

IN THE HIGH COURT OF SINDH, KARACHI

CRIMINAL APPEAL NO. 890 OF 2019

Appellant; Baboo Shaikh son of Eidoo
Shaikh through Mr. Moula Bux
Bhutto, Advocate

For State; Mr. Abrar Ali Khichi, Additional
Prosecutor General Sindh.

Complainant; Ghulam Qadir through Mr. M.B.
Shakeel, Advocate

Date of Judgment 24.01.2024

Date of Announcement 29.01.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Baboo Shaikh s/o. Eidoo Shaikh was proceeded against in the Court of 1st Additional Sessions Judge /Model Criminal Trial Court, Thatta in respect of Crime No.345 of 2018 under section 302/324/504/34 PPC registered at P.S. Thatta whereby the appellant vide judgment dated 07.12.2019 was convicted and sentenced to life imprisonment with fine of Rs.1,00,000/- as compensation payable to the legal heirs of deceased. It was also ordered that such compensation shall be recovered as arrears of land revenue. However, in case of default in payment of such compensation the appellant shall undergo S.I. for six months more. The appellant was also extended the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as narrated in the FIR are set out below;

"Sir, report of complainant is that I reside at above mentioned address and I have a Tea hotel in Chhato Chand which I run myself. I live together with my brothers Muhammad Khan aged 32/35 years and others while my relatives namely Baboo S/o. Eido, his sons Nawaz, Nawab and Dhani Bux also live in our neighbor/Mohallah. Our lands are situated adjacent to each other too, they had not good terms with my brother Muhammad Khan over the passage of land. Today in the morning I, my brothers

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Muhammad Khan, Gul Hassan, Akbar and other family members available at home that in the meantime at 8:15 a.m, someone called from outside of house, upon which my brother Muhammad Khan came out from house. On voice of commotions and abuses, I and my brothers Gul Hassan and Akbar came out from house and saw that each namely Baboo, Lido was holding double barrel gun, his sons Nawaz and Nawab holding iron rods while Dhani Bux having hatchet. In front of us, Baboo aimed gun upon my brother Muhammad Khan and said him we will not leave you alive today that you have exchanged harsh words with us upon passage of land. Having said so, Baboo opened straight double gun barrel fires upon my brother Muhammad Khan which fires hit on his chest, he fell down on the earth, his sons Nawaz & Nawab caused iron rod blows to Akbar while Dhani Bux inflicted hatchet blows on his ear with intention to kill. Meanwhile, on reports of fire and hues & cries, my maternal uncle Kandiro S/o. Jumoon Shaikh and other neighbors came running there, having seen them coming, accused persons ran towards Kalri Shakh by giving abuses. Thereafter, we saw that brother Muhammad Khan had expired due to receiving fires. Having arranged conveyance, I and my maternal uncle Kandiro took away my brother deceased Muhammad Khan, injured brothers Gul Hassan and Akbar at Civil Hospital Makli where we informed you police and you police arrived there. After that, after conducting postmortem of deceased brother Muhammad Khan, providing treatment and completing formalities, we shifted the dead body of deceased at Village. Having buried him, now I appeared to report that my complaint is against accused Baboo, his sons Nawaz, Nawab and Dhani Bux, who in connivance with each other caused straight gun shots to my brother Muhammad Khan and have also injured to brother Gul Hassan and Akbar by inflicting hatchet and iron bellows with intention to kill. I am complainant investigation be made".

3. After usual investigation the case was challaned and the matter was sent up for trial. The appellant pleaded not guilty to the charge and claimed trial.
4. The prosecution in order to prove its case examined 08 witnesses and exhibited various documents and other items. The statement of the appellant and his co-accused were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against him. None of the accused gave evidence under oath or called any DW in support of his defence case.
5. After hearing the parties and 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. The three other co-accused were acquitted of the charge by being extended the benefit of the doubt. No appeal was filed 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 dated 07.12.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case on account enmity; that the eye witnesses are planted witnesses and there evidence be discarded especially as they are all related to the deceased; that S.103 CrPC has been violated; that the shot gun was foisted on the appellant; that the recovered empties were not tested against the recovered shotgun and as such there is no link between them; that one of the co-accused was acquitted on the same set of evidence and as such the appellant is entitled to the same treatment 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, he placed reliance on the cases of Umar Hayat v. The State (PLD 1995 Supreme Court 526), Naveed Asghar and 2 others v. The State (PLD 2021 Supreme Court 600), Wazir Muhammad v. The State (1992 SCMR 1134), Tariq Pervez v. The State (1995 SCMR 1345) and Shamoon alias Shamma v. The State (1995 SCMR 1377).

