

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Naimatullah Phulpoto,
Mr. Justice Mohammad Karim Khan Agha*

Criminal Appeal No.412 of 2017
Criminal Jail Appeal No.416 of 2017
Confirmation Case No.07 of 2017

Appellant	Ali Gul through Mr. Suleman Badshah, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Date of hearing	09.04.2019
Date of Announcement	24.04.2019

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant in the instant appeal has assailed the judgment dated 13.09.2017 passed by Learned Sessions Judge, Thatta in a Sessions Case bearing No.24 of 2012 whereby the appellant was convicted under Section 302(b) PPC and awarded death sentence subject to confirmation by this Court. He was also directed to pay Compensation of Rs.1,00,000/- to be paid to the legal heirs of deceased, in default of payment he has to undergo simple imprisonment for four months more (the impugned judgment).

2. The brief facts of the case are that on 27.01.2012 at about 1730 hours, complainant Abdul Majeed Jat appeared at police station Garho and lodged FIR wherein he stated that he is farmer by profession and resides in Deh Baili, Taluka Ghorabari, District Thatta. His nephew namely Muhammad Jat used to drive Shehzore vehicle belonging to one Wali Muhammad Jat. On 26.01.2012 the complainant Zaman Jat and Wali Muhammad Jat went to Thatta for treatment of the children in Shehzore vehicle along with Muhammad Jat and after hospital treatment they left Thatta in the same vehicle for their village. He was sitting on front seat beside the driver seat, while Mst. Jannat w/o. Hussain Jat (his sister's daughter) was sitting between him and the driver. The Shehzore vehicle was being driven by Muhammad Jat, while Zaman and Wali Muhammad

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were sitting on its rear portion. It was about 2215 hours at night, when they reached at Sehran Stop, that they noticed one china motorcycle being driven by Ali Gul s/o Ali Hassan b/c Jat coming in front of their vehicle and signaled them to stop the vehicle upon which the driver stopped the vehicle and then Ali Gul Jat also alighted from his motorcycle and opened the door of driving side of Shehzore and exchanged hot words with the driver by saying as to why he was not giving him lift in the vehicle and on saying so, he gave him fists/punch blows, whereupon complainant and PWs Zaman and Wali Muhammad restrained him not to fight with his cousin (Maroot) and to be a gentleman. On this accused Ali Gul Jat took out his pistol and put the same on the right check of Muhammad Jat, in the meantime they gave hackles not to kill Muhammad Jat but he did not pay any heed and within their sight, he made pistol fire upon Muhammad Jat at his cheek and the bullet passed through him and hit Mst. Jannat and he thereafter fled away on his motorcycle whilst making aerial firing. Thereafter they saw that Muhammad Jat had expired, while Mst. Jannat was seriously injured. Such information regarding the incident was conveyed to nekmard of the village namely Rehmatullah Jat and others, subsequently a number of villagers gathered at the scene of occurrence. After the funeral of Muhammad Jat the complainant approached the police station and lodged the FIR against the accused Ali Gul alleging that he killed Muhammad Jat and injured Mst. Jannat seriously.

3. After completion of investigation, investigating officer submitted challan against the accused before concerned sessions court Thatta. The charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove it's case examined 09 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He declined to record his statement under oath and did not call any witness in support of his defense. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against conviction.

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5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 13.09.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant contended that there was a delay of 20 hours in lodging of the FIR; that injured PW Mst. Jannat has not been examined by the prosecution and thus the presumption can be drawn that she might not have supported the prosecution case; that the incident was at night time and since there was no evidence of any source of light the identification of the accused has not been proven; that the accused has been acquitted for remaining charges under section 324 on same set of evidence and as such he should also have been acquitted of the charge under S.302 PPC; that all the eye witnesses are closely related and as such their evidence cannot be safely relied upon without independent corroboration; that there was a dispute over a hotel and a plot adjacent to it between the accused and complainant and as such in order to get the accused out of the way and grab the hotel and plot the accused has been falsely implicated in this case by the complainant; that it was a case of dacoity which he had nothing to do with as had been reported in the newspapers and that for one and/or all the above reasons the accused be acquitted by extending to him the benefit of the doubt. In support of his contentions he placed reliance on **Abdul Jabbar V State** (2019 SCMR 129), **Lal Khan V State** (2006 SCMR 1846) and **Khalid and Khalidi V State** (2012 SCMR 327)

