

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah,*

SPECIAL CRIMINAL A.T. APPEAL NO. 75 OF 2018

Appellants	1. Ubaid @ K-2 son of Khursheed 2. Nadir Shah son of Munwar Shah through M/s. Raj Ali Wahid Kunwar and Nadeem Ahmed Azar, Advocates
Respondent	The State through Mr. Mohammad Iqbal Awan, Additional Prosecutor General Sindh and Chaudhary Mehmood Anwar, Special Public Prosecutor, Pakistan Rangers.
Date of Hearing	05.10.2021
Date of Announcement	11.10.2021

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellants Ubaid @ K-2 son of Khursheed and Nadir Shah son of Munwar Shah have assailed the impugned judgment dated 28.02.2018 passed by Learned Judge, Anti-Terrorism Court No.VII, Karachi in Special Case No.395(vii) of 2015 arising out of Crime No.53 of 2000 under Section 302/34 PPC r/w Section 7 of ATA, 1997 registered at PS Soldier Bazar, Karachi whereby the appellants were convicted under Section 265-H (ii) Cr.PC for offence u/s. 7 (a) ATA, 1997 r/w Section 302(b)/34 PPC for committing murder of deceased SIP Nisar Ahmed and SIP Muhammad Rehan and sentenced them to each suffer R.I. for life and to pay fine of Rs.2,00,000/- (Two Lacs) each to the legal heirs of the deceased as compensation. In case of non-payment of fine they shall suffer further S.I. for six months each. Benefit of Section 382(b) Cr.PC was extended to the appellants.

2. The brief facts of the prosecution case as per FIR is that on 25.03.2000 Muhammad Imran son of Zaheer-ud-Din recorded his S.154 Cr.PC statement averring therein that his brother SIP Muhammad Rehan and his friend SIP Nisar Ahmed posted at Police Lines Central, left their

house at about 0945 hours to appear before DIG Crimes, Karachi, when they reached at M.A. Jinnah Road Opposite Bundu Khan Hotel at about 10:15 a.m. they were fired upon allegedly by terrorists of MQM (Altaf Group). It was further averred that his brother SIP Muhammad Rehan and SIP Nisar Ahmed along with SHO Sarwar Commando and SHO Nasir-ul-Hassan had played an important and active role for arresting terrorists of MQM (Altaf Group) therefore, few days prior to the incident, deceased brother of complainant was being threatened of dire consequences by Asif Dhoon, Shahid Rameez, Javed Akhtar Siddiqui, Faheem Kankatta, Ubaid alias K-2, Nadir Shah, Aamir alis Sheru and Jawed Shah Puri, therefore, FIR was registered for the offence under section 302/34 PPC r/w section 7 ATA. Investigation was entrusted to Inspector Muhammad Saleem SHO, PS Soldier Bazar, who visited the place of occurrence, recorded 161 Cr.PC statements of PWs and prepared sketch of place of occurrence. He conducted S. 174 Cr.PC proceedings of deceased police officers, inspected their dead bodies, obtained cause of death certificates. He tried to search the culprits, but could not succeed and on expiry of stipulated period, submitted final report in 'A' class.

3. On 04.04.2015 DSP Rahim Shah of Jamshed Quarters, received an entry that an accused Ubaid alias K-2 was arrested by Azizbad PS, required in several offences pertaining to different police stations, confined at the lockup of PS Gulberg. He was directed to interrogate the said accused and carry on investigation against him in the instant FIR. He along with his subordinate staff, arrived at PS Gulberg, interrogated the accused and during interrogation accused Ubaid alias K-2, disclosed that he along with Nadir Shah and other assailants, caused fire shots at SIP Nisar Ahmed and SIP Muhammad Rehan within the local limits of PS Soldier Bazar while armed with deadly weapons. Thereafter, he arrived at PS Paposh Nagar, collected custody of Nadir Shah, interrogated him, who also during interrogation admitted his complicity in the commission of instant offence. Both the accused became ready to point out the place of occurrence, and thereby was inspected on the pointation of both accused, where DSP Rahim Shah re-arrested both the accused under memo. Thereafter, he recoded 161 Cr.PC statements of PWs, produced the accused before concerned Court and obtained police custody remand. He

was transferred and investigation was handed over to Inspector Gul Faraz.

