

**IN THE HIGH COURT OF SINDH, KARACHI**

Criminal Appeal No.39 of 2014

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Badal and another  
v/s.  
The State and another

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***Before: Justice Mrs. Ashraf Jahan.***

Appellant No.1 : Badal son of Ibrahim  
Through Mr. Muhammad Hanif, Advocate.

Appellant No.2 : Ibrahim son of Ali Muhammad  
Through M/s. Mehmood Alam  
Rizvi and Zakir Leghari, Advocates.

Complainant : Muhammad Ismael Samejo  
Through Mr. Jamil Ahmed Shah,  
Advocate

The State : Ms. Rahat Ehsan, Additional P.G.

Date of Hearing : 14.12.2017

Date of Judgment : 23.01.2018

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**JUDGMENT**

**MRS. ASHRAF JAHAN, J.:** The Appellants being aggrieved with the judgment dated 11.02.2014, passed by the II Additional Sessions Judge, Thatta, in Sessions Case No. 166 of 2009, emanating from FIR No. 82 of 2009, under Sections 302, 114, 34 PPC, have assailed the same before this Court, whereby they were convicted and sentenced to undergo life imprisonment and to pay a fine of

Rs.2,00,000/- each. In case of payment of fine, same to be paid to the legal heirs of the deceased Muhammad Samejo as compensation and in case of default to further suffer R.I. for 12 months more. However, benefit of Section 382-B Cr.P.C. was extended in their favour.

2. The brief facts of the case of prosecution, as per FIR, are that the Complainant Muhammad Ismail Samejo lodged report on 16.06.2009 at 1400 hours at police station Mirpur Sakro alleging therein that his nephew (sister's son) Muhammad son of Khamiso Samejo, aged about 26/27 years used to run fruit shop alongwith his brother Gul Muhammad in Bohara Town. In the evening of 15.06.2009 Complainant came to know that there had been exchange of hot words between Gul Muhammad (nephew) and one Badal son of Ibrahim over purchase of fruits. On 16.06.2009 at about 11:00 a.m. Complainant alongwith Ghulam Hussain son of Allah Bachayo, Habibullah son of Qadir and Meboob son of Yousuf came at Bohara Town for their work and sat beside the shop of their nephew. Meanwhile they saw accused Ibrahim son of Ali Muhammad Jokhio, driving a black colour Cultus car came there, while his son Badal was sitting beside him. As soon as they arrived, they started abusing his nephew. Ibrahim Jokhio, armed with Kalashnikov made aerial firing and instigated his son Badal not to spare and kill his nephew Muhammad. Accused Badal made straight fire with his T.T. pistol at Muhammad, who received fire arm injuries on his chest at the lower part of his neck and fell down. Accused ran away in the same car making aerial firing with Kalashnikov. The

Complainant party rushed to the injured Muhammad and found that he had received fire arm injury on chest, which had crossed from the back side and he expired at the spot. The Complainant party brought the dead body at Shaikh Zaid Medical Centre, Mirpur Sakro and then the Complainant went to police station, who completed all the legal formalities and handed over the dead body to the Complainant party, the dead body was sent to the village and the Complainant lodged the FIR of the incident.

3. After registration of FIR, investigation was conducted by the police; they arrested accused Badal on 17.06.2009 alongwith the crime weapon viz. 30 bore T.T. pistol and two bullets. Subsequently, the accused Ibrahim was arrested by the police on 20.06.2009. The police after completing the investigation, submitted the challan against the accused persons in the Court of law.

4. Charge against the accused was framed under Sections 302, 114 read with Section 34 PPC (Ex.3) to which they pleaded not guilty and claimed trial.

5. The prosecution, in order to prove its case, examined in all 12 witnesses:

- i) The Complainant Muhammad Ismail, who is one of the eye witnesses also, was examined as Ex.7, he produced FIR as Ex.7-A and receipt for receiving dead body as Ex.7-B. He endorsed the contents of FIR and supported the case of prosecution on all material points.

- ii) PW Gul Muhammad, one of the eye witnesses, was examined as Ex.8. He also supported the prosecution case.
- iii) PW Mehboob, the third eye witness, was examined as Ex.9, his evidence also supports the version of prosecution case.
- iv) PW Habibullah, fourth eye witness, examined as Ex.10, adduced in favour of case of prosecution.

PW Ghulam Hussain being the formal witness, was given up by the prosecution vide statement as Ex.11 on record.

- v) ASI Muhammad Qasim (mashir) produced mashirnama of dead body as Ex.14-A, Danistnama as Ex.14-B and Lash Chakas Form as Ex.14-C. He also issued the letter for conducting post mortem of the dead body and produced its carbon copy as Ex.14-D.
- vi) Dr. Ghulam Rasool was examined as Ex.16, who conducted post mortem of the deceased, produced original police letter as Ex.16-A, original Lash Chakas Form as Ex.16-B, post mortem report into four (4) leaves as Ex.16-C and receipt regarding handing over the blood stained clothes of the deceased as Ex.16-D.
- vii) ASI Javed Iqbal was examined as Ex.17, who had produced mashirnama of arrest and recovery dated 17.06.2009 in respect of accused Badal as Ex.17-A, copy

of roznamcha entries 10 and 11 dated 17.06.2009 as Ex.17-B.

