

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

**Crl. Jail Appeal No.D-55 of 2016
Confirmation Case No.D-11 of 2016**

PRESENT:

**Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,**

Appellant : Misri Khan son of Iqbal Pathan, through
Mr. Altaf Hussain Surahio, Advocate assisted by
Ashfaq Hussain Abro.

Respondent : The State, through Mr. Ali Anwar Kandhro,
Addl. Prosecutor General.

Complainant : Javed Khan Pathan, through Mr. Nisar Ahmed G.
Abro, Advocate.

Date of hearing : 17.02.2021.

Date of Judgment : 23.02.2021.

J U D G M E N T

Mohammad Karim Khan Agha, J.- This appeal was preferred from jail by appellant Misri Khan Pathan challenging the judgment dated 25.08.2016, passed by learned 1st Additional Sessions Judge, Shikarpur, in Sessions Case No.275/2011, re-State Vs. Misri Khan, based on Crime No.86/2011, registered at Police Station Stuart Ganj, Shikarpur, whereby the appellant was convicted for offence under Section 302(b), PPC as Tazir and sentenced to death subject to confirmation by this Court, and to pay Rs.500,000/- (rupees five hundred thousand) as compensation to the legal heirs of deceased Noor Ahmed in terms of Section 544-A, Cr.P.C; in case of default thereof to undergo simple imprisonment for six months more. Trial Court has sent reference u/s 374, Cr.P.C (Confirmation Case No.D-11/2016) for confirmation of death sentence of the appellant.

2. The prosecution case as set out in the FIR is that:

"Complaint is that, today I and my father Noor Ahmed s/o Nazal Khan Pathan, aged about 65/66 years, retired Head Constable and brother Shoukat Khan had come together from Sukkur for prayer over grave of our grandfather Nazal Khan Pathan, after prayer we along with relatives Arif Hussain s/o Deedar Hussain Pathan went together at house of relative Fareed Ahmed Pathan, where we came to know that Aunti(Puphi) of Fareed Ahmed Pathan and others has passed away. From there we were going together towards Hazari Gate, when we reached near house of Aijaz Khan Pathan, it was 1030 hours, accused Misri Khan son of Iqbal Ahmed Pathan, resident of Kirri Nawab Pathan, having DBBL gun in his hand, came running and fired straight from his gun upon my father Noor Ahmed with intention to kill him, which hit on his left side shoulder muscles, he raised cries and fell down and expired within our sight; then Mst. Naseem Pathan asked him as to why he killed an innocent person, on which accused made second fire of his gun straight upon Mst. Naseem Pathan at her abdomen, she sustained injuries and was shifted by her sons to Civil Hospital, Shikarpur. The accused in the meantime decamped. We then saw our father Noor Ahmed Pathan and found pellets having crossed through muscle of his arm, hitting at ribs. We shifted his dead body to Civil Hospital Shikarpur for postmortem. Now I have appeared here for lodging FIR that accused Misri Khan Pathan by making fire from his gun with intention to kill has committed murder of my father Noor Ahmed Pathan and he made second fire at Mst. Naseem Khatoon, wounded her and she expired in hospital. The parents of Mst. Naseem Pathan will lodge the FIR separately. I am complainant, may investigation be held."

3. After registration of FIR, police inspected the place of wardhat, collected blood-stained earth, one empty cartridge, sealed it at the spot, prepared inquest report. On 14.5.2011 accused Misri Khan was arrested and on 18.05.2011 he voluntarily produced crime weapon viz. an unlicensed DBBL gun before police. On completion of usual investigation, the appellant/accused was sent up to face trial. The accused pleaded not guilty to the charge and claimed trial.
- 4

4. In order to prove its case, the prosecution examined 9 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. Thereafter, statement of accused was recorded under Section 342 Cr.PC in which he denied the allegations and claimed his false implication due to old enmity. The accused however did not examine himself on oath or call any DW's in support of his defence case.
5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellant/accused as mentioned earlier in this judgment vide Judgment dated 25.08.2016 hence the appellant has filed this appeal against his conviction.
6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 25.08.2016 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 appellant has contended that there was an unexplained delay of 4 hours in lodging the FIR which was fatal to the prosecution case; none of the PW eye witnesses was present at the scene of the incident and that it was an unseen incident; that the eye witnesses were put up witnesses on account of old enmity in order to fix the appellant in this false case; that the eye witnesses, even if they were present, are all related and as such their evidence cannot be safely relied upon; that there were no independent mashirs; that the ocular evidence is contradicted by the medical evidence; that there are material contradictions in the evidence of the eye witnesses which makes their evidence unreliable and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **MUSHTAQ and 3 others versus THE STATE** (PLD 2008