4. After delegation of investigation, Inspector Faraz Gul Abbasi, approached the concerned Court of J.M. and moved an application sought permission to produce witnesses, his application was entertained with directions to produce the witnesses on 13.04.2015. On the said date, he produced the witnesses before the Court of J.M. and requested for identification parade, which was held, wherein both the accused were identified by P.W. Manthar Ali. He collected FSL and Biochemical report. After completion of all necessary formalities, he submitted report under Section 173 Cr.PC in the Court of law, showing accused Asif Dhoon, Javed Shah, Aamir, Shahid Afroz, Faheem Kankata and Javed Akhtar in column 2. Thereafter charge was framed against the appellants whereby they plead not guilty and claimed trial

5. The prosecution in order to prove its case examined 12 witnesses and exhibited various documents and other items. The statement of both the appellants was recorded under Section 342 Cr.P.C in which they denied all the prosecution allegations and claimed false implication at the hands of the police on account of political victimization. Neither of the appellants gave evidence under oath or called any witness in support of his defence.

6. After appreciating the evidence on record the trial court convicted and sentenced the appellants as set out earlier in this judgment. Hence, the appellants have filed these appeals against their convictions.

7. Learned counsel for the appellants has contended that the appellants are completely innocent and have been falsely implicated by the police on account of political victimization; that the identification of the appellants by the sole eye witness cannot be safely relied upon as no hulia of the appellants was given by him at the time when he recorded his S.161 Cr.PC statement and that there were major procedural defects in the subsequent identification parade where the appellants were picked out by the eye witness and as such the identification parade could not be safely relied upon; that no recovery was made from the appellants; that the appellants' alleged confessions before the police are inadmissible in

evidence and that for any of the above reasons the appellants should be acquitted by extending them the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Sajjan Solangi v. The State** (2019 SCMR 872), **Hayatullah v. The State** (2018 SCMR 2092), **Abdul Sattar v. The State** (PLD 1976 Supreme Court 404), **Fazal Hussain alias Faqeer and others v. The State** (2020 P Cr. LJ 311), **Taj Bahadur alias Taji and another v. The State** (1997 MLD 1072), **Kunwar Anwar Ali, Special Judicial Magistrate: In the matter of Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal NO.259 of 2018 decided on 22nd February, 2019, Toor Jan v. The State** (2020 YLR 1099), **Riaz Ahmed v. The State** (2010 SCMR 846), **Muhammad Umair alias Bhutto v. The State** (2018 MLD 1196), **Jalal Hassan v. Ameer Hamza Awan and 2 others** (2019 MLD 1170), **Muhammad Ali v. The State and 3 others** (2015 P. Cr.1448), **Ali Sher and others v. The State** (2008 SCMR 707) and **Khurram Jalali v. The State** (2017 P Cr.LJ Note 19).

8. On the other hand learned Special Prosecutor Rangers and learned APG appearing on behalf of the State have fully supported the impugned judgment. They have contended that the eye witness evidence was trustworthy, reliable and confidence inspiring and that he has correctly identified the appellants as the persons who murdered the deceased at the identification parade; that the medical evidence corroborates/supports the eye witness evidence, that blood and empties were found at the scene of the offence; that there are no contradictions in the prosecution evidence which can be safely relied upon; that the appellants both confessed their guilt during interrogation by the police; that the appellants after their confessions took the police to the place of the wardat; that it was an act of terrorism and that all the convictions and sentences be maintained and the appeals dismissed. In support of their contentions they placed reliance on the cases of **Atta-ur-Rehman and another v. The State** (2018 SCMR 372), **Muhammad Zaman v The State** (2007 SCMR 813), **Niaz-ud-Din v The State** (2001 SCMR 725), **Muhammad Ehsan v The State** (2006 SCMR 1857) and **Solat Ali Khan v The State** (2002 SCMR 820).

9. We have heard the arguments of the learned counsel for the appellants as well as learned Special Prosecutor Rangers and APG, gone

through the entire evidence which has been read out by learned counsel for the appellants along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the medical evidence, the medical reports and certificates, recovery of empties at the scene, the recovery of blood at the scene and the bullet holes in the bike which the deceased were riding at the time they were shot we find that the prosecution has proved beyond a reasonable doubt that on 25.03.2000 at about 10.15am SIP's Muhammed Rehan and Nisar Ahmed (the deceased) were shot by firearm whilst riding a motor bike near Bundoo Khan Hotel M.A.Jinnah Road Karachi whereby they were seriously injured and later died on account of the serious firearm injuries which they sustained on the same day at Civil Hospital Karachi.

