

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Crl. Appeal No.D-18 of 2012
Crl. Revn. Appln. No.D-12 of 2012

BEFORE:

Mr. Justice Muhammad Junaid Ghaffar,
Mr. Justice Muhammad Saleem Jessar,

Appellant : Azeem Chachar, through Messrs Asif Ali Abdul
in Crl. Razak Soomro and Rafique Ahmed K. Abro,
Appeal Advocates.

Applicant : Mian Khursheed Ahmed Farooqui, through
in Crl. R.A. Mr. Habibullah G. Ghouri, advocate.

Respondent: The State, through Mr. Khadim Hussain Hussain
Khooharo, Additional Prosecutor General.

Date of hearing: 26-09-2017. Date of Judgment: 26.09.2017.

J U D G M E N T.

Muhammad Saleem Jessar, J.- Appellant Azeem Chachar has filed the captioned appeal assailing the judgment dated 11.02.2012 passed by the learned Additional Sessions Judge, Kashmore in Sessions Case No.169/2011 re-State v. Azeem Chachar (Crime No.64/1994 of P.S Kashmore, u/s 302, 114, 34, PPC), whereby the appellant was convicted for offence under Section 302(b), PPC and sentenced to life imprisonment and to pay fine of Rs.100,000/- as compensation to be paid to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C. In case of default in payment of fine amount, he was to suffer S.I for six months more. He was also extended benefit of Section 382-B, Cr.P.C. Whereas, the Criminal Revision Application No.D-12/2012 has been filed by applicant/complainant Mian Khursheed Ahmed Farooqui for enhancement of sentence awarded by the trial Court to accused Azeem Chachar .

2. Prosecution case in brief is that on 24.6.1994 complainant Mian Khursheed Ahmed Farooqui lodged F.I.R at P.S Kashmore, alleging therein that he, his father Mian Illahi Bux Khan (a retired Superintendent of Police) and PWs Mian Zahid Ahmed and Mian Munir Ahmed, all by caste Farooqui, after offering Juma Prayer at Jamia Masjid of Kashmore town were returning their home, his father was ahead of them, while complainant and P.Ws were following him. At about 1445 hours, when they reached at Chowk of Daya-Bhatti communities, they saw two persons with open faces, both armed with guns, standing there, out of whom one person on the instigation of other fired at complainant's father Mian Illahi Bux Farooqui hitting him on his chest, who fell down on the ground, whereafter the other accused also fired at him and then both the accused persons fled away on a motorcycle of black colour. Complainant's father Mian Illahi Bux died at the spot and the complainant leaving PWs there went to police station and lodged FIR.

3. Record shows that the trial of instant case previously proceeded against co-accused Muhammad Liaque and others, who were acquitted, whereas appellant/accused Azeem and co-accused Muhammad Ali, who were on bail, absconded after cancellation of their bail, as a result whereof the case was lying on dormant file; however, subsequently, appellant/accused Azeem was arrested on 17.8.2011 and was tried.

4. On his refusal to accept the charge framed by the trial Court, the trial proceed and at trial the prosecution examined complainant Mian Khursheed Ahmed, PWs Munir Ahmed, Dr. Liaquat Ali, Din Muhammad, Zahid Ahmed, mashir Abdul Qadir, mashir of vardhat Muhammad Yasin, I.O DSP Muhammad Hashim, SIP Ziyad Ali, who had simply arrested the appellant/accused Azeem and Aftab Ahmed, the then Civil Judge & FCM, Kashmore, who all produced the necessary documents. Thereafter, the side of prosecution was closed.

5. Statement of the accused under Section 342, Cr.P.C was recorded, wherein he denied the allegations and pleaded innocence.

