

Incidar Doubtful Sole eye witness 277
unreliable

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Omar Sial

CRIMINAL JAIL APPEAL NO.22 OF 2022
CONFIRMATION CASE NO.19 OF 2020

Appellant:	Khalid Zafar s/o Abid Zafar through Mr. Moula Bux Bhutto, Advocate.
Respondent:	The State through Mr. Abrar Ali Khichi, Additional Prosecutor General Sindh.
Complainant:	Ejaz Hussain Shaikh through Mr. Zulfiqar Ali Jalbani, Advocate
Date of Hearing:	27.09.2022
Date of Judgment:	03.10.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Khalid Zafar son of Abid Zafar was tried in the Court of Vth Additional Sessions Judge / Model Criminal Trial Court (East) Karachi under Crime No.183/2014 u/s.302/324/397 PPC registered at PS Shahrah-e-Faisal, Karachi and vide judgment dated 16.09.2020 was convicted under section 265-H(ii) Cr.P.C. for an offence punishable u/s.302(b) PPC and awarded death sentence as Tazir with fine of Rs.5,00,000/- (Rupees Five Lac) as compensation under Section 544-A Cr.P.C to the legal heirs of the deceased subject to confirmation by this court. The appellant was further convicted for an offence punishable u/s.324 PPC to suffer S.I. for 07 years and to pay fine of Rs.50,000/- and in default of payment of fine he shall suffer S.I. for three (03) months more and also pay Rs.100,000/- as compensation u/s.544-A Cr.P.C to injured PW/complainant Ejaz Hussain Shaikh. The appellant was also convicted for an offence punishable u/s.397 PPC to suffer R.I. for 07 years.

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2. The brief facts of the case as per FIR lodged by the complainant Ejaz Hussain Shaikh are that he is running Bobby Mart General Store at Qasim Complex, Block-18, Gulistan-e-Jauhar, Karachi and on 07.03.2014 at about 1.45 a.m. (night) he and his younger brother Ayaz were present at the said shop and were closing the shop. Meanwhile, one person armed with deadly weapon arrived there riding in a car and started firing and also demanded money from them. When complainant asked him to stop firing, the culprit opened straight fires, which hit in the abdomen, finger and both legs of the complainant. His younger brother Ayaz also sustained three bullet injuries, two on waist and one on abdomen. Thereafter, they were shifted to Darul Sehat Hospital by the workers of Balochistan Sijji Hotel, where Ayaz, the younger brother of complainant succumbed to his injuries, whereas the complainant remained admitted in the hospital. Thereafter complainant lodged FIR of this case against unknown persons. Subsequently, present accused arrested in other crimes during investigation also admitted the commission of the offence in this case, and was thereafter also arrested in this case.

3. After completion of investigation, challan was submitted against above named accused and thereafter a formal charge was framed against the accused to which he plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 05 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. However, the appellant neither examined himself on oath nor produced any witnesses in his defence.

5. 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.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated

16.09.2020 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 has been falsely implicated in this case by the police in order to show there efficiency; that the complainant is a put up witness as there is no evidence that he was present at the scene of the crime or received any injuries; that even otherwise the correct identification of the appellant by the complainant who is the sole eye witness in the case cannot be safely relied upon; that the pistol allegedly recovered from the appellant in another case had been foisted on him; that his alleged confession before the police was inadmissible; that the police entries and other FIR's on record were further evidence that this was a false case and thus 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 **Tariq Pervez v The State** (1995 SCMR 1345), **Wazir Muhammad v The State** (1992 SCMR 1134) and **Naveed Asghar v The State** (PLD 2021 SC 600).

