

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Jamal Khan Mandokhail
Mr. Justice Syed Hasan Azhar Rizvi
Ms. Justice Musarrat Hilali

Crl. Appeal No. 46-L of 2020 and
Crl. Petition No. 906-L of 2014

(On appeal from the judgment of the Lahore High Court, Lahore dated 14.07.2014 passed in Crl. Appeal No. 2293 of 2010 and M.R. No. 589 of 2010)

| | | |
|-----------------------------|----------------------|----------------------|
| <i>Abid Hussain</i> | <i>Crl. A. 46-L</i> | <i>...Appellant</i> |
| <i>Mushtaq Ahmad</i> | <i>Crl. P. 906-L</i> | <i>...Petitioner</i> |

Versus

| | | |
|--------------------------------|----------------------|-------------------------|
| <i>The State</i> | <i>Crl. A. 46-L</i> | <i>...Respondent(s)</i> |
| <i>Abid Hussain etc</i> | <i>Crl. P. 906-L</i> | |

For the Appellant : Ms. Najma Parveen, ASC
(Via video Link Lahore)

For the Petitioner : Mian Shah Abbas, ASC
(Via video Link Lahore)

For the State : Mr. Irfan Zia, DPG Punjab

Date of Hearing : 26.03.2024

JUDGMENT

Jamal Khan Mandokhail, J.- Facts in brief are that an FIR No. 156 dated 08.04.2009 was registered by one Mushtaq Ahmad under sections 302, 109, 34 of the Pakistan Penal Code (**'PPC'**) at Police Station Saddar Samundri, District Faisalabad, nominating Abid Hussain, Muhammad Tariq (appellants) and Muhammad Raheel @ Reela (since acquitted by the High Court on the basis of a compromise). The complainant alleged in the FIR that Muhammad Tariq made first fire upon his son Muhammad Ashfaq, which hit

him on his chest. Second shot was fired by appellant Abid Hussain and the bullet hit right side of the chest of Muhammad Ashfaq. Muhammad Raheel @ Reela made third fire, which hit the deceased on his abdomen, who subsequently succumbed to the injuries.

2. After their arrest, the appellants and the third nominated accused were tried by the Additional Sessions Judge, Samundri, District Faisalabad (**Trial Court**) and were convicted under section 302(b)/34 PPC and sentenced to death. A murder reference was sent to the High Court for confirmation or otherwise of the sentence. The convicted appellants filed a criminal appeal before the Lahore High Court. During the pendency of their appeal before the High Court, one of the convicts Muhammad Raheel @ Reela was acquitted on account of a compromise arrived at between him and the legal heirs of the deceased, whereas, the appeal to the extent of the remaining, i.e., the appellants in this appeal was dismissed. The High Court maintained their conviction, however, sentence of death awarded to each of the appellant was converted into imprisonment for life. Consequently, the murder reference was answered in the negative. Feeling aggrieved, the appellants Abid Hussain and Muhammad Tariq filed a jail petition, whereas, the complainant filed a petition against the impugned judgment, with a request for enhancement of sentence. This Court *vide* order dated 10.02.2020 granted leave to appeal. During the pendency of the appeal, Muhammad Tariq, one of the appellants has passed away while in jail, as such, the appeal to his extent abates.

Crl. Appeal No. 46-L of 2020:

3. Arguments heard and have perused the record. The occurrence had taken place on 08.04.2009 at about 1.00 pm, whilst the FIR was registered at 3.20 pm on the same day. The

complainant in his statement before the Court stated that after the occurrence, he went to the petition writer and got recorded his complaint. Subsequently, he went to the police station for the registration of an FIR, but the Moharrar referred the complainant to the Incharge, therefore, he returned back. The complainant stated that he did not inform the Moharrar about the incident. He further stated that he came back to the place of the occurrence, where the police officials were already present. According to the investigating officer (I.O.), he along with other police officials reached at the place of the occurrence upon receiving an information regarding the incident. That was the first information, which he did not enter into a register maintained in the police station, nor has disclosed the source of his information. The complainant contended that he made an oral statement before the I.O. at the place of the occurrence, who reduced it into writing and obtained his signatures thereon, but no FIR was registered upon his statement, nor was it produced in the court. Thus, the initial stance of the complainant has not come on the record. Besides, PW7 who is nephew of the complainant, claimed to have witnessed the occurrence. He in reply to a question, stated that the I.O. recorded his statement and fifteen minutes thereafter, the complainant reached at the scene of the occurrence, but surprisingly, his statement was also not taken as a first information. Admittedly, the FIR was subsequently registered upon a written complaint of the complainant, drafted by a petition writer. Facts and circumstances lead us to a conclusion that the FIR was not registered promptly, rather, the matter was reported belatedly to the police, after deliberation and consultation, therefore, false involvement of the appellant cannot be ruled out.

