

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Criminal Appeal No. 223 of 2020

Appellants: Muhammad Yasir and Muhammad Rashid sons of Muhammad Yamin Khan through Mr. Merajuddin, advocate.

Respondent: The State through Mr. Siraj Ali Khan Chandio, Additional Prosecutor General, Sindh.

Criminal Revision Application No. 89 of 2020

Applicant: Muhammad Hanif Awan son of Muhammad Hassan Awan through Mr. Muhammad Ilyas Khan Tanoli, advocate in Cr. Revision Application.

Respondents: Muhammad Yasir and Muhammad Rashid sons of Muhammad Yamin Khan, through Mr. Merajuddin, advocate.

Date of hearing: 30.03.2022

Date of announcement: 06.04.2022

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- By this common judgment, we intend to dispose of captioned criminal appeal filed by the appellants Muhammad Yasir and Muhammad Rashid who have challenged the judgment dated 26.02.2020 (*impugned judgment*) passed by the learned 1st Additional Sessions Judge/Model Criminal Trial Court, Karachi-South in Special Case No. 847/2016 (*Re: The State v. Yasir Yameen & another*), culminated from FIR No. 144/2016 registered at P.S. Mehmoodabad, Karachi-South, under section 302, 34 PPC and also criminal revision application filed by the father of deceased in FIR No. 144/2016 for enhancement of sentences awarded to the appellants. Through the impugned judgment, appellants were convicted under Section 265-H(2) Cr.P.C. for the offence punishable u/s. 302 PPC read with section 34 PPC and were sentenced to life imprisonment and were directed to pay compensation under section 544-

A Cr.P.C. in the sum of Rs.300,000/- to legal heirs of the deceased, in default thereof each of them were to suffer S.I. for six months more. Benefit of Section 382(b) Cr.P.C. was extended to them.

2. Briefly, facts of the prosecution case are that on 20.05.2016, complainant Sher Bahadur's son Nabeel Khan came home, complaining about two people who had harassed him at the street of Imran Public School when he had left to meet his friend. The complainant, accompanied by deceased Iftikhar, his son Nabeel and Matloob Awan went to the said street and inquired about the two people who had harassed his son. In the meantime, the two individuals (appellants in the present case) arrived at the place and started abusing the complainant and his son. Nabeel restrained them from using abusive language which infuriated the assailants who each shot from their pistols and one of the bullets hit Iftikhar who later died during his treatment on 25.05.2016. Police recorded the statement of the complainant on 21.05.2016 at 0030 hours which was incorporated in the FIR which was registered by Sub-Inspector Muhammad Azeem.

3. Following usual investigation by the police, a challan was submitted against the appellants. Then, a formal charge was framed against them by the trial Court to which they pleaded not guilty and claimed to be tried. In order to substantiate its case, prosecution examined as many as eleven witnesses namely PW-1 Sher Bahadur, PW-2 Nabeel Khan, PW-3 Matloob Khan, PW-4 Muhammad Hanif Awan, PW-5 Muhammad Afsar, PW-6 Shakir Khan, PW-7 MLO-Dr. Sheeraz Ali, PW-8 I.O SIP Maqsood Ahmed, PW-9 Dr. Rasheed Jumma, PW-10 (Rtd.) Inspector Muhammad Azeem and PW-11 I.O Inspector Muhammad Ejaz Awan and one court-witness namely CW Zubair Khan. Statements of accused were recorded under section 342 Cr.P.C wherein they denied the allegations levelled against them in totality and claimed their false implication. Neither did they examine themselves on oath under section 340(2) Cr.P.C. nor examined any witness in their defence, however, they submitted their statements separately in writing and stated that PW

Nabeel, son of complainant Sher Bahadur, fired upon them, but the bullet missed and hit deceased Iftikhar instead.

4. Learned trial Court, after considering the material available before it and hearing the learned counsel for the respective parties, handed down the impugned judgment and sentenced the appellants as stated supra.