7. On the other hand Mr. Mohammad Iqbal Awan, learned Deputy Prosecutor General appearing on behalf of the State fully supported the impugned judgment. He contended that the delay in lodging of the FIR has been explained because first priority of the complainant was to save the life of the seriously injured Mst. Jannat and once she was admitted to hospital and the funeral of the deceased had taken place the FIR was immediately lodged by the complainant; that the eye witness PW's evidence was reliable and confidence inspiring and when corroborated by

the medical evidence it was sufficient to convict the accused; the fact that all the PWs were close relatives to the deceased is not sufficient to discard their evidence and the mere production of a newspaper cutting to blame the offense on dacoits is not legally admissible. The prosecution had therefore proved its case against the accused beyond a reasonable doubt and the impugned judgment did not require any interference and as such the appeal be dismissed. In support of his contentions he placed reliance on **Zahid v. The State** (PLD 1993 Karachi 337).

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

9. In a nut shell the case of the prosecution is that on 26-01-2012 Muhammad Jat (the deceased) was driving a shehzore vehicle along with other relatives to Thatta in order to get medical treatment for some of his relatives. On the same day when they were returning back to their village Dhandari Taluka Ghorabari from Thatta at about 10.15pm Gul Jat (the accused) intercepted the shehzore vehicle on his motor bike and after exchanging hot words with the deceased shot him in the face with his pistol the bullet of which passed through his face and entered the head of Ms Jannat where it remained lodged. The motive for the murder was because the deceased had refused to give the accused a lift in his vehicle. The accused escaped the scene but was arrested by the police the next day on spy information.

10. In a nut shell the case of the accused is that he had a dispute with the complainant (PW 1 Abdul Majeed) over the ownership of both a hotel and a plot and that the complainant has falsely fixed him in this case so that he can get hold of the disputed hotel and plot. According to him the witnesses are all related and have colluded with the police to falsify the case against him as the real culprits were dacoits and not himself.

11. Based on the evidence on record it appears that the deceased was murdered by one firearm shot which does not appear to be disputed by

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either party. What in our view is in issue is the identity of who actually murdered the deceased. Was it the accused or some other person(s)?

12. The prosecution has produced 3 eye witnesses in support of its case that the accused by a single firearm shot from his pistol fired at and killed the deceased and that the said bullet passed through his cheek and entered the head of Mst. Jannat who was sitting next to him and who was seriously injured. These eye witnesses are PW 1 Abdul Majeed (the complainant), PW 2 Wali Mohammed and PW 3 Zaman all of whom identify the deceased as having fired at and killing the deceased. These eye witness PW's corroborate each other in all material respects. There ocular evidence is also corroborated by the medical evidence and the fact that only one empty was recovered from the scene, the FSL report was positive as was the chemical report. We are aware that as a matter of law we can convict the accused based on this eye witness evidence and corroborative evidence **provided that** we find it to be trustworthy, reliable and confidence inspiring. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857).

13. The question therefore is whether we find this eyewitness evidence to be trustworthy, reliable and confidence inspiring based on the particular facts and circumstances of this case. It is true that all the eye witnesses are related and that we may still rely on them notwithstanding this fact however this is **subject to** them not being partisan and interested witnesses. In this respect reliance is placed on **Abdur Rauf V State** (2003 SCMR 522).

14. In this case it appears that the eye witness PW's are all related to each other and it is the case of the accused, which was put to each of the eye witnesses, that the complainant had a dispute with the accused over a hotel and a plot in their village. Although this was denied by each eye witness in our view it does give a slight dent in their evidence especially as it appears that after the incident the accused's family by way of jirga has been ousted from the village and the complainant has taken over the disputed hotel and plot. The accused interlinked defense plea that the complainant has fixed him in this case for the above personal motive and

that the real culprits were dacoits was also consistently put to each of the eye witnesses except the complainant.

15. At this stage it is significant to note certain replies which the accused made in his section 342 Cr.PC statement. In this respect Questions and Answers to Questions 7 and 10 are set out below for ease of reference:

Q.7. Why the PW's have deposed against you?

A. Due to enmity and being interested PW's

Q.10. Have you to say anything else?

A. I am innocent and I have been falsely implicated in this case due to dispute of plot concerning with my Restaurant (Hotel). After this incident, the complainant has encroached upon my plot and hotel and so also my entire family have been forced to vacate the village. The alleged murder was committed by unknown dacoits and during such incident deceased Muhammad and Mst. Jannat sustained fire arm injuries. Mst. Jannat was not ready to depose against me hence the complainant had withheld her evidence against me. Such news was published in Daily Awami Awaz dated 27.01.2012, wherein it was clearly mentioned that the murder took place at the hands of dacoits. I will try to produce its original copy arguments. I pray for justice." (bold added)

16. We have also noted through the cross examination of the three aforesaid PW eye witnesses that except the complainant their evidence at trial has been greatly improved from what they stated in their S.161 Cr.PC statements in order to improve the prosecution case which creates another dent in the prosecution eye witness evidence as these can be seen as dishonest improvements. In this respect reliance is placed on **Muhammed Mansha V State** (2018 SCMR 772)

17. In effect therefore at this stage we have doubts that the evidence of PW 2 Wali Muhammad and PW 3 Zaman is trustworthy, reliable and confidence inspiring.

