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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Amjad Ali Bohio

SPL. CR. A.T. APPEAL NO.164 OF 2022

Appellant:	Sultan @ Jabbal s/o. Abdul Rahim through M/s. Muhammad Rehan and Shahabuddin Ghori, Advocates.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General Sindh

SPL. CR. A.T. JAIL APPEAL NO.170 OF 2022

Appellants:	1. Arif @ Mama s/o. Imam Bux 2. Asif @ Lamba s/o. Faiz Muhammad through Mr. Muhammad Yousuf Narejo, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General Sindh.
Date of Hearing:	14.09.2023
Date of Announcement:	27.09.2023

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Arif alias Mama, Asif alias Lamba and Sultan alias Jabal were tried by the Anti-Terrorism Court No.IV, Karachi in Special Case Nos 399 of 2015 and 35 of 2019 under FIR No62 of 2014 u/s. 302/34 PPC r/w. Section 7 ATA, 1997 registered at PS Mochko, Karachi and vide judgment dated 29.08.2022 they were convicted under section 265-H(2) Cr.P.C. and sentenced as under:

a. Accused Arif @ Mama, Sultan @ Jabbal and Asif @ Lamba found guilty, they are convicted under Section 302(b)/34 PPC and sentenced to life imprisonment, each and to pay sum of Rs.100,000/- (rupees one hundred thousand) each as

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compensation u/s. 544-A Cr.P.C. to the legal heirs of the deceased, which shall be recovered by way of arrear of land revenue, and in default of payment / recovery thereof, they shall undergo further imprisonment for six months;

b. Accused Arif @ Mama, Sultan @ Jabbal and Asif @ Lamba found guilty, they are convicted under Section 7(1)(a) of ATA 1997 and sentenced to life imprisonment, each with fine of Rs. Rs.100,000/- (Rupees one hundred thousand) each and in of default in payment of fine, they shall further suffer for six months imprisonment.

All the sentences were ordered to run concurrently. However, the appellants were extended the benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 10.03.2014, complainant Muneer Ahmed s/o Ghulam Mustafa lodged FIR at PS, wherein he disclosed that he is serving in Pakistan Navy and received information through phone call that his two brothers namely Javed and Ismail, maternal uncle Taj Muhammad and cousin Shoaib and Faisal were murdered in Moash Goth. Their dead bodies are lying in Civil Hospital. Complainant reached there and found the dead bodies in emergency ward. The complainant learnt that at about 01:15 am (midnight) accused Saeed Commando, Kamran @ Kamo, Nazeer, Asif, Sultan Jabal, Nazir Baloch, Majeed Steel and their 02/03 unknown accomplices committed murder of above named persons by making firing upon them with sophisticated weapons. Hence this FIR was lodged.

3. After usual investigation the charge was framed against the accused persons and they were sent-up to face the trial where they pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 12 witnesses and exhibited various documents and other items. The statements of accused persons were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed false implication by the complainant in collusion with the police. However, the appellants did not give evidence on oath and did not produce any DW in support of their defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed these appeals against their convictions.

6. The facts of the case as well as evidence produced before the trial court finds an elaborate mention in the impugned judgment dated 29.08.2022 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 appellants have contended that the appellants are completely innocent and the complainant has lodged a false case against them in collusion with the police due to enmity as the complainant did not want to return the payment made by one of the appellants for securing him a job in the Pakistan Army as a sports man which he failed to do; that the two eye witnesses cannot be safely relied upon as they are related to the complainant and the deceased and that apart from their evidence there is no other evidence that the appellants committed the offences for which they were convicted and sentenced and as such the appellants be acquitted by being extended the benefit of the doubt. In support of their contentions, they placed reliance on the cases of **Abdul Aziz Ansari v The State** (2023 YLR 1012), **Javed Khan alias Bacha v The State** (2017 SCMR 524), **Main Sohail Ahmed v The State** (2019 SCMR 956), **Hayatullah v The State** (2018 SCMR 2092), **Muhammad Mansha v The State** (2018 SCMR 772) and **Tariq Pervez v The State** (1995 SCMR 1345).

8. On the other hand learned Additional Prosecutor General Sindh has fully supported the impugned judgment and in particular has relied upon the evidence of the eye witnesses to the murder which is supported by the medical evidence.

9. We have heard the arguments of the learned counsel for the appellants and learned Additional Prosecutor General Sindh who is also representing the interest of the complainant and have also gone through the entire evidence which has been read out by the learned counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. We find that the medical evidence alone proves that the 5 deceased persons died unnatural deaths by being shot in the head by firearm.

11. The question before us is who shot and murdered the five deceased on the date, time and location as set out in the charge.

12. After our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellants for which they were convicted based on the particular facts and circumstances of the case and the fact that each criminal case must be decided on its own unique evidence for the following reasons;

(a) That although the FIR was lodged with promptitude and named some of the accused with the non specific allegation of firing on the deceased which lead to their death this FIR was based on the hearsay evidence of a person who was not examined. This is not fatal to the prosecution case but it is of concern.

(b) That the prosecution case rests on two eye witnesses to the incident whose evidence we will consider below;

(i) Eye witness PW 2 Asif Raza who was the son of one of the deceased and was also related to the other deceased. According to his evidence in the night of 9/10.03.2014 he was at home when between 12 midnight and 1am persons affiliated with the Lyari gang war came to his residence and knocked on their door. His father (one of the deceased) told him and his brother Saddam Hussain to go hide on the roof which they did. From the roof he saw the accused and others drag his father out from the house along with four other relatives and saw the accused fire at them all as a result of which all five, including his father, were murdered. At about 04/05am rangers officials came to the spot and took him and his brother PW 3 Saddam Hussain to rangers HQ where they narrated the incident to the rangers. He also gave evidence that on 17.03.2014 the accused persons burnt their houses and robbed them of their valuables.

