

THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Yousuf Ali Sayeed &
Mr. Justice Adnan Iqbal Chaudhry.

Spl. Cr. A.T.A. No.111 of 2019 : Kamran Khan son of Dawood Khan & Muhammad Asif son of Muhammad Latif versus the State.

FIR No.127/2013 u/s
302/324/397/34 PPC
r/w section 7 ATA, 1997
P.S. Awami Colony, Karachi.

Spl. Cr.A.T.A. No.112 of 2019 : Kamran Khan son of Dawood Khan versus the State.

FIR No.163/2013 u/s 23(1)(a)
SAA, 2013
P.S. Awami Colony, Karachi.

Spl. Cr.A.T.A. No.113 of 2019 : Muhammad Asif son of Muhammad Latif versus the State.

FIR No.164/2013 u/s 23(1)(a)
SAA, 2013
P.S. Awami Colony, Karachi.

For the Appellants : Mr. Muhammad Latifuddin Pasha, Advocate.

For the State : Mr. Abrar Ahmed Khichi, Additional Prosecutor General Sindh.

Dates of hearing : 08-06-2021, 15-06-2021,
22-06-2021 and 29-06-2021.

JUDGMENT

Adnan Iqbal Chaudhry J. - These appeals under section 25 of the Anti-Terrorism Act, 1997 are against the common judgment dated 10-04-2019 passed by the Anti-Terrorism Court No.II, Karachi, in Special Case No. A-58/2013, Special Case No.130/2014, Special Case No.429/2014 and Special Case No.B-02/2018 whereby the Appellants

were sentenced and the co-accused Noor Alam was acquitted as follows:

- “124. The two accused Kamran Khan @ Doctor, and Mohammad Asif @ Goga are convicted u/s 302 PPC as ‘Taazir’ as well as u/s 7(a) of Anti-Terrorism Act for ‘imprisonment for life’.*
- 125. The two accused Kamran Khan @ Doctor, and Mohammad Asif @ Goga are also awarded sentence for possessing of unlicensed pistols u/s 23(1)(a) Sindh Arms Act, 2013 for ‘ten years’. Both accused are liable to pay compensation/fine to the legal heirs of deceased in the sum of Rs. One Lac each. Failure to pay the same to undergo imprisonment for another six months. Both the punishment will run concurrently. The accused are given benefit of section 382 of CrPC.*
- 126. The charge against accused Noor Alam is not proved, therefore, he is acquitted u/s 265-H(1) CrPC, under the circumstances, I have discussed.”*

2. The victim, namely Aurangzeb, was a Police Constable, shot dead allegedly by terrorists on 03-05-2013 around 15:00 hours while off-duty in plain clothes sitting alone under a shack, described as an abandoned chapra hotel next to the N-5 Bus Stop and Mashallah Service Station, Korangi Industrial Area, Karachi. The body was taken to the hospital by his brother, Muhammad Shoaib (Complainant). PS Awami Colony received a report of the incident over the phone at 15:15 hours (Exhibit 13-A) whereupon SI Chaudhry Gazanfar Ali examined the body at the morgue (Exhibit 12-A) before post mortem was conducted. FIR No. 127/2013 under section 302/34 PPC read with section 7 of the Anti-Terrorism Act, 1997 was registered the next day on 04-05-2013 at 13:20 hours after the Complainant was done with the burial.

3. Per FIR No. 127/2013, the Complainant stated that around 03:00 p.m. one Farooq came to inform him that Aurangzeb had been shot by unknown persons whilst sitting at the aforesaid place; that when the Complainant reached the spot, he saw Aurangzeb lying dead with firearm injuries on his head, face and chest; that the Complainant took the body to the hospital; and thereafter he learnt that two men in pant/shirt on a motorcycle had fired upon Aurangzeb. The Complainant added that Aurangzeb was in

possession of a .30 bore pistol bearing No.5823, under license No.8105 dated 12-03-1996, which firearm was missing. The FIR was registered against two unknown persons.

