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HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.S-112 of 2016

[Khuda Bux versus The State]

Appellant : Through Mr. Om Parkash advocate
The State : Through Mr. Nazar Muhammad Memon
Additional Prosecutor General Sindh
Date of hearing : 13.05.2024
Date of decision : 20.05.2024

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, I.- Appellant has challenged the Judgment dated 11.06.2016 passed by the learned Additional Sessions Judge Sehwan in Sessions Case No.242 of 2012 (*Re: The State versus Khuda Bux*), outcome of Crime No.126 of 2012 registered at P.S Sehwan under Section 302, 324 and 353 PPC, whereby he has been convicted and sentenced to suffer imprisonment for life as Ta'zir with further directions to pay Rs.2,00,000/- as compensation to the legal heirs of deceased and in case of failure in payment thereof he has to further suffer R.I for two years, however benefit of Section 382-B Cr. P.C was extended to him.

2. The brief facts of the case are that complainant SIP Ghulam Haider of P.S Sehwan lodged the FIR by stating that on 21.08.2018 at about 1710 hours he alongwith PC Ghulam Shabir Otho, PC Muhammad Rafiq Mallah, PC Gulzar Ahmed Abro and Driver PC Farooque left the police station under entry No.15 for patrolling duty and during patrolling when they reached at Shahi Bazar Chowk, they received spy information that accused Khuda Bux S/o Jumo by caste Solangi and two unknown persons are going towards Protective Bund; that they chased the accused persons and at about 1850 hours when they reached in the street, going towards Protective Bund, near Government Higher Secondary Girls School Sehwan, they saw three accused persons having pistols in their

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hands; that they identified one of said accused persons as Khuda Bux S/o Jumo by caste Solangi; that they directed the accused persons to stop, upon which they made straight firing upon the police party with intention to commit their murder; that accused Khuda Bux made straight fire which hit PC Ghulam Shabir at right side of his abdomen and he fell down; that police party also took position and made fires in their self-defense and the encounter lasted for 10 minutes and finally the accused persons escaped away; that thereafter they saw that PC Ghulam Shabir, who had firearm injury, was lying dead; that dead body was shifted to Taluka Hospital Sehwan and after postmortem subject FIR was lodged. On 26.08.2012 appellant/accused was arrested and during interrogation he allegedly produced one pistol fitted with magazine having four live bullets for which separate FIR was lodged.

3. After usual investigation police submitted the challan and the trial court after completing necessary formalities framed the charge against the appellant to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined four (04) witnesses, who exhibited numerous documents and other items. Then statement of accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him by the prosecution witnesses and claimed his false implication by the police. However, he neither examined himself on Oath nor led any evidence in his defense.

5. After hearing the parties and assessing the evidence on record the trial Court convicted and sentenced the appellant as stated in opening paragraph of this Judgment, hence appellant has preferred this Jail Appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and that he has been falsely implicated in this case by the police and hence the delay in lodging the FIR; that the eye witnesses cannot be safely relied upon; that there was no independent mashir; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; that since there was no FSL report the recovery of the pistol on the pointation of the appellant is irrelevant and that for any or all of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions, he placed reliance on the cases of (i) SARFRAZ alias SAPPI and 2 others vs. The STATE [2000 SCMR 1758] and (ii) MUHAMMAD ILYAS and others vs. The STATE [2011 SCMR 460].

8. On the other hand Learned APG after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, he contended that the FIR was lodged promptly, the eye witness evidence was trust worthy reliable and confidence inspiring and was to be believed; that the murder weapon (pistol) was recovered from the appellant on his pointation at a hidden place which only the appellant could have known about; that the medical evidence supported the ocular evidence and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, he placed reliance on the case of MUNIR AHMAD vs. The STATE [2020 SCMR 968].

9. I have heard the learned counsel for the appellant as well as learned APG and have also perused the material available on record and the case law cited at the bar.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence, the blood and empties recovered at the scene of the crime I find that the prosecution has proved beyond a reasonable doubt that PC Ghulam Shabir (the deceased) was murdered by firearm on 21.09.2012 at about 1850 hrs at common

street leading from Sehwan to protective bund near Government girls higher secondary school, Sehwan, taluka Sehwan.