Supreme Court 1), MUHAMMAD FIAZ versus THE STATE (PLD 1993 Peshawar 138), MUHAMAMD YOUNIS versus THE STATE (1986 MLD 2422), COMMISSIONER INLAND REVENUE ZONE-I, RTO , RAWALPINDI versus Messrs KHAN CNG FILLING STATION, RAWALPINDI and others (2017 SCMR 1414), ABDULLAH JAN and others versus TILA MUHAMMAD and others (1985 SCMR 94), ABDUL AZIZ SHAH and another versus ABDUL GHAFOR and another (1985 SCMR 221), ALLAH DINO AND 2 OTHERS versus MOHAMAMD UMAR AND 2 OTHERS (1974 SCMR 411), MUHAMMAD MUZAFFAR versus THE STATE (1995 P.Cr.L.J 1345), GHULAM QADIR and 2 others versus THE STATE (2008 SCMR 1221), AKHTAR ALI and others versus THE STATE (2008 SCMR 6), Mst.RUKHSANA BEGUM and others versus SAJJAD and others (2017 SCMR 596), NASRULLAH alias NASRO versus The STATE (2017 SCMR 724), ABDUL JABBAR alias JABBARI versus The STATE (2017 SCMR 1155), HAZOOR BAKHSH versus WADOON and 3 OTHERS (1980 SCMR 979), PATHAN versus The STATE (2015 SCMR 315), MUHAMMAD IRSHAD versus ALEEMUDDIN and others (2001 MLD 1840), GHULAM SIKANDAR AND ANOTHER versus MAMARAZ KHAN AND OTHERS (PLD 1985 Supreme Court 11), Mst. SUGHRA BEGUM and another versus QAISERF PERVEZ and others (2015 SCMR 1142), ISMAIL (MUHAMMAD ISMAIL) versus THE STATE (1975 P.Cr.L.J 1394) and Mst. ASKAR JAN and others versus MUHAMMAD DAUD and others (2010 SCMR 1604).

8. On the other hand learned Addl. Prosecutor General and the complainant fully supported the impugned judgment and contended that the three eye witnesses to the incident were reliable and confidence inspiring and had fully implicated the appellant in the murder of the deceased; that the eye witnesses were corroborated by the medical evidence; that the appellant produced the murder weapon on his pointation which was hidden in a secret place which only he could have known about; that the FSL report as well as the

chemical report relating to the blood stained earth recovered at the scene of wardat were both positive and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and his conviction and sentence maintained. In particular they stressed that due to the cold bloodied and unprovoked attack on an old defenseless man (the deceased) by the appellant the death sentence was fully attracted in this case. In support of their contentions they have placed reliance on **MUHAMMAD LATIF versus THE STATE** (2008 YLR 619), **KHADIM HUSSAIN versus THE STATE** (PLD 2010 Supreme Court 669) and **FAROOQ KHAN versus THE STATE** (2008 SCMR 917).

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 1 Dr.Imtiaz Ali Memon MLO, post mortem and other medical reports, PW 2 Nadeem Parvaiz Tapedar and recovery of empty and blood stained earth at the scene which lead to both a positive FSL report and chemical report we find that the prosecution has proved beyond a reasonable doubt that Noor Ahmed (the deceased) was murdered by firearm at about 10.30am on 10.05.2011 at Common street Kiri Nawab near house of Iijaz Khan.

11. The only question left before us therefore is who murdered the deceased by firearm at the said time, date and location.

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

- (a) That the FIR was lodged with promptitude within 4 hours of the murder based on the particular facts and

3

circumstances of the case. During this period the complainant had taken his injured/dead father to hospital where post mortem was carried out and thereafter he lodged the FIR and thus there was no unexplained delay in the lodging of the FIR which would give the opportunity to the complainant or the police to cook up a false case against the appellant. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant party which would motivate them to lodge a false case against him. The appellant is named in the FIR with a specific role.

