

IN THE HIGH COURT OF SINDH AT KARACHI**PRESENT:****Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi****Spl. Criminal A.T. Appeal No.39 of 2021**

Appellant: Naseer Ahmed @ Mullan
through Mr. Zahoor Ahmed, Advocate

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

Date of Hearing: 06.10.2022
Date of Judgment: 13.10.2022

J U D G M E N T

ZULFIQAR ALI SANGI, J.— Being aggrieved and dissatisfied with the judgment dated 23.02.2021 passed by learned Judge, Anti-Terrorism Court No.IV, Karachi in Spl. Case No.1080 of 2017 arising out of FIR No.290/2014 for the offence punishable U/S 302/34 PPC r/w section 7 ATA of P.S. Baghdadi, whereby the appellant has been convicted U/s 302 (b),34 PPC to imprisonment for life with compensation of Rs.100,000/- to be paid to the legal heirs of the deceased and in case of default he shall further undergo 06 months S.I. more in addition to his substantive sentence the appellant has filed this appeal against his conviction and sentence.

2. The brief facts of the prosecution case appearing in the FIR are that on 11.09.2017 complainant Muhammad Ilyas received a phone call of Faizan disclosing that he along with deceased Tariq on motorcycle bearing NO.DKW-686 were coming back from Saddar to their house and when reached at Tendery Road near Liyari General Hospital Gate, at about 2.00 pm, four unknown boys started firing upon them who fell down. The culprits took away Muhammad Tariq with them along with his motorcycle. At about 3.30 p.m. dead body of deceased

Muhammad Tariq was found near the slaughter yard near Kachra Kundi. The deceased was serving in Pakistan Army, Sindh Regiment and had come to Karachi just a day before the incident for his work. The complainant then appeared at P.S. and lodged FIR.

3. During the investigation police could not trace the accused as such filed report for disposal of the case under "A" class on 29.10.2014. On 16.04.2017 accused Naseer Ahmed @ Mullan was arrested in Crime No.73/2017 u/s 23(1) (a), Sindh Arms Act, 2013 of P.S. Baghdadi and during interrogation he admitted his involvement in the present crime along with his accomplices namely Suhail Khouf, Faiz Muhammad @ Lala Orangi, Muhammad @ Qari Qasim, Waleed Dada and Azam. Accordingly charge sheet was submitted against the appellant.

4. Charge against the appellant was framed on 02.05.2018 to which he pleaded not guilty and claimed his trial.

5. The prosecution in order to prove its case examined P.W.1 complainant Muhammad Ilyas at Ex.6, P.W.2 ASI Munir Hussain at Ex.7, P.W.3 HC Muhammad Atif at Ex.10, P.W.4 Shafqat Hussain, learned Judicial Magistrate at Ex.11, P.W.5 Faizan Ali at Ex.12, P.W.6 Dr Muhammad Pervez Anwar at Ex.15, P.W.7 Muhammad Anwar at Ex.16, P.W.8 I.O. Inspector Saeed Alam at Ex.17 and then closed its side.

6. Statement of the accused was recorded under Section 342 Cr. P.C in which he denied all allegations levelled against him. After appreciating the evidence on record, the learned trial Court convicted the appellant as mentioned above. Hence this appeal against conviction.

7. Learned counsel for the appellant has mainly contended that the appellant is innocent and has been falsely implicated in this case; that neither appellant is nominated in the FIR nor there was any evidence connecting him with the commission of murder of the deceased; that the appellant was arrested by law enforcement agency and was handed over to police on 16.04.2017 and was implicated in FIR No.73/2017 U/s 23(1), (A) Sindh Arms Act, in which he has been acquitted; that per prosecution case the appellant was arrested on 25.03.2017 and