- viii) H.C. Muhammad Anwar was examined as Ex.18, who deposed regarding arrest of the accused Badal.
- ix) Civil Judge & Judicial Magistrate Amjad, who recorded the confessional statement under Section 164 Cr.P.C. of accused Badal, was examined as Ex.19, he produced the letter of police for recording confessional statement of accused Badal as Ex.19-A and confessional statement of accused Badal as Ex.19-B.
- x) PW Maqbool Ahmed was examined as Ex.20, who had also acted as mashir of clothes of deceased Muhammad. He also acted as mashir of blood stained mud as well as mashir of place of wardat, which was produced as Ex.20-A.
- xi) PC Khursheed Ali was examined as Ex.21. His evidence is to the extent that he verified the signatures of SIP Taj Muhammad Khaskheli on FIR, being well conversant with his signatures. Above referred SIP recorded the FIR in this case but subsequently died, therefore, the prosecution examined PC Khursheed Ali to verify his signatures. He also produced mashirnama of arrest dated 20.06.2009 of accused Ibrahim as Ex.21-A, Chemical Examiner's report regarding blood stained clothes of deceased as well as blood stained mud as

Ex.21-B. He also produced Forensic examination report of pistol allegedly used as crime weapon and recovered from the possession of accused Badal at the time of his arrest and regarding empty secured from the spot, as Ex.21-C. The report revealed that the secured empty was fired from the pistol recovered from accused Badal.

- xii) Last witness examined by the prosecution was Haji Muhammad, the Tapedar of Tapo Bohara as Ex.22. He produced the letter of police for preparation of sketch as Ex.22-A and sketch prepared by him as Ex.22-B.

Thereafter the learned DPP closed the side of prosecution vide statement Ex.23 on record.

6. The statements of both the accused persons were recorded under Section 342 Cr.P.C., wherein they pleaded that they have been involved falsely in this case due to political enmity. The accused Badal also retracted from his confessional statement, recorded before the Civil Judge & Judicial Magistrate. However, they did not wish to examine themselves on oath nor did produce any witness in their defence.

7. The learned trial Court after conclusion of the trial, passed the judgment dated 11.02.2014, which is impugned before this Court.

8. I have heard the learned counsel appearing for the parties and have perused the case record.

9. It is contended by the learned counsel for the Appellant No.1 that all the witnesses examined in the instant case are related to each other and the prosecution has failed to examine any independent witness in support of its case. Besides there are material contradictions in the evidence of prosecution witnesses, but the trial Court did not consider the same at all and passed the judgment against the factual controversies and legal position.

10. It is contended by the learned counsel for Appellant No.2 that the motive set up by the prosecution in the instant case is unbelievable and does not attract to a prudent mind. No empties of Kalashnikov were recovered from the place of wardat, which belies the whole incident. The Appellants being son and father are innocent and have falsely been implicated in this case, therefore, the present appeal may be allowed and the impugned judgment of the trial Court may be set aside. In support of his contentions, he relied upon the following case-law:

- I). 2016 SCMR 2021 (Muhammad Javed v/s. The State)
- II). 2009 SCMR 237 (Shahid Abbas v/s. Shahbaz and others).
- III). 2017 SCMR 1546 (Hakeem and others v/s. The State).
- IV). 2017 SCMR 596 (Mst. Rukhsana Begum and others v/s. Sajjad and others)
- V) 2017 SCMR 486 (Muhammad Asif v/s. The State)

11. Conversely, the learned Prosecutor, appearing on behalf of the State, argued that all the eye witnesses have supported the case of prosecution and their evidence could not be shattered during the

cross-examination, therefore, the trial Court has rightly convicted the Appellants, hence she opposed the present appeal.

12. The learned counsel for the Complainant submitted that the FIR was lodged promptly, the names of Appellants alongwith their roles have been specified in it. The incident had occurred during daylight; therefore, question of mistaken identity does not arise. All the four eye-witnesses have fully supported the case of prosecution, which further finds support with the circumstantial evidence in the shape of medical evidence, recovery of pistol and report of Ballistic expert etc. Therefore, the appeal is liable to be dismissed, being devoid of merit. In support of his contentions, he relied upon the following case-law:

- I) 2017 SCMR 986 (Hashim Qasim and another v/s. The State).
- II) 2016 SCMR 274 (Azeem Khan and another v/s. Mujahid Khan and others).
- III) 2016 SCMR 2152 (Nasir Iqbal @ Nasra and another v/s. The State).
- IV) 2016 P.Cr.L.J. 513 (Abdul Karim v/s. Kaliq Jan and another).