8. Learned Assistant Prosecutor General Sindh as well as learned counsel for the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, they contended that there were 3 eye witnesses in this case all of whose evidence could be safely relied upon; that the medical evidence supported the ocular evidence and that the murder weapon (shot gun) had been recovered on the pointation of the appellant 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 Nasir Ahmed v. The State (2023 SCMR 478), Qasim Shahzad and another v. The State and others (2023 SCMR 117), Muhammad Asif and another v. Mehboob Alam and others (2020 SCMR 837), Abdul Khalique v. The State (2020 SCMR 178), The State/ANF v. Muhammad Arshad (2017 SCMR 283) and Sikandar Ali Lashari & another v. The State (SBLR 2020 Sindh 981).

9. I have heard the arguments of the learned counsel for the appellant, learned Additional Prosecutor General Sindh and learned counsel for the

complainant and have gone through the entire evidence which has been read out by the 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.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence, recovery of blood and empties at the crime scene which lead to both positive chemical and FSL (to a certain extent) reports I find that the prosecution has proved beyond a reasonable doubt that Muhammed Khan Shaikh (the deceased) was murdered by firearm on 14.12.2018 at about 08.15am on the street near the house of the complainant located in village Jummon Shaikh Taluka and district Thatta.

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

12. After my reassessment of the evidence on record, I 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 within 11 hours of the incident with the police even being informed straight after the incident who proceeded to the hospital where the deceased and injured had been taken and based on the particular facts and circumstances of the case I do not find such slight delay in lodging the FIR fatal to the prosecution case. This is because after the witnessing the murder and transporting the dead body and the injured to hospital the complainant after receiving back the body of the deceased after its post mortem arranged for burial of the body and there after lodged the FIR at the PS as such any slight delay in lodging the FIR has been fully explained. In this respect reliance is placed on the case of Muhammad Nadeem alias Deemi v. The State (2011 SCMR 872).
- (b) The appellant is named in the promptly lodged FIR with the specific role of murdering the deceased by shotgun fire whilst his co-accused Dhani is named as injuring Gul with a hatchet on his ear and co-accused Nawaz and Nawab of injuring Akbar with iron rods. Thus there was no time for the complainant to cook up a false case against the appellant. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant or any PW which would motivate them to lodge a false case against the appellant.
- (c) In my view the prosecution's case primarily rests on the eye witnesses to the murder whose evidence I shall consider in detail below;

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- (i) Eye witness PW 1 Ghulam Qadir. He is the complainant and is the brother of the deceased. According to his evidence on the fateful day he was at his house with his brothers Gul Hassan, Akbar and the deceased when at about 8.15 am some one called them from out side his house. The deceased went outside and they heard a commotion and cries so they also went outside to see what was going on. He saw the appellant and his sons Dhani Bux, Nawaz and Nawab who are his relatives and live in the same Mohalla. The appellant told the deceased that he would not spare him as he had picked a quarrel over a path and border of agricultural lands. Thereafter he saw the appellant fire his double barrel gun at the chest of the deceased who then fell down. His brother Akbar went forward and co-accused Nawaz and Nawab hit him with iron rods. His other brother Gul Hassan also went forward and co-accused Dhani Bux hit him over the head with a hatchet. His maternal uncle Kadero and some others reached the scene and the accused escaped. They then arranged to take the deceased and injured to hospital and informed the police about the incident.

