

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan.*

CRIMINAL A.T. JAIL APPEAL NO.353 OF 2019

Appellant: Ali Hassan S/o. Muhammad Ibrahim
through Mr. Faisal Shahzad, Advocate.

Complainant/The State: Through Mr. Muhammad Iqbal Awan,
Additional Prosecutor General.

CRIMINAL REVISION APPLICATION NO.215 OF 2019

Applicant: Shabbir Hussain Zahid S/o. Muhammad
Hussain, Nemo.

Respondent/The State: Through Mr. Muhammad Iqbal Awan,
Additional Prosecutor General.

Date of Hearing: 07.12.2021

Date of Judgment: 13.12.2021

J U D G M E N T

Mohammad Karim Khan Agha, J:- The Appellant Ali Hassan S/o. Muhammad Ibrahim was convicted by the Anti-Terrorism Court No.XIII, at Karachi in Special Case No.1277/2016 in Crime No.174/2016 u/s. 393/302/427/34 PPC R/w section 7 ATA, 1997, and Special Case No.1278/2016 in Crime No.175/2016 U/s. 23(I)-A of Sindh Arms Act registered at P.S. Mubina Town, Karachi vide Judgment dated 29.10.2019 and was awarded sentence for Life Imprisonment and to pay Rs.200,000/- as compensation to legal heirs of the deceased u/s. 302(b) PPC and in case of default he shall suffer R.I. for one year more. The appellant was also sentenced to R.I. of 07 years with fine of Rs.50,000/- and in case of default in payment of fine he shall suffer R.I. for 03 months more. All the

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sentences awarded to the accused were ordered to run concurrently except the payment of fine. However, the benefit of Section 382-B Cr.P.C. was extended to the accused.

2. Being aggrieved with the impugned judgment dated 29.10.2019 Criminal Revision Application being No.215 of 2019 has been filed by the applicant/complainant with a prayer to call for R&Ps from the learned trial court and enhance the sentence of life imprisonment as awarded by the learned trial court to the death penalty as it was a brutal murder with no mitigating circumstances.

3. The brief facts of the prosecution case as per FIR are that on 13.07.2016 at 0010 hours statement of Shabir Hussain s/o Muhammad Hussain u/s. 154 Cr.PC was recorded by ASI Muhammad Urs of PS Mubina Town, later on same was incorporated into 154 Cr.PC book bearing crime No.174/2016 as per his verbatim, complainant stated therein that he is doing job in Suparco Finance Department. On 12.07.2016 he along with driver Mohammad Idress and security guard Faisal Abbas went to Soneri bank for encashment of Rs.660,000/- in vehicle Cultus bearing No.GP3003 and when they were returning back to their Suparco office all of sudden three persons were on two motorcycles arrived in front of their car and instantly took out T.T. pistol and made firing from driver side. Security guard namely Faisal Abbas also made firing upon the culprits in retaliation. Due to firing of dacoits driver Idress and security guard Faisal Abbas sustained bullet injuries on their bodies. Later on accused made fire and escaped while he went to SUPARCO. An ambulance arrived at the scene and shifted the injured Idress and Faisal Abbas to Dow Hospital and then to Liaquat Hospital and later on he came to know that Idress had expired on account of his injuries. The police party arrived at place of incident and arrested accused in injured condition. On inquiry accused disclosed his name as Ali Hassan s/o Ibrahim and disclosed the name of his companions Sarmad and unknown. On his personal search police secured one 30 bore pistol along with magazine containing 2 live bullets. On demand of license accused could not produce the same. Then SIP Muhammad Ishaq prepared the memo of arrest and recovery at the spot and sealed the same and then accused and

property were brought at PS, thereafter FIR was registered against the accused Ali Hassan s/o Ibrahim who along with his companions namely Sarmad and unknown had committed the murder of driver Idress and tried to snatch cash amount from them on the show of weapon and prayed for taking legal action against the accused.

