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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

CRIMINAL APPEAL NO.668 OF 2019
CONFIRMATION CASE NO.27 OF 2019

Appellant:	Dad Gul son of Zar Gul through Mr. Muhammad Farooq, Advocate.
Respondent:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General Sindh.

CRIMINAL ACQUITTAL APPEAL NO.585 OF 2019

Appellant:	Awal Khan son of Haji Ghani through Mr. Mahmood Habibullah, Advocate.
Respondent No.1:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General Sindh.
Respondent Nos.2 & 3:	Sher Ali son of Haji Sher Muhammad and Muhammad Naeem son of Sheen Khai, through Mr. Iftikhar Ahmed Shah, Advocate
Date of hearing:	17.02.2022
Date of announcement:	24.02.2022

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Dad Gul @ Magha son of Zar Gul was convicted by the learned 1st Additional District & Sessions Judge/Model Criminal Trial Court, (Malir) Karachi in Session Case No.1464 of 2014 arising out of F.I.R. No.389 of 2014 u/s. 302/109/34 PPC vide judgment dated 07.09.2019 u/s. 265-H(i) Cr.PC and sentenced to death subject to confirmation by this court with fine of Rs.02 million to be paid to the legal heirs of the deceased under section 544-A Cr.PC and in case of default in payment he shall further undergo S.I. of 06 months.

2. The brief facts of the prosecution case as per FIR are that on 22.11.2014 at 1020 hours Opp: Hasnat Masjid Quetta Town Scheme No.33 Malir Karachi the present accused Dad Gul @ Magha along with already convicted accused namely Muhammadullah and absconding accused Rehmatulah, on the instructions of Sher Ali and Muhammad Naeem in lieu of head money came at Quetta Town on two motorcycles being armed with pistols and thereafter in furtherance of common intention the accused Dad Gul fired upon the son of complainant namely Dost Muhammad son of Awal Khan who died due to such injuries and the accused namely Sher Ali and Naeem conspired and abetted the murder of deceased Dost Muhammad and paid Rs.10,00,000/- (Ten lac) as head money of Dost Muhammad to accused Muhammadullah, Rehmatullah and Dad Gul @ Magha, hence this FIR.

3. After usual investigation this case was challaned before the concerned trial court where the appellant pleaded not guilty to the charge and claimed trial.

4. In order to prove its case the prosecution examined 08 PW's who exhibited various documents and other items in support of its case. The appellant recorded his statement under section 342 Cr.PC wherein he admitted all the allegations which had been made against him. He did not give evidence on oath or call any witness in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the learned Judge of the trial court convicted and sentenced the appellant as set-out earlier in this judgment. Hence the appellant has filed this appeal against his conviction. However the accused/respondents Sher Ali son of Haji Sher Muhammad and Muhammad Naeem son of Sheen Khai were acquitted by the trial court through the impugned judgment and the complainant has filed an appeal against their acquittal.

6. 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.

7. Learned counsel for the appellant contended that the eye witnesses being related to the each other were not reliable and as such their evidence should be ignored; that the magistrate whom the judicial confession was recorded before did not give evidence and as such the judicial confession carried no weight ; that the empties at the scene were sent to FSL 2 years after their recovery and as such the FSL report could not be relied upon and based on any or all of the above reasons the accused should be acquitted by extending him the benefit of the doubt. In the alternative he submitted that if the conviction of the appellant was upheld by this court then the sentence should be reduced to life imprisonment.

8. On the other hand, learned Additional Prosecutor General Sindh and learned counsel for the complainant have fully supported the impugned judgment. In particular they have contended that the eye witnesses have correctly identified the accused as the person who fired on and murdered Dost Muhammad and that there evidence is trust worthy and confidence inspiring and can be safely relied upon; that the medical evidence supported the eye witness evidence; that the accused confessed his guilt both before a magistrate and in his S.342 Cr.PC statement and that the appeal should be dismissed. In particular the learned counsel for the complainant contended that the death penalty should be upheld due to the brutal nature of the pre planned attack which lead to the murder of the deceased. In support of their contentions they have relied on the case of **Nasir Mehmood V State** (2015 SCMR 423).

