

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-221 of 2012
Criminal Jail Appeal No.S-31 of 2019

Date of hearings: 15.05.2023
Date of decision: 02.06.2023

Appellants: Fateh Muhammad and Moledino,
Through M/s Sajjad Ahmed Chandio and Mian
Taj Muhammad Keerio advocates respectively.

Complainant: Ghulam Hussain,
Through Mr. Fahad Dawach advocate.

The State: Through Ms. Sana Memon, Assistant PG.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J.- By means of impugned judgment dated 14.06.2012 passed by learned 3rd Additional Sessions Judge Dadu in Sessions Case No.188 of 2006, appellant Fateh Muhammad has been convicted and sentenced u/s 302(b) PPC to suffer imprisonment for life as Ta'zir and to pay fine/compensation of Rs.1,00,000/- to the legal heirs of deceased in terms of section 544-A CrPC, in default thereof to suffer SI for six months more, with benefit of Section 382-B CrPC. Whereas, co-accused Ghulam Mustafa and Master Naban @ Nabi Bux have been acquitted.

2. It is relevant to say here that after recording of 342 CrPC statements of all accused, accused Mouledino and Faiz Muhammad, who were on bail, jumped it off, were declared absconder, and their case was separated and given number as No.188-A/2006 vide order dated 14.04.2012. They were arrested in the year 2018 and sent up for trial. By means of a judgment dated 02.03.2019 passed by learned 3rd Additional Sessions Judge Dadu, accused Faiz Muhammad Jatoi has been acquitted, whereas, appellant Mouledino Jatoi has been convicted and sentenced u/s 302(b) PPC to suffer imprisonment for life

as Ta'zir and to pay fine / compensation of Rs.2,00,000/- to the legal heirs of deceased in terms of section 544-A CrPC, in default thereof to suffer SI for six months more, with benefit of Section 382-B CrPC. Both the judgments arising out of the same crime and offence have been impugned in the appeals in hand.

3. Briefly put, on 09.05.2006 complainant Ghulam Hussain along with his brother HC Gul Muhammad aged about 45 years was taking tea at the hotel of Allahando Kharal at Chandni Chowk Dadu where PWs Ghulam Abbas and Ghulam Rabani came for the same purpose. There arrived at about 1900 hours, accused Moledino, Fateh Muhammad alias Fadoo, Faiz Muhammad, Ghulam Mustafa duly armed with pistols and Master Naban. They called the complainant party out, and started abusing them. Accused Master Naban instigated the other accused to commit murder of Gul Muhammad. Whereupon accused Moledino fired at him which hit him on his head. Accused Fateh Muhammad alias Fadoo fired at him hitting his back, accused Faiz Muhammad and Ghulam Mustafa also fired at him which hit his back and elbow of left arm respectively, and as a result he fell down. Thereafter, accused fled away raising slogans, disclosing that they had taken revenge of murder of deceased Gulzar Jatoi. The deceased died within no time and complainant while instructing witnesses to take Gul Muhammad to hospital himself appeared at police station and registered FIR.

4. After usual investigation, arrest of the accused and framing of a formal charge, the trial started. Prosecution examined as many as 08 witnesses. They have produced all necessary documents: postmortem report, FIR, sketch, memo of dead body, inquest report and dead body inspection form, all the relevant memos, chemical and ballistic report etc. In statements recorded u/s 342 CrPC, the accused have denied the allegations. Then after hearing the parties, the trial court vide impugned judgments has convicted the appellants in the terms as stated above.

5. Learned defense counsel have argued that appellants are innocent, have been falsely implicated in the case on account of enmity that is admitted in evidence by the witnesses; there are material contradictions in the evidence of witnesses over important features of

