

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.D-54 of 2016
Confirmation Case No.D-10 of 2016

PRESENT:

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,

Appellant : Misri Khan son of Iqbal Pathan, through
Mr. Altaf Hussain Surahio, Advocate.

Respondent : The State, through Mr. Ali Anwar Kandhro
Additional Prosecutor General.

Complainant : Fareed Ahmed, through Mr. Nisar Ahmed G.
Abro, Advocate.

Date of hearing : 16.02.2021.

Date of Judgment : 23.02.2021.

J U D G M E N T

Muhammad Karim Khan Agha, J.- This appeal was preferred from jail by appellant Misri Khan Pathan challenging the judgment dated 25.08.2016, passed by learned 1st Additional Sessions Judge, Shikarpur, in Sessions Case No.273/2011, re-State Vs. Misri Khan, based on Crime No.85/2011, registered at Police Station Stuart Ganj, Shikarpur, whereby the appellant was convicted for offence under Section 302(b), PPC as Tazir and sentenced to death subject to confirmation by this Court, and to pay Rs.500,000/- (rupees five hundred thousand) as compensation to the legal heirs of deceased Mst. Naseem in terms of Section 544-A, Cr.P.C; in case of default thereof to undergo simple imprisonment for six months more. Trial Court has sent reference u/s 374, Cr.P.C (Confirmation Case No.D-10/2016) for confirmation of death sentence of the appellant.

2. The prosecution case as set out in the FIR is that:

"Complaint is that, today my father's sister(Puphi) Mst. Sartaj had died, she was residing at Hazari Gate, Shikarpur. One retired Head Constable Noor Mohammad son of Nazal Pathan, resident of New Pind, Sukkur had also come to graveyard for prayer over grave of late father, whereafter he came to our home, from where I, my mother Mst. Naseem Pathan, aged about 56/57 years, 2) Noor Mohammad Pathan, 3) brother Rafiullah, and 4) brother Arshaad Khan Pathan, were going together through street towards the house of deceased, at 10.30 a.m. when we reached at the house of Aijaz Khan Pathan, accused Misri Khan son of Iqbal Ahmed Pathan, resident of Kirri Nawab Pathan having DBBL gun in his hand came from his house and fired straight from his gun at Noor Mohammad Pathan and killed him; then my mother Mst. Naseem Pathan asked him that why he killed an innocent person, to which accused Misri Khan Pathan made second fire of his gun straight at the abdomen of my mother and slipped away. My mother fell down, she was bleeding; we shifted her to Civil Hospital, Shikarpur for medical treatment, where she died at 1.15 p.m. Now I have appeared for lodging FIR that accused Misri Khan Pathan on the objection of my mother over murder of an innocent person Noor Mohammad Pathan fired from his gun straight at my mother, seriously wounded her and she died in Civil Hospital, Shikarpur. Accused Misri Khan Pathan unjustifiably killed my mother Mst. Naseem Pathan by making fire with his gun. The parents of Noor Mohammad Pathan will lodge separate FIR of murder against the same accused. I am complainant, may investigation be held."

3. After registration of FIR, police inspected place of wardhat, collected blood stained earth, one empty cartridge and sealed it at spot, prepared inquest report. On 14.5.2011 accused was arrested and voluntarily produced unlicensed crime weapon viz. DBBL gun before

police on 18.05.2011. On completion of usual investigation, the appellant/accused was sent up to face trial. The accused pleaded not guilty to the charge and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. Thereafter, statement of accused was recorded under Section 342 Cr.PC in which he denied the allegations and claimed his false implication due to old enmity. The accused however did not examine himself on oath or call any DW's in support of his defence case.

