

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No.D- 24 of 2015.
Conf. Case No.D- 7 of 2015.

Present:

Mr. Justice Mohammad Karim Khan Agha -J
Mr. Justice Zulfiqar Ali Sangi -J

Appellant: Mir Muhammad alias Kuraro and Allah Wadhayo through Mr. Asif Ali Abdul Razak Soomro, Advocate.

Respondent: The State through Mr. Ali Anwar Kandhro, Addl: P.G.

Complainant: Abdul Qadir through Mr. Athar Abbas Solangi, Advocate.

Date of hearing: 20.01.2021.

Date of judgment: 28.01.2021

J U D G M E N T

Mohammad Karim Khan Agha -J:- Through this criminal appeal appellants Mir Muhammad alias Kuraro and Allah Wadhayo alias Walar have assailed impugned judgment dated 06.7.2015 passed by learned 4th Additional Sessions Judge, Shikarpur in Sessions Case No.399 of 2013 re: State v. Mir Muhammad and others arising out of Crime No.88 of 2013 of Police Station New Foujdari registered for an offence under Sections 302, 148, 149, 337-H(2), 504 PPC whereby the appellants have been convicted for offence U/S 302(b) PPC r/w Section 149 PPC and sentenced to death subject to confirmation by this court, the appellants were also convicted for offence U/S 148 PPC and sentenced to suffer R.I for two years with fine of Rs.5000/- each and in case of default in payment of fine they shall undergo S.I for two months more and they were also sentenced to pay fine of Rs.200,000/= each and in case of default in payment thereof, they shall undergo R.I for two years more and if the fine is recovered same shall be paid to legal heirs of deceased Ghulam Qadir as compensation in terms of Section 544-A Cr.P.C.

2. The brief facts of the prosecution case as unfolded in the FIR are as under:

"Complaint is that on 02.05.2013 I, my son namely Ghulam Qadir Shujrah aged about 39/40 years, 2. relative Mohammad Fazal s/o Mohammad Saban, 3. Bashir Ahmed s/o Nawab Shujrah proceeded together from Sukkur to Shikarpur to visit namely Pathan Khan Shujrah who is father in law of my son namely Ghulam Qadir, we were returning back from there, when we reached in common street Mohalla Khanchand Abad at 1130 hrs we saw accused each Mir Mohammad @ Kuraro armed with T.T pistol, 2. Allah Wadhayo @ Walar armed with T.T pistol both sons of Haji Gul Mohammad @ Galu, 3. Nisar Ahmed s/o Mohammad Tagial armed with T.T pistol by caste Shujrah r/o Khanchand Abada Mohalla Shikarpur and three unidentified persons with open faces came gathered; all of the accused used abusive language and accused Mir Mohammad @ Kuraro made straight fire upon my son Ghulam Qadir with intention to kill, which hit him on his chest; 2. Accused Allah Wadhayo @ Walar made fire straight upon my son Ghulam Qadir with intention to kill, which hit him below left side nipple, he raised cries and fell down on the earth. Accused Nisar Ahmed made aerial firing over us in order to harass us, we raised cries of "murder murder", then the accused persons ran away and my son Ghulam Qadir expired on our sight who was bleeding. We informed the police of P.S, New Foujdari, got post mortem of dead body from Civil Hospital Shikarpur and shifted it to home at Sukkur, after funeral now I am here at P.S, lodging FIR that accused namely Mir Mohammad @ Kuraro and others duly armed with deadly weapons gathered used abusive language made two fires at my son Ghulam Qadir with intention to kill and committed his murder. Accused Nisar Ahmed made aerial firing upon us. The unidentified accused persons would be identified if seen again. I am complainant may investigation be held."

3. During investigation, appellants Mir Muhammad alias Kuraro and Allah Wadhayo alias Walar were arrested and sent up to stand trial under charge sheet in which co-accused Nisar Ahmed and three unknown accused were shown as absconders. Charge was framed against the accused to which they both pleaded not guilty and claimed trial.

4. To prove its case the prosecution examined 8 prosecution witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s 342 Cr.PC wherein they denied all the allegations against them and claimed false implication. Neither accused examined themselves under Oath

and the accused called one DW in support of their defence case which as per the evidence of this DW was one of alibi.

5. Learned 4th Additional Sessions Judge, Shikarpur after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 06.07.2015, convicted and sentenced the appellants as stated above, hence these appeals have been filed by the appellants against their convictions.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 06.07.2015 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that none of the PW eye witnesses was present at the scene of the incident; that they are all related and chance witnesses and in effect are put up witnesses upon whose evidence no reliance can be placed; that the FIR was delayed after an unexplained delay of 24 hours which lead to a false case being cooked up against the appellants; that there were major contradictions in the evidence of the PW's which rendered their evidence unreliable upon which no reliance can be placed; that the ocular evidence is not supported by the medical evidence; that there have been major improvements in all the evidence of the PW's which once again renders it unreliable; that the recovered pistols were foisted on the appellants and for any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he has placed reliance on **Nooruddin and another v. The State** (2005 MLD 1267) which is a SB Judgment of this court and an unreported SB judgment of this court dated 28.08.2020 in Criminal Jail Appeal No.S-108 of 2017 re: **Ali Bux alias Ali and another v. The State** .

