

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,*

SPL. CRIMINAL A.T. APPEAL NO. 89 OF 2021.
SPL. CRIMINAL A.T. APPEAL NO. 90 OF 2021.

Appellant:	Kosar alias Munna S/o. Muhammad Badar through Mr. Tariq Mehmood, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of hearing:	12.10.2022.
Date of Announcement:	17.10.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Kosar alias Munna S/o. Muhammad Badar has preferred these appeals against the judgment dated 14.06.2021 passed by Learned Judge, Anti-Terrorism Court No.VII, Inside Central Prison at Karachi in Special Case No.15(vii)/2020 arising out of Crime No.472 of 2020 U/s. 302/353/324/34 PPC R/w section 7 ATA 1997 and Special Case No.15-A(vii)/2020 arising out of Crime No.473 of 2020 U/s. 23(1)(A) of Sindh Arms Act, 2013 registered at P.S. Suijani Town, Karachi whereby the appellant was convicted and sentenced as under:-

- i) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 302 PPC and sentenced to suffer R.I. for life and to pay fine of Rs.200,000/- (Two Lacs). In case of default in payment of fine he shall suffer S.I. for six months more.
- ii) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 7(a) of Anti-Terrorism Act 1997 and sentenced to suffer R.I. for life and to pay fine of Rs.200,000/- (Two Lacs). In case of default in payment of fine he shall suffer S.I. for six months more.

- iii) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 324 PPC and sentenced to suffer R.I. for five years and to pay fine of Rs.20,000/- (Twenty Thousand). In case of default in payment of fine he shall suffer S.I. for six months more.
- iv) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 7(b) of Anti-Terrorism Act 1997 and sentenced to suffer R.I. for ten years and to pay fine of Rs.5,000/- (Five Thousand). In case of default in payment of fine he shall suffer S.I. for three months more.
- v) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 353 PPC and sentenced to suffer R.I. for one year and to pay fine of Rs.3,000/- (Three Thousand). In case of default in payment of fine he shall suffer S.I. for six months more.
- vi) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 7(h) of Anti-Terrorism Act 1997 and sentenced to suffer R.I. for five years and to pay fine of Rs.20,000/- (Twenty Thousand). In case of default in payment of fine he shall suffer S.I. for three months more.
- vii) Accused Kosar alias Munna S/o. Muhammad Badar was convicted for the offence under section 23(i)(a) of Sindh Arms Act, 2013 and sentenced to suffer R.I. for ten years and to pay fine of Rs.10,000/- (Ten Thousand). In case of default in payment of fine he shall suffer S.I. for three months.

All the sentences were ordered to run concurrently. The benefit of section 382(b) Cr.P.C. was also extended to the appellant.

2. The facts of the case as averted in the FIR are that on 22.05.2020 PC Sohail along with PC Mehboob, PC Ghulam Hyder and PC Yaqoob of PS Surjani Town during patrolling on two official Bikes reached at Katcha Pakka Road, Nasri Goth Surjani Town, Karachi at about 1200 noon and found two suspects coming on motor bike bearing Registration No. KMT-7701. The police party signaled them to stop but the suspects accelerated and speeded-up their bike and the police chased them to which the accused sitting on rear seat of bike opened fire on the police party which was retaliated by the police. During the shootout, the culprit driving the bike was gunned down by the policemen and expired at the spot, whose name later on came to be known as Faisal S/o. Unknown, whereas present accused seated on the rear seat sustained injuries due to fall from the Bike and was arrested at the spot along with unlicensed 30 bore pistol, loaded with two live rounds. Meanwhile, during the

encounter PC Mehboob also sustained bullet shots at his person, caused by the accused and was shifted to Abbasi Shaheed Hospital where later on he succumbed to his wounds at hospital.

3. After completion of investigation I.O. submitted charge sheet against the accused who plead not guilty to the charge and claimed trial. The prosecution in order to prove its case examined 11 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. The appellant however did not examine himself on oath and did not call any DW's in support of his defence case.

4. 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.

5. 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.

6. Learned counsel for the appellant has contended that there was an unexplained delay in filing the FIR which lead to the complainant cooking up a false case against the appellant; that the alleged eye witnesses were planted witnesses and were not present at the time of the incident; that no encounter took place; that no independent mashir was associated in violation of S.103 Cr.PC; that the pistol was foisted on the appellant; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; that the alleged eye witnesses have made up the story in order to save PC Sohail who shot the deceased by mistake and that 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 **Afaq Ahmed v The State** (2020 YLR 676), **Rajib v. The State** (2020 P Cr.LJ 1342), **Muhammad Akram v. The State** (2022 SCMR 18), **Muhammad Arif v. The State** (2019 SCMR 631), **Gulfam v. The State** (2017 SCMR 1189), **Muhammad Rafique v. The State** (2014 SCMR 1698), **Sardar Bibi v.**

Munir Ahmed (2017 SCMR 344), **Muhammad Ajmal v. The State** (2017 MLD 266), **Akhtar Ali v. The State** (2008 SCMR 6), **Ghulam Qadir v. The State** (2008 SCMR 1221) and **Muhammad Din v. The State** (1985 SCMR 1046).

