Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Jail Appeal No. 34 of 2017

Muhammad Faris
Vs
The State

APPELLANT BY: Raja Rizwan Abbasi and Mr. Imran Feroze, Advocates.

State By: Mr. Ishtiaq Ahmed, State Counsel.

DATE OF HEARING: 14-07-2021.

BABAR SATTAR, J.- Through this judgment we will decide ***Jail Appeal No. 34/2017*** titled above and ***Criminal Revision No. No. 26/2017 (Raja Amjad Ali Vs. Muhammad Faris, etc.)*** filed against the judgment dated 07.02.2017 passed by the learned Sessions Judge, Islamabad (East) pursuant to which Muhammad Faris **("Appellant")** charged under section 302(b) of Pakistan Penal Code, 1860 **("PPC")** in case FIR No. 64/2011 was convicted for murder of Aftab Hussain **("Deceased")** and was sentenced under section 302(b) PPC as Tazir for life imprisonment along with payment of compensation of Rs.300,000/- under section 544-A of Cr.P.C to the legal heirs of the Deceased (failing which the Appellant would serve six months rigorous imprisonment) and benefit of section 382-B of Cr.P.C was also extended to the Appellant.

2. On 09.06.2011 the Deceased and the Appellant were both attending Mehfil-e-shairkhwani **("Event")** hosted by Ali Asghar in relation to the wedding celebrations of his sons. Close to the culmination of the Event, the Deceased was shot dead. His brothers Amjad Ali (PW-3) and Arshad Ali (PW-4) were also present at the Event, they accused the Appellant for having fired multiple shots with a 30-bore pistol, which caused the death of the Deceased, after which the Appellant resorted to aerial firing and left the place of occurrence. Amjad Ali (PW-3) and Arshad Ali (PW-4) attended to the Deceased, who was rushed to PIMS Hospital and was pronounced dead. On the complaint (Exh.PA) of Amjad Ali (PW-3), FIR (Exh.PA/1) was registered at 5.45 a.m on the day of occurrence. The investigation was conducted by Muhammad Akbar, S.I. (PW-9) who reached PIMS Hospital and had the postmortem examination of the Deceased conducted. At the Hospital he received a complaint from Amjad Ali (PW-3) on the basis of which the FIR (Exh.PA/1) was registered. He recorded statements of Amjad Ali (PW-3) and Arshad Ali (PW-4) at the Hospital under section 161 of Cr.P.C. After the dead body was handed over to the legal heirs of the Deceased, Muhammad Akbar (PW-9) visited the place of occurrence and collected five empties through recovery memo (Ex-PE). The Appellant was arrested on 11.06.2017 and his physical remand was granted to the Investigating Officer on 13.06.2017. On the pointation of the Appellant, a 30-bore pistol and three live bullets were recovered from the house of the accused on 15.06.2011

through recovery memo (Exh.PR). The Investigating Officer also took into possession a video film of the Event through recovery memo (Exh.PJ). The charge was framed against the Appellant, on 22.10.2011 who pleaded not guilty and was consequently tried.

3. The learned Sessions Court in the impugned judgment reproduced the summary of the evidence adduced before it which need not be recapitulated. Based on appreciation of the evidence, the learned trial court concluded that testimony of Amjad Ali (PW-3) and Arshad Ali (PW-4), who witnessed the occurrence, was reliable and consistent in terms of its own account as well in relation to the medical evidence produced before the trial court. In view of the ocular account provided by Amjad Ali (PW-3) and Arshad Ali (PW-4), on the one hand, and Mustansar Abbas Kazmi (DW-1) on the other, the learned trial court concluded that the time of occurrence, date of occurrence, venue of occurrence, the presence of the Deceased and Amjad Ali (PW-3) and Arshad Ali (PW-4) at the place of occurrence, the light available at the Event and the fact that the Event transpired during which the Deceased was shot dead were not in dispute. The only facts in contention were the manner in which the deceased was shot, and (ii) who was responsible for his death. The learned trial court disbelieved the account provided by the Appellant in his statement under section 342 of Cr.P.C, wherein he had contended that a number of people were firing at the Event and it was one of the stray bullets that had caused the death of the Deceased. The learned trial court

