

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

SPL. CRIMINAL A.T APPEAL NO.104 OF 2021

Appellants: 1. Adil son of Zafar Hussain
2. Abdul Basit son of Haji Ismail
Through Khawaja Naveed Ahmed,
Advocate

Respondent: The State through Mr. Muhammad Iqbal
Awan, Additional Prosecutor General,
Sindh.

Date of Hearing: 03.11.2021

Date of Announcement: 10.11.2021

J U D G M E N T

Mohammad Karim Khan Agha, J. Appellants Adil and Abdul Basit were convicted by the learned Judge, Anti-Terrorism Court No.III, Karachi in Special Case No.117-A of 2014 and Special case No.B-88 of 20154 in Crime No.459 of 2013 u/s.302/324/376/365/34 PPC r/w Section 7 ATA 1997, PS Maripur, Karachi vide impugned Judgment dated 28.03.2020 and were sentenced as under:

“Accused Adil s/o Zafar Hussain and Abdul Basit s/o Haji Ismail were convicted for offences u/s 7(1)(1) ATA with imprisonment for life on each count for causing death of Muzafar Baig, Mst. Shazia, Abdul Samad and Imran;

Accused were convicted for offence 302/34 PPC to undergo imprisonment for life on each count for causing death of Muzafar Baig, Shazia, Abdul Samad and Imran and to pay fine of Rs.50,000/- and compensation of u/s.544/ A Cr.PC and fine of Rs.100,000/- payable to the legal heirs of deceased and in default of payment of fine they shall suffer R.I. imprisonment for one year.

Accused were also convicted for committing gang rape upon Mst. Shazia which is an offence u/s.376(2) PPC accordingly the accused were convicted and sentenced to undergo imprisonment for life.

Accused were convicted and sentenced for having caused injury to Mst. Muniza which constitute offence u/s.7(1)(c) to 10 years and to pay fine of Rs.50,000/- to victim and in default of payment of fine shall undergo simple imprisonment for a period of three months.

Accused were also extended benefit of Section 382-B Cr.P.C "

2. We note that the accused Adil vide the impugned judgment was acquitted for offences u/s S. 353/324/34 PPC and for offences u/s 4/5 Explosive Substances Act 1908 and u/s.23 (i) (a) SAA 2013. The State has not filed an appeal against such acquittals.

3. The brief facts of the case are that the accused challenged the judgment of Anti-Terrorism Court No. V before Hon'ble High Court of Sindh in Spl. CrI. A.T.A appeal No.314/2016 to Spl.CrI. A.T.A appeal No.317/2016. Accused Abdul Basit was also convicted in the main case against which Spl.CrI. A.T.A appeal No.53/2017 was also preferred. The Hon'ble High Court of Sindh found that PW-6 Mst. Muniza daughter of Muzafar Baig was not cross examined by the counsel for accused Abdul Basit who was denied the right of cross examination of PW-6 Mst. Muniza. The Hon'ble High Court of Sindh therefore, remanded the case for hearing application u/s.540 Cr.PC dated 02.04.2016 filed by counsel for appellant Abdul Basit for cross examining Mst. Muniza and in the event that the said application is allowed learned counsel for the accused Abdul Basit shall be given opportunity to cross examine Mst. Muniza. This court was then required to re-write the judgment keeping in view whatever the evidence may have come on record after the cross examination. In view of the above directions of the Hon'ble High Court of Sindh the pending application U/S 540 Cr.P.C was heard and by order dated 13.03.2020 the application was allowed and Mr. Farooq Hayat learned counsel for accused Abdul Basit cross examined PW-6 Mst. Muniza. Thereafter, the statement of the accused U/s 342 Cr.P.C was recorded. Accused Abdul Basit during his statement U/s 342 Cr.P.C in an answer to a question replied that he would make statement on oath and would examine his father in his defense. Later on without making statement on oath and recording the evidence of his father his defense counsel closed his side by statement on 21.03.2020

4. Crime No.459/2013 was registered on the basis of S.154 Cr.P.C statement of one Muhammad Mushtaque who stated that deceased Muzafar

