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CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cr. A. 125/08 s/w Cr. Rev. 116/08

Fazal Rehman vs. The State

HIGH COURT OF SINDH

Composition of Bench: S. B./D. B.

Mr. Justice Mohammad Karim Khan Agha,

Mr. Justice Muhammad Saleem Jesser

Date(s) of Hearing: 13-02-20

Decide on: 18-02-20

(a) Judgment approved for reporting:

Yes

Kfjz

CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- NOTE:
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
 - (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

**IN THE HONORABLE HIGH COURT OF SINDH,
AT KARACHI.**

Cr.Appeal No. 125

/2009

PRESENTED

27-06-2009

M. J. J. J.
27/6/09
Ct. Registrar (Ld.)

Fazal Rehman
S/O Wash Dil,
Muslim, adult, presently confined in
Central Prison at Karachi.....

Applicant/Accused 1843

R/o Sharafi Goth
Landhi Town at
Karachi

VERSUS

The State.....Respondent

FIR No.59/2005
U/S: 302, 324 PPC
P.S: SHARAFI GOTH

APPEAL U/S 408 CRIMINAL PROCEDURE CODE

Being aggrieved and dissatisfied with the judgment dated 30-05-2009 it is most respectfully prayed that this Honorable Court may kindly be pleased set a side the impugned judgment passed by District & Sessions Judge, Malir, in the best interest of justice.

FACTS

Facts are gathered from statement U/S 154 Cr.P.C and from FIR as under that on dated 23-05-2009 at about 2:45 pm I was available on the roof of my house alongwith brother deceased Barkatullah and PW Abdul Qadir. Three other persons including contractor PW Arshad with his worker Shabir and on other per son, whose name I do not remember now were working at 2:45 pm accused Fazal Rehman came there and called us. We went there on which he told us that they have damaged my house by terming the out let and roof towards his house on which some hard words were exchanged between us then he took the pistol on seeing the pistol we retreated as we were standing on the roof top and the accused was standing on the ground/ thereafter he ran towards the roof of his mother's house and challanged us to where they were escape now thereafter he fired towards us, which hit my

Cont/P-2

Criminal Revision No. 116 of 2009.

..... APPLICANT 2157

Fazal ur Rehman
S/o Washdil
Muslim, adult, presently confined in
Central Prison at Karachi RESPONDENT 5

F.I.R. No.59/2005
P.S. Sharafi Goth,
Karachi
U/S 302, 324 P.P.C.

Being aggrieved and dissatisfied partly with the judgment dated 30.05.2009 (Annexure "A") passed by the learned Sessions Judge Malir, Karachi in Sessions case No.207/05, arising out of Case No. 59/05 U/S.302, 324 PPC, P.S. Sharafi Goth, Karachi, whereby the accused of above case/Respondent of this appeal have been awarded the lesser punishment convicted and sentenced to suffer life imprisonment (R.I) for offence punishable U/S 302 PPC and also convict and sentence him to suffer 5 years (R.I.) and also pay fine of Rs.20,000/- for offence punishable u/s 324 P.P.C in

IN THE HIGH COURT OF SINDH AT KARACHI

CRIMINAL APPEAL NO.125 OF 2009

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Muhammad Saleem Jessar.

Appellant : Fazal Rehman S/o. Wash Dill through Mr. Zulfiqar Ali Langah, Advocate.

For State: Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.

Complainant : Rehmat Ali S/o. Shafi Muhammad through Mr. Arshad H. Lodhi, Advocate.

CRIMINAL REV. APPLICATION NO.116 OF 2009

Applicant : Rehmat Ali S/o. Shafi Muhammad through Mr. Arshad H. Lodhi, Advocate.

Respondent : Fazal-ur-Rehman S/o. Washdil through Mr. Zulfiqar Ali Langah, Advocate.