This eye witness knew the appellant before the incident as he was related to him and saw the appellant from close range murdering the deceased by shot gun so there is no case of mistaken identity and no need to hold an identification parade especially as it was a daylight incident. The accused is also named with specific a role in the promptly lodged FIR. In this respect reliance is placed on the cases of *Amanullah v State* (2023 SCMR 527) and *Qasim Shazad V State* (2023 SCMR 117).

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. 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), *Ashfaq Ahmed v. The State* (2007 SCMR 641) and *Abdul Wahid versus The State* (2023 SCMR 1278)

This eye witness is not a chance witness as he was residing in his house with the deceased who was his brother and the deceased was shot in front of him virtually on the doorstep of his house. There are no material improvements in his promptly lodged FIR from his evidence. The appellant lived in a house only about 100 feet away so his presence was also natural. He was not dented during a lengthy cross examination and he gave his evidence in a natural manner and thus I believe his evidence to be trust worthy, reliable and confidence inspiring and I believe the same.

It is well settled by now that I can convict the accused on the

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evidence of a sole eye witness provided that I find his evidence to be trust worthy reliable and confidence inspiring. 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 Shazad V State (2023 SCMR 117). 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 witnesses to be of good quality and believe the same.

However there are yet other eye witnesses.

(ii) Eye witness PW 2 Gul Hasan. He is the brother of the deceased and the complainant. His evidence corroborates the evidence of the complainant in all material respects. He is named as an eye witness in the promptly lodged FIR and his Section 161 Cr.PC eye witness statement was given promptly. He also knew the accused from before in this day light incident and he was injured by one of the acquitted co-accused which injury is supported by the medical evidence. It is settled by now that the evidence of an injured eye witness is deemed more reliable than usual eye witnesses. In this respect reliance is placed on the case of Aquil V State (2023 SCMR 831). He was not also dented during cross examination and as such the same considerations apply to his evidence to that of the complainant as discussed above. Namely, I find it to be trust worthy, reliable and confidence inspiring and as such I believe the same

(iii) Eye witness PW 3 Ali Akbar. He is related to the complainant and deceased. He is the brother of the deceased and the complainant. His evidence corroborates the evidence of the complainant and PW 2 Gul Hassan in all material respects. He is named as an eye witness in the promptly lodged FIR and his Section 161 Cr.PC eye witness statement was given promptly. He also knew the accused from before in this day light incident and he was injured by one of the acquitted co-accused which injury is supported by the medical evidence. It is settled by now that the evidence of an injured eye witness is deemed more reliable than usual eye witnesses. In this respect reliance is placed on the case of Aquil V State (2023 SCMR 831). He was not also dented during cross examination and as such the same considerations apply his evidence to that of the complainant and PW 2 Gul Hassan as discussed above. Namely, I find it to be trust worthy, reliable and confidence inspiring and as such I believe the same

Having believed the evidence of the three eye witnesses which is discussed above I turn to consider the corroborative/supportive evidence whilst keeping in view that it was held in the case of Muhammad Waris v. The State (2008 SCMR 784) as under;

"Corroboration is only a rule of caution and is not a rule of law and if the eye witness account is found to be reliable and trust worthy there is hardly any need to look for any corroboration"

Thus, based on my believing the evidence of the 3 eye witnesses as mentioned above what other supportive/corroborative material is their against the appellant?