18. Another aspect in determining whether the evidence of the 3 PW eye witnesses is trustworthy, reliable and confidence inspiring is to consider if there was any delay in lodging the FIR. In our view this aspect of the case becomes crucial in the backdrop of the fact that the accused has taken the plea that he has been falsely implicated in this case by the

complainant due to a dispute he had with the complainant over the ownership of a hotel and plot of land and that he has been fixed in this false case so that the complainant can grab the land and the hotel.

19. It is settled law that an FIR must be registered promptly and the sooner it is lodged after an incident the more reliability it has. In some cases even a delay of 2/3 hours in lodging an FIR can be fatal to the prosecution case. In this respect reliance is placed on **Zeeshan @ Shani V State** (2012 SCMR 428). The logic behind this is that if there is any delay in lodging an FIR this gives time to the complainant's side to concoct a false story in order to fix another or to ensure that they will not be entrapped in the offense. The delay itself however is not the sole issue but rather it is whether any delay has been adequately explained.

20. In the instant case the incident took place at around 10.15 pm on 26-01-2012 and the FIR was lodged by the complainant at 17.30 on 27.01.2012 being a delay of approx 20 hours. The complainant has explained this delay by the fact that he immediately had to take Mst. Jannat to hospital who was seriously injured. Initially they went to RHC Baghan and then to JPMC. Thereafter, he returned to his village for the funeral service of the deceased and then registered the FIR. In our view ordinarily this explanation may have been sufficient to explain the delay. In this case, however, there are certain significant aspects that stand out. The first is that immediately after the incident the complainant went with 3 or 4 of the others including the two other eye witnesses in this case to PS Garho with the body of the deceased and injured Ms Jannat who they thought was dead. According to the eye witnesses they knew the accused as he was a co-villager and as such they were able to identify him. However **quite astonishingly** when they reached the PS with the two bodies not one of the 3 eye witnesses lodged the FIR against the accused. Instead a **Roznamcha** entry is made concerning the incident at **23.40 (approx one hour and 40 minutes after the incident)** mentioning the incident but **not** naming the accused and stating that "I will get registered report in detail later on". This begs the question why later on? The complainant and other eye witnesses knew who the culprit was and any other of the eye witnesses present could have taken Ms Jannat to hospital

or lodged the FIR as they were also eye witnesses. In our view the reason why they did not lodge the FIR there and then against the accused has not been adequately explained. A copy of the Roznamcha entry is set out below for ease of reference.

PS. Garho

Ex. No.15-A
Distt: Thatta

COPY OF DAILY DIARY REGISTER NO.2 FORM 22-48(i)
TRUE COPY

From dated: 26.01.2012 at 0800 Hrs. to dated 27-1-2012 at 0800 Hrs.

S. No.	Designation	Nature	Date	Time	Description
14	ASI	Registration of note Round Seal of STATION HOUSE OFFICER POLICE STATION GARHO	26/1/2012	2340	At this time, it is registered that I Abdul Majeed s/o Muhammad Jat, R/o Dandari, Deh Beli, Taluka Ghora Bari, District Thatta appeared and disclosed that the brother's son named Muhammad s/o. Fateh Muhammad Jat has died away due to fire arm injury while Mst. Jannat wife of Hussain Jat has become injured, hospital letter for necessary proceeding may be issued, I will get registered report in detail later on, I am in tension right now, having kept such entry, letter for necessary proceeding has been issued. Attested by: Sd/-(In English) & Stamp of STATION HOUSE OFFICER, POLICE STATION GARHO

21. Even more revealing is an inquest form registered at the PS at the same time (one hour and 40 minutes after the incident) which under the heading "what said in information" it is mentioned that, "Informed that

his brother's son named Muhammed Jat has been killed by **unknown** accused person's by making fire" According to the IO PW Ali Nawaz both the roznamcha entry and the inquest form was filled out on the dictation of the complainant. A copy of the Inquest form is set out below for ease of reference.