4. After completion of investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 11 witnesses and exhibited various items and other documents. The appellant recorded his statement under Section 342 Cr.P.C. whereby he claimed that he is innocent and was not involved in the incident as he was on his way to Dow medical hospital and was shot as an innocent by stander and fixed in the case by SUPARCO workers who did not want to take the blame for injuring him. He did not give evidence on oath or call any witness in support of his defence.

6. After appreciating the evidence on record, the learned trial court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence whilst the applicant/complainant has made an application for enhancement of his sentence from life imprisonment to death.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.10.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the appellant is completely innocent of any wrong doing; that he was shot as a passer by and SUPARCO workers along with the police had fixed him in this false case; that there was a long delay in lodging the FIR which enabled the complainant in connivance with the police to cook up a false case against him; that there were material contradictions in the evidence of the PW's

especially the eye witnesses which made their evidence unreliable; that the medical evidence did not corroborate the eye witness evidence and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt.

9. On the other hand learned APG fully supported the impugned judgment. In particular he contended that the prosecution had proved its case beyond a reasonable doubt through eye witness evidence which was trust worthy, reliable and confidence inspiring; that the appellant was arrested in injured condition on the spot when an unlicensed firearm was recovered from him; that any delay in lodging the FIR stood fully explained; that the medical evidence largely supported the prosecution case and even where it did not the oral eye witness evidence would prevail over the medical evidence in so far as the type of firearm which was used to murder the deceased; that empties recovered at the scene matched with the recovered pistol from the appellant which produced a positive FSL report and as such the appeal should be dismissed. In support of his contentions he has placed reliance on the cases of **Muhammad Rafique alias Neela v The State** (2020 SCMR 664), **Muhammad Nadeem alias Deemi v The State** (2011 SCMR 872), **Dadullah and another v The State** (2015 SCMR 856), **Haji Tahir Hussain v Saqlain and others** (2008 SCMR 817), **Muhammad Ilyas v The State** (2011 SCMR 460), **Abdul Rashid v Muhammad Nazir** (1970 SCMR 330), **Muhammad Din v The State** (1985 SCMR 1046) and **Mobashir Ahmad v The State** (PLD 2010 SC 665).

10. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and considered the criminal revision application for enhancement of sentence filed by the applicant/complainant, gone through the entire evidence which has been read out by learned counsel for the appellant along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

11. Based on our reassessment of the evidence of the PW's, especially PW 1 eye witness Shabir Hussain, injured eye witness Faisal Abbas, PW 3 Muhammed Amjad, the other witnesses including medical evidence, recovery of human blood and empties at the scene of the incident we find that the prosecution has proved beyond a reasonable doubt that Muhammed Idress (the deceased) the driver of a Cultus car along with Security Guard Faisal Abbas during a botched robbery were both shot by firearm at about 1530pm near Dow Hospital on 12.07.2016 whereby the deceased died on the spot and Faisal Abbas sustained fire arm injuries.

12. The only question left before us therefore is who attempted to rob the deceased and who murdered the deceased by firearm and also seriously wounded Faisal Abbas by firearm at the said time, date and location?

13. After our reassessment of the evidence 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) That the FIR was lodged with promptitude being 9 hours after the attempted robbery and shooting of the deceased which lead to his death and the firearm injuries caused to Faisal Abbas based on the particular facts and circumstances of the case. Such delay this has been explained by the PW 6 Muhammed Urs who stated that he only returned to the PS after performing his duties following the incident at 12am when he recorded the S.154 Cr.PC statement of the complainant who had been waiting for him at the PS for over 4 hours. The complainant had no enmity with the appellant to implicate him in a false case and does not even name him in the FIR. Had the appellant wanted to fix the appellant in a false case he would have named him in the FIR. The fact that he did not shows that he was not colluding or conniving with the police who already knew the name of the appellant who had been arrested on the spot. With respect to an explained delay in lodging the FIR not being fatal to the prosecution case reliance is placed on the case of **Muhammed Nadeem** (Supra)

