

IN THE HIGH COURT OF SINDH, AT KARACHI.

PRESENT:-

Mr. Justice Abdul Mobeen Lakho.

Cr. Appeal No. 137 of 2017.

Appellant	Muhammad Ali s/o. Gul Muhammad Hajano through Mr. Jamal Ahmed Mufti, Advocate
Respondent	The State. through Ms. Amna Ansari, Addl: P.G.
Date of hearing	11.02.2020 & 13.02.2020.
Date of Judgment	02.03.2020.

<><><><><>

JUDGMENT

Abdul Mobeen Lakho, J: Being aggrieved and dissatisfied with the judgment, sentence and fine dated 01.03.2017 passed by learned IVth Additional/ District & Sessions Judge-South, Karachi in Session Case No.83/2009, (The State V/s Muhammad Ali Hajano & another), arising from Crime No.376/2008 of Police Station Boat Basin, Karachi U/S 302/34 PPC, whereby the appellant was convicted and sentenced with imprisonment for the life and to pay fine of Rs.50,000/- with the benefit of Section 382-b Cr.P.C. the appellant has preferred this appeal against conviction.

2. The facts giving rise to this appeal, briefly stated, are that on 04.09.2008 the complainant SIP Riaz Hussain of P.S. Boat Basin, ASI Muhammad Hassan informed him on telephone that one dead body of Khuwajasira (Shemale) is laying on road opposite South City Hospital. He went at place of incident, where he came to know the name of Khuwajasir as Fida Hussain. At about 03:40 am he conducted proceedings U/S 174 Cr.P.C. and recorded statements of Khuwajasira namely Danish and Shahzad. He then called the ambulance and shifted the dead body to Jinnah Hospital and issued a letter to the MLO for conducting post mortem. After the post mortem he was handed over the body which he shifted to Edhi Centre in Edhi Ambulance. He was handed over the clothes of the deceased and a projectile recovered from the dead body of the

deceased. The FIR of the incident was registered on 04.09.2008 at P.S Boat Basin, Karachi vide Crime No.376/2008 for the offence under section 302/34 PPC. The projectile and clothes were handed over to I.O, SIP/Muhammad Hameed Khan under a memo and showed him the place of incident situated at South City Hospital near Bilawal Chowrangi. The I.O on 4.9.2008 visited the place of incident and recovered an empty and a black Cap from the place of incident under a memo at Ex.12 at Page-147, in presence of the mashir namely Ghulam Haider and Muhammad Saleem.

3. Challan was submitted against accused Muhammad Ali Hajno S/o Gul Muhammad Hajno and Muhammad Umair Khan S/o Muhammad Ashraf Khan U/S 302/34 PPC before the competent court.

4. After supplying requisite copies, formal charge under Section 302/34 PPC was framed against accused Muhammad Ali Hajano S/o Gul Muhammad Hajano and Umair Khan S/o Muhammad Ashraf Khan as Ex.03 and pleas were recorded at Ex.02 & 02/A, in which accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined complainant PW-01 SIP Muhammad Riaz as Ex.04, who produced entry No.17 as Ex.05, memo of dead body and inquest report as Ex.06 & 07, letter to MLO as Ex.08, letter to Edhi Centre as Ex.09, FIR No.376/2008 and entry No.13 as Ex.10 & 11 and memo of place of incident and recovery as Ex.12. PW-02 Muhammad Adil S/o Muhammad Sultan was examined as Ex.13, who produced letter to Incharge Edhi Centre as Ex.14. Thereafter, learned DDPP for State give up PWs Nazar Hussain and Manzoor Hussain through statement as Ex.15. PW-03/ ASI Abdul Ghaffar was examined as Ex.16, who produced memo of place of incident and arrest of accused as Ex.17. PW-04 ASI Muhammad Hassan was examined as Ex.18. CW-01 Inspector Muhammad Hameed Khan, who is also investigation Officer of the case, his statement was recorded as Ex.19, who stated that he received NBWs for PWs Aftab Ahmed S/o Mushtaq Ahmed and Khuwajasira Danish @ Jugni and Shahzad @ Tooti. He went to address of Aftab Ahmed where he came to know that said Aftab Ahmed has shifted/migrated to unknown place. In this connection he

