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IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal A.T. Appeal No.97 of 2021.

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

Appellant:	**Muhammad Shakeel @ Chotu S/o. Muhammad Younus through Mr. Ghulam Fareed Baloch, Advocate.**
Respondent:	**The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.**
Date of hearing:	**18.10.2022.**
Date of **Announcement:**	**20.10.2022.**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Shakeel @ Chotu S/o. Muhammad Younus has preferred the instant appeal against the judgment dated 15.06.2021 passed by Learned Judge, Anti-Terrorism Court No.X, Karachi in Old Special Case No.42 of 2019 (New Special Case No.02 of 2021) arising out of Crime No.120 of 2013 U/s. 302/324/109/34 PPC R/w section 7 ATA 1997 registered at P.S. Kalri, Karachi whereby the appellant was convicted u/s 7(a) ATA, 1997 R/w section 302 PPC and sentenced to undergo Life Imprisonment with fine of Rs.100,000/- payable to legal heirs of deceased persons. In case of non-payment of fine he shall suffer S.I. for 01 year more. The appellant was further convicted for the offence U/s. 7(c) of ATA, 1997 R/w 324 PPC and sentenced to undergo R.I. for 15 years with fine of Rs.50,000/- payable to each injured person. In case of default in payment of such fine, he shall undergo further S.I. for 03 months more. Both the sentences were directed to run concurrently. The benefit of Section 382-B Cr.P.C was also extended to the accused.

2. The facts of the prosecution case arising out of the instant FIR are that on 30.04.2013, complainant Muhammad Aslam S/o. Muhammad Sagheer was playing around with his baby/niece outside near to his House viz. inside Street No.H-2, Noorani Masjid, Agra Taj Colony, Karachi, while his paternal cousin

namely Muhammad Saleem S/o. Muhammad Zakir was sitting with his area friends namely Saleem Qureshi, Muhammad Shehzad @ Guddu, who had come as a Guest from Maripur and were making conversation. Meanwhile, at about 1645 hours, 05 to 06 unknown persons came inside the said Lane on foot and opened fire upon paternal cousin of the complainant including his friends named above with intention to kill them. Subsequently they became injured on having sustained bullet injuries. Looking to this scenario, the complainant saved his life by running away whereas the armed assailants managed to flee away on foot by running towards Shah Abdul Latif Bhittai Road who were duly seen by the complainant and others including area people. Following which the injured above named were immediately taken by the complainant to Civil Hospital for their treatment with the assistance of Mohallah people, whereby injured Haji Shehzad @ Guddu S/o. Riaz Ahmed and Muhammad Niaz S/o. Taj Uddin succumbed to their injuries and were declared dead by the doctor. Besides this, at that time, injured paternal cousin of the complainant Muhammad Saleem and his friend namely Muhammad Tasleem Qureshi were admitted in Operation Theatre for their medical treatment. On reaching the hospital the complainant came to know that during the above incident of firing, one Muhammad Arif S/o. Muhammad Ahmed had also become injured having fallen down on the ground while saving his life. As per complainant, during treatment at Hospital, his injured paternal cousin namely Muhammad Saleem S/o. Muhammad Zakir Qureshi was also declared as dead. Following which, on the same day, i.e. 30.04.2013 at about 2100 hours complainant recorded his statement U/s. 154 Cr.P.C. before the police, narrating therein, the entire facts of the incident as highlighted above and such Statement of the complainant was then incorporated into FIR book, bearing Crime No.120/2013 U/s. 302/324/34 PPC at P.S. Kalri, Karachi.

3. After completion of investigation, challan was submitted against above named accused and thereafter a formal charge was framed against the accused to which he plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 10 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed false implication by the police. However, the appellant neither examined himself on oath nor produced any witnesses in his defence.

5. After hearing the parties and 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 his conviction.

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

7. Learned counsel for the appellant has contended that the appellant has been falsely implicated in this case by the police in order to show their efficiency; that the eye witness Arif is a put up witness who was not present at the time of the incident and even if he was present he was not in a position to correctly identify the appellant as one of the persons who made firing on the deceased; that the appellant was shown to the eye witness by the police before the identification parade and as such the identification parade cannot be relied upon; that the appellants confession before the police is inadmissible in evidence; that the appellant did not take the police to the place of the wardat; that there are material contradictions in the evidence of the prosecution witnesses which renders such evidence unreliable and thus for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Nadeem Khan and 2 others v. The State** (2020 YLR 2461), **Ayaz Ahmed Siddiqui v. The State** (2021 P Cr.LJ 325), **Hakeem and others v. The State** (2017 SCMR 1546), **Hayatullah v. The State** (2018 SCMR 2092),**Ayaz and 2 others v. The State** (2020 PCr.LJ Note 44), **Farooq v. Musavir Ahmed and 3 others** (2020 P Cr.LJ 328), **Jehan Ali alias Jee Khan v. The State and others** (2017 P Cr.LJ 622) and **Mst. Mir Zalai v. Ghazi Khan and others** (2020 SCMR 319).