9. The State did not file any appeal against the acquittal of the respondents. The complainant however moved an appeal against the acquittal of the respondents who had allegedly paid the appellant and his co-accused to murder Dost Muhammed. He has relied on the judicial confession and S.342 Cr.PC Statement of the appellant who had directly implicated the respondents as the persons who paid the head money for the murder of Dost Muhammed. On the other hand learned counsel for the respondents has contended that the judicial confession even if admissible is exculpatory in nature and cannot be used against the co-accused and even the S.342 Cr.PC statement cannot be used against the

respondents unless it is corroborated from some independent source of evidence of which there is none in this case and even otherwise having been acquitted by the trial court the respondents enjoyed a double presumption of innocence and as such the appeal against the acquittal of the respondents should be dismissed. In support of his contentions he placed reliance on the case of **Khalid Javed V State** (2003 SCMR 1419)

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

11. Based on our reassessment of the evidence of the PW's, especially PW eye witnesses, the other witnesses including medical reports, recovery of human blood and empties at the scene of the incident we find that the prosecution has proved beyond a reasonable doubt that Dost Muhammed (the deceased), on 22.11.2014 at 1020 hours opposite Hasnat Masjid Quetta Town Scheme 33 Malir was shot and killed by persons who came on motor bikes and opened fire on him with intention to murder him.

12. The only question left before us therefore is who carried out the attack by firearm on the deceased which lead to the murder of the deceased on account of firearm injuries at the said time, date and location?

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

(a) That the FIR was lodged with reasonable promptitude being 7 hours after the incident whereby the appellant is named in the FIR as coming on motor bikes with other named persons and firing on the deceased by firearm which caused his death. Even if there was considered to be a slight delay in lodging the FIR this is explained by the fact that the complainant was busy in taking his deceased son first to Patel Hospital and then to Abbasi Shaheed Hospital for post mortem before the body was released and thereafter the FIR was lodged. With respect to an explained delay in lodging the FIR not being fatal to the prosecution case 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 rests on the evidence of the eye witnesses to the murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Awal.** He is the complainant in the case and is the father of the deceased. According to his evidence on 22.11.2014 at about 1030 hours the deceased left his house when he saw two motor cycles coming to Hasnat Masjid. He saw that on one motor cycle three persons were sitting whilst on the other two persons were sitting. They all started firing on the deceased after which the deceased fell down. One of the motor cyclists also got injured named Muhammedullah. He identified the appellant, Muhammedullah and Rehmattullah as the persons who fired on his son. He took the deceased who was dead on arrival and the accused Muhammedullah to Patel hospital.

He was a natural witness and not a chance witness and had no enmity or ill will which would lead him to falsely implicate the accused. It was a day light incident and he knew the accused and got a good look at him from relatively close distance. He named him in the FIR which was filed with promptitude as one of the persons who fired at his son within hours of the attack and as such there was no need for an identification parade. He identified the accused on his arrest on 20.03.2018 at the PS after the trial and conviction of accused Muhammedullah in respect of the same offence. He has made no material improvements in his evidence from that of the FIR. Two of the persons named in the FIR Naeem and Habib Khan gave eye witness evidence at the earlier trial of the injured accused Muhammedullah who was convicted by the concerned trial court prior to the trial of the accused.

Admittedly the eye witness was related to the deceased who was his real son 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. In this respect reliance is placed on the cases of **Ijaz Ahmed V The State** (2009 SCMR 99) **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152).

We find that the eyewitness gave his evidence in a straight forward and natural manner and was not challenged by the accused on any aspect of his evidence 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 one of the persons who fired at the deceased and caused his death through firearm injuries and can convict on the evidence of this eye witness alone provided that there is some corroborative/ supportive evidence. In this respect reliance is placed on the cases 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 2 Bahadur Khan.** He is the brother of the complainant who was named in the FIR as an eye witness. According to his evidence on 22.11.2014 he was standing at the gate of his house when he heard firing. He saw three persons sitting on one motor cycle and two persons on another all of whom were firing on the deceased. The three persons he saw on one bike who were firing on the deceased he identified as the appellant, Muhammedullah and Rehmat. He knew the appellant and the attack took place in broad day light not far from him. He further stated that both the deceased and injured person were taken to hospital. He corroborates eye witness PW 1 Awal in all material respects. The same considerations apply to him as PW 1 Awal. He was not challenged on any aspect of his evidence during cross examination and was a natural as opposed to a chance witness and as such we believe his evidence especially in connection with the correct identification of the appellant as being one of the persons who fired at the deceased and which caused his death.

