

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Jail Appeal No.S-44 of 2020  
Criminal Jail Appeal No.S-45 of 2020  
Criminal Appeal No.S-56 of 2020

Date of hearings: 26.09.2022 & 03.10.2022.  
Date of decision: 14.10.2022.  
Appellants: Mazhar Ali and Mst. Uzma,  
Through M/s Syed Shafique Ahmed Shah and Mir  
Naeem Akhtar Talpur, advocates.  
Complainant: Mushtaque Ahmed,  
Through Mr. Aijaz Shaikh, advocate.  
The State: Through Mr. Shahzado Saleem Nahiyoon, APG.

**J U D G M E N T**

**MUHAMMAD IQBAL KALHORO, J:-** Appellant Mazhar Ali, for murdering Ahsan (the deceased), and appellant Mst. Uzma for instigating him to murder Ahsan for refusing to marry her, at Al-Madina Stop Dando Link Road near Khosa Phatak, Matli on 17.10.2019 at 2015 hours, stood a trial as S. Case No.12/2019 in the Court of Sessions Judge/MCTC, Tando Muhammad Khan, and have been convicted to suffer imprisonment for life and pay fine of Rs.100,000/- each, in default, to undergo R.I for 06 months more with benefit of Section 382-B CrPC vide judgment dated 31.01.2020.

2. In addition, appellant Mazhar Ali has been convicted and sentenced, u/s 25 of Sindh Arms Act, 2013 for keeping an unlicensed pistol (crime weapon) for 10 years and fine of Rs.30,000/, in default, to undergo R.I. for two months in S. Case No.33/209 (Jail Appeal No.S-45/2020) registered at the same police station vide judgment announced on the same date i.e. 31.10.2010. Both the impugned judgments have been challenged by him by means of appeals in hand.

3. Record shows that complainant appeared at police station Tando Ghulam Hyder on 18.10.2019 at 1900 and reported, reduced as FIR No.141 of 2019, that his son Ahsan, his nephew Muhammad Naeem and he on two motorcycles set out (from home) for village Haji Mahi Khaskheli to run an errand. His son, alone on his motorcycle, was slightly ahead of them on the

road. At about 08:15pm when they reached Dando Link Road, an unknown person riding a motorcycle went past them, intercepted his son and hit him on his forehead with the butt of his pistol before making a straight fire from it at the same place i.e. forehead, and killed him at the spot. Their cries for help went in vain as meanwhile the accused sped away towards Matli. He then called the police which arrived after a short while and arranged Edhi Ambulance on which the deceased was shifted to Matli Hospital for postmortem, etc. In late hours, after due formalities, the complainant returned to home for burial of his son and lodged report next day, as stated above, after attending to condolence messages.

4. On 24.10.2019 SHO along with his team, complainant and PW Muhammad Naeem, having gained information about presence of accused at Mehfil Lawn, Matli, proceeded to the said place and found him available there. He was identified by the said two witnesses to be the same person who had committed murder of Ahsan. The accused sensing the situation tried to escape but the police apprehended him at about 9pm and recovered a pistol loaded with three live bullets from him. A memo, recoding such events, was prepared and the accused was brought at Police Station. Next day i.e. 25.10.2019 complainant visited Police Station and made a further statement, duly recorded in police dockets and produced by him in evidence, that he had come to know that appellant Mst. Uzma had asked his son to marry her, but when his son declined, she got riled up and instigated appellant Mazhar Ali to murder him (Ahsan). Acting upon it, police arrested Mst. Uzma on 29. 10.2019. But before that, on the same day in the morning, Mst. Uzma, being called by SHO/IO, had visited Police Station with her father where she and appellant Mazhar Ali were made to confront each other over the incident in presence of SHO/IO. Appellant Mazhar Ali admitted killing the deceased at the instance of appellant Mst. Uzma. And Mst. Uzma on her part did not deny it or the motive: the deceased had refused her offer to marry her. This whole episode was recorded on camera, and its transcript has been produced in evidence.

5. The trial commenced thereafter and prosecution, to prove the charge has examined 07 PWs and has produced all necessary documents: FIR, Post Mortem Report, Memos, and Relevant Entries etc. Appellants, when confronted with such evidence u/s 342 CrPC, have simply denied it and pleaded innocence. They did not opt to examine themselves on oath. However, appellant Mazhar Ali has examined one Hussain Bux as his defense witness. Finally, vide impugned judgment, the trial Court in terms as set out in Para 1 above has convicted and sentenced the appellants.