Baig was his brother in law and on 29.12.2013 while he was present in his house, he received telephonic information at about 08.15 am that his brother-in-law Muzafar Baig and his family members have been done to death by firing and their dead bodies have been moved to Civil Hospital Karachi. He reached at Civil Hospital and found the dead bodies of his brother in law Muzafar Baig, sister Shahzia Begum, nephews Abdul Samad and Imran. His niece Muniza aged about 18 years was also in the hospital and she told him that at about 02:00 am the family members were taking food when 01 Abdul Rasheed @ Chief 02. Mehar Bux S/o Rasool Bux, 03. Nazeer Baloch @ Mulla S/o Muhammad Yaqoob, 04 Adil S/o Zafar Hussain, 05. Yaseen Baloch S/o Manzoor Baloch and 3/4 unknown persons entered their house armed with weapons. They committed rape upon her and her mother Mst. Shazia. The culprits then took the family members at Thandi Sarak near Gabo Pat where the culprits fired on Muzafar Baig, Shazia, Abdul Samad and Imran. Muniza then tried to escape with her sister Iqra aged about 13 years and Kiran aged about 12 years and upon which culprits also fired on her brother Sumeer aged about 2 1/2 years. She also received fire arm injury on right left side of her abdomen as such she was also fell on the ground. Later on she was taken to hospital in Cheepa Ambulance. The complainant then took Muniza from Civil hospital to Abbasi Shaheed hospital. It is further stated that Muniza was pregnant at the time of incident and due to fire arm injury there was premature miscarriage of her child. The injured Muniza was under treatment in the I.C.U of Abbasi Shaheed hospital. The Complainant after completion of funeral ceremony of deceased's recorded his statement under S.154 Cr.PC at about 1800 hours at his house and later on same was incorporated in the FIR of 459/2013 of PS Maripur.

5. On 30.12.2013 based on spy information SIP Ismail apprehended nominated accused Yaseen and Adil during patrolling from Baba Mazhar Budni Goth Maripur after a brief encounter, One 30 bore pistol loaded with four live bullets in magazine and one in chamber and one Hand Grenade was recovered from the possession of accused Adil apart from one mobile phone Nokia and cash Rs.1900/-. From possession of accused Yaseen one 30 bore pistol three live bullets in magazine and one in chamber apart from cash Rs.700/- were recovered. They disclosed the names of absconding accused as Abdul Rasheed, Mehar Bux, Mulla Nazeer and Mulla Zubair. SIP Ismail then called BDU Team and prepared memo of arrest and recovery and registered

crime Nos.460 to 463/2013 at PS Maripur and handed over the papers to SIO. On completion of investigation the report U/s 173 Cr.P.C was submitted by DSP Sohail Afzal against the accused before the trial proceedings against accused Adil and Abdul Basit were separated from the case of adult accused as the present accused were declared as juvenile offenders and trial of the accused was conducted accordingly.

6. After registration of FIR's initially the investigation of the cases were entrusted to SIO Arshad Khan of PS Maripur, who visited place of occurrence on the pointation of complainant, in presence of mashirs recorded statement of witnesses u/s 161 Cr.PC. On 30.12.2013 after encounter accused Adil and Yaseen were arrested by SIP Muhammad Ismail of PS Maripur and recorded statement of witnesses u/s 161 Cr.PC. Meanwhile the investigation was transferred to DSP Sohail Afzal, who produced the accused before the ATC-II and obtained their police custody remand and during investigation sent samples for DNA test and obtained the report. On 04.01.2014 I.O recorded 161 Cr.P.C. statement of Muniza. On 05.01.2014 absconding accused Abdul Basit was arrested and produced before the ATC. During Interrogation accused Abdul Basit confessed his guilt to the offence and disclosed his complicity in commission of offence along with his companions. On 10.01.2014 during encounter absconding accused Mehar Bux was killed at Musharaf Mor. The I.O then conducted raid at different places on the pointation of accused but could not arrest any more of the accused as they had gone underground. The I.O. then referred the recovered pistol and empty shells to FSL for examination and obtained such examination report as well as seized blood stained clothes sent to Chemical Examiner for examination and report. The I.O. tried to arrest the absconding accused but could not succeed. Charge sheet u/s 173 Cr.PC was filed against the accused.

7. Consolidated charge against the accused was framed on 26.03.2015 to which they pleaded not guilty and claimed to be tried.

8. In order to prove its case, the prosecution examined 12 PWs and exhibited various items and other documents. The appellants recorded their statements under Section 342 Cr.P.C. whereby they claimed that they were innocent and had been falsely implicated in this case on account of a dispute between the complainant Mustaque and the accused Adil who the complainant had enmity with. In support of his defence case Adil gave

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evidence on oath that on 24.08.2016 along with his father and two brothers he was picked up by the police from his house and falsely implicated in this case when he refused to pay a bribe. He called 2 DW's in support of his defence case one of whom was his father who also stated that Adil had been fixed in this false case due to the complainant's enmity with him. Accused Abdul Basit also gave evidence on oath that he was shot during the gang war, awoke in hospital and when he returned home was falsely implicated in this case by the police. His brother gave evidence in support of his defence case.

