

Criminal Appeal No-149 of 2020

Faizan Ali

Vs.

The State

HIGH COURT OF SINDH

Composition of Bench. Single.

Mr. Justice Mohammad Karim Khan Agha

Dates of hearing : 19-11-2024

Decided on : 26-11-2024

(a) Judgment approved for Reporting

Yes

KA

CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/. Over-rules/ reverses/ explains a previous decision.

* Strike out whichever is not applicable.

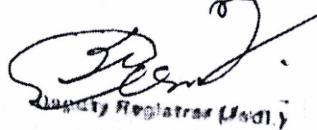
NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

PRESENTED ON
17-02-2020


District Registrar (Legal)

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 149 / 670 of 2020

FAIZAN ALI

Son of Dildar Ali, Muslim, Adult,

Resident of Karachi

PRESENTLY Confined at

Central prison Karachi

..... APPELLANT

VERSUS

1. THE STATE

2. Learned Trial Court Additional

District And Session Judge 1st

Karachi East

.....RESPONDENTS

FIR NO 136/2017

U/S 302-PPC

P.S GULSTAN E JOHAR KARACHI

APPEAL UNDER SECTION 410 C.R.PC

Being aggrieved and dissatisfied with the judgment dated 20.1.2020 passed by the learned trial court 1st Additional District & Sessions Judge East at Karachi in Session Case No.1419/2017 vide FIR No.136/2017 under section 302 PPC, it is respectfully prayed that this honorable court may kindly be pleased to set aside the judgment dated 20.1.2020 passed by the learned trial court in which trial court awarded life imprisonment twice to accused and 2 lacs fine and in case of default further 6 months simple imprisonment and after hearing both the

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.149 OF 2020.

Appellant:	Faizan Ali son of Dildar Ali through Mr. Abdul Qadir Soomro, Advocate.
Complainant:	Wajahat Ali son of Dildar Ali through Mr. Samiullah Abbasi, Advocate
Respondent:	The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General Sindh
Date of Hearing:	19.11.2024
Date of Announcement:	26.11.2024

J U D G M E N T

Mohammad Karim Khan Agha, J: Appellant Faizan Ali was tried in the Court of Addl. District & Sessions Judge-I, Karachi East in Sessions Case No. 1419 of 2017 in respect of Crime No. 136 of 2017 registered under Section 302 P.P.C. at P.S. Gulistan-e-Jauhar, Karachi and after a full-fledged trial vide judgment dated 20.01.2020 he was convicted under section 302(b) P.P.C. for committing Qatl-e-amd and sentenced to suffer imprisonment for life on two counts. In addition to that the accused is required to pay compensation to tune of Rs.2,00,000/- to the legal heirs of each deceased. In case of failure of payment of fine/compensation, the accused shall further undergo simple imprisonment for six months.

2. The brief facts of the case, as per FIR lodged by complainant Wajahat Ali son of Dildar Ali are that on 23.03.2017 he was present on his duty and at about 1530 hours, he was talking with his wife on mobile phone; during conversation his wife informed him that his stepbrother Faizan Ali had fired upon his brother Dilawar Hussain and his father Dildar Ali. On receiving such information, he immediately rushed to Dar-ul-Sehat Hospital where he found his brother Dilawar in dead condition, while his father Dildar was lying injured, who was shifted to Agha Khan Hospital. After few hours his father also succumbed to his injuries. He

had been informed that accused Faizan Ali had fired upon them. Thereafter, both the dead bodies were shifted to Civil Hospital Karachi where he had given statement to ASI Naimat Ali that he does not want to conduct postmortem of both dead bodies. ASI Naimat Ali recorded his statement under Section 154 Cr.P.C. in emergency ward of Civil Hospital Karachi. Hence, on the basis of his statement under Section 154 Cr.P.C. such FIR was lodged against the above named accused.

3. After usual investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed his trial.

4. In order to prove this case, the prosecution examined 9 witnesses and exhibited various documents and other items. The appellant recorded his statement under Section 342 Cr.P.C. whereby he claimed that he was innocent. However, he did not give evidence on oath or call any witness in support of his defence.

5. After appreciating the evidence on record, the learned trial Court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence.