4. The post-mortem report (Exhibit 7-B) showed 4 wounds of entry, 4 wounds of exits, and 1 injury on the forearm; and that the death was instantaneous caused by firearm injuries to the chest, head and abdomen.

5. Per the memo of scene of offence and seizure (Exhibit 14-A) dated 04-05-2013, SI Muhammad Aslam Gondal collected 2 empties, 1 *sikka*, 1 missed round of TT pistol and blood stained earth; and that the victim was sitting on a wooden bench under a *jhompra* (shack) which was an abandoned hotel, on the east of which was a wall and then the Mashalla Service Station.

6. The Appellants were allegedly arrested on 17-06-2013 at 02:00 hours and booked under section 23(1)(a) of the Sindh Arms Act, 2013. Per FIR No. 163/2013 and FIR No. 164/2013 lodged at P.S. Awami Colony, SI Syed Ghous Alam along with other police officers were on a search patrol when a spy informed them that persons wanted in murder and dacoities were at Dar-ul-Uloom Road, K-Area Market, Korangi, duly armed with intent to commit an offence; that on reaching the spot they found the Appellants standing there; that a search of the Appellant Kamran revealed (i) a 9 mm pistol bearing No. 2216 with 6 live rounds in the magazine, (ii) a china-made mobile, and (iii) Rs.100/- cash in a purse along with some documents; that a search of the Appellant Asif revealed (i) a .30 bore pistol bearing No.5823 with 6 live rounds in the magazine, (ii) a mobile phone, Nokia 2690, and (iii) Rs. 300 cash.

7. Per the investigation, the .30 bore pistol seized from the Appellant Asif was the missing pistol licensed to the victim Aurangzeb; that during interrogation the Appellants confessed to Aurangzeb's murder and to the taking of his pistol; that the

Appellants also named Babu Bhai, Noor Alam, Shahid and Aslam as accomplices; and that the Appellants also pointed to the place of offence which was witnessed by the Complainant and HC Imran Shah. Thus, the Appellants were arrested also in FIR No. 127/2013 for Aurangzeb's murder.

8. After the Appellants had been arrested, one Jamaluddin came forward as eye-witness of Aurangzeb's murder, and at a test identification parade before the Magistrate on 28-06-2013, he identified the Appellants amongst persons who had fired upon Aurangzeb on 03-05-2013.

9. Noor Alam, allegedly named by the Appellants as an accomplice, was said to have been arrested on 20-08-2015 from a bus stop in Korangi Industrial Area, again within the remit of PS Awami Colony, and booked in FIR No. 289/2015 under section 23(1)(a) of the Sindh Arms Act for carrying an unlicensed .30 bore pistol with 4 live rounds. During interrogation, he is said to have confessed to Aurangzeb's murder alongside the Appellants and other accomplices, and therefore he was also arrested in FIR No. 127/2013.

10. Under the provisions of the Anti-Terrorism Act, 1997 a joint trial was ordered of the Appellants and Noor Alam for offences under FIR No. 127/2013, FIR No. 163/2013, FIR No. 164/2013 and FIR No. 289/2015. Charge was amended more than once. The final amended charge was framed on 12-06-2018 charging all of the said accused for offences under section 302, 34 PPC, read with section 7(1)(a) of the Anti-Terrorism Act, 1997, and under section 23(1)(a) of the Sindh Arms Act, 2013 to which all of them pleaded not guilty.

11. Apart from the MLO (PW-1), one Shahid Mehmood (PW-5), and the eye-witness Jamaluddin (PW-2), all other prosecution witnesses were police officials.

12. Statements of the accused were recorded under section 342 CrPC. The Appellant Kamran stated that he was a labourer in a tin manufacturing factory; that he did not go by the alleged alias of 'Dr.' linked by the Police with his name; that he was picked up by the Police on 07-06-2013 when he was on his way back home from the factory and was unable to give Rs. 5 lacs demanded of him; that he was confined blind-folded in an unknown place before being moved to the Police lock-up on 17-06-2013; that the pistol was foisted on him; that he did not know any of the other accused persons; and that Jamaluddin was a witness planted by the Police.