5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellant/accused as mentioned earlier in this judgment vide Judgment dated 25.08.2016 hence the appellant has filed this 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 judgment dated 25.08.2016 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 none of the PW eye witnesses was present at the scene of the incident and that it was an unseen incident; that the eye witnesses were put up witnesses on account of old enmity in order to fix the appellant in this false case; that the eye witnesses, even if they were present, are all related and as such their evidence cannot be safely relied upon; that there were no independent mashirs; that the ocular evidence is contradicted by the medical evidence; that there are material contradictions in the evidence of the eye witnesses which makes their evidence unreliable and 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 **MUSHTAQ and 3 others versus THE STATE**

(PLD 2008 Supreme Court 1), MUHAMMAD FIAZ versus THE STATE (PLD 1993 Peshawar 138), MUHAMAMD YOUNIS versus THE STATE (1986 MLD 2422), COMMISSIONER INLAND REVENUE ZONE-I, RTO , RAWALPINDI versus Messrs KHAN CNG FILLING STATION, RAWALPINDI and others (2017 SCMR 1414), ABDULLAH JAN and others versus TILA MUHAMMAD and others (1985 SCMR 94), ABDUL AZIZ SHAH and another versus ABDUL GHAFOR and another (1985 SCMR 221), ALLAH DINO AND 2 OTHERS versus MOHAMAMD UMAR AND 2 OTHERS (1974 SCMR 411), MUHAMMAD MUZAFFAR versus THE STATE (1995 P.Cr.L.J 1345), GHULAM QADIR and 2 others versus THE STATE (2008 SCMR 1221), AKHTAR ALI and others versus THE STATE (2008 SCMR 6), Mst.RUKHSANA BEGUM and others versus SAJJAD and others (2017 SCMR 596), NASRULLAH alias NASRO versus The STATE (2017 SCMR 724), ABDUL JABBAR alias JABBARI versus The STATE (2017 SCMR 1155), HAZOOR BAKHSI versus WADOON and 3 OTHERS (1980 SCMR 979), PATHAN versus The STATE (2015 SCMR 315), MUHAMMAD IRSHAD versus ALEEMUDDIN and others (2001 MLD 1840), GHULAM SIKANDAR AND ANOTHER versus MAMARAZ KHAN AND OTHERS (PLD 1985 Supreme Court 11), Mst. SUGHRA BEGUM and another versus QAISER PERVEZ and others (2015 SCMR 1142), ISMAIL (MUHAMMAD ISMAIL) versus THE STATE (1975 P.Cr.L.J 1394) and Mst. ASKAR JAN and others versus MUHAMMAD DAUD and others (2010 SCMR 1604).

8. On the other hand learned Addl. Prosecutor General and the complainant fully supported the impugned judgment and contended that the three eye witnesses to the incident were reliable and confidence inspiring and had fully implicated the appellant in the murder of the deceased; that the eye witnesses were corroborated by the medical evidence; that the appellant produced the murder weapon on his pointation which was hidden in a secret place which only he could have known about; that the FSL report as well as the chemical report relating to the blood stained earth recovered at the scene of wardat were both

positive and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and his conviction and sentence maintained. In particular they stressed that due to the cold bloodied and unprovoked attack on an old defenseless lady (the deceased) by the appellant the death sentence was fully attracted in this case. In support of their contentions they have placed reliance on **MUHAMMAD LATIF versus THE STATE** (2008 YLR 619), **KHADIM HUSSAIN versus THE STATE** (PLD 2010 Supreme Court 669) and **FAROOQ KHAN versus THE STATE** (2008 SCMR 917).

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

10. Based on our reassessment of the evidence of the PW's, especially the PW eye witnesses, PW 1 Dr. Farah Naz MLO, post mortem and other medical reports, PW 2 Nadeem Parvaiz Tapedar and recovery of empty and blood stained earth at the scene which lead to both a positive FSL report and chemical report we find that the prosecution has proved beyond a reasonable doubt that Mst Naseem (the deceased) was murdered by firearm at about 10.15am on 10.05.2011 at Common street Kiri Nawab near house of Ijaz Khan.