4. Moreover, according to the prosecution, one fire each was made by the nominated accused on the person of the deceased. Dr. Akhtar Alam who conducted the post-mortem of the deceased,

appeared as PW4. In his cross examination, he replied that size of all the three injuries on the person of the deceased was same and possibly all the injuries might be a result of a single weapon. Out of the three nominated persons, a pistol was recovered on the pointation of the appellant, allegedly used by him. The pistol was sent to the ballistic expert for examination, wherefrom, a negative report was received, therefore, the High Court declared the recovery of pistol from the appellant to be inconsequential. Keeping in view the observation of the doctor regarding shape and size of the injuries, it is evident that the injuries were caused by a pistol, other than the one recovered from the appellant Abid Hussain. The complainant has assigned the role of first fire to Muhammad Tariq, who died during the pendency of this appeal, whereas, third fire was assigned to Muhammad Raheel @ Reela, who was acquitted of the charge by the High Court on account of a compromise. In the FIR and in his court statement, the complainant alleged that a day before the occurrence, there was altercation between the appellant Muhammad Tariq and his deceased son, as a result whereof, the occurrence had taken place. If the contention of the complainant is believed to be true, then there was no occasion for the appellant Abid Hussain to take such an extreme step for no whim and reason. Motive was assigned to Muhammad Tariq, with which, the appellant Abid Hussain has no nexus, therefore, his involvement in the case is an afterthought. Since, one of the convicts was acquitted by the Appellate Court on the basis of a compromise and the other had died during the pendency of the appeal, therefore, their roles towards the incident remained undecided. Under such circumstances, it is unsafe to hold the appellant, Abid Hussain alone responsible for the commission of the offence.

5. Without prejudice to the above, the conduct of the complainant and the alleged eyewitnesses is unnatural. It is not acceptable to a prudent mind that when the son of the

complainant received bullet injuries, he and PW7 being his nephew did not take the injured to a hospital, in order to save his life. Instead, the complainant opted to go to the police station for registration of an FIR, leaving behind PWs Shahbaz and Imran. The record reflects that the dead body remained lying at the place of the occurrence for about two and half hours. According to the doctor (PW4), the dead body was brought to the hospital by the police officials and there is no evidence to prove that the complainant and PW7 went along the dead body to the hospital, that is why, the dead body was identified by others, who were not produced as witnesses. The manner in which the complainant and PW7 narrated the story does not appear to be trustworthy. In the facts and circumstances of the case, their presence at the place of the occurrence at the relevant time is not established, therefore, we have no doubt in our mind that the prosecution case against the appellant is doubtful. The Courts below have not appreciated the evidence and the material available on the record in its true perspective and have come to a wrong conclusion. Under such circumstances, the conviction and sentence awarded to the appellant Abid Hussain are unjustified, hence, the impugned judgment to his extent is not sustainable.

These are the reasons for our short order dated 26 March 2024, which is reproduced herein below:

“For the reasons to be recorded later, Crl.A. No. 46-L/2020 is allowed with majority of two over one (Syed Hasan Azhar Rizvi, J. dissenting). The judgment dated 14.07.2014 passed by the High Court in Criminal Appeal No. 2293 of 2010 and judgment dated 23.09.2010 passed by the Trial Court are set aside. The Murder Reference No.589 of 2010 is answered in negative. The appellant be released from jail forthwith, if not required to be detained in any other case. Crl.P. No. 906-L/2014 is also dismissed.”

Crl. Petition No. 906-L of 2014

6. This petition for enhancement of sentence of respondents No.1 & 2 is barred by time. No application for condonation of delay has been filed. Even otherwise, we have observed in the preceding paragraph that the prosecution has failed to prove its case against the respondents and have acquitted respondent No.1 of the charge, whereas, as per jail report, the respondent No.2 has died in prison. Under such circumstances, this criminal petition for enhancement of sentence of the respondents cannot be entertained. Therefore, leave to appeal is refused and the petition is dismissed.