recorded statements of two witnesses namely Ghulam Haider and Muhammad Saleem. He produced statements alongwith CNICs as Ex.19/A & 19/B. He also enquired about Khuwajasira/Shemale Danish @ Jugni and Shahzad @ Tooti and came to know that they used to reside at different shrines due to which they could not be served. He returned unexecuted NBWs as Ex.19/C and submitted his report as Ex.19/D. Thereafter, learned DDPP for state give up PW ASI Muhammad Iqbal through statement as Ex.20. PW-05 SIP Nazar Abbas being well conversant of the I.O. Inspector Gulzar Hussain was examined as Ex.21, who produced memo of recovery of articles as Ex.21/A. Thereafter, learned DDPP for State give up PW/ PC Fida Hussain through statement as Ex.22. PW-06 Syed Khawar Abbas was examined as Ex.23. PW-07 Inspector Abdul Ghaffar Jummani was examined as Ex.24, who produced memo of arrest and recovery as Ex.24/A. CW-02/Inspector Muhammad Hameed Khan, who is also Investigation Officer of the case, his statement was recorded as Ex.25, who stated that he received NBWs for PW Jawaid Ahmed S/o Basheer Ahmed but the said PW has been shifted/migrated to unknown place. He recorded statements of muhalla people namely Abdul Ghaffar and Hanif Khan. He produced statement alongwith CNICs as Ex.25/A to 25/D, submitted his report alongwith unexecuted NBWs as Ex.25/E and 25/F. PW-08 Dr. Abdl Razzak was examined as Ex.26, who produced post mortem report as Ex.26/A and certificate of cause of death as Ex.26/B. PW-09 I.O./Inspector Hameed Khan was examined as Ex.27, who produced photographs of sealed cap as Ex.27/A, naksha Nazri as Ex.27/B, photograph of deceased as Ex.27/C, letter to chemical examiner as Ex.27/D, examination report as Ex.27/E, letters to FSL as Ex.27/F & 27/G, examination reports as Ex.27/H & 27/I, copies of two entries as Ex.27/J & 27/K, letter to MLO Jinnah Hospital for DNA Test as Ex.27/L, letter to SSP as Ex.27/M, letter to Inchrge A.Q Khan Institute as Ex.27/N, Human DNA Forensic Analysis Report as Ex.27/O, application for identification parade as Ex.27/P, order of Magistrate as Ex.27/Q, application for statement U/S 164 Cr.P.C. of eye-witness as Ex.27/R, notice to PWs as Ex.27/S to 27/U, copies of identification parades as Ex.27/V & 27/W and statement U/S 164 Cr.P.C. of PW Khawar Abbas as Ex.27/X. Later on, learned ADPP for the State closed the prosecution side through statement as Ex. 28.

6. Statements of present accused Muhammad Ali Hajano and Umair Khan were recorded under Section 342 Cr.P.C. as Ex.29 & 30. They claimed themselves to be innocent and they denied all the prosecution allegations leveled against. Neither they examined themselves on Oath U/S 340(2) Cr.P.C. nor produced any defence witness in disproof of the prosecution allegations.

7. Trial Court, after hearing the learned counsel for the parties and assessment of the evidence available on record, vide judgment dated 01.03.2017, convicted the appellants under Section 265-H(ii) Cr.P.C for the offence punishable under section 302 PPC. The benefit of 382(b) was also extended to the appellant. Appellant Muhammad Ali s/o. Gul Muhammad Hajano has impugned the said judgment in this appeal.

8. By this judgment, I intend to decide the appeal filed by the appellant.

9. As regards to the unnatural death of the deceased, the prosecution examined PW-8 Dr. Abdul Razzaq of Jinnah Post Graduate Medical Centre, Karachi to whom the Investigation Officer had dispatched the dead body of Fida Hussain for post mortem, deposed that on 04.09.2008 SHO, P.S Boat Basin referred to him a dead body of Fida Hussain for conducting the post mortem examination and report. Medical Officer started postmortem examination at 07:50 a.m. and finished it at 09:05 a.m. On external examination of the dead body, Medical Officer found following injuries:

External injuries:

Fire arm injury 0.5 cm x 0.5 cm at left nipple showing the wound of entry. The injury was ante-mortem.

