

## CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Crl Appeal NO. 147 of 2021  
Crl Jail Appeal NO. 276 of 2021

Suleman & another

Vs

The State

HIGH COURT OF SINDH

*Composition of Bench.* S.B.

Mr. Justice Muhammad Karim Khan Agha

Date of hearing: 25-09-2024

Decided on : 03-10-2024

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.

PRESENTED ON

10.03.2021  
  
Deputy Registrar (Judl.)

1064

**IN THE HIGH COURT OF SINDH  
AT KARACHI**

147

Criminal Appeal No. \_\_\_\_\_/2021.

Suleman  
S/O Bundo Khan, Muslim, Adult,  
R/O Karachi at 100 Quarters,  
Korangi Road,  
Karachi .....Appellant.

**VERSUS**

The State.....Respondent.

F.I.R. No.420/2018  
U/S 302/34 PPC.  
R/W 397 PPC.  
P.S. Zaman Town

**APPEAL UNDER SECTION 410 OF  
CRIMINAL PROCEDURE CODE**

Being aggrieved and dissatisfied with the impugned judgment  
dated 02.03.2021, passed by the II<sup>nd</sup> Additional Session Judge  
Karachi East in S.C. No.713/2019, the appellants of following  
facts and grounds:-



Certified copy of the impugned judgment is enclosed  
herewith and marked as Annexure "A".

Contd..... P/2.

**IN THE HIGH COURT OF  
SINDH AT KARACHI.**

Crl. Jail Appeal No.                      Of 2021.

276

1

**Muhammad Shahbaz**  
**Son of Muhammad Meraj**  
 Muslim, adult, presently  
 confined in Central Prison,  
 Karachi.....Appellant in person.

Versus

The state. ....Respondent.

Sessions Case NO.712/2019.  
 FIR No.420/2018  
 Sections.397/302/34PPC.  
PS. Zaman Town, Karachi.

**APPEAL UNDER SECTION 410 CR.P.C.**

Honourable Sir,

Being aggrieved and dis-satisfied with  
 impugned judgement dated 02.03.2021, passed by Mr.  
 Javed Iqbal, **Learned V<sup>th</sup> Additional Sessions Judge**  
**Karachi, East, (MODEL CRIMINAL TRIAL COURT**  
**EXTENSION)** in Sessions Case number mentioned above  
 re: The State Vs. Muhammad Shahbaz, being outcome of  
 FIR number mentioned above , Police Station Zaman  
 Town, Karachi, under sections 302 , 397, 34 P.P.C.

Whereby convicting and sentencing the  
 Appellant/ accused by awarding him sentences as under:-

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present:

*Mr. Justice Mohammad Karim Khan Agha*

**CR. APPEAL NO.147 OF 2021**

Appellant: Suleman s/o Bundo Khan through Mr. Qadir Hussain Khan, Ms. Shehla Anjum, and Amanullah Kakar, Advocates.

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

**CRL. JAIL APPEAL NO.276 OF 2021**

Appellant: Muhammad Shahbaz s/o Muhammad Meraj through Mr. Muhammad Hanif Noonari, Advocate.

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

Date of Hearing: 25.09.2024

Date of Announcement: 03.10.2024

**JUDGMENT**

By this common judgment, I intend to dispose of both the Cr. Appeal and Cr. jail Appeal filed by Appellants Suleman and Muhammad Shahbaz respectively, who were convicted and sentenced by the Vth Additional Sessions Judge-East/Model Criminal Trial Court (Extension) Karachi vide Judgment dated 02.03.2021 as under:-

For the offence punishable under section 302/34 (b) accused persons Suleman son of Bundo Khan and Muhammad Shahbaz son of Muhammad Meraj to suffer R.I. Imprisonment for life as *Tazir* (each) and pay Rs.5,00,000/- (Rupees Five Lacs) **each** as compensation under Section 544-A Cr.P.C. to the legal heirs of deceased Shahid Khan.

For the offence punishable under section 397/34 accused persons Suleman son of Bundo Khan and Muhammad Shahbaz son of Muhammad Meraj to suffer R.I. 7 years (Seven years) **each**.

Benefit of Section 382-B Cr.P.C was also extended to the accused persons. Above sentences were ordered to run concurrently.



2. The brief facts of the case as per FIR lodged by complainant Mst. Samina are that on 19.08.2018 her husband Shahid Khan along with his son Sumair, riding on motorcycle went to purchase grass for cow, at about 1030 hours, her son informed the complainant on mobile phone that her husband had received bullet injury caused by unknown culprits. Later on, the complainant came to know that at Ghous Pak Road, opposite Riway Marriage Hall, Korangi No.5½ two culprits riding on motorcycle fired upon her husband while commission of robbery, resultantly he received bullet injuries and was shifted to Jinnah Hospital where he succumbed to his injuries. Hence the aforesaid FIR was lodged against the two unknown persons.

3. After completion of investigation I.O. submitted charge sheet against the accused persons to which the appellants plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 9 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them and claimed false implication.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellants and sentenced them as stated earlier in this judgment and hence, the appellants have filed these appeals against their 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 appellants have contended that the appellants are completely innocent and have been falsely implicated in this case by the police in order to show their efficiency which lead to the FIR being lodged with an unexplained delay of 4 days; that the sole eye witnesses evidence cannot be safely relied upon especially in terms of correctly identifying the appellants as the persons who carried out the robbery and murder and even the appellant's identification parade was legally defective; that no recovery was made from the appellants and that for any or all of the above reasons the appellants should be acquitted of the charge by being extended the benefit of the doubt. In support of

their contentions they has placed reliance on the cases of **Abdul Ghafoor V The State** (2013 P Cr. LJ 1185 and **Mst. Robina V The State** (2022 YLR 454).