the case rendering the entire prosecution story doubtful; there is difference between medical and ocular evidence; in medical evidence the deceased is shown to have received only two firearm injuries with exit wounds, whereas in ocular account furnished by the witnesses the deceased is said to have been hit four times by shots fired by four different accused; one fire on back of the deceased is assigned to co-accused Faiz Muhammad who has been acquitted vide judgment dated 02.03.2019; in all three pistols, two from appellants and one from acquitted accused Faiz Muhammad, were recovered after their arrest on 18.05.2006 and 21.05.2006 respectively; the said pistols and empties recovered from the place of incident on 10.05.2006 were sent together for ballistic expert's report on 12.06.2006 after more than one month of the incident; no record has been submitted as to where for such entire time the empties and the pistols were kept; that even the police official who delivered such case property to the Forensic Science Laboratory has not been examined, therefore neither the safe custody nor the safe conveyance of the case property to the lab has been established by the prosecution; acquittal of co-accused Faiz Muhammad has not been challenged by the prosecution and the role of appellant Fateh Muhammad is identical to that of him, as such, he is also entitled to the same relief. They have relied upon 2021 SCMR 736, 2019 SCMR 129, 2016 SCMR 2073, 2017 SCMR 344, 2015 SCMR 1142, 2017 SCMR 486, 1999 SCMR 697, 1971 SCMR 432, 2003 PCrLJ 1847, 1995 SCMR 1345, 2023 SCMR 241, PLD 1995 Supreme Court 1, 2012 SCMR 327, 1999 SCMR 697, 2007 SCMR 1825, 2006 SCMR 1517, PLD 2021 Supreme Court 600, 2020 SCMR 1850, 2017 SCMR 1710, PLD 2019 Federal Shariat Court 1, 2018 SCMR 71, 2018 SCMR 344, 2019 SCMR 1068, 2017 SCMR 1710, 2016 SCMR 267, 2014 MLD 936 (Sindh), 1995 SCMR 599, and 2015 SCMR 1142.

6. On the other hand, counsel for complainant has supported the impugned judgment and has submitted that the prosecution through unimpeachable evidence has succeeded in establishing its case against the appellants beyond a reasonable doubt; all the witnesses are consistent over salient features of the case and have not contradicted each other; the discrepancies and contradictions pointed out by the defense counsel are minor in nature and do not impinge intrinsic value of the prosecution case; medical evidence is in accord with the evidence of eyewitnesses and there is no worthwhile discrepancy between them to give its benefit to the appellants; the incriminating weapons were

recovered from the appellants after their arrest and were sent for the FSL report in time that is in positive. He has relied upon 2023 SCMR 831, 2011 PCrLJ 1801, 2005 SCMR 1906, 2018 SCMR 1282, PLD 1989 07, 2006 SCMR 216, 2021 SCMR 1456, 2006 SCMR 216, 2006 SCMR 1796, 2010 SCMR 1090, 2009 SCMR 471, 2020 SCMR 679, 2020 SCMR 685, 2011 SCMR 429, 2005 SCMR 1110, 2014 SCMR 1554, 2020 SCMR 1841, 2006 SCMR 1373, 2006 SCMR 33, 2006 SCMR 1796, 2005 SCMR 1568, 2006 PLD Supreme Court 292, 2021 SCMR 149, 1986 SCMR 1934, 2002 SCMR 1155, 2005 SCMR 1906, 2015 PLD Supreme Court 145, 2005 PLD Supreme Court 288, PLD 2005 Supreme Court 484, 2006 SCMR 33 and 2021 SCMR 149.

7. Learned Assistant PG has supported the case against appellant Mouledino. However, she has submitted that case against appellant Fateh Muhammad and acquitted accused Faiz Muhammad is founded on the same lines. Since accused Faiz Muhammad has been acquitted on a benefit of doubt, appellant Fateh Muhammad is entitled to the same relief.

8. I have considered submissions of parties and perused material available on record including the case law cited at bar. Prosecution has examined Medico Legal Officer as PW-1 at Ex.8. He has produced postmortem report and in his evidence has stated that deceased had received two firearm injuries: one on occipital region of head (injury of entrance), on the mid of top parietal region of head (exit wound); the other on the right side of chest towards backside of body (entry wound), an injury on the left lumber region (wound of exit). In his cross examination he has clarified that deceased was fired at from the distance of less than 04 feet and in a sitting position. Next witness examined by prosecution is complainant Ghulam Hussain who has produced, *inter alia*, FIR in his evidence, and contents of which he has reiterated in his evidence. PW-3 is Ghulam Abbas, an eyewitness. He has followed complainant in narrating the incident in his evidence.

