

Case of No evidence

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IN THE HIGH COURT OF SINDH, KARACHI

SPL. CRIMINAL A.T. JAIL APPEAL NO.08 OF 2021.

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,*

Appellant: Saad Aziz alias Tin Tin S/o. Aziz Shaikh through Mr. Moula Bux Bhutto, Advocate.

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

Date of hearing: 03.10.2022.

Date of Announcement: 06.10.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Saad Aziz alias Tin Tin S/o. Aziz Shaikh has preferred the instant jail appeal against the judgment dated 19.12.2020 passed by Learned Judge, Anti-Terrorism Court No.VIII, Karachi in Old Special Case No.275 of 2015 (New Case No.25 of 2020) arising out of Crime No.364 of 2014 U/s. 302/34 PPC R/w section 7 ATA 1997 registered at P.S. New Karachi, Karachi whereby the appellant was convicted and sentenced to suffer life imprisonment for the offence punishable u/s. 7(i) (a) of ATA 1997, r/w section 302/34 PPC. He was also liable to pay fine of Rs.500,000/- and in case of default in payment of fine, he was to undergo imprisonment for 03 years more. Properties of the accused were also ordered to be forfeited. The benefit of Section 382-B Cr.P.C was also extended to the accused.

2. The brief facts of the prosecution case are that on 17.10.2014 at about 2100 hours complainant Kamran Ahmed Hashmi recorded his statement u/s 154 Cr.P.C. in which he stated that his elder brother Waqar Hashmi son of Shafiq Ahmed Hashmi was serving in Police and posted in RRF (Muhafiz). On 16.10.2014 the complainant was present in his office,

when he received information through cell phone that his elder brother Waqar Hashmi has been hit by bullet shot and is dead. On such information, he proceeded to Abbasi Shaheed Hospital, where he found the dead body of his brother in the mortuary of the hospital, where he came to know that on 16.10.2014, his brother Waqar Hashmi went to attend his duty in his office. On the way, returning to his home on his bike bearing No.KEH-3837, Make Unique, Black color at Power House Chowrangi, near Chippa Ambulance booth, Sector 11-K, New Karachi, at about 2220 hours there some unknown culprits duly armed with deadly weapons who attacked his brother and fired shots at his person, consequently he succumbed to his death at the crime scene. At that time he was wearing his official police uniform and at outer side he was wearing his civilian shirt. He further came to know that some culprits are involved in murdering of the officials of police force and are committing target killing to spread turmoil and terror in the city of Karachi. His brother was also murdered through target killing by hitting bullet shot at his head, thereafter, initial proceedings/primary investigation was made by duty officer ASI Raja Muhammad Rafique. Thereafter the investigation was entrusted to SIO/P.I. Ali Haider Shah of the police station.

3. During investigation, I.O./SIO Ali Haider Shah proceeded for site inspection of the place of occurrence along with SI Raja Muhammad Rafique and prepared memo of site inspection in presence of mashirs. He secured one empty and blood stained earth from the crime scene and sealed the same. He wrote letters to different police stations for matching the recovered bullet from the pistols recovered in crimes to different police stations. I.O. recorded 161 Cr.P.C. statements of the witnesses and further wrote letters to intelligence sources and activated spy informers as well. On 17.10.2014 I.O. sent recovered empty to FSL and bloodstained earth for chemical examination. On 15.06.2015 I.O. received entry from CTD Police that one accused namely Saad Aziz has been arrested and he is admitting his involvement in Crime No.364/2014 U/s. 302/34 PPC r/w 7 ATA 1997. On such information he proceeded to CTD Police Station. At CTD P.S. He interrogated the accused in presence of police officials. During interrogation, accused Saad Aziz disclosed his involvement by stating that he along with his companion committed the murder of the deceased of present crime. On such disclosure, I.O. re-arrested accused

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Saad Aziz in the present crime and prepared memo of re-arrest and due to security constraints, he let the accused Saad Aziz stay confined in P.S. CTD. On 28.06.2015 I.O. along with police officials and accused proceeded to Power House Chowrangi, Sector 11-K, North Karachi, there accused pointed out the place of commission of offence. On his disclosure, the I.O. prepared memo of site inspection on pointation of the accused.