(b) In our view the prosecution's case rests on the evidence of the eye witnesses to the attempted robbery, murder of the deceased

and firearm injuries caused to Faisal Abbas whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Shabbir Hussain.** He was the complainant in the case and at the time of the incident was posted as junior executive security/finance branch SUPARCO. According to his evidence on 12.07.2016 he went in a car at 01.10pm from SUPARCO's office near Dow Medical Hospital for encashment of a cheque amounting to RS 6, 60,000 from Soneri Bank along with the deceased who was the driver of the car and Faisal Abbas who was a guard. After encashing the cheque and whilst returning to his office the car was intercepted by 2 motor cycles where after two persons got off the motor cycles and made straight fire at the temple of the deceased and gunman Faisal Abbas who was hit on left arm and abdomen. Faisal Abbas took up position on the ground, returned fire and hit one of the accused whilst he was trying to escape. He then asked about the health of Faisal Abbas and then took the cash to his office. When he reached the gate of SUPARCO he saw the accused on the ground in an injured condition who he identified as the person who fired at the head of the deceased. Meanwhile the police arrived on the scene and arrested the accused and recovered a pistol from him.

He was a natural witness and not a chance witness and had no enmity or ill will which would lead him to falsely implicate the accused. He was in the back seat of the car and would have got a good look at the accused when the firing started as this was a day light incident and the accused was not too far from him with an unmuffled face and the firing went on for at least a minute or two. He then a minute or so later identified the injured accused who Faisal Abbas had shot and who he identified as the person who had attempted to rob them and murdered the deceased and fired on Faisal Abbas. Since the accused was arrested on the spot there was no need for an identification parade and based on the above discussion there is no need to doubt the correct identification of the accused. The accused admits his presence at the scene and claims that he was a passer by on the way to the hospital and was hit by chance however this is not believable in light of the fact that he received three targeted bullet injuries which were fired by Faisal Abbas. If he was a passer by who was hit by chance he would have been hit by one or at best two stray shots and not three. No other passer by was hit.

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The appellant was hit by aimed targeted shots fired by the injured guard Faisal Abbas whilst the accused was attempting to escape from the botched robbery and murder. This witness gave his evidence in a straightforward manner and although there have been some improvements in his evidence from his FIR we do not find these improvements as being so material as denting his evidence which otherwise stood up to a lengthy cross examination.

We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same especially in terms of his correct identification of the appellant who attempted to rob the complainant and then murdered the deceased and fired upon Faisal Abbas.

(ii) **Eye witness PW 2 Faisal Abbas.** He was the security guard in the cultus car at the time of the incident. According to his evidence on 12.07.2016 he left with the deceased and PW 1 Shabbir Hussain in the car in order to encash a cheque at Soneri bank. After obtaining cash from the bank they were returning to their office near Dow Medical hospital when two persons on a motor bike came in front of their car with pistols. One person fired at the driver whilst the other fired at him. The deceased was shot in the head and he received a gun shot wound to his abdomen and left shoulder. He fired in self defence and one of the accused was injured on account of his firing whilst trying to escape. An ambulance shifted him to hospital where he was treated for his injuries and on 19.07.2016 his eye witness statement was recorded whereby he stated that he could recognize the accused if he saw him again which he did when he was shown a photograph of the accused.

He, like **PW 1 Sabbar Hussain**, was a natural witness and not a chance witness and had no enmity or ill will which would lead him to falsely implicate the accused. He was in the passenger seat of the car and would have got a good look at the accused when the firing started as this was a day light incident and the accused was not too far from him with an unmuffled face and the firing went on for at least a minute or two. Admittedly his S.161 Cr.PC eye witness statement was taken after a delay of 5 days but this was because he was in injured condition in hospital and was not fit to be interviewed. He identified the accused by photo rather than identification parade and thus we give very little weight to

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the correctness of this witnesses identification of the appellant at the scene which in any event we do not find of much consequence because as mentioned earlier the accused was arrested in injured condition on the spot and was identified almost immediately after the incident by PW1 Shabbir Hussain. The importance of this witness is that he fully corroborates the incident. He was injured at the scene and the medical evidence supports his injuries and as such his present at the scene we do not find to be in doubt. He gave his evidence in a natural and straight forward manner and withstood a lengthy cross examination and as such we believe his evidence.