9. After appreciating the evidence on record, the learned trial court convicted and sentenced the appellants as set out earlier and hence, the appellants have filed this appeal against their convictions and sentences.

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

11. Learned counsel for the appellants has contended that the entire prosecution case revolves around the evidence of eye witness PW-6 Mst. Muniza which could not be safely relied upon as she had given her evidence at the instance of her relative complainant Mustaque who had enmity with appellant Adel, that there was no corroborative evidence that she had been raped; that even if she had been fired upon it could not be proven that the appellants had fired on her or any of her family members; that there were material contradictions in her evidence and the medical evidence and as such her evidence should be disbelieved as it did not ring true; that there was no other evidence against the appellants and both the appellants should be acquitted of all charges by extending them the benefit of the doubt.

12. On the other hand learned Additional Prosecutor General appearing on behalf of the State and also representing the complainant has fully supported the impugned judgment. In particular he has emphasized that the appellants can be convicted based on the evidence on a sole eye witness provided that it is reliable, trust worthy and confidence inspiring as it was in this case and as such the appeals should be dismissed in respect of each of the appellants. In support of his contentions he has placed reliance on the cases of **Muhammad Mansha v The State** (2001 SCMR 199), **Ijaz Ahmad v The State** (2009 SCMR 99), **Muhammad Ehsan v The State** (2006 SCMR 1857), **Allah** ?

Ditta v The State (PLD 2002 SC 52), **Farooq Khan v The State** (2008 SCMR 917) and **Zia Ullah and another v The State** (2021 SCMR 1507).

13. 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.

14. Before proceeding further we are fully conscious that this was a case of a particularly serious and heinous nature which concerns 4 brutal murders one of whom was a young child and the gang rape of two women however as Judges we cannot be swayed by the brutality of the offences which have been committed and are obligated to decide these appeals based on the strength of the evidence before us and our reappraisal of such evidence.

15. At the outset based on our reassessment of the evidence and in particular the medical evidence and the medical reports we find that the prosecution has proved beyond a reasonable doubt that on 29.12.2013 at about 2am Muzafar Baig, Shazia Begum, Imran and Abdul Sarmad (collectively referred to as the deceased) were all murdered by firearm at Thandi Sarak Gabo Pat.

16. The questions before us are essentially (a) were either/or both the women in question Mst. Shazia and Ms Muniza raped and if so by whom and (b) who murdered the deceased and injured Ms Muniza at the time, date and place as per the charge.

17. We find that when we examine the evidence in a holistic manner based on our reassessment of such evidence the prosecution has **NOT** proved beyond a reasonable doubt that either of the appellants raped Mst.Shazia or Ms Muniza and has **NOT** proved beyond a reasonable doubt that the appellants murdered the deceased keeping in view the fact that both the accused gave evidence under oath and called defence witnesses to show that they were either arrested from home on account of enmity with the complainant Mustaque or in the case of Abdul Basit was arrested when he went to the PS to report his own shooting by members of the Lyari Gang war for the following reasons;



(a) The prosecution case revolves around the evidence of the sole eye witness PW 6 Muniza. Yes, she was an injured eye witness who was allegedly raped but this does not mean that her evidence is automatically to be believed. Her evidence has to be analyzed in terms of its reliability and whether it is confidence inspiring and whether there is any corroboration.

(b) When taken together the following findings tend to cast doubt on her evidence and the prosecution case;

(i) According to her evidence the accused barged into her house at 2am in the morning when all the deceased and herself were apparently awake eating dinner which to us seems some what odd to say the least. At such a late hour most families have eaten and have long since gone to bed.

(ii) Apparently she narrated the incident to the complainant Mustaque whilst she was being treated in hospital yet according to the evidence of PW 3 Sedar Khan when he went to take the statement of Ms Muniza in hospital the Dr. informed him that she was unable to make a statement and stopped him from doing so which tends to cast doubt on the content of the later FIR lodged by the complainant.

(iii) At 1800hrs PW 3 Sedar Khan recorded the statement of the complainant Mustaque whom the appellants state they had an enmity with at his home who gave a very detailed statement of the incident i.e rape and murder which had allegedly been given to him earlier by Ms. Muniza at the hospital which even gave the names of all the accused and co-accused. Appellant Abdul Basit however was not named in the FIR whom Mst Muniza later named in her evidence and claimed to have known for 10 years. Such detail in the FIR based on the hearsay evidence of an injured women who was not well enough to record her statement before the police at about the same time as she gave the information to the complainant is also some what dubious.