6. The learned Counsel for the appellant argued that it is the case of prosecution as per FIR that the complainant, his father Mian Illahi Bux Khan and PWs were intercepted by two unknown persons, who were seen clearly by the complainant and PWs and it is also an admitted position that previously the trial of instant case had proceeded against co-accused Muhammad Liaque and 7 others, who were acquitted vide judgment dated 30.4.2010; that the name of appellant was introduced by the prosecution subsequently through the statement of one Din Mohammad recorded before police after 11 to 15 days of incident; that said Din Mohammad is admittedly not an eyewitness of the alleged incident; that the parties were previously known to each other, therefore, introduction of name of applicant through statement of PW Din Mohammad was not understandable; that though the crime weapon i.e. gun was shown recovered from the appellant, but mere recovery of crime weapon and medical evidence without corroboration by strong oral and circumstantial evidence are of no value in law; that all the P.Ws are paid servants of the complainant and they have also acted as witnesses in other cases of complainant party, whereas the law is settled that evidence on capital charge must come from an unimpeachable source or be supported by strong circumstances for removing inherent doubt attaching to the evidence of the interested and partisan witnesses; that the medical evidence also does not support the oral version; that the identification test of the accused, which was a joint identification parade and that too without assigning any role, is also of no value in law; that there are contradictions in the evidence of complainant and P.Ws examined during trial, which rendered the prosecution case highly doubtful. Lastly, learned Counsel submitted that the appellant may be acquitted by extending benefit of doubt. Learned Counsel has placed reliance on the following reported cases:-

1. 2009 SCMR 436,
2. 2011 SCMR 563,
3. 2010 SCMR 1189,
4. 2007 SCMR 1825,
5. 1995 SCMR 1350,
6. 2008 SCMR 06,
7. 2014 YLR 2091,
8. 2013 YLR 1456,
9. 2013 YLR 458,
10. 2013 YLR 788,
11. 2010 P.Cr.L.J 1156,
12. 2010 P.Cr.L.J 1494,
13. 2010 P.Cr.L.J 1730,
14. 2010 P.Cr.L.J 1842,
15. 2016 SCMR 1605.

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7. Learned Counsel for the complainant argued that the 161, Cr.P.C statements of eyewitnesses were recorded without any delay; that PW Din Muhammad had also seen the appellants while fleeing away from the place of incident at considerable distance; that strong motive of tribal clash and deceased's supporting the opposite party of accused was shown, which was fully supported by the P.Ws; that the eyewitnesses fully supported the prosecution case and were unanimous on all material aspect of the case and their evidence was fully corroborated by the medical and circumstantial evidence of identification parade, recovery of motorcycle and guns used in the commission of offence; that the appellant remained absconder for noticeable period and the magistrate also fully supported the prosecution case.

8. Learned Addl. P.G supported the impugned judgment and argued that all the P.Ws have fully implicated the appellant with the commission of alleged offence; that appellant after his arrest was identified in identification parade, recovery of crime weapon was effected from him, which stood proved at trial; that the prosecution evidence has not been shattered in cross-examination and is confidence inspiring.

9. We have heard all present and have given careful consideration to the arguments of the learned Counsel for the appellant, learned Addl. P.G, and also perused the record.

10. Admittedly, the allegation of causing death of deceased Ghulam Sarwar is against two unidentified accused persons. It appears from the record that co-accused Muhammad Laique and others, who were previously subjected to trial and acquitted of the charge, were tried for hatching conspiracy in the murder of deceased, while the present appellant was subsequently arrested on the basis of statement of PW Din Mohammad. The trial Court recorded its conviction against the present appellant in the following manner:-

“28. Having scanned above evidence, I have found that complainant Mian Khursheed Ahmed, PW Munir Ahmed and PW Zahid Ahmed are eyewitnesses of the incident, while PW Din Muhammad disclosed the names of present accused and absconding accused Muhammad Ali. All the said four witnesses are material witnesses in this case. Complainant, PW Munir Ahmed and PW Zahid Ahmed deposed that on the day of incident, after Juma prayer they were returning back and at 2.45 they reached at Daya-Bhatti Chowk, where two accused having guns were standing there. They also deposed that one accused was without beard, who fired upon Illahi Bux, which hit on his chest, therefore, he fell down, then other accused who was with beard fired upon deceased, which hit on his buttock. All three deposed that accused were not previously known to them by their names, but the name of present accused Azeem was disclosed by PW Din Muhammad, who reached at the place of incident, after departure of complainant. The present incident was taken place at day time, therefore, question of mistaken of identification, does not arise. The complainant is son of deceased, while PW Munir Ahmed and Zahid Ahmed are nephews of the deceased and they are close relatives of the deceased Illahi Bux, therefore, question of false implication of an innocent instead of real culprits does not arise. Substitution is phenomena of rare cases. Even interested witnesses would not normally allow the real culprits for the murder of their relative to let off by involving innocent persons. The prosecution in order to prove its case, it has established that accused were correctly and properly were identified by the witnesses at the time of occurrence and such goal cannot be achieved unless evidence furnished by the prosecution at trial, is capable to provide answer to certain question as to how long did the witnesses have the accused under observation with what distance and in what light. In the present case, complainant and PWs categorically stated that they had seen accused at day time from near distance. Learned counsel has pointed out that complainant did not nominate present accused, as they were not known to him by name previously. Learned counsel has