Admittedly the eye witness was the son of the deceased and was related to the complainant and we are put on caution in respect of his evidence as according to the defence case the complainant, who the eye witness, is also related to had enmity with the accused as according to the defence case he owed them RS70,000 for not securing a job for one of the accused in the Pakistan army as a sports man. Thus we are put on caution as to the reliability of his evidence.

Most significantly, however there is no evidence to suggest that from the time of the incident in 2014 until 2017 he told any body about the incident and instead chose to remain silent. According to him he kept quiet as the lyari gang war

was as its height and he was afraid. We are, however, not convinced by this reason for not coming forward earlier. This is because he was not an ordinary citizen with no influence. He was in the Pakistan navy and his other relatives and cousins were in the Pakistan Army (the complainant) and the Airforce and as such he should not have had any reason to fear the Lyari Gangsters with the might of the Armed Forces behind him. Instead he did not even report the incident to anyone in the navy. There is no evidence that he even told any of the rangers who collected him on the night of the incident apart from his bare word. There is no record that he made any such report. He is also not named in the FIR as an eye witness. We find it simply inexplicable that a son would keep mum over the murder of his father and other relatives which he allegedly saw for over 3 years especially as he had the support of his institution. He was re housed presumably for his safety and the FIR had already been lodged in respect of the incident so in reality he had little to fear in coming forward. It is well settled by now that even a few days unexplained delay in recording an eye witness S.161 Cr.PC statement would render the evidence of the witness unreliable let a lone a period of 3 years. In this respect reliance is placed on the case of **Muhammed Asif V State** (2017 SCMR 486)

It is also claimed that he knew the accused from before. If this was the case why was it necessary for accused Arif @Mama to be put before an identification parade? This identification parade was not necessary if the eye witness knew the accused and was 3 years after the arrest of accused Arif @Mama. Since the magistrate who conducted the identification parade was not called to give evidence there is also no evidence that the required procedures were carried out before performing the identification parade. It has even come in evidence that all the dummies were different and as such the accused could easily be made to stand out from the dummies. CNIC's, names and addresses of dummies were also not collected which makes the identification parade unreliable. **Even, in his evidence this eye witness states that he named the accused Arif @Mama for the first time after a period of 3 years.**

According to his evidence he saw the ladies take the deceased to hospital but no lady was examined to support his evidence.

There is no evidence that any of his house hold articles were robbed and/or recovered from any of the accused or that his house was burnt down.

Thus, for the reasons mentioned above we find that we cannot safely rely on the evidence of this eye witness who could easily have cooked up his evidence 3 years after the event in collusion with the complainant who was his relative and had enmity with the accused. Thus, we place no reliance

on the evidence of this eye witness.

(ii) **Eye witness PW 3 Saddam Hussain.** He is the son of one of the deceased (father) and related to the other deceased and is the brother of PW 2 Asif Raza. His evidence corroborates PW 2 Asif Raza excepts he concedes in cross examination that he did **not** see the accused kill his father which is some what surprising as he was on the roof with his brother at the same time and had the same view of the incident. In any event he, like his brother PW 2 Asif Raza, remained completely mum for over 3 years about the incident which we have already found to be inexplicable especially when it was his father who was murdered allegedly by people he knew. He had been moved to a safe place and as such was no longer in danger and as such he had no good reason not to come forward earlier especially as the FIR had already been lodged and the investigation started. Most of his relatives were in the armed forces who would have supported him. He is also not named in the FIR and as such for the same reasons as mentioned for PW 2 Asif Raza we find that we cannot safely rely on the evidence of this eye witness who could easily have cooked up his evidence 3 years after the event in collusion with the complainant who was his relative who had enmity with the accused. Thus, we place no reliance on the evidence of this eye witness.

(c) Having disbelieved the two eye witnesses hardly any evidence remains against the accused. For example, no pistol or other weapon was recovered from any of them.

(d) The empties found at the crime scene did not produce a positive FSL report.

(e) It is notable that two of the accused confessed to their involvement to this capital offence whilst in police custody in an arms case which they were acquitted from. It does not appeal to logic, reason or commonsense that a person would confess to an offence which carried the death penalty (five murders) when there was little, if any, evidence against them. **Significantly,** none of the accused were brought before a magistrate in order to record a judicial confession.

(f) That the defence case was consistent throughout i.e the accused had been fixed by the complainant because he did not want to return the money to one of the accused for failing to get him a job in the army as a sportsman. **Significantly** the complainant was in the Army as a sportsman and might have been able to make such an arrangement or convince the accused that he could. As such the defence case cannot be simply discarded.

13. It is a well settled principle of criminal law that the prosecution must prove its case against the accused beyond a reasonable doubt and

that the benefit of doubt must go to the accused by way of right as opposed to concession and in this case we have found many doubts in the prosecution case.

14. Thus, for the reasons discussed above, by extending the benefit of the doubt to the appellants they are acquitted of the charge, the impugned judgment is set aside, their appeal is allowed and the appellants shall be released unless wanted in any other custody case.

15. The appeal stands disposed of in the above terms.