

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha.
Mr. Justice Arshad Hussain Khan.*

**CRIMINAL APPEAL NO.440 OF 2020
CONF. CASE NO.16 OF 2020**

Appellant:	Muhammad Kashif son of Shahnawaz through Mr. Muhammad Hanif Samma, Advocate
Respondent:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General, Sindh.
Date of Hearing:	16.12.2021
Date of Announcement:	22.12.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant namely Muhammad Kashif has assailed the impugned judgment dated 13.10.2020 passed by the Additional Sessions Judge-X, Karachi (West) in Sessions Case No.325 of 2017 arising out of Crime No.296 of 2016 under Section 302 PPC, registered at PS Saeedabad, Karachi whereby the aforesaid appellant was convicted u/s. 265-H(ii) Cr.P.C. for offence u/s. 300 PPC, punishable under clause (b) of Section 302 PPC and accordingly sentenced him to death as Tazir subject to confirmation by this court. The Appellant/accused was also directed to pay fine of Rs.5,00,000/- and in case of default in payment he shall suffer S.I. for 06 months.

2. The brief facts of the prosecution case are that the complainant Muhammad Aqib s/o Noor Ahmed had registered the instant FIR on 10.12.2016 at about 0350 hours, wherein he stated that he is residing with his family and running a Garment Factory with name and style of Friends Traders situated at Shershah, Karachi and his younger brother Muhammad Shehazad aged 35 years was residing with his mother at Sector 9-E/1 near Kabarri Chowk, Saeedabad, Karachi and working as a

laborer. It is further narrated that 3/4 years ago his brother Muhammad Shehazad contracted court marriage with one Mst. Shakeela and after passage of some time, his brother Muhammad Shehazad used to quarrel with Mst. Shakeela due to which her sister in law (bhabhi) Mst. Shakeela often went to her parents' house along with her daughter. It is further narrated by him that 15/20 days before, Mst. Shakeela again went to her parents' house along with her daughter Aiza and put demand before her husband Muhammad Shehazad to arrange a separate house for her then she would reside with him. It is further narrated that on 09.12.2016 at about 0900/1000 hours, the sister in law (saali) of his brother Muhammad Shehazad namely Mst. Samina brought baby Aiza to meet with his brother Muhammad Shehazad and went away after handing over baby Aiza to him. Thereafter, at about 1300 hours, the brother in law of his brother namely Muhammad Kashif s/o Shahnawaz came to the house of his brother Muhammad Shehazad and he called his brother Muhammad Shehazad from outside the house and asked him to hand over his daughter Aiza to him for which his brother Muhammad Shehazad replied to Muhammad Kashif that he was feeding his daughter and later on, he himself will come to his house for handing over baby Aiza but Muhammad Kashif again called his brother Muhammad Shehazad and repeated his demand and when his brother Muhammad Shehazad opened the door of his house and came outside, Muhammad Kashif made straight firing upon him, resultantly; his brother Muhammad Shehazad received bullet injuries on his left shoulder, left ribs and right legs and fell to the ground. In the meantime his mother namely Zareena Bibi made hue and cry as such vicinity people reached there and Muhammad Kashif made his escape good and his brother Muhammad Shehazad succumbed to such injuries and died on the spot. It is further narrated that his mother informed him about the incident on phone and also told him that the dead body of his brother Muhammad Shehazad had been taken to Civil Hospital Karachi through ambulance. On receiving such information he reached at Civil Hospital and found the dead body of his brother Muhammad Shehazad lying in mortuary of hospital, where police officials made legal proceedings and postmortem of his brother was conducted by doctor of Civil Hospital hence he lodged the FIR.

3. After completing usual investigation charge was framed against the accused to which he pleaded not guilty and claimed trial of his case.

