THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S-154 of 2015.

Date of hearing: 29.11.2022

Date of decision: 05.12.2022.

Appellant:	Shafquat Hussain through Mr. Altaf Shahid Abro advocate.
Complainant:	Through Mr. Mufeed Ahmed Narejo, advocate.
The State:	Through Mr. Nazar Muhammad Memon Additional Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- Appellant stood a trial in Sessions Case No.156/2004, arising out of Crime No.31/2004, PS Thariri Muhabbat, District Dadu, u/s 302, 324, 147, 148, 149, 114 PPC against charge of murdering deceased Mehboob Ali on 16.03.2004 at 0730 hours in prosecution of common object of unlawful assembly alongwith co-accused on the abetment of co-accused Ghulam Qadir (since acquitted) by firing from Kalashnikovs at him near village Makhdoom Pir within jurisdiction of PS Thariri Muhabbat District Dadu, has been convicted vide impugned judgment dated 26.10.2015 by learned 1st Additional Sessions Judge Dadu and sentenced to suffer RI for life and to pay Rs.100,000/- as fine/compensation, in default, to further undergo SI for six months with benefit of Section 382-B CrPC, has challenged the same by means of this appeal.

2. As per brief facts, complainant alongwith his brother Mehboob Ali (deceased), cousin Nadir Ali and maternal cousin Rafiq Ahmed went to graveyard near Makhdoom Pir Vij in early hours on 16.03.2004 for offering Fateha. While returning, when they reached link road leading to village Dawood Dero at about 0730 hours, they saw accused Shafqat Hussain, Riaz Hussain, Khan Muhammad armed with Kalashnikovs, Shahid Hussain with a pistol and Ghulam Qadir with a

repeater. Applicant Ghulam Qadir instigated others to not spare complainant party. Upon which, appellant Shafqat Hussain and Riaz Hussain fired shots from their respective weapons upon complainant party. A fire made by appellants hit Mehboob Ali on his chest, he fell down and died. Accused Khan Muhammad and Shahid also made fires upon complainant party but they ducked down and saved themselves. Villagers present nearby got attracted to the spot, seeing them, the accused decamped while issuing threats to complainant party.

3. After usual investigation, Challan was submitted before the trial Court in which appellant was shown absconder. The trial, however, commenced against co-accused namely Shahid Hussain, Khan Muhammad, Ghulam Qadir, Riaz Hussain and ended in their acquittal vide judgment dated 19.01.2012, while the case against appellant Shafquat Hussain was kept on dormant file. Appellant after one year thereof on 31.01.2013 surrendered before the Court and was remanded to judicial custody. Thereafter, trial against him started in which prosecution examined six witnesses including complainant, Medico-Legal Officer etc. who have produced all necessary documents to bring home charge against appellant. In 342 CrPC statement, appellant has simply denied the prosecution case without however leading any evidence in defence. Finally, the trial Court vide impugned judgment has convicted and sentenced the appellant in the terms as state above. Hence, this appeal.

4. Learned defence counsel has argued that appellant is innocent; there are material contradictions in evidence of witnesses; eye witness Nadir Ali had filed a written application before the trial Court stating that he had not seen the incident, which makes the case against appellant doubtful; medico-legal officer has opined that deceased sustained bullet in sleeping position; that blood stained earth and clothes of deceased were sent for FSL report after more than 1 ½ years of incident as is evident from FSL report produced in previous trial against co-accused. He has relied upon 2010 SCMR 566, 2007 SCMR 212, 2007 SCMR 162, 1980 PLD SC 201 and 2020 PCrLJ (Note) 31 to support his arguments.

5. On the other hand, learned counsel for complainant and learned Additional PG both have supported the impugned judgment

stating that appellant has been assigned specific role of causing death of deceased which is supported by direct evidence of witnesses.

