

HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Cr. Jail Appeal No.D-07 of 2020

Confirmation Case No.05 of 2020
[Ghulam Mustafa versus The State]

Before:

Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Omar Sial

Appellant : Through Mr. Noor-ul-Haq Qureshi advocate

Complainant: Through Mr. Mushtaque Ahmed Abbasi advocate

The State : Through Mr. Shawak Rathore Addl: P.G Sindh

Date of hearing: 08.05.2024

Date of decision: 16.05.2024

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, J.- Appellant has challenged the Judgment dated 22.01.2020 passed by the learned Vth Additional Sessions Judge/MCTC Shaheed Benazirabad in Sessions Case No.66 of 2019 (*Re: The State versus Ghulam Mustafa*), outcome of Crime No.86 of 2018 registered at P.S Khadhar under Sections 302 and 504 PPC, whereby he has been awarded death sentence under Section 302(b) PPC subject to confirmation by this court and has also been directed to pay compensation of Rs.3,00,000/- to the legal heirs of deceased, failing which he has to serve S.I for six months; whereas for offence under Section 504 PPC he has been convicted and sentenced to suffer R.I for one (01) year and has been directed to pay fine of Rs.20,000/- and in case of failure in payment of fine he has to further suffer S.I for three months; however benefit of Section 382-B Cr.P.C has been extended to him.

2. The brief facts of the case are that on 20.12.2018 Complainant Yar Muhammad appeared at P.S Khadhar and lodged the subject

65

FIR by alleging that he is farmer by profession and about 10 years back his sister namely Mst. Irshad Khatoon had married with accused Ghulam Mustafa; that there is dispute between them and accused over matrimonial affairs; that marriage ceremony of his brothers namely Raza Muhammad and Fiaz Muhammad was fixed for 20.12.2018, as such he, his brother Noor Muhammad aged about 22 years, his paternal uncle Manthar Ali S/o Haji Piyaro Magsi and his maternal cousin Ghulam Nabi S/o Ghulam Mustafa Magsi boarded on two motorcycles and went to the house of his sister Mst. Irshad Khatoon for taking her for marriage ceremony, but his brother-in-law Ghulam Mustafa was not present there and his sister Mst. Irshad Khatoon informed them that her husband had gone for irrigating the land; that then they jointly went at the land and parked their motorcycles on road; that his brother Noor Muhammad went towards accused Ghulam Mustafa for getting permission of Mst. Irshad Khatoon for marriage ceremony; that Ghulam Mustafa was holding spade in his hand and was irrigating his land; that at about 12:00 pm as soon as Noor Muhammad reached near the accused, the accused on seeing Noor Muhammad started abusing him and said that matrimonial revenge is outstanding as such today he would commit his murder and by saying so accused caused spade below on right side jaw and neck of Noor Muhammad, who raised cries and fell down; that they yelled towards accused, but accused ran away; that thereafter they saw that Noor Muhammad had sustained two injuries, one at right side of jaw to ear and second on his neck and blood was oozing and he became unconscious; that they arranged the private vehicle and shifted the Noor Muhammad to PMCH Nawabshah but he succumbed to injuries and died; that his uncle Manthar informed the police of P.S Khadhar, who reached at hospital and then dead body was shifted to Taluka Hospital Sakrand, where postmortem of dead body was carried out and then it was handed over to them for burial and after funeral ceremonies he lodged the subject FIR.

3. After usual investigation police submitted the challan before the Magistrate concerned, who took cognizance of the matter and

66

sent the case papers to concerned trial court where after completion of necessary formalities charge was framed against the appellant, to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined six (06) witnesses, who exhibited numerous documents and other items. Then statement of accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him and claimed his false implication by the complainant party. However, he neither examined himself on Oath nor led any evidence in his defense.

5. After hearing the parties and appreciating the evidence on record the trial court convicted and sentenced the appellant as stated in the opening paragraph of this Judgment and also sent reference to this Court for confirmation of death sentence or otherwise, hence appellant has preferred this Jail Appeal.

6. 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 is not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case on account enmity hence the delay in lodging the FIR which allowed the complainant along with the police to cook up a false case against him; that the eye witnesses are planted witnesses and their evidence be discarded especially as they are all related to the deceased and have enmity with appellant; that S.103 Cr.PC has been violated; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the case of (i) NAZIR AHMED vs. The STATE [2018 SCMR 787], (ii) ZAFAR vs. The STATE [2018 SCMR 326], (iii) PERVAIZ KHAN and another vs. The STATE [2022 SCMR 393], (iv) Mst. SUGHRA BEGUM and another vs. QAISER PERVEZ and

67

others [2015 SCMR 1142], (v) MUHAMMAD IMRAN vs. The STATE [2020 SCMR 857], (vi) MUHAMMAD ASHRAF alias ACCHU vs. The STATE [2019 SCMR 652], (vii) MUHAMMAD ARIF vs. The STATE [2019 SCMR 631] and (viii) MUHAMMAD NADEEM alias BANKA vs. The STATE [2011 SCMR 1517].