Judge

Judge

Judge

Islamabad

26 March 2024

K. Anees and Waqas Ahmad, LC

3/7/24

JUDGMENT

SYED HASAN AZHAR RIZVI: I have had the privilege of going through the majority judgment authored by my learned brother Jamal Khan Mandokhail, J. I with due respect, find myself in disagreement with the same for the reasons herein below.

2. This Appeal arises out of the Jail Petition No.343 of 2014 filed by convicts Muhammad Tariq and Abid Hussain from jail. A report dated 14.01.2020 was received from the Superintendent, Central Jail Faisalabad which reveals that convict Muhammad Tariq has died in DHQ Hospital, Faisalabad on 08.01.2020. In view thereof, the jail petition having abated to the extent of Muhammad Tariq was accordingly dismissed. To the extent of Abid Hussain (Appellant), leave was granted vide order dated 10.02.2020 for reappraisal of entire evidence.

3. Apart from this, Criminal Petition for leave to appeal No.906-L of 2014 was also filed by Complainant Mushtaq Ahmed against both convicts with the prayer that the death sentence awarded by the trial court may be upheld. Since Muhammad Tariq has died therefore this petition also abates to the extent of Muhammad Tariq.

4. Before discussing the grounds in detail, it is pertinent to reiterate important facts briefly. Perusal of the record reveals that Muhammad Ashfaq was a rickshaw driver by profession. On the 07.04.2009, at 06:00 PM, while he was en route from Adda Khadarwala to Chak Number 209/G.B on his rickshaw, there was accumulation of rain water on the road. Due to tires of rickshaw of Muhammad Ashfaq water splashed on Muhammad Tariq, who was walking in the middle of the road, resultantly his clothes became dirty. This led to a verbal altercation and exchange of hot words

between Muhammad Tariq and the deceased but the matter was resolved on interference by the people. On 08.04.2009, around 01:00 PM, the deceased was standing with his rickshaw at Chowk Adda Khadarwala Gojra Road when three individuals namely Muhammad Tariq, Abid Hussain, and Raheel alias Reela, armed with pistols, approached from Adda Chowk. Muhammad Tariq threatened retaliation for the previous day's incident; raised a lalkara that he would teach the deceased a lesson and made a fire with pistol which landed on the left side of chest of the deceased; second fire was made by the Abid Hussain with pistol which landed on right side of chest of deceased; third fire was made by Reela which landed on the abdomen of deceased who fell down and succumbed to injuries at the spot. The occurrence is alleged to be committed on the abetment of the Falak Sher.

5. Record further reveals that this whole occurrence was witnessed by Shahbaz Ali (PW-7) and Irfan Ali (Given up PW). Abid Hussain and Muhammad Tariq were arrested on 21.04.2009. On 05.05.2009 pursuant to disclosure of Abid Hussain, a .30 bore pistol was recovered by the police and taken into possession vide recovery memo Exh.PA.

6. In order to prove its case, prosecution produced twelve witnesses during the trial. Mushtaq Ali, complainant and father of deceased (PW-5) and Shahbaz Ali (PW-7) furnished ocular account of the incident. Rehmat Ali (PW-8) is the witness of abetment. The medical evidence was provided by Dr.Akhtar Alam, medical officer, THQ Hospital Samundari (PW-4). Liaqat Ali (PW-1) is the witness of recovery of .30 bore pistol allegedly recovered at instance of appellant Abid Hussain.

7. It transpires that occurrence took place on 08.04.2009 at 01:00 PM, which was reported through a written application by the complainant at 02:40 PM and the FIR was registered at 03:20 PM.

As far as delay in lodging FIR is concerned, following explanation was provided by the complainant Mushtaq Ahmed (PW-5) in his examination in chief :-

“...After leaving the above named PWs at the place of occurrence, I came to Samundri and got written an application from Tehsil offices Samundri and went to P/S Saddar, Samundri while boarding on a bus but the police was on patrolling duty, therefore, I again went to Khiderwala while boarding on another bus. Thanidar was present on place of occurrence so I submitted my application to him which is Ex.PC bearing my signatures Ex.PC/1.”

Complainant was cross-examined at length wherein he confirmed the above-statement and provided full explanation as follows:-

“I boarded on a bus from Khiderwala to report the matter at P/S Saddar Samundri at 01:30 PM. I delighted from the bus at old Katchery Stop, Samundri. Thereafter, I went to a petition writer and got recorded a petition. Subsequently, I went to P/S alongwith said petition on a bus. I arrived at P/S at about 02:15 PM. I inquired from Moharrer pertaining to my submission of my application. He told me for submission of said petition before Thanidar who already had proceeded to Khiderwala. I did not tell Moharrer about murder of my son. Thereafter, I again went to Khiderwala and arrived there at about 02:30 PM. When I delighted from the bus I saw a police constable present there.