Date of hearing: 13.02.2020

Date of announcement: 19.02.2020

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Fazal-ur-Rehman s/o. Washdil has preferred this Criminal Appeal against the impugned judgment dated 30.05.2009 passed by the learned Sessions Judge, Malir, Karachi in Sessions Case No.207 of 2005, F.I.R. No.59 of 2005 u/s. 302/34 PPC registered at P.S. Sharafi Goth, Karachi whereby the appellant has been convicted and sentenced to life imprisonment under section 302(b) PPC and also convicted for the offence under section 324 PPC and sentenced him to suffer R.I. for 05 (five) years along with fine of Rs.20,000/-. In default in payment of fine, the appellant was ordered to

suffer S.I. for three months more. Both the sentences were ordered to run concurrently. Benefit of section 382-B was also extended to the appellant.

2. Being aggrieved and dissatisfied with the impugned judgment of learned Sessions Judge Malir, Karachi dated 30.05.2009 the complainant / respondent has filed the Criminal Revision Application for modification and enhancement of sentence awarding major punishment of death under Section 302 PPC to the appellant. On the other hand being aggrieved and dissatisfied with the impugned judgment of learned Sessions Judge Malir, Karachi dated 30.05.2009 the appellant has filed this appeal against conviction.

3. The brief facts of the prosecution case as unfurled in the S.154 Cr.P.C. statement of Rehmat Ali, brother of the deceased are that on 23.05.2005, he, his brother Barkat, contractor Arshad, labourer Abdul Qadir and others were busy in construction work over the roof of his house. At about 02:45 p.m. their neighbour Fazal-ur-Rehman (accused) son of Washdil came their, who directed the complainant party to construct rainy water outlet on the other side of the roof. The complainant party informed him that the said construction of the outlet was within the boundary of their house and not towards his house. Hearing this, Fazal-ur-Rehman threatened the complainant to see them. After a short while, Fazal-ur-Rehman returned with a pistol in his hand. Instantly, he fired upon the complainant party with intention to commit their Qatl-e-Amd. The bullet hit to Barkat (the deceased) brother of the complainant, at his abdomen, crossed from it and struck Arshad on his left shoulder. Both the injured fell on the ground, whom the complainant with the help of Shabbir and Asghar brought to JPMC for treatment. Barkat succumbed to his injuries at hospital, whereas Arshad was admitted in the hospital and survived his injuries. The police on acquiring information about the incident arrived at JPMC and recorded statement of the complainant.

4. Based upon the said statement, FIR was ascribed by SIP Ameer Badshah. He visited the Hospital, inspected the dead body, prepared its memo, Inquest Report, delivered the dead body to the complainant Rehmat Ali and then delivered the documents to SIP Muhammad Ishaq Awan of Investigation Wing of Police Station Sharafi Goth for investigation purpose, who visited place of the incident. On 28.5.2005, the

present accused was arrested by SIP Sher Muhammad Sangi. On 02.6.2005 the accused produced the crime weapon (pistol) from his house to SIP Abdul Majeed Nagra second Investigation Officer of this crime. On completion of entire procedural formalities, the charge sheet was submitted against the accused on 18.6.2005.

5. The charge was framed against the appellant on 06.10.2005 to which he pleaded not guilty and claimed for trial.

6. The prosecution to prove its case examined 13 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The statement of accused Fazal ur Rehman was recorded under S.342 Cr.PC in which he denied the allegations leveled against him by the prosecution witnesses and claimed false implication in the case. He examined himself on oath and produced one defence witness namely Nazar Hussain who in effect was an alibi witness.

7. Learned Sessions Judge Malir, Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 30.05.2009, convicted and sentenced the appellant Fazal-ur-Rehman as stated above, hence this appeal has been filed against his conviction.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant has contended that the appellant was completely innocent, that he had been falsely implicated in this case on account of enmity, that there were contradictions in the evidence of the PW's which meant that they could not be safely relied upon, that there was blackening on the firearm injury of the deceased which was contrary to the prosecution evidence, that the murder weapon being the pistol had been foisted upon him and that for any of the above reasons he should be extended the benefit of the doubt and acquitted of the charge. In support of his contentions he placed reliance on **Nazar Hussain V The State** (PLD 2010 SC 1021), **Muhammad Ishtiaq V The State** (PLD 2008 Islamabad 21),

Azmat Ullah V The State (2014 SCMR 1178), **Khadim Hussain V The State** (2015 MLD 543) and **Ashraf Ali alias Jamat Ali V The State** (2013 P Cr. L J 872).