9. Thereafter, prosecution has examined PW-4 Ghulam Rabani, he too is an eyewitness and has revealed almost the same facts in his examination-in-chief as disclosed by previous two eyewitnesses. PW-5 examined by prosecution is Tapedar. He has prepared sketch of place of incident which he has accordingly produced in his evidence. After him, prosecution has examined ASI Muhammad Yaseen as PW-6. He was the duty officer on the day of incident and had recorded FIR per

verbatim of complainant. His evidence concerns with a detail about registration of FIR, and visiting hospital to prepare inquest report and other relevant memos including memo of dead body etc.

10. Gul Muhammad has been examined by prosecution as PW-7. He has acted in the case as mashir. He has produced memos of place of incident, of arrest of accused Fateh Muhammad and Faiz Muhammad dated 11.05.2006, memo of recovery of pistol from appellant Fateh Muhammad dated 18.05.2006, of recovery of pistol from acquitted accused Faiz Muhammad dated 21.05.2021 etc. Last witness examined by prosecution is investigating officer, inspector Ghulam Akbar. He has given entire account of investigation after receiving FIR on the day of incident, proceeding to place of incident next day, recovering four empties from there, arresting the accused including appellant Mouldedino and recovering from them a 30 bore pistol each. The pistols so recovered from them were sent by him vide letter dated 12.06.2006 for FSL report, which he has produced in his evidence along with report of chemical examiner regarding clothes of the deceased. In the statement of 342 CrPC, the appellants have simply denied the case set up by the prosecution against them.

11. It is apparent that prosecution in this case has examined at least three eyewitnesses. All the witnesses are cast fellows and related to the deceased. These witnesses on some of the points regarding their seating arrangement etc. at the hotel on the fateful day have differed with other. Although, in FIR complainant has disclosed that he and the deceased were sitting on benches available in the hotel but in cross examination he has revealed that he and his deceased brother were sitting on two chairs available near counter of the hotel. He sat at the chair which was available near outer door, and the deceased was sitting on a chair which was in the hotel near the counter. According to him, when the accused came, the people available there did not run and kept mum. And that all the benches available in the hotel were kept in rows facing television. Further, he had left place of incident to report the matter on a bicycle belonging to one waiter. And that on receiving injuries, the deceased fell down on the ground and died.

12. Narration in evidence of PW-3 Ghulam Abbas is quite different. Per his cross-examination, complainant and his brother were sitting on a bench (not on chairs) in the hotel. The benches were kept in front of each other and some benches were placed in different directions -- not that all benches were facing television as asserted by the complainant. Further, the complainant and his brother were sitting in front of each other, meaning thereby not on the same bench and not on chairs as asserted by the complainant. According to him, as soon as the accused came and raised their weapons the persons available in the hotel went out from the hotel – not that everyone became statue and kept mum as revealed by the complainant. Then, complainant in his deposition has revealed that merely one minute was consumed in the incident. Whereas, per this witness, at least 15 minutes were consumed in the incident. He has stated next that both of owner of the hotel was sitting at the Desk/Counter. This statement in fact belies assertion of the complainant that on chairs near the Desk/Counter he and his deceased brother were sitting. As per his examination in chief, the deceased died after half an hour of reaching the hospital, which is against what has been stated in FIR and in evidence of the complainant that the deceased had died in the hotel soon after receiving injuries. He has further revealed in cross examination that the complainant had gone to police station on foot which is not what complainant has asserted in this regard that he had gone to police station on a waiter's bicycles.

13. PW-4 Ghulam Rabani in his evidence has stated that complainant and his brother deceased Gul Muhammad were sitting on the next bench, implying that the bench next to their bench and that both were on the same bench. That is not what PW Ghulam Abbas in his evidence has asserted, that is, complainant and his brother were sitting in front of each other. It also falsifies statement of the complainant that all the benches were facing television and that they were sitting on chairs near the Desk/Counter. Further, this PW in his evidence has revealed that when the accused came in the hotel they kept sitting mum and so also other people. This is against what PW-3 Ghulam Abbas has said in evidence that people on arrival of the accused left the hotel. He has also given different statement than the

complainant and PW-3 Ghulam Abbas over the time consumed in the incident by stating that 15 to 30 minutes were spent.