6. Learned defense counsel have submitted that appellants are innocent and have been falsely implicated in the case; the evidence is full of contradictions; there is no direct evidence against appellants; FIR does not bear name of any of appellants, and that there is delay of one day in registration thereof; no identification parade of appellant Mazhar Ali was conducted; source of light on which appellant Mazhar Ali was identified by the witnesses has not been disclosed in the case; appellant Mst. Uzma was arraigned in the case on a further statement of complainant but he has not revealed source of getting such information from; video-recorded transcript of conversation between the appellants admitting the guilt before police officer carries no value in law, it is a manipulated document even otherwise as there is no record of the lady appellant visiting police station with her father before her arrest; Call Data Record (CDR) has been produced to establish contact of appellant Mst. Uzma with the deceased and appellant Mazhar Ali, but it is without any transcript of conversation firstly and secondly it has not been verified by the relevant mobile company, as such it is a weak type of evidence and cannot be relied upon in proof of such fact; place of incident is doubtful as nothing was recovered from it; although complainant claimed that he and PW Naeem were with the deceased on the fateful day on a separate motorcycle but that motorcycle was not handed over to IO in investigation to establish such fact; the empty recovered from the spot and crime weapon recovered afterwards were sent together on the same date for Forensic Science Laboratory (FSL) report, as such the positive report in this regard has no value in law. In support of their contentions, learned counsel have relied upon 2022 SCMR 1107, 2021 SCMR 381, 2021 522, 2016 SCMR 274, PLD 2016 SC 951, 2020 YLR Note 82, 2019 YLR Note 114 and 2018 YLR 1092.

7. Learned counsel for complainant and Additional PG, au contraire, supported the impugned judgment and contended that there was sufficient material connecting the appellants with the offence. Their role is ascertainable from evidence of witnesses, positive FSL report of crime weapon, recovery of mobile phones with Call Data Record (CDR) showing both the appellants in constant contact with each other on the day of incident, and CD & USB, containing conversation between them and SHO in which they not only admit murdering the deceased but the reason why they did so.

8. I have heard the parties and perused material available on record plus the case law relied at bar. Delay of one day in FIR, urged in defense, is immaterial and cannot be counted to have undermined the prosecution case. For, it is registered against an unknown accused and not against the appellants by name to think of any manipulations or deliberation on the part of complainant

to name them in the case. Insofar as the arguments: appellant Mazhar Ali has been arraigned on the basis of weak evidence, or no identification parade was held to establish his identity, or the complainant in his further statement has not even specifically charged him in the murder of his son, are concerned. It may be said that there are two eye-witnesses, the complainant and his nephew Muhammad Naeem. Latter's 161 CrPC statement was recorded on 19.10.2019 next day of FIR in which he has disclosed name of accused as Mazhar Ali, and the circumstances as to how he came to know of him. He says that he had seen him in Matli city and identified him. Matli is the city where the parties reside, and it is not a big city at all to exclude such possibility. He then made an inquiry of his identity from bystanders and was apprised of his and his father's name accordingly. He has reiterated these facts in his deposition, without any pernicious challenge by the defense divesting such facts of inherent value. So, when further statement of the complainant was recorded on 25.10.2019, identity of appellant Mazhar Ali and the role played by him had already become known and there was no need to repeat the whole story therein, or to hold identification parade for this purpose. Nonetheless, the complainant has categorically stated in the statement that appellant Uzma had her son murdered through appellant Mazhar Ali. His identity was also confirmed at the time of his arrest when the two eye witnesses had, without any motive to falsely implicate, immediately recognized him to be the accused. Then, recovery of a pistol from him in investigation, identified in FSL report to be the crime weapon, has further wedded him with the offence. In the court, at the time of deposition, both the witnesses have identified him to be the same person who had committed murder of the deceased. His identity and role played by him in the offence, both stand established from such evidence. Witnesses' evidence insofar as locale of injuries and weapon used is concerned has been supported by the medical evidence, to boot. There is no record of any ill-will on the part of witnesses to involve an innocent man in the murder of deceased by substituting him with the real culprit.