(iv) According to Ms Muniza's evidence after the incident she managed to reach PS Maripur with her younger brother and sister. However no FIR was lodged at that time and no police entry to that effect has been produced. It seems that the police called a chippa ambulance for this young injured women and sent her off unaccompanied to hospital. No member of Chippa was examined as a PW and PW 3 Sedar Khan who was on duty at 8am that morning at PS Maripur had no idea that Ms Muniza had reached the PS in the morning. He was only informed where the dead bodies were lying and when he reached that place found that they had already been taken to civil Hospital. This is also very surprising conduct on the part of Ms Muniza and the police and does not particularly accord with natural human conduct based on the particular facts and circumstances of the case

(v) With regard to her rape and that of her mother Ms Shazia in her evidence she states that;

"Yasin Baloch and Adil took me in a room and they committed Zina on me forcibly. Thereafter Rashid, Mehr Bux took my mother Shazia in a room and committed Zina with her".

Significantly, she knew appellant Adil for about 10 years who lived in the same Mohalla and as such she could not mistakenly have identified him if her evidence was truthful that he raped her. If her evidence is to be believed then appellant Abdul Basit played no part in the rape of either Ms Muniza or Ms Shazia as he is not named in the evidence as one of the rapists by Ms Muniza.

With regard to the rape of Ms Muniza PW 7 Dr. Farreda Mobeen who medically examined her on 29.12.2013 shortly after the incident she did not note any bruising around the vagina or thighs which would be commonly found in a case of gang rape. She was married and as such it was not surprising that her hymen was not intact and PW 7 was of the view that whether intercourse was fresh or not would turn on the DNA report. In this case no DNA report was exhibited and the chemical report did not find any semen on the vaginal swabs taken from Ms Muniza which indicates that she might well not have been raped **and casts some doubt on the reliability of her evidence.** Even in the impugned Judgment neither appellants Adil nor Abdul Basit have been convicted of raping Ms Muniza and only of gang raping Ms Shazia. Certainly Ms Muniza could not have been raped by Abdul Basit who was not even named as one of the rapists in her evidence.

With regard to the rape of Mst Shazia for which both the appellants were convicted she was not medically examined for physical injuries in respect of a potential rape. No DNA report is on record regarding her rape. Although the chemical report showed that the vaginal swabs taken from Mst Shazia did find semen this does not provide us with the identity of the rapist and according to the evidence of Ms Muniza although she did **not** witness Ms Shazia's rape she states in her evidence that she (Ms Shazia) was raped in a different room by co-accused Rashid and Mehr Bux and as such there is no evidence that she was raped by either appellants Adil or Abdul Basit and as such the appellants must be acquitted of the charge of gang raping Ms Shazia who might even have had sexual intercourse prior to the incident with her husband.

(vi) Interestingly the impugned judgment originally convicted the appellants of murder and acquitted them of rape and was set aside by this court only for the re-recording of the evidence of Ms Muniza whose evidence has been more damaged in cross examination than before and did not improve the case of rape yet the trial court in the current impugned judgment based on similar evidence or no better evidence has this time convicted both the appellants of gang rape which we find rather surprising.

(vii) Significantly when PW 3 Sedar Khan went to the house (wardat for the rape) he stated in his evidence that;

"We had seen the house from the inside but could not find anything left by the culprits which can be treated as proof of their presence in the house".

This evidence also tends to cast doubt on the prosecution case as according to the prosecution about 10 heavily armed men entered this rather small house, beat up and tied up the occupants of whom there were about 8, gang raped two of the female occupants and then forcibly took them all from the house yet the house appears to have been in an undisturbed state which would not support such an incident taking

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place in the house. It is also significant that Ms Muniza's eye witness S.161 Cr.PC statement was made after a considerable delay of 6 days which gave her a chance to improve it or ensure that it was in line with the very detailed FIR lodged by her father based on her hearsay.

(viii) Ms Iqra who was the daughter of one of the deceased and Kiran who was the son of one of the deceased who were also in the house at the time of the beatings and rape and were also taken to the plot where they also witnessed the shooting of the deceased and were saved by PW Ms Muniza were about 13 to 14 and 12 to 13 years of age respectively at that time and would have been about 15 to 16 and 14 to 15 years of age respectively at the time of trial but did **not** give evidence for the prosecution at trial. We find this to be rather surprising as both would have been mature enough to support the evidence of Ms Muniza and as such it appears that the prosecution deliberately chose to omit some of the best evidence without any reason which tends to undermine the prosecution case.