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

12. 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 promptitude within 3 and a half hours of the murder. During this period the complainant took his seriously injured mother to the hospital where he stayed with the deceased whilst she received treatment at the hospital

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however she died at 1.15pm and within 30 minutes he then registered the FIR and thus there was no unexplained delay in the lodging of the FIR which would give the opportunity to the complainant or the police to cook up a false case against the appellant. The post mortem was also carried out within 25 minutes of the deceased's death and the medical report clearly states that the deceased died 2 to 3 hours after being injured which ties in with the complainant's evidence. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant party which would motivate them to lodge a false case against him. The appellant is named in the FIR with a specific role.

(b) In our view the prosecution's case rests on the eye witnesses to the murder whose evidence we shall consider in detail below;

(i) **Eye witness PW 5 Fareed Ahmed.** He is the complainant in the case and the son of the deceased who was his mother. According to his evidence on 10.05.2011 at 10.30am he, the deceased, his relative retired HC Noor Muhammed, his brother Rafiullah and Arshad Khan were going to the house of his paternal aunt Mst Bibi Sartaj to offer condolences. Along Common Street and when they reached the house of Aijaz Pathan he saw the appellant who was armed with DBBL gun who he saw shoot Noor Muhammed and when his mother asked why the appellant had shot an innocent man he also saw the appellant shoot his mother which hit her in the abdomen. The accused fled and he took his mother to hospital where she died at about 1.15pm whilst under treatment. He then registered the FIR against the appellant within 30 minutes of his mother's death.

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. The appellant was also named and given the same specific role in the FIR lodged promptly after the incident. The fact that he could see the incident clearly was corroborated by the evidence of the other eye witness PW's who also saw the appellant shoot the deceased. Since it was a day light incident as mentioned earlier and the complainant and other eye witnesses knew the appellant they would have had no difficulty in identifying him especially as the attack went on for a few moments.

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.

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Reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152)

The complainant is **not** a chance witness as he was going with his mother (the deceased) and other family members to condole the death of his aunt and thus the complainant and all the other eye witness PW's had a reason to be walking down the street with the deceased at the time of the incident.

As mentioned earlier he lodged his FIR with promptitude and named the other eye witnesses in the FIR along with the accused with a specific role. Any delay in registering the FIR is fully explained by the complainant in his evidence and is corroborated by the medical evidence of PW 1 Dr. Farah Naz MLO who stated that the deceased was brought unconscious to the hospital and died at about 1.15pm. His evidence reflects that of his FIR and there have been no significant improvements in the same so as to render his evidence unreliable. He had no proven enmity with the appellant and had no reason to falsely implicate him in the murder of his mother. His evidence was not dented despite lengthy cross examination. He did not intervene in the attack because he was unarmed and he did not give chase as his priority was to take his injured mother to the hospital for life saving treatment. We find his evidence to be reliable, trust worthy and confidence inspiring and we can convict on this evidence alone. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917), what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

(ii) **Eye witness PW 6 Arshad Khan. He is the brother of the complainant. He corroborates eye witness PW 5 Fareed Ahmed** in all material respects. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement on the day of the incident which left no room for concoction and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 5 Fareed Ahmed**

(iii) **Eye witness PW 7 Rafiullah. He is also the brother of the complainant. He corroborates eye witness PW 5 Fareed Ahmed and eye witness PW 6 Arshad Khan** in all material respects. He is named in the FIR as an eye witness shortly

after the incident and gave his S.161 Cr.PC eye witness statement shortly after the incident which left no room for concoction and the same considerations apply to him as to **PW 5 Fareed Ahmed and eye witness PW 6 Arshad Khan.**

Having believed the eye-witness evidence we find that the authorities cited by the appellant are of little, if any, assistance to him since they mainly relate to corroborative/support evidence which is hardly of any relevance once 3 eye-witnesses' evidence is found to be reliable, trust worthy and confidence inspiring and is believed by us as in this case.