7. On the other hand learned Additional Prosecutor General Sindh has contended that the evidence of the eye witnesses is reliable, truthful and confidence inspiring and is to be believed; that empties recovered at the spot were matched with the pistol which was recovered from the accused on the spot; that the medical evidence supported the ocular evidence and as such the impugned judgment should be upheld and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of **Muhammad Waris v. The State** (2008 SCMR 784), **Nizamuddin v. The State** (2010 SCMR1752), **Majhi v. The State** (1970 SCMR 331), **Khalid Naseer v. The State** (2020 SCMR 1966), **Abdul Majeed v. The State** (2008 SCMR 1228), **Amrood Khan v. The State** (2003 SCJ 604) and **Ijaz Ahmed v. The State** (2022 SCMR 1577).

8. We have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and 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.

9. Based on our reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of empties at the crime scene we find that the prosecution has proved beyond a reasonable doubt that PC Mehboob (the deceased) was shot and murdered by firearm on 22.05.2020 at about 12 noon near Katcha Pakka road, Nasri Goth, Surjani Town Karachi.

10. The only question left before us therefore is whether it was the appellant who fired at and murdered the deceased by firearm at the said time, date and location?

11. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge in respect of the PPC offences against the appellant but **not** in respect of the ATA offences for

which he is acquitted keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That the FIR was lodged with promptitude after only two hours of the incident and this slight delay was caused because the complainant was organizing taking the deceased to hospital where his life might have been saved and thereafter he lodged the FIR as such he had no time to consult with the other police or anyone else in order to cook up a false case against the accused. His mind would have been in turmoil following the incident and at that point in time his main concern would have been the condition of his seriously injured colleague rather than putting together a false narrative in order to implicate the accused. Thus, we find that there has been hardly any delay in lodging the FIR and even such slight delay has been fully explained. In any event the accused is named in the FIR as he was arrested on the spot and neither the prosecution has been benefited nor the accused prejudiced on account of such slight delay in lodging the FIR which based on the particular facts and circumstances of the case is not fatal to the prosecution case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872).

(b) We find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether we believe their evidence whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Sohail Ahmed. He is the complainant.** According to his evidence on 22.05.2020 he was on patrol with the deceased, PW Ghulam Hyder and PC Yaqoob when they saw suspicious persons sitting on a bike which they had followed when the person on the back of the bike opened fire on them. Due to such fire the deceased received firearm injuries and he in retaliation returned fire which lead to the death of one of the persons on the bike (Faisal the driver) and the accused who was also on the bike when it fell down being apprehended by the Mohalla people who maltreated him before he was arrested by the police. The police recovered from him a 30 bore pistol and two live bullets. ASI Idrees who was duty officer at Sujani Town arrived at the spot and collected 4 empties.

This eye witness is not a chance witness as he was on patrol at the time of the incident. He is not related to the deceased and has no ill will or enmity with the accused and has no reason to falsely implicate him in this case. It was a day light incident where the accused was arrested on the spot with the help of the Mohalla people who had gathered there and thus there is no case of mistaken identity. The FIR which names the accused and narrates the incident was lodged with promptitude and no significant improvement was made in its content during the course of his evidence. He gave his evidence in a natural manner which was not dented despite

a lengthy cross examination. We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same.

We can convict on the evidence of this eye witness alone though it would be of assistance by way of caution if there is some corroborative/ supportive evidence. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) and **Muhammad Ismail v. The State** (2017 SCMR 713). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality and believe the same. It is also significant that the appellant was caught red handed on the spot. In this respect reliance is placed on the cases of **Majhi** (Supra) and **Muhammed Din v State** (1985 SCMR 1046). In this case however there is more than one eye witness.

(ii) **Eye witness PW 10 Ghulam Hyder.** He was present on patrol with eye witness PW 1 Sohail Ahmed at the time of the incident. His evidence corroborates PW 1 Sohail Ahmed's evidence in all material respects save for a few minor discrepancies which we do not find to be material and the same considerations apply to his evidence as to the evidence of PW 1 Sohail Ahmed.

Thus, based on our believing the evidence of the PW eyewitness what other supportive/corroborative material is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of Muhammad Waris v The State (2008 SCMR 784)

(c) That PW 7 Faheemuddin and PW 8 Danish both of whom lived in the same street where the encounter took place and were not chance witnesses gave evidence that they heard the firing and that after the firing they came out of their houses and saw the accused being grabbed and maltreated by mohalla people before being arrested by the police. They had no enmity or ill will towards the accused and had no reason to give false evidence against him. Their evidence also fits in with the evidence of other witnesses who reached the crime scene after the incident and they were not dented during cross examination and as such we believe their evidence. Why would mohalla people grab hold of an innocent person and start to maltreat him for absolutely no reason. This does not appeal to logic, reason or common sense or the prevailing ground realities in Karachi as when such an incident occurs and the public have a chance to catch the culprit they often do so and subject him to a serious beating if not worse.

(d) That PW 2 Muhammed Idress who was also a police man who reached the scene shortly after the incident corroborates the eye witnesses in so far as the after incident events are concerned and recovered 4 empties from the crime scene.