8. On the other hand learned APG and learned counsel for the complainant contended that the eye witnesses correct identification of the appellant could be safely relied upon; that the medical evidence of the deceased Ayaz supported the ocular evidence; that the pistol which was recovered from the appellant in another case matched with the empties which were recovered at the scene; that he was a habitual offender and hardened criminal and as such the prosecution had proved its case beyond a reasonable doubt and that appeal be dismissed and the confirmation reference answered in the affirmative due to the brutal nature of the crime and the lack of mitigating circumstances. In support of their contentions, they placed reliance on the cases of **Dr. Javid Akhtar v The State** (PLD 2007 SC 249), **Dadullah v The State** (2015 SCMR 856), **Khalid Saif Ullah v The State** (2008 SCMR 688), **Tariq Iqbal alias Tariq v The State** (2017 SCMR 594), **Muhammad Noman v The State** (2017 SCMR 560), **Muhammad Talha Hussain alias Noman v The State** (PLD 2008 SC 115), **Niaz-ud-din v The State** (2011 SCMR 725), **Asfandiyar v The State** (2021 SCMR 2009), **Muhammad Imran v The State** (2021 SCMR 69), **Anwar Shamim v The State** (2010 SCMR 1791), **Khaliad Saif Ullah v The State** (2008 SCMR 688), **Muhammad Akram v The State** (2006 SCMR

1567), **Muhammad Akhtar Ali v The State** (2000 SCMR 727), **Mursalin alias Denni v The State** (1999 SCMR 2683) and **Moinuddin alias Moin v The State** (2000 YLR 1063).

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

10. At the outset based on the prosecution evidence, especially the medical evidence we find that Ayaz (the deceased) was murdered by firearm.

11. The issue before us is whether the prosecution has proved beyond a reasonable doubt that the appellant robbed Bobby Mart General Store at Qasim Complex Blaoock E Gulistan-e-Johar Karachi on 07.03.2014 at about 0145am and in so doing murdered Ayaz (the deceased) by firearm and injured by firearm the complainant Ejaz Hussain Shaikh.

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) We find that the prosecution's case rests **almost** exclusively on the evidence of the **sole eye witness** to the incident as to the place of the incident and his ability to correctly identify the appellant who allegedly came to his shop, robbed him, murdered his brother and also seriously injured him by firearm and as such we shall consider his evidence keeping in view the entirety of the prosecution case/evidence;

(i) **Eye witness PW 1. Ejaz Hussain.** He is the complainant **in the case.** According to his evidence on 07.03.14 he and the deceased were present at his shop at about 1.20am when they were closing the shop. The accused then arrived and fired with his pistol at the deceased which hit the deceased on his abdomen and then shot the deceased in his chest and demanded money from him. He told the accused that he his giving him the money but the accused fired on him and hit him on his left hand. The accused then fired for the third time on the deceased and hit him on the backside. The accused then again demanded money from him and fired at him

which hit him on the abdomen and thereafter the accused fired on him twice which fire hit him on both thighs. Then accused looted cash RS15,000 which he handed over to him. Accused also looted mobile phone cards and then left the place of the incident in his Liana car. Thereafter some boys from opposite restaurant namely Balochistan Sajji arrived there and shifted him and the deceased to Dar-ul-Sehat Hospital where the deceased expired and he remained for treatment. He identified the accused in the court as the same person who had robbed and shot him and the deceased.

It is to be noted that the complainant and the deceased were each shot three times making a total of 6 firearm wounds which in usual circumstances ought to have bled profusely but no blood was recovered from the inside of the shop where the incident allegedly took place.

No bullet mark was found in the shop despite 6 firearm shots being discharged.

No one from the Balochistan Sajji restaurant who alleged took the eye witness and the deceased from the shop to the private hospital was examined to this effect.

No medical evidence has been produced from any source to prove the injuries sustained by the complainant a part from one photo where he does not look like a person who had just received one bullet to the chest, one to his hand and one on each thigh.

There is no evidence that the deceased was ever taken to a private hospital. PW 3 Kaleem who carried out the post mortem of the deceased states that the deceased was brought at 3am by SIP Chaudhry Latif to JPMC SIP Chaudhry Latif was also not examined as to whether he had collected the dead body from a private hospital.

The IO went and inspected the wardat without any one who could even point it out. Presumably he was given the name of the shop and went there. He only recovered 3 out of the 6 empties and it is not stated where they were recovered from i.e inside or outside the shop.