5. Learned counsel for the appellants has contended that there is a delay in lodging of FIR; that there are general allegations and no specific role has been attributed to any of the two appellants; that prosecution has not established as to who caused the fatal injury to the deceased; that none from the complainant and eye-witnesses appeared at the police station to lodge FIR after commission of the incident; that there is six days' delay in sending empties to the Forensic Science Laboratory; that no malkhana entry has been produced through which empties were kept in the malkhana; that the prosecution witnesses have made several improvement in their evidence; that the empties were not sent alongwith pistols to the Forensic Science Laboratory; that the PWs are interested and related to the complainant; that the incident took place during night hours and no source of light has been disclosed; that one mashir of recovery has been declared as hostile and second mashir has been given up; that one pistol matched with the empties but another did not match with the empties secured from the place of scene; that there is conflict between ocular account and medical evidence; that independent witness Zubair Khan has deposed nothing about the facts of the case; that prior to registration of FIR, the investigation officer conducted investigation in the case. In support of his arguments, learned counsel has placed reliance on case law reported as **2020 PCrLJ Note 22** (*Hashim Raza alias Taaro v. The State*), **PLD 2019 SC 64** (*Mst. Asia Bibi v. The State*), **PLD 2019 SC 527** (*notice to police constable Khizr Hayat s/o Hadayat Ullah on account of his false statement; in the matter of*), **2019 YLR 2381** (*Waris v. The State*), **2019 PCrLJ 1378** (*Muhammad Ibrahim and another v. The State*), **2019 PCrLJ 1033** (*Amir Muhammad v. The State*), **2019 YLR 1073** (*Abdul Jabbar v. The State & another*), **2019 PCrLJ 777** (*Abdul Hassan v. The State & 6 others*), 2018 **SCMR**

153 (*Nadeem alias Kala v. The State & others*), **2018 SCMR 2118** (*Haroon Shafiq v. The State & others*), **2017 SCMR 486** (*Muhammad Asif v. The State*), **2017 SCMR 2002** (*Zahir Yousaf & another v. The State*), **2017 PCrLJ Note 19** (*Khurram Jalali v. The State*), **2014 MLD 1504** (*Shams-ul-Haq & 2 others v. The State*), **2014 PCrLJ 783** (*Ali Haider & 2 others v. The State*), **2014 PCrLJ 865** (*Ghulam Qadir v. The State*), **2013 PCrLJ 237** (*Shah Rukh v. The State*), **PLD 2013 SC 386** (*Muhammad Sarfaraz v. The State through P.G. Punjab & another*), **2010 SCMR 1122** (*Muhammad Arif v. The State*), **2010 SCMR 1009** (*Muhammad Shah and another v. The State*), **2009 SCMR 230** (*Muhammad Akram v. The State*), **1999 SCMR 1034** (*Asadullah & another v. The State and another*).

6. Conversely, learned Additional Prosecutor General Sindh has supported the impugned judgment while submitting that the prosecution has proved its case by examining eleven witnesses including three eye-witnesses; that empties have been secured from the scene, referred to the expert and FSL report received was positive; that ocular account has been fully supported by the medical evidence; that the appellants were nominated in the FIR with specific role of making firing at the deceased; and that licenced pistols have been recovered from the houses of the appellants in presence of mashirs. He has placed his reliance on the case law reported as **2008 SCMR 817** (*Haji Tahir Hussain v. Saqlain and other*), **PLD 1975 SC 227** (*Abdur Rashid v. Umid Ali & 2 others*), **2010 SCMR 1025** (*Faisal Mehmood & another v. The State and another*), **PLD 1010 SC 642** (*Aftab Tasleem v. The State*), **2008 SCMR 1228** (*Abdul Majeed v. The State*), **2017 SCMR 1639** (*Muhammad Zafar and another v. Rustam Ali & others*), **1999 SCMR 2303** (*Anar Gul v. The State through Advocate General, NWFP and another*) and **2000 SCMR 1818** (*Sultan & another v. The State*).

7. Similarly, learned counsel for the applicant in Cr. Revision Application for enhancement of sentence has adopted the arguments as advanced by the learned A.P.G. for the State while contending that motive has been alleged and proved by the prosecution for commission of the alleged incident; that the appellants/respondents with their common intention committed murder of the deceased; and that the learned trial

court has not discussed mitigating circumstances for not awarding the normal sentence of death. He has referred to case law reported as **2013 PCrLJ 1298** (*Anwar Khatab & another v. The State*), **2010 SCMR 1706** (*Muhammad Asghar alias Nannah and another v. The State*), **1983 SCMR 697** (*Khushi Muhammad and another v. The State*), **2002 SCMR 1806** (*Arshad Ali alias Achhu v. The State*), **2002 SCMR 785** (*Sakhawat Ali & others v. The Deputy Settlement and Rehabilitation Commissioner & others*), **2011 SCMR 725** (*Niaz-ud-Din & another v. The Stat and another*), **2011 SCMR 1394** (*Shamshad Ali v. The State*) and **2004 SCMR 477** (*Wilayat Ali v. The State and another*).

