P.W Ahmed Ali. All the eyewitnesses denied the suggestion in cross-examination for deposing falsely against the accused.

17. From perusal of the evidence of these witnesses, it appears that there are material contradictions and improvements in their evidence. Complainant in his cross-examination has stated that 7/8 persons were available at his Otaq whereas P.W Ahmed Ali has stated in his cross-examination that 5/7 persons were present in Otaq of complainant. Both P.Ws Ahmed Ali and Muhammad Juman in their evidence have deposed that **“complainant, his guests and brother also reached there”**, however, surprisingly, except complainant no other brother has been cited by the prosecution and even complainant has also not mentioned about presence of his other brother.

18. We have further noticed that both the eye-witnesses Ahmed Ali and Muhammad Juman have deposed that on the light of bulb they had seen the occurrence, however, it is pertinent to mention here that the Tapedar in his cross examination has stated that he had not noticed any electric bulb. I.O had also not secured any electric bulb from the place of incident to establish that the witnesses could see the whole episode of the incident and to identify the assailant. So the identification of the assailant was also doubtful in such circumstances of the case. Rightly reliance has been placed upon the case reported as **2017 SCMR 344 SARDAR BIBI and another versus MUNIR AHMED and others**).

19. Apart from the above, we further observed while going through the evidence of Tapedar Muneer Ahmed, who had prepared the sketch and surprisingly in the sketch, the Otaq of complainant is not shown, which belies the statements made by complainant and P.Ws Ahmed Ali and Muhammad Juman and even in the said sketch the presence of witnesses who allegedly seen the accused while causing injuries to the deceased Mushtaq was not shown. We have also gone through the evidence of I.O, who in his cross-examination replied that in the memo of place of incident, it was mentioned that foot prints marks of two persons were available at the crime scene. Though the prosecution witnesses made conscious attempt to make believe their presence on the spot but we are mindful that neither they were present on the spot nor the incident had happened in the manner as described by the prosecution. In such state of affairs, we cannot hold otherwise, but that the witnesses were chance and interested witnesses with the sole purpose to implicate the appellant for a blind murder. In case reported as **Gulfam and another v. The State (2017 SCMR 1189)**, wherein it is held that:

"The prosecution had relied upon two eye-witnesses, i.e. Muhammad Rafiq complainant (PW-17) and Muhammad Ishaq (PW13) out of whom the complainant was a brother of Muhammad Hanif deceased and Faheem Abbas deceased was an uncle of the complainant. The said eye-witnesses lived at some distance from the place of occurrence and they had claimed that at the relevant time they were available near a Dahi Bhalay cart on a roadside. Availability of the said eye-witnesses on a roadside near a cart at about midnight and doing nothing and for no purpose was a circumstance which was sufficient to raise many an eyebrow. The said eye-witnesses were, thus, nothing but chance



witnesses who had failed to establish any reason for their availability near the place of occurrence at the relevant time."

20. As regards to the delay in lodging of the FIR is concerned, it is settled law that an FIR must be registered promptly and the sooner it is lodged after an incident the more reliability it has. In some cases even a delay of 2/3 hours in lodging an FIR can be fatal to the prosecution case. In this respect reliance is placed on **Zeeshan alias Shani v. State (2012 SCMR 428)**. The reason behind is that if there is any delay in lodging an FIR this gives time to the complainant's side to concoct a false story in order to fix another or to ensure that they will not be entrapped in the offense. The delay itself however is not the sole issue but rather it is whether any delay has been adequately explained. In the instant case the incident took place on 18<sup>th</sup>/19<sup>th</sup> September 2009 and the deceased died on 20<sup>th</sup> September 2009, but the FIR was lodged by the complainant on 22.09.2009 at 1430 hours after delay of three days. The complainant has explained this delay by the fact that he immediately took the deceased, who was injured at that time, to Civil Hospital Tando Allahyar and thereafter at Civil Hospital Hyderabad where he died on the next day. Thereafter, he returned to his village for the funeral ceremony of the deceased and then registered the FIR. In this case, however, there are certain significant aspects that stand out. Firstly after the incident immediately the complainant went with P.Ws Ahmed Ali and Muhammad Juman to Police Station Tando Allahyar with injured Mushtaq. According to the eye-witnesses, they knew the accused and as such they were able to identify him. However quite astonishingly when they reached the PS with injured not one of the said two eye-witnesses lodged the FIR against the accused and only obtained letter for treatment. Thus, based on the particular facts and circumstances surrounding this case for the reasons mentioned above we do not consider that the delay in registering the FIR has been satisfactorily explained therefore, deliberation and consultation to involved the appellant in the present case cannot be ruled out.

21. Another disturbing aspect of the matter is that Dr. Abdul Latif Senior Medical officer of Civil Hospital Tando Allahyar in his cross-examination has stated that the injured was in condition to communicate

but his statement was not recorded by the police when he was brought at the police station, hence, his statement should have been recorded.

22. Now coming to the recovery of blood stained 'big knife' on the pointation of appellant. The occurrence in this case took place on 19.09.2009 and the accused was arrested on 26.09.2009 whereas blood stained big knife was allegedly recovered on the pointation of appellant on 27.09.2009. As per report of the Chemical Examiner the parcel of knife and other articles were deposited in the office of Chemical Examiner, on 11.11.2009, as such the blood-stained knife was deposited in the office of Chemical Examiner, after lapse of one month and fourteen days from the date of its recovery, therefore, it was unlikely that the blood on said knife would not disintegrate during the above mentioned period. The Hon'ble Supreme Court of Pakistan in the case of **Muhammad Jamil v. Muhammad Akram and others' (2009 SCMR 120)** has held that recovery of blood stained Churri has been effected after about one month from the occurrence, it was not likely that the blood would not disintegrate in the meanwhile, thus, the alleged recovery of Chhuri from the accused was not reliable.

23. It has been established that the case of prosecution is highly doubtful and no conviction can be sustained on the basis of such type of shaky and untrustworthy evidence as per settled principle and guidance of honorable Supreme Court and its benefit must go to the accused not as a matter of grace but of right. In the case **Muhammad Akram v. The State (2009 SCMR 23)**, it has been held by the Honorable Supreme Court that:

"----It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace---."

24. In view of the above discussion, since the prosecution has failed to prove its case against the appellant beyond any shadow of doubt, therefore, the judgment dated 30.09.2015 is set aside and the appellant Sikandar son of Muhammad Hussain Khaskheli is acquitted of the charge under sections 302(b) P.P.C. by extending benefit of doubt, in case pursuant to FIR No. 245/2009, Police Station Tando Allahyar. He be released forthwith, if he is not required in any other case. Since the

appeal of the appellant against his conviction is allowed. Therefore, the Murder Reference filed made by the trial Court for confirmation of death sentence is answered in negative.

JUDGE

JUDGE