(iii) **Eye witness PW 4 Abdullah.** He is the brother of the complainant. According to his evidence on 22.11.2014 he was present inside Masjid-e-Hasnat when he saw five persons on two motor cycles come there. According to his evidence all five persons on the motor bikes fired on the deceased who sustained firearm injuries and also one of the motor bike riders fell down as he sustained a firearm injury from one of his accomplices. He and PW 1 Awal took the deceased and injured rider to Patel hospital where the deceased died and the police arrested the injured rider named Muhammedullah after treatment. He corroborates eye witness PW 1 Awal and eye witness PW 2 Bahadur Khan in all material respects. The same considerations apply to him as to eye witness PW 1 Awal and eye witness PW 2 Bahadur Khan and we believe his evidence especially in terms of the correct identification of the accused.

As such based on the eye witness evidence **we have no doubt that the PW eye witnesses have correctly identified the**

appellant as being one of the persons who shot the deceased by firearm which lead to his death especially as the appellant does not even deny his presence at the scene of the incident either during cross examination of the PW's or in his S.342 Cr.PC statement. In fact in his S.342 Cr.PC statement he admits his full participation in the murder of the deceased.

Thus, based on our believing the evidence of the PW eye witnesses and their correct identification of the appellant what other supportive/corroborative material is their against the appellant? Keeping in view the legal position that such evidence is only a rule of caution/prudence in the face of reliable and trust worthy eye witness evidence especially as in this case there are three witnesses who we have found to share such attributes and have correctly identified the appellant as firing upon and causing the death of the deceased. In this respect reliance is placed on the case of **Muhammad Afzal v The State** (2003 SCMR 1678)

(c) That **PW 3 Dr.Abid Haroon** was MLO at Abbassi Shaheed Hospital on the day of the incident gave evidence that accused Muhammedullah was produced before him in injured condition as a result of this incident which injury he found to have been caused by firearm which corroborates/supports all the eye witness evidence that Muhammedullah fired at the deceased, was injured by firearm and was then taken to hospital where he was arrested after treatment.

(d) That co-accused Muhammedullah was arrested on the spot whilst his co-accused (including the appellant) absconded. Muhammedullah was convicted for the same offence before another trial court based on similar evidence and sentenced to life imprisonment for his role in murdering the deceased by firearm

(e) That although no post mortem was exhibited the memorandum regarding examination of dead body and report of unnatural death with the former quoting the post mortem report carried out by the MLO that the cause of death was by firearm and it is noted that the deceased was hit by numerous bullets corroborates the eye witness evidence that the deceased was shot and killed by firearm which issue has not been disputed. As such the medical evidence supports the ocular evidence.

(f) That the appellant gave a confession before a judicial magistrate. The magistrate was not called to give evidence and as such we cannot be sure that the required procedural safe guards were given before recording the judicial confession. Furthermore, the judicial confession appears to be exculpatory in nature by attempting to blame the appellant's co-accused and only admitting his presence at the scene and as such we place little, if any, reliance on it.

(g) Like wise the positive FSL report is of no assistance in proving who fired at the deceased as no pistol or other weapon was

recovered from the appellant. The fact that no recovery was made from the appellant is not relevant as the appellant was arrested a number of years after the incident and as such he would not have been expected to have the same firearm with him which he would most probably have disposed of.

(h) That what is however of **significance** is the appellant's S.342 Cr.PC statement where in he admits to the entire prosecution case. For ease of reference the S.342 Cr.PC statement of the appellant is set out below for ease of reference;