had disclosed about his involvement in the present case but his identification parade was held on 20.04.2017 after about one month thus the identification parade has lost its value; that there is no eyewitness that the appellant had murdered deceased; that motive in the case has not been asserted nor proved; that there is no independent and trustworthy evidence connecting the appellant with the murder of deceased. Lastly, he submitted that the prosecution has miserably failed to prove the case, therefore, the conviction and sentence of the appellant is liable to be set aside. He has relied upon the cases of **Saifullah Vs. The State (1985 SCMR 410)**, **Mehmood Ahmad and 3 others Vs. The State and another (1995 SCMR 127)**, **Alim Vs. The State (PLD 1967 SC 307)**, **Lal Pasand Vs. The State (PLD 1981 SC 142)**, **Mian Sohail Ahmed & others Vs. The State and others (2019 SCMR 956)**, **Tahir Javed Vs. The State (2009 SCMR 166)**, **Abid Mehmood Vs. The State (2009 P Cr. L J 894)**, **Wazir Muhammad and another Vs. The State (2005 SCMR 277)**, **Rehmatullah Vs. The State (2006 P Cr. L J 358)(Lahore)**, **Imran Ashraf & 7 others Vs. The State (2001 SCMR 424)**, **Naveed Asghar and 2 others Vs. The State (PLD 2021 SC 600)**, **Tariq Pervez Vs. The State (1995 SCMR 1345)**, **Ramzan & others Vs. Emperor (AIR 1929 Sind 149)**, **Muhammad Umar, ETC Vs. The State (2015 SD 181)**, **Siraj ul Haq & another Vs. The State (2008 SCMR 302)**, **Ameer Bux and another Vs. The State (2012 P Cr. L J 500)**, **Shamoon alias Shamma Vs. The State (1995 SCMR 1377)** and **Wazir Muhammad Vs. The State (1992 SCMR 1134)**.

8. On the other hand, learned Addl. P.G. Sindh contended that all the witnesses have fully supported the case of prosecution; that no major contradictions in their evidence has been pointed out by learned defence counsel; that it is well-settled law that even evidence of a single eye witness is sufficient for a conviction of accused in a murder case; that appellant had admitted his guilt and also made confession before learned Magistrate, therefore, impugned judgment does not suffer from any illegality. He has relied upon the cases of **Muhammad Mansha Vs. The State (2001 SCMR 199)**, **Dadullah & another Vs. The State (2015 SCMR 856)**, **Khalid Mehmood Vs. The State (2017 SCMR 201)**, **Ijaz Ahmad Vs. The State (2009 SCMR 99)**, **Muhammad Nadeem@Deemi Vs. The State (2011 SCMR 872)**, **Niaz ud**

din & another Vs. The State & another (2011 SCMR 725).

9. We have heard the learned counsel for the appellant as well as the learned Addl. P.G. Sindh and examined the record with their able assistance.

10. From our reassessment of the entire evidence, we find that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence.

11. The incident took place on 11.09.2014 at 1530 hours and the FIR was registered on the same day at 1900 hours against unknown accused without disclosing their descriptions/hulia. As per prosecution evidence, the offence was committed by the accused persons in two episodes, i-e abduction of the deceased and thereafter murder of the deceased. Episode one was claimed to be witnessed by PW-5 Faizan Ali, however, there is no eye witness of the murder. Therefore the entire prosecution case hinges upon the evidence of P.W.5 Faizan Ali who is the only eyewitness of the incident of the abduction of Tariq. Though he claimed to be the eye-witness of the incident he remained silent for about eight days and his statement u/s 161 Cr. P.C was recorded after 08 days of the incident wherein he has also not disclosed the description/hulia of the accused persons to show his ability to identify them.

12. As far as establishing the identity of the accused is concerned, it is a matter of record that the appellant was unknown to the complainant party and the FIR was lodged against four unknown dacoits. The appellant was arrested on 16.04.2017 and presented before the Judicial Magistrate for conducting his identification parade on 20.04.2017 after 05 days after his arrest and three years of the incident. The general principle regarding conducting identification parades has been laid down in the recent case of ***Mian Sohail Ahmed v. The State (2019 SCMR 956)***, wherein the Hon'ble Apex Court has emphasized that care and caution must be taken by the Courts in ensuring that an unknown accused is correctly identified. For an identification parade to be properly held, it is essential that it must be conducted soon after the arrest of the accused and that

