

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 696 of 2019

Appellant : Muhammad Riaz
through M/s. Mehmood A. Qureshi and Jamshed Iqbal, Advocates

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

Complainant : Mr. Mamoon A.K. Sherwany, Advocate

Date of hearing : 8th February, 2023

JUDGMENT

Omar Sial, J.: Mohammad Khan at about 11:00 a.m. on 26.01.2014 received information that his younger brother Mohammad Saeed had been fired upon by the brothers of one Haji Aslam. When Khan reached Saeed's home, he was told that the body had been shifted to the Abbasi Shaheed Hospital. Khan recorded a section 154 Cr.P.C. statement at the mortuary in which he stated that Haji Aslam and Fayyaz had held Saeed by his arms and that Riaz and others had shot and killed him. F.I.R. No. 39 of 2014 under sections 302 and 34 P.P.C. was registered against Riaz, Fayyaz, Haji Aslam, Ali Marwan and 2 unknown persons at the Ittehad Town police station.

2. The background to the case is a little convoluted, however, broadly it is as follows: One Zahid Rana asked Saeed (the deceased) to arrange for a house on rent for his relative Amir Rana. Saeed facilitated Amir Rana to rent a house owned by Fayyaz, who was Riaz's (the appellant) brother; Riaz also agreed to this arrangement. Some days later Riaz complained to Saeed that residents had been complaining about Amir Rana, as he was a bachelor. Negotiations failed and Riaz told Saeed to have the house vacated by Amir Rana. Upon Saeed being hesitant to vacate Amir Rana, an exchange of harsh words took place between Saeed and Riaz. Riaz went away but returned later at night and put his own lock on top of the lock put by Amir

Rana. Saeed broke the lock installed by Riaz and told Amir Rana that he will sort out the issue in the morning. While Amir Rana was asleep there was a knock on his door and 2 persons, said to be Haji Aslam and Riaz came and abused and maltreated him and were very angry that Saeed had broken their lock and let Amir Rana in. Riaz, accompanied by his brother Fayyaz, went to Saeed's house and were received by Saeed's wife Shamim. Saeed was asleep but was finally woken up and went to the house, the tenancy of which was in dispute. Shamim stood at the door of her house and saw that Haji Aslam, Mohammad Riaz, Mohammad Fayyaz, Mohammad Mushtaq, Mohammad Imtiaz and other relatives of Haji Aslam had gathered at the spot. Harsh words were exchanged between the parties, which ultimately saw a fight break out. It was during this fight that Haji Aslam told his sons Riaz and Fayyaz to use their weapons. Both Riaz and Fayyaz allegedly then fired at, and killed, Saeed.

3. Mohammad Mushtaq, Mohammad Aslam, Mohammad Fayyaz and Mohammad Riaz were charged for the murder of Mohammad Saeed, however, all 4 pleaded not guilty and claimed trial. At trial the prosecution examined **PW-1 Mohammad Khan**, the complainant; **PW-2 A.S.I. Mohammad Muneer** was the police officer who first responded to the information of the shooting. **PW-3 Shamim Akhtar** was an eye witness to the incident. **PW-4 Amir Rana** was the person on whose tenancy the two parties had quarreled. **PW-5 Zahid Ali** was the person who had asked Saeed to arrange rented premises for Amir Rana. **PW-6 Sajjad Ahmed** claimed to be an eye witness. **PW-7 Riyasat Ali** arrested Haji Aslam. **PW-8 Faizan Rasool** claimed to be an eye witness. **PW-9 Faisal Niaz** was with the complainant when the news of the incident was received. **PW-10 Dr. Tariq Jaleesi** conducted the post mortem. **PW-11 Shah Rehman** was a person who had reached the place of incident in its immediate aftermath. **PW-12 Nisar Ali** witnessed the arrest of Haji Aslam. **PW-13 A.S.I. Muneer Ahmed** registered the F.I.R. **PW-14 H.C. Mohammad Shahzad** witnessed the arrest of Mushtaq. **PW-15 S.I. Muneer Ahmed** was the first investigating officer of the case. **PW-16 Inspector Syed Anwar Hussain Bukhari** was the second

investigating officer of the case. **PW-17 Dr. Rajendra Kumar** was the doctor at the Civil Hospital who treated Ali Mardan, said to also have been injured in the quarrel.

4. In their respective section 342 Cr.P.C. statements all the accused professed innocence. None of the accused examined themselves on oath however DW-1 Najeem Khan (a person brought as witness to prove alibi for Riaz) and DW-2 Amroz Khan (a person brought as witness to prove alibi for Fayyaz) were examined.

5. At the end of the trial the learned 10th Additional Sessions Judge, Karachi West, vide his judgment dated 12-10-2019 acquitted Mohammad Mushtaq, Mohammad Aslam and Mohammad Fayyaz. Mohammad Riaz was convicted under section 302(b) and sentenced to a life in prison as well as directed to pay a Rs. 500,000 to the legal heirs of the deceased or spend a further period of 6 months in prison.

6. Both, the learned counsels for the appellant and the complainant gave written arguments which are part of the record and therefore not being reproduced for the sake of brevity. Their arguments as well as those of the learned APG have however been taken into consideration in my findings and observations below.