(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 5 Javed Khan.** He is the complainant in the case and the son of the deceased who was his father. According to his evidence on 10.05.2011 he, his father (the deceased) and Shoukat Ali had come from Sukkur to Shikarpur to offer Fateha to their elders who were buried in Shikarpur. After performing Fateha he met his relative Arif Hussain and they all went to the house of their relative Fareed Hussain who informed them that puphi Fareed had expired (Ms Sartaj Bibi who was also his relative). He, his father (the deceased), Mst Naseem Pathan, Shoukat Ali, Arif Hussain, Farred Khan, Rafique Khan and Arshad Khan at 10.30 am were proceeding along common street Kiri Nawab Khan Pathan Shikarpur near Otaq of Aijaz Khan Pathan to offer condolences on the death of Sartaj Bibi when he saw the appellant armed with a DBBL shot gun. He saw the appellant fire directly at his father in order to murder him which shot hit his left side muscle. When Mst Naseem asked why the appellant had killed an innocent person the appellant also shot her which hit her in the abdomen. He then took his dead father to hospital and then registered an FIR against the appellant.

He knew the appellant, it was a day light incident and he was not far away when the appellant shot the deceased so there is no case of mistaken identity and no need to hold an identification parade. The appellant was also named and given the same specific role in the FIR lodged promptly after the incident. The fact that he could see the incident clearly was corroborated by the evidence of the other eye witness PW's who also saw the appellant shoot the deceased. Since it was a day light incident as mentioned earlier and the complainant and other eye witnesses knew the appellant they would have had no difficulty in identifying him especially as the attack went on for a few moments and they were close to

the appellant at the time when he shot their deceased father.

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 has not been proven in this case by any reliable evidence. Reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152)

The complainant is **not** a chance witness as he came with his father and others to Shikarpur from Sukkur in order to offer Fateha at the grave of his elders. He then met his relative Arif Hussain who took him to the house of Farred Ahmed who was also his relative and they all set out together to offer condolences on the death of Sartaj Bibi who was related to them all and thus the complainant and all the other eye witness PW's had a reason to be walking down the street with the deceased at the time of the incident.

As mentioned earlier he lodged his FIR with promptitude and named the other eye witnesses in the FIR along with the accused with a specific role. Any delay in registering the FIR is fully explained by the complainant in his evidence His evidence reflects that of his FIR and there have been no significant improvements in the same so as to render his evidence unreliable. He had no proven enmity with the appellant and had no reason to falsely implicate him in the murder of his father. His evidence was not dented despite lengthy cross examination. He did not intervene in the attack because he was unarmed and he did not give chase as his priority was to take his injured/dying father to the hospital for treatment/post mortem. 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 v. The State** (2008 SCMR 917), 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 6 Shoukat Ali. He is the brother of the complainant. He corroborates eye witness PW 5 Javed Khan 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 promptly which left no room for concoction and there has not been any

5

significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to PW 5 Javed Khan.

(iii) **Eye witness PW 7 Arif Hussain. He is related to the complainant. He corroborates eye witness PW 5 Javed Khan and eye witness PW 6 Shoukat Ali 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 shortly after the incident which left no room for concoction. The main difference between this eye witness and the other two earlier mentioned eye witnesses is that he did not know the appellant before the incident. However since it was a day light incident, the eye witness was close to the appellant when he fired on the deceased and the incident went on for a few moments we are of the view that he was able to correctly identify the eye witness and there was no need for an identification parade and otherwise the same considerations apply to him as to eye witness PW 5 Javed Khan and eye witness PW 6 Shoukat Ali

Having believed the eye-witness evidence we find that the authorities cited by the appellant are of little, if any, assistance to him since they mainly relate to corroborative/supportive evidence which is hardly of any relevance once 3 eye-witnesses' evidence is found to be reliable, trust worthy and confidence inspiring in terms of correctly identifying the culprit and is believed by us.

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

(c) That the evidence of the 3 eye-witnesses is corroborated by PW-3 Arbab Ali who was the PC who lodged the FIR on behalf of the complainant and in particular the complainant reaching the PS at 02.15 hours to lodge the FIR which ties in with the evidence of the three eye witness PW's discussed above.

