

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA. 316/2018 q/w Conf-case 16 of 18

Munawar vs. The State

HIGH COURT OF SINDH

Composition of Bench: ~~S.B.~~/D. B.

Mr. Justice Mohammad Karim Khan Agha,

Date(s) of Hearing: 10-02-2020 11-02-20

Decide on: 17-02-20

(a) Judgment approved for reporting:

Yes



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 / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- 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.

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PRESENTED ON

06-11-2018

Deputy Registrar (Judl.)

IN THE HIGH COURT OF SINDH AT KARACHI

(Criminal Appellate Jurisdiction)

Sp1 Criminal A.T.A. Appeal No. 346/2018

Munawar alias Mano David,

Son of David Masih,

Christian, Adult, presently confined in
Central Jail, Karachi.

Appellant/Accused

Versus

The State.

Respondent

F.I.R. No. 336/2013

U/s: 302/324/397/34 P.P.C.

R/w Section 7-A.T.A.,

P.S. Awami Colony, Karachi.

**APPEAL UNDER SECTION 25 OF THE ANTI-TERRORISM ACT,
1997, (ACT OF XXVI OF 1997) READ WITH SECTION 410,
CRIMINAL PROCEDURE CODE**

Being aggrieved and dissatisfied with the judgment dated 29.10.2018, passed by the learned Special Judge, Anti Terrorism Court-IX, Karachi, Mr. Abdul Latif Golo, in Special Case No.A-131/2013 (The State vs. Munawar David) vide FIR No.336/2013, under Section 302, 324, 397/34 P.P.C. Read with Section 7, ATA 1997, of Police Station KIA, Karachi, convicting the appellant herein, under Section 7(1) (a) of ATA 1997 R/w Section 302/34 PPC and sentenced him to death for two times on account of the two murders of deceased Mukhtiar and Ayaz and he is ordered to be hanged by neck till he is dead, the accused is also ordered to pay the fine of Rs.200,000/- (Two Lac) in case of default of payment of fine and he will have to undergo R.I. for one year, the appellant/accused was also convicted under Section 324/34 PPC and sentenced to suffer R.I. for

(11)

1754
CRL
06/11/18

**OFFICE OF THE JUDGE, OF ANTI - TERRORISM COURT NO-IX
JUDICIAL COMPLEX, CENTRAL PRISON AT KARACHI**

No.ATC-IX/K-DIV/ 899 /2018, Karachi,

Dated: 31-10-2018

To,

The Registrar,
Hon'ble High Court of Sindh,
Karachi.

**SUBJECT: REFERENCE UNDER SECTION 374 CR.P.C R/W
SECTION 30 OF ATA 1997 FOR CONFIRMATION OF
DEATH SENTENCE AWARDED TO ACCUSED
MUNAWWAR DAVID IN SPECIAL CASE NO: A-
131/2013, FIR No: 336/2013, U/S: 302/324/397/34 PPC OF P.S.
AWAMI COLONY (STATE VERSUS MUNAWWAR DAVID S/O DAVID
MASIH).**

It is submitted that accused Munawwar David, who was facing the trial in special case, mentioned in subject has since been convicted and awarded death sentence on 29-10-2018 subject to confirmation of the Hon'ble High Court of Sindh as such the R&Ps of the case mentioned in subject are submitted herewith in terms of section 374 Cr.P.C, r/w section 30 of ATA for the confirmation of death sentence awarded to accused, or otherwise.

(ABDUL LATIF GOLO)
JUDGE
ANTI TERRORISM COURT NO.IX
KARACHI

THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Appeal No.316 of 2018.
Confirmation Case No.16 of 2018.

Present:

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

Appellant: Munawar alias Mano David son of David
Masih through Mr. Javed Ahmed, Advocate.

Respondent: The State through Mr. Muhammad Iqbal
Awan, Deputy Prosecutor General along with
complainant Sajjad Ali.

Date of hearing: 10.02.2020 and 11.02.2020

Date of Announcement 17.02.2020.