11. The only question left before us therefore is who seriously injured the deceased by firearm which lead to their deaths (murder) 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 appellants for which they were convicted for the following reasons;

(a) In our view the prosecution's case rests on the evidence of the sole eye witness to the murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 10 Manthar.** According to his evidence on 25.03.2000 at about 10.15 to 10.30am he saw two police men passing ahead of him on a bike who were being chased by a Suzuki Hi-roof which dashed with the bike of the police men. He saw 5 to 6 culprits armed with sophisticated weapons alight from the Suzuki Hi roof who made indiscriminate fire on the police men who had fallen off their bike having dashed with the Suzuki Hi-roof which culprits then fled the scene of the offence. Inspector Saleem from PS Soldier Bazzar arrived at the scene of the incident who recorded his S.161 Cr.PC statement on the same day. On 13.04.2015 he identified both the appellants with a specific role at an identification parade held by PW 3 Muhammed Sulemen who was a judicial magistrate.

According to his evidence he was a scrap shop keeper who happened to be in the area pushing his scrap cart when the incident took place. He however could not name his shop and its location or even his residential addresses during the last 15 years with any precision. Furthermore, he is not named in the FIR as an eye witness. As such it appears that he had no genuine reason to be in the vicinity and appears to be a chance witness.

Even if he was present at the scene at the time of the incident although it was a daylight incident there is no mention in his evidence how far away he was from the incident, he has not given any hulia in his S.161 Cr.PC Statement of either of the appellants, he did not know the appellants prior to the incident and it appears that he would have only got a fleeting glance of them during a chaotic and frightening incident whereby he would be looking to take cover from the indiscriminate firing. **Significantly** the police men named Muhammed Saleem who allegedly recorded his S.161 Cr.PC statement was not even named in the calendar of witnesses let alone gave evidence of this fact and appears to have been the first IO or at least a first responder. Interestingly when the report was originally filed in "A" class in 2003 PW 10 eye witness Manthar was not named as a witness. PW 11 Gul Faraz who reopened the case and was the last IO's evidence as to how he traced out PW 10 eye witness Manthar is also not confidence inspiring and tends to contradict PW 10 Manthar's evidence that he had been living outside Karachi for the last two years. This all tends to suggest that PW 10 eye witness Manthar might have been a put up witness. Taking all the above into account and the fact that he identified the appellants at an identification parade **15 years after the incident** we find that we cannot safely rely on him as having correctly identifying the appellants who fired at the deceased who later died on account of their wounds. The FIR although registered promptly based on hearsay evidence only contains a list of persons including the appellants who had allegedly threatened the complainant's deceased brother against which no formal complaint was made which at best made the appellants suspects.

Admittedly, the eye witness had no enmity with the appellants but it appears that the police did as according to the prosecution case the deceased had carried out operations against the appellants' political organization which had also targeted the police on account of such operations and threatened the deceased on account of his involvement in such police operations.

It is true that 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

even if the eye witness was present at the time of the incident based on the reasons mentioned above he would not have been able to correctly, safely and reliably identify either of the appellants after a lapse of over 15 years since he allegedly witnessed the incident.

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 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 recent 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.

Thus, having found that the sole eye witness would not have been able to correctly, safely and reliably identify the appellants after a lapse of 15 years the conduct of the identification parade becomes inconsequential.

(b) With no eye witness evidence to the murders the medical evidence becomes inconsequential as it can only reveal how the deceased died, what kind of weapon was used and the seat of the injuries. It cannot identify the person who inflicted the injuries.

(c) It is notable that the appellants confessed to the offence whilst in police custody. Confessions before the police are inadmissible in evidence and thus we place no reliance on such confessions. Even other wise, it does not appeal to logic, reason or commonsense that a person behind bars who there was hardly any evidence against would confess to an offence which carried the death penalty. The appellant's confessions were also not recorded before a magistrate despite the appellants being taken before a magistrate for an identification parade.

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

(e) No weapon was recovered from either of the appellants as such the recovery of any empties at the crime scene and any FSL report is irrelevant and does not connect the appellants to the commission of the offence.

13. 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. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

14. For the reasons discussed above by extending the benefit of the doubt to the appellants they are both acquitted of the charge, the impugned judgment is set aside, their appeals are allowed and both of the appellants shall be released unless wanted in any other custody case.

15. The appeals stand disposed of in the above terms.