

Eye witness Unreliable

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CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

**Spl Criminal A.T Appeal NO. 10 of 2021
Confirmation Case NO. 04 of 2021**

Muhammad Ishaque alias Bobi

Vs

The State

HIGH COURT OF SINDH

Composition of Bench.

D.B.

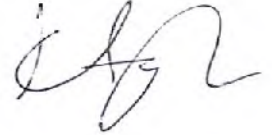
**Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi**

Date(s) of hearing: 06-09-2022

Decided on : 12-09-2022

Judgment approved for Reporting

Yes



CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law
*/decides a question of law which is of first impression/distinguishes/. Over-rules/
reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first
page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the
Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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1.
PRESENTED ON
23/01/2021

[Signature]
Deputy Registrar (Judl.)

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IN THE HIGH COURT OF SINDH AT KARACHI

Spl CR/APPEAL No. *10* of 2021

Muhammad Ishaque alias Bobi alias Hussain
S/o Muhammad Ibrahim
Muslim adult, R/o Karachi
Presently confined in
central prison.....Appellant

VERSUS

The State.....Respondent

F. I. R No.336 of 2014
U/S. 302/324/34/ PPC
R/W Section 7 ATA 1997
PS. Zaman Town Karachi

**CRIMINAL APPEAL UNDER SECTION 25 ANTI
TERRORISM ACT**

Being aggrieved and dissatisfied with the judgment dated.14-1-2021 passed by Anti-Terrorism Court No.XVI Karachi, in the spl case No. 2614/2016, New special case No.214/2019 whereby convicted the appellant as under:-

- a. For causing death of the deceased Syed Zahid Hussain shah, Muhammad Nawaz and Muhammad Younus punishable under section 302 r/w 34 PPC the accused is sentenced to death on each count; the accused shall be hanged by neck till death.
- b. For causing death of the deceased Syed Zahid Hussain punishable under section 7(a) of the Anti-Terrorism Act, 1997, the present accused is also sentenced to death on each count with fine of Rs.200,000/- (two lacs) each; the accused shall be hanged by neck till death.

OFFICE OF THE JUDGE ANTI-TERRORISM COURT-XVI,
JUDICIAL COMPLEX CENTAL PRISON, KARACHI

ATC-XVI/K-DIV/131/2021 Karachi

Dated: 14.01.2021

To,

The Registrar,
Honourable High Court of Sindh,
Karachi.

INWARD TO 80-A
BRANCH - ckt
DATE 28/1/2021
HIGH COURT OF SINDH KARACHI

Old Special Case No.2614/2016
(New Special Case No.214/2019)

The State
Versus

Muhammad Ishaq @ Bobi @ Hussain S/o Muhammad IbrahimAccused in custody.

FIR No.336/2014
U/S: 302/324/34 PPC,
R/w 7 of Anti-Terrorism Act-1997
P.S: Zaman Town, Karachi.

SUBJECT: REFERENCE FOR CONFIRMATION OF DEATH SENTENCE U/S 374
CR.P.C. IN SPECIAL ABOVE
CASES.

With reference to the subject noted above, death sentence passed by the undersigned vide judgment dated 14.01.2021 against accused **Muhammad Ishaq @ Bobi @ Hussain S/o Muhammad Ibrahim** is submitted herewith for confirmation, the sentence of accused convicted as under:

- For causing death of the deceased Syed Zahid Hussain Shah, Muhammad Nawaz and Muhammad Younus, punishable under section 302 r/w 34 PPC, the accused is sentenced to **death** on each count, the accused shall be hanged by neck till death.
- For causing death of the deceased Syed Zahid Hussain Shah, Muhammad Nawaz and Muhammad Younus, punishable under section 7(a) of the Anti-Terrorism Act, 1997, the accused is also sentenced to **death** on each count with fine of Rs.200,000/- (two lacs) each; the accused shall be hanged by neck till death.

IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal A.T. Appeal No.10 of 2021.
Conf. Case No.04 of 2021.

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi,

Appellant: Muhammad Ishaque alias Bobi alias Hussain S/o. Muhammad Ibrahim through Mr. Hashmat Khalid, Advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.

Date of hearing: 06.09.2022.

Date of Announcement: 12.09.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Ishaque alias Bobi alias Hussain S/o. Muhammad Ibrahim has preferred the instant appeal against the judgment dated 14.01.2021 passed by Learned Judge, Anti-Terrorism Court No.XVI, Karachi in Old Special Case No.2614 of 2016 (New Special Case No.214 of 2019) arising out of Crime No.336 of 2014 U/s. 302/324/34 PPC R/w section 7 ATA 1997 registered at P.S. Zaman Town, Karachi whereby the appellant was convicted and sentenced as under:-

- (a) The accused Muhammad Ishaque alias Bobi alias Hussain S/o. Muhammad Ibrahim was convicted for the offence u/s. 302 r/w 34 PPC for causing death of the deceased Syed Zahid Hussain Shah, Muhammad Nawaz and Muhammad Younus and sentenced to death on each count subject to confirmation by this court.
- (b) The accused was also convicted for the offence u/s. 7 (a) of Anti-Terrorism Act, 1997 for causing death of the deceased Syed Zahid Hussain Shah, Muhammad Nawaz and Muhammad Younus and sentenced to death on each count subject to confirmation by this court with fine of Rs.200,000/- (Two Lacs).
- (c) The accused was also convicted for the offence u/s. 7 (1)(h) of Anti-Terrorism Act, 1997 for committing act of terrorism and

sentenced to undergo R.I. for 10 years with fine of Rs.50,000/- (Fifty Thousand).