appraised the medical evidence including the postmortem report (Exh.PL) prepared by Dr. Farrukh Kamal (PW-6), who noted that there was one entry wound at the back of the Deceased and one exit wound closed to the ear at the front of the face and that the death of the Deceased was caused by firearm injury that caused blackening around the wound. The trial court held that the firearm shot that claimed the life of the Deceased could not have been fired from a distance of more than two feet and consequently the medical evidence supported the version presented by the prosecution and not the story narrated by the accused in his statement under section 342 of Cr.P.C or the testimony presented by Mustansar Abbas Kazmi (DW-1). The learned trial court noted that empties were recovered on 09.06.2011 and were sent for forensic examination on 23.06.2011. It reasoned that the pistol was recovered from the house of the Appellant on 15.06.2011 and the empties after being recovered from the site of occurrence on 09.06.2011 had not been sent for forensic examination till 23.06.2011 (i.e. eight days after recovery of the weapon allegedly used in the commission of the offence), the recovery and the report matching the empties to the 30-bore pistol were inconsequential.

4. The learned trial court also noted that the motive attributed by Amjad Ali (PW-3) to the Appellant was that the Deceased was operating a real estate office at Chirah Adda which the Appellant wanted shut down, and the Deceased and the Appellant had an altercation and exchange hot words a couple of days prior to the date of occurrence, but that the

prosecution had led no evidence to prove motive. In view of the ocular account, which was consistent with the medical evidence, the learned trial court came to the conclusion that despite the recovery having been rendered inconsequential, the prosecution had proved its case beyond reasonable doubt that the Appellant shot the Deceased at the Event which inflicted a fatal injury on the Deceased and claimed his life. The learned trial court found the Appellant guilty of offence of murder punishable under section 302(b) of PPC as Tazir. But as the prosecution has failed to prove the motive attributed to the accused or prior enmity between the Appellant and the Deceased, and the cause of death was a single shot of a 30-bore pistol, the learned trial court treated these as mitigating factors in determining the sentence and held that the Appellant was liable to life imprisonment.

5. The learned counsel for the Convict contended that fatal injury was caused to the Deceased at the Event where enumerable persons were resorting to aerial firing. He submitted that the video of the Event (Exh.PJ) was a key piece of evidence, the last thirty minutes of which were missing. And the fact that a key piece of evidence was not preserved and presented by the prosecution would militate against the prosecution's case. He then submitted that the prosecution had failed to prove motive and consequently prosecution's case would fail on this score too. He contended that the occurrence happened in the middle of the night/early morning and no source of light was mentioned and consequently it could not be ascertained beyond doubt that

the Appellant had been correctly identified. He argued that in view of the ocular evidence, the deceased was sitting at a place where he was facing the accused. But the medical evidence suggested that the deceased had been fired at by someone toward his back. That as the bullet hit the Deceased on the back of his neck, it could only have been fired by someone seated behind him and not the Appellant who was not seated behind the Deceased. He also contended that the Deceased had a criminal history and various FIRs have been registered against him and consequently a number of individuals could have held a grudge against him. He also argued that the testimony presented by Amjad Ali (PW-3) and Arshad Ali (PW-4) could not be believed as they were real brothers of the Deceased and thus interested witnesses. And that the account in the FIR and their subsequent testimony reflected that they had attempted to improve their statements in order to implicate the Appellant. He submitted that testimony of Mustansar Abbas Kazmi (DW-1) had remained unshaken and persuasive and he had stated that a stray bullet hit the Deceased. The learned counsel for the Appellant relied on ***Muhammad Yousaf Vs. The State (1994 PCr.LJ 55)***, ***Bashir Ahmed Vs. The State (1999 SCMR 114)***, ***Jehangir Vs. Nazar Farid and another (2002 SCMR 1986)***, ***Ellahi Bakhsh Vs. Rab Nawaz and another (2002 SCMR 1842)*** and ***Mansoor Ahmed alias Pappi Vs. The State (2014 YLR 1881)***.

