Identification not reliable

338

IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain.

Spl. Criminal ATA No.182 of 2020.
Spl. Criminal ATA No.183 of 2020.
Confirmation Case No.07 of 2020.

Appellant:	Muhammad Sajid @ Chota Bona S/o. Muhammad Yameen through Mr. Mohammad Mahmood Sultan Khan Yousifi, Advocate.
Complainant:	Muhammad Wasim Khan through Mr. Khawaja Naveed Ahmed, Advocate.
State:	Through Mr. Muhammad Iqbal Awan, Additional Prosecutor General.
Date of Hearing	17.11.2021
Date of Judgment	24.11.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The Appellant Muhammad Sajid @ Chota Bona S/o. Muhammad Yameen was convicted in the Court of Anti-Terrorism Court No.XVI, Karachi in Special Cases No.238/2019 (New Spl. Case No.191/2019) in Crime No.469/2012 u/s. 302/34 PPC r/w section 7 ATA 1997 PS Jamshed Quarters, Karachi and in Special Case No.1784 of 2019 (New Special Case No.09/2019) Crime No.34/2019 u/s. 23(1)(a) of Sindh Arms Act registered at P.S. Bahadurabad, Karachi vide Judgment dated 31.10.2020; whereby the appellant was convicted under section 265-H(2) Cr.P.C. and sentenced to death under Section 302 r/w 34 PPC and also sentenced to death under Section 7(a) of ATA, 1997 with fine of Rs.200,000/- subject to confirmation by this court. He was also sentenced R.I. for 10 years under Section 7(1)(h)of ATA, 1997 with fine of

Rs.50,000/-. He was also convicted for the offence under Section 23(I)(A) of SAA, 2013 and sentenced to R.I. for seven years with fine of Rs.50,000/- and in default thereof, he shall suffer SI for three months more. However, he was directed to pay an amount of Rs.200,000/- to the legal heirs of deceased Muhammad Shamim as compensation, as provided under Section 544-A Cr.P.C. and in default thereof, he shall further undergo SI for six months. All the sentences were directed to be run concurrently. However, the benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the prosecution case are that on 19.10.2012 Muhammad Wasim Khan resident of H.No.B-39, Rizwan Society Scheme No.33, University Road, Karachi lodged FIR that he is a Government servant. On 16.10.2012 when he was at his home he received information that his brother Muhammad Shamim received firearm injuries and was shifted to Aga Khan Hospital. He rushed to the hospital and learnt that some boy of urdu speaking wearing pant shirt entered in the office of his brother and fired upon him, resultantly he succumbed to injuries and died. His dead body was then shifted to Jinnah Hospital where his postmortem was conducted vide PM-987/12. He also reported that the mohallah people had seen the accused person when they were fleeing. Accordingly, FIR was lodged against unknown accused person and after usual investigation the case was filed as "A" class. Later on, accused Muhammad Sajid @ Chota Bona was arrested in FIR No.52/2019 under Section 4/5 Explosive Substance Act at PS Jamshed Quarter who during interrogation admitted to the murder of deceased Muhammad Shamim with the help of his accomplices, accordingly case was reopened.

3. After further investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined 16 witnesses and exhibited various documents and other items. The statement of the

appellant was recorded under Section 342 Cr.P.C in which he denied all the prosecution allegations and claimed false implication at the hands of the police on account of political victimization. The appellant did not give evidence on oath and did not call any witness in support of his defence.

5. After appreciating the evidence on record the trial court convicted and sentenced the appellant as set out earlier in this judgment. Hence, the appellant has filed this appeal against his convictions.

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 by the police on account of political victimization; that there has been an unexplained delay in lodging the FIR which lead to consultation with the complainant cooking up a false story in league with the police; that the identification of the appellant by the two eye witnesses cannot be safely relied upon as no hulia of the appellant was given by them at the time when they recorded their S.161 Cr.PC statements and that there were major procedural defects in the subsequent identification parade where the appellant was picked out by the eye witnesses and as such the identification parade could not be safely relied upon; that no recovery was made from the appellant and that the pistol was foisted on him; that the appellant's alleged confession before the police is inadmissible in evidence and that for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt.