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) It is true that the FIR was lodged after 4 hours however based on the particular facts and circumstances of the case I find that this delay in lodging the FIR has been explained and is not fatal to the prosecution case. This is because after the encounter with the appellant and two unidentified persons the police arranged to take their deceased brother officer to hospital where after the post mortem was carried out and only after the return of the dead body to the relatives of the deceased did the complainant (police) lodge the FIR and as such there was no time for the complainant to cook up a false case against the appellant. 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 causing him firearm injury. Even otherwise **no specific/proven enmity** has come on record between the appellant and the complainant or any PW which would motivate him/them to lodge a false case or give false evidence against the appellant.
- (c) The prosecution's case rests on the eye witnesses to the murder of the deceased whose evidence I shall consider in detail below;
 - (i) **Eye witness PW 3 PC Rafique Ahmed.** According to his evidence on 21.08.2012 he was on patrol with SHO Sehwan, PC Gulzar Ahmed and Shabir Ahmed (deceased) and when they reached Shahi Bazar chowk the SHO received spy information that the appellant along with two other persons duly armed with weapons were going from the protective bund. At 1850 hours they reached at the gate of girl's high school Sehwan and saw 3 armed persons and when they gave them hakals on seeing them in police uniform the three fired at them. **He saw the appellant make direct firing which hit the deceased.** They returned fire in self defence and the appellant and the co-accused ran away. They saw that the deceased had died on the spot from the firearm injury which he had received.

This eye witness is an independent witness. This eye witness **knew the appellant before the incident and at 6.50pm in August** it would still have been day light and the appellant was quite close to him during the encounter which lasted for about 10 minutes and as such there is no case of mistaken identity and no need to hold an identification parade. In this respect reliance is placed on the case of **Munir Ahmed** (Supra). He is named as a witness in the promptly lodged FIR. He gave his S.161 Cr.PC statement promptly which was not materially improved on during the course of his evidence. He was not a chance witness as he was a part of the police party who took part in the encounter with the appellant and his two co-accused after a tip off from a spy. He had **no proven enmity** or ill will with the appellant which would lead him to implicate the appellant in a false case. He gave his evidence in straightforward manner and was not damaged during a lengthy cross examination. I find his evidence to be reliable, trust worthy and confidence inspiring especially in relation to the identification of the appellant and believe the same and place reliance on it.

It is well settled by now that I can convict the accused on the evidence of a **sole eye witness** provided that I find his/her evidence to be trust worthy, reliable and confidence inspiring and in this case I have found the evidence of this eye witness to be trust worthy, reliable and confidence inspiring especially in respect of the correct identification of the appellant and as such I believe the same and place reliance on it. In this respect reliance is placed on the cases of **Muhammad Ehsan v. The State** (2006 SCMR 1857), **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 and another v The State** (2023 SCMR 117). His evidence is also of good quality and it is settled by now that it is not the length of the evidence which is of importance but its quality.

There are however 2 other eye witnesses.

- (ii) **PW 4 Ghulam Hyder.** He is the complainant in this case as well as the IO. He was the SHO in charge of the police party which **PW 3 PC Rafique Ahmed** was a part of whose evidence is discussed above. His evidence regarding the encounter and the appellant shooting and murdering the deceased corroborates the evidence of eye witness **PW 3 PC Rafique Ahmed** in all material respects. He lodged the FIR promptly based on the particular facts and circumstances of the case

which was not materially improved on during his evidence. He knew the appellant from before and there was still day light. He was an independent and not a chance witness. He may have suffered from short sightedness but he saw the appellant from close enough to be able to clearly identify him. He had no ill will or enmity with the appellant and had no reason to implicate him in a false case. He also arrested the appellant 5 days later in the presence of mashirs. The accused confessed to the crime and the accused lead this witness along with mashirs to where he had hidden the pistol (murder weapon) on his pointation which was buried at a place which only he would have known about. He was not dented despite a lengthy cross examination. For the reasons mentioned above I find his evidence to be trust worthy reliable and confidence inspiring and believe the same especially in respect of the identification of the appellant.