J U D G M E N T

Mohammad Karim Khan Agha, J:- Accused Munawar David son of David Masih was tried by learned Judge, Anti-Terrorism Court No.IX, Karachi in Special Cases No. 131/2013 arising out of Crime No.336/2013 u/s. 302/324/34 PPC r/w. Section 7 ATA 1997. After trial vide judgment dated 29.10.2018 the appellant Munawar David was convicted and sentenced u/s. 7(1)(a) of ATA 1997 r/w section 302/34 PPC and u/s. 324/34 PPC as follows:-

- i) Accused is convicted and sentenced to death for two times on account of the two murders of deceased Mukhtiar and Ayaz and he is ordered to be hanged by neck till he is dead. The accused is also ordered to pay the fine of Rs.200,000/- (two lac) in case of default of payment of fine he will have to undergo R.I. for one year more.
- ii) Accused is convicted and sentenced to suffer R.I. for ten years with a fine of Rs.50,000/- and in case of non-payment of such fine the accused will have to undergo R.I. for six months more.

The benefit of Section 382-B Cr.P.C was however, extended to the accused and the death sentence was subject to confirmation by this court.

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2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.IX, Karachi, the aforesaid appeal has been preferred by the appellant.
3. The brief facts of the prosecution case as per FIR lodged by the complainant Sajjad Ali through his statement u/s 154 Cr.P.C. are that he was a practicing lawyer by profession and resided with his family in Bilal Colony. On 31.10.2013 he along with PW Jaan Mohammad, his father was coming from Tamir Bank after withdrawing their golden ornaments and it was about 01:00 pm when they reached at the street wherein their house was located where three persons came on a motorcycle bearing registration No.KGI-7852 and pointed pistol and demanded gold ornaments from them which were wrapped in an envelope.
4. It is further alleged that on their refusal to surrender their gold ornaments, the culprits fired upon Jaan Mohammad, the father of complainant which hit him on his leg. On hearing the fire short report PW Mukhtiar, the brother of complainant and so also one Ayaz Mangi, their neighbour came at the scene of occurrence who tried to apprehend the culprits but the culprits fired upon Mukhtiar as well as Ayaz Mangi with an intention to commit their murder as a result of which they both were seriously injured.
5. It is also alleged that during such firing made by the culprits, one of their own companions who was subsequently known as Imam Bux lost his life at the spot. One of the culprits who was subsequently known as Munawar David, the present accused was however, apprehended at the spot by the people of locality who gathered at the place of incident. While removing the injured Mukhtiar and Ayaz to hospital they succumbed to their injuries and such FIR was registered by the police on the basis of statement of complainant recorded u/s 154 Cr.P.C.
6. On receiving such information about the alleged incident the police reached at the scene of occurrence and made the arrest of accused Munawar alias David, who was however, found to be in injured condition having injuries on his body which he received at the hands of the persons

who had apprehended him at the spot at the time of commission of alleged incident and the police also secured a pistol of 9mm bore and so also five empties and the metal (Sika) of bullet of 9mm bore from the place of incident.

7. During the course of the investigation police produced PWs Mohammad Nawaz and Altaf Hussain before the learned Magistrate having jurisdiction where they were examined u/s 164 Cr.P.C. and after completing the remaining investigation including the postmortem report of the deceased persons and the Medico Legal Certificate of injured PW Jaan Mohammad the police filed the charge sheet of case against the present accused before the court of law having jurisdiction wherein accused Imran was shown as an absconder and whereas accused Imam Bux was shown to had been murdered during the commission of an alleged incident as a result of fire shots made by his own companions.

8. To prove its case the prosecution examined 11 prosecution witnesses and thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s 342 Cr.P.C. The appellant/accused claimed false implication in the present case. He did not give evidence under oath or call any DW in support of his defense case.

9. Learned Judge Anti-Terrorism Court No.IX, Karachi after hearing the counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 29.10.2018, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

10. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.10.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

11. Learned counsel for the appellant has contended that the appellant is completely innocent and that this is a false case, that although the eye witnesses were present at the scene of the offense they cannot be safely

relied upon, that there are contradictions in the evidence of the PW's and as such the appellant should be acquitted by extending him the benefit of doubt. In the alternate he submitted that the sentence should be altered from that of death to life imprisonment although he conceded that there were no mitigating circumstances. In support of his contentions he has placed reliance on the case of **Muhammad Umair & others v. The State** (SBLR 2017 Sindh 1247).

