ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Crl. Jail Appeal No. S- 39 of 2013

Date	Order with signature of Judge

Muhammad Mithal APPELLANT

VERSUS

The State RESPONDENT

For hearing of Application U/S 426 Cr.P.C.
For hearing of M.A No. 1891/2016 (B.A)

Dates of hearing: 06-06-2018 and 11-06-2018
Date of Judgment: 29.06.2018

Mr. Shevak Ram Valecha, Advocate for Appellant;
Mr. Sardar Ali Shah Rizvi, D.P.G

J U D G M E N T

ADNAN IQBAL CHAUDHRY, J. This jail appeal was received by this Court on 15-06-2013 from Central Prison Sukkur. On receipt of notice of this appeal, the Complainant had appeared before this Court and stated that the APG may proceed with the case also on behalf of the Complainant. Though this matter was listed for hearing of the bail application, by consent of learned counsel and learned DPG the main appeal was taken up for hearing.

1. The Appellant, Muhammad Mithal s/o Muhammad Murad Manghlo has appealed the judgment dated 05-06-2013 passed by the IInd Additional Sessions Judge Khairpur in Sessions Case No.354/2006 whereby the Appellant was convicted for offences under section 302(b) PPC read with section 149 PPC for the *qatl-i-amd* (in prosecution of common object) of Ali Nawaz (the Deceased), and under section 324 PPC for the attempt to commit *qatl-i-amd* of, and in the process causing hurt to Ali Gohar (the Complainant) who is the brother of the Deceased.

For the offence under section 302(b) PPC, the Appellant was sentenced to R.I. for life and was also directed to pay compensation of Rs.50,000/- under section 544-A Cr.P.C. to the legal heirs of the Deceased and in default of the latter to suffer S.I. for four more months. For the offence under section 324 PPC, the appellant was sentenced to R.I. for seven years and was also directed to pay compensation of Rs.20,000/- under section 544-A Cr.P.C. to the Complainant, and in default of the latter to suffer S.I. for two more months.

2. Along with the Appellant, the FIR had nominated 20 other accused persons. Per mashirnama (Exhibit No.15-E), four of the accused persons (other than the Appellant) were arrested on 08-07-2006 but it appears that subsequently they were not challaned. One of the accused namely Nabban s/o Muhammad Ameen (different from accused Nabban s/o Ibrahim) was in custody in another case and was arrested in this case on 6-8-2006. It appears that he was subsequently granted bail but later absconded and was declared a proclaimed offender. The case against nine accused persons who had been declared proclaimed offenders was separated and is kept on a dormant file until their arrest. The two co-accused namely Ghulam Nabi and Asghar, who were tried along with the Appellant in Sessions Case No.354/2006, were acquitted for want of proof by the judgment impugned herein.

3. The FIR had been registered on the information of the Complainant on 07-06-2006 as Crime No.51/2006 at P.S. Sobhodero under sections 302, 324, 147, 148 PPC. Per the FIR, the Appellant used to accuse the Complainant for the murder of the Appellant's brother (Miskeen) and had threatened to kill the Complainant. Per the FIR, the incident took place at about 5:30 a.m when the Complainant and the Deceased were on their way to work as *haris* on agricultural land. The FIR alleged that twenty

persons including the Appellant, all armed with firearms, identified in the FIR by name, father's name and caste, came running towards them; that at the instigation of the Appellant, the co-accused Rajib and Nabban fired straight shots at the Deceased who died at the spot; that the Appellant fired a straight shot at the Complainant with the intent to kill him, which shot hit the Complainant on the arm; that on hearing cries and gun shots, Niaz, Gullan, Saindad and other villagers rushed to the scene and saw the accused persons who then ran away while firing in the air.

4. Charge was framed on 21-10-2009 against the Appellant (Mithal) and three of the co-accused (Ghulam Nabi, Asghar and Nabban s/o Muhammad Ameen). All pleaded not guilty. The prosecution examined 9 witnesses. The stated eye-witnesses of the incident were the Complainant (Ali Gohar, PW-2), Ghulam Qadir @ Gullan (PW-1), and Saindad (PW-4). The Medical Officer who had conducted post-mortem of the Deceased and examined the injuries of the Complainant was PW-8. The Appellant and the other co-accused tried with him were examined under section 342 Cr.P.C. but none of them opted to lead evidence. The contention of the Appellant's counsel that the Appellant had been charged only under section 324 PPC is a misreading of the charge.

