Unreliable ID

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IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.29 OF 2020

Appellant:	Rehman Bacha @ Chota son of Shereen Bacha through Mr. Shamsul Hadi, Advocate
Respondent:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General.
Complainant:	Through Iftikhar A. Gohar, Advocate
Date of Hearing:	17.04.2024
Date of Announcement:	19.04.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Rehman Bacha has assailed the impugned judgment dated 23.10.2019 passed by learned Ist Additional Sessions Judge/Model Criminal Trial Court (MCTC-I), Malir Karachi in Sessions Case No.969 of 2018 arising out of Crime No.284 of 2018 under Section 302-PPC registered at PS Quaidabad, Karachi whereby the appellant was convicted under section 265-H(ii) Cr.P.C. and sentenced to life imprisonment. Appellant was also ordered to pay compensation under section 544-A Cr.P.C.to the legal heirs of deceased to the sum of Rs.20,00,000/- (Rupees two million only). Appellant was extended benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 27.08.2018 at 0045 hours at Mehran Highway Gul Ahmed Chowrangi Opp: New Lucy Hotel District Malir Karachi the accused committed Qatl-e-Amd of deceased Ahmed Ali son of Misal Khan, aged about 49 years (brother in law of complainant Nasir Ali) by causing him fire-arm injuries and thereby committed the offence punishable under Section 302 PPC. Hence the aforesaid FIR was lodged against the appellant.

3. After completing all the legal formalities, the charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 08 prosecution witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He did not give evidence on oath but called one DW in support of his defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 23.10.2019 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 contended that the appellant is innocent and has been mistakenly implicated in this case; that the evidence of the eye witnesses cannot be safely relied upon especially in terms of the correct identification of the accused; that the best eye witness evidence was withheld or given up by the prosecution which raises the inference that these eye witnesses would not have supported the prosecution case; that the pistol was foisted on the appellant by the police and it did not produce a positive FSL report when it was matched with the empty recovered at the crime scene and that for all or 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 placed reliance on the cases of **Khalid Mehmood alias Khaloo v the State** (2022 SCMR 1148), **Abdul Ghafoor v The State** (2022 SCMR 1527), **Nazir Ahmad v The State** (2018 SCMR 787), **Saeed Ahmad v Muhammad Nawaz** (2012 SCMR 89), **Tajamal Hussain Shah v The State** (2022 SCMR 1567), **Ayaz Ali v The State** (2021 MLD 1501) and **Bangul v The State** (2019 P Cr. L J 1351)..

8. Learned APG and learned counsel for the complainant fully supported the impugned judgment and contended that the prosecution

had proved its case beyond a reasonable doubt against the appellant and as such the appeal be dismissed. In support of their contentions they placed reliance on the record.

9. I have heard the learned counsel for the appellant as well as learned APG and learned counsel for the complainant and have also perused the material available on record and the case law cited at the bar.

10. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of empty at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Ahmed Ali (the deceased) was murdered by firearm on 27.08.2016 at about 0045am at Mehran highway, Gul Ahmed Chowrangi, opposite new lucky hotel, Malir, Karachi.

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 S.154 Cr.PC Statement of the complainant was lodged with reasonable promptitude within 9 hours of the incident with this delay being explained by the fact that the complainant having received the information concerning the incident had to reach Karachi, then wait until the deceased died as he was injured and died in hospital and then after collecting the body he lodged the FIR. The actual events of the murder mentioned in the FIR are however based on the complainant's own inquires which are based on hearsay evidence. He names the appellant as murdering the deceased by firearm after a quarrel and admittedly he had no ill will or enmity with the appellant to implicate him in a false case.

(b) I find that the prosecution's case rests on the evidence of the two eye witnesses to the murder of the deceased and whether I believe their evidence especially in relation to the correct identification of the appellant as being the person who murdered the deceased whose evidence I shall consider in detail below;

(i) **Eye witness PW 4 Talha. He is a friend of the deceased.** According to his evidence on 27.08.2018 at

about midnight he was available at Lucky hotel Gul Ahmed Chowrangi when he heard a commotion and went to investigate where he saw the deceased arguing with the accused. People separated them where after the accused left and the deceased sat near Jehanzeb's cabin and he returned to the hotel. After 10 to 15 minutes the accused returned and hit the deceased over his head with a pistol. He then saw the accused fire on the deceased which fire hit the deceased in the abdomen and thereafter the accused ran away. The deceased was taken in an injured condition to hospital and he learnt that the deceased had expired at hospital at 10am the next day.

This eye witness was an independent witness who had no enmity or ill will with the appellant and as such had no reason to implicate him in a false case and was also not a chance witness as he lived in the same mohalla and was a neighbor of the deceased. There was light from the hotel at the time of the incident so he would have been able to see the same from the 30 to 40 feet from where he saw the incident. He gave his S.161 Cr.PC eye witness statement within a day and there are no material contradictions in it and the evidence which he gave at trial. He gave his evidence in a straight forward manner and was not damaged during cross examination and as such I believe his evidence *as regards him witnessing the incident.*