also pointed out that complainant has made improvement regarding the description of accused, for which complainant disclosed that he has given such description in his further statement recorded by the police. No doubt complainant did not disclose that one accused was with beard and other accused was without beard, but the whole ocular evidence cannot be discarded only on the basis of this improvement. Learned defence counsel also pointed some minor contradictions, which are bound to occur, as evidence of witnesses has been recorded in the present case, after lapse of about 17 years. It is humanly not possible to remember each and every facts of the case after 17 years of incident. Learned defence counsel has pointed out that present incident took place in a thickly populated area and no any independent witness has been examined. In our society, people are generally reluctant to give evidence in respect of a case belonging to other community or caste. Moreover, complainant Mian Khursheed Ahmed, PW Munir Ahmed and PW Zahid Ahmed also identified accused in the identification parade held before the learned Civil Judge and FCM, Kashmore. The mashimama of said identification parade reveals the description of accused and role of accused, as stated by the PWs in their evidence. No any major defect has been pointed out by the defence counsel in the identification parade. The eyewitnesses are consistent in respect of material points and their evidence has remained unshattered after cross-examination."

11. From the perusal of FIR, it would appear that the description of the accused were not given by the complainant, whereas the complainant in his examination-in-chief has stated that PW Din Muhammad disclosed to him that he had identified the accused, who had also given description and names of the accused to him. In his examination-in-chief complainant deposed that there was dispute between Bahadur Chachar and Dhani Bux Chachar and his father was murdered due to his (complainant's fathers') friendship with Bahadur Chachar. In cross-examination, complainant stated that first fire was made upon deceased from a distance of 20/25 feet, while the second fire was made from a distance of half foot. He further stated in his cross that "there were houses near the place of vardat, but no any shop was present on the day of incident near the place of vardat. I had stated in my previous statement that place of vardat was situated in the thickly populated area and shops were also situated there." He further stated in his cross-examination as under:

"Both parties are known to us. Accused were not on visiting terms with us. I do not remember, whether I stated in my previous statement that accused were at visiting terms with us. Again says I stated so in my previous statement. PW Din Muhammad is my servant. PW Din Muhammad is son in law of mashir Chand. I stated in my previous statement that mashir Chand was my servant. It is a fact that I lodged 4/5 criminal cases, in which I had shown mashir Chand and Din Muhammad as witnesses."

12. PW Munir Ahmed while making improvement in his evidence stated in his examination in chief that after departure of complainant from place of incident to police station PW Din Muhammad arrived there, who disclosed the names of accused persons to them, whereafter PW Zahid went to PS in order to disclose the names of accused to the complainant, but on return he was informed by complainant and PW Zahid that FIR was already registered against unknown accused. In cross-examination he stated that it is a fact that present incident took place in the heart of city, where mosques, shops and houses are situated. He further stated that the first fire was made upon deceased from a distance of 10/12 feet and second fire was made by keeping gun on the buttock of deceased. He further stated in his cross that PW Din Muhammad arrived at the place of incident after 20 minutes. He further stated that both accused were not known to him by names but they were in acquaintance with them. In cross-examination he also deposed that ***"I stated in my previous deposition that accused were previously known to me prior to this incident. I stated in my previous deposition that I was not in proper sense due to incident. Din Muhammad and mashir Chand are not our servants."***

13. PW Zahid Ahmed in his examination in chief deposed that:-

"After leaving me and PW Munir Ahmed over the dead body complainant went to PS for registration of FIR. After departure of complainant, PW Din Muhammad came at the place of incident and asked about the incident, therefore, we narrated above incident to him. PW Din Muhammad disclosed that he had seen and identified both the accused, who were going on a motorcycle. PW Din Muhammad disclosed the name of accused who was with beard as Muhammad Azeem and the name of accused who was

without beard as Muhammad Ali. After half an hour complainant returned back along with police. My 161 Cr.P.C statement was recorded on the same day at the place of incident and my 164 statement was recorded after 2/3 days of incident.”