5. Regards the conviction of the Appellant for the offence of *qatl-i-amd* of the Deceased (under section 302(b) PPC), the same is on the premise of section 149 PPC i.e. one committed by way of common object of an unlawful assembly. As regards his conviction for attempt to commit *qatl-i-amd* of the Complainant (under section 324 PPC), though the injuries suffered by the Complainant were *ghayr-jaifah mutalahimah* and *ghayr-jaifah damiyah* attracting (on their own) punishment for imprisonment not exceeding three years and one year respectively (section 337-

F PPC), it was held by the trial court that such injuries were caused with the intent to commit *qatl-i-amd*.

6. Regards occurrence of the incident, there does not seem to be any question to the fact that the Deceased died of firearm injuries on the day, time and place alleged. In addition to three empties found near the body, seven empties were found at a distance of about 50 paces away (mashirnama Exhibit No.15-A), suggesting that in addition to the person(s) who fired upon the Deceased, there were others who fired shots, aerial or at the victim(s). However, since firearms used in the crime were not recovered, there is no ballistic or forensic evidence. The only evidence that puts the Appellant at the scene of the crime and implicates him in the commission of the alleged offences, is the oral evidence of the Complainant (Ali Gohar, PW-2), Ghulam Qadir (PW-1) and Saindad (PW-4). Per the trial court, though all three witnesses saw the Appellant at the scene of the crime, only two of them, the Complainant (Ali Gohar, PW-2) and Saindad (PW-4), are witnesses to the commission of the offences by the Appellant and it is the evidence of these two witnesses that forms the basis of the Appellant's conviction. While noting that the said three witnesses (PW-1, PW-2, PW-4) were interested witnesses, the Complainant being the brother of the Deceased and Ghulam Qadir (as nephew) and Saindad (as cousin) being related to them, the trial court found their oral evidence to be trust worthy and reliable because it was consistent with circumstantial evidence and the medical evidence. Therefore, it is primarily the oral evidence of the said three witnesses i.e. the Complainant PW-2 (Exhibit No.11), Ghulam Qadir PW-1 (Exhibit No.10), and Saindad PW-4 (Exhibit No.13) that needs to be reappraised. After going through the evidence of the said witnesses my observations follow.

7. Ghulam Qadir @ Gullan (PW-1) deposed as follows (underlining supplied for emphasis):

> *"……. I, Saindad and Niaz were standing out side the Otaq…… we rushed towards the firing …… we saw that our maternal uncle Ali Nawaz lying dead…….We saw accused Rajib, Nabban, Mithal* (Appellant)*, Asghar, Ghulam Nabi, Wazeer and other 20/25 unidentified accused persons were making fire upon us. My maternal uncle Ali Gohar had sustained injuries on his right arm."* On cross-examination he stated that, *"Deceased had gone from the house to attend the call of nature (latrine purpose). Deceased Ali Nawaz was alone …….When we reached over the dead body of my maternal uncle Ali Nawaz accused persons made firing upon us. We laid down in sugarcane crop and saved ourselves."*

Thus from the evidence of Ghulam Qadir (PW-1) one can also conclude that the Complainant was not accompanying the Deceased when the Deceased was attacked and that the Complainant reached the scene after the Deceased had been shot; that Ghulam Qadir (PW-1) and Saindad (PW-4) reached the scene together and after the Deceased had been shot and after the Complainant had been injured inasmuch as, per Ghulam Qadir, Saindad was with him when they arrived at the scene and it is doubtful that Saindad witnessed the commission of the said offences by the Appellant when Ghulam Qadir did not; that the Complainant may have been hit in the arm by a pellet fired by any of more than 25 persons who per Ghulam Qadir fired indiscriminately at them when they reached the scene. This version of the evidence was also heavily relied upon by the Appellant's counsel to advance the case of the Appellant.

8. The evidence of the Complainant (Ali Gohar, PW-2) also suggests that Ghulam Qadir (PW-1) and Saindad (PW-4) were not

eye-witnesses of who fired at the Deceased and who injured the Complainant when he says in his examination-in-chief that:

> *"Accused Nabban, Rajib directly fired upon the deceased Ali Nawaz of guns. My brother fell down. Accused Mithal directly fired upon me which hit me on my left arm. On the firing shot report villagers were attracted. There came Niaz, Ghulam Qadir and Saindad from houses. All the accused persons seeing coming the above named persons and villagers accused made aerial firing thereafter they ran away."*

Keeping in view the aforesaid evidence of Ghulam Qadir and the Complainant, the oral evidence of Saindad (PW-4) that he reached the scene of the crime in time to witness the commission of offences by the Appellant, is not supported by the oral evidence of both Ghulam Qadir and the Complainant.