We can convict on this eye witness evidence which we have believed provided that there is some corroborative/supportive evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917) and **Niaz-ud-Din V The State** (2011 SCMR 725) what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of these eye witnesses to be of good quality.

Thus, based on our believing the evidence of the PW eye witnesses what other supportive/corroborative material is their against the appellant?

(c) **PW 3 Muhammed Ajal Khan** is an eye witness to seeing PW 1 Shabbir Hussain pointing out the injured appellant on the ground as one of the dacoits who had fired at them and is an eye witness to seeing the injured appellant on the ground with a pistol and witnessing his arrest by the police from the spot along with the pistol which he had with him. He also corroborates the evidence of PW 1 Shabbir Hussain about seeing the appellant injured on the ground straight after the incident with a pistol whilst he was taking the cash to the office. Once again he is a natural witness who had no enmity or ill will towards the appellant and had no reason to implicate him in a false case and as such we believe his evidence.

(d) **PW 5 Muhammed Ishaq** was not an eye witness but his evidence is of importance because he arrested the appellant at the scene in injured condition with an unlicensed firearm shortly after the incident. He was not a chance witness and had no ill will or enmity with the appellant so as to implicate him in a false case and as such we believe his evidence.

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(e) That the appellant was arrested on the spot in an injured condition which is confirmed by the medical evidence whereby he was found to have sustained 3 firearm injuries with no blackening which indicates fire not from very close range i.e from Faisal Abbas' return of fire.

(f) That the appellant has admitted his presence at the scene and that he was shot at the scene.

(g) That the medical evidence and reports as discussed above fully support the eye-witness/ prosecution evidence in terms of the manner of injury and places of injury to the deceased and those others who sustained firearm injuries. The only slight anomaly is that PW 10 Sheeraz Ali MLO opined that the deceased was hit in the head by a rifle shot as opposed to a pistol. In any event it is settled by now that reliable, trust worthy and confidence inspiring direct oral evidence in terms of type of firearm used to cause the injury will take preference over medical evidence. In this respect reliance is placed on the case of **Muhammed Riaz V Muhammed Zaman** (PLD 2005 SC 484) where it was held that even if the eye witness evidence slightly differed from the medical evidence this was no ground to disbelieve the eye witness evidence in the following terms at P.491.

"We having examined the evidence in detail find that the reasons given by the High Court for disbelieving the presence of witnesses at the spot were highly speculative, flimsy and artificial. The conclusion that the injuries on the person of deceased were the result of one shot which was probably not fired from front and medical evidence was inconsistent to the ocular account of eye-witnesses was also not based on sound reasons. The statement of doctor to the effect that the injuries were the result of single shot, being only an opinion which may or may not be correct and would not be sufficient to discard the direct evidence and suggest the non presence of eye-witnesses at the spot. The conflict of medical evidence with ocular account in respect of number and nature of injuries may be relevant to ascertain the role of an individual accused in the occurrence but this is not a valid ground to disbelieve the eye-witnesses and exclude their evidence from consideration. We may observe that even if it would be assumed that injuries were result of single shot, still in the facts of the present case, it

would be difficult to suggest that witnesses were not truthful or the respondents were not responsible for the crime." (bold added)

Like wise in the case of **Muhammad Hanif v. The State** (PLD 1993 SC 895) it was held as under at P.899;

"The expert's evidence may it be, medical or that of Ballistic Expert, is entirely in the nature of confirmatory or explanatory of direct or other circumstantial evidence, but if there is direct evidence as in the instant case, which is definite and trustworthy, the confirmatory evidence is not of much significance. In any case, it cannot outweigh the direct evidence." (bold added)

Again in the case of **Amir Khan v. The State** (2000 SCMR 1885), in terms of ocular evidence outweighing corroborative/supportive evidence such as medical evidence it was held as under at P.1888;

"It has time and again been held by the superior courts that if a bald statement of a medical expert is opposed to the proved and admitted confidence inspiring and reliable account of the eye-witnesses or other material and trustworthy evidence on record, then the latter are to be preferred against the former."