8. Learned Assistant Prosecutor General Sindh and learned counsel for the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, they contended that there were two eye witnesses in this case both of whose evidence could be safely relied upon, that the medical evidence supported the ocular evidence and the spade (which was the murder weapon) was recovered on the pointation of the appellant as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of their contentions they placed reliance on the cases of (i) NIAZ-UD-DIN and another vs. The State and another [2011 SCMR 725], (ii) MUHAMMAD RASOOL & others vs. The STATE [SBLR 2014 Sindh 1315], (iii) IJAZ AHMAD vs. The STATE [2017 SCMR 1941], (iv) ALI BUX and others vs. The STATE [2018 SCMR 354], (v) CHETAN vs. The STATE [2018 P Cr. L.J Note 46 Sindh], (vi) GHULAM NABI vs. The STATE [2018 P Cr.L.J Note 80 Sindh], (vii) MUHAMMAD YOUSIF vs. The STATE [2019 YLR 2128 Sindh], (viii) MUHAMMAD NADEEM alias Deemi vs. The STATE [2011 SCMR 872], (ix) KHIZAR HAYAT vs. The STATE [2011 SCMR 429] and (x) MUHAMMAD ASHRAF vs. The STATE [2021 SCMR 758].

9. I have heard the arguments of the learned counsel for the appellant, learned APG and learned counsel for the complainant and have gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the medical evidence and blood recovered at the crime

68

scene we find that the prosecution has proved beyond a reasonable doubt that Noor Muhammed (the deceased) was murdered by being hit with a spade on 19.11.18 at about 1200 hours at crop field land of Manzoor Hussain Zardari Taluka Sakrand.

11. The only question left before us therefore is who murdered the deceased by hitting him with a spade at the said time, date and location?

12. After our reassessment of the evidence on record, we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

- (a) Admittedly the FIR was lodged a day after the incident. When the incident occurred the deceased was seriously injured and hence efforts were made to take him to hospital in order to save his life. However the deceased died on route to PMCH Nawabshah. Then the dead body of the deceased was shifted to Taluka hospital Sakrand for post mortem. After post mortem the body was handed over to his father and his uncle PW Manther who took the dead body for burial at their village Tando Allahyar following which the complainant lodged the FIR at the PS. As such based on the particular facts and circumstances of the case we find that any delay in lodging the FIR has been fully explained and is not fatal to the prosecution case. Even otherwise, the police were informed about the incident of the accused murdering the deceased **shortly after the incident** as per evidence of the complainant, PW 4 Manther and PW 6 Qalander Bux who was the IO of the case and as such there was no time for the complainant to cook up a false case against the appellant. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872).
- (b) The appellant is named in the relatively promptly lodged FIR with the specific role of murdering the deceased by hitting him with a spade.
- (c) We find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder whose evidence we shall consider in detail below;

(i) **Eye witness PW 3 Yar Muhammed. He is the complainant and is brother of the deceased.** According to his evidence his sister had been married to the deceased for about 10 years and there was a dispute with the accused on matrimonial affairs. The marriage of his brothers was fixed on 20.12.2018 and thus on 19.12.2018 he, the deceased, PW Manther and Ghulam Nabi went to his sister's house to invite her to

the wedding. On reaching her house their sister informed them that her husband/accused was out watering the land. They went to the land where the accused was and parked their bikes on the road. The deceased went towards the accused upon which the accused became annoyed and started abusing the deceased stating the revenge of matrimonial dispute is outstanding between us. He then saw the accused hit the deceased twice on the jaw and neck respectively. They raised hackals and the accused ran away and when they reached the deceased they found that he was unconscious. The deceased was shifted to PMCH Nawabshah where he died en route.

This eye witness knew the appellant before the incident as he was related to him and saw the appellant from close range murdering the deceased by hitting him with a spade in broad day light from close range so there is no case of mistaken identity and no need to hold an identification parade. The accused is also named with specific a role in the relatively promptly lodged FIR. In this respect reliance is placed on the cases of Amanullah v State (2023 SCMR 527) and Qasim Shazad V State (2023 SCMR 117).

Admittedly the eye witness was related to the deceased who was his brother and there was enmity between the complainant's side and the appellant in terms of a matrimonial dispute although most of it tended to flow from the appellant's side and thus I am put on caution as to the evidence of this eye witness.

This eye witness however is not a chance witness as he was residing in the neighbor and had come to invite his sister to the wedding of their brother the next day but needed the permission of her husband/accused. There are no material improvements in his relatively promptly lodged FIR from his evidence. He was not dented during a lengthy cross examination and he gave his evidence in a natural manner. The appellant's counsel questioned why the eye witnesses did not capture the appellant who apparently could not run fast due to an old leg injury. The answer lies in his first priority being to try and save his brother who had been seriously injured and was not yet dead, that the appellant still had a spade and could have fought them off and finally there is no evidence on record whatsoever to prove that the appellant could not run fast due to some old leg injury.

