

IN THE HIGH COURT OF SINDH AT KARACHI
Cr. Jail Appeal No.299 of 2020

Appellants: 1. Khalid son of Abdul Hameed,
2. Muhammad Imtiaz @ Muhammad Fayyaz son of
Muhammad Riaz, through Ms. Sara Malkani,
advocate.

Respondent: The State through Ms. Seema Zaidi, Deputy
Prosecutor General, Sindh.

Date of hearing : 12 .05.2023

Date of Announcement: 01.06.2023

J U D G M E N T

AMJAD ALI BOHIO,J . The appellants mentioned above have filed an appeal against the judgment passed on 03.03.2020 by the Vth Additional Sessions Judge, Karachi-East. Whereby the appellants were convicted for the offense under Section 302(b)/34, P.P.C. and sentenced to life imprisonment as Tazir, along with a compensation of Rs.10,00,000/- (Rupees Ten Lac Only) each to be paid under Section 544-A Cr.P.C. to the legal heirs of the deceased, Babar, for allegedly committing the murder of Babar, son of Muhammad Iqbal, on 17th August 2016, near Café Allah Malik, Sector 32/A, Korangi No.1½, Karachi. The appellants caused firearm injuries to P.W Muhammad Shahid, in furtherance of their common intention. Additionally, they were sentenced to 10 years of rigorous imprisonment (each) for the offense under Section 324/34 P.P.C., along with a fine of Rs.50,000/- (each). In case of failure to pay the fine, they were ordered to undergo an additional sentence of four months of simple imprisonment (each). Furthermore, they were directed to pay Rs.100,000/- (each) as compensation under Section 544-A Cr.P.C. to the injured party, P.W-1/Shahid. Lastly, they were sentenced to seven years of rigorous imprisonment (each) for the offense under Section 397 PPC.

2. On 17th August 2016, the prosecution alleged that a person (whose name was not mentioned) informed the complainant, Muhammad Aslam, that his two brothers had sustained bullet injuries. Upon receiving this information, the complainant proceeded to the location of the incident mentioned above. The complainant came to know (the source of this information was not disclosed) that two unidentified culprits riding a motorcycle with the registration number KFZ-8367 had robbed his brother, Babar, and his brother Shahid while they were on foot. The culprits snatched a purse containing Rs. 5000/- and Babar's CNIC. However, both brothers resisted the culprits' actions, leading to

the culprits firing upon Babar and Shahid. Consequently, both brothers sustained bullet injuries and were subsequently taken to Jinnah Hospital by their relatives. Tragically, Babar succumbed to his injuries, while Shahid remained hospitalized for treatment. The complainant lodged FIR No. 313/2016 at P.S. Korangi on August 18th, 2016, at 21:30 hours.

3. ASI Muhammad Rafiq of PS Korangi, who was on duty at the time of the occurrence, received information via phone from an anonymous individual regarding the alleged incident. Immediately upon receiving the information, he left the police station (as recorded in entry No. 37) at 2230 hours and arrived at the scene of the incident. At 2240 hours, in the presence of Police Mashirs, he recovered two motorcycles under Section 550 Cr.P.C. and prepared such memo. It is worth noting that the memo prepared by ASI Muhammad Rafiq did not mention the presence of empty cartridges or blood at the scene of the incident, which are typically found when individuals sustain firearm injuries. This is particularly noteworthy considering that ASI Muhammad Rafiq visited the scene within 25 minutes of the incident. Additionally, it is important to mention that the FIR was registered on the following day, 18th August 2016, at 2130 hours against unknown culprits.