9. The incident took place at 8.15.pm and at about 8.25.pm, just after 10 minutes, SHO/IO was called by the complainant from the spot. This fact itself proves presence of the witnesses with the deceased on the spot at the relevant time. Apart from evidence of SHO/IO who has confirmed such facts in his deposition, the inquest report, the first document prepared at the spot by the police after arrival, reveals lucidly presence of the complainant, disclosure of events by him as they happened plus condition of the body and the manner it was found in. Noticeably, all such data has been noted in the document at about 8.40.pm, just after 25 minutes of the incident. In presence of such undeniable facts, there is no room to agree with the defense and to get

skeptical about presence of the witnesses at the relevant time. It is not possible for a person, not present at the spot otherwise, to arrange presence of police and completion of preliminary formalities by them within such a short span of time and make it part of the record. Presence of the witnesses in fact is thus borne out of the record itself. Not only presence of the witnesses but the place of incident, challenged in defense too, can be recognized from such material, besides, from recovery of blood stained earth and crime empty from there. Additionally, during investigation SHO/IO had recovered cell phones of appellants Mazhar Ali, Mst. Uzma and the deceased and through I.T. branch, SSP office collected their CDR which he has produced in his evidence. This record shows appellants Mazhar Ali and Mst. Uzma were in constant contact with each other before and after the incident. All these pieces of evidence identifying appellant with the offence -- his presence at the spot, his identity verified by the witnesses at the time of his arrest and also in the court in evidence, his specific part in the offence explained by the witnesses exactly, supporting medical evidence, recovery of crime weapon from him, record of his cell phone — not crushed by defense in cross examination, point out unequivocally to involvement of appellant Mazhar Ali in the commission of present offence beyond a reasonable doubt.

10. The case against appellant Uzma is nonetheless not so strong. She has been arraigned on the basis of a further statement of complainant recorded on 25.10.2019, after 7 days of FIR. He essentially says therein that he could not identify the accused in time and now he has come to know that she had proposed his son but he refused. She got infuriated and got him killed through appellant Mazhar Ali. In his evidence, he has made the same assertion, but, when pressed in cross examination, has expressed that his deceased son had in fact disclosed to him 2/3 times about her behavior. In reply to another question, he has revealed that appellant Uzma had indeed had come to his house and issued his son threats of killing, in case he refused to marry her. But strangely, this fact: she herself visiting her house and threatening his son in his presence, important as it appears to be, is not quoted by him in the statement. The impression which one can gather from a perusal of his statement is that as if he was informed by someone outsider about proposal of appellant Uzma to his son which when he refused to accept led to the tragedy. But when one looks at his evidence, it becomes clear that he had entire knowledge about appellant Uzma and her offer to his son, his refusal, and her serious threats to him, sufficient to spring him, after the tragedy, into action to check with her first or at least alarm the police to do so. But he did not and remained mum for 7 days. It begs therefore many questions about his conduct and also about veracity of his

further statement implicating her. From the facts as they stand, it seems that inspection of phone recovered from arrested accused Mazhar Ali on 24.10.2019 led to discovery of his contract with the lady appellant on the fateful day at the crucial time. And when the complainant found out about it, he got convinced about her involvement and arraigned her in the case. Otherwise, there is no reason why -- despite her eccentric manner in proposing his son and extending threats to him in home in his presence if he decided not to marry her -- the complainant would no suspect her first in the wake of tragedy. Apart from such apparent anomaly, conduct of remaining family members, none of whom has come forward to support such important aspect and lend credence to what has been alleged by the complaint against appellant Uzma is completely unexplainable and clouds this part of the story.