(d) That the medical evidence and post mortem report of PW 1 Dr. Imtiaz Ali Memon fully supports the eye-witness/prosecution evidence as he confirms that the deceased was brought dead to the hospital by PW 4 PC Khalil Ahmed on account of gun shot wounds to the upper left arm and chest area. We disagree with the medical opinion that the wounds were caused by two separate shots. The fact that a DBBL gun was used to shoot the deceased would explain why there are numerous entry wounds as the cartridges of DBBL guns

⚡

contain many pellets and tend to spray in all directions and thus would account for numerous entry wounds despite only one shot being fired at the deceased. The PW MLO has however confirmed that a DBBL gun was used and that it's cartridges contain numerous pellets. We must keep in mind that the PW MLO is a medical expert and **not** a firearm expert who did not have such indepth knowledge and expertise of opining on how many pellets were in a particular cartridge. In any event direct oral evidence will take precedence over medical evidence which is only corroborative/supportive in nature.

(e) That the appellant was arrested 4 days after the incident on 14.05.2011 with nothing incriminating in his possession. However 4 days after his arrest he took the police on his pointation to the place where he had secretly hidden the DBBL gun (murder weapon) from the side root of a Khabar tree which was a place which only he could have known about and was not known to the police or any other party. The DBBL gun was handed over by the appellant to the police who had no enmity with him and no reason to falsely implicate him in this case. If the police would have wanted to falsely implicate the accused in the case they would have simply foisted the gun on him at the time of his arrest rather than making up this laborious recovery story which again goes to the truthfulness of the appellant leading the police to the hidden weapon.

(f) That PW 6 Shouakat Ali as well as being an eye witness to the incident were also a mashir in the case and his signature appears on all relevant mashirnama's such as inquest report, exhibit of corpse, place of incident, production of clothes of the deceased, arrest and recovery of the gun on pointation of the appellant. As mentioned earlier this PW had no proven enmity with the appellant and had no reason to falsely implicate the appellant in the case and we have already believed his evidence as an eye witnesses to the murder and have no reason not to do so in his role as mashir. He corroborates nearly all steps taken in the investigation by the police who also had no reason to falsely implicate the appellant in this case.

(g) That the empty recovered at the wardat matched with the recovered DBBL gun through a positive FSL report.

(h) That the blood stained earth recovered at the wardat was sent for chemical examination which report found the blood recovered at the scene to be human blood.

(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 appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the shooting of the deceased by the appellant to the deceased being taken to the hospital to the lodging of the FIR to the arrest of the appellant to the recovery of the murder weapon on the pointation of the appellant.

(j) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up his arrest or foisting the DBBL gun on him 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). The signatures of the dead IO ASI Lutifullah on all the relevant documents signed by him have been recognized by PW 9 Fayyaz Ahmed who knew his signature well as he had worked with him for a long time and as such these documents can be safely relied upon as being genuine.

(k) That it does not appeal to reason, logic or commonsense that two sons both of whom were eye witnesses would let the murderer of their father go scot free by substituting him with an innocent person (the appellant). In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

(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 is simply one of false implication based on enmity which has not been substantiated whatsoever by the appellant. He did not give evidence on oath or call any DW in support of his defense case which was basically false implication simpliciter. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought. Thus, in the face of three reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) 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 appellant beyond a reasonable doubt for the offence for which he has

been convicted and hereby maintain his conviction.

14. With regard to sentencing the prosecution has not asserted and has not been able to prove the motive for the appellant murdering the deceased and in such type of cases usually the death penalty is reduced to life imprisonment. We however by exercising our sentencing discretion are not persuaded by a lack of motive alone justifying a reduction in sentence based on the particular facts and circumstances of this case. The appellant not only murdered the deceased in cold blood but also another person at the same time, date and location in the same manner and hence he committed double murder in broad day light and in this case that of an elderly defenseless old man in front of his sons with a DBBL gun which murderous attack we find to be both senseless, brutal and callous and is not deserving of any leniency on the part of the courts and that a deterrent sentence is justified based on the particular facts and circumstances of this case. Thus, under these circumstances the appeal is dismissed, the impugned judgment is upheld along with its convictions and sentences and the confirmation reference is answered in the **affirmative**.

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