

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 749 of 2019

Appellant : Asadullah Chohan
through Mr. Naeemullah Bhutto, Advocate

Respondent : The State
through Mr. Talib Ali Memon, A.P.G.

Complainant : through Mr. Akbar Awan, Advocate

Date of hearing : 28th September, 2022

JUDGMENT

Omar Sial, J. On 02.09.2014 at about 8:00 p.m., Aamir Ali informed his father Gulzar Ahmed, that his maternal uncle, a man named Sarwar along with his daughter Mehak, had both been shot at. When Gulzar reached the identified spot he saw Sarwar lying dead having been shot several times whereas a bullet had grazed the head of Mehak and she was bleeding. Sarwar's wife, Ambreen, told Gulzar that Asadullah Chohan, who was Gulzar's nephew, had shot Sarwar and in the firing Mehak too had been injured. F.I.R. No. 348 of 2014 was registered under sections 302, 324 and 34 P.P.C. at the Baloch Colony police station on 03.09.2014 at 12:10 a.m. Asad was arrested the same day at 5:30 p.m. from a bus station when he was ostensibly trying to escape.

2. Asad pleaded not guilty to the charge against him and claimed trial. At trial the prosecution examined 8 witnesses. **PW-1 Gulzar Ahmed** was the complainant. **PW-2 Muhammad Hasan Malik** was a person who was known to Asad and who claimed that the night Asad had killed Sarwar, he i.e. Malik was with him sitting on a motorcycle outside. **PW-3 Ambreen Rajput** was the wife of the deceased and the only eye witness of the crime. **PW-4 Ameer Muhammad** alias Naeem was the person whose motorcycle Asad had borrowed to go to Sarwar's house. **PW-5 S.I. Sadaruddin Lakhani** was the police officer who arrested Asad and then effected recovery of the

crime weapon on Asad's pointation. **PW-6 Ghulam Raza** was the learned magistrate who recorded a section 164 Cr.P.C. statement made by PW-2 Muhammad Hasan Malik. **PW-7 Dr. Qarar Abbasi** was the doctor who conducted the post mortem on Sarwar's body. **PW-8 S.I. Ansar Pervaiz** was the first investigating officer of the case.

3. Asad recorded his section 342 Cr.P.C. statement in which he denied all wrong doing. He also elaborated by stating that Ambreen had falsely implicated him because she had been pressurized by her brother. He said that the deceased had a business dispute with Ambreen's brothers and as Asad was Sarwar's business partner, he was falsely implicated in the case so that Sarwar's brothers could usurp his property. He also recorded that Ambreen is living separately now and if she was recalled as a witness she would not give the same testimony she did at trial.

4. The learned 1st Additional Sessions Judge, Karachi South on 24.10.2019 held Asad to be guilty of murder and sentenced him to a life in prison as well as directed him to pay a fine of Rs. 500,000 and if he failed to do so he would have to spend another 6 months in prison. Asad was also convicted for an offence under section 324 P.P.C. for the injury he caused to Mehak and sentenced to spend 5 years in prison as well as pay a fine of Rs. 50,000 or spend a further 1 month in prison. It is this judgment that has been challenged through these proceedings.

5. The learned counsel for the appellant has argued that there is a discrepancy in the time of recording the section 154 Cr.P.C. between what the complainant claimed it was compared to the time written on the statement; that Mehak remained absent at trial therefore the story was made up by the defence to show the reason for her mother, Ambreen, to be present at the place of incident; that Ambreen said at trial that it was between afternoon and sunset that the incident occurred whereas in actuality it occurred at 8:00 p.m.; Mohammad Hasan recorded his statement after 7 days hence he could not be believed; the first information of the murder was given to 15 however the person receiving

the information was not examined; that the number of empties and crowns found on the spot did not reconcile with the injuries sustained by the deceased. To the contrary the learned APG and the learned counsel for the complainant supported the impugned judgment.

6. I have heard the learned counsels for the appellant as well as the complainant and the learned APG. With their assistance the record has also been reviewed. My observations and findings are as follows.