4. During investigation, the I.O. further came to know that accused Saad Aziz had also been arrested in Crime No.107 of 2015 by CTD Police against recovery of unlicensed weapon u/s 23(i)(a) of Sindh Arms Act, 2013. On 16.07.2015 I.O. sent recovered empty to ballistic expert for matching the same with the crime weapons 9mm pistol, which were recovered from the accused and other accused in crime No.107 and 108 of 2015. He received FSL report. The recovered empties were found 'similar' with the 9mm pistol recovered by CTD police in another crime from accused Tahir Hussain Minhas and as per admission of accused Saad Aziz after commission of murder of police constable, the said weapon was handed over by him to accused Tahir Husain Minhas. Thereafter accused Saad Aziz was remanded to Judicial Custody and sent to Central Prison. Subsequently I.O. received approval for submission of challan from his high officials and submitted final report u/s. 173 Cr.P.C. before the Administrative Judge ATCs, the case was approved and transferred to ATC for trial of the accused in accordance with law.

5. The accused plead not guilty to the charge and claimed trial. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication by the police. He did not examine himself on oath or call any DW's in support of his defence case.

6. 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.

7. 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.

8. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the police hence the unexplained delay of lodging the FIR whilst the police cooked up a false case against him; there was no eye witness to the incident; that there was no last seen evidence; that the recovered pistol in another case was foisted on him and that this is a case of no evidence at all and as such the appellant should be acquitted of the charge by extending him 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), **Shamoon alias Shamma v. The State** (1995 SCMR 1377), **Naveed Asghar and 2 others v. The State** (PLD 2021 Supreme Court 600), **Mst. Saira Bibi and others v. The State and others** (2019P Cr.LJ 1363), **Wazir Muhammad v. The State** (1992 SCMR 1134), **Muhammad Farooq v. The State and others** (2019 P. Cr.LJ 609), **Saifullah v. The State** (1985 SCMR 410) and an unreported judgment of this Court in the case of **Tahir Hussain Minhas @ Sain v. The State** (Special Criminal A.T. Jail Appeal No.06 and 07 of 2021) dated 29.08.2022.

9. On the other hand learned APG has fully supported the impugned judgment and has submitted that the prosecution had proved its case against the appellant beyond a reasonable doubt through reliable evidence which had been placed on the record and as such the appeal should be dismissed.

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

11. Based on our reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of empty and blood at the crime scene we find that the prosecution has proved beyond a reasonable doubt that PC Waqar Hashmi (the deceased) was shot and

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murdered by firearm on 16.10.2014 at about 2220 hours at power house Chowrangi near cheepa ambulance booth Sector 11-K New Karachi.

12. The only question left before us therefore is whether it was the appellant who murdered the deceased by firearm at the said time, date and location.

13. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That there was no eye witness to the murder of the deceased.

(b) That the accused was not arrested on the spot but much later whilst in CTD custody whilst he was already under arrest in another case.

(c) That there was no last seen evidence.

(d) That the appellant's confession before the police is inadmissible in evidence. The appellant was not taken to record his confession before a judicial magistrate for which no explanation has been given.

(e) That the appellant was not named in the FIR and it does not appeal to logic, reason or commonsense that he would confess to a murder which carried the death penalty when at that stage there was no evidence against him in the murder case which had already been disposed of in "A" class when he was only in custody in connection with an illegal arms case and a police encounter case which only carried a maximum sentence of up to 14 years in jail.

(f) That no recovery was made from the appellant in this case as he was already in police custody.

(g) That the empty which was recovered at the crime scene did not match the pistol which was allegedly recovered from the accused in the illegal arms case for which he was already in custody and there was no evidence that he actually used the pistol at all so the positive FSL report is of no help to the prosecution.

(h) That the medical evidence only confirms the place and nature of injury on the deceased and possibly the type of weapon used. It is not of any assistance in respect of identifying the accused.

(i) That the accused took the police to the place of wardat is of no consequence as the police already knew where the place of wardat was.

(j) That the prosecution has produced hardly any cogent evidence to link the appellant to the crime and in such like cases the appellant is entitled to the benefit of the doubt as a matter of right as opposed to concession.

14. For the reasons mentioned above the appellant is acquitted of the charge, the appeal is allowed and the impugned judgment is set aside. The appellant shall be released unless wanted in any other custody case.

15. The appeal is disposed of in the above terms.