6. The learned State Counsel submitted that the complainant Amjad Ali (PW-3) was the brother of the

Deceased and was present at the place of occurrence and the testimony presented by him and Arshad Ali (PW-4) remained unshaken and trustworthy. He contended that the time and place of occurrence as well as the presence of witnesses at the place of occurrence was an admitted fact that had been corroborated by Mustansar Abbas Kazmi (DW-1) as well. That a specific role was attributed to the Appellant. That the version presented by the Appellant that a number of people was resorting to aerial firing was not supported by evidence. That the video film of the Event reflected that there was ample light at the Event and so the question of false identification of the accused did not arise and further the video did not reflect anyone resorting to aerial firing at the Event. He lastly contended that the medial evidence reflected that the Deceased was shot from close arrange resulting to the blackening around the wound and thus the fatal injury that caused the death of the deceased could not have been inflicted by a stray bullet or aerial firing.

7. We have heard the learned counsel for the Appellant and the learned State Counsel, and perused the record.

8. In view of the evidence adduced, the presence of the Deceased and the Appellant at the Event where the Deceased received a fatal gunshot and the time, place and manner in which the Deceased died is not disputed. The Appellant did not deny his presence at the place of occurrence but merely the manner in which the Deceased got shot. It is the prosecution's case that the Appellant shot the Deceased from

close range. It is the defence's case that a stray bullet fired during the celebratory aerial firing claimed life of the Deceased. In cross-examining Amjad Ali (PW-3) and Arshad Ai (PW-4), the defence tried to establish that the said witnesses were not present at the place of occurrence and had not witnessed the occurrence themselves. This was claimed by the Appellant in his statement recorded under section 342 of Cr.P.C as well. However, Mustansar Abbas Kazmi (DW-1) in his testimony admitted that Amjad Ali (PW-3) and Arshad Ali (PW-4) were present at the place of occurrence and that DW-1 together with PW-3 and PW-4 attended to the Deceased at the time when he was shot. Amjad Ali (PW-3) and Arshad Ali (PW-4) placed the Appellant a few feet away from the Deceased and both eye-witnesses (i.e. PW-3 and PW-4) claimed that the Appellant fired multiple shots, including shots fired after the Deceased received the fatal injury. The medical evidence is consistent with such ocular evidence in that the Deceased was shot from close range inflicting gunshot injury that caused blackening around the wound. Dr. Farrukh Kamal, MLO (PW-6) also testified that the injury was caused by a single firearm shot and that the Deceased had died within minutes of being shot. The defence led no evidence to establish that Amjad Ali (PW-3) and Arshad Ali (PW-4), being brothers of the Deceased, were to be regarded as interested witnesses nurturing ulterior motives against the Appellant on account of enmity etc. The said eye-witnesses were natural witnesses due to their presence at the Event which was a family affair for being

convened in relation to wedding celebrations. It has been held by the august Supreme Court that there exists no rule of law that statements of even interested witnesses cannot be taken into account with corroboration or even without corroboration if supported by surrounding circumstances. Reliance is placed on ***Khadim Hussain Vs. The State (2010 SCMR 1090)***, ***Ashiq Ahmed Vs. The State (2007 SCMR 641)***, ***Shoukat Ali Vs. The State (PLD 2007 SC 93)*** and ***Muhammad Mansha Vs. The State (2001 SCMR 199)***. The testimony of Amjad Ali (PW-3) and Arshad Ali (PW-4) remained unshaken and consistent with the medical evidence and surrounding circumstances of the case and is therefore reliable and trustworthy.