(d) The accused was also directed to pay an amount of Rs.200,000/- (Two Lac) to the legal heirs of deceased Syed Zahid Hussain Shah, Muhammad Nawaz and Muhammad Younus as compensation as provided under section 544-A Cr.P.C. and in default of such payment the accused was ordered to suffer S.I. for six months.

(e) The property of the accused was directed to be forfeited as required u/s. 7(2) of Anti-Terrorism Act, 1997.

All the sentences were directed to be run concurrently and the benefit of Section 382-B Cr.P.C was also extended to the accused.

2. The brief facts of the prosecution case are that complainant Syed Zahid Hussain lodged FIR that his father Syed Zakir Hussain was working in Dargah Nazar Ali Shah, Nasir Jump, Korangi, Karachi for last 30/35 years. On 23.08.2014 one Amir Hussain aged about 12/13 years came to his house and reported that at about 1330 hours two young boys came at Dargah Nazar and after inquiry and meeting with Syed Zakir Hussain left there and came again after about 16 minutes opened fire upon Syed Zakir Hussain, his friend Muhammad Nawaz and Muhammad Younus @ Lahore who as a result thereof succumbed to their injuries whilst the accused also fired upon Amir Hussain but he remained safe. Accordingly he rushed to the Dargah but his father along with others were shifted to Jinnah Hospital. Accordingly the FIR was lodged against unknown persons.

3. After registration of the case, the investigation was assigned to Inspector Raja Muhammad Shahbaz of PS Model Colony, Karachi, who after usual investigation filed the report under "A Class". Later on accused Muhammad Ishaque @ Bobi was arrested in other cases and during interrogation the accused made disclosure that he had made firing upon the deceased Syed Zakir Hussain and Muhammad Nawaz, accordingly after collection of evidence the I.O. submitted Challan against the accused for disposal according to law.

4. The accused plead not guilty to the charge and claimed trial. The prosecution in order to prove its case examined 14 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the

allegations leveled against him and claimed false implication by the police.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier in this judgment and hence, the appellant has filed this appeal against his convictions and sentences.

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 is completely innocent and has been falsely implicated in this case by the police; that the sole eye witnesses evidence cannot be safely relied upon and even the appellant's identification parade was legally defective and in short there is no other evidence against the appellant and as such the appellant should be acquitted by being extended the benefit of the doubt; In support of his contentions he has placed reliance on the cases of **Shafqat Mehmood and others v. The State** (2011 SCMR 537), **Gulfam and another v. The State** (2017 SCMR 1189), **Muhammad Akram v. The State** (2009 SCMR 230), **Noor Islam v. Ghani-ur-Rehman and another** (2020 SCMR 310), **Patoo and another v. The State** (2012 MLD 1358), **Tariq Pervez v. The State** (1995 SCMR 1345), **Ashiq Hussain v. The State** (1993 SCMR 417) and **Hafiz Muhammad Arshad v. The State** (PLD 2007 Lahore 324).

8. On the other hand learned APG appearing on behalf of the State has fully supported the impugned judgment and contended that the appeal is without merit and should be dismissed with the confirmation reference being answered in the affirmative. In particular he has contended that the FIR was lodged with promptitude which gave no chance for the prosecution to cook up a false case against the appellant; that the eye witnesses evidence was reliable, trust worthy and confidence inspiring especially in terms of the correct identification of the appellant who carried out the murders who the eye witness had picked out at an identification parade and his evidence was fully corroborated by the

medical evidence. In support of his contentions he placed reliance on the cases of *Noor Ahmed and others v. The State* (PLD 2005 Karachi 177), *Niaz-ud-Din and another v. The State and another* (2011 SCMR 725), *Muhammad Nadeem alias Deemi v. The State* (2011 SCMR 872), *Muhammad Akram Rahi and others v. The State and others* (2011 SCMR 877), *The State/ANF v. Muhammad Arshad* (2017 SCMR 283), *Solat Ali Khan v. The State* (2002 SCMR 820), *Ghazanfar Ali @ Pappu and another v. The State* (2012 SCMR 215), *Ghulam Abbas v. The State* (2022 SCMR 1102), *Muhammad Zaman v. The State* (2007 SCMR 813) and *Muhammad Waris v. The State* (2008 SCMR 784).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, 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 the prosecution evidence, especially the medical evidence, the blood and empties recovered at the crime scene we find that the prosecution has proved beyond a reasonable doubt that on 23.08.2014 at about 1315 to 1330 hours Syed Zakir Hussian Shah, Muhammed Nawaz and Muhammed Younis (collectively referred to as the deceased) were all shot and murdered by firearm at Mazar/Shrine Nazar Shah Baba at Nasir Jump road, Korangi Karachi.