All the above gives us pause and raises some doubt whether the incident actually took place as narrated by the complainant at his shop and whether he was even present at the time of any such incident.

Even if we believe that the eye witness was present at the time of the incident we note that it was a night time incident when it was dark, that the complainant according to his own evidence was closing his shop for the night, that the surrounding shops were closed and thus no source of light has been proven on which the accused could identify the accused who he had not seen before which cases usually require an identification parade. Admittedly the accused might have been close to the deceased as there was

blackening on his wounds but not necessarily the complainant where there is no medical evidence to support any blackening around his wounds which he allegedly received at the time, the situation would have been one of great trauma as both he and his brother had been shot which might have effected his ability to correctly identify the accused; he would only have got a quick look at the accused in bad light; he also gave no hulia of the accused in his FIR or at any other time and did not draw any picture of the accused; apparently he recognized the accused from a photo which the police showed him; this photo has not been exhibited so we do not know if it bears a likeness to the accused or where even the police got the photo from or even if it actually existed; he was not taken for an identification parade because he was apparently injured but there is no evidence to suggest that he remained in the hospital for even one week and could not later on have appeared before an identification parade to see if he could identify the accused; the accused identified the appellant in court after about 5 years when he would have also have had plenty of opportunity to see the accused before trial; that the supreme court as a rule has deprecated in court identification of unknown accused.

Although the complainant would have no reason to substitute the real killer of his brother with an innocent person and we can 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 the appellant which in effect means that although he had no intention of substitution he was mistaken in his identification of the accused and as such we veer on the side of caution in this case and find that the eye witness was not able to correctly identify the appellant.

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, J.C, 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. 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.

(b) That with no eye witness evidence to identify 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) That it is notable that although the appellant confessed to the offence whilst in police custody he was not produced before a magistrate to record his confession under S.164 Cr.PC and thus we place no reliance on his confession allegedly made before the police.

(d) That even the police entries in this case concerning the confession of the appellant before the police appear some what doubtful .Ex 10/G reveals at 4pm on 15.03.14 PW 5 IO Ibrahim departed from PS Shahra-e-Faisal to PS Aziz Bhatti for investigation in this case as apparently the appellant had confessed in another case. However EX 10/H reveals that FIR 113/2014 of PS Aziz Bhatti under which the appellant was arrested and booked was lodged at 4.30pm. So this begs the question as to why the IO was heading to that PS to interrogate the appellant 30 minutes **before** he had been shown arrested let alone an investigation started where the accused confessed before the IO in this case?

(e) That 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 in another case when there was no evidence against him at the time of his arrest in respect of the instant case.

(f) That a pistol was allegedly recovered from the accused at the time of his arrest in the other case 15 days later but there is no evidence that this pistol was kept in safe custody before it was sent to FSL along with the earlier recovered empties (or that they were

kept in safe custody) which makes the FSL report doubtful as it could easily have been managed especially as the pistol along with empties were sent to FSL after a delay of 13 days after recovering the pistol.

(g) That appellant did not even take the police to the place of wardat so there is no evidence that he knew where it was.

(h) That neither the alleged robbed cash of RS 15,000 nor robbed mobile phone cards were recovered from the appellant on his arrest.

(i) That according to the complainant despite being shot in the hand, abdomen and both thighs he was able to hand over the cash to the appellant whilst in the shop. If the appellant had been shot in each thigh which disabled him from going before an identification parade how was he able at the time of receiving such injuries able to pay the cash to the accused as apparently he was immobile and would not have been able to reach his till. This aspect of the prosecution case does also not appear to ring true.

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),

14. For the reasons discussed above we find doubt in the prosecution case and by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed, the confirmation reference is answered in the negative and the appellant shall be released unless wanted in any other custody case.

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

ANNOUNCED IN OPEN COURT ON 03-10-2022

10/10/22
 Muhammad Karam Khan Agha J
 Zulfiqar Ali Sanghi J. 3/10/2022