

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha J.
Mr. Justice Zulfiqar Ali Sangi J.

Spl. Criminal A.T. Acquittal Appeal No.186 of 2018

Mubarak Ali. Appellant

Vs.

Shoukat Ali & another Respondents.

Mr. Khuda Bux, advocate for appellant.

Mr. Farhad Khan, advocate for respondent.

Mr. Muhammad Iqbal Awan, Addl. P.G.

19.10.2022

ORDER

MUHAMMAD KARIM KHAN AGHA -J., The respondent Shoukat Ali was tried by learned Anti-Terrorism Court-XIII, Karachi in Spl. Case No.936/2016 in respect of crime No.129/2013 U/s 302, 34 PPC r/w section 7 ATA, 1997 and vide judgment dated 07.05.2018 was acquitted of the charge, hence appellant/complainant has filed this appeal against his acquittal.

2. Brief facts of prosecution case as per FIR are that on 06.03.2013 at about 2045 hours complainant lodged FIR No.129/2013 u/s 302,34 PPC contending therein that on 06.03.2013 while he was available at his Medical and General Store, situated at Johar Complex along with his brother Muhammad Ali, nephew Ali Hassan and one Ghulam Ali, at about 2.00 pm four persons on two motorcycles being armed with weapons arrived there and started issuing directions for closing the shops. While they were doing so, all of sudden they started firing, as a result, his brother Muhammad Ali sustained firearm injuries on neck and died on the spot. All accused persons fled away from the spot after making aerial firing. Complainant party took deceased to Memon Hospital, then Jinnah Hospital, there postmortem of deceased was conducted, hence this FIR was lodged.

3. In order to prove its case, prosecution examined 08 witnesses and on conclusion of trial, learned trial court acquitted the respondent as stated above.

4. Learned counsel for appellant has argued that learned trial court did not appreciate the evidence and has erroneously acquitted the respondent; that there was sufficient evidence proving charge of murder against the respondent but learned trial court ignored the same; that the respondent was put the identification parade before learned Magistrate and was rightly identified by the complainant; that all the witnesses supported the prosecution case; he prayed for setting aside acquittal of the respondent.

5. On the other hand, learned Addl. P.G and counsel for respondent supported the impugned judgment and stated that same has been passed on sound reasons.

6. We have heard the parties and perused the record.

7. We find that main reason while acquitting the respondent by the impugned judgment is as under:-

"I have heard learned APG for the State and counsel for accused and perused the record with due care. Perusal of record shows that P.W.1 learned Judicial Magistrate deposed that on 29.10.2015 he conducted identification parade through eyewitness and prepared such memo (Ex.7/B). During his cross examination he has stated that he does not remember if description of accused were not mentioned in the FIR. He also stated that he does not remember, if this case was disposed of in "A" clause and same report was accepted by the concerned Judicial Magistrate. He has admitted that he had not verified the diaries to verify the fact that accused was not shown to the witness in the police station prior to identification parade. Perusal of record shows that FIR was lodged on 06.03.2013 whereas, identification parade was held on 29.10.2015, which delay of about 2 ½ years. In this regard I relied upon citation in case of Saeedul Haque alias Abdullah (2018 YLR 242) Honourable High Court of Sindh, its relevant para is hereby reproduced as under:-

"Identification of accused persons before the Trial Court after such delay of the incident hardly satisfied the requirement of law---identification parade test was essentially to be held in the present case but no such test was held".

Perusal of memo of identification parade reveals that addresses and number's CNIC of dummies were not mentioned by learned Judicial Magistrate. In this connection I relied upon case law reported in Zafeer Ahmed Vs. The State (2017 P Cr. L J 662 Hon'ble Gilgit Baltistan Chief Court, relevant para is reproduced as under:-

"---names /parentage and addresses of the dummies were not mentioned in the report—"

Perusal of evidence of complainant P.W.2 & P.W.3 they have deposed that on 06.03.2013 it was about 2.00 p.m four persons on two motorcycles arrived there and by standing on road loudly asked the whole shopkeepers to close the market, on which they started to close their medical store, meanwhile the said persons made straight firing upon them, resultantly one bullet hit his brother namely Muhammad Ali on his neck. They shifted injured to Memon Hospital in emergency ward, where after examination doctor declared that his brother Muhammad Ali has been expired. During cross examination complainant has admitted that in his FIR he has not given the identification/descriptions of accused persons who made firing on his brother and shop. In this regard relied upon case law reported in case Adnan Vs. The State 2018 MLD 43 Lahore.

It is pertinent to mention here that Identification test of accused Shoukat was held approximately 2 ½ years after the occurrence. It is not readily believable that the P.W who has seen fleeting glimpses of accused, would remember their features for such long period particularly when his features and contours have not been mentioned in the FIR or in their statements recorded under section 161 Cr.P.C. Perusal of record shows that complainant did not disclose about weapon in the hands of accused at the time of incident. It has also noted that no recovery of crime weapon as well as motorcycle was made from the accused, simply empties allegedly recovered from place of incident, could not prove that those were fire by accused. Six empties were recovered by police from place of wardat. No crime weapon having been recovered from accused, it was not possible that empties were matched and report became positive. Identification parade is not a substantive piece of evidence but is only corroborative of the evidence given by the eye-witnesses at trial. It has come on record that the accused was kept in police station and that the witnesses had been visiting the police station during investigation. Possibility that police had got accused identified by witnesses prior to identification parade could not be ruled out. There is delay of more than six (6) hours in lodging the FIR for which no reasonable explanation has been given by the complainant. It is noted that FSL report (Ex.13) indicates that on 19.03.2013 empties were received in the office of FSL, while occurrence took place on 06.03.2013, no explanation has been furnished for such

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delay for dispatching the empties to FSL. Record further shows that whole investigation of this case was carried by the P.W.8 Muhammad Nawaz, who is Sub Inspector was not legally empowered to investigate the present case. In terms of section 19 ATA, 1997 an Inspector has to investigate the case triable by the Court of Anti-Terrorism. In this regard I relied upon case laws reported in "Maqsood Yameen Vs. R.P.O. Mutlan 2013 P Cr. L J 923 Lahore.

8. On assessment of the evidence, we find no legal infirmity in the above findings of the learned trial court. There were two eyewitnesses in this case, one being P.W.2 complainant Mubarak Ali and other P.W.3 Ali Hassan. It is noted that none of the eyewitnesses had seen the respondent before the incident and none of them gave any hulia/description of the respondent. Only P.W.2 Mubarak Ali was put before the identification parade which was held after 2 ½ years of the incident and on the basis that he did not give any hulia or other description of the respondent and incident took place 2 ½ years ago, we find that it was not possible to correctly identify the respondent at the time of incident. It is also noted that this case was originally disposed of under "A" class and respondent was booked after he had been arrested already in another case after he allegedly made confession before the police. Significantly before Identification parade the respondent was not produced before learned Magistrate for recording his concession. Furthermore, no pistol was recovered from him and as such FSL report in respect of the empties becomes of no significance. It is held by the Honourable Supreme court in case of The State v. Abdul Khaliq and others (PLD 2011 Supreme Court 554) that in appeals against acquittal, the scope is very narrow and limited because the respondent acquires double presumption of innocence. For the foregoing reasons we find no reason to interfere in the impugned judgment as it does not suffer from any infirmity and is in accordance with law. Accordingly, instant Acquittal appeal is dismissed in limine.