8. On the other hand learned APG and the complainant have fully supported the impugned judgment and in particular have contended that the appellant was correctly identified by two natural eye witnesses at an identification parade with a specific role; that an unlicensed pistol was recovered from the appellant on his arrest which matched empties

recovered at the scene; 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 appellant confessed his guilt during interrogation by the police and that all the convictions and sentences be maintained and the appeal be dismissed.

9. We have heard the arguments of the learned counsel for the appellant as well as learned APG and the complainant, gone through the entire evidence which has been read out by learned counsel for the appellant along with the impugned judgment with the able assistance of the parties and have considered the relevant law.

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 and the recovery of blood at the scene we find that the prosecution has proved beyond a reasonable doubt that on 16.10.2012 at about 5pm duly armed persons entered the office of the Director Education School Jamshed Road No.3 Karachi and then entered the room of director education Muhammed Shamin Khan (the deceased) and made straight fires on him which lead to his death by firearm injuries later that day at the Aga Khan University hospital.

11. The only question left before us therefore is who seriously injured the deceased by firearm which lead to his death (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 appellant for which he was convicted for the following reasons;

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

(i) **Eye witness PW 11 Afsar Ali.** According to his evidence on 16.10.2012 whilst he was at the education office on

Jamshed Road at about 5pm two armed persons came who brought peon Muhammed Jameel and guard Muhammed Shahid by force of weapons inside the waiting room where he was sitting. A third armed person directly entered the room of the deceased and made four to five fires. At the time of firing two guests were sitting with the deceased namely advocate Khalil Quershi and another friend. After the accused departed they entered the deceased's office and helped to take him to hospital where he died about 30 minutes after his arrival. He was the driver of the deceased and we find him to be a natural witness being at his place of work with the deceased. His presence is also corroborated by eye witness PW 9 Shahnawaz. It was also a day light incident, he was not damaged during cross examination, he had no enmity with the appellant and we therefore believe his narration of the incident.

What is however in issue is whether he was able to correctly identify the appellant as one of the persons who fired upon the deceased. His S.161 Cr.PC eye witness statement was recorded **6 days after** the incident and **he did not give any hulia** or any kind of description of the appellant in his statement. He gave no sketch of the appellant. It is well settled by now that S.161 Cr.PC eye witness statements must be given very shortly after the incident and reasons given for any prolonged delay and must give a hulia of the accused or else they lose their evidentiary value as in this case. He did not know the appellant before the incident and only got a fleeting glance at him during a very traumatic and frightening incident. He picked out the appellant from an identification parade 7 **years after the incident** after which time the appellant had **already been shown on the TV and in the newspapers** as the murderer which facts were exhibited at trial and as such we cannot rule out the eye witness not seeing or reading about the appellant **before** the identification parade. PW 10 Muhammed Ali who was the judicial magistrate who carried out the identification parade also in his evidence states as under;

*"Accused was provided opportunity of raising objection to which accused stated that he has been **in police custody from about 12 days. Accused further stated that different people had seen him at P.S and had asked him that is he killer of Shamim Khan.** Accused further stated that on 16.02.2012 he was outside of Karachi for preparation of Tabligi Ijtama and he returned to Karachi on 24th or 25th March 2012."*

Thus, at the very outset the appellant had claimed to have been shown to people as the killer of the deceased whilst he was in police custody for 12 days. Interestingly, he also stuck

to his alibi of being out of Karachi during the murder for religious reasons in his S.342 Cr.PC statement which facts cannot be simply brushed aside.