4. The prosecution in order to prove its case examined 12 PWs 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 under oath or call any DW in support of his defence case. 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 his conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 13.10.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the complainant party in connivance with the police; that the eyewitnesses are interested witnesses who did not see the appellant at the scene and have falsely implicated him after consultations and deliberations on account of a matrimonial dispute and hence the delay in lodging the FIR; that the pistol was foisted on the appellant and thus 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 the cases of **Ali Sher and others vs. The State** (2008 SCMR 707), **Muhammad Arif vs. The State** (2019 SCMR 631), **Nazakat Ali vs. The State** (2019 PCRLJ 107), **Abdul Jabbar and another vs. The State** (2019 SCMR 129), **Mumtaz Ahmad and others vs. The State and others** (2020 PCRLJ 1381) and **Muhammad Hussain vs. The State** (2011 SCMR 1127).

7. On the other hand learned Additional Prosecutor General appearing on behalf of the State has fully supported the impugned judgment. He has contended that the evidence of the eyewitnesses is reliable, trust worthy and confidence inspiring and that they have

correctly identified the appellant as the person who shot and murdered Shahazad (the deceased); that any delay in the FIR has been fully explained; that the medical evidence corroborates the eye witness evidence; that the empties recovered at the scene lead to a positive FSL when matched with pistol recovered by the appellant on his pointation and as such the prosecution had proved its case beyond a reasonable doubt and the appeal should be dismissed and the confirmation reference answered in the affirmative. In support of his contentions, he placed reliance on the cases of **Faisal Aleem vs. The State** (PLD 2010 Supreme Court 1080), **Anwar Shamim and another vs. The State** (2010 SCMR 1791) and **Muhammad Rafique alias Neela and another vs. The State and others** (2020 SCMR 664).

8. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and have gone through the entire evidence which has been read out by counsel for the appellant, and the impugned judgment with the able assistance of learned counsel and have considered the relevant law including the case-laws cited at the bar. At the outset we note that PW 11 Noor Ahmed who was the MLO was not cross examined by learned defence counsel however in light of the oral and other evidence we find that this has not prejudiced the defence case and that this lapse can be ignored as being inconsequential. In this respect reliance is placed on the case of **Muhammed Rafique** (Supra) which held as under at P.666 Para 4;

"4. Petitioner is assigned fatal blow. According to the autopsy report, conducted at 2:30 p.m. same day, it is an incised wound of quite an extensive nature, penetrating into brain cavity; it is consistent with hatchet P-3 found stained with blood, forensically opined that of human origin, recovered pursuant his disclosure on 6.11.2019. Infliction of the fatal blow at petitioner's hand has unanimously been confirmed by the witnesses; occurrence being a broad daylight affair on a thoroughfare within the vicinity of inhabitation, inculpatory investigative conclusions, being in line therewith, have not been found by us as open to any legitimate exception. Jafar Hussain, real father of the accused, is saddled with instigation, he has rightly been acquitted by the trial Court; whereas triviality of abrasions, swayed on the High Court to exercise

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caution qua Muhammad Naveed and Muhammad Saeed is an equally expedient choice. Doctrine of abundant caution is a silver lining in our jurisprudence to ensure safe administration of criminal justice and application thereof does not necessarily imply destruction of entire volume of evidence, if otherwise found sufficient to sustain the centrality of the charge. Though, the Medical Officer has not been cross-examined during the trial, nonetheless, upon analysis abrasions came about during the occurrence, admit possibilities, exculpatory in nature. The High Court has been well within remit to let off respondents; wage settled is conscionable in circumstances. Scales are in balance. Petitions fail. Leave declined".

9. Based on our reassessment of the evidence of the PW's, especially PW 2 Muhammed Shaukat and PW 3 Mst Rozina, the other prosecution witnesses especially PW 11 Noor Ahmed (MLO) and other medical reports including the post mortem report of the deceased, recovery of empties at the scene which lead to a positive FSL report, and blood recovered from the scene which lead to a positive chemical report we find that the prosecution has proved beyond a reasonable doubt that Shahazad (the deceased) was shot and murdered by firearm at about 1300hours on 19.12.2016 outside a house situated at Sector 9/E-1 near Kabari chowk, Saeedabad, Karachi.

