

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 227 of 2019
Criminal Acq. Appeal No. 328 of 2020

Appellant : Wali Muhammad
through Mr. Muhammad Ramzan, Advocate

Respondent : The State
through Ms. Robina Qadir, Addl.P.G.

Complainant : through Mr. Shabbir Ahmed, Advocate

Date of hearing : 14th March, 2023

JUDGMENT

Omar Sial, J. Wali Mohammad (the appellant herein), Ali Ahmed and Ali Mohammad were charged by the learned 2nd Additional Sessions Judge, Thatta for having committed the murder of one Jawaid on 08.05.2013. After a full dress trial, on 18.03.2019, the latter 2 accused were acquitted by the learned trial court whereas Wali Mohammad was convicted under section 302(b) P.P.C. and sentenced to a life in prison as well as directed to pay a compensation of Rs. 100,000 to the legal heirs of the deceased or spend a further period of 6 months in prison.

2. A background to the case is that the deceased Jawaid worked as a helper at a Shell Petrol Station in Mirpur Bathoro. On 08.05.2013 at about 7:00 p.m. a motorcycle on which were riding Wali Mohammad and Ali Ahmed came to the petrol station and Wali Mohammad shot Jawaid in his stomach and then the 2 accused sped away on their motorcycle. Ali Mohammad was brought into the case as an accused as it was alleged that Jawaid had been shot at upon his instructions. An injured Jawaid was first taken to a nearby hospital but was told to go to a bigger hospital in the closest city of Hyderabad. Jawaid died before he could reach the hospital. F.I.R. No. 45 of 2013 was registered under sections 302, 109 and 34 P.P.C. at the Mirpur Bathoro police station on the complaint of Mohammad

Qasim on 09.05. 2013. Wali Mohammad was arrested on 14.05.2013 and a pistol recovered from him.

3. The 3 accused pleaded not guilty to the charge against them and claimed trial. At trial **PW-1 Mohammad Ramzan** was an eye witness to the occurrence; **PW-2 Fayyaz Ahmed** was another helper at the Shell petrol station as well as an eye witness of the incident. **PW-3 Abdul Sattar** served as witness to several steps in the investigation as well as the arrest of the accused. **PW-4 Sarkar Ali** was the tapedar who prepared the sketch of the place of incident; **PW-5 Dr. Abdul Qadir** examined the injured Jawaid before opining that he should be taken to a bigger hospital in the nearest city of Hyderabad. **PW-6 Dr. Faiz Ahmed** conducted the post mortem on the deceased. **PW-7 S.I. Mohammad Jameel** was the investigating officer of the case. In their respective section 342 Cr.P.C. statements all the accused pleaded innocence, denied all wrong doing however did not give their version of events nor did they examine themselves on oath or desire to bring any witness to support their innocence.

4. Learned counsel for the appellant has argued that the appellant deserved to be acquitted on the ground of consistency keeping in view the fact that the other 2 accused were acquitted; that the witnesses were all related inter se to the deceased; the complainant was not examined at trial; that witness Ramzan made several errors in his testimony; the currency notes which were taken from the accused at the time of his arrest were not produced as case property; that although the prosecution claimed that only one empty was found at the place of incident, 2 were produced at trial and thus the recovery cannot be trusted; that the injury to the deceased was found on his right side by the doctor whereas the witnesses said that it was on the left; a few other minor contradictions were also pointed out. To the contrary the learned Addl.P.G. strongly supported the impugned judgment and said that not only were there 3 eye witnesses to the occurrence but that the empty found from the place of incident matched the pistol recovered from the appellant. I have heard the counsels and re-appraised the entire evidence.

5. I have come to the conclusion that the prosecution was successful in proving its case against the appellant beyond reasonable doubt and my reasons for so concluding are as follows.

6. I have given the most weight to the testimony recorded by PW-2 Fayyaz Ahmed. Fayyaz was a cousin of Jawaid's who not only worked at the same Shell petrol station but was also present in close proximity when the incident occurred. The incident occurred in the night of 08.05.2013 and Jawaid's section 161 Cr.P.C. statement was recorded with reasonable promptitude on 10.05.2013. He explained at trial that Wali Mohammad and Ali Ahmed had come on a motorcycle between 7:15 and 7:30 p.m. on the night of 08.05.2013 and that Wali Mohammad, who had a pistol fired straight at Jawaid, which fire hit the right side of his abdomen, as far as this witness is concerned there is no contradiction regarding whether Jawaid was hit on the right or the left side of his body. However, the medical report revealed that Jawaid had been hit on his buttock and the bullet had exited from his stomach. In the circumstances of the case this contradiction is hardly material. He told the court that he was 8 to 10 feet away from where Jawaid was shot. According to him, the deceased was shot from a distance of about 1 to 2 feet. The medical report does not seem to support this estimation as no blackening was found on the wound of entry. Be that as it may, a witness, when somebody is being shot in front of him cannot be expected to be meticulous in his estimates of distance. Suffice to say that Jawaid was shot from a relatively close range and that Fayyaz was standing in close proximity. The couple of omissions in his statement under section 161 Cr.P.C. and what he said at trial were minor and have no impact on the decision of the case. This was a natural witness, and although he was Jawaid's cousin, there is nothing on record or argued by the learned counsel which would show malafide for making a false accusation. I have found the testimony of Fayyaz to be trust worthy, reliable, confidence inspiring with a ring of truth to it.