It has also come in evidence that the appellant was **a very small man being under 5 feet tall** and that even PW 16 Muhammed Farreduddin the final IO in the murder case stated in his evidence that,

*"The accused present in court is of small height. **It is almost true that the accused is less than 5 feet of height. It is true that height of the accused is not normally found in public."***

Significantly PW 10 Muhammed Ali who was the judicial magistrate who carried out the identification parade states in his evidence that,

*"It is true that proper description of dummies such as age, **height**, physique, complexion and features/hulia are not mentioned in the memo. The memo is silent regarding color, style and type of clothes of dummies and accused."*

The eye witness in his evidence also states as under regarding the composition of the identification parade;

*"In the dummies there was different **height**, complexion and different clothes i.e some in shalawar Kameez and pant shirts with different looks some with shave, some with beards and some with clean shaven were standing."*

Significantly neither of the eye witnesses stated in their S.161 eye witness Cr.PC statement the **unique feature** that the killer was extremely small which must have stood out to them at the time.The fact as admitted by the IO that such small men are not available in the general public and the magistrate having no record of the appearance of the dummies **including height** and the dummies according to the eye witness were **not** similar at all leads to the inescapable conclusion that the appellant stood out from the other dummies at the identification parade and could have been easily described to the eye witness before the identification parade. It appears to be no coincidence that the magistrate who carried out the identification parade did not keep records of the dummies which he was obliged to in accordance with law to ensure a fair and reliable identification parade.

Thus, taking into account all the above factors we find that we cannot safely rely on the identification of eye witness PW 11 Afsar Ali as correctly identifying the appellant as

one of the persons who was present when the deceased was murdered.

(ii) Eye witness PW 12 Shahnawaz. According to his evidence on 16.10.2012 he was sitting in the PA room attached to the office of the deceased when two accused entered bringing one guard Muhammed Shahid and peon Jameel at the force of weapons. The third accused went directly into the office of the deceased and he heard 4 to 5 fires. The third accused came out of the office and the other two accused left with him. He helped shift the deceased with PW 11 Afsar Ai to Aga Khan Hospital where after 30 minutes he was declared dead. He also states in his evidence that advocate Khalil Quershi and another unknown person were sitting with the deceased at the time when he was shot.

Once again he was a natural witness but as with PW 11 Afser Ali the same considerations apply to this eye witness. Thus, although we believe that the eye witness was present at the scene and has accurately narrated the events for the same reasons given above for eye witness PW 11 Afser Ali **we find that we cannot safely rely on the identification of eye witness PW 12 Shanawaz as correctly identifying the appellant as one of the persons who was present when the deceased was murdered.**

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.

The prosecution case against the appellant therefore collapses at this stage as there is no safe and reliable identification of the appellant as being one of the murderers of the deceased. Even otherwise;

(b) According to the evidence of the eye witnesses discussed above two eye witnesses who were actually sitting in the room with the deceased when the killer entered and shot him, namely, Khalil Quershi advocate and one other and who would have been able to give the best evidence of the murder despite being readily traceable were not produced as prosecution witnesses and as such the prosecution has intentionally and deliberately not produced the best evidence at trial against the appellant which we find has damaged its case.

(c) With no eye witness evidence to the murder 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.

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

(e) We have extreme doubts that an unlicensed pistol was recovered from the accused at the time of his arrest in a separate case years later. It does not appeal to logic, commonsense or reason that a person who had committed a brutal murder would keep the murder weapon for nearly 7 years. He would have disposed of the weapon. As to the empties which were recovered from the scene of the incident in 2012 there is no evidence where they were kept in safe custody until 2019 when the pistol was allegedly recovered from the appellant and as such the fact that they match with the pistol we give no weight to. The whole prosecution evidence regarding to arrest and recovery of the pistol from the appellant we find to be highly doubtful and we cannot rule out the possibility that the pistol was foisted on the appellant.

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 appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed and the confirmation reference is answered in the negative. The appellant shall be released unless wanted in any other custody case.

15. The appeals and confirmation reference stand disposed of in the above terms.