8. On the other hand learned Addl. Prosecutor General and the complainant have fully supported the impugned judgment and contended that the short delay in lodging the FIR has been fully explained; that the eye witnesses are all reliable, trustworthy and confidence inspiring and fully implicate both the appellants in the murder, that the medical evidence

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supports the ocular evidence; that the murder weapons were recovered from the appellants, that the FSL report was positive in respect of each recovered pistol one of each was recovered on the pointation of each appellant and the chemical report was positive and as such the prosecution has proved its case beyond a reasonable doubt against both the appellants and as such their appeals should be dismissed and their convictions and sentences maintained. In support of their contentions they have placed reliance on **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669), **Farooq Khan v. The State** (2008 SCMR 917), **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152) and **Khalid Iqbal and 2 others v. Mirza Khan and others** (PLD 2015 Supreme Court 50).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the PW eye witnesses, PW MLO, post mortem and other medical reports, PW Tapedar and recovery of empties and blood stained earth at the scene which lead to a positive chemical test we find that the prosecution has proved beyond a reasonable doubt that Ghulam Qadir Shujrah (the deceased) was shot by firearm at about 11.30 am on 02.05.2013 at Common Street, Mohalla Khan Chandabad near Wang (Arch) who died on the spot on account of the firearm injuries which he sustained.

11. The only question left before us therefore is who shot the deceased which lead to his death by firearm injury.

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charges against both the appellants for which they were convicted for the following reasons;

(a) Although one of the main defences of the appellants was the delay in the filing of the FIR and indeed both SB Judgments relied upon by the appellants are to this effect we do not find such delay to be fatal based on the particular facts and circumstances of this case.

This is because such delay is only fatal if it is unexplained and materially prejudices the appellants. In this case we find no unexplained delay in reporting the incident. The essence of the incident was reported to the local PS within about 30 minutes of the incident by the complainant which is reproduced in duly exhibited police entries by PW 8 SIP Hakim Ali who confirmed in his evidence that the complainant reported the incident to him and he recorded the aforesaid entries, thereafter the complainant and the police proceeded to the hospital where the dead body of the complainants son was brought, after the post mortem the body was handed back to the complainants family who buried him on the same day and then the FIR was lodged on the next day. Evidence has been led to show that the complainant was too upset and distraught to register the FIR immediately and in any event his priority quite naturally was to make the arrangements for the burial of his dead son. The FIR was lodged within 24 hours of the incident and we find that this delay in the FIR has been fully explained and left no time for a story to be cooked up for which the accused would be falsely implicated. As such we do not find this slight delay in lodging the FIR fatal to the prosecutions case.

(b) In our view the prosecution's case rests on the eye witnesses to the murder whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Abdul Qadir.** He is the complainant in the case and the father of the deceased. According to his evidence he had traveled from Sukkur to Shikarpur on 02.05.2013 in the morning along with his son, PW Bashir and PW Muhammed Fazal to meet with Pathan Khan who was the father in law of his son. After the meeting and just after leaving Pathan Khan's house at about 11.30am he saw both the appellants armed with TT pistols and Nisar Ahmed with two to three unknown persons. **According to his evidence he saw appellant Mir Muhammed fire his pistol at his son which fire shot hit his son on his right side chest. He also saw Appellant Allah Wadhayo fire from his pistol at his son which fire shot hit his son on his left side of his chest and thereafter Nisar Ahmed made aerial firing and the appellants ran away. He states in his evidence that on account of the fire shots his son fell down and died before him.** He then informed the local police and the dead body was taken to hospital. His evidence accords with the FIR which he lodged one day after the incident. He knew the accused, it was a day light incident and he was only 8 feet away when his son was shot by the appellants so there is no case of mistaken identity and no need to hold an identification parade. He has also given the same specific role to each of the appellants in his FIR.

Admittedly the eye witness was related to the deceased however it is well settled by now that evidence of related witnesses cannot be discarded **unless** there is some ill will or enmity between the eye witnesses and the accused which there was not in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal** (Supra).