4. Subsequently, Investigating Officer (I.O.) SIP Muhammad Abid took over the investigation on 18th August 2016. On the same night, at 2230 hours, he conducted an inspection of the scene of the incident in the presence of Complainant Muhammad Aslam and co-Mashir Akhtar Ali. The I.O. collected and sealed the bloodstained earth at the scene, documenting the process in an inspection memo, which was witnessed by Complainant Muhammad Aslam and Akhtar Ali. The I.O. also recorded the statement of an individual named Daniyal Iqbal on 18th August 2016, who claimed to be an eyewitness to the incident. However, it is worth noting that Daniyal Iqbal's name was not included as an eyewitness in the FIR filed by the Complainant. Furthermore, the I.O. recorded the statement of the injured eyewitness, Muhammad Shahid, under Section 161 Cr.P.C on 26th August 2016. During the course of the investigation, appellant Muhammad Imtiaz was arrested on 28th September 2016, followed by the arrest of appellant Abdul Khaliq on 18th November 2016. The Identification Test of the appellants was conducted on 19th December 2016 before the Magistrate, during which PW Muhammad Shahid identified them as the individuals who committed the aforementioned offense.

5. After completing the standard investigation, the prosecution submitted the challan (charge sheet) and subsequently, both accused/appellants underwent trial proceedings.

6. On 22nd October 2018, a formal charge for the offenses under Sections 302, 324, 397, and 34 of the Pakistan Penal Code (PPC) was framed against the accused/appellants. They pleaded not guilty to the charges.

7. To substantiate its case, the prosecution presented several witnesses, including the injured witness PW Shahid, Mashir PW Daniyal Khan, Mashir PW Shahbaz, First Class Magistrate Mr. Abdul Nabi, MLO Dr. Ejaz Ahmed, Mashir PW PC Shamsuddin, IO ASIF Muhammad Shafiq, who registered the FIR, and IO SIP Muhammad Abid. Following their testimonies, the learned ADPP (Assistant District Public Prosecutor) concluded the presentation of the prosecution's evidence.

8. During the trial proceedings, the appellants, in their statements recorded under Section 342 of the Criminal Procedure Code (Cr.P.C.), denied all the allegations made against them. They claimed their innocence and asserted that they were falsely implicated, alleging that they were shown to the prosecution witnesses at the police station.

9. Before the death of PW Babar, Dr. Aijaz examined him and found the following injuries on his person:-

1. Firearm projectile entry wound at right occipital area of skull 0.5 x 0.5 cm. inverted margins, no blackening seen.
2. Exit wound 2x 2 cm at right temporal parietal area of skull. Brain matter with blood oozing out from the wound with averted margins.
3. Firearm projectile entry wound 0.5 x 0.5 cm at right anterior lower chest blackening and charring seen. Inverted margins.
4. Exit wound measuring 1 x 1 cm at trunk left side of vertebral column averted margins at lower thoracic area.

10. Subsequently, after Babar succumbed to his injuries, the Medical Officer conducted an autopsy and discovered the following injuries on the deceased's body:

1. Firearm projectile entry wound at right occipital area of skull 0.5 x 0.5 cm. inverted margins, no blackening or charring seen.
Exit wound 2x 2 cm at right temporal parietal area of skull. Brain matter and blood oozing out from cranial cavity.
2. Firearm projectile entry wound 0.5 x 0.5 cm at right anterior lower chest blackening and charring seen. Inverted margins.

Exit wound measuring 1 x 1 cm at trunk left side of vertebral column. Averted margins. Blood oozing.

11. According to the Medical Officer's findings, the injuries sustained by Babar were caused by a firearm weapon. The cause of death was attributed to firearm projectile injuries, specifically due to hemorrhage shock. This ultimately led to cardiorespiratory failure, resulting from the impact of the firearm projectile.

12. Injured Muhammad Shahid was examined by Dr. Aijaz Ahmed at 11:15 p.m. During the examination, Muhammad Shahid's general condition was found to be conscious. The following injuries were observed on his person:-

1. Firearm projectile entry wound 0.5 x 0.5 cm. at right lateral aspect of neck. Inverted margins, blackening positive.
2. Exit wound at left anterior aspect of neck 1x 1 cm. Averted margins. Blood was oozing.

13. As per the Medical Officer's assessment, both of the injuries sustained by Muhammad Shahid were caused by a firearm.

14. After the trial court's decision, both the accused were convicted as mentioned. Subsequently, the appellants filed the current appeal. A notice was issued to the complainant, and complainant Muhammad Aslam appeared on 13th February 2023.