6. I have considered respective pleas of parties and perused material available on record including case law cited at bar. A perusal of record shows that complainant in FIR has stated that on instigation of co-accused Ghulam Qadir, appellant Shafqat Hussain and co-accused Riaz Hussain, already acquitted, had made straight fires upon them from their respective Kalashnikovs and one bullet fired by appellant Shafqat Hussain had hit deceased on his chest. In his evidence Ex.49 he has not taken name of accused Riaz Hussain for making firing upon deceased and has stated that it was appellant Shafqat Hussain who made a direct fire from his Kalashnikov upon his brother Mehboob Ali with intention to commit his murder. Further, in FIR he has stated that as soon as they reached the spot they saw the accused standing duly armed with weapons. In his evidence, he has stated that accused had come to spot riding on two motorcycles. His assertion has been contradicted by PW.2 Rafique Ahmed, an eye witness, who has stated that the accused came in front of them by foot. Said PW has stated that on instigation of Ghulam Qadir all accused started firing on them and then appellant Shafqat also started doing so and his fire hit Mehboob Ali on his chest. This is different to what complainant has said. In his cross examination, he has stated that accused were standing at a distance of 15 meters (almost 45 feet) from them and conjointly fired at complainant party, members of which, from narration in FIR, appear to be standing together in close proximity. But strangely, it is only the deceased who received a single bullet injury, and none of PWs sustained a scratch from alleged heavy firing made by accused.

7. Factum of heavy firing is actuated from memo of place of incident which shows that six empties of rifle 7.62 and three misfired bullets of same weapon were recovered from place of incident, besides blood stained earth. Both pieces of evidence were collected and duly sealed but strangely none of them was sent for FSL report in investigation, and instead, the FSL report Ex.35/C shows that blood stained earth and clothes of deceased were received by chemical examiner on 23.11.2005 through a letter dated 10.11.2005 although the incident had occurred on 16.03.2004. Such long delay, since has not

been explained, would be fatal to the prosecution insofar as connectivity of such pieces of evidence qua guilt of the appellant is concerned.

8. Complainant and PW.2 both have stated in their evidence that all the accused armed with different weapons had fired upon them, but from place of incident, empties and missed bullets of only 7.62 mm rifle were recovered and not a single empty of a bullet fired from pistol or repeater was found. Then, it beggars belief that why the accused targeted deceased only and spared complainant and others present on the spot, although it has been asserted that they had issue with entire complainant party, and not with deceased only. Targeting the deceased only and leaving others unscathed so that they could testify against them in the Court of law does not appeal to common sense. Next, I may add, when all the accused fired, or at least two accused appellant and acquitted-accused Riaz Hussain, as is stated in FIR, it would not be humanly possible to distinguish and/ or perceive which accused's bullet had hit the deceased. Therefore, assertion of the complainant and PW that it was a bullet fired by appellant Shafqat Hussain which had hit the deceased is not without a question either.

9. Complainant and PW.2, an eye witness, both have stated that at the time of incident Nadir Ali, another cousin, was also present with them. But said Nadir Ali filed an application in trial Court stating that he had not seen the incident, which was taken on record, and the trial Court has mentioned about it in the impugned judgment. Thereafter, learned State Counsel also filed a statement giving up said PW. Illustrations (g) to Article 129 of the Qanun-e-Shahadat Order, 1984 in such a case would be attracted that the said witness, if had been examined, would not have supported the prosecution case. His filing application and non-examination has, to a certain extent, dealt a severe blow to presence of witnesses at the spot, which if seen with the discrepancies pointed out above would lead one to get suspicious about presence of witnesses on the spot and the manner in which incident has been described by them to have happened.

10. Medico-Legal Officer in cross examination has opined that the fire to the deceased was made from a distance of 05 to 20 feet, which does not align with the distance between the accused and complainant party described by PW.2 Rafiq Ahmed in his cross examination (45 feet). Doctor has further suggested that probability of the deceased having

sustained injury in sleeping position cannot be ruled out, which does not fit in with description described by the witnesses in this regard. Long abscondence of appellant cannot be considered to be sufficient proof of his being guilty, nor has the same even been considered by learned trial Court. More so, regarding his absconsion, no question has been put to him in his statement u/s 342 CrPC.

11. Furthermore, investigation in this case appears to be faulty as neither the items recovered from place of incident plus clothes of victim were sent for lab report within time nor a Tapedar was deputed to prepare sketch of place of incident to point out exact location of the deceased with regard to presence of accused and witnesses.

12. All these facts and circumstances, if seen from bird's eye view, make the case against appellant tinted with doubt. It is settled that for giving benefit of a doubt to an accused, it is not necessary that there may be multiple circumstances creating doubt over veracity of the case. If there is a single circumstance creating a reasonable doubt, benefit of which has to be extended to the accused as a right. This being the position, I am of the view that prosecution, because of existence of doubt, as discussed above, has not succeeded in proving the case against the appellant. As a result, the appeal is allowed, and the appellant is acquitted of the charge. He shall be released forthwith if not required in any other custody case.

J U D G E

Irfan Ali