The Appellant Asif stated that he was a worker in a power loom factory; that he was picked up by the Police on 09-06-2013 on his way back home from the factory on the premise that he was an MQM worker; that he was confined at an unknown place before being moved to the Police lock-up on 17-06-2013; that he was falsely implicated in the case when he could not pay the Police Rs. 5 lacs demanded for his release; and that Jamaluddin was a witness planted by the Police.

The co-accused Noor Alam stated that he did not know the Appellants; that he was picked up by the Rangers on 17-08-2015 and later delivered to the SHO PS Awami Colony when his father filed a missing-person petition before the High Court; that to justify his custody, the Police then foisted a pistol on him and implicated him in the subject cases. Noor Alam had examined his father as a witness.

13. While the Appellants were convicted and sentenced, the case set-up by the prosecution against Noor Alam was disbelieved by the trial court on observing that the missing-person petition filed by his father in the High Court was before the date of his alleged arrest shown by the Police. Noor Alam was therefore acquitted.

14. Learned counsel for the Appellants submitted that the Appellants did not go by any alias and that such alias was added to their names by the Police to give the impression that they were criminals; that the Appellants were actually picked up by the Police

earlier from elsewhere and falsely implicated in Aurangzeb's murder; that the pistols were foisted on them; that the test identification parade was defective; that the memo of the test identification parade records that the statement of the Appellants that they were in custody before the date of their alleged arrest; that the extra-judicial confession extracted from the Appellants was inadmissible as evidence; that in any case, as per the report of the FSL, the 9mm empties recovered from the crime scene of Aurangzeb's murder, did not match with the pistols allegedly recovered from the Appellants; and that Jamaluddin was planted as a witness only after the Appellants had been arrested.

15. The learned APG submitted that the test identification parade was not defective; that Jamaluddin had identified the Appellants as the assailants not only at the test identification parade, but also before the Court at trial; and that the Appellants had not lead evidence to support their version that they had been arrested earlier from elsewhere. However, the learned APG acknowledged that Jamaluddin was a chance witness and that the case turns largely on his testimony.

16. Heard the learned counsel and perused the evidence.

17. That the victim Aurangzeb was a Police constable who was gunned down on 03-05-2013 around 15:00 hours while off-duty in plain clothes sitting alone under a shack, described as an abandoned chapra hotel next to the N-5 Bus Stop and Mashallah Service Station, Korangi Industrial Area, Karachi, was a fact well established by the evidence. The fact that the name of the service station was mentioned by some of the witnesses as 'Bismillah' instead of 'Mashallah' does not seem to be material as the place of occurrence was beyond doubt. The FIR of the murder having been registered against unknown persons, the point for determination in these appeals is whether the evidence establishes beyond reasonable doubt that the Appellants were the assailants.

18. The Complainant (PW-3) deposed that he was at his shop when one Farooq came there to inform him that Aurangzeb had been shot. Farooq himself had not seen the assailants, nor was he a prosecution witness. Shahid Mehmood (PW-5) who knew both Aurangzeb and the Complainant, deposed that he and Farooq had just met Aurangzeb at the *chapra* before they went for lunch at a nearby hotel; that while having lunch they heard the firing and rushed to see that Aurangzeb was lying in critical condition; that he (Shahid) saw the back of one person in pant/shirt running away, but given the distance and the fact that he did not see the face of that person, he could not identify the assailants.