7. The main witness on whose testimony this case hinged was PW-3 Shamim Akhtar. Learned counsel for the appellant was of the view that as this witness made several improvements at trial from what she had stated before, she cannot be trusted. He relied on Akhtar Ali vs The State (2008 SCMR 6) in this regard. To the contrary, the learned counsel for the complainant argued that Shamim Akhtar was a natural witness and during her cross examination she was asked a number of questions by the defence in an attempt to show that she had made a number of improvements in her testimony but that each time, the learned trial court noted that she had made no such improvement. I have gone through the testimony recorded by Shamim Akhtar and am inclined to agree with the learned counsel for the complainant. The record reveals that she was asked 18 questions by the

defence in her cross examination suggesting that she had made improvements in her testimony. The learned judge found that there 2 inconsistencies between what the witness had stated in her section 161 Cr.P.C. statement and what she testified at trial. One contradiction was that the witness at trial said "it is incorrect that in my statement of 26.01.2014 I had stated that when I came at site I saw dead body of my husband." This was not correct as noted by the learned judge. The other contradiction was that she testified that in her section 161 Cr.P.C. statement she had given the description of co-accused Mushtaq. This was not correct as she had earlier not given his description. I find the testimony of Shamim Akhtar to have a ring of truth in it. She had known three of the accused i.e. Riaz, Fayyaz and Haji Aslam for the last 12 to 13 years prior to the incident, thus there was no chance of misidentification. The house outside which the incident occurred was in the same lane as that of Shamim Akhter and was 10 to 12 paces away from her. She was therefore in close proximity to enable her to witness the incident. I find no reason to conclude that Shamim Akhter did not tell the truth.

8. Another witness who backed up PW-3 Shamim Akhtar version of events was PW-6 Sajjad Ahmed. Sajjad was present in the house with PW-3 Shamim Akhter and had followed her to the place where the incident occurred. Learned counsel for the appellant contended that Sajjad also could not be believed because he did not ordinarily reside in the area and that he was not present on the scene of the incident as the post mortem report prepared at the Abbasi Shaheed Hospital did not reflect that they were present at the hospital and finally that Sajjad was introduced as a witness in the case one month after the incident. Learned counsel had a similar argument to give for not believing another prosecution witness i.e. PW-8 Faizan Rasool. Sajjad Ahmed explained at trial that the deceased was his maternal uncle and that as it was a Sunday he had come to visit him at home. His narration of events corroborates that of Shamim Akhter in all material respects i.e. Saeed was sleeping when Taj Mohammad came to inform the family that Riaz and Fayyaz were summoning him; Saeed was

woken up by Shamim Akhter; Saeed had woken up and gone outside; Shamim told Sajjad that Saeed had a dispute with Haji Aslam and his brothers; he had followed Shamim out of the house; the house where the incident occurred was 5 to 6 houses away from Saeed's (10 to 12 paces according to Shamim Akhter); he also saw Riaz and Fayyaz shoot at Saeed. As far as the non-identification of the deceased at the hospital is concerned, Sajjad Ahmed himself in his testimony explained that the deceased was initially taken to the hospital by Shamim Akhter, Lal Afsar and Shah Rehman whereas he (Sajjad) had followed later along with the complainant of the case. Shamim Akhter also recorded the same version. The record reflects that the statements of both Shamim Akhter and Sajjad Ahmed were recorded on 26.01.2014 on the date of the incident and not one month later as the learned counsel argued. I do not find any material inconsistencies or contradictions between the testimony of the 2 witnesses. The same version of events that had unfolded at the place of incident was also testified by PW-8 Faizan Rasool.

9. I find the testimony of the eye witnesses to be trustworthy and confidence inspiring and would be satisfied to maintain the conviction awarded by the trial court. In addition, 7 empties and blood stained earth was also collected by the police from the place of the incident. There was no enmity between Shamim Akhter, Sajjad Ahmed and Faizan Rasool to falsely implicate the accused.

10. The learned counsel is correct that on the same set of evidence and charged for the same role i.e. shooting on the deceased, Fayyaz was acquitted and hence Riaz should also be acquitted. I am not inclined to extend this concession to Riaz as the record reflects that though Fayyaz was acquitted by the learned trial court, his case could not be re-appraised by this Court as the acquittal appeal was filed by the complainant after the period of limitation. Riaz cannot be given the benefit of a technical default which worked for Fayyaz. Learned counsel has relied on PLD 2019 SC 527, 2008 SCMR 6, 2017 SCMR 344 and 2019 SCMR 274; however I have already given my reason to distinguish the case of Fayyaz from that of Riaz.

11. Taking a look at the defence taken by Riaz in his section 342 Cr.P.C. statement I find it odd that he even denied that he had anything to do with the house which was rented out and which was the bone of contention between the parties. Witness after witness at trial spoke about the involvement of Haji Aslam, Riaz and Fayyaz, which also included Aamir Rana, the tenant who was beaten by the accused and whose tenancy was objected to by Haji Aslam, Riaz and Fayyaz. It simply does not appeal to logic that each witness had an axe to grind with Riaz and thus came and gave a false testimony. He did not offer any explanation in his section 342 Cr.P.C. statement and even though he said that the councilor of the area knew the truth, he did not summon the councilor to come testify for him. A very sketchy and vague testimony was given by DW-1 Najeem Khan to show that Riaz was sitting with him at his vegetable shop from 10:00 to 12:30 p.m.

12. Having re-appraised the evidence I do not find any reason to interfere with the judgment of the learned trial court. The appeal stands dismissed.

JUDGE