7. There is another eye witness, PW-1 Mohammad Ramzan who claimed that he was sitting at a nearby hotel when the incident occurred. I

am not entirely satisfied by the testimony of this witness. My reasoning is that he claimed that he was sitting at a hotel opposite the Shell petrol station along with the complainant of the case Mohammad Qasim when the 2 accused came and shot Jawaid. I however find his statement difficult to rely upon in a murder case as he admitted that there was a main road between the petrol station and the hotel in which he sat and estimated that the hotel was 50 to 60 feet away from the petrol station with not only traffic plying on the road but it being a busy area with a rickshaw stand also near the petrol station. Even if he was sitting there it seems unnatural that while having tea with his brother in law at the hotel his eyes were fixed on the happenings across the road. In such incidents it is usually after the shooting that people's attention is drawn to the occurrence. While this witness may have assisted in taking the injured to the hospital, one cannot rely on his eye witness account to support the conviction. The 3rd eye witness, Mohammad Qasim, who was also the complainant, could not be examined at trial as he most unfortunately had died before that time.

8. One empty was found from the place of occurrence, the memo made as well as the witness to the recovery confirms this position. The crime weapon was recovered from the appellant upon his arrest on 14.05.2013. The pistol and the empty recovered earlier, in separate bags was sent to the Forensics Laboratory on 22.05.2013. The Laboratory reported that the empty recovered had been fired from the same weapon. While I am not entirely happy with the delay in sending the recovered pistol and empty for forensics, keeping in view the backward area where the crime has been committed, and the delay not being inordinate, I am not inclined to give any benefit to the appellant on this count. As regards the discrepancy pointed out by learned counsel that 2 empties instead of one was produced at trial, there seems to be no manipulation in this regard, as the extra empty was the test empty which the Laboratory has noted in its report as having been kept in the parcel by the Laboratory itself.

9. Wali Mohammad cannot be given the benefit of the acquittals of his co-accused Ali Ahmed and Ali Mohammad. Ali Ahmed was said to be

accompanying Wali Mohammad when Wali shot Jawaid whereas Ali Mohammad, who was admittedly not even present on the spot was accused of instigating the murder of Jawaid. There were also a number of contradictions between the witnesses in this regard. In my opinion, the learned trial court rightly extended the benefit of doubt to the 2 co-accused, who in any case were assigned no overt act nor was the weapon that matched the empty recovered from either one of them.

10. It would be natural that a person who claimed that he was being falsely implicated would have a version to give as to where he was, with whom and what was he doing that fateful evening. A person being falsely accused would at least attempt to bring those persons he was with as witnesses to vouch for them. None of this was done. A blanket plea of innocence was given. The prosecution, in my opinion had discharged its burden which had then shifted on the accused to give a plausible defence. The accused gave none, let alone a plausible one.

11. I find no reason to interfere with the judgment of the learned trial court. The appeal stands dismissed.

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12. As mentioned above, when Wali Mohammad was arrested on 14.05.2013 a pistol was recovered from him which was the crime weapon. F.I.R. No. 47 of 2013 was registered against him under section 23(1)(a) of the Sindh Arms Act, 2013 as he could not produce a valid license. He was acquitted of the charge by the learned Judicial Magistrate, Mirpur Bathoro on 16.12.2019.

13. This appeal against his acquittal has been filed on behalf of the State primarily on the ground that the case should have been tried by a Court of Sessions instead of a Magistrate. It has therefore been prayed by the State that the case be remanded back to the learned Court of Sessions for a de novo trial.

14. I have heard the learned counsel for the State as well as the learned counsel for the accused convict.

15. The argument given by the State is correct that pursuant to section 35(1) of the Sindh Arms Act 2013, it is the Court of Sessions that had jurisdiction to hear the case under the Sindh Arms legislation. The impugned order however reflects that initially the case was sent to the Court of Session, however the case was sent back to the Magistrate with the directions that it has to be proceeded under section 13(e) of the West Pakistan Arms Ordinance. A case under that legislation proceeds before a Magistrate. The legality of the order of the Court of Session has not been challenged by any side throughout the life of this case. The argument of the State therefore on the ground of jurisdiction holds little weight.

16. Notwithstanding the above, the fact that the case for an unlicensed weapon proceeded in a different court to where the murder case proceeded has led to a conflict in judgments. I also am of the view that the issue in the case, apart from the fact that the weapon was licensed or not, was also whether the weapon had been used for an unlawful person, as it was in the present case.

17. As I have already concluded that Wali Mohammad is guilty of the murder of Jawaid with the same weapon as is the subject of this appeal, the impugned judgment is set aside. The appellant is convicted under section 13 of the West Pakistan Arms Ordinance, 1965 and sentenced to pay a fine of Rs. 100,000 and if he fails to pay the fine, he will have to stay in prison for a period of one month.

JUDGE