- (d) That it does not appeal to logic, commonsense or reason that brothers, would let the real murderer of their other brother get away scot 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)**.
- (e) That according to the evidence of the three eye witnesses shortly after the shooting of the deceased by the appellant their maternal uncle Kadero who lived in a house about 100 feet from their house reached the crime scene. PW 4 Kadero in his evidence corroborates this fact and in his evidence states that when he heard cries and shots he came out of his house and saw the appellant with a double barrel gun and the co-accused with a hatchet and iron rods in their hands respectively. He saw the deceased lying on the ground and saw the appellant and his co-accused running away. He knew the appellants from before and his evidence corroborates their presence at the crime scene along with the weapon which the eye witnesses gave evidence that they were each carrying. He also saw the dead body of the deceased. He also helped transport the deceased and injured to the hospital. He had no ill will or enmity with the appellants who he knew from before. His Section 161 Cr.PC statement was recorded with promptitude and he is also named as an eye witness in the promptly lodged FIR. He was not dented during a lengthy cross examination and he gave his evidence in a natural manner and thus I believe his evidence which further corroborates the present of the appellant at the crime scene with a shotgun just after the incident.
- (f) That the medical evidence and post mortem report fully support the eye-witness/prosecution evidence that the deceased died from receiving a firearm injury on the part of his body as mentioned by the eyewitnesses and the injured eye witnesses also received their injuries from a hatchet and iron rods respectively. In any event it is well settled by now that if the medical evidence is in conflict with the ocular evidence the ocular evidence will take precedence over the medical evidence. In this respect reliance is placed on the case of **Imran Mehmood versus The State and another [2023 SCMR 795]**.
- (g) That on his arrest a day after the incident the accused immediately lead the police to the murder weapon (Shot gun) on his own pointation which was hidden in a place which only he could have known about.
- (h) That the recovered empties were cartridges coming from a shot gun and the medical evidence points to pellets being found in the body of the deceased during his post mortem which also indicates that the murder weapon was a shot gun as identified in the evidence of the eye witnesses. The shot gun was found to be in working order but no

FSL report is available in respect of the empties and the recovered shot gun as the supplementary challon was made final and the charge was framed before the final FSL report could be received.

- (i) That there was no ill will or enmity between the police and the appellant and as such the police had no reason to falsely implicate the appellant in this case, for instance, by foisting the shot gun on him. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474). Thus, I believe the evidence of the IO who was not dented during a lengthy cross examination whose evidence of arrest and recovery is supported by the mashir's evidence.
- (j) That nearly all the relevant police entries have been exhibited.
- (k) That the blood stained earth recovered at the wardat and clothes recovered from the deceased were sent for chemical examination which report found the blood recovered at the scene and on the clothes to be human blood.
- (l) The motive for the murder has come on record through the FIR and witness evidence. Namely, that the appellant had a dispute with the deceased over a path bordering a piece of agricultural land.
- (m) 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) **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669) and **Maskeen Ullah and another versus The State and another** (2023 SCMR 1568). The evidence of the PW's provides a believable corroborated unbroken chain of events from the appellant knocking on the door of the complainant's house and having a confrontation with the deceased and his brothers over the disputed path to the appellant shooting the deceased dead with his shotgun to the recovery of empties and blood at the scene to the arrest of the appellant and the recovery of the shot gun on his pointation.
- (n) That from the evidence it does not appear that the accused has denied his presence at the crime scene at the time of the murder of the deceased.
- (o) The acquittal of the appellants' co-accused is of no assistance to the appellant as the acquitted co-accused played a much minor role compared to that of the appellant in that they were only accused of causing relatively minor injuries to PW Gul and Akber whereas the evidence against the appellant is that he fired directly at the deceased with a shot gun which lead to his death. The co-accused also seem to have been acquitted not because their presence at the crime scene was doubted and their evidence in respect of the appellant was relied upon but because their injuries were not found to be at the exact

same place as alleged by them when compared to the medical evidence, erroneously in my view, because as discussed above ocular evidence prevails over medical evidence. Be that as it may no appeal against their acquittal was filed and their case is distinguishable from that of the appellant based on the particular facts of the case.

- (p) 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 as set out by the appellant is that he was falsely implicated in this case due to enmity however no enmity has come on record. He also claims that the complainant party attacked them however from the impugned judgment it appears that this case resulted in an acquittal and not a single witness was called in support of their defence case which must have been available if the defence case was true. The appellant also declined even to give evidence on oath in order to support his defence case of being attacked first. If he suffered any injuries he produced no medical report. It is well settled that if the defence puts forward a specific plea then he must prove it. In this case he has miserably failed to do so. Thus, in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other supportive/corroborative evidence discussed above I disbelieve the defence case which has not at all dented the prosecution case.

13. Thus, based on the above discussion, I find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and sentenced in the impugned judgment and as such his appeal is dismissed.