19. The only prosecution witness who claimed to have seen the assailants was Jamaluddin (PW-2). However, he emerged as an eye-witness after 20/25 days of the incident when the Appellants had already been arrested. His testimony was that he did not come forward earlier due to fear; that at the time of the incident he was present at Bismillah Service Station for the service of his motorcycle; that he saw two persons on a motorcycle who came and fired upon the victim; that after 20/25 days of the incident, when he again went to Bismillah Service Station he came across the Complainant who was weeping as no one was willing to come forward to give evidence; that he (Jamaluddin) then informed the Complainant that he was an eye-witness of the incident but feared giving evidence; that the Complainant took his cell number and ultimately convinced him to give evidence; that on 28-06-2013 he had identified the assailants at a test identification parade; and that the Appellants were those very assailants. On cross-examination, Jamaluddin stated that Bismillah Service Station, where he was getting his motorcycle serviced, was 15/20 paces from the place where the victim was seated; that on hearing the gunshots he looked towards that direction and saw the Appellants firing on the victim. According to him, 12/13 shots were fired at the victim.

20. Though Jamaluddin (PW-2) claimed to be a motor-oil supplier, on the given day and time he was at the service station for the service of his motorcycle. He was therefore a chance witness. It is settled law, as reiterated in *Naveed Asghar v. The State* (PLD 2021 SC 600), that the testimony of a chance witness has to be scrutinized with caution.

21. Jamaluddin was a resident of Shah Faisal Colony, far from the Korangi Industrial Area, the area of occurrence. Why he chose to get his motorcycle serviced that far from home, remained unexplained. His deposition also does not explain why he went back to the same service station again after 20/25 days of the incident where he coincidentally met the Complainant; and what prompted him to introduced himself to the Complainant as eye-witness and to give the Complainant his cell number when admittedly he was fearful of giving evidence. At the time Jamaluddin came forward and met the Complainant, viz. after 20/25 days of the murder, the Appellants had already been arrested and their identities/appearance had already been revealed to the Complainant who had witnessed the memo of pointation dated 20-06-2013 (Exhibit 12-E) in the presence of the Appellants. Therefore, given the prior interaction between the Complainant and Jamaluddin, the subsequent identification of the Appellants by Jamaluddin on 28-06-2013 at the test identification parade does not inspire confidence.

22. Nevertheless, while deposing in Court, Jamaluddin had contradicted his earlier account of the incident as recorded before the Magistrate in the memo of the identification parade held on 28-06-2013. There he had stated that the Appellants were amongst 5/6 persons who had fired upon the victim. But while deposing in Court his statement was that only two persons on a motorcycle came and fired upon the victim. Furthermore, his deposition was that the Appellants fired 12/13 shots at the victim, however, only 4 empties were recovered from the scene of the crime. Admittedly, he was at least a distance of 15/20 paces from the place of incident and stated that he left the scene right thereafter due to fear. It is unlikely that he

could have taken a good look at the faces of the assailants from such distance when he was in fear of his own safety and looking to leave the place hurriedly. Therefore, even if it were to be believed that Jamaluddin was present at the scene of the firing, his evidence is contradictory, unsubstantiated and clearly unreliable.

23. The testimony of the eye-witness found unreliable, this leaves the matter of the pistols allegedly recovered from the Appellants, more particularly the 30 bore pistol recovered from the Appellant Asif, which was said to be the property of the victim and licensed to the victim. Before advertng to that aspect of the matter, it needs to be highlighted that none of the pistols allegedly recovered from the Appellants were found to be the murder weapon. Per the report of the Examiner of Firearms dated 14-10-2013 (Exhibit P/68), the empties collected from the crime scene were that of a 9mm firearm and did not match the 9mm pistol said to have been recovered from the Appellant Kamran. This was also affirmed by IO Muhammad Sohail (PW-14). The 9mm empties ruled out the use of the 30 bore pistol allegedly recovered from the Appellant Asif. Given that evidence, the fact that the empties collected from the crime scene on 04-05-2014 were sent to the Forensic Division for examination as late as 19-06-2013 (Exhibit P/54), does not remain relevant.