The next issue is whether I believe that he correctly identified the appellant as the person who murdered the deceased. There were lights on at the hotel so seeing the appellant ought not to have been an issue however he admitted during his cross examination, ***"I did not know the name of the accused before this incident and had not even seen him before that. The accused name was disclosed to me after his quarrel with the deceased"***.In his S.161 Cr.PC statement he gave no hulia or description of the appellant as the person who he saw shooting the deceased. He was only told the name of the appellant by some one who did not give evidence which name may or may not have been correct. The appellant was not arrested on the spot but a few days after the incident when he returned voluntarily from his village and surrendered before the police. Under the circumstances narrated above it was **imperative** for their to have been an identification parade to be sure that it was in fact the appellant who this eye witness saw murdering the deceased by firearm. **However no such identification parade was ever held.**

In this respect reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524) concerning the

necessity for an early hulia/description of an accused by an eye witness before an identification parade and the need to strictly follow the rules governing identification parades where it was held as under at P.528 to 530:

*"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. **As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted.** In Ramzan v Emperor (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, **"The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases"** (page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, **"Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier"** (page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, **held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case"** (page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, **it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible"** (page 485P).*

*8. **The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits.***

Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. ***The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect....***

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) AND Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, ***the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times*** *(page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces.* ***In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential."*** (bold added)

The case of **Mian Sohail Ahmed V State** (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified.

As such for the reasons mentioned above I find that I cannot place reliance on this eye witness as to the correct identification of the person who murdered the deceased being the appellant.

(ii) **Eye witness PW 5 Abid Jamal. He is the son of the deceased.** According to his evidence on 27.08.2018 he went with his father/deceased to collect medicine for his younger brother who was unwell. He was dropped at the medical store whilst his father/deceased went to meet friends. He witnesses the initial quarrel between the deceased and the accused and also saw the accused shoot his father and

runaway before he took his father to hospital by ambulance who was conscious at the time but passed away in the operating theatre of the hospital.

This eye witness although related to the deceased being his son had no enmity or ill will with the appellant and as such had no reason to implicate him in a false case and was also not a chance witness as he lived in the same house as his father and had gone with his father to buy medicines for his sick brother. There was light from the hotel at the time of the incident so he would have been able to see the incident. He gave his evidence in a straight forward manner and was not damaged during cross examination and as such I believe his evidence *as regards him witnessing the incident as with PW 4 Talha.*

The next issue, as with PW 4 Talha, is whether I believe that he correctly identified the appellant as the person who murdered the deceased. There was light coming from the hotel so seeing the appellant ought not to have been an issue. However in his evidence in chief he states that, ***"I took my father to the hospital alone. When I tried to talk to my father to inquire as to who had fired on him he was talking but he did not take the name of any person. It is correct that my father had talked to me even when we reached the hospital when he said that his legs may be straightened".*** Thus, if this eye witness saw and knew who had shot his father it begs the question as to why he asked his father who had fired on him. The implication is that this eye witness was unable to recognize/identify the person who had fired on his father. This implication is further fortified by the fact that he admitted during his cross examination that, ***"I had not even seen Rehman Badshah (the accused) before this incident",*** which again begs the question how he knew the identity of the accused who he had not seen before. As with PW 4 Talha no identification parade was made after the arrest of the appellant which was not made on the spot.

Thus, for the reasons mentioned above I find that I cannot place reliance on this eye witness as to the correct identification of the person who murdered the deceased being the appellant..

Other evidence and considerations.

(c) The prosecution with held some of the best evidence in this case without explanation. For example, Riaz Khan who is named in the FIR as an eye witness and who it seems along with PW 4 Talha gave the hearsay evidence concerning the murder which formed the basis of the FIR was not called as a witness. Jehanzeb who also witnessed the incident from the shack where the deceased was shot was also dropped as

a prosecution witness without explanation and thus under Article 129 (g) Quanoon-e-Shahdat Ordinance 1984 the adverse inference can be drawn that neither of these witnesses would have supported the prosecution case.

(d) The appellant was not arrested rather he surrendered himself before the police claiming that at the time of the incident he was in his village in KPK and he produced one witness to this effect. In such like cases it is unusual for a guilty person to voluntarily surrender to the police in Karachi when he could have continued to have remained in hiding in KPK with little chance of him being arrested shortly after the FIR was lodged.

(e) That it was the prosecution's case that after his arrest the accused lead the police on his pointation to the place where he had hidden the pistol (murder weapon) in his house. However when this pistol was sent for FSL with the empty recovered at the crime scene the FSL report was negative. Thus, the recovered pistol was not the murder weapon which begs the question as to why a person would produce an unlicensed pistol before the police simply to be charged with an offence under the Arms Act when it was not the murder weapon in the case under investigation. This does not appeal to logic, commonsense or reason and suggests that the pistol was foisted on him.

(f) The appellant had no motive to murder the deceased.

(g) The appellant allegedly confessed to the murder before the police however such confession is inadmissible in evidence. Had this been a genuine confession it again begs the question as to why the police did not produce the appellant before a magistrate to record his judicial confession which would have been potentially of evidentiary value.

(h) That although the medical evidence supports the prosecution case it can only identify the nature of the injury, the seat of the injury and type of weapon used but is of no assistance in identifying the perpetrator.

(i) The appellant claims in his S.342 Cr.PC statement that he was at his village at the time of the incident and he produced one DW in support of his claim. The fact that he also surrendered from his village in KPK at Karachi also bolsters this claim especially as I have found that there is no reliable identification of the appellant as the person who shot and murdered the deceased at the crime scene.

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 unless he is wanted in any other custody case.

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