

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Spl. CR. ANTI-TERRORISM APPEAL No.

D-372 of 2018

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

HONORABLE MR JUSTICE KARIM KHAN AGHA
HONORABLE MR. JUSTICE MUHAMMAD SALEEM JESSAR

Dates of hearing: 02-03-2020

Decided on 16-03-2020

(a) Judgment approved for reporting.

Yes
~~No~~

[Signature]

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Sp. A.T. Appeal No: 372 of 2018

PRESENTED ON
28-12-2018

Syed Jawad Ali s/o Anjum Hussain
Muslim, Adult, resident of House No. C/135,
berick No.49, Jatt line, Petrol Pump,
Husaini Imam Barga, Lines Area,
Karachi -----

4724
Deputy Registrar (Judl.)

APPLICANT

Versus

The State -----

RESPONDENT

FIR: 279/2015

U/S.392/353/324/34 PPC r/w 7-
ATA, 1997

P.S. Ferozabad, Karachi

SPECIAL CRIMINAL APPEAL UNDER SECTION 25 OF ANTI- TERRORISM ACT OF 1997 READ WITH SECTION 410 CRIMINAL PROCEDURE COURT

Being aggrieved and dissatisfied with impugned consolidated Judgment dated 22.12.2018 passed by the Learner Judge of Anti-Terrorism Court No:X, Karachi in Special Case No:168/2018 (old Case No.1903/2016) in Crime FIR No: 279/2015 of u/s 392/353/324/34 PPC r/w 7-ATA, in which the Learner judge did not consider the merits of the cases and passed the sentence to the applicant/accused. It is respectfully prayed on behalf of above named applicant/accused that this Honorable Court may graciously be pleased to suspend the Judgment as well as set aside the above impugned judgment dated 22.12.2018 so also acquit the applicant/accused, on consideration of the following facts and grounds:-

Certified copy of Judgment is enclosed as Annexure 'A'

IN THE HIGH COURT OF SINDH KARACHI

Special Criminal Anti-Terrorism Appeal No.372 of 2018.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Muhammad Saleem Jessar.

Appellant	: Syed Jawad Ali S/o Anjum Hussain through Mr. Danial Faraz Khan Ujjan, Advocate.
Respondent /State	: Through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, Sindh
Date of Hearing	: 02.03.2020.
Date of Judgment :	16.03.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Syed Jawad Ali s/o Anjum Hussain was tried by the learned Judge, Anti-Terrorism Court No.X, Karachi in Special Cases No.168/2018, Old No.(1903/2016), arising out of Crime No.279/2015 U/s. 392/353/324/34 PPC r/w section 7 ATA, 1997, registered at P.S. Ferozabad, Karachi. After trial vide judgment dated 22.12.2018 the appellant named above was convicted as under:-

1. Convicted accused Syed Jawad Ali s/o Anjum Hussain for offence u/s 392 PPC and sentenced to undergo R.I. for "10" years with fine of Rs.100,000/-. In default in payment of such fine, he shall suffer further R.I. for "06" months more.
2. Convicted accused Syed Jawad Ali s/o Anjum Hussain for offence u/s 7 (h) of ATA, 1997 R/w S.353/324 PPC and sentenced to undergo R.I. for "10" years with fine of Rs.100,000/-. In default in payment of such fine, he shall suffer further R.I. for "06" months more.

Both the sentences were ordered to run concurrently. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.X, Karachi, the aforesaid appeal has been preferred by the appellant.

3. The brief facts of the prosecution case are that on 20.04.2015, at about 2320 hours complainant Noman Rasheed s/o Abdul Rasheed got recorded his statement U/s 154 Cr.P.C. wherein, he stated that on that day, when he was

returning to his home along with his brother Kamran Rasheed in Car from Tariq Road after shopping at about 2230 hours when the complainant stopped his car opposite House No.M-44, Block-2, PECHS, Karachi (nearby his house) suddenly "03" young boys on 02 motorcycles came over and robbed one Q-Mobile Phone, Lenovo mobile phone and cash Rs.7000/- from the complainant and his brother on gunpoint and then made their escape good. The complainant further claimed in his statement U/s 154 Cr.PC that consequently, he then headed towards the concerned Police Station for lodging the Report about the incident and by the time he reached at Jheel Park Marriage Hall, Block-2 PECHS he heard firing noise and one Police Mobile was also available there. As soon as the complainant came nearby the Police officials, he saw that the culprit, who had robbed the Mobile phones and cash amount from him and his brother, was lying in an injured condition, who was also holding a pistol in his right hand and the same was recovered and taken into possession by one SIP Muhammad Sachal, whereas the said injured accused was also holding a plastic shopper in his left hand, wherefrom two mobile phones (which were robbed by the culprits from the complainant and his brother) as well as 07 other Mobile phones of different companies were recovered and were taken into possession by the Police. The complainant further claimed in his statement U/s 154 Cr.P.C. that the accomplices of the injured/apprehended culprit managed to escape away from the crime scene on their motorbike by making fire shots, whereas, they had also left behind one motorbike having registration No.KGM-5463 (maker Superstar) on the spot. Upon inquiry, the apprehended/injured accused disclosed his name as to be Hafeez-u-ddin S/o. Qamar-u-ddin. The complainant further stated in his statement U/s 154 Cr.P.C. that the said injured accused along with his accomplices had assaulted upon the police party as well as made fire shots upon them at about 2300 hours and as a result of cross-firing, he got injured. The complainant further stated that the injured accused was then shifted to Hospital for his medical treatment, whereas the police officials had also secured empty shells from the place of Wardat as well as blood stained earth and some documents were also prepared by the Police on the spot. Later on, at about 0250 hours viz. 21.04.2015, SIP Muhammad Sachal incorporated the statement U/s. 154 Cr.PC of the complainant into the FIR book bearing FIR No.279/2015 U/s. 392/353/324/34 PPC.