13. I have considered the arguments, advanced before me and perused the record. As mentioned earlier in the present case incident had taken place at 11:00 a.m. whereas FIR was lodged on same day i.e. 16.06.2009 at 1400 hours promptly soon after the incident, by the Complainant, who is one of the eye-witnesses of the incident. Parties were known to each other and F.I.R. was lodged without any delay, which rules out any possibility of substitution or consultation to falsely rope the Appellants. The deceased Muhammad, as per case



of prosecution, soon after receiving the firearm injury died at the spot. All the prosecution witnesses have fully supported the case of prosecution to the extent of firearm injury caused to the deceased by the Appellant Badal. In this regard apart from the evidence of eye-witnesses, the evidence of doctor is of material value, who examined the deceased on the same day and issued such post-mortem report, which is available on record as Ex.16/c. The doctor in post-mortem report opined that the death of the deceased was the result of firearm injury and his evidence regarding death of the deceased and cause of death was not challenged during cross examination; therefore, it is established that deceased Muhammad died on 16.06.2009 due to firearm injury.

14. As per case of prosecution Appellant Badal made straight fire at the deceased Muhammad, whereas evidence against accused Ibrahim is that he made aerial firing at the time of incident and also instigated his son to murder the deceased. In the instant case there are four eye-witnesses and they all have categorically deposed that accused Badal fired at the deceased from his pistol and there is no contradiction in the evidence brought on record regarding time, place and manner of the incident. So far as the objection of the learned counsel for the Appellants in respect that all the witnesses are related to each other is concerned, it is observed that no doubt that they are related to deceased, but their evidence cannot be disbelieved merely on account of their relationship with the deceased and complainant, unless they are proved to be on inimical terms with the Appellants. Mere relationship of eye witnesses with the

deceased is not always enough to declare such witness to be partisan or interested witness, when his testimony was confidence inspiring and corroborated with all types of circumstantial evidence. Reliance in this regard is placed upon the case of Nasir Iqbal @ Nasra v/s. The State (2016 SCMR 2152).

15. During their statements recorded under section 342 Cr.P.C., the Appellants have taken the stand that they have been involved in this case due to political enmity, but except the verbal assertion they have not brought anything on record in respect of their political enmity against the complainant party, even they did not opt to record their statements on oath, thus they have failed to bring on record any supporting evidence to their stance of being politically victimized.

16. The next piece of evidence is that Appellant Badal got recorded his confessional statement under section 164 Cr.P.C. during the investigation of this case before the Judicial Magistrate on 18.06.2009 on the very next day of his arrest i.e. 17.06.2009, wherein he voluntarily confessed his guilt of making straight fire upon the deceased. Though subsequently he retracted from his earlier statement recorded under section 164 Cr.P.C., but there is sufficient law on this point by the Honourable Apex Court that even the retracted confessional statement can be made basis for conviction if it is voluntary and supported by the corroboratory evidence. In the instant case the police had also secured the empty of the fire from the place of incident, which was sent alongwith pistol recovered from Appellant Badal for the forensic examination and as

per report of forensic laboratory, the recovered empty was fired from the above pistol. Thus, there is not only direct evidence against Appellant Badal, but there is sufficient corroboratory pieces of evidence connecting him with the commission of crime, therefore, I am of the view that prosecution has succeeded to discharge its burden so far as the case of Appellant Badal is concerned.

17. Reverting to the case of Appellant Ibrahim, it is observed that his case is distinguishable. No doubt all the eye-witnesses of the incident have deposed against him with the allegation that he made aerial firing at the time of incident and also instigated his son, Appellant Badal, to commit murder of deceased Muhammad. As the prosecution witnesses have alleged aerial firing against him, therefore, such oral version of the prosecution witnesses requires circumstantial evidence in support of their allegations, in the shape of recovery of Kalashnikov and empties from the place of incident. But the case of prosecution is totally silent in this regard, on the contrary the P.Ws have admitted in their cross examination that no empties of Kalashnikov were recovered from the place of incident, therefore, inspite of oral evidence of four eye-witnesses against the Appellant Ibrahim, due to non-recovery of empties, prosecution case against him seems to be doubtful. Moreover Appellant Ibrahim was arrested on the fourth day of incident, but there is no recovery of Kalashnikov from him. There is ample law on the point that even a single doubt, if found reasonable, would entitle the accused person for acquittal and it is not necessary that there should be a combination of several doubts in his favour. Reference in this regard

can be made to the case of Riaz Masih @ Mithoo v/s. The State (1995 SCMR 1730) and the case of Hashim Qasim and another v/s. The State (2017 SCMR 986). Thus a careful analysis of ocular account shows that the possibility that eye witnesses had exaggerated to the extent of Appellant Ibrahim could not be ruled out.

18. In the light of above discussion, I am of the considered view that prosecution has failed to prove its case beyond shadow of doubt against Appellant Ibrahim, as the circumstantial evidence in the shape of recovery of Kalashnikov and empties from the place of incident is missing, which has made the case against him doubtful one.

19. As a sequel of above discussion, the Judgment of trial Court is partially modified, consequently, the instant Appeal is dismissed to the extent of Appellant Badal, whereas same is accepted in favour of Appellant Ibrahim, giving him benefit of doubt. He is in custody, he may be released forthwith if not required in any other case.

**J U D G E**

Azeem