(e) That the medical evidence of MLO PW 5 Dr. Sohail and medical reports fully support the eye-witness/prosecution evidence. It confirms that the deceased died from a fire arm shot to his chest. There was no blackening around the wound which indicates that it was not made from within 3 feet which fits in with the prosecution case of the distance between the parties during the encounter i.e not from within 3 to 4 feet. The deceased co-accused named Faisal was also found to have been killed by one fire arm shot during the encounter which also fits in with the prosecution case of an encounter and one accused being killed in the encounter on the spot who later was disclosed by the accused as being named Faisal.

(f) That it is the case of the prosecution through its witness PW 7 Faheemuddin and PW 8 Danish as discussed above that the accused was grabbed by the mohalla people and maltreated. This conduct from local people is not unusual in Pakistan when they catch hold of a criminal trying to escape and is supported by the medical evidence of PW 6 Dr. Abid Ali who examined the accused after the incident and found his injuries to be consistent with being maltreated by people

(g) That the empties which were recovered at the scene lead to a positive FSL with the pistol which was recovered from the accused at the scene when he was arrested on the spot for which he was not able to produce a valid license. Like wise the empties recovered at the scene of the crime also matched PW Sohail's pistol which supports his evidence of firing at the accused during the encounter. The delay of sending the pistols and empties to FSL for 6 days is not material based on the particular facts and circumstances of this case and cannot outweigh the ocular evidence as was held in the cases of **Nizamuddin (Supra)** and **Muhammad Ashraf v The State** (2011 SCMR 1046)

(h) That the bike which the accused and his deceased co-accused Faisal were riding at the time of the incident was found to be owned by Faisal who was killed at the time of the encounter which once again links the accused to the crime scene.

(i) That it has not been proven through evidence that any of the police PW's who gave evidence had any enmity or ill will towards the appellant and had no reason to falsely implicate him in this case for instance by planting a pistol on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon and as such we rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed v. The State** (2020 SCMR 474).

(j) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan v. State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the time the police eye witnesses ordered the accused

to stop to the accused riding away on there bike whilst firing at the police to the police firing in retaliation to one of the accused being killed on the spot to the one of the policemen being killed on the spot during the encounter to the apprehension and maltreatment of the accused by mohalla people 50 feet from the incident to the accused arrest on the spot and recovery of pistol from with to his pistol producing a positive FSL report with the empties recovered at the crime scene.

(k) The fact that S.103 Cr.PC was not complied with based on the particular facts and circumstances of this case and the other available evidence on record we do not give much significance to as it has now virtually been judicially recognized that in such type of criminal cases now a days due to general apathy in the public and fear of reprisals independent people are not willing to act as mashirs and unnecessarily embroil themselves in the legal process which may have repercussions on both them and their family. In this respect reliance is placed on the cases of **Salah-uddin v. The State** (2010 SCMR 1962) and **Ibrarullah v. State** (2021 SCMR 128)

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The defence case is simply one of false implication by the police as allegedly PW Sohail accidentally shot the deceased for which the accused have produced not an iota of evidence which he was obliged to do once he raised this specific defence. In this respect reliance is placed on the case of **Anwar Shamim v. State** (2010 SCMR 1971). Importantly the defence case admits the presence of the appellant at the crime scene at the time of the crime along with co-accused deceased Faisal and the accused being caught and mistreated by the mohalla people before being handed over to the police. In this respect the appellants reply in his S.342 Cr.PC statement to question 45 as to whether he had any thing else to add is reproduced as under for ease of reference;

"I am innocent, booked falsely. On the alleged day of occurrence, I and Faisal were passing from the area when we were signaled by two of the police constables, who were there on Bike. We stopped our bike after passing some distance from the police staff. Neither we were given opportunity to be heard nor searched, rather P.C. Sohail through his official 9mm pistol initiated firing to us, to which he was restrained by P.C Mehboob, but the bullet missed us and caused injury to P.C Mehboob, other bullets hit to Faisal and me. Mohalla people arrived, caused me maltreatment there. Nothing incriminating were either recovered from me nor from deceased Faisal. Police in order to save P.C. Sohail managed the story and thereby booked in this false encounter. I pray for mercy."

The appellant did not give evidence on oath and thus, for the reasons mentioned above we disbelieve the defence case as an afterthought in the face of reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive

evidence against the appellant which has not at all dented the prosecution case.

12. We however do **not** find that this case falls within the purview of the ATA as defined by a larger bench of the Supreme Court in the case of **Ghulam Hussain v. State** (PLD 2020 SC 61) where in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of such act. Whether people were terrorized as a by product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Based on the particular facts and circumstances of this case it appears that the intent of the appellants was to rob people in the local area however when they were confronted by the police they fired upon them in order to make there escape good which firing had no object, intent, purpose or design to create terror which was done only to escape from the police and as such the appellant is acquitted of all offences under the ATA.

13. Based however on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eyewitness evidence and other corroborative/supportive evidence mentioned above, we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and sentenced under the PPC in the impugned judgment and hereby maintain such convictions and sentences in the impugned judgment.

14. As such the appeal is dismissed except as modified above.