8. On the other hand learned APG contended that the FIR was lodged with promptitude; that the eye witnesses correct identification of the appellant could be safely relied upon as bolstered by the eye witnesses identification of the appellant at the identification parade; that the medical evidence supported the ocular evidence; that the appellant confessed his involvement in the crime before the police; that the appellant took the police to the place of wardat on his pointation; that there were no material contradictions in the evidence of the prosecution witnesses which evidence could be safely relied upon; that the prosecution witnesses were not related to the appellant and had no enmity with

him and a such has no reason to falsify the case against the appellant; that the trial court had already taken a lenient view in terms of sentencing considering that three persons were murdered by firearm and one injured by firearm by only awarding a life sentence to the appellant and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of **Amrood Khan v. The State** (2003 SCJ 604), **Muhammad Waris v. The State** (2008 SCMR 784), **Khalid Naseer and another v. The State and another** (2020 SCMR 1966), **Akhtar v. The State** (2020 SCMR 2020), **Muhammad Hayat and another v. The State** (2021 SCMR 92) and **Ijaz Ahmed v. The State and others** (2022 SCMR 1577).

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

10. At the outset based on our reassessment of the prosecution oral and documentary evidence, especially the medical evidence, the empties and blood recovered at the crime scene we find that the prosecution has proved beyond a reasonable doubt that Muhammed Niaz, Haji Shahzad, Muhammed Saleem (the deceased) were murdered by firearm and that Muhammed Tasleem was injured by firearm and Muhammed Arif received injuries by falling down stairs during the course of the incident on 20.04.2013 at about 1645 hours inside street No. H-2 Noorani Mosque, Aghra Taj Coloney Karachi.

11. The only issue left before us is whether the appellant was one of the persons who murdered the deceased by firearm and injured Tasleem by firearm and caused injuries to Muhammed Arif at the said time, date and location?

12. Before proceeding further we are acutely aware that this is a very heinous offence whereby three young men lost there lives and one young man was injured by firearm and another man injured by falling during the incident but we as Judges have to put such aspects aside and decide the guilt or innocence of the appellant by dispassionately assessing the evidence before us and coming to a decision which is supported by the evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the

evidence and the law and nothing else. In this respect we refer to the case of **Naveed Asghar v State** (PLD 2021P.600) which held as under;

> *"The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.".*

13. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted keeping in view that each criminal case is based on its own particular facts, circumstances and evidence for the following reasons;

(a) We find that the prosecution's case rests **almost** exclusively on the evidence of the **sole eye witness** to the incident who claims that he can correctly identify the appellant (keeping in view that PW 2 Muhammed Aslam who was the complainant and was present during the incident and PW 3 Ali Mardan Chang who reached shortly after the incident stated in their evidence that they did not see the faces of the culprits) as one of the person's were fired at and murdered the deceased and injured Tasleem as such we shall consider his evidence in detail below;

(i) **Eye witness PW 6 Muhammed Arif.** According to his evidence on 30.04.2013 he, Muhammed Saleem, Haji Shahzad Tasleem Quershi, Muhammed Aslam Quershi and Niaz Muhammed were sitting in gali No.H-2 Noorani Masjid Road Agra Taj Coloney having tea when at about 0445pm four to five armed men came from Noorani Masjid Street and made straight fire on them with intention to murder them. Muhammed Saleem, Haji Shahzad, Tasleem Quershi, Muhammed Aslam Quershi and Niaz Muhammed received firearm injuries and whilst being terrified he ran from front side of home and while climbing the staircase fell down and injured his arm and foot. After the firing had stopped he returned to the place of incident and found all the above named critically injured who were shifted by Mohalla people to the civil hospital. He also went to civil hospital where he was treated for his injuries and discharged after 3 to 4 hours. On 09.11.2016 he recognized the appellant before an identification parade held before a judicial magistrate with a specific role.