... FIR was lodged on basis of petition submitted by me before Thanidar...”

Considering that the police station is located 13 miles away from the scene of the incident, along with the explanation provided by the complainant, it can be concluded that the report was made promptly. It is a well-established principle of criminal law that if delay in lodging FIR is well explained then same is not fatal for the prosecution's case.

8. At this juncture, it is pertinent to highlight a persistent issue in the society. In instances of murder cases, people often hesitate to provide any sort of assistance to the victim or family of

deceased, such as declining to provide their vehicles to transport the injured or deceased to hospitals. This reluctance typically arises from fears of involvement in the criminal cases and distrust of law enforcement. However, this reluctance leads to significant consequences, including delays in medical care for the injured and challenges for law enforcement/investigations. This case is no exception to that, because, in this case also father of the deceased (complainant) strived hard to approach the Police Station to report the incident, he went in the bus therefore there was a delay of 2 and half hours in the lodging of FIR. In light of circumstances mentioned above, this delay is not fatal to the prosecution case. Reference can be made to the case of Nasrullah and others versus The State (1996 SCMR 1926), wherein this court has ruled that delay of 7-8 hours in lodging FIR was not fatal to the case of prosecution if there is a convincing explanation for the alleged delay. In the instant case, delay in lodging the F.I.R. has plausibly been explained by the complainant. Even otherwise in the absence of previous enmity the delay in lodging the F.I.R. would not matter much. The ocular account is fully supported by the medical evidence and corroborated by the circumstances of the case. Moreover, High Court in impugned judgment has considered the delay in lodging FIR with ample reasoning and has held that same is not fatal to prosecution case.

9. It is important to highlight that neither the time nor the location of the incident, nor the unfortunate death of the deceased, has been disputed by the defense.

10. As far as motive part of FIR is concerned, prosecution has not produced any evidence to substantiate the same therefore same was disbelieved by trial court hence real motive of the

occurrence is still shrouded in mystery. Now the question arises that what will be the fate of prosecution's case if motive alleged by it has not been proved. This has been sufficiently and consistently considered by this court that mere failure to prove alleged motive has no adverse effect on the prosecution's case. Reference may be made to the case of Hameed Khan alias Hameedai versus Ashraf Shah and another (2002 SCMR 1155) wherein this court has held that:-

4. "...Sometime atrocious crimes are committed without any motive or for very minor motive as such adequacy or weakness of the motive or where motive is alleged but not proved, in such cases it is the duty of the Court to scrutinize the prosecution evidence carefully. If the ocular evidence is trustworthy and reliable the motive part becomes immaterial as motive is a guess of the complainant who speculates that such motive might have motivated the assailant to commit the crime as the real motive is only known to the offender being within his exclusive knowledge. Absence of motive or failure to prove the motive would not adversely affect the prosecution case if prosecution has proved its case by reliable evidence."

Moreover, in another case of Saeed Akhtar versus The State (2002 SCMR 383) this court has observed that:-

8. "...Sufficiency or otherwise of the motive is not a sine qua non for the commission of the offence. It has been noticed that some desperate, reckless and ruffian type of people commit murder or other offences just at their whims while on the other hand people who have been properly nourished, educated and disciplined, do not lose their temper in most challenging situation, but rather act with patience and sobriety."

This court in the case of Syed Hamid Mukhtar Shah v. Muhammad Azam and 2 others (2005 SCMR 427) has ordained that Insufficiency of motive or motive being shrouded in mystery could not be considered as circumstances justifying non-awarding of the normal penalty of death to a murderer or to reduce the sentence of death to a lesser punishment.

11. Record further reveals that recovery of .30 bore pistol is also inconsequential and of no help to the prosecution for the reason that neither report of the Forensic Science Laboratory (FSL) is available on record nor any evidence was produced to prove that pistol was ever kept safe in Malkhana during the period from

05.05.2009 to 17.05.2009. While excluding the recovery of the pistol, entire case of prosecution rests on the ocular account and medical evidence.

12. To the extent of ocular account, the primary objection raised by learned counsel for the respondent is that all the eye-witnesses are related to the deceased therefore no reliance can be placed on their testimonies.