Thus, based on our believing the evidence of the 3 PW eye witnesses what other supportive/corroborative material is their against the appellant?

(c) That the evidence of the 3 eye-witnesses is corroborated by PW-3 Arbab Ali who was the PC who lodged the FIR on behalf of the complainant and in particular the complainant reaching the PS at 13.40 hours to lodge the FIR which ties in with the evidence of the three eye witness PW's discussed above.

(d) That the medical evidence and post mortem report of PW 1 Dr. Farah Naz fully supports the eye witness/prosecution evidence as she confirms that the deceased was brought injured to the hospital and died about two hours later on account of gun shot wounds to the abdomen. The post mortem was carried out with promptitude which would rule out the cooking up of any false case. The fact that a DBBL gun was used to shoot the deceased would explain why there are two entry wounds as the cartridges of DBBL guns contain many pellets and tend to spray in all directions and thus would account for 2 entry wounds and 6 holes in the body of the deceased despite only one shot being fired at her and hitting her.

(e) That the appellant was arrested 4 days after the incident on 14.05.2011 with nothing incriminating in his possession. However 4 days after his arrest he took the police on his pointation to the place where he had secretly hidden the DBBL gun (murder weapon) from the side root of a Khabar tree which was a place which only he could have known about and was not known to the police or any other party. The DBBL gun was handed over by the appellant to the police who had no enmity with him and no reason to falsely implicate him in this case. If the police would have wanted to falsely implicate the accused in the case they would have simply foisted the gun on him at the time of his arrest rather than making up this laborious recovery story which again goes to the truthfulness of the appellant leading the police to the hidden weapon.

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(f) That PW 6 Arshad Khan and PW 7 Raifullah as well as being eye witnesses to the incident were also mashirs in the case and their signature appears on all relevant mashirnama's such as inquest report, exhibit of corpse, place of incident, production of clothes of the deceased, arrest and recovery of the gun on pointation of the appellant (Raifullah only). As mentioned earlier these PW's had no proven enmity with the appellant and had no reason to falsely implicate the appellant in the case and we have already believed their evidence as eye witnesses. They corroborate nearly all steps taken in the investigation by the police who also had no reason to falsely implicate the appellant in this case.

(g) That the empty recovered at the wardat matched with the recovered DBBL gun through a positive FSL report.

(h) That the blood stained earth recovered at the wardat was sent for chemical examination which report found the blood recovered at the scene to be human blood.

(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 and the conviction of the appellant. In this respect reliance is placed on **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 shooting of the deceased by the appellant to the appellant's death to the lodging of the FIR to the arrest of the appellant to the recovery of the murder weapon on the pointation of the appellant.

(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 by for example making up his arrest or foisting the DBBL gun on him 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 **Mustaq Ahmed V The State** (2020 SCMR 474).

(k) That it does not appeal to reason, logic or commonsense that two sons both of whom were eye witnesses would let the murderer of their mother go scot free by substituting him with an innocent person (the appellant). In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

(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 cast doubt on or dent the prosecution case. The defence case is simply one of false implication based on enmity which has not been substantiated

whatsoever by the appellant. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought. Thus, in the face of three reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) has not at all dented the prosecution case.

13. 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 his conviction.

14. With regard to sentencing the prosecution has asserted and proved the motive through the evidence of the eye witness PW's that the appellant shot the deceased because she complained to the appellant why he had shot an innocent person which lead to the appellant shooting her. The appellant not only murdered the deceased in cold blood but also another person at the same time, date and location in the same manner and hence he committed double murder in broad day light and in this case that of an elderly defenseless women in front of her sons with a DBBL gun which murderous attack we find to be both senseless, brutal and callous and is not deserving of any leniency on the part of the courts and that a deterrent sentence is justified based on the particular facts and circumstances of this case. Thus, under these circumstances the appeal is dismissed, the impugned judgment is upheld along with its convictions and sentences and the confirmation reference is answered in the **affirmative**.

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