Internal Examination:

Skull: Skull bone and neck were normal.

Thorax: On opening the cavity, blood about 600 and 500cc was present in left and right chest cavity.

Heart: Heart was puncture and showing the track bullet on back of right chest.

The middle lob of lung was punctured, metallic piece of bullet were recovered and sealed.

Abdomen: The abdomen was normal. On examination of anal region, no any tear of blood.

10. Thus, there is no doubt that the accused was murdered by fire arm.

11. There were three eye witnesses to the crime. Out of the three eye witnesses only one namely Khawar Abbas was examined the remaining two who identified the accused before the Magistrate could not be examined as both had left their residence with no forwarding address and learned trial court had examined CW/I.O namely Muhammad Hameed Khan in this respect as Ex. 19 and 25.

12. Now the question arises that who had committed murder of the deceased and whether it was on the instigation of the appellant?

13. Learned counsel for the appellant mainly contended that the appellant is innocent and has been falsely implicated in the FIR in this case; that names of the accused have not been mentioned in the FIR; that according to the prosecution case there are three eye witnesses namely Syed Khawar Abbas, Aftab and Javed but the prosecution had examined only one eye witness i.e. PW-06 Syed Khawar Abbas; that the identification parade of the accused was conducted by the Aftab and Javed but no specific role was assigned in the identification parade; that there is a delay of seven days in conducting the identification parade after the arrest of the accused; that both the witnesses identifying the accused were not examined. Hence, the identification parade cannot be used against them; that the magistrate who conducted the identification parade was also not examined; that the PW-6 was not examined on same date i.e. 02.02.2009 though he was present in court and he was withheld from identifying the accused; that the 164 Cr.P.C statement was not exhibited but it was produced by the I.O and it was marked as Ex-27"x"; that the blood was taken on 04.04.2009 after the arrest of the accused on 27.01.2009; that there is no Mashir in whose presence

the blood was drawn; that none of the eye witnesses have mentioned that the accused persons was wearing a cap; that the eye witness is not independent witness and he is interested witness as he is one of the police; that not a single question has been asked in the 342 Statement from the accused with regard to the incriminating pieces of evidence; that it is the case of misreading or non-reading of the evidence; that the learned trial Judge has not applied his judicial mind in convicting the accused. Lastly, Learned counsel for the appellant/accused argued that there is only testimony of PW-06 Syed Khawar Abbas which too is uncorroborated by independent evidence whose testimony is not sufficient to base conviction and as such the appellant should be acquitted of the charge. In support of his arguments, the learned counsel relied upon the cases of law reported in *MUHAMMAD ASHRAF alias ACCHU. VERSUS THE STATE (2019 SCMR 652, SUHABAT ALI VERSUS THE STATE (2018 MLD 850), IMTIAZ alias TAJ VERSUS THE STATE and others (2018 SCMR 344), MUHAMMAD SADDIQUE VERSUS THE STATE (2018 SCMR 71), GUL BAHAR alias GULBO alias ALI GOHAR and another VERSUS THE STATE (2014 YLR 652), AZEEM KHAN and another VERSUS MUJAHID KHAN and others (2016 SCMR 274), MEHMOOD AHMAD and 3 others VERSUS THE STATE and another (1995 SCMR 127), SYED SAEED MUHAMMAD SHAH and another VERSUS THE STATE (1993 SCMR 550) and ZAHAR HUSSAIN SHAH and others VERSUS SHAH NAWAZ KHAN and others (1999 P Cr. L J 1981).*

14. Learned Addl: P.G argued at the very outset at Page-325 Naqsha it is very much mentioned that dead body and cap are mentioned; that the memo at Page-147 is most important which mentioning when the police party alongwith I.O went to the place of incident at 11:00 a.m and they recovered the cap and empty from the place of incident. The two witnesses were not examined as they had left without any forwarding address and in this regard I.O was examined as court witness. The ocular account in the shape of eye witness evidence of PW-06 Syed Khawar Abbas fully implicates the appellant in the offence; that no enmity or ill-will is suggested about the appellant during cross-examination of witnesses; that witnesses were cross-examined at length but no major contradiction has been pointed out by the defence counsel. Lastly, by supporting the

impugned judgment has prayed for dismissal of the instant appeals. In support of his arguments, the learned Addl: P.G relied upon the cases of law reported in *RAFAQAT ALI and others VERSUS THE STATE (2016 SCMR 1766)* and *MUHAMMAD AKRAM RAHI and others VERSUS THE STATE and others (2011 SCMR 877)*.