11. Next piece of evidence relied upon by prosecution against her is CDR of her phone showing her to be in contact with the main accused Mazhar Ali on the fateful day. Her contact on phone with the latter would not *ipso fact* mean that she had instigated or was instigating the latter to commit murder of the deceased, or that he was actually acting upon her instigation, or that she even knew that the latter was going to act upon her instigation and commit murder of the deceased. To make her guilty of such charges, these facts were needed to be independently established through reliable evidence, or by producing, at least, transcript of conversation between the appellants in confirmation of abetment by her and/or conspiracy between the two to commit the alleged offence. A person would be convicted for the offence of abetment only when it is proved through evidence that the offence is committed in consequence of the abetment. Likewise, an accused would be held responsible and convicted for a criminal conspiracy when there is evidence indicating a conscious agreement between two or more persons to do an illegal or unlawful act or to do a lawful act by unlawful means — and not merely because there is intention of two or more persons to commit an offence. No evidence as above to evince that she had instigated appellant Mazhar Ali to do away with the deceased or that the latter did so in consequence of her instigation or that she had consciously agreed with appellant Mazhar Ali to murder the deceased has come on record satisfactorily.

12. Yet another piece of evidence is her conversation with the appellant Mazhar Ali and SHO/IO recorded on camera, the transcript of which the latter has produced in his evidence. It is said that she was called with her father at police station before her actual arrest for such purpose. But there is no record — SHO has indeed admitted it -- that before her arrest she happened to be present at police station for this purpose. It is not clear therefore that under



what conditions this episode took place, whether it was made voluntarily with the consent of appellants, and before that the appellants were warned of probable consequence in law of such disclosure, and that it would be used against them in the court of law as a piece of evidence, and that it was their constitutional right to remain silent and not to self-incriminate and reveal their involvement in the offence [Article 13(b) of the Constitution], etc. Although it is a different question that if all these rudiments were ensured, would it still be an admissible evidence, keeping in view the fact that this disclosure was made before a police official. But defiantly non-compliance of such fundamentals has taken away whatever value in law could have been attached to this filming. There is yet another factor, to boot, although SHO/IO has produced CD & USB, containing recording of episode, but nowhere has it transpired that they were played in the court in presence of the appellants, and their contents verified. And the appellants were afforded an opportunity to question them in cross examination. Nor, the record shows, before framing of the charge, in compliance of section 265-C, a copy of such documents i.e. CD & USB were provided to the appellants for putting up defense accordingly. In fact, SHO/IO has admitted in his evidence that these pieces of evidence i.e. CD & USB are not even the case property and were not even sent to forensic lab for evaluating their veracity. Hence, obviously, such transcript reflecting purported conversation between appellants with SHO/IO admitting their guilt cannot be construed as a piece of evidence in law. Minus such evidence coupled with foregoing discussion discarding other material brought by the prosecution against her, the case against appellant Uzma has become doubtful.

13. In the case appertaining to recovery of a pistol from appellant Mazhar Ali [found licensed in the name of his grandfather who has since been acquitted vide impugned judgment for want of evidence showing him facilitating his grandson Mazhar Ali to use his weapon in the offence] which he used in the commission of crime. The prosecution has examined complainant who was SHO at the relevant police station, and HC Ali Hyder, the Mahsir of recovery. Both have supported recovery of said pistol from him on the day of his arrest i.e. 24.10.2010 from Mehfil Lawn, Matli. Apart from these two witnesses exclusively examined in this case, both complainant and PW Muhammad Naeem examined in the main case have supported factum of recovery of a pistol from him on the day of his arrest in their presence. In cross-examination of these witnesses, nothing to doubt such recovery has come on record. The pistol later found to be licensed one would not relieve the appellant of the offence u/s 25 of Sindh Arms Act, 2013 which reads that whoever uses or attempts to use firearm licensed or unlicensed or an imitation firearm with

purpose to commit any crime, any lawful act or to resist or prevent his lawful arrest or detention or of any other person shall be punishable with imprisonment which may extend to ten years and with fine. I am therefore of the view that prosecution has succeeded in bringing home the charge against the appellant of using the said pistol in the crime.

14. Consequently, in the light of above discussion, criminal jail appeals No.S-44/2020 & No.S-45/2020 filed by appellant Mazhar Ali are dismissed and his conviction and sentence are accordingly maintained with one modification that Rs.100,000/ to be paid by appellant as fine u/s 302 (b) PPC is converted as compensation u/s 544-A, as section 302 (b) PPC does not stipulate provision of fine upon the accused. However, cr. appeal No.S-56/2020 by appellant Uzma is allowed and she is acquitted of the charge on benefit of doubt. She shall be released forthwith, if not required in any other custody case. The appeals in hand are accordingly disposed of in above terms.

JUDGE