- (iii) **Eye witness PW 1 Muhammed Ali.** He is related to the deceased. According to his evidence on 21.08.2012 he went to the clinic of Dr.Abdul Majeed near secondary girl's school in Sehwan. At 6.50pm he heard firing and came out of the clinic. His evidence corroborates that of eye witnesses PW 3 PC Rafique Ahmed and PW 4 Ghulam Hyder in all material respects in terms of the encounter and the appellant shooting the deceased. He also corroborates PW 4 Ghulam Hyder in terms of the arrest of the appellant and the recovery of the appellant's pistol on his pointation as he was the mashir in each case.

Admittedly the eye witness was related to the deceased 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) and **Ashfaq Ahmed v. The State** (2007 SCMR 641).

However I note that his S.161 Cr.PC statement was recorded **9 days after the incident** and he is not named in the FIR and as such I place little, if any, reliance on his evidence in so far as the murder is concerned however since his S.161 Cr.PC statement was made shortly after the arrest of the accused and the recovery of the murder weapon (pistol) on the pointation of the appellant I place reliance on it in this regard

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Having believed the evidence of the two eye witness as to the murder of the deceased and the identification of the murderer 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"

- (d) That the medical evidence and post mortem report fully support the eye-witness/prosecution evidence that the deceased died from receiving a fire arm injury in the place which they claim. Even if there is some discrepancy in the medical evidence (which there is not in this case) it is well settled by now that ocular evidence if found to be trust worthy, confidence inspiring and reliable (as it has been so found in this case) will prevail over the medical evidence. In this respect reliance is placed on the case of **Qasim Shahzad** (Supra)
- (e) That there was no ill will or enmity between the police and the appellant and as such they had no reason to falsely implicate the appellant in this case. For instance by foisting the pistol 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 and other police witnesses who were not dented during cross examination.
- (f) That the appellant after his arrest recovered the pistol (alleged murder weapon) on his pointation in a place which only he would have known about however since the empties recovered from the crime scene were not sent with the recovered pistol for matching by way of FSL this recovery is of very little evidentiary value and I have not taken the same into consideration although it begs the question as to why he produced the pistol in the first place and the lack of the FSL report appears to be on account of the negligence of the police.
- (g) 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 police receiving spy information about the presence of the appellant and his co-accused all being armed near the protective bund to the police proceeding there to their encounter with the appellant and his co-accused during which

the appellant made direct fire on the deceased to the appellant being arrested a few days later and thereafter recovering the pistol on his pointation at the hidden place which only he would have known about.

- (h) It is true that there was no independent mashir however it has now become a judicially recognized fact that in such like cases independent members of the public do not want to involve themselves and as such today the fact that there are no independent mashir's is not of huge significance especially when the eye witness evidence is believed and in this case where the recovery of the pistol has not been considered.
- (i) 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 caste doubt on or dent the prosecution case. The defence case as set out by the appellant in his S.342 Cr.PC statement is simply false implication by the police at the instance of one Abdul Majeed who he allegedly owed money to. The appellant did not give evidence on oath or call a single defence witness in support of his claim of false implication on account of the influence of Abdul Majeed and he did not cross examine any witness on this aspect of the case and only brought up this defence belatedly at the time of recording his S.342 Cr.PC statement and even then he did not call any defence witness to back up his defence regarding Abdul Majeed. 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 as an after thought 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 offence for which he has been convicted and sentenced in the impugned judgment and as such his appeal is **dismissed**.

14. The appellant's bail is recalled with immediate effect and SHO PS Sehwan is directed to arrest the appellant and return him to Central Prison Hyderabad to serve out the remainder of his sentence. A copy of this judgment shall be sent to SSP Jamshoro for compliance.