15. The learned counsel for the appellants has raised several contentions in the appeal. The counsel argued that there was an unexplained delay of approximately 24 hours in lodging the FIR, which created doubts about the authenticity of the prosecution's case. Additionally, the learned counsel for the appellants pointed out that the name of PW Daniyal Iqbal was not initially mentioned in the FIR but was later inserted, suggesting malicious intent. Furthermore, the counsel argues that the evidence presented by the prosecution does not support the prosecution's version. The counsel highlights the absence of any empty cartridge or blood at the scene of the incident during the visits of ASI Muhammad Rafiq and IO SIP Muhammad Abid, as well as the lack of witness testimony from ASI Muhammad Rafiq regarding the presence of bloodstained earth at the scene. The authenticity of the Identification Test is also called into question, as it is argued that the deceased eyewitness Daniyal Iqbal, as testified by Complainant Muhammad Aslam, had seen the appellants at the police station, while PW injured Muhammad Shahid himself admitted during cross-examination that he had seen the appellants at the police station after their arrest. The learned counsel for the appellants relies on various legal cases, including

Mian SOHAIL AHMED and others vs. The State and others (2010 SCMR 956), KANWAR ANWAAR ALI, Special Judicial Magistrate (PLD 2019 SC 488), KAMAL DIN alias KAMALA V. THE STATE (2018 SCMR 577), and AZHAR MEHMOOD and others v. THE STATE (2017 SCMR 135), to support their contentions.

16. The learned Deputy Prosecutor General, Sindh, has presented counter-arguments in response to the contentions raised by the defense counsel. The Deputy Prosecutor General asserts that the prosecution has properly framed charges against the accused, and the sole evidence of PW Shahid is sufficient to convict both the accused. As an injured witness, PW Shahid holds a crucial position as the key eyewitness to the incident, having sustained firearm injuries during the occurrence. The Deputy Prosecutor General further argues that the discrepancies highlighted by the defense counsel are not substantial enough to discredit the testimony of PW Shahid. The absence of enmity between PW Shahid and the accused is emphasized, suggesting that he had no motive to falsely implicate the appellants in the offense. The Deputy Prosecutor General maintains that PW Shahid's testimony is consistent, reliable, and deserving of trust, as correctly relied upon and accepted by the trial court. Therefore, she advocates for upholding the impugned judgment and contends that the present appeal should be dismissed.

17. After carefully considering the arguments presented by the learned counsel for both parties and thoroughly examining the entire record in relation to Criminal Jail Appeal No. 299/2020, I have reviewed the complete documentation and evidence available in the case.

18. Upon careful examination, it is noted that the case surrounding the incident is enveloped in uncertainty. The victims, Babar (deceased) and Muhammad Shahid (injured), sustained firearm injuries inflicted by unidentified culprits. Both victims suffered multiple injuries, yet no empty cartridge or blood stained earth was collected by ASI Muhammad Rafiq, who arrived at the scene within 25 minutes of the incident. It is further observed that the blood-stained earth was collected by the investigating officer from the same location after a lapse of 24 hours since the registration of the FIR. Additionally, the FIR is silent on specific details regarding the type or description of the firearm weapons involved in the incident.

19. Upon examining the contents of the FIR, it is evident that the incident occurred on 17th August 2016 at 22:15 hours, while the report was lodged the following day on 18th August 2016 at 21:30 hours, resulting in a delay of more than 23 hours without any explanation

provided. According to the FIR, the investigation was assigned to IO Muhammad Abid, who admitted during his testimony that ASI Muhammad Rafiq conducted proceedings under Section 174 Cr.P.C and handed over relevant documents, including the recovery memo of two motorcycles from the scene of the incident on 17th August 2016 at 22:40 hours, as presented by Mashir PC Shamsuddin at Ex-10/A. However, the recovery memo does not mention the presence of blood-stained earth or empty cartridges. Surprisingly, the IO secured the blood-stained earth approximately 24 hours after the incident, without offering any explanation for such negligence. The prosecution side has not provided any explanation as to why no empty cartridges were secured from the scene of the incident visited by ASI Muhammad Rafiq immediately after the occurrence. Therefore, the non-recovery of empties and the fact that only blood-stained earth was collected by the investigating officer after 24 hours of the incident established that the prosecution failed to prove guilt beyond a reasonable doubt. In such circumstances, it would be unsafe to rely on the ocular and circumstantial evidence discussed above. The reliance in this regard is placed upon the case of "Muhammad Khan and another versus The State (1999 SCMR 1220)".

