

Eye witness disbelieved

392

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CRIMINAL JAIL APPEAL NO. S-42 OF 2014
FAZIL V/S THE STATE

SINDH HIGH COURT, CIRCUIT COURT HYDERABAD

COMPOSITION OF BENCH

HON'BLE MR. JUSTICE MOHAMMAD KARIM KHAN AGHA
(S.B.)

Date of last hearing (heard/reserved): 07-11-2023

Decided on: 15-11-2023

(a) Judgment approved for reporting YES



C E R T I F I C A T E

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

NOTE: -

- (i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used, the Reader must attach it to the top of the first page of the Judgment.
- (iii) Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No. **S-42/2014**

Fazil S/O Mir Gul Tehlani,
confined in Central Prison Hyderabad.....Appellant

Versus

The State.....Respondent

Sessions Case No. **308/2011**

Crime No. **111/2011**

Police Station B-Section Nawabshah
U/s 302 PPC.

ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Cr. Jail Appeal No.S-42 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE(s)
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For hearing of main case.

07-11-2023

Mr. Mumtaz Ahmed Lashari advocate for the appellant.
Mr. Nazar Muhammad Memon, Additional Prosecutor General.

I have heard learned counsel for the appellant and learned Additional Prosecutor General. Complainant has been served but he preferred to remain absent, hence, his interests have been looked after by learned Additional Prosecutor General. Reserved for judgment.

Irfan

Eye witness Disbelieved

395

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Criminal Jail Appeal No. S- 42 of 2014

FAZIL

Versus

THE STATE

Appellant : Fazil s/o Mir Gul Tehlani.	Through Mr. Mumtaz Ahmed Lashari, Advocate.
Respondent : The State	Through Mr. Nazar Muhammad Memon, Additional Prosecutor General, Sindh.
Counsel for the complainant called absent without intimation.	
Date of hearing	07.11.2023
Date of judgment	15.11.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 15.02.2014, passed by the learned 1st Additional Sessions Judge, Shaheed Benazirabad, in Sessions Case No. 308 of 2011 (re: The State versus Fazil), emanating from Crime No.111 of 2011, registered at Police Station B-Section, Nawabshah, under section 302 PPC, whereby the appellant Fazil Tehlani has been convicted u/s 302 (b) PPC as Ta'zir and sentenced to suffer imprisonment for life for committing the murder of deceased Mst. More Zadi. He was also directed to pay Rs.100,000/- (Rupees One

Lac) as compensation to the legal heirs of deceased Mst. More Zadi as provided u/s 544-A Cr.P.C; and, in case of non-payment of said compensation, the appellant shall further undergo SI for the period of 06 months. However, benefit of Section 382-B Cr.P.C was extended to the appellant.

2. The facts of the prosecution case as mentioned in the FIR are as under:-

"On 23.07.2011 at 1430 hours complainant Mir Hazar Khan Tehlani appeared at Police Station B-Section, Nawabshah and lodged FIR, stating therein that he has seven daughters and his fourth number daughter namely Mst. More Zadi aged about 16/17 years is unmarried. Since long time his nephew namely Fazil s/o Mir Gul Tehlani (the present appellant) was asking him that he will kill Mst. More Zadi as he has suspicion on her character and he was also saying that Mst. More Zadi is not of a good character. Today the complainant and his cousins Jalal s/o Khuda Bux Tehlani and Muhammad Panah s/o Muhammad Amin Tehlani were sitting in their house and his daughter Mst. More Zadi went outside the house for washing the cloths at pond adjacent to his house. At about 07:30 hours they heard two fire shots noise from the pond side, they immediately rushed towards there and saw that Fazil Tehlani was straight firing upon his daughter, to whom they gave hakals but he ran away towards the western side alongwith weapon. Then they saw that one firearm was hit to his daughter on the right side of neck and passed through and through from her forehead and two fire shots hit on her back towards right side and left side and one fire shot was hit on her right side of forearm and she was lying on the earth and due to firearm injuries she was expired. Then complainant left the above named witnesses over the dead body and went to inform the police and lodged report against his nephew Fazil Tehlani that he has committed the murder of his daughter Mst. More Zadi on false suspicion on her character, hence this FIR"

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the accused/appellant, to which he pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined 7 witnesses and exhibited numerous documents and other items. The statement of accused was recorded under section 342 Cr.P.C whereby he denied the allegations leveled against him and claimed his false

implication by the complainant. However, neither he examined himself on oath nor led any evidence in his defence.

5. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated earlier in this judgment. Hence the appellant has filed this appeal against his conviction.

6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. It is also noted that the complaint appointed counsel but he preferred to remain absent without intimation. Since the appellant had already spent a number of years in jail and the interest of the complainant could be looked after by learned APG in the interests of Justice I proceeded with this old appeal of 2014 and have decided the same through this judgment.

8. Learned advocate for the appellant has contended that the appellant is innocent and has been falsely implicated in this case by the complainant; that it was an unseen incident and that the evidence of the sole eye witness could not be safely relied upon; that there were material contradictions in the evidence of the prosecution witnesses which rendered their evidence unreliable; that no recovery had been made from the appellant and as such based on all or any of the above circumstances the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Muhammad Shoban versus The State** [2022 SCMR 1608], **Sarfraz Masih versus The State** [2017 P.Cr.L.J 280], **Muhammad Din and others versus The State and others** [2018 YLR 850], **Saeedul Haque alias Abdullah and another versus The State** [2018 YLR 242], **Muhammad Ramzan and another versus The State** [2006 P.Cr.L.J 1739], **Mian Khan and 3 others versus The State and another** [2018 MLD 226], **Saifal and another versus The State** [1976 P.Cr.L.J 476], **Sarong versus The State** [1976 P.Cr.L.J 254], **Umaid Ali**

and another versus The State [1971 P.Cr.L.J 67] and, Yousaf Khan versus The State and another [2005 YLR 901].