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

11. 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 keeping in view that each criminal case must be decided on its own particular facts and circumstances;

(a) Admittedly the FIR was lodged after a delay of 11 hours. It is settled by now that the delay in lodging the FIR might not be fatal to the prosecution case provided that such delay has been adequately explained and the appellant has not been prejudiced by such delay in lodging the FIR. In this case the deceased was shot, and the immediate concern of the family was to send his body to civil hospital so that he might be saved and as such they arranged for the body of the deceased to be sent to civil hospital by ambulance where he was pronounced dead, thereafter the police

formalities and post mortem of the dead body was carried out before it was released for burial and thus we find that based on the particular facts and circumstances of the case there has been no unexplained delay in lodging the FIR and no undue advantage has been gained by the prosecution on account of such explained delay. The appellant is named in the FIR which a specific role and the complainant had no enmity with the appellant so as to involve him in a false case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872)

(b) In our view the prosecution's case primarily rests on the eye witnesses to the murder and their correct identification of the appellant whose evidence we shall consider in detail below;

(i) **Eye witness PW 2 Muhammed Shaukat.** He is the brother of the deceased. According to his evidence on 09.12.2016 he went to meet his mother (eye witness PW 3 Ms Rozina) at her house. When the deceased came out of the house he saw the appellant make three fire shots at him. He reached his brother who was lying injured in the middle of the street and chased the appellant who was on a motor bike but did not catch him due to the narrow streets. When he returned to his deceased he found that he had died and was lying in the lap of his mother (eye witness PW 3 Ms Rozina). He accompanied the dead body to hospital where he saw that the deceased had three firearm injuries on his shoulder, waist and knee. On 28.01.2017 he was told that the appellant had been arrested and he went and identified the appellant at the PS who had shot the deceased who was then arrested in this case. He was also present when the appellant took the police to the pistol which was recovered in a hidden place on the pointation of the appellant.

He gave his section 161 Cr.PC statement promptly and section 164 Cr.PC statement before the magistrate and has made no material improvements in his evidence. He was not a chance witness as he was going to visit his mother at her house when the incident occurred outside his mother's house.

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 especially as the appellant was named with specific role in the FIR and he identified the appellant at the PS about 6 weeks after the incident. The fact that he could see the incident clearly was corroborated by the evidence of the other eye witness PW who also saw the appellant shoot the deceased. Since it was a day light incident as mentioned earlier and the complainant and other eye witness 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 of the shooting.

Admittedly the eye witness was related to the deceased who was his brother 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) **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152).

He is the real brother of the deceased and thus would not allow the real murderer of his brother to go scot free by substituting him with an innocent person.

We find that the eyewitness gave his evidence in a straight forward and natural manner and was not dented during cross examination.

Thus, for the reasons mentioned above we find the evidence of the eyewitness to be reliable, trustworthy and confidence inspiring and we believe the same **especially with regard to the correct identification of the appellant as the person who shot and murdered the deceased** and can convict on this evidence provided that 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) and **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eyewitness to be of good quality.

(ii) **Eye witness PW 3 Mst Rozina**. She is the mother of the deceased. According to her evidence on 09.12.2016 she was present in her house along with the deceased and his baby daughter when the appellant came personally outside the house and called for the baby daughter who was told to go away by the deceased as he was feeding her and was told that at about 2 to 3pm he will drop her off. The appellant then went away and twice called the deceased threatening him. The appellant then returned and parked his motor bike in front of the door of the house and called for the deceased. The deceased went out and she was behind him when the appellant fired shots at the deceased. The deceased died in her lap while she also corroborates the presence of her other son eye witness PW 2 Muhammed Shaukat at the time of the murder. The same considerations apply to her as for PW 2 Muhammed Shaukat however **we give lesser weight to her eye witness testimony** as it appears that she has improved it from the time when she made her Section 164 Cr.PC statement where she said that she did not actually see the accused fire the shots but saw him escaping on his motor bike as she was slightly behind the deceased at the time when the firing was made on the deceased.