9. Both in the FIR and in his examination-in-chief, the Complainant deposed that it were only the accused Rajib and Nabban who fired at the Deceased. But on cross-examination he contradicted himself when he tried to improve the prosecution's case by stating that *"Accused Nabban and Rajiba <u>and Mithal</u> directly fired upon the deceased <u>while rest accused fired also upon deceased</u>."* Saindad (PW-4) also contradicted the prosecution's case when in his examination-in-chief he named as many as 15 accused persons including the Appellant who fired upon the Deceased, and then on cross-examination he contradicted himself when he stated that *"Only 5/6 persons fired at the deceased while other accused were their helpers."*

10. The incident occurred at about 5:30 a.m. Muhammad Hashim PW-6 who was signatory of mashirnamas (Exhibits 15-A and 15-D) had stated on cross-examination that *"At the time of incident the electricity was off and there was darkness."* Yet,

during an incident that is described as a surprise attack at such time, the Complainant managed to identify as many as 20 accused persons and Saindad managed to identify 15 accused persons.

11. The Appellant and the two co-accused tried with him were examined under section 342 Cr.P.C. and the Appellant stated that:

> *"All PWs are interested and set-up witnesses……. I am innocent and complainant party falsely involved me due to enmity. I produce photocopy of Cr.No.5/2005. Same was registered by my brother against complainant party. In this FIR co-accused of present case namely Nabban s/o Ameen was accused with complainant party. I pray for justice"*.

Learned counsel for the Appellant submitted that in referring to Crime No.5/2005 the Appellant was contending that since the co-accused Nabban s/o Mohammad Ameen had been implicated by the Appellant's brother with the complainant party in said crime, i.e. there was a dispute between the Appellant and Nabban, therefore it was absurd to allege that the Appellant and the co-accused Nabban were hand in glove. This aspect of the case had been vociferously argued by the Appellant's counsel. On the other hand, learned DPG pointed to the cross-examination of the Complainant to show that though there had been a dispute between the Appellant and the co-accused Nabban s/o Mohammad Ameen, such dispute had been settled between them prior to the incident and therefore a reference to their previous enmity was irrelevant. It will be seen that in his examination under section 342 Cr.P.C., the plea of Nabban s/o Mohammad Ameen was that he had been falsely implicated by the complainant party to get back at him for patching up with the Appellant. Be that as it may, while this aspect of the case may be more relevant to Nabban's case, for the Appellant's case it can at

best be relied upon by his counsel to show enmity between the complainant party and the Appellant, which enmity is otherwise well established.

12. Apart from the contradictions noted above in the oral evidence of the eye-witnesses, there is yet another reason to doubt the oral evidence of Saindad (PW-4). From the cross-examination of Saindad (PW-4) it transpires that his statement under section 161 Cr.P.C. was recorded after a delay of 15 days. In his cross-examination Saindad has tried to explain the delay by stating that on 10-6-2006 he had left for Larkana. But he did not explain why his statement could not be recorded before that, nor did he disclose the date he came back from Larkana, or if he came back later, what prevented him from going to record his statement before that. Such an unexplained delay in the recording of the statement under section 161 Cr.P.C makes the oral evidence of Saindad (PW-4) unreliable and unsafe to sustain conviction. In holding so, I rely on the case of *Muhammad Asif v. The State* (2017 SCMR 486) wherein it was observed by the Honourable Supreme Court of Pakistan that :

> "Again there is another doubtful aspect of the case because Nazar Hussain (PW-9), the father of the deceased who according to the FIR was stated to be guarding the dead body, on arrival of the local police to the spot, however, in the very examination in chief at page/20 of the paper book he has squarely stated that he joined the investigation after one month and one day after the occurrence. There is a long line of authorities/precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses cannot be safely relied upon."

13. Both the FIR and the deposition of the Complainant manifest the prior enmity between the complainant party and the Appellant. Such enmity was categorically cited in the FIR by the Complainant as the motive. In his examination under section

342 Cr.PC the Appellant too had raised the plea that he had been falsely implicated due to prior enmity. It is also established that the eye-witnesses (the Complainant Ali Gohar, Ghulam Qadir and Saindad) on whose testimony the entire conviction rests, were all related *inter se* and with the Deceased, making them partisan witnesses. The rule for appraisal of oral evidence of a partisan witness is that in order for it to be given credence, such oral evidence should be corroborated by other facts/evidence of the case. For the said rule, reliance can be placed on the case of *Umar Hayat v. The State* (1997 SCMR 1076) wherein it was held by the Honorable Supreme Court of Pakistan as follows:

> "It is a settled position of law that evidence of a partisan witness requires corroboration before the same is relied on for conviction. In the case of Muhammad Nawaz v. Abdul Khaliq and others (1971 SCMR 500) the prosecution witnesses were not only related inter se but they were also related with the deceased and it was held that such evidence required some corroboration to ensure that the witnesses were speaking the truth. In the case of Sharif and another v. The State (1973 SCMR 83), it was held that where majority of the eye-witnesses can be described as interested and partisan it is necessary to look for satisfactory corroboration for connecting the accused with the crime. The question as to what sort of corroboration should be there that is answered in the case of Nazir and others v. The State (PLD 1962 SC 269), where it was held that corroboration can be afforded by anything in the circumstances of a case, which tends sufficiently to satisfy the mind of the Court that the witness had spoken the truth. But it was not possible to lay down as to what circumstances would be sufficient for corroboration."