10. On the other hand learned DPG has contended that the eye witness evidence fully implicates the accused in the offense, that the medical evidence supports the prosecution case, that the pistol was recovered from the appellant on his pointation, that there are positive FSL and chemical reports and as such the prosecution has proved its case beyond a reasonable doubt against the appellant whose appeal should be dismissed. In support of his contentions he placed reliance on **Ghulam Mohy-ud-Din V The State** (2014 SCMR 1034), **Muhammad Ashraf V The State** (2011 SCMR 1046) and **Dr. Javid Akhtar V The State** (PLD 2007 SC 249). Mr. Arshad Lodhi, learned counsel for the complainant although under instructions at the outset withdrew his criminal revision petition for enhancement of sentence however he adopted the arguments of learned DPG for maintaining the conviction and sentence of the appellant of life imprisonment,

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

12. In our view after our reassessment of the evidence we find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the following reasons;

- (a) The FIR was lodged promptly on the same day of the incident after only a slight delay of 5 hours which slight delay based on the facts and circumstances of the case have been fully explained as the deceased was injured at the time when he was shot and PW Arshad was injured and as such the priority was to get them to the hospital for treatment as opposed to rushing to lodge an FIR and as such there was no time for the complainant to cook up a false case in collusion with the police.

(b) The appellant is named in the FIR and has been given the specific role of firing on the deceased which bullet passed through the deceased and also hit PW Arshad

(c) That there were three eye witnesses to the incident and we shall consider each of their evidence in turn;

(i) **Eye witness PW 1 Rehmat Ali** who is also the complainant in the case. According to his evidence he was on the roof of his house doing construction work along with the deceased, PW Abdul Qadir, PW Arshad and two others when the accused came and accused him of damaging his house. Hot words were exchanged where upon the accused pulled a pistol and went to the roof of his adjacent mother's house and shot the deceased and PW Arshad. The eye witness was a natural witness and not a chance witness who knew the accused as they were neighbours. It was a day light incident and the reason for the firing was a dispute over construction and as such the identity of the appellant is not in doubt. There was no enmity between the complainant, deceased or any other PW as admitted by the accused in his evidence under oath when he states during his cross examination that, *"it is correct to suggest that there was no enmity between me and the deceased. I have no enmity with any of the witness in this case"*. Hence this eye witness had no reason to falsely implicate him in this case. His evidence was not damaged during cross examination. As such we consider this eye witnesses evidence to be reliable, trust worthy and confidence inspiring and we place reliance on it and believe the same.

(ii) **Eye witness PW 5 Shaikh Abdul Qadir** is the contractor and was present on the roof of the house during the construction works. He is therefore a natural witness and not a chance witness. In his evidence he corroborates eye witness PW 1 Rehmat Ali in all material respects. He is witness to the exchange of hot words and the accused firing at the deceased and hitting the deceased and PW Arshad with one shot which passed through and through the deceased and then hit PW Arshad. According to his evidence the accused was quite close when he made the fire shot as the accused according to this eye witnesses evidence, *"went over the roof top of his mother's house, from where he pointed the pistol towards us and challenged them now where will you escape"*. He had no enmity with the accused, as admitted by the accused himself under oath, and had no reason to falsely implicate him in this case. His evidence was not damaged during cross examination. He gave a timely S.164 Cr.PC statement shortly after the incident which is in line with his evidence and also confirms that he knew the accused as they live in the same locality. As such we consider this eye witnesses evidence to be reliable, trust worthy and confidence inspiring and we place reliance on it and believe the same.