6. Learned counsel for the appellant has contended that he is innocent of any wrong doing and that he has been falsely implicated in this case by the complainant party; that the cause of death of the deceased has not been established as no post mortem was conducted; that the sole eye witnesses evidence cannot be safely relied upon and should be excluded from consideration; that three of the PW's were declared as hostile as they were not supporting the prosecution case and as such no reliance could be placed on their evidence; that the dying declaration cannot be believed; that the pistol was foisted on the appellant by the police and that for any or all 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 learned counsel for the appellant has placed reliance on the cases of *Fazal Hussain Alias Faqeer & Ors. v. The State* (2020 P Cr.L J 311), *Nasreen & Ors. v. The State* (2001 P Cr. L J 685), *Syed Ali Akbar v. The State* (2023 YLR 901), *Muhammad Zaman v. The State* (2023 YLR 456), *Muhammad Mansha v. The State* (2018 SCMR 772), *Sardar Bibi v. Munir Ahmed* (2017 SCMR 344), *Afaq Ahmed v. The State* (2020 YLR 676), *Owais & Ors. v. The State* (2022 P Cr. LJ 920), *Azhar Ali & Ors. v. The State* (2021 YLR 2263 Sindh), *Hasan v. The State* (2020 P Cr. LJ Note 14), *Khalil-ur-*

Rehman v. The State (2022 P Cr. LJ Note 25), Zeeshan alias Shani v. The State (2012 SCMR 428), ~~Khizar Hayat v. The State~~ (PLD 2019 SC 527), Ghulam Muhiyuddin v. The State (2020 MLD 502), Fayyaz Ahmed v. The State (2017 SCMR 2026), Qasim Ali Malik v. The State (2012 P Cr. LJ 124), Amanullah v. The State (2022 YLR 1681), Riaz Ahmed v. The State (2010 SCMR 846), Khuwaja Muhammad v. The State (2001 P Cr. LJ 401) and Muhammad Ashraf v. The State (2011 SCMR 1046).

7. On the other hand, learned Additional Prosecutor General Sindh and learned counsel for the complainant have fully supported the impugned judgment. In particular, they contended that the FIR had been lodged with promptitude naming the accused with the role of murdering both of the deceased; that the sole eye witnesses evidence could safely be relied upon; that the dying declaration supported the eye witness' version of events; that the pistol used in the murder of both the deceased was found by the police on the pointation of the appellant after his arrest and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of their contentions they placed reliance on the cases of Majeed v. The State (2010 SCMR 55), Qasim Shahzad v. The State (2023 SCMR 117), Niaz-ud_Din v. The State (2011 SCMR 725), Abdur Rehman v. The State (1998 SCMR 1778) and Farmanullah v. Qadeem Khan (2001 SCMR 1474).

8. I 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.

9. Based on my reassessment of the evidence of the PW's, especially the medical evidence in terms of S.174 Cr.PC reports and MLC's, the blood stained earth seen at the crime scene and the empties recovered from the crime scene I find that the prosecution has proved beyond a reasonable doubt that on 23.03.2017 at about 1515pm Dildar Ali and Dilwar Ali (the deceased) were both murdered by firearm inside house No.A-660 Pehalwan Goth, Block 9, Gulshan-e-Johar Karachi.

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

11. After my reassessment of the evidence I find that the prosecution has 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) The FIR was lodged with relative promptitude being about 5 and a half hours after the incident. This delay however has been fully explained as once the complainant heard of the murderers he rushed to Dar-ul-Sehat hospital where one of the deceased was already dead whilst the other was taken by ambulance to Aga Khan hospital as he was still conscious at that time where he later died. Hence his priority was to save his injured relative. Both bodies were then taken to civil hospital for post mortem which the complainant did not allow. He gave his S.154 Cr.PC statement at civil hospital to the police which later became the FIR. As such based on the particular facts and circumstances of the case I find that the slight delay in lodging the FIR has been fully explained and is not fatal to the prosecution case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872).

(b) That the appellant is named in the promptly lodged FIR with the specific role of murdering both the deceased by firearm albeit this is based on hearsay evidence which is inadmissible but is supportive of the eye witness evidence.

(c) I find that the prosecution's case primarily rests on (a) the evidence of the sole eye witness to the murders of both the deceased and whether I believe his evidence and (b) the dying declaration given by the deceased which evidence I shall consider in detail below;

(i) **Eye witness PW 3 Danish Ali. He is the real brother and son of each deceased respectively.** According to his evidence on 23.03.2017 he was sitting in the court yard of his house whilst both the deceased were sitting in a room in his house when the accused entered the house and the room where both the deceased were about 15/20 minutes before the incident. The accused was talking loudly in the room so he also went to the room where the accused was exchanging hot words and abusing both of the deceased (his father and real brother) and demanding money from his father. His brother told the accused not to abuse his father which annoyed the accused who took out a pistol and fired at his brother and father. The first fire hit his brother on his chest and the second fire hit his father on his shoulder. He became afraid and hid in the kitchen. The accused then ran out of the house and his father followed the accused. He then came out of the kitchen and went outside the house where his father was lying injured when the accused made second fire on his father which hit his father in the abdomen. He and neighbors then took his brother and father to Dar-ul-Sehat Hospital where his brother's death was confirmed. His father was taken to Aga Khan Hospital where he also died after treatment.