11. The only question left before us therefore is whether the appellant was one of the persons who shot and murdered the deceased at the said time, date and location?

12. 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) The prosecution's case rests exclusively on the evidence of the sole eye witness to the incident and his ability to correctly identify the appellant who allegedly came to the shrine along with another and fired on and caused the murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 10 Amir Hussain.** According to his evidence on 23.08.2014 he was watering the flowers at the shrine when two person's met him who he informed the Gadinashen was sitting inside the room. Both the persons went inside the room and came out and left. After a while the two persons returned and started firing at the Gadinashen and also fired over him to harass him where upon he escaped from the shrine. He later returned to the shrine and saw that the deceased had received firearm injuries and had died. He gave the information to the family members of the Gadinashen who came and shifted the dead bodies to hospital.

The eye witness does not appear to be a chance witness as he was working as a gardener at the shrine and also knew the family members of the Gadinashen and his presence at the crime scene is also mentioned in the FIR which was lodged with promptitude and he had no reason to falsely implicate the appellant.

The timing of his S.161 eye witness Cr.PC statement appears to be in some doubt. The first responder Muhammed Arif PW 8 states in his evidence that the eye witness approached him at the crime scene and told him that he had seen the incident but he did not record his statement. The first IO PW 15 Muhammed Naseem Farooqui apparently recorded the S.161 Cr.PC statement of the eye witness a day after the incident and then sent him off to the CTD to draw up sketches of the accused. The second IO PW 14 Jaffar Khan Baloch in his evidence however stated that there was no eye witness in the police file handed over to him and that there was no statement of eye witness Amir in the file. He also did not get the sketches of the accused drawn by the eye witness as according to him he was searching for the eye witness Amir and that he disposed of the case in "A" class and there was no mention of any eye witness in his report. The third IO PW 12 Muhammed Khan Quershi who took up the investigation two years after the incident came to know of eye witness Amir and tracked him down who then recorded his S.161 Cr.PC statement where he stated that he could recognize the accused if he saw them again. Whether the eye witness gave his S.161 Cr.PC statement the next day or two years later what is of **significance** is that he gave no hulia of the accused. He only said two years later that he could recognize them if he saw them again. Admittedly it was a day time incident but the eye witness would only have got a fleeting glance of the accused especially during the chaotic firing at the deceased and himself which lead him to flee the incident and he had never seen either of the accused before that day. Even he concedes during cross examination that in his S.161 Cr.PC statement (whenever it was given) that it does not mention whether or not he saw the accused whilst firing on the deceased. Under these circumstances in order to ensure a safe and reliable identification of the accused an identification parade was a requirement.

We find however based on the particular facts and circumstances of the case the correct identification of the appellant by the eye witness **cannot** be safely relied upon for the following reasons even if he was present at the time of the incident; (i) even if the eye witness gave his S.161 Cr.PC statement a day after the incident which appears doubtful he gave no hulia of the accused and thus he had no bench mark in which to correctly identify the appellant at an identification parade. The importance of an early hulia for a correct identification before an identification parade has been emphasized by the Supreme Court in the case of **Javed Khan V State** (2017 SCMR 524); (ii) that the eye witness according to his evidence **drew sketches of the accused one day after the incident** through the police which would be exceedingly compelling to lead to a correct identification of the accused at a later identification parade **however** according to the evidence of the last IO PW 12 Muhammed Khan Quershi the sketches drawn by the eye witness did **not** match the accused in police custody; (iii) the eye witness in his own evidence states that the accused was shown to him in police custody **before** the identification parade as was claimed by the appellant in his S.342 Cr.PC statement which makes the identification parade of no significance.

(b) With no eye witness evidence to the identity 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.

(c) It is notable that the appellant confessed to the offence whilst in police custody however he was not produced before a magistrate to record his confession under S.164 Cr.PC despite being produced before a magistrate for an identification parade and thus we place no reliance on his confession allegedly made before the police.

(d) No evidence was produced to establish as to how and why the appellant came to be arrested in this FIR when at that time there was no evidence against him.

(e) 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 when there was no evidence against him at the time of his arrest.

(f) No recovery was made from the appellant such as a pistol and hence the empties recovered at the crime scene cannot be linked to him.

13. For the reasons discussed above by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed, the confirmation reference is

answered in the negative and the appellant shall be released unless wanted in any other custody case.

14. The appeal and confirmation reference stand disposed of in the above terms.


JUDGE Ali


JUDGE