8. We have heard the arguments advanced by the learned counsel for the appellant as well as learned Additional Prosecutor General Sindh and learned counsel for the applicant and have gone through the entire evidence available on record with their assistance.

9. The ocular account of the incident is primarily furnished by three eye-witnesses, the complainant himself namely Sher Bahadur (PW-1), his son Nabeel (PW-2) and Matloob Khan (PW-3). It is the prosecution case that the incident took place on 20.05.2016, Nabeel came home and complained to his father about two people who had harassed him at Imran Public School when he had left to meet his friend. The complainant then accompanied his son along with deceased Iftikhar and Matloob Khan and when they reached at the place, they started inquiring about the people who had harassed Nabeel meanwhile the appellants appeared at the place of incident and started abusing the complainant. When restrained by Nabeel, the appellants were infuriated and opened fire from their pistols, resultantly injuring Iftikhar with a gun-shot wound to his left shoulder, grazing his neck. The appellants then escaped and Iftikhar was brought to Jinnah Hospital for treatment wherefrom, after being provided first aid, he was referred to Agha Khan University Hospital for further treatment. However, his condition worsened overtime and he was left paralyzed, eventually succumbing to his injury on 25.05.2016. The presence of the three eye-witnesses is not disputed by the appellants, rather they have admitted the quarrel taking place between the parties through their statements filed before the trial Court. Learned counsel for

the appellants contended that several improvements had been made by the eye-witnesses in their evidence, however when the statement of complainant Sher Bahadur u/s 154 Cr.P.C is put in juxtaposition with his depositions recorded before the trial Court and depositions of PW-2 Nabeel Khan and PW-3 Matloob Khan, they perfectly align with each other from minor details to major events such as the appellants' presence. The witnesses are in comfortable unison on all the salient aspects of the incident as well as details collateral therewith. The cross-examination remained inconsequential inasmuch as nothing adverse could be solicited from the witnesses except for a volley of suggestions, vehemently denied. The contention of the learned counsel for the appellants regarding the prosecution witnesses being related to the complainant inter-se and interested is of little, if any, assistance to the appellants. Despite the friendship of the complainant and P.Ws with the deceased, their evidence after careful consideration is found trustworthy. It is a settled principle of law that mere relationship with the deceased is not a ground to discard otherwise trustworthy evidence provided that there is no ill will or enmity between the witnesses and the accused which was not present in this case. Reliance in this respect is placed on the case of *Nasir Iqbal alias Nasra and another v. The State* (2016 SCMR 2152). Even otherwise, we find it to be quite unbelievable that the complainant, who had no previous enmity or quarrel with the appellants, would go as far as implicating them falsely in the murder of his neighbour's son, more so his son's friend to settle a petty argument between the appellants and his own son Nabeel. It appears extremely unreasonable to even consider such a fact. Reference is made to the case of *Islam Sharif v. The State* (2020 SCMR 690). Even if the evidence of such "interested" witnesses is taken out of consideration, the evidence of the complainant himself is straight forward, confidence inspiring and trustworthy and his presence at the time of incident has been explained and admitted, therefore his evidence alone is sufficient to hold the appellant guilty of the charge. Furthermore, the Hon'ble Apex Court has upheld conviction in the case of *Niaz-ud-Din and another v. The State* (2011 SCMR 725) on the basis of solitary eyewitness evidence if

found to be reliable, trust-worthy and confidence inspiring which we find such evidence to be in this case.

10. Besides the ocular evidence, the investigation officer had also recovered two crime empties from the place of incident on 21.05.2016 in the presence of the complainant PW-1 Sher Bahadur and PW-3 Matloob Khan. The two crime empties along with the licensed pistols recovered from the house of the appellants were then sent to the chemical examiner and such report is available at Ex.18-H wherein the forensic examiner notes that both the pistols, one belonging to appellant Yasir marked as 'A' and the other belonging to appellant Rashid marked as 'B' were in working condition and that *"Two 30 bore crime empties marked as 'C1 and C2' were fired from the above mentioned 30 bore pistol No. BBA2404 marked as B in question, in view of the fact that major points i.e. striker pin marks and breech face marks are similar."* As such, expert evidence in the shape of FSL report also corroborates the ocular account of the incident. Moreover, as far as the establishment of safe custody of the recovered pistols is concerned, both the pistols possessed serial numbers, being licensed. These serial numbers were mentioned in the letter sent to AIG Forensic Division Karachi available at Ex.21/G being one 30 bore pistol with serial No. BBA-2404 and another 30 bore pistol with serial No. BBA-593 and the same numbers found mention in the FSL report available at Ex.18/H. Moreover, the forensic examiner also noted that each pistol was secured within a parcel and had two seals each, therefore there is no question of tampering with the same either. With regard to the contention regarding the absence of source of light due to the incident taking place in dark hours of the day, the pictures of the place of incident available at Ex.18-C show the clear presence of a street light, as such the contention is devoid of any merit. Moreover, the parties were known to each other being neighbours as is admitted by both the appellants in their statements before the trial Court. The appellant Rashid Khan had fired from his pistol, twice, as is evident from the FSL report and the appellant Yasir was present at the place of incident, duly armed with his licensed pistol too. His presence at the place of incident has been proven beyond reasonable doubt and all the witnesses have deposed that he too had fired from his