> *Q.1: It is alleged that on 22.11.2014 at about 1030 hours you accused along with accused Muhammadullah and Rehmatullah in furtherance of your common intention came in front of Masji-e-Hasnat Quetta Town Karachi and then you accused fired on Dost Muhammad, resulting therein he died, what you have to say?*
>
> ***Ans. We were five persons who committed the murder. The two accused were unknown and I do not know their names.***
>
> *Q.2: It is further alleged that during this firing one of the co-accused namely Muhammadullah was also injured from firing of accused Rehmat and arrested on spot by public, what you have to say?*
>
> ***Ans. It is correct.***
>
> *Q.3: That Dost Muhammad died unnatural death on account of fire-arm injuries, what you have to say?*
>
> ***Ans. It is correct.***
>
> *Q.4: That, on 20-03-2018 you were arrested in this case by ASI Arshad Mehmood and you made confession before judicial Magistrate-IV Malir on 26-03-2018 that you along with Rehmat and Muhammadullah had killed Dost Muhammad after taking his head money of Rs.10,00,000/- (Ten Lac) from Naeem and Sher Ali, what you have to say?*
>
> *Ans.* ***It is correct, but due to fear I did not disclose learned Magistrate that we were five accused persons.***
>
> *Q.5: Why witnesses are deposing against you?*
>
> *Ans.* ***All are deposing truth.***
>
> *Q.6: Do you want to examine any witness in your defense?*
>
> ***Ans. No.***
>
> *Q.7: Do you want to examine yourself on oath?*
>
> ***Ans. No.***
>
> *Q.8: Have you to say anything else?*
>
> ***Ans. It was in year 2014 I was sitting outside house of Muhammadullah. Meanwhile Rehmat also came there. After sometime the accused who are present in court namely Naeem and Sher Ali also came there. At there Sher Ali and Naeem were discussing with my friend Muhammadullah***

about murder of Dost Muhammad. The contract of killing of Dost Muhammad was fixed at Rs.10,00,000/- and it was stated by Sher Ali and Naeem that be careful this time because earlier they had paid and assigned task of killing Dost Muhammad to Sindhi boys, but they instead of him killed his brother Najeebullah. After three days I along with Muhammadullah, Rehmat and two unknown persons went Quetta Town where at about 1000 /1030 hours we took out our pistols and saw that father of Dost Muhammad was also coming from behind. We killed Dost Muhammad in Quetta Town in front of Masjid. In this incident due to firing of my friend Rehmatulah, Muhammadullah also sustained 03 fire injuries. Then we left Muhammadullah over there. Then I along with Rehmatullah and 02 other persons left from there. I was riding bike when Rehmatullah called Naeem that we have completed the task. At Indus Plaza Naeem and Sher Ali gave us Rs.10,00,000/- (Ten Lac). Accused Naeem and Sher Ali present in court are same who paid us Rs.10,00,000/- (Ten Lac).(bold added)

This is a clear admission by the appellant that he fired on the deceased along with others and intentionally and deliberately murdered him. The Supreme Court in the case of **Nasir Mehmood** (supra) **has held that a S.342 Cr.PC statement is more believable than an accused statement under S.164 Cr.PC in the following terms at P.428;**

> "*In Azhar Iqbal v. State (2013 SCMR 383)* this Court has specifically held that statement of an accused recorded under section 342, Cr.P.C. has to be accepted or rejected in its entirety and where prosecution's evidence was found to be reliable and the exculpatory part of such statement was established to be false and excluded from consideration, then the inculpatory part of such statement might be read in support of prosecution's evidence. In *Muhammad Azam v. The State (2009 SCMR 1232)*, *Abdul Rehman @ Boota v. The State (2011 SCMR 34)*, *Talat Mehmood v. Muhammad Ilyas (2002 SCMR 1889)*, *Shabbir Ahmed v. The State (PLD 1995 SC 343)*, *Ghulam Qadir v. Esab Khan (1991 SCMR 61)* and *Ayaz Ahmed v. Allah Wasaya (2004 SCMR 1808)* this court has held that statement of an accused recorded under section 342, Cr.P.C has to be read in its entirety and has to be accepted or rejected as a whole. The statements of accused recorded under section 342, Cr.P.C. if believed in entirety also find support from the prosecution evidence. **Even otherwise, the statement of an accused recorded under section 342, Cr.P.C. is more reliable than compared to the statement recorded under section 164, Cr.P.C. which is recorded when the accused is in police custody, as before submission of challan under section 173, Cr.P.C. the accused as a precaution gets a chance to record his statement before the Magistrate. In the instant case the appellants were afforded full opportunity to get recorded their statements**

> **under section 342, Cr.P.C. without any duress or coercion. Even at trial when the appellants were duly represented no question of duress or coercion arose. The appellants did not deny the occurrence in which six persons lost their lives but have pleaded that the incident had not taken place in the manner narrated by the prosecution.**"(bold added)

We note that the appellant's S.342 Cr.PC statement fits in with the entirety of the prosecution case and fully corroborates/supports the evidence of the eye witnesses and we believe the same and place reliance on it.

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and **not** material and certainly **not** of such materiality so as to effect the prosecution case/evidence 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 eye witnesses seeing five persons (including the appellant) on two separate motor bikes shooting with firearms at the deceased which shots hit the deceased and caused his death to co-accused Muhammedullah being injured in the firing and being taken in injured condition to hospital to the arrest of the appellant to his confession before the magistrate.