Eye witness

7. The record reflects that PW-3 Ambreen Rajput was the only eye witness to the incident. As she permanently lived in Shahdadkot (a town 500 km away from Karachi) she explained her presence on the spot by stating that one foot of her daughter Mehak was paralyzed since birth and that it was for her treatment that she would have to come to Karachi. It was between afternoon and sunset, while she was preparing food for her husband Sarwar, that there was a knock on the door. When she opened the door, Asad had barged in and taking a pistol out from his shalwar, opened fire on Sarwar. Mehak was also injured in the encounter. Picking up Mehak, she ran down the stairs where she saw another boy sitting on a motorcycle outside. This boy, as later evidence would reveal, was PW-2 Muhammad Hasan Malik. She had then called her relative PW-1 Gulzar Ahmed, told him about the incident, and requested help. She, in what I believe was an honest statement, admitted that she did not know why Asad killed her husband but did say that Asad was a relative of her husband and that they were business partners in Shahdadkot but differences had developed between the two. Her statement under section 161 Cr.P.C. was recorded soon after the registration of the F.I.R.

8. In her cross examination Ambreen admitted that Asad had come earlier that day to her house along with his sister and also had tea at their house. He had left and then come later when he fired at Sarwar. She acknowledged an error she made in her examination-in-chief when she said that she had come to Karachi for the treatment of her daughter Mehak

whereas she had actually come for the treatment of her son Muhammad Aslam. She however clarified herself by stating that both her children had medical issues with their feet. She also acknowledged that while she had said in her examination in chief that she had seen another boy sitting on the motorcycle outside, it was actually the neighborhood people who had told her and that she herself had not seen him.

9. In spite of the 2 lapses made by Ambreen, as mentioned in the preceding paragraph, I still find her testimony to be true, confidence inspiring and trustworthy. It must be kept in mind that Ambreen was a hard core rural lady and being exposed to the intimidating environment of a trial and recording evidence, it is but natural that her testimony at trial had a few lapses. In my view, her admitting to the lapses without making any effort whatsoever to hide the same or provide manipulated explanations, adds to the intrinsic value of her testimony. Asad was well known to her, the incident happened right in front of her and inside a well-lit room hence there is no chance of a mistaken identity.

PW-2 Muhammad Hasan Malik and PW-4 Ameer Muhammad alias Naeem

10. The evidence of these 2 witnesses has to be read together. Naeem testified that it was about 7:15 p.m. on 02.09.2014 when Asad had come to his shop and asked Naeem if he could borrow his motorcycle as his grandfather was unwell. Asad had returned the motorcycle after 10 minutes. Muhammad Hasan attempted to corroborate Naeem's testimony by giving a story which is far from being believable. A bare read of his testimony supports this observation. His account was also negated by PW-4 Naeem when Naeem said that neither was Hasan present when Asad had come to borrow his motorcycle nor had he even seen Hasan that day. Hasan's section 161 Cr.P.C. statement being recorded 7 days after the occurrence further raised suspicion about the veracity of his testimony. I believe that Hasan was "created" as witness by an over-zealous investigating officer who perhaps had little faith in the statement recorded by the eye witness Ambreen. The testimonies of both these witnesses

added no value to the prosecution case. In particular Hasan's statement. If what the prosecution alleged was true, I see little reason as to why Hasan himself was not investigated as an accused. There might be some truth to what Hasan said at trial, but that truth was over shadowed by the long and unbelievable statement he gave.

Recovery

11. 4 empties and one crown of a bullet were recovered from the place of incident at 12:50 a.m. on 03.09.2014. Asad was arrested the same day at 5:30 p.m. At his pointation the pistol he had used in the crime was recovered at 7:30 p.m. The empties and the weapon were sent for analysis on 04.09.2014 and the Forensic Lab opined that the empties recovered from the place of incident had been fired from the pistol recovered at the pointation of Asad. Recovered empties and the weapon were sent for analysis with great promptitude. The Forensic Lab report therefore also corroborates the prosecution version.