pistol and despite a volley of contrary suggestions during cross-examination, the three eye-witnesses remained firm on their stance. Therefore, even though shots fired by him did not hit the deceased, his presence at the place of incident while being armed with a pistol makes him vicariously liable for the offence committed and he too had shared common intention to take the life of the deceased.

11. After proper assessment and evaluation of evidence, this Court concurs in the conclusion regarding the guilt of the appellants having been proven to the hilt. The point now requiring consideration before this Court is whether there were any mitigating circumstances which could justify the sentences of life imprisonment awarded to the appellants rather than the normal sentence of death. Deceased Iftikhar's father filed Criminal Revision Application No. 89 of 2020 for enhancement of sentence awarded to the appellants. Without doubt, learned trial Court came to the conclusion that the prosecution has established the guilt against the respondent/convict beyond any shadow of doubt. At the very outset, learned counsel for the applicant Muhammad Hanif has argued that the learned trial Court did not examine the mitigating circumstances for awarding a lesser punishment to the appellants/respondents. Even though PW-3 Matloob Khan deposed in his examination-in-chief that the bullet fired by Rashid hit the deceased, said deposition is an improvement when put in juxtaposition with the depositions of PW-2 Nabeel and PW-1 Sher Bahadur, both of whom could not single out as to who's bullet had hit the deceased. Medical evidence, in that regard, cannot point to a single culprit either. Now coming to the motive and the question as to whether the offence was pre-meditated or not, undisputedly, prosecution failed to establish any motive behind the murder of the deceased at the hands of the appellants/respondents. Motive, so alleged, was that a quarrel had taken place between Nabeel, the son of complainant, and the appellants. Deceased Iftikhar was not present with Nabeel during the initial occurrence, as such the appellants had no reason to cause any harm to him. From the depositions of the witnesses, it is evident that when Nabeel restrained the appellants from abusing his father, Sher Bahadur, the

appellants opened fire at him, but missed and hit Iftikhar instead. The alleged incident was done within a matter of seconds without any words being exchanged between the appellants and the deceased Iftikhar. This alone rules out any premeditation of murder by the respondents. It is also a matter of record that it wasn't the appellants who had gone to the complainant party, rather the complainant party came looking for them after the initial quarrel between the appellants and Nabeel. It is a well-settled principle of law that where the prosecution fails to prove the motive behind the commission of an offence, it shall justify awarding lesser punishment for the offence. In this respect, reliance is placed on the case law reported as *Sarwar and another v. The State and others* (2020 SCMR 1250), wherein the Hon'ble Apex Court dismissed an application for enhancement of sentence after the High Court had converted the same from death sentence to life imprisonment. Similarly, in the case of *Ahmad and another v. Shafiq-ur-Rehman and another* (2013 SCMR 583), the Hon'ble Apex Court dismissed an application for enhancement of sentence in the presence of extenuating circumstances. Therefore, judicial propriety demands that in such cases, the sentence of life imprisonment be awarded. Therefore, in existence of the mitigating circumstances as noted above and in view of the dictum laid by the Hon'ble Apex Court time and again in the cases referred above, this Court finds that the learned trial Court rightly awarded life imprisonment by taking a lenient view against the respondents and no illegality or infirmity was pointed out by the learned counsel with regard to the sentence.

12. For what has been discussed above, we are of the considered view that the prosecution has proven its case against the appellants and the view taken by the learned trial Court is just and appropriate, which does not call for any interference. Resultantly, impugned judgment is upheld and the conviction and sentence awarded to the appellants are maintained. As a consequence thereof, captioned criminal appeal and criminal revision application are dismissed being meritless.

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