In cross-examination, he stated that :-

“30/40 people of different castes reached at the place of incident, after departure of accused. PW Din Muhammad reached at the place of incident after ten minutes of arrival of people of locality. PW Din Muhammad did not disclose the exact place where he saw the accused, while they were crossing him. PW Din Muhammad is not servant of complainant, but he was a farmer of complainant. There are houses and shops around the place of incident.”

14. The above-referred evidence of complainant and PWs Munir Ahmed and Zahid Ali shows that they have implicated appellant/ accused Azeem only on the basis of information received from PW Din Muhammad. We, therefore, deem it appropriate to reassess the evidence of PW Din Mohammad, on whose disclosure the name of appellant was introduced. Evidence of P.W Din Muhammad reads as under:-

“I am eyewitness in this case. This incident took place in the year 1994 and it was Friday. On the day of incident, I was going to Kashmore and at 2 or 2½ pm, I reached near Pir Fateh Shah, where I saw two persons were going on a motorcycle, who were identified by me as they were Azeem and Muhammad Ali, both were armed with guns and accused Azeem was driving his motorcycle. Both the accused were saying that they had committed murder of Illahi Bux Farooqi, therefore, they were driving the motorcycle hastily. After covering some distance, the people of locality disclosed that Illahi Bux Farooqi was murdered at the street of Bhatti. I went to the place of incident and saw that PWs Zahid and Munir were standing over the dead body along with other persons of locality. I informed to the PWs Munir and Zahid that I had seen both the accused, as they were Azeem and Muhammad Ali and they were going on a motorcycle. My 161 statement was recorded at PS and after 10/15 days of the incident my 164 statement was recorded by the Civil Judge & JM, Kashmore. I see my 164 statement at Ex.7A, which I have already produced in my previous statement, it is same, correct and bears my LTI. I also identified accused Azeem and Muhammad Ali before the magistrate in the identification parade. Accused Azeem present in the Court is same.

CROSS TO MR. ABDUL HAKEEM KHAN BIJARANI,
ADVOCATE FOR THE ACCUSED AZEEM.

It is a fact that I was servant of complainant Khurshood. It is a fact that I was also witness in 7/8 cases lodged by the complainant against so many

other persons. 10/15 people of locality were already present at the place of vardat, when I reached there. I had seen accused Azeem and Muhammad Ali half km away from the place of incident. It is incorrect to suggest that my 164 statement was written by a Clerk of the Court. Voluntarily says, my 164 statement was recorded by the Judge, who was sitting on a chair. Learned Judge did not go to the veranda. Identification parade was held in the veranda of the Court. I cannot say whether learned Judge was present at the veranda at the time of identification or not. Police was also present at the veranda at the time of identification parade. It is a fact that Bahadur Chachar and accused party used to visit at the Otaque of Illahi Bux Farooqi prior to this incident. My eyesight is weak today. Accused himself disclosed his name as Azeem, but I cannot say whether he is same or not due to weakness of my eyesight and lapse of more than 17 years."

15. The above evidence of PW Din Muhammad clearly indicates that he is a stock witness, as, according to him, he has acted as witness in almost 7/8 cases lodged by the same complainant. He had allegedly crossed / passed the appellant Azeem and co-accused Muhammad Ali at the distance of about half kilometer away from the place of incident while going on their motorcycle and at that time he was also on his motorcycle and according to him the accused persons while crossing him were saying that they had committed the murder of deceased Illahi Bux. This statement of PW Din Muhammad is hardly believable. This witness also admitted in his cross-examination that he had acted as witness in this case at the instance of complainant as he was his servant. His evidence shows that he is not an eyewitness of the alleged incident. The complainant and PWs Munir Ahmed have also admitted in their evidence that PW Din Muhammad is servant of complainant and he has also acted as witness in many other cases lodged by the same complainant. It also appears from the evidence that the place of incident was surrounded by houses and shops and after the incident many persons from the locality had gathered there, but even then none from the said independent persons was cited as witness and even the police/investigating officer did not bother to examine any one from those independent persons. In such a situation, evidence must have come from an unimpeachable source or supported by strong

circumstances. No matter that the evidence of single witness is sufficient if it comes from an uninterested witness, but in this case P.W Din Muhammad appears to be an interested witness being servant of complainant, therefore, his evidence cannot be accepted as a gospel truth without corroboration by evidence of uninterested and unimpeachable character.