This eye witness is closely related to both of the deceased and also to the accused (who is his step brother) however no enmity or dispute has been proven between this eye witness and the appellant and thus the 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), *Dildar Hussain v Muhammad Afzaal alias Chala* (PLD 2004 SC 663).

This eye witness also knew the appellant before the incident which took place at 3.20pm in the day time inside his house as the appellant was his step brother. The incident went on for about 5 minutes and the eye witness was close to the incident and would have got a good look at the appellant who he already knew. Thus, there is no case of mistaken identity and no need to hold an identification parade in order to determine the identity of the appellant.

This eye witness is a natural witness and not a chance witness as he was living in the house where the murders took place and as such his presence was to be expected. His evidence was not materially improved on from his S.161 Cr.PC statement which was made with promptitude. He gave his evidence in a natural manner and was not dented at all during cross examination and as such I find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the appellant who murdered both of the deceased.

I can convict on the evidence of this sole eye witness alone though it would be of assistance by way of caution if there is some corroborative/ supportive evidence. In this respect reliance is placed on the case of *Muhammad Ehsan v. The State* (2006 SCMR 1857). As also found in the cases of *Farooq Khan v. The State* (2008 SCMR 917), *Niaz-ud-Din and another v. The State and another* (2011 SCMR 725), *Muhammad Ismail vs. The State* (2017 SCMR 713) and *Qasim Shahzad* (Supra). That what is of significance is the quality of the evidence and not its quantity and in this case I find the evidence of this eye witness to be of good quality and believe the same.

(ii) PW 1 Wajahat Ali (complainant) and PW 2 Adil Hussain both gave evidence that after being shot and injured prior to his death Dildar informed them each separately that the appellant had shot him and the other deceased. In effect the seriously injured Dildar gave a dying declaration shortly before his death.

Guidelines for the law on relying on a dying declaration were set out in the case of *Majeed v. State* (2010 SCMR 55) where it was held as under:-

"7. The evidence of P.Ws. 3, 4 and 7 reveals that when they reached on the fire-arm reports they found the deceased Mir Shandad lying dead while Mujeeb-ur-Rehman was alive but lying in injured

condition who disclosed that the appellant Majeed and Ismail had fired at them. P.W.7 apart from naming the above two persons also named Naseer and Bashir. All these three witnesses were cross-examined but nothing came on record to discredit their evidence. No serious effort was made to challenge their statement on the question of dying declaration. From the evidence it has been established beyond any shadow of doubt that deceased Mujeeb-ur-Rehman made dying declaration immediately after the incident, eliminating the possibility of influence etc. before the witnesses making the appellant responsible as one of the accused for causing them injuries. It is a well-settled principle of law that if dying declaration is made even before a private person, is free from influence and the persons before whom such dying declaration was made was examined then it becomes substantive piece of evidence and for that no corroboration is required and such declaration can be made basis of conviction. This Court gave following guiding principles for relying upon the dying declaration in the case of *Farmanullah v. Qadeem Khan* 2001 SCMR 1474.

- (i) There is no specified forum before whom such declaration is required to made.
- (ii) There is no bar that it cannot be made before a private person.
- (iii) There is no legal requirement that the declaration must be read over or it must be signed by its maker.
- (iv) It should be influence free.
- (v) In order to prove such declaration the person by whom it was recorded should be examined.
- (vi) Such declaration becomes substantive evidence when it is proved that it was made by the deceased.
- (vii) Corroboration of a dying declaration is not a rule of law, but requirement of prudence.
- (viii) Such declaration when proved by cogent evidence can be made a basis for conviction."

In essence there is no hard and fast rule whether a dying declaration can be believed and can be safely relied upon. In this case both the witnesses PW 1 Wajahat Ali (complainant) and PW 2 Adil Hussain evidence meets the requirements of relying on a dying declaration especially as there is sufficient evidence to show that the deceased Dildar remained conscious for a considerable period of time after being shot and usually it would be regarded as a substantive piece of evidence. However based on the particular facts and circumstances of this case where the complainant PW 1 Wajahat Ali did not mention this crucial piece of evidence either in his FIR or his S.161 Cr.PC statement and PW 2 Adil Hussain (who was an independant witness) did not record a S.161 Cr.PC statement and was declared hostile by the prosecution I only give a little weight to the evidence concerning the deceased Dilwar's dying declaration which corroborates that of eye witness PW 3 Danish Ali whose

evidence was discussed earlier in this Judgment.