12. On the other hand learned Deputy Prosecutor General for the State who was also representing the complainant has fully supported the impugned judgment. He has contended that the eye witnesses can safely be relied upon, that the pistol was recovered at the scene of the offense, that the medical evidence supports the prosecution case, that there were positive FSL and chemical reports and as such the appeal should be dismissed and the death penalty upheld as there were no mitigating circumstances to justify a reduction in sentence. In support of his contentions, he placed reliance on the cases of **Muhammad Ashraf and others v. The State** (2010 SCMR 407), **Aijaz Nawaz alias BABA V. The State** (2019 P. Cr.LJ 1775), **Tariq Iqbal alias Tariq v. The State** (2017 SCMR 594), **Dadullah and another v. The State** (2015 SCMR 856), **Khalid Mehmood v. The State** (2017 SCMR 201) and **Muhammad Faryad v. The State** (2011 SCJ 173).

13. 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 including that cited at the bar.

14. In our view after our reassessment of the evidence we find that the prosecution has proved its case against the appellant beyond a reasonable doubt and hereby uphold the convictions in the impugned judgment for the following reasons;

- (a) In our view there has been no lengthy unexplained delay in lodging the FIR and as such there was not time for the police in collusion with the compliant to cook up a false case against the accused.

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(b) The key witnesses in this case in our view are eye witnesses PW 8 Muhammed Nawaz, PW 9 Jan Muhammed and PW 10 Sajjad Ali hence we will consider the evidence of these eye witnesses in turn.

(i) **PW 8 Muhammed Nawaz** was standing at the corner of the street where he was residing and his shop was located and hence he is not a chance witness. He is not closely related to the deceased and has no enmity with the accused and thus has no reason to falsely implicate him in this case. According to his evidence it was a day light incident at 1pm and as such light is not an issue. According to his evidence he was 10/12 feet away from the incident and as such he would have had a good view of the incident. According to his evidence he saw PW 10 Sajjad Ali and his father PW 9 Jaan Muhammed on a motorcycle which was being followed by three other motorcycles including one of which the accused was seated on with a pistol in his hand. He saw one of the persons (Iman Bux deceased) on the motorcycle fire at PW 9 Jaan Muhammad and hit him on the leg which is corroborated by the medical evidence of the injury to PW 9 Jaan Muhammed. **He also saw the accused fire at deceased Mukhtiar who was grappling with the accused and deceased shopkeeper Muhammed Ayaz.** He also saw one of the accomplices being injured on the spot. He saw the accused being caught on the spot by the local people. He gave his S.161 and S.164 Cr.PC statements timely and was not shaken during cross examination. As such we consider this eye witnesses evidence to be reliable, trust worthy and confidence inspiring and we place reliance on and believe the same.

(ii) **PW 9 Jaan Muhammed** was riding on the motorbike with his son (PW 10 Sajjad). He is not a chance witness. In his evidence he states that when he stopped outside his house the culprits came on a motorcycle armed with pistols and demanded the gold which they were carrying with them. When he resisted he was shot on his leg. His other son deceased Mukhtiar when hearing the fire came out of his house in order to protect him but he was shot at by the culprits. Another neighbor named Ayaz was also shot by the culprits. His injury was corroborated by eye witness PW 8 Muhammed Nawaz and eye witness PW 10 Sajid Ali and his medical certificate so there is no doubt that he was present at the scene of the incident and since he was the subject of the robbery would have seen all the culprits clearly as he was close by and it was a day time incident. Again he had no enmity with the appellant or any reason to falsely implicate him in this case. He gave his S.161 statement timely and was not shaken during cross examination. As such we consider this eye witnesses evidence to be reliable, trust worthy and confidence inspiring and we place reliance on and believe the same.