9. Learned Additional Prosecutor General Sindh on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has supported the impugned judgment. He mainly contended that the FIR was lodged without delay naming the appellant with a specific role; that the evidence of the sole eye witness could be safely relied upon and that the medical evidence corroborated the ocular evidence and as such the appeal be dismissed. In support of his contentions, he placed reliance on the case of **Sajid Mehmood versus The State** [2022 SCMR 1882].

10. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, tapedar's evidence/sketch and recovery of blood and empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Mst Mourzadi (the deceased) was murdered by firearm on or about 23.07.2011 at 0730 hours at water pond near village Jumoon Khan Jamali, Deh Khiyaryoon, Talika Nawabshah.

11. The only question left before me is whether it was the appellant who murdered the deceased by firearm at the said time, date and location?

12. After my reassessment of the evidence I find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

- (a) Admittedly the FIR was lodged with relative promptitude on the same day and the appellant was named in the FIR with a specific role along with the eye witness.
- (b) I find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether I believe their evidence whose evidence I shall consider in detail below;
 - (i) Eye witness PW 1 Mir Hazar. He is the complainant and father of the deceased. According to his evidence

the accused used to tell him that he would kill the deceased based on her bad character. That on 23.07.2011 at 7.30am the deceased had gone to wash some clothes at the pond near their village. On hearing fire arm noise he along with Jalal went to the place of incident and saw that the deceased was lying with firearm injuries. The accused fired shot at the deceased and then ran away. The deceased died on the spot and then he went to lodge his FIR. During cross examination he also stated that along with Jalal a Mr. Panah was sitting with him at the time of the incident.

The witness is the father of the deceased **however** there is no proven enmity with the appellant thus the complainant's mere relationship to the deceased is no reason to discard his evidence which has to be judged on its own worth. In this respect reliance is placed on the cases of **Amal Sherin v The State** (PLD 2004 SC 371) and **Dildar Hussain v Muhammad Afzaal alias Chala** (PLD 2004 SC 663) and **Qasim Shazade** (Supra). I am however put on caution regarding the complainant's evidence.

This eye witness **knew** the appellant **before** the incident and he allegedly saw him in day light murder his daughter by firearm. Although he is not a chance witness as he was residing in the same house as his unmarried deceased daughter I do have doubts about his evidence for the following reasons;

1. According to his own evidence he was inside his house when he heard shots and then came out with Jalal who had been sitting with him and Panah. During his cross examination he states that he heard 4 shots. The deceased only received 4 firearm injuries (only 3 empties were recovered at the crime scene) so it follows that all the shooting was over before he left his house. The question then arises as to how he saw the appellant shoot the deceased. Even in his cross examination he states that he saw the deceased runaway with a pistol in his and which again indicates that he did not actually see the appellant shoot the deceased. It is also note worthy that in his own evidence he states that the incident took place 2 acres away from his house so it is difficult to see how despite it being day light he was able to correctly identify any one especially when they were fleeing with their back to him.
2. The complainant's evidence is further undermined and further doubt is caste on the same by the evidence of PW 4 Jalal who states in his evidence that he was present in the city of Nawabshah when the incident took place and was called to the water pond where the deceased had been

murdered by the complainant. This clearly shows that he was **not** an eye witness to the incident and was **not** with the complainant at the time of the incident sitting with him in his house. He was not declared hostile and was not contradicted on these facts during his evidence. **I find this to be a material contradiction which adversely effects the evidence of the complainant.**

3. The complainant's evidence is further undermined and further doubt is cast on the same by the evidence of PW 7 Muhammed Panah who states in his evidence that he came from his house in Shahdadpur and reached the place of incident at about 10am where he saw the dead body of the deceased. This clearly shows that he was **not** an eye witness to the incident and was **not** with the complainant at the time of the incident sitting with him in his house. **Again I find this to be a material contradiction which further adversely effects the evidence of the complainant.** This witness was even declared hostile but withstood his subsequent cross examination.
4. No other witness gave evidence that the appellant had threatened to murder the deceased on account of her bad character.

It is true that I can convict on the basis of a sole eye witness provided that I find his/her evidence to be reliable, trust worthy and confidence inspiring. Based on the particular facts and circumstances of this case, as discussed above, I do **not** find the evidence of the complainant who is the sole eye witness to the murder of the deceased to be reliable, trust worthy and confidence inspiring and disbelieve his evidence. I find the murder of the deceased to be an unseen incident.

What other evidence is there against the appellant.

- (c) Now that I have disbelieved the evidence of the sole eye witness as to the identity of the person who carried out the murder. The medical evidence is not of much consequence as it can only tell you the type of injury, seat of injury and type of weapon used. It cannot tell you the name of the perpetrator of the offence.
- (d) No mashirnama of arrest and recovery was exhibited so there are doubts as to when and where the appellant was actually arrested especially as the appellant claims that he was already in police custody when his arrest was disclosed.
- (e) No memorandam of recovery of any pistol was exhibited nor was any pistol and as such the recovery of empties at the crime scene is insufficient to link the appellant to the murder.
- (f) No motive has been **proven** for the murder of the deceased by

the appellant rather only bare uncorroborated allegations of the complainant that he would kill her.

13. Thus, based on the above discussion, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt and by extending the appellant the benefit of the doubt for the reasons discussed above, which he is entitled to as a matter of right as opposed to concession, I hereby set aside the impugned judgment, **allow** the appeal and acquit the appellant of the charge. The appellant shall be released from prison **unless** he is wanted in any other custody case.

14. The appeal stands disposed of in the above terms.

Hafiz Fahad