accused is not shown to the witnesses before the identification parade. However, the said guidelines were not followed. Furthermore, the incident took place on the road during day light hours and if it is believed that P.W.5 Faizan Ali would have seen the accused properly he would have been able to describe the assailants in his statement u/s 161 Cr. P.C but he could not do so. PW-5 Faizan Ali however admitted during his cross-examination that ***“It is correct to suggest that I had got a prepared sketch of one suspect. It is correct to suggest that I had not got papered sketch of present accused.”*** We have also gone through the evidence of PW-4 the Judicial Magistrate Shafqat Hussain who conducted the identification parade of the appellant and we find legal defects in the identification parade. *Further, the identification parade was conducted after about three years of the incident and the appellant was not previously known to P.W.5 Faizan Ali, who had only one look at the accused as he had never seen him before or after the incident.* P.W.4 Shafqat Hussain learned Judicial Magistrate has deposed that P.W.5 Faizan Ali had identified the accused at 9.30 a.m. however as per his evidence the dummies were ordered to be arranged at 8.30 a.m. whereas P.W.5 Faizan Ali during cross-examination has stated that he had reached the court between 10.00 to 11.00 a.m. for identification parade of the accused which creates very serious doubt in the identification parade. In these circumstances, we also found that the identification parade is not helpful to the prosecution to maintain the conviction of the appellant which we find was not conducted by following all the guidelines as laid down in the case of ***Kanwar Anwaar Ali (PLD 2019 SC 488)***

13. PW-5 Faizan Ali the sole eye-witness also made improvements at the time of recording his evidence before the trial court which he had not stated in his statement under section 161 Cr.P.C. During the cross-examination he also admitted that *“It is correct to say that it is not mentioned in my statement u/s 161 Cr. P.C that four accused on the show of pistols stopped us. It is correct to say that it is not mentioned in my statement u/s 161 Cr. P.C that I had made a phone call to 15 (police helpline). It is correct to say that it is not mentioned in my*

statement u/s 161 Cr. P.C that police APC and Rangers came at the place of incident and after some time announcement was made from loudspeakers of mosques that Tariq is employee of Army and he be released. It is correct to say that hulia of accused is not mentioned in my statement u/s 161 Cr.P.C.” It reflects that P.W.5 Faizan Ali has made several improvements dishonestly to bring the case in the line with the other witnesses of the prosecution.

14. There is no evidence of torturing the deceased by the accused persons so also with respect to who had thrown the dead body of the deceased at Kachra Kundi. Initially, the case was disposed of under “A” class, however, when the appellant was arrested on 16.04.2017 in an Arms case bearing crime No.73/2017 it is alleged that during interrogation he had confessed the present offence before the I.O. He was not produced before any Magistrate for recording his confessional statement nor his statement before the police has been exhibited in the evidence nor have the manner of the incident been deposed by the I.O before whom he confessed the offence. The investigation officer deposed that the accused confessed before him that one Army personnel was apprehended by Sohail @ Khaof and Qari Qasim and brought to the torture cell where Lal Orangi and other companions were present where they killed the deceased. Despite having such information the investigation officer did not visit and search the said torture cell where the deceased was killed and from such confession it reflects that the accused was not the person who kidnapped the deceased or murdered him. Further, as per Articles 38 and 39 of Qanoon-e-Shahadat Order 1984, any confession before the police while in custody is inadmissible in evidence. It also reflects that after the arrest of the accused, statement u/s 161 Cr.P.C. and evidence of PW Faizan Ali have been managed to book the present appellant falsely in the instant offence.

15. For these reasons and in the wake of serious doubts in the prosecution case regarding the involvement of the appellant in the alleged crimes we see no legal justification for upholding his conviction and sentence. The rule of benefit of the doubt is a golden rule which cannot be ignored while dispensing justice in

accordance with law as has been held by the Honourable Supreme Court of Pakistan in the case of ***Ayub Masih v. The State (PLD 2002 SC 1048)***, wherein it is held as under:-

".....It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him."

16. For what has been discussed above, we are of the firm view that the prosecution has miserably failed to bring home the guilt of the appellant beyond a reasonable shadow of a doubt. Accordingly, the instant appeal is allowed and conviction and sentence awarded to the appellant vide impugned judgment dated: 23-02-2021 by the Anti-Terrorism Court No. IV, Karachi in Spl. Case No.1080 of 2017 arising out of FIR No.290/2014 for the offence punishable U/S 302/34 PPC r/w section 7 ATA of P.S. Baghdadi, is set aside and the appellant is acquitted from all the charges while giving him the benefit of doubt. The appellant be released forthwith if not required in any other custody case.

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

JUDGE

JUDGE