Thus, based on our believing the evidence of the PW eyewitnesses what other supportive/corroborative material is there against the appellant?

(c) **PW 6 Usman Ghani** who lives in the same street as the incident gave evidence that on 09.12.2016 at about 1230 hours he was standing with his friend Rizwan in the street when the appellant asked him where the deceased was and he told him that he had gone home with his daughter. He saw and heard the appellant call outside the house where the deceased was to hand over the baby girl at which he heard and saw the deceased tell the appellant that he would return the girl himself at 1500hrs after jumma prayers. The appellant then left whilst making irritating and unpleasant gestures and using bad words about the appellant. Around jumma time he heard three shots from his house which was 10 houses away from where the deceased was staying. He came out of his house where he saw the appellant speeding away on his motor bike from the place of the incident. He came to the deceased who was lying injured with bullet injuries and stayed with him and PW 2 eye witness Muhammed Shaukat before the deceased was taken to hospital by ambulance. He is an independent witness who does not claim to be an eye witness (which he could have done if he was a put up witness). He had no enmity with the appellant and any reason to falsely implicate him in this case. He was a natural witness as he lived a few streets away and his evidence corroborates that of PW 3 Mst Rozina in respect of the events leading up to the murder of the deceased by the appellant and the appellant making his escape good on his motor bike after murdering the deceased. He was not dented in cross examination and we believe his evidence.

(d) **PW 9 Rizwan Khan** also lives in the same street only 2/3 houses away from the place of the incident and was named in PW 6 Usman Ghani's evidence as being with him when the appellant approached them inquiring about the whereabouts of the deceased. He corroborates the evidence of PW 6 Usman Ghani in all material respects and we find that the same considerations apply to him as to the evidence of PW 6 Usman Ghani which we believe.

(e) That the medical evidence and medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased was brought to the hospital suffering from three firearm injuries to his shoulder, waist and knee. The fact that there was blackening around the wounds also supports the prosecution case that the firing was from relatively close range from outside the house.

(f) That the appellant took the police to the secret place where he had hidden the pistol which was the murder weapon which only he could have known about and for which he did not have a license.

(g) That the pistol empties recovered at the wardat straight after the incident when matched with the pistol recovered by the appellant on his pointation lead to a positive FSL report.

(h) 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 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 deceased bringing his baby daughter home for lunch to the appellant demanding the return of the baby girl to the appellant being sent away by the deceased in an angry mood to the deceased returning and murdering the appellant by firearm to the recovery of the pistol (murder weapon) on the pointation of the appellant to the empties recovered at the scene matching with the recovered pistol when sent for FSL report.

(i) 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 for example by making up his arrest or foisting the pistol on him and in such circumstances it has been held that the evidence of the PWs can be fully relied upon. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(j) 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 caste doubt on or dent the prosecution case. The defence case is simply one of false implication simpliciter. The appellant did not give evidence under oath and did not call any DW in support of his defence case. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought in the face of reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

12. Thus, based on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eyewitness 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.

13. With regard to sentencing when learned counsel for the appellant was asked by the court whether there was any mitigating circumstances

which might warrant the death sentence being reduced to that of life imprisonment he candidly conceded that there were none. Based on the evidence on record we find this to be a pre meditated brutal murder whereby the appellant fired 3 shots at the deceased and intentionally murdered him in front of his mother and baby daughter over a petty dispute out of which a baby girl has lost her father. Under these circumstances the appellant is not entitled to any leniency and as such his sentence is upheld and the confirmation reference is answered in the affirmative

14. As such the appeal is dismissed and the conviction and sentence are maintained with the confirmation reference being answered in the affirmative.