16. In view of above, we are clear in our mind that the very edifice of eye-witness account in this case, which is based on the evidence of PW Din Muhammad, complainant Mian Khursheed Ahmed Farooqui and PWs Munir Ahmed and Zahid Ali, has not been satisfactorily substantiated by the prosecution.

17. The FIR in this case was lodged on 24.6.1994, the supplementary statement of complainant and 161, Cr.P.C statements of the PWs, except PW Din Muhammad, were recorded on the same day and that of PW Din Muhammad after 11 to 15 days of the alleged incident. The appellant was arrested on 09.7.1994 and recovery of gun was also shown from him, whereas the 164, Cr.P.C statements of PWs were recorded on 11.7.1994. The complainant in the FIR had not disclosed the description of the accused, though from the evidence on record it appears that both the parties were previously known to each other.

18. So far the identification parade is concerned, the prosecution relied upon the evidence of complainant Mian Khursheed Ahmed, PWs Munir Ahmed and Din Muhammad and Zahid Ahmed and the Magistrate, namely, Mr. Aftab Ahmed Arain. In this context, it may be mentioned here that the complainant in his evidence has not deposed about identifying the appellant in the identification parade, whereas so far PW Din Muhammad is concerned, since according to the prosecution case, at the time of incident he himself had disclosed the identity of appellant and co-accused to the complainant and P.Ws.

However, in his evidence PW Din Muhammad deposed that the identification parade of accused was held in the veranda of the Court and he could not say whether learned Judge was present at the veranda at the time of identification or not and further that police was also present at the veranda at the time of identification parade. He also deposed that accused himself disclosed his name as Azeem but he could not say whether he was same or not due to weakness of his eyesight. It may be observed that holding of identification parade through PW Din Muhammad was not warranted in law. So far PWs Munir Ahmed and Zahid Ahmed are concerned, the mashirnama of identification parade shows that no role was assigned by these witnesses to appellant Azeem. Moreover, it was a joint identification of appellant Azeem and Muhammad Ali, which is not permissible in law in terms of Article 22 of the Qanoon-e-Shahadat Order, 1984. In such circumstances, the identification parade was of no value in the eyes of law.

19. The other piece of evidence, on the basis of which, the learned trial Court has based conviction against the appellant, is the recovery of crime weapon i.e. gun allegedly made from the appellant/accused as well as the medical evidence. So far medical evidence is concerned, there is no dispute that the deceased died unnatural death, there is discrepancy in the ocular version and the medical evidence, as according to the alleged eyewitnesses of the incident one of the two fires was made on the deceased by keeping the gun on his buttock, whereas according to the medical evidence of Dr. Liaquat Ali, it appears that the injury No.1, which was on chest, was caused from a distance of 10 feet, whereas the injury No.3, which was on upper part of left thigh posteriorly was caused from a distance of 20/25 feet and both injuries were received by the deceased while being in standing position, whereas the ocular version shows that after receiving the first shot, deceased had fallen down on the ground, whereafter second shot was allegedly

made upon by keeping the gun on his buttock while he was lying on the ground.

20. However, so far the recovery of crime weapon is concerned, the recovery mashir Abdul Qadir in his evidence has admitted that he was on visiting terms with the complainant prior to the incident and was picked by the SHO while going to the place of recovery from the way. It may be observed that mere recovery of crime weapon is of no value unless the same is corroborated by independent and trustworthy evidence. Even otherwise, the mashirnama of recovery of gun from the appellant produced during the course of previous trial of co-accused, on perusal, shows that the gun was with No.572172 of 12 bore word (paper torn) was written on its barrel. However, mashir Abdul Qadir in cross-examination admitted that both gun produced in trial and shown to him as case property were without number and no identification marks were available on the guns.

21. From the above discussion, we have come to the conclusion that the appellant is able to create dents in the prosecution case and benefit thereof should be given to the accused/appellant not as a matter of grace or concession but as a matter of right.

22. In view of the above circumstances, the appeal of the appellant was accepted and the impugned judgment dated 11.02.2012 passed by the learned Additional Sessions Judge, Kashmore was set aside and the appellant was acquitted of the charge vide short order passed on 26.9.2017. Whereas, the criminal revision application filed by the applicant/complainant Mian Khursheed Ahmed in view of the acceptance of appeal of appellant Azeem Chachar was found to be without substance and the same was accordingly dismissed. Above are the detailed reasons for such short order.