14. The sketch/site plan prepared by Tapedar indicates that the deceased and the witnesses including the complainant were sitting in a row. The deceased was at point 'A' inside the hotel, at points 'B', 'C', and 'D' that are in a row were sitting complainant and the witnesses respectively. The evidence of the eyewitnesses does not support such sitting arrangement, as discussed above. Further, as per memo of place of incident, the exact place of incident is a bench, found blood stained, available near the Desk/Counter in the veranda and not inside the hotel, as is shown in the site plan. PW Ghulam Abbas in his evidence has revealed that he and PW Ghulam Rabani were sitting on a bench in the backside of the hotel-room. PW Ghulam Rabani has revealed in evidence that the deceased and his brother, complainant, were sitting on the bench next to theirs. If the evidence of these both witnesses is read together, it would emerge that the complainant and the deceased were sitting on a bench available in the back portion of the hotel-room next to their bench. The site plan shows availability of witnesses and complainant and the deceased in a row near the Desk/Counter (Point 'F'). In small cities like Dadu, the Desk/Counter is always arranged at the entry-point of the hotel, also used as exit, where either the owner or his representative sits and collects charges of food, etc. from the customers when they leave. It is never at the backside of the hotel, and hence their assertion in evidence is quite contrary to the site plan. Their evidence is also in conflict with memo of place of incident indicating availability of the bench, on which the deceased was sitting, in the Vernada/Corridor, and not in the back portion of the hotel-room. Then memo of place of incident itself is different to what complainant in this connection has described in evidence that he and deceased were sitting on the chairs near the Desk/Counter and that the deceased's chair was inside the hotel. The Medico Legal Officer in his evidence has deposed that the probable time between death and injury was about 5 to 7 minutes. PW Ghulam Abbas who had taken the deceased to the hospital has deposed on the contrary that the deceased had died after half an hour in hospital which is against what complainant and the doctor in their evidence have revealed.

15. Apart from above mentioned inconsistencies over exact location and position of the witnesses and the deceased in the hotel on the fateful day and the fact whether the people available in the hotel seeing the accused had kept sitting mum or had fled out of fear etc., the evidence of eyewitnesses is in conflict with the medical evidence. All the eyewitness are unanimous in their evidence that the deceased was fired at four times, each time by a different accused, and he had sustained four injures – one on his forehead, two injures on his back and fourth injury on his arm. Postmortem report and evidence of Medico Legal Officer evince that deceased had received only two firearm injuries. He did not get any firearm injury on his left arm, as told by eyewitnesses, which is attributed to accused Ghulam Mustafa, since acquitted. Nor he had received two injuries on his back. The only injury received by him on the back was on the lumber region, right side of the chest with exit wound on left lumber region. Such discrepancy in the medical evidence and the ocular account has cast a serious doubt over presence of the eyewitnesses at the spot at the relevant time, and suggests strongly their absence when the incident took place.

16. To a layman the injuries visible on the person of the deceased, if counted, would be four, two entry and two exit wounds, and he would tend to believe the deceased has received four injuries. It seems that the complainant and witnesses saw the dead body before FIR and on having found four injuries on it narrated the story of four fires by four different accused on the deceased in FIR. Then, in evidence by sticking to the same description, they appear to support their earlier stance of four injuries visible to the naked eye. The postmortem report has however clarified that there were only two firearm injuries on the person of the deceased with exit wounds. With this conclusion in mind, the time of registration of FIR, after 15 minutes of the incident, does not seem actual, but rather manipulated to cover up absence of complainant and witnesses on the spot and actual time of their gaining knowledge of the incident. The complaint, leaving the place of incident and the deceased within no time for police station to report the matter, instead of attending to his dying brother, and taking him to hospital, a natural impulse, is simply incredulous, and imbues mind with skepticism over the time of reporting the matter recorded in FIR and story of presence of the complainant and the witnesses on the spot.