24. Per FIR No. 127/2013, the Complainant had stated that Aurangzeb's .30 bore pistol (not his service weapon) was also 'missing'. It was not his statement that he had seen Aurangzeb with such firearm at the relevant time, or that he usually carried such firearm when he was off-duty. Even assuming that Aurangzeb was carrying said firearm at the time he was murdered, it was implausible that after firing upon the victim in broad daylight at a busy area, the assailants would risk exposure by prolonging their stay to search the victim's body or to pick up his firearm. Even Jamaluddin, the eye-witness, did not state that he saw the assailants take the victim's firearm after shooting him. The firearm may well have been at the victim's home, also shown as the Complainant's home, or it may have

been on the body of the victim before the Complainant shifted him to the hospital. The statement of the Complainant under section 154 CrPC was taken at his home one day after the incident. With that time for deliberation, and given the effort made to mention details of the firearm in the FIR, i.e. 'bearing No.5823, license No.8105 dated 12-03-1996', the narration in the FIR of the 'missing' firearm of the victim appears to be by design.

25. Apparently, a photocopy of Aurangzeb's license of his .30 bore pistol was with the Complainant when he gave the above mentioned details for the FIR on 04-03-2013, but that photocopy was not provided to the I.O. until 19-06-2013 (Exhibit P/25 and Exhibit P/25-A) i.e. after the arrest of the Appellants. Per the photocopy of that license, it was issued to Aurangzeb at Balakot, Mansehra, and later re-registered with the Deputy Commissioner District East, Karachi. The evidence does not show that the I.O. or the prosecution made any attempt to verify the photocopy of that license either from the issuing authority at Balakot or from the Deputy Commissioner District East, Karachi.

26. Per FIR No. 163/2013 and FIR No. 164/2013 it was 02:00 a.m. on 17-06-2013 when the Appellants were found simply "standing" at Dar-ul-Uloom Road, near K-Area Market, Korangi, at a place pointed out by a spy. On cross-examination, the arresting officer, SI Syed Ghous Alam (PW-6) acknowledged that the Appellants did not try to flee, nor did they have any conveyance. The alleged recovery of firearms from the Appellants and their arrest was witnessed only by police officials. Per the memo of arrest and seizure (Exhibit P/17), apart from the pistols, other items such as cell phones, cash, wallet and documents were also seized from the person of the Appellants, but then those items did not emerge from the parcels desealed in Court. In fact, SI Syed Ghous Alam (PW-6) acknowledged that he had not sealed those other items along with the pistols, thus casting a doubt on the entire recovery made from the Appellants. On the other hand, the Appellants were consistent in their stance that they had

been picked up by the Police elsewhere and separately prior to FIR No. 163/2013 and FIR No. 164/2013. ASI Falak Sher (PW-9) who had interrogated the Appellants in said FIRs, acknowledged that the Appellants had informed him that they had been picked up by the Police prior to said FIRs. The memos of the identification parade of the Appellants (Exhibit P-44 and Exhibit P-46) also recorded their statement that they were taken into custody on different dates prior to the date of their alleged arrest. Again, in their respective statements recorded under section 342 CrPC, the Appellants stated that they were picked up by the Police on separate dates when returning to their respective homes from work, and that the pistols were foisted on them.

27. In view of the foregoing evidence, the recovery of the alleged pistols from the Appellants also becomes doubtful. The testimony of the eye-witness already found to be unreliable, there is nothing else that links the Appellants to the murder of Aurangzeb. Given the entirety of the evidence discussed above, the extra-judicial confession obtained from the Appellants is hardly inspiring. Therefore, we cannot but conclude that the prosecution has not been able to prove the charges against the Appellants beyond reasonable doubt. Consequently, the conviction of the Appellants *vide* judgment dated 10-04-2019 passed by the Anti-Terrorism Court No. II, Karachi, in Special Case No. A-58/2013, Special Case No.130/2014 and Special Case No.429/2014 is set aside, and the accused Kamran Khan s/o Dawood Khan and Muhammad Asif s/o Muhammad Latif are acquitted in FIR No. 127/2013, FIR No. 163/2013 and FIR No. 164/2013 lodged as PS Awami Colony, Karachi. They shall be released from jail if their custody is not required in any other case.

JUDGE

JUDGE