Medical Evidence

12. The doctor who conducted the post mortem found 6 injuries on the deceased where the bullet had gone through the body. 2 further skin deep injuries were also found on the person of the deceased. Learned counsel has argued that the medical evidence does not reconcile with the prosecution version as only 4 empties were found from the place of occurrence. The learned counsel is correct in his assertion. I however am of the view that the discrepancy in the number of empties collected from the scene of the incident and the actual shots fired, in the circumstances of the case, is not a ground strong enough to upset a conviction. The turmoil, panic and confusion which must have necessarily ensued after the sudden firing by Asad, could be a perfectly legitimate reason for the police to have not conducted a thorough search of the room. Even if one were to accept the argument, there is no explanation as to how the 5 empties recovered from the spot were opined to have been fired from the weapon recovered at Asad's pointation.

Injuries to Mehak

13. Learned counsel has argued extensively that while Mehak was said to have been injured in the incident, the entire prosecution case is silent as to why she was not examined at trial or at least why her medical reports were not produced at trial. I am not convinced that Mehak's absence at trial was due to any clandestine or ulterior motives of the prosecution. It must be kept in mind that the little girl was a differently abled minor and of course the parents would not like her to be exposed to the rigors of investigation and trial.

Defence taken by the accused

14. As is also mentioned above, the defence taken by the appellant at trial was that he had been falsely implicated in the case because Ambreen was pressurized by her brothers to frame him. This pressure, he stated, was because the brothers of the deceased had a dispute with him and as they wanted the deceased's property, they killed him and falsely implicated Asad because Asad was the deceased's business partner. He further said that if Ambreen were to be summoned, she would not support the prosecution case. I find his defence rather implausible. I fail to understand that even if a dispute existed between the deceased and his brothers, why would Asad without any rhyme or reason, be framed by them. Further, if Ambreen had been asked to leave the house by the brothers of the deceased and Asad was sure that she would retract what she had stated at trial earlier, there was nothing stopping Asad from making an application seeking a recall of the witness. He did not do so nor did the learned counsel for the appellant attempt to clarify the position on both the foregoing counts. Asad did not also opt to summon any witness in his defence who could have probably corroborated his assertion that a dispute existed between the deceased and his brothers. Asad, in his section 342 Cr.P.C. statement did not deny the recovery of the crime weapon however said that it had been taken by the police from his house. When asked about the recovery of the weapon and the match made by the Forensic Lab with the

empties, he simply replied that it was false. If Asad had reasons to believe that the report was false and that the empties had not actually matched the weapon admittedly recovered from him, though from a different place, than where the prosecution said it was recovered from, the law permitted Asad to make an application to summon the Forensics expert so that he could be examined as to why a false report was given. This too was not done. When put in juxtaposition, it is the prosecution case which sounds more convincing.

Conclusion

15. The record reflects that all steps taken by the complainant and the police were with promptitude. No delay of any sort was revealed in the recording of the section 154 Cr.P.C. statement followed by the registration of the F.I.R., the recording of section 161 Cr.P.C. statements (except that of PW-2 Muhammad Hasan Malik, whose statement I have already discarded). The testimony of Ambreen is confidence inspiring and trustworthy. The crime weapon was recovered on Asad's pointation. The empties recovered from the scene of the incident matched the weapon. No enmity, ill-will or malafide was proved at trial which the complainant party or the police had with the appellant that would motivate them to falsely implicate him. The medical evidence produced at trial reconciles substantially with the ocular version. Although the learned trial judge has not given any reasons as to what were the mitigating factors to award a lesser punishment than death, it appears that perhaps because of the few lapses and the motive not being proved, a lenient view was taken. Not sufficient evidence was produced at trial to substantiate the injuries that Mehak sustained hence the charge against the appellant under section 324 P.P.C. was not proved. On the other hand, the appellant leaving the premises of the deceased earlier and then coming back a little while later to kill the deceased suggests pre-meditation on his part as far as the killing of Sarwar was concerned.

Opinion of the court

16. In view of the above observations and findings, the appeal is partially allowed. The appellant is acquitted on the charge causing hurt to Mehak i.e. under section 324 P.P.C., however, his conviction and sentence under section 302(b) P.P.C. is maintained. The appeal stands disposed of in the foregoing terms.

JUDGE