20. Additionally, delay in conducting the postmortem examination has created serious doubt in prosecution case. Although the incident took place on 17th August 2016 at 22:15 hours, the postmortem examination of the deceased, Babar, was conducted on 18th August 2016 at 02:45 hours, four and a half hours later. Such a delay raises suspicions of the police potentially fabricating a story for the prosecution. The case of Allah Rakha vs. State (2022 P. Cr. L.J Note 88) is relied upon to support this contention. The delay also raises doubts about the accuracy of the reported time of FIR registration. The IO recorded the statement under Section 161 Cr.P.C of the injured PW Muhammad Shahid on 26th August 2016, eight days after the registration of the FIR, without providing any explanation for this delay. The IO also recorded the statement under Section 161 Cr.P.C of PW Daniyal Farooq, whose name does not appear in the FIR. There is no information available prior to the statement under Section 161 Cr.P.C of PW Daniyal Farooq to suggest that he was an eyewitness to the incident. The absence of his name in the FIR, which was lodged with a delay of more than 23 hours after the occurrence, raises questions about his credibility as an eyewitness. The case of Afaq Ahmed versus State (2020 YLR 676) is referred to in support of this argument.

21. Considering the evidentiary value of the ocular account of evidence in the present case, it is apparent that the complainant,

Muhammad Aslam, was informed about the incident while he was at his home. However, he failed to disclose the name of the informer. Consequently, he cannot be considered an eyewitness to the occurrence, and his testimony holds no evidentiary value as per Article 71 of Qanun-e-Shahadat Order 1984. The cases of Noor Mustafa versus the State (2020 P. Cr. L.J Note 183) and Ali Nawaz alias Nazoo versus State (2022 P. Cr. L.J Note 121) have held that hearsay evidence, such as that provided by a witness who has no firsthand knowledge of the incident, carries no evidentiary weight.

22. It is evident that the appellants were primarily implicated based on the identification parade conducted before the Magistrate on December 19, 2016. The investigating officer, Muhammad Abid, stated during his evidence that appellant Muhammad Imtiaz was identified by PW Daniyal at the police station on September 28, 2016, which led to his arrest. Furthermore, on November 14, 2016, the investigating officer received information from PS Jamshed Quarter ACLC about the arrest of accused Abdul Khalid, who allegedly admitted for committing the crime along with accused Imtiaz. However, the IO failed to disclose who informed him about Abdul Khalid's admission and before whom he made the confession.

23. Furthermore, there was a significant delay of two months and twenty-one days for accused Imtiaz and approximately one month for accused Abdul Khalid in conducting their identification parade, for which the IO provided no explanation. It has been held in the case of Liaquat Ali versus the State (2021 YLR 2405) that a jointly conducted identification parade becomes defective due to unexplained delays. Moreover, both PWs, in their statements recorded under section 161 Cr. P.C. before the IO and during the identification parade, failed to assign a specific role to the accused in the commission of the offense. Similar facts were considered in the case of Liaquat Ali versus the State (2021 YLR 2405) before the Federal Shariat Court as under:-

“Moreso, the identification parade is defective because of delay in holding the same jointly, had not been explained satisfactorily and the role attributed to the accused was not stated by the witnesses, therefore, their identification had no evidentiary value. Reliance in such regard is placed on Mehmood Ahmad and others v. The State (1995 SCMR 127), Lal Pasand v. The State (PLD 1981 Supreme Court 142), Ziaullah alias Jajj v. The State (2008 SCMR 1210), Sabir Ali alias Fauji v. The State (2011 SCMR 563), Ghulam Rasool and others v. The State (1988 SCMR 557) and Khadim Hussain v. The State (1985 SCMR 721).”