14. But apart from the oral evidence of the Complainant, Ghulam Qadir and Saindad discussed above, which on its own appraisal does not hold up, there is also no other corroborating evidence that places the Appellant at the scene of the crime or implicates him in the commission of the alleged offences.

15. This brings us to the medical evidence of the case so as to see whether that in any way advances the case of the prosecution. The medical evidence is the deposition of the Medical Officer PW-8 (Exhibit No.19), his report of post-mortem of the Deceased (Exhibit No.19-B), and Injury Certificate issued by him relating to the Complainant (Exhibit No.19-C). Since the firearm injury to the Deceased is not attributed to the Appellant, the post-mortem report is not relevant to this discussion. As regards the firearm injury to the Complainant, per the Injury Certificate (Exhibit No.19-C) the following two injuries were said to be suffered by the Complainant :

> *"1. Fire arm injury - a lacerated wound on the left fore arm below the elbow joint nearing 1 cm in diameter margin blackish and inverted. A pellet lying inside the left fore arm.*
>
> *2. Swelling and abrasion on left elbow joint."*

Per the medical evidence, the nature of injury No.1 was *ghayr-jaifah mutalahimah,* while injury No.2 was *ghayr-jaifah damiyah*. But what is striking is that while injury No.1 is said to be caused by a fire arm such as gun, injury No.2 is said to be caused by a "hard and blunt substance".

16. The Appellant's counsel had argued that the mention in the medical evidence of the existence of injury No.2 by a "hard and blunt substance", which has not, and cannot be attributed to the Appellant, establishes that the attributing of injury No.1 to the Appellant is false. On the other hand, the learned DPG argued that both injuries were one and the same. In my view, had both injuries been one and the same, or had injury No.2 been part of injury No.1, that much would have been mentioned or clarified in the Injury Certificate (Exhibit No.19-C). In fact, the Injury Certificate categorically distinguishes between the two injuries by stating that injury No.2 is caused by a "hard and blunt substance" while injury No.1 is caused by a firearm. While injury

No.2 had to be caused by someone in close proximity to the Complainant during the incident, injury No.1, as per the Medical Officer (on cross-examination), was caused from a range of 18 feet. Therefore, it appears that injury No.2 was caused by a person different from the one who caused injury No.1. It is not the case of the Complainant/injured that any of the accused had hit him with a hard and blunt substance before or after he had been fired upon, or that any of the accused persons were in such close proximity to him to do so. This bit of evidence in fact makes questionable the entire incident as propounded by the prosecution.

17. The Injury Certificate relating to the Complainant (Exhibit 19-C) leaves much to be desired. Learned counsel for the Appellant had argued that it is likely that the Complainant was already carrying the said injuries before the incident. However, since the Injury Certificate does not opine on the age of the injuries, it is not possible to determine whether such injuries related to the incident or not. On cross-examination, the Medical Officer acknowledged that he did not extract the pellet from the forearm of the Complainant for forensics. He did not explain why he thought best not to do so. The Injury Certificate was also not coupled with any x-ray of the Complainant's forearm so as to establish the extent of the pellet's penetration and prove the range of fire, or to explain if there was a risk to the Complainant's well being if the pellet was extracted.

18. There is yet another reason to conclude that the oral evidence relied upon is not consistent with medical evidence which reason is as follows. Injury No.1 (firearm injury) caused to the Complainant is by a 'pellet' which suggests that the firearm used was a shotgun. The empties collected were those of a 12 bore weapon. It is the opinion of the Medical Officer (on cross-examination) that the Complainant was fired upon from a

distance of 18 feet. If the Complainant had been a target of such shotgun at that range and fired upon by a person intending to kill, then there is great force in the Appellant's counsel's submission that the Complainant would certainly have suffered more than just a one pellet injury.

19. The evidence discussed above from paras 7 onwards creates reasonable doubt about the veracity of the case of the prosecution. In these circumstances, this Court is not left with no option but to acquit the Appellant from the charge. Thus, in view of the foregoing discussion, I set aside the conviction and the sentence of the convict Muhammad Mithal s/o Muhammad Murad Manglo and acquit him of the charge in Sessions Case No.354/2006 arising from Crime No.51/2006. He shall be released forthwith if not required to be detained in any other criminal case. Accordingly, Criminal Jail Appeal No.39/2013 is allowed.

J U D G E