PS. Garho

Ex. No.15-C
Distt: Thatta

INQUEST FORM
26-1-2012

S. No.	Question	Answer
1	Deceased's Name, Parentage	Muhammad s/o Fateh Muhammad, by caste Jat
2	Address	R/o. Dandari, Deh Beli, Taluka Ghora Bari, District Thatta
3	Religion	Islam
4	Age	About 24 / 25 years
5	Offence occurred on	26-1-2012 at 2215 Hrs.
6	Informed on	26-1-2012 at 2340 Hrs.
7	Informer	Abdul Majeed s/o Muhammad, by caste Jat, R/o. Dandari, Deh Beli, Taluka Ghora Bari, District Thatta
8	What said in information	Informed that his brother's son named Muhammad Jat has been killed by unknown accused persons by making fire
9	When police examined the dead body	26-1-2012 at 2340 Hrs.
10	Detail of injuries sustained on the body of deceased	Hole like fire arm injury on right cheek, blood is oozing out
11	Clothes on body	Light yellow coloured Shalwar & Qameez, white sash cord is lying in Shalwar having small pink flowers.
12	Ornaments etc.	Nil
13	Whether dead body is cold or warm	Cold.

Sd/- (In English)
ASI. Ghara PS

22. Thus, based on the particular facts and circumstances surrounding this case for the reasons mentioned above we do not consider that the delay in registering the FIR has been satisfactorily explained and that such a long delay without naming the accused as the culprit at the first opportunity and instead naming unknown accused leads us to believe that there is an **extreme likelihood** that the FIR was concocted against the accused after consultation in order to seize his property which the accused was in dispute with the complainant. Thus, we do not find the evidence of any of the eye witnesses to be trustworthy, reliable and confidence inspiring.

23. Even otherwise there are many other aspects of the prosecution case which cause us to doubt the guilt of the accused bearing in mind that the onus is placed solely on the prosecution to prove the same beyond a reasonable doubt. For example,

- (a) It was a night time incident and there was no evidence of any source of light and thus how was it possible for the eye witnesses to identify the accused? The fact that they did not name him as the culprit when the eye witnesses reached the police station immediately after the incident and instead named unknown accused gives credence to the fact that the accused was not identified at the scene but was made the accused after consultation before registering the FIR especially as the accused was not arrested from the spot.
- (b) Ms Jannat who was injured at the scene and could have given the best evidence despite according to the doctor being well orientated when she left the hospital was given up by the prosecution and as such it may be presumed that she would not have supported the prosecution case. In this respect reliance is placed on **Muhammed Rafique V State** (2010 SCMR 385)
- (c) The alleged motive that the complainant gave that the accused shot the deceased because the deceased refused to give him a lift in his vehicle does not seem credible. It is not natural human conduct to shoot someone because they refuse to give you a lift especially when you are riding your own motor bike. Likewise it does not appeal to reason as to how a person riding a motor bike could force a large wagon to stop. These aspects of the prosecution case do not appeal to reason, logic, commonsense or natural human conduct. In this respect reliance is placed on **Mst Rukhsana Begum v Sajjid** (2017 SCMR 596)
- (d) The police investigation also seems to us to be defective and even suspicious. For example, PW 4 Allah Bux allegedly was present when the accused was arrested and signed the mashirnama of

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arrest and recovery however during cross examination he denied his presence during the arrest and his signature on the mashirnama of arrest and recovery. Likewise was the position when the motor bike of the accused was seized.

- (e) If the accused fled the scene whilst making aerial firing why were no empties recovered relating to that firing found?
- (f) The blood stained clothes of the deceased were not taken from him and sealed on the spot but rather given to the police in a bag and thus any blood stains found on them cannot be safely relied upon due to the broken chain of custody;
- (g) If the deceased was killed in the vehicle why were no blood stains found in the vehicle when it was inspected?

24. It is a cardinal principle of criminal law that the prosecution has to prove its case beyond a reasonable doubt and that any doubt must go to the benefit of the accused as was recently emphasized by the Supreme Court in the case of **Abdul Jabbar** (Supra). Based on the above discussion we have doubts as to the identity of the person(s) who actually murdered the deceased and accordingly whilst extending the benefit of that doubt to the appellant the appeal is allowed, the appellant is acquitted from the charge, the confirmation reference is answered in the negative and the appellant shall be released unless he is wanted in any other custody case.

25. The office of this court shall send a copy of this judgment to the IGP Sindh for taking action against the investigating officer of this case, strictly in accordance with law, for conducting a defective investigation

26. The appeal is disposed of in the above terms with the confirmation reference being answered in the negative.