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. He has relied on the evidence on record and particularly on the evidence of the eye witness to the robbery and murder.

9. I 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 I find that the prosecution has proved beyond a reasonable doubt that on 19.08.2018 at about 2230 hours Shahid Khan (the deceased) was shot and murdered by firearm. In fact this is an admitted position by learned counsel on behalf of the appellants and as such is not in dispute.

11. The only question left before me therefore is who shot and murdered the deceased at the said time, date and location and whether the deceased was robbed by such person(s)?

12. After my reassessment of the evidence I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellants for which they were convicted keeping in view that each criminal case is based on its own particular facts, circumstances and evidence for the following reasons.

(a) There was a delay on 4 days in lodging the FIR by the wife of the deceased. I find that such delay has not been fully explained especially as her son who is named in the FIR who was with the deceased at the time when he was shot was in a better position to lodge the FIR immediately yet he failed to do so for reasons best known to himself. I find that this casts some suspicion on the prosecutions case but not enough to be fatal to the prosecution case based on the particular facts and circumstances of the case; namely that the FIR was lodged against unknown persons and there was no attempt to falsely implicate anyone however such delay puts me on caution.

(b) I find that the prosecution's case rests almost exclusively on the evidence of the sole eye witness to the incident and his ability to correctly identify the appellants who allegedly came on a motor bike and attempted to rob his father and then shot dead his father on his resistance whose evidence I shall consider in detail below;

(i) **Eye witness PW 5 Sameer Khan. He is the son of the deceased.** According to his evidence on 19.08.2018 at about 10.30pm he and the deceased went to purchase cattle food on his motor bike. When they reached near Rivaj Shadi Hall situate at Ghous park road two robbers came on a motor bike and intercepted them and tried to rob them. On his father's resistance one of the accused fired on his father which fire shot hit his father in the face who fell to the ground whilst both the robbers escaped. He then phoned his mother and called an ambulance and with the help of the people who reached the place of the incident he took his father by ambulance to JPMC where his father was pronounced dead. He further stated in his evidence that he can identify the accused persons whenever shown to him.

It was a night time incident and there is no evidence of their being any light available at the scene of the incident. The eye witness did not know the appellants from before. He gave no hulia of either of the appellants in his S.161 Cr.PC statement which in any event was given 5 days after the incident which delay itself is often fatal to the prosecution case. His mother when she lodged her FIR 4 days later based on the hearsay evidence of her son does not state that her son told her that he could recognize the assailants if he saw them again. The incident would have occurred quickly in the heat of the moment and it is unlikely that the eye witness got a good look at the assailants over this short period of time especially as it was dark and he did not know them from before and he most likely would have been in a state of panic.

In cross examination the eye witness states as under regarding the identification of the assailants;

"It is correct that I narrated the entire facts which happened with me and my father to police officer who was recording my statement u/s.161 Cr.p.C. on 29.08.2018. **It is correct that as per the contents of mashirnama of site inspection it is mentioned that I could not see the accused persons at the time of incident.**" (bold added)

Furthermore, PW 2 Yousif Ali who the eye witness took to the crime scene states as under during cross examination;

"It is correct that on pointation of the son of deceased I visited the place of incident and drawn such pictures. It is correct that the son of deceased is mashir of memo of site inspection Ex.4/B. It is correct that it is mentioned in the mashirnama that due to darkness mashir who was son of deceased could not identify the accused and also states same facts in statement u/s.161 Cr.P.C. (bold added)

It is therefore apparent that the <sup>eye witness</sup> was not in a position to correctly identify the assailants even if a later identification parade was held especially as he did not even give any hulia of the assailants which appears now to be because he did not see them due to the darkness of night.

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.

Thus, although the eye witness identified the appellants before an identification parade held 5 months after the incident since he has admitted before the identification parade that he could not identify the assailants as it was too dark and he gave no hulia of the them I find that I cannot safely rely on his identification of the appellants as the persons who allegedly robbed and murdered his father. Even the conduct of the identification parade was legally defective as it was a joint identification parade, with only 6 dummies present all of whom were dissimilar and the appellants were produced from jail at the city court with unmuffled faces where the police could have pointed them out to the eye witness prior to the identification parade.

Thus, although I place reliance on the evidence of the eye witness in terms of the actual incident I place no reliance on his identification of the appellants who committed the offence.

(c) 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.

(d) It is notable that the appellants confessed to the offence whilst in police custody however they were not produced before a magistrate to record their confessions under S.164 Cr.PC despite being produced before a magistrate for an identification parade and thus I place no reliance on the appellants confessions allegedly made before the police.

(e) It does not appeal to logic, reason or commonsense that the appellants 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 them in that case and they were being detained in an Arms case which carried a much lesser sentence.

(f) No empty was recovered at the crime scene as wrongly alleged by the IO in his evidence which makes the police conduct doubtful and as such no empty could have been tested by the police from a firearm which was recovered in another case 4 months after the arrest of the appellants. It has not been proven that any firearm relating to this case was recovered from the appellants. Significantly even the FSL report was negative when the alleged empty recovered at the crime scene was matched with the so called pistol recovered from the appellants 4 months later on after their arrest in a separate case.

(g) The appellants taking the police to the place of wardat is irrelevant as the police already knew where the place of wardat was.

(h) It is notable that the complainant also filed an affidavit with the first IO to withdraw the case which tends to indicate that the appellants might have been innocent.

(i) No robbed items were recovered from the appellants on their arrest and even the charge in respect of S.397 PPC appears to be defective as the appellants were not put on notice that they had committed a robbery and what items they had actually robbed.

13. For the reasons discussed above I find that the prosecution case is riddled with doubt and as such the appellants are acquitted of the charge, the impugned judgment is set aside, their appeals are allowed and the appellants shall be released unless wanted in any other custody case.