(ix) According to the evidence of Ms Muniza after the rape the occupants of the house were forcibly removed by the culprits and were taken to a vacant plot where her mother was raped again. She does not say who raped her mother at the plot. According to her evidence the accused all then made indiscriminate fire on them which lead to the death of the deceased and her injury. She does not name a single accused who was present at the vacant plot and opened fire on the deceased and her. **According to her own evidence there was no light available at the plot at the time of the shooting of the deceased.** The question therefore arises whether it can be safely found that all of the about 10 persons who entered her house heavily armed were present at the time when the deceased were shot. One or two might have left the group. She does not identify either of the appellants as being present by name at the time of the shooting. Furthermore, **in her evidence she states that the culprits made indiscriminate fire and that the distance of fire was neither from close range or from a distance.** Such evidence is **not** supported by the medical evidence. Three of the 4 deceased received fire shot injuries to the head where **blackening and charring** was found by PW 5 Dr.Ahmed who was the MLO who carried out 3 of the 4 post mortems of the deceased which **indicates that 3 out of the 4 deceased were shot from a very close range.** One deceased received one fire shot to the head, 2 of the deceased received two fire shots each and one of the deceased received three fire shots when considered against the close distance of the shots also indicates that this was not indiscriminate firing but execution style killings which contradicts the evidence of PW Muniza on this aspect of the case. The fact that the accused left the scene as they all ran out of ammunition and then returned also does not appeal to reason logic or common sense as how could about 10 heavily armed men run out of ammunition when shooting 4 people with about only 12 bullets from relatively close range? Again this suggests that there were fewer than 10 heavily armed men and as such some of the men from the house might not have been present at time when the deceased were shot. If it was dark how was it

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possible for Ms Muniza to recognize accused Abdul Basit who was according to her allegedly accidentally shot by the other accused? Interestingly she mentions no other accused by name which tends to indicate that at trial she was trying to negate accused Abdul Basit's defence that he was not present as he was shot by members of the Lyari Gang war and was receiving hospital treatment at the time of the incident. It is also significant and suspicious that despite a long and detailed narration of the incident given to the complainant Mustaque whilst she was wounded in hospital she neglected to narrate this aspect of the case.

(x) It may be that Ms Muniza was present and was shot when the deceased were murdered but she has not produced any medical evidence of her gunshot injury and we find that she cannot say for certain that the appellants Adil and Abdul Basit were present at the time of the shooting who have both given evidence that they were not present during the incident and produced DW's in support of their case.

(xi) On appellant Abdul Basit's arrest no weapon was recovered from him and as such he cannot be linked to the empties found at the murder scene.

(xii) On appellant Adil's arrest a pistol was recovered from him however he has been acquitted in the encounter case and case under SAA on the basis that the evidence of the prosecution witnesses in respect of this aspect of the case has been disbelieved. This also means that the place of arrest with respect to appellant Adel is now in doubt and it cannot be ruled out that he was arrested from his house as per his defence case.

(xiii) In any event the pistol recovered from him was not sent for an FSL report in respect of the empties recovered at the wardat of the murders so the recovered pistol story which was disbelieved cannot link him to the murder scene.

(xiv) There was no motive or reason for the appellants to break into the house of the deceased and gang rape two women and aim to kill the entire occupants. On the contrary complainant Mustaque's enmity with appellant Adil gave the complainant a reason to falsely implicate the appellants in this case in league with the police some of whose evidence has already been disbelieved when acquitting appellant Adil in the encounter and Arms cases which casts further doubt on the reliability of the prosecution case. Significantly the prosecution did not appeal Adil's acquittals in these cases.

(xv) Apart from the evidence of PW eye witness Muniza there is no other supportive or corroborative evidence in respect of the rapes and the murders against the appellants which could link them to these offences. In fact as we have noted above there are numerous doubts in the evidence of PW eye witness Muniza's evidence and we find that we cannot rely safely on it to convict the appellants for the offences for which they have been charged without some unimpeachable corroborative or supportive evidence which as discussed above there is none.

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18. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

19. For the reasons discussed above we find numerous doubts in the prosecution case against the appellants and thus by extending the benefit of the doubt to the appellants both the appellants are acquitted of the charge, the impugned judgment is set aside, their appeals are allowed and both the appellants shall be released unless wanted in any other custody case.

20. The appeals stand disposed of in the above terms.