17. Two accused: appellant Fateh Muhammad and acquitted accused Faiz Muhammad have been saddled in evidence with hitting the deceased on his back by their fires. From both the accused one pistol each was recovered, along with the pistol recovered from appellant Moledino, the FSL report of which has come in positive. This fact in fact mystifies prosecution case because as per medical evidence only two fires were made at the deceased, one on forehead allegedly made by accused Moledino and the other on his lumber region. How it is possible then that FSL report in regard to two pistols, one of which in view of only one injury on the back of the deceased was not used, could come in positive. If FSL report is correct, then there should have been two fire arm injures on the back of the deceased because both the pistols are shown to have been used and have matched with the empties, but it is not so. As far as injury on head of the deceased is concerned, it is attributed to the pistol recovered from the appellant Moledino.

18. Further, from place of incident four empties are shown to have been recovered but the deceased has sustained only two firearm injuries as per postmortem report. There is no evidence that either any aerial firing was made by the accused or any fire made upon the deceased by them was missed. Recovery of four empties from the place of incident matching with the three pistols recovered from the accused - - indicating as if all the three pistols were used -- is inconsistent with prosecution story, and has further compounded the case. If the FSL Report about four empties matching with three pistols is to be believed, the question would be, since the deceased received only two firearm injuries, where the two fire shots ended up. There is no explanation about the two fires apparently made. When they did not hit the deceased, whether they hit any bench or a wall or any person present there has not been explained. But if no bench or wall or the person was hit by such two extra fires then what account can be given about two extra empties recovered from the place of incident. Then, the witnesses say four pistols by four different accused were used. But contrary to it four empties have matched with three pistols recovered from the accused. Therefore, apparently, there is a clear incongruity between all these facts and so also injuries described by the witnesses and asserted

in the medical evidence, all pointing out to the facts different from each other.

19. Nonetheless, recovery of empties and pistols is of no consequence in this case. It is settled that as soon as the empties are recovered from the place of incident, they are to be immediately dispatched to the lab for examination without waiting for recovery of crime weapon to maintain transparency, and rule out a possibility of faking evidence by firing from the same pistol and sending the empties to lab for a report obtained thus. The recovery of pistols from the accused was effected on 18.05.2006 and 21.05.2006 respectively after almost 10 and 12 days of the incident. Where meanwhile those pistols were kept by the police, the record is silent. The pistols and empties were sent for the lab report on 12.06.2006 that is after almost one month of the incident and at least 20 days of the recovery of pistols. Further, the prosecution story, as reiterated by the witnesses is that four fires by four different accused armed with pistols respectively were made, but lab report shows four fires were made from three pistols recovered from the appellants and acquitted accused Faiz Muhammad which is not even the prosecution case.

20. Besides, where four empties recovered on 10.05.2006 were kept at police station has not been explicated by the prosecution through any evidence. There is absolutely no evidence to prove either safe keeping of the empties and the crime weapons recovered from the accused at the police station or their safe conveyance to the lab. Even the official who took the same to the lab has not been named as a witness or an effort made by the prosecution to examine him in the trial.

21. By now, it has been settled by the Supreme Court in a number cases that an incriminating piece of evidence, not confronted to the accused in his statement u/s 342 CrPC, would not be considered for recording conviction against him. 342 CrPC statement of appellant Mouledino indicates that he has not been confronted with the evidence of his arrest and recovery of pistol from him. Nor he has been asked about positive FSL report of the recovered pistol, or any question about unnatural death of the deceased and postmortem report confirming the same. Although appellant Fateh Muhammad has been confronted with

the recovery of pistol from him on 18.05.2006 but he too has not been put to any question about his arrest, the sending of pistol allegedly recovered from him and the empties to lab for FSL report or the medical evidence including postmortem report. If all these pieces of evidence are taken out of consideration, no conclusion qua guilt of the appellants could be arrived at. Minus corroboratory evidence: recovery of weapons, empties from place of the incident, positive report of FSL in regard to them and postmortem -- not confronted to the appellants u/s 342 CrPC and thus excluded -- the prosecution would not be held to have proved the case against the accused beyond a reasonable doubt, simply through oral account of the witnesses that is full of discrepancies as highlighted above.

22. In view of foregoing discussion, I am of the view that prosecution has not been able to prove the case against the appellants beyond a reasonable doubt, and they are entitled to its benefit. The appeals in hand are resultantly allowed. The appellant are acquitted of the charge. They shall be released from the jail forthwith, if not required in any other custody case.

The appeals are accordingly disposed of.

JUDGE