9. The learned counsel for the Appellant has laid a lot of emphasis on the seating arrangement reflecting that the Appellant and the Deceased were seated facing one another and consequently the Deceased could not have been shot by the Appellant. It is unnatural to assume that merely because the Appellant and the Deceased were originally seated in a certain manner, they remained stationary throughout the Event. The Appellant was seated within a few feet from the Deceased that the gunshot attributed to him is consistent with the injury inflicted on the Deceased and the said injury could not be attributed to a stray bullet landing on the neck of the Deceased as a consequence of aerial firing. Amjad Ali (PW-3) and Arshad Ali (PW-4), while being brothers of the Deceased cannot be treated as motivative witnesses as no evidence has been led to establish that the said witnesses

nurtured any animosity against the Appellant. The inconsistencies being attributed to their testimony also does not help the Appellant. In his testimony Amjad Ali (PW-3) explained that he initially believed that multiple gun shots had hit his brother, given the manner in which blood was oozing from the injuries caused to the Deceased. It is unnatural for a witness of a violent event to form a 100 percent accurate picture of minute details of such event that starts and ends within seconds.

10. The learned trial court rightly concluded upon appreciation of evidence, that the defence had failed to establish that eye-witness testimony was unreliable or inconsistent and therefore unbelievable. The defence story on the other hand, whether in relation to the manner in which the Deceased died (i.e. as a consequence of aerial firing) or denial of the presence of Amjad Ali (PW-3) and Arshad Ali (PW-4) at the place of occurrence by the Appellant, has not been substantiated by any evidence. There is nothing on record to establish that any guests at the Event indulged in aerial firing or the nature of injury that caused the death of the Deceased could have been caused by a stray aerial fire.

11. The contention of the learned counsel for the Appellant that there was no source of light at the Event is also not borne out by the video of the Event and by the evidence. The learned trial court has correctly concluded that there was no question of mistaken identity as Amjad Ali (PW-3) and Arshad Ali (PW-4) were eye-witnesses who knew the

Appellant and identified him. The Appellant also does not deny his presence at the place of occurrence at the relevant time. The recovery has been deemed inconsequential by the learned trial court and rightly so as empties were sent for forensic examination after a period of eight days of the recovery of the weapon allegedly used in the occurrence. However, the recovery having been rendered inconsequential does not undermine the ocular evidence in relation to the Appellant being attributed the fatal gunshot, which is consistent with the medical evidence and the 30-bore pistol recovered from the house of the Appellant. Further the inability of the prosecution to lead evidence to prove motive does not defeat the prosecution's case. It was held in ***Tahir Hussain Vs. The State (1995 SCMR 1776)*** that proving the motive for murder is not prerequisite in order to find the accused guilty of an offence under section 302(b) of PPC, but lack of proof of motive can be a relevant mitigating factor for purposes of sentencing. Reliance is placed on ***Ghulam Mohyuddin Vs. the State (2104 SCMR 1034)***.

12 The Appellant was idented as the sole accused in the FIR and the eye-witnesses, Amjad Ali (PW-3) and Arshad Ali (PW-4), identified the Appellant as the sole culprit responsible for the death of the Deceased in their testimony. It was held by the august Supreme Court in ***Muhammad Iqbal Vs. The State (PLD 2001 SC 222)*** that in a case of murder, *"substitution of an accused who is actually involved in the commission of a crime is a rare phenomenon in this country particularly in an incident in which a single accused was*

involved by nominating him in the FIR for the very beginning." Reliance is also placed on ***Muhammad Yaqoob Vs. The State (PLD 1983 SC 27)*** and ***Ranjha Vs. The State (2007 SCMR 455)***.

13. For the aforesaid reasons, we are in agreement with the judgment rendered by the learned trial court convicting the Appellant. In view of the fact that the prosecution has been unable to prove motive and the death of the Deceased was caused by a single firearm shot, these circumstances ought to be treated as mitigating factors for purposes of sentencing which has been done by the learned trial court. We are therefore not inclined to interfere with the sentence adjudged by the learned trial court either. We find that the impugned judgment suffers from no infirmity. The verdict as well as sentence passed by the learned trial court is **upheld** and consequently both the Jail Appeal and the Criminal Revision (filed by the complainant, Amjad Ali, for enhancement of sentence) are **dismissed**.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on **12.08.2021.**

JUDGE

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Saeed*