It is well settled by now that we can convict the accused on the evidence of a sole eye witness provided that we find his evidence to be trust worthy reliable and confidence inspiring. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) **Muhammad Ismail vs. The State** (2017 SCMR 713) and **Qasim Shazad V State** (2023 SCMR 117). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this

70

eye witnesses to be of good quality, trust worthy, reliable and confidence inspiring and as such we believe the same and rely on it.

However there is yet another eye witnesses.

(ii) **Eye witness PW 4 Manthar Ali. He is related to the deceased.** His evidence corroborates the evidence of the complainant in all material respects especially in terms of the incident and the identity of the accused who murdered the deceased by spade. He also corroborates the presence of the complainant at the time of the incident. He gave his S.161 Cr.PC eye witness statement with promptitude which was not materially improved upon during his evidence. He is named in the relatively promptly lodged FIR as an eye witness. He was a natural witness and not a chance witness as he lived in the neighbor hood and being related to the complainant had gone with the complainant and the deceased to ask permission from the accused for the sister of the deceased to attend the wedding of his brother the next day. He was not dented during a lengthy cross examination and as such the same considerations apply to his evidence to that of the complainant as discussed above. Namely, we find it to be trust worthy, reliable and confidence inspiring and as such we believe the same especially as regards the identity of the accused who murdered the deceased in broad day light in front of them with a spade.

Having believed the evidence of the two eye witnesses which is discussed above we turn to consider the corroborative/supportive evidence whilst keeping in view that it was held in the case of **Muhammad Waris v. The State** (2008 SCMR 784) as under;

"Corroboration is only a rule of caution and is not a rule of law and if the eye witness account is found to be reliable and trust worthy there is hardly any need to look for any corroboration"

Thus, based on us believing the evidence of the 2 eye witnesses as mentioned above what other supportive/corroborative material is their against the appellant?

- (d) That it does not appeal to logic, commonsense or reason that a brother would let the real murderer of his real brother get away scot free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammed Ashraf V State** (2021 SCMR 758).
- (e) That the medical evidence fully corroborates/supports the ocular evidence in terms of there being two incised injuries to the head and neck caused by a sharp cutting instrument. i.e a spade 7

- 71
- (f) That there was no ill will or enmity between the police and the appellant and as such the police had no reason to falsely implicate the appellant in this case for example by foisting the spade on him. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474). Thus, we believe the evidence of the IO who was not dented during a lengthy cross examination and whose evidence ties in with the prosecution case.
 - (g) That the spade (murder weapon) was recovered on the pointation of the appellant shortly after his arrest hidden in a place which only he could have known about which was covered in human blood as confirmed by a positive chemical report.
 - (h) The motive for the murder has come on record. Namely, that the appellant had a matrimonial dispute with the complainant side over his treatment of their sister who he used to beat.
 - (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 the cases of **Zakir Khan V State** (1995 SCMR 1793) **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669) and **Maskeen Ullah and another versus The State and another** (2023 SCMR 1568). The evidence of the PW's provides a believable corroborated unbroken chain of events from the complainant, other eye witness and deceased going to the house of the accused to seek permission for his sister to come to their brothers wedding as there relations were strained to the appellant being found watering his land to the appellant abusing the deceased over a matrimonial dispute before hitting him twice over the head with a spade which later lead to his death to the arrest of the appellant and the recovery of the murder weapon (spade) on his pontation hidden at a place which only he was aware of.
 - (j) The fact that no one was prepared to act as an independent mashir has almost become a judicially recognized fact as these days no member of the public (unless they are related to the deceased or the complainant) wishes to associate themselves which such like cases and run the risk of being called to give evidence especially if they are from the same village as the accused.
 - (k) The fact that neither the father nor the sister was examined we do not find to be of huge significance or dent the prosecution case. This was because neither of them was an eye witness to the murder. The father was said to be in shock and a wife would most likely be reluctant to give evidence against her husband/accused in a murder case fearing the

consequences of his acquittal and as such we find that their evidence was not necessary based on the particular facts and circumstances of this case

- (1) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case as set out by the appellant is that he was falsely implicated in this case due to a matrimonial dispute, that the deceased was killed by unknown person's from another caste who had enmity with the deceased and that he was arrested from his house a day before the incident and kept in unlawful confinement by the police. However the appellant did not give evidence on oath or call any witness or produce any document in support of his defence case e.g to complaint that he was in illegal confinement, that another caste out of enmity had murdered the deceased. Thus, in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other supportive/corroborative evidence discussed above we disbelieve the defence case which has not at all dented the prosecution case.

13. Thus, based on the above discussion, we find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and maintain his conviction.

14. With regard to sentencing we are **not** entirely convinced that the motive for the murder has been **fully proven** and even otherwise the attack was not extremely brutal where by only two spade blows were caused to the deceased and as such we hereby reduce the death penalty to one of life imprisonment.

15. The upshot of the above discussion is that the appeal is dismissed except as modified above in terms of sentence and the confirmation case is answered in the negative.