An identical view was also taken in the Indian Supreme Court case of **Balvir V State of Madhya Pradesh** dated 19-02-2019 when there was a slight difference between the ocular evidence and the medical evidence at Para's 26 and 27 in the following terms;

"26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In Ramnand Yadav v. Prabhu Nath Jha and others (2003) 12 SCC 606, the Supreme Court held as under:-

"17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per

the oral testimony, then only in a given case the court has to draw adverse inference".(bold added)

The same principle was reiterated in State of U.P. v. Krishna Gopal and another (1988) 4 SCC 302, where the Supreme Court held "that eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility".

27. *The inconsistencies pointed out in the evidence of eye-witnesses inter se and the alleged inconsistencies between the evidence of eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case. The evidence of eye witnesses are the eyes and ears of justice. The consistent version of PWs 2, 3 and 13 cannot be decided on the touchstone of medical evidence". (bold added)*

It is noted that PW 10 Sheeraz Ali MLO evidence in chief was not recorded in the presence of his defence counsel however based on so much direct evidence in terms of the injuries received to the injured parties we do not consider that this has prejudiced the appellant based on the particular facts and circumstances of this case especially as the counsel for the accused did cross examine that PW and justifies the appeal being remanded. In this respect reliance is placed on the recent Supreme Court case of **Muhammed Rafique V State** (2020 SCMR 664)

(h) That the empties recovered from the spot were immediately sent to FSL which produced a positive FSL report. The recovered pistol and Faisal Abbas's SMG were also sent to FSL later with the recovered empties which produced a positive FSL report. Like wise when the empties were matched against the vehicle which the complainant, deceased and Faisal Abbas were driving at the time of the incident.

(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) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the attempt to rob and shooting of the deceased and injuring of Faisal Abbas by the appellant to the appellant being shot by Faisal Abbas and being arrested from the spot in an injured condition as confirmed by medical evidence to the recovery of the unlicensed pistol from him on the spot which when matched with the empties recovered at the scene lead to a positive FSL report.

(j) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up his arrest or foisting the pistol on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(k) In a kidnapping for ransom case in order to deter such crimes, as is the need to deter robberies which turn into murders (like in this case), the supreme Court held that **courts need to take a dynamic approach in assessing the evidence**. In the case of **Advocate General Sindh, Karachi v. Farman Hussain and others** (PLD 1995 SC 1), in a kidnapping for ransom case it was observed as under:-

"It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice".
(bold added).

(l) 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 is that the accused was on his way to Dow hospital when he was caught in a cross fire and then falsely implicated in this case. Thus, the accused admits his presence at the scene of the incident and that he was injured by firearm. As already discussed above the appellant was hit three

times by targeted shots by the trained guard Faisal Abbas. He was not hit by a stray shot or else he would have received only one or at best 2 bullet injuries. Notably no other passer by was hit. The witnesses had no reason to implicate the appellant in a false case for example by foisting a pistol on him. The accused did not give evidence under oath to disprove the prosecution case and he did not produce a single piece of evidence via a document e.g. proscriptio or Dr's appointment or even a DW to give evidence that he was going to hospital for a check up. Thus in the face of reliable, trust worthy and confidence inspiring eye witness evidence of the appellant being involved in the attempted robbery and murder of the deceased and other supportive/corroborative evidence we disbelieve the defence case.

14. 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 for the offences for which he has been convicted and hereby maintain his conviction.

15. With regard to sentencing we note that the learned trial judge in the impugned judgment had handed down the lesser sentence of life imprisonment to the appellant instead of the death penalty on the mitigating circumstance that it could not be sure whether the appellant or the absconding co-accused fired the fatal shot which lead to the death of the deceased. The supreme Court has on numerous occasions reduced the sentenced from one of death to life imprisonment on such a mitigating circumstance and we see no reason to take a different view in this case and as such the criminal revision application is dismissed and the sentence of life imprisonment and other sentences mentioned in the impugned judgment are maintained.

16. As such the appeal and criminal revision application are both dismissed.