24. Admittedly description of the appellants with regard their height, bodily size and colour of the skin was not stated by both eye witnesses Muhammad Shahid and deceased P.W Danyal Farooq in their statements

recorded under section 161 Cr.P.C.. It was duty of IO to guard the identity of appellants till their identification is conducted before the magistrate. The IO, during cross-examination, denied the suggestion that both accused Imtiaz and Abdul Khalid were shown to injured PW Muhammad Shahid at the police station. However, PW Muhammad Shahid himself admitted during his cross-examination that after the arrest of the accused persons, they were shown to him at the police station. Complainant Muhammad Aslam and IO Muhammad Abid also testified that deceased PW Daniyal Farooq had seen accused Imtiaz at the police station. It is noted that the Magistrate's report did not mention descriptions of the dummies used in the identification parade, such as their structure, age, height etc. Additionally, the IO was obligated to take measures to conceal the identity of the appellant till their identification test but failed as PW Muhammad Shahid confirmed in his evidence that the appellants were shown to him at the police station. As a result, the authenticity of the identification of the accused is compromised.

25. It is observed that the appellants were seen by the eye witnesses before the identification test conducted before the Magistrate. However, this fact reduces the importance that can be given to the identification test. Furthermore, since it is admitted that the appellants were shown to both PWs before the identification parade, the identification test cannot be relied upon securely, in line with the case of Rahmatullah and another versus the State (2020 YLR Note 103) [Sindh]. Such parameters have been defined in landmark judgment in case of Mian Sohail Ahmed and others Versus The State (2019 SCMR 956) as under:-

“According to the complainant one of the appellants was his employee at the godown and the Investigation Officer (PW-15) admits in the cross-examination that he took the appellants to the godown after they were arrested and the employees at the godown confirmed that both of them worked as employees at the godown of the complainant. This is also indicated from the statements of the appellants under section 342, Cr.P.C. Police is to guard the identity of the suspects from the witness till TIP takes place. Visiting the godown of the complainant with the suspects unravels the identity of the suspects, tarnishing the secrecy required. This once again is suggestive and is also referred to as "impermissible suggestiveness¹" at the hands of the police, therefore the probability of the witnesses knowing the identity of the appellants prior to the identification parade cannot be ruled out.”

26. Accordingly I.O admittedly failed to take precautionary measures to conceal the identity of the appellants before they were put to identification and were shown to eye witnesses of the occurrence,

therefore, no value could be attached to the identification of the appellants by witnesses as held in the case of Iftikhar and another Versus The State (2022 YLR Note 43).

27. It is noted that the substantial evidence regarding the blood-stained earth collected by I.O from the place of the incident after the registration of the FIR has raised doubts. ASI Muhammad Rafiq, who inspected the place of the incident immediately after it occurred, did not find any blood marks at that time. This raises questions about the authenticity and reliability of the blood-stained earth collected by I.O Muhammad Abid. Furthermore, the I.O failed to establish the safe custody of the parcel containing the blood-stained earth in the Malkhana of PS Korangi from 18.08.2016 until 09.01.2017 when it was delivered to the Incharge Chemical Examiner Karachi. The I.O did not produce an entry in Register No.19, vide which he kept the parcel in the Malkhana. Additionally, there is no proof of the dispatch of the parcel from the PS, as the I.O failed to produce the entry of its departure and arrival back at the PS. As a result, the authenticity of the Chemical Report, produced at Ex-13/L, is questionable. It is important to note that the trial court failed to consider these material discrepancies and defects during the investigation as discussed above, which could affect the reliability and credibility of the evidence presented.

28. To consider the discrepancies highlighted in the case, it appears that the prosecution has not been able to establish its case against the appellants beyond a reasonable doubt. Trial Court failed to consider the prosecution evidence according to settled principles of law. Therefore, it is concluded that the impugned judgment dated 03.03.2020 passed by the Vth Additional Sessions Judge, Karachi South, in Sessions Case No.1723/2017 is set aside and the accused/appellants were acquitted.

29. These are the reasons of short order announced by me on 12.05.2023.

J U D G E