15. Heard both the counsels and have gone material available on record.

16. It is by now settled principle of law that ocular account in such cases plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution.

17. It is also settled principle that if the court is satisfied about the truthfulness and direct evidence, the requirement of the corroborative evidence would not be of much significance in that, as it may as in present case eye witness account of P.W-6 Syed Khawar Abbas which is un-impeachable and of confidence inspiring character deposed that he saw the co-accused shoot the deceased on the instigation of the present accused and is corroborated by medical evidence. It is observed that the incident was witnessed by PW-06 when he was only 10 paces away from the appellants/accused and the area being bang opposite the hospital was fully lit with a street light. He therefore got a good view of the appellant. He is not a chance witness. He gave his 161 statement in a timely manner alongwith the hulia of the appellant. It may also be observed that PW-06 Syed Khawar Abbas who has no reason or enmity to implicate the present accused attributed role of instigating the co-accused to open fire on the lady (she male) which fact finds place in the 164 Cr.P.C. of the eye witness. The veracity of PW-06 Syed Khawar Abbas therefore could not be discredited in the lengthy cross-examination especially keeping in mind that his presence has not been challenged in any manner whatsoever. Mere fact that he as a journalist and has contacts in the police would not be sufficient to hold that he was interested witness specially considering fact that he had no enmity with the appellant or with the co-accused. As such we find the evidence of the PW-6 to be reliable, trust worthy and confidence

inspiring and believe the same. Reliance is placed on {(Muhammad Ehsan ... V ... The State) 2006 SCMR 1857} wherein it was held that:

This Court has time and again held that even testimony of single witness if found to be reliable, confidence-inspiring and unimpeachable same would be sufficient to base conviction. It is not necessary that in each and every case there should be more than one witness for the purpose of basing conviction considering that fact also that is not the quantity of evidence but the quality of evidence on the basis of which conviction is to be based.

18. Furthermore all the prosecution witnesses supported the case of the prosecution on all the aspects of the case and the defense could not point out any discrepancy or infirmity to dent the case of the prosecution. The defense also failed to prove that there is any enmity because of which the prosecution witnesses deposed falsely against the accused in the present case. The other PWs also corroborative themselves in all material respect with no major contradictions. Reliance is placed on (Niazuddin & another ... Vs ... The State) 2011 SCMR 725.

19. Further perusal of the record shows that the DNA report from I.Q. Khan Institute was found to be similar, to the blood obtained from the accused when compared with the sample of the hair found in the Cap which was recovered from the place of incident which provided the strongest corroborative evidence to the testimony of the eye witness.

20. The opinion in the FSL report under micro scopic examination is positive and reveals that the empty of 9mm which was recovered from the place of incident which when compared to 9mm pistol bearing No. TAX 83393 secured from the accused in Crime No. 33 of 2009 the following marks were found similar:

- a. striker pin marks,
- b. breech face marks,
- c. ejector marks and chamber marks.

21. With regard to the identification parade of the two eye witnesses namely Aftab Ahmed s/o. Mushtaq Ahmed and Javed Ahmed Butt s/o. Bashir Ahmed who were not examined nor the Magistrate who conducted the identification parade was examined by the prosecution would not be fatal to the case of the prosecution as the evidence of the third eye witness which was produced before the learned trial Judge was confidence inspiring and trust worthy and could not be discredited and was corroborated/supported by medical evidence, other PWs, positive FSL and most importantly positive DNA report.

22. For the above stated reasons, I find the prosecution has proved its case against the appellant beyond a reasonable doubt and as such there is no merit in the criminal appeal, and the same is dismissed.