13. In view of this, the question arises as to whether relationship of deceased with the witnesses is sufficient to discredit their testimonies. It is a settled principle of criminal law that mere close relationship of the deceased with witnesses is not the criteria to believe or disbelieve a piece of evidence. This court in the case of **Muhammad Ahmed and another versus the State** (2010 SCMR 660) has held that, the crucial test for accepting or rejecting a piece of evidence is its intrinsic worth and not the source from which it is coming out.

Reference may be made to the case of **Ijaz Ahmed versus the State** (2009 SCMR 99) wherein this court has held that:-

"9. ... In the wake therefore, it proceeds that merely because the witnesses are kith and kin, their evidence cannot be rejected, if otherwise it is trustworthy. It would also be pertinent to mention here that related witnesses some time, particularly in murder cases, may be found more reliable, because they on account of their relationship with deceased, would not let go the real culprit of substitute an innocent person for him..."

In another case of **Saeed Akhtar versus The State** (2002 SCMR 383) this court has observed that:-

"8. ...There is no need to emphasize that mere relationship of the witnesses with the deceased would not detract from their veracity as they had absolutely no motive of their own to involve the appellants."

In case of **Abid Ali versus. The State** (2011 SCMR 208), this Court has held that to believe or disbelieve a witness, all depends upon intrinsic value of the statement made by him. There cannot

be universal principle that in every case, interested witnesses should be disbelieved or disinterested witnesses be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on scene of crime and that he is making true statement. Person who is reported otherwise to be very honest, above board and very respectable in society, if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement. As a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of evidence. It is not that who is giving evidence and making statement. What is relevant is what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged."

14. In the present case, eye-witnesses have given very reliable reason for their presence on the spot at the time of occurrence which could not be discredited. They had no axe of their own to grind and it could not be shown that they substituted the appellants for any ulterior motive. Learned Trial Court and High Court have evaluated and dilated upon the evidence in detail and have, for cogent and sound reasons, held the appellant responsible for the commission of the offence.

15. Typically, most people in the community are hesitant to get involved as witnesses in serious murder cases unless they have some kind of personal connection to either the victim or the accused. This reluctance stems from various factors such as fear of retaliation, concerns about their safety/security and a lack of trust in the legal system. It is common for individuals to feel more compelled to come forward if they have a relationship, whether it's familial, social, or otherwise, with one of the parties involved.

However, for those without such ties, the idea of being involved in such a serious and emotionally charged situation can be overwhelming, leading them to prefer staying on the sidelines.

16. This court has dealt with this aspect in the case of **Muhammad Ahmed and another versus the State (1997 SCMR 89)** wherein it was ordained that:-

"14. As regards the argument of the learned counsel for the appellant that Muhammad Iqbal P.W. being an interested witness, it was not safe to rely upon his evidence without independent corroboration, suffice it to observe that the rule requiring independent corroboration of testimony of interested witnesses is a rule of prudence which is not to be applied rigidly in each case. There can be cases like the present one where implicit, reliance can be placed on the uncorroborated testimony of an interested witness if it otherwise inspires confidence. ..."

More recently, this court has reiterated this well-settled proposition by relying on previous precedents in the case of **Sajid Mehmood versus The State (2022 SCMR 1882)** and has ruled that:-

"As far as the question that the complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain conviction of the appellant is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case."

17. In light of above discussion, it can be safely concluded that the complainant Mushtaq Ahmed and other eye witnesses have been rightly believed by the courts below. Complainant undoubtedly was a witness of the occurrence which took place in broad daylight with no possibility of mistaken identity. Being a father of the deceased, he would not allow the real culprit to escape by implicating an innocent person.

18. It transpires from the record that prosecution witnesses were subjected to lengthy cross-examination by the defense but nothing favourable to the appellant or adverse to the prosecution could be produced on record. All the PWs remained consistent on each and every material point inasmuch as they

made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. Additionally, medical evidence fully corroborates the ocular account furnished by the prosecution witnesses.

19. In view of above discussion, I observe that prosecution has produced sufficient incriminating material against the appellant. High Court in the Impugned judgment has duly considered all aspects of the case, both legal and factual. High court has rightly converted the death sentence of the appellant to life imprisonment. The impugned judgment is well reasoned and needs no interference.

20. Consequently, for the reasons mentioned above, both cases being devoid of merit are hereby dismissed.

(Syed Hasan Azhar Rizvi)

JUDGE

Islamabad
Paras Zafar, LC/-
NOT APPROVED FOR REPORTING