(j) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mushtaq Ahmed V The State** (2020 SCMR 474).

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

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The appellant has not put up any meaningful defence case. No PW was challenged during cross examination, the appellant made a confession before the magistrate and the appellant admitted his role in the murder of the deceased in his S.342 Cr.PC statement and as such in the face of reliable, trust worthy and confidence inspiring eye witness evidence of the appellant being involved in the firing and murder of the deceased and other supportive/corroborative evidence we believe the

defence case in so far as it is fully supportive of the evidence lead by the prosecution.

14. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and hereby maintain the appellant's conviction.

15. With regard to sentencing we note that it is unclear as to who fired the fatal shot which killed the deceased as according to the eye witnesses all five motor bike riders fired on the deceased and the medical evidence reveals that the deceased received numerous firearm injuries. There is a plethora of Supreme Court authorities that in such circumstances the death penalty may be reduced to life imprisonment. Furthermore, the co-accused Muhammedullah who was tried earlier and separately who played the same role as the appellant in the murder of the deceased and was convicted on similar evidence was also only sentenced to life imprisonment as opposed to the death penalty. Thus, keeping in view these two factors the sentence of the appellant is reduced from the death penalty to RI for Life with all other fines, compensation etc in the impugned judgment remaining in tact. The appellant shall have the benefit of S.342 Cr.PC and any remission available to him under the law.

16. With regard to the appeal against acquittal of the respondents who were alleged to have been paid head money to the appellant and his co-accused to murder the deceased as mentioned earlier in this judgment an appeal against acquittal as a matter of law has a very narrow scope and the accused acquires a double presumption of innocence. In this respect in the recent Supreme Court case of **Muhammed Shafi** V State (2019 SCMR 1045) it was held as under at P.1047;

> *"It is by now well settled that acquittal carries with it double presumption of innocence; it is reversed only when found blatantly perverse, **resting upon fringes of impossibility and resulting into miscarriage of justice**. It cannot be set aside*

merely on the possibility of a contra view. The High Court has derogated from settled principles of law and thus departure does not commend itself with approval." (bold added)

17. The complainant in his appeal against acquittal in respect of the respondents who allegedly paid head money to the appellant and other co-accused to murder the deceased has placed reliance on the judicial confession of the accused however for reasons discussed above we have placed little, if any, reliance on such a judicial confession especially as it is exculpatory in nature and aims to exonerate the accused and implicate his co-accused. Such confessions which cannot be used against their maker cannot be used against the persons referred to therein as was held in the case of **Khalid Javed** (Supra) in the following terms at P.1455;

"In this context another aspect requiring examination would be whether confessional statement can be used against co-accused Khalid Javed. Suffice it to observe that confessional statement Exh. PE under Article 43 of the Qanun-e-Shahadat Order, 1984 can furnish proof against the persons making it and the Court may take into consideration such confession as circumstantial evidence against such other person. Therefore, with reference to the instant case we are of the opinion that if confessional statement Exh.PE cannot be used against its maker namely appellant Aleem Ahmed, it cannot be equally used as circumstantial evidence against Khalid Javed."

18. The only other piece of admissible evidence against the respondents is the S.342 Cr.PC statement of the appellant however it is well settled by now that a statement of one co-accused against another co-accused is insufficient to lead to their conviction unless supported by some unimpeachable independent corroborative piece of evidence of which there is none in this case bar only a few bits and pieces of inadmissible hearsay evidence. In this respect reliance is placed on the case of **Arif Nawaz Khan V The State** (PLD 1991 FSC 53).Thus based on the legal position regarding the requirements for an appeal against conviction to succeed when placed in juxta position with the available evidence against the respondents the appeal against acquittal is found to be without merit and is dismissed.

19. Thus, for the reasons mentioned above, in summary;

(a) We dismiss the appeal against conviction and uphold the conviction in the impugned judgment however we reduce the sentence of death to one of RI for Life. All other fines, compensation in the impugned judgment shall remain in tact. The appellant shall have the benefit of S.382 (B) Cr.PC and any remissions available to him under the law with the confirmation reference being answered in the negative.

(b) The appeal against acquittal is dismissed.

20. The appeals and confirmation reference stand disposed of in the above terms.