This eye witness was a natural witness and not a chance witness as he had come with his son to discuss his son's domestic affairs with his son's father in law as it is apparent from the evidence that his son's wife and daughters were staying with Pathan Khan his son's father in law and that there was some kind of matrimonial dispute. In such circumstances it would only be natural for him to take along some relatives in order to give him some moral support all of whom lived in the same area as him in Sukkur and had come on his request. He lodged his FIR with promptitude and named the other eye witnesses in the FIR along with the accused with specific roles. He had no enmity with the appellants and had no reason to falsely implicate them. His evidence was not dented despite lengthy cross examination. There have not been any significant improvements in his evidence from his FIR so as to render it unreliable. We find his evidence to be reliable, trust worthy and confidence inspiring and we can convict on this evidence alone. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan** (Supra) what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

(ii) **Eye witness PW 2 Muhammed Fazul corroborates eye witness PW 1 Abdul Qadir** in all material respects. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement on the day after the incident and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 1 Abdul Qadir**.

(iii) **Eye witness PW 3 Bashir Ahmed corroborates eye witness PW 1 Abdul Qadir and eye witness PW 2 Muhammed Fazul** in all material respects. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement on the day after the incident and the same considerations apply to him as to **PW 1 Abdul Qadir and eye witness PW 2 Muhammed Fazul**.

Thus, based on our believing the evidence of the 3 eye witnesses what other supportive/corroborative material is their against the appellants?

(c) The meeting of the complainant and his son and the other eye witnesses at the house of Pathan Khan at the time and date mentioned in evidence as well as their time of leaving and the subsequent shooting of the deceased a few hundred feet from Pathan Khan's house is corroborated by Pathan Khan himself who gave evidence as **PW 4** who had no reason to make up the meeting or his knowledge about the subsequent shooting of the deceased.

(d) In our view the medical evidence and post mortem report of **PW 6 SMLO Dr. Imtiaz Ali** fully supports the prosecution evidence as he

confirms that the deceased was brought dead to the hospital as a result of two firearm injuries one on the right side of the chest and the other over the abdomen which caused his death. That the deceased died on the spot and that his post mortem was carried out with promptitude which would rule out the cooking up of any false case. In his post mortem report he also notes that there was no blackening around either of the wounds which ties in with the prosecution evidence that the fire shots were made from over 3 feet away.

(e) That 4 pistol empties were recovered from the vardat; were sealed and kept in safe custody.

(f) That the appellants were arrested by the police a day after the incident and a few days later they took the police to where they had hidden the pistols (the murder weapons) which were hidden in a place which only the appellants would have known about.

(g) That the pistols when matched with the recovered empties lead to a positive FSL report.

(h) That there was a positive chemical report in respect of human blood found at the scene.

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellants. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussian** (Supra). Their evidence provides a believable corroborated unbroken chain of events from the meeting with Khan Pathan, the shooting of the deceased by the appellants by firearm to the arrest of the appellants by the police to the murder weapons being recovered on the pointation of the appellants.

(j) That the police PW's had no enmity or ill will towards the appellants and had no reason to falsely implicate them in this case by for example making up their arrest or foisting pistols on them and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(k) That it does not appeal to reason, logic or commonsense that a father would let the murderer of his son go scot free by substituting him with innocent persons (the appellants).

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case initially was that the eye witnesses were falsely implicating them in order to save Pathan Khan. It then shifted to an old dispute in their S.342 Cr.PC statements and finally ended up as an alibi by DW one which we disbelieve as an after thought. Thus, in the face of three reliable, trust worthy and

confidence inspiring eye witnesses we do not believe the defence case which has not at all dented the prosecution case.

13. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellants beyond a reasonable doubt for the offences for which they have been convicted and hereby maintain their convictions.

14. With regard to sentencing we note that the murder was not carried out in a brutal or heinous manner as only one shot was made on the deceased by each appellant which subsequently lead to his death and that no other eye witness was fired upon. Furthermore, in our view the prosecution has neither asserted nor been able to prove a motive. The only hint of a motive is that the deceased had now been promoted as an officer which we find insufficient as a reason to lead to the appellants murdering him. It is settled by now that if the prosecution asserts a motive and fails to prove it then this often leads to the reduction of the death sentence to that of life imprisonment especially in cases such as this where the murder is not of a brutal nature. In this respect reliance is placed on **Muhammed Ismail V The State** (2017 SCMR 713) and **Imtiaz V State** (2020 SCMR 287). Thus we are of the view that in exercising our discretion on sentencing that the appropriate sentence in this case is one of life imprisonment as opposed to the death penalty. Thus, both the appellants' sentences are reduced from the death penalty to that of RI for life with the remainder of the convictions and sentences mentioned in the impugned judgment remaining in tact as well as the benefit of S.382 B Cr being given to the appellants.

15. As such the appeals against conviction are dismissed subject to the modification in sentences as mentioned above and the impugned judgment is upheld but with the confirmation reference being answered in the negative.

16. The appeals are disposed of in the above terms.