According to PW 3 Shakeel he stated that the eye witness had also been injured although he was not an eye witness to this. It appears that the eye witness was a neighbor and as such he was not a chance witness and his injuries are supported by an MLC. The deceased were not his relatives and he had no enmity or ill will to lead to him giving false evidence against the appellant. Thus we find that this eye witness was present at the crime scene.

The question which emerges is whether the eye witness was correctly able to identify the appellant after a period of three years and 6 months. Admittedly it was a day time incident however the eye witness did not know the appellant and this was the first time he saw him. He would only have got a fleeting glance of the appellant under traumatic and chaotic circumstances and even in his own evidence he states that he was terrified and ran to save his life and became confused. Surprisingly, despite it being his friends who were murdered before his very eyes and him being an important eye witness he did not go to the police to give his statement instead the police came looking for him which raises eye brows. He gave his S.161 Cr.PC eye witness statement **5 days** after the incident which goes against him. According to his evidence due to trauma he **was unable to prepare sketches** of any of the accused who made the firing and he **did not give any hulia** in respect of any of the persons who had made firing but only said that he could recognize them again if he saw them again. **The identification parade was held after around 3 years and 6 months of the incident** when the accused was arrested in another case and the eye witness stated at the identification parade that 7/8 people made the firing as opposed to 4/5. If the eye witness can make this basic mistake how can we safely rely on his correct identification 3.6 years later of the appellant based on our above discussion in a situation where he admits that he was scared, traumatized and confused and did not give any sketches or hulia of any of the 4/5 culprits. Notably the accused, as he was wanted in a number of other police cases, was on police remand and was kept at the police station so the eye witness had every opportunity to be shown to the accused by the police as claimed by the accused in his S.342 Cr.PC statement.

Although we can we can convict based on the evidence of a sole eye witness however based on the particular facts and circumstances of this case as discussed above we find that based on the reasons mentioned above the eye witness would **not** have been able to correctly, safely and reliably identify the appellant and as such we veer on the side of caution in this case and find that the eye witness was **not** able to correctly identify the appellant.

In this respect reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524) concerning the necessity for an early hulia/description of an accused by an eye witness in his S.161 Cr.PC statement before an identification parade and the need to strictly follow the rules governing identification parades where it was held as under at P.528 to 530:

"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. ***As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted.*** *In Ramzan v Emperor (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that,* ***"The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases"*** *(page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that,* ***"Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier"*** *(page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court,* ***held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case"*** *(page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that,* ***it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible"*** *(page 485P).*

8. ***The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits.*** *Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the*

appellants were placed, were of similar age, height, built and colouring. ***The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect....***

9.As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) and Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, ***the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times*** *(page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces.* ***In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential."*** (bold added)

The Supreme Court case of **Mian Sohail Ahmed V State** (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified. In fact such extra care and caution in relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

(b) That Tasleem who was an injured eye witness at the crime scene and was the star eye witness of the prosecution was given up by the prosecution without any reasonable explanation and as such as per Section 129 (g) Qanoon-e-Shahadat Ordinance 1984 an adverse inference can be drawn that he would not have supported the prosecution case. Thus, the prosecution deliberately withheld the best evidence available to them.

(c) That with no eye witness evidence to identify who carried out the attack the medical evidence becomes inconsequential as it can only reveal what kind of weapon/device was used and the seat of the injuries of the dead and injured. It cannot identify the person who inflicted the injuries.

(d) That it is **significant** that although the appellant confessed to the offence whilst in police custody he was not produced before a magistrate

to record his confession under S.164 Cr.PC despite being produced before an identification parade which was held by a magistrate and thus we place no reliance on his confession allegedly made before the police.

(e) That it does not appeal to logic, reason or commonsense that the appellant would confess to such a serious crime as the present one which carried the death penalty whilst in police custody in another case which related to narcotics when there was no evidence against him at the time of his arrest in respect of the instant case which had been disposed of long ago in "A"class.

(f) That no pistol was recovered from the accused and as such the empties which were recovered at the scene of the crime despite a positive FSL report cannot link the appellant to the crime scene and as such the FSL report is of no significance.

(g) That the appellant took the police to the place of wardat 3.5 years after the offence is of no relevance as the police already knew where the crime scene had taken place.

(h) That the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession and in this case we find numerous doubts in the prosecution case as discussed above. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345),

14. For the reasons discussed above we find doubt in the prosecution case and by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed and the appellant shall be released unless wanted in any other custody case.

15. The appeal stands disposed of in the above terms.