(iii) With regard to the evidence of the other PW's who were declared hostile. Namely, PW 5 Jawed, PW 6 Haider and PW 9 Shahman. It is settled that their evidence cannot be simply ruled out of consideration but must be considered with great caution as they appear to sing two different tunes at the same time. With regard to the evidence of hostile witnesses in the case of **State V Abdul Ghaffar** (1996 SCMR 678) it was held as under;

"In the light of the above principles it is settled that the testimony of a hostile witness cannot be altogether left out of consideration. The evidence of a hostile witness has to be considered like the evidence of any other witness, but with a caution for the simple reason that the witness has spoken in different tones. When a witness speaks in different voices, it would be for the Court to decide in what voice he speaks the truth. In such cases, the determining test is corroboration from independent source and conformity with the remaining evidence." (bold added)

PW 5 Jawed, PW 6 Haider and PW 9 Shahman appear to have been declared hostile by the prosecution as their evidence did not include them being eye witnesses to the murders as perhaps was expected by the prosecution. However, the other evidence which they give tends to support the happening of the event and in the case of PW 9 Shahman that the incident happened in the house but she did not see it and as such I give some, but little weight, to their evidence in terms of the incident taking place at the house of PW 3 and their assistance after the firing incident.

Thus, based on my believing the evidence of the sole eyewitness and giving some weight to PW 1 and 2 who gave evidence about the deceased dying declaration against the appellant what other evidence/material supportive/corroborative or other wise is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(d) Although no post mortem was carried out I do not find this fatal to the prosecution case. The eye witness whose evidence I have believed and placed reliance on clearly stated that both the deceased were shot by fire arm by the appellant. The S.174 Cr.PC reports of both the deceased make it clear that both the deceased died on account of firearm injuries. The MLC's of each of the deceased also makes it clear that both of the deceased received firearm injuries. Thus, I have no doubt that the death of the deceased was caused by firearm and I do not find it relevant based upon the above particular facts and circumstances that no post mortem was conducted on either of the deceased. The medical evidence, such as it is, fully supports the prosecution case of how the deceased died. In this respect reliance is placed on the case of **Abdur Rehman** (Supra)

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(e) That despite the appellant being the step son/brother of the deceased he did not lodge any FIR, he did not attend the funeral of the deceased or remain to help the police with their inquiries instead he ran away to the Punjab where he was arrested two months after the incident. He did not surrender to the police. This is hardly the act of an innocent man.

(f) That 2 days after his arrest on 29.05.2017 the appellant confessed to the murder before the police and he took the police on his pointation to the place where he had hidden the murder weapon (pistol) which was a place which he only knew about. That it has not been proven through evidence that any particular police witness had any enmity or ill will towards the appellant and had any reason to falsely implicate him in this case for instance by foisting the pistol on him and in such circumstances it has been held that the evidence of the police witnesses can be fully relied upon and as such I rely on the police witness evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(g) That the pistol (30 bore) recovered on the pointation of the appellant matched three of the empties (30 bore) recovered at the crime scene through a positive FSL report. The other empties that were recovered being 9mm are of lesser significance as it is the prosecution case that the accused had two pistols at the time of the incident (one 30 bore which was recovered and one 9mm which was not recovered). I find any slight delay in sending the pistol and empties for an FSL report to be inconsequential especially as there had been no suggestion of tampering with the same. In this respect reliance is placed on the case of **Muhammed Ashraf** (Supra)

(h) That it does not appeal to logic, commonsense or reason that a son/brother would let the real murderer of his father/brother get away scott free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammad Ashraf V State** (2021 SCMR 758)

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I 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 the cases of **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 time the appellant entered the house of PW 3 to him arguing with both of the deceased inside the house to him shooting both of the deceased after an exchange of hot words to the appellant running away and being arrested in the Punjab to the appellant recovering the murder weapon on his pointation from a hidden place to the empties recovered at the crime scene matching with the recovered pistol in producing a positive FSL report.

(j) That the motive as per FIR and evidence on record is the fact that the appellant's father would not lend him any money.

(k) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but I 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 however the appellant did not give evidence on oath or call any DW in support of his defence case. Thus, for the reasons mentioned above I disbelieve the defence case in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

12. Thus, based on the above discussion, I have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt as per the charge and dismiss the appeal.