(iii) **Eye witness PW 6 Muhammed Arshad.** He is the injured eye witness. He corroborates the evidence of the other two eye witnesses but states in his evidence that he did not see who shot him. Once again he is a natural witness who has no reason to falsely implicate anyone or not tell the truth and as such we believe his evidence. Since he appears to have been behind the deceased as the bullet passed through the deceased and then hit him it may well be that he did not see or know who shot him.

(d) It is settled law that we can convict if we find the direct oral evidence of one eye witness to be reliable, trust worthy and confidence inspiring. In this respect reliance is placed on **Muhammad Ehsan V The State** (2006 SCMR 1857). In this case we find 2 eye witnesses to be fully corroborative and reliable, trust worthy and confidence inspiring who actually saw the accused shoot the deceased with a pistol and the bullet also hitting PW 6 Muhammed Arshad. Although PW 6 Muhammed Arshad did not see who shot him he confirms that he was on the roof at the time of the incident and was shot. Never the less by way of abundant caution we will consider below whether any corroborative /supportive evidence is available in respect of the direct oral eye witness evidence.

(e) We find that the medical evidence is corroborative/supportive of the eye witness evidence in terms of the number of injuries received by the deceased and the injured PW 6 Muhammed Arshad, the place where the injuries were received and the weapon used to inflict those injuries i.e firearm. It would appear from the evidence that only one shot was fired by the accused which hit the deceased in the abdomen and passed through and through before lodging in the shoulder of PW 6 Muhammed Arshad. It is true that there was some blackening around the wound of the deceased which ties in with the evidence PW 5 Shaikh Abdul Qadir which indicates that the accused got quite close to the deceased before firing at him. Even otherwise oral evidence takes precedence over medical evidence when in conflict. There is no blackening around the wound of injured PW 6 Muhammed Arshad since the bullet had already passed through the deceased before hitting him.

(f) Only one empty was recovered from the scene of the incident which is corroboratory of the prosecution evidence whereby only one shot was fired.

(g) The accused after his arrest took the police to his house and showed them the iron box in which he had hidden the murder weapon which only he could have known about and not the police.

(h) The recovered pistol and empty proved positive in the FSL report. Even if there was some delay in sending the empty and or the pistol to the FSL this is not fatal to the prosecution's case especially when there has been no suggestion of any tampering. In this respect reliance is placed on **Muhammed Ashraf's** case (Supra)

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793). Their evidence provides a believable corroborated unbroken chain of events from the exchange of hot words between the accused and the complainant party about the construction works to the murder of the deceased on the roof by the appellant by firearm to the arrest of the appellant and the recovery of the murder weapon (pistol) on his pointation

(j) It is well settled by now that police witnesses are as reliable as any other witness unless any ill will or enmity has been attributed to them which has not been done in this case. Like wise it is well settled that simply because a witness is related does not make him an interested witness and unreliable unless he has reason to falsely implicate the accused, or he is biased, or partisan to the accused which there is no evidence of in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99).

(k) It is of course for the prosecution to prove its case against the accused beyond a reasonable doubt (which we have found that the prosecution has done in this case) but a brief review of the defense case shows that it is devoid of any merit. The accused in his S.342

Cr.PC statement has essentially taken the plea of false implication and called one DW as an alibi witness however he has not produced a shred of evidence as to why either the police or the complainant would falsely implicate him in this case apart from the same old chestnut of him refusing to pay the police a bribe and has even admitted under oath that he had no enmity with any witness. His defense witness is an old friend and it is significant that during his cross examination of PW's he did not suggest that he was with this DW at the time of the incident. As such we find the DW as a put up witness and place no reliance on his evidence. We therefore find that the defense case is without merit and is an after thought on the part of the appellant in order to save his skin. In our view this is a case where an argument over construction work escalated between the complainant party and the accused which lead the accused in a pre mediated manner to shooting the deceased.

13. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt. It may be true that the appellant has already spent a long time in jail but we have observed that the trial judge has already shown leniency toward him by not applying the death penalty which is the usual sentence in murder cases.

14. Thus, for the reasons mentioned above the impugned judgment is maintained and the appeal and the criminal revision petition are dismissed.