4. After completion of the investigation, the charge against the accused was framed to which he pleaded not guilty and claimed trial of the case.

5. To prove its case the prosecution examined 06 prosecution witnesses and exhibited numerous items and other documents and thereafter the side of the prosecution was closed. The statement of the accused u/s 342 Cr.P.C. was also recorded in which he denied all the allegations leveled against him and claimed false implication. He did not examine himself on oath or call any defense witnesses in support of his defense case.

6. Learned Judge ATC No.10 at Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 22.12.2018, convicted and sentenced the appellant Syed Jawad Ali as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 22.12.2018 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 he is completely innocent and has been falsely implicated in this case, that he has not been correctly identified, that the motor cycle recovered at the scene does not belong to him and as such this is a case of no evidence and as such he should be acquitted of the charge and his appeal allowed.

9. On the other hand learned Deputy Prosecutor General has fully supported the impugned judgment. He has contended that the prosecution has proved its case against the appellant beyond a reasonable doubt as the appellant has been fully implicated in the case by his arrest and recovery of the motor bike at the scene of the encounter which belongs to him and as such the appeal should be dismissed.

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

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11. In our view after our reassessment of the evidence based on the evidence of the PW witnesses, PW MLO, post mortem report, IO's evidence, recovery of weapon from deceased accomplice from the scene along with empties and recovery of robbed items from the deceased who was killed at the spot during the encounter, positive FSL and chemical reports, we are satisfied that the prosecution has proved beyond a reasonable doubt that on or about 20-04-2015 between 2230 and 2300 Noman Rashid and his brother were robbed and almost immediately thereafter on the same night one of the accused involved in the robbery was killed in an encounter with the police whilst his accomplices escaped from the scene.

12. In our view therefore the only issue before us is whether the appellant was one of the persons who took part in the aforesaid robbery and subsequent encounter with the police on 20-04-2015.

13. After our reassessment of the evidence we are of the view that the prosecution has **not** been able to prove beyond a reasonable doubt that the appellant took part in the aforesaid robbery and subsequent encounter with the police on 20-04-2015 for the following reasons;

(a) The appellant was not arrested on the spot and made his escape good and thus his case will turn on the correctness of his identification.

(b) Turning to the identification of the appellant:

- (i) It was a night time incident and no source of light has come in evidence. The fire came from distance and was not close range as is evidenced by the deceased accused who was killed by firearm since as per post mortem report no blackening was found around his wounds which indicates that the fire was not made from close range but from a distance.
- (ii) Those police PW's who allegedly identified the appellant were told by the IO that he was the person who committed the crime which is no identification at all and is based on hearsay. Even those who identified him in court gave no hulia or other description of the appellant in their S.161 statements and in court identification has been deprecated by the Supreme Court.
- (iii) The PW's who were robbed by the appellant and his accomplices could not recognize the appellant in court as the person who robbed them despite the fact that they would

have been nearer to him than any other witness as they handed over the robbed items to the robbers on the motor bikes.

- (iv) The appellant was unknown to any PW's and they only got a fleeting glance of him yet no identification parade was held for unexplained reasons.

(c) Thus, for the reasons mentioned above we have doubts that the appellant has been correctly identified and as such in our view the identification of the appellant cannot be safely relied upon.

(d) Even otherwise there are other doubts in the prosecution case. For example,

- (i) There is no evidence when and from where the appellant was arrested and by whom.
- (ii) No memo of his arrest has been exhibited
- (iii) No recovery was made from the appellant at the time of the arrest.

(e) It appears that the only evidence against the appellant is that the motor bike recovered at the scene belonged to him. However this has been denied by the appellant in his S.342 Cr.PC Statement. Even if he did own the motorbike this is not sufficient evidence on its own to convict him for the offenses as charged. He could have even lent the motor bike to some one else even if it did belong to him.

14. Thus, since we are of the view that the identification evidence vis a vis the correctness of the identification of the appellant cannot be safely relied upon and there is little, if any, other evidence against the appellant for the offenses so charged by extending the benefit of the doubt to the appellant we hereby set aside the impugned judgment, allow the appeal, acquit the appellant of the charge who shall be released unless he is wanted in any other custody case.

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