(iii) **PW 10 Sajjad Ali.** He was sitting with his father on the

motor bike having collected the gold when they stopped near his house. According to his evidence culprits on motorcycle demanded the gold. He corroborates the evidence of PW 9 Jaan Muhammed who was his father sitting on the bike who was shot in the thigh. With regard to the firing he states in his evidence that his brother Mukhtiar grappled with the a culprit who was firing and in the meantime another culprit who was sitting on a motorcycle behind the driving culprit **directly fired and my bother (Mukhtiar) and Ayaz Ali sustained fire arm injuries and fell down.** This evidence regarding the firing corroborates eye witness PW 8 Muhammed Nawaz's evidence that it was Iman Bux who was grappling with Mukhtiar and that it was the accused who shot Mukhtiar and Ayaz. Iman Bux (who was an accomplice of the accused) was also shot and killed by such fire. He is not a chance witness and had no enmity with the accused and saw the whole incident from close range. He also is the complainant who registered the FIR through his S.154 report promptly. He was not shaken during cross examination. As such we consider this eye witnesses evidence to be reliable, trust worthy and confidence inspiring and we place reliance on and believe the same.

(c) It is settled law that we can convict if we find the direct oral evidence of one eye witness to be reliable, trust worthy and confidence inspiring. In this respect reliance is placed on **Muhammad Ehsan V The State** (2006 SCMR 1857). In this case we find 3 eye witnesses to be fully corroborative and reliable, trust worthy and confidence inspiring. Never the less by way of abundant caution we will consider below whether any corroborative /supportive evidence is available in respect of the direct oral eye witness evidence.

(d) The accused was grabbed by the public on the spot and was even beaten (which is quite a common occurrence in Karachi when the public get hold of a person who has just committed a serious criminal offense in their mohalla in front of them) which is corroborated by his MLC and as such the question of mistaken identity does not arise. He was then immediately handed over to the police.

(e) The medical evidence through PW 5 Dr. Jagdesh Kumar and PW 6 Dr. Afzal Ahmed and their post mortem reports corroborate/is supportive of the oral eye witness evidence as they opine that the deceased were shot by firearm and this was the cause of death. That PW 9 Jan Muhammed was shot in the thigh by firearm. In no case was there any blackening which indicates that the shooting was done from more than 3 feet away which is consistent with the oral evidence. Again there was no delay in carrying out the post mortems which could have lead to any concoction of any false case against the appellant through consultation between the PW's and the police. The injuries in the appellants MLC are also consistent with him being beaten by the public.

(f) A pistol was recovered from the appellant at the time of his capture by the public.

(g) A positive FSL report matching the pistol with the empties is available on record.

(h) A positive chemical report showing that the blood gathered at the scene and on the clothes of the deceased was human blood

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793). Their evidence provides a believable corroborated unbroken chain of events from the murder of the deceased whilst attempting to rob PW 9 Jaan Muhammed and PW 10 Sajjad of their gold ornaments until the capture of the accused by the public and immediate arrest thereafter by the police.

(j) It is well settled by now that police witnesses are as reliable as any other witness unless any ill will or enmity has been attributed to them which has not been done in this case. Like wise it is well settled that simply because a witness is related does not make him an interested witness and unreliable unless he has reason to falsely implicate the accused, or he is biased, partisan or inimical to the accused which there is no evidence of in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99).

(k) It is of course for the prosecution to prove its case against the accused beyond a reasonable doubt (which we have found that the prosecution has done in this case) but a brief review of the defense case shows that it is devoid of any merit. The accused in his S.342 Cr.PC statement simply states that he has been falsely implicated by the complainant in connivance with the police but he has produced not a shred of evidence as to why either party would do this apart from the same old chestnut of him refusing to pay the police a bribe. He did not give evidence or oath or call any defense witness in support of his case. As such we are of the view that the defense case is without merit and is an after thought on the part of the appellant in order to save his skin.

15. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt.

The next issue is one of the applicability of the ATA and sentencing.

16. In this respect at the outset we are of the view that this case does not fall under the purview of the ATA since according to the evidence there was no design, object or intent to cause terror. It was a case of robbery which turned into a murder case when PW's 9 Jaan Muhammed and PW 10 Sajjid Ali refused to hand over the gold to the appellant and his co-accused. Thus, the provisions of the ATA will not apply

17. The appellant has been sentenced to death. From the evidence it appears that the motive for the murder was a failed robbery which has been proved through the evidence. Furthermore, in our view it is clear from the evidence of eyewitnesses PW 8 Muhammed Nawaz and PW-10 Sajjad Ali that it was the accused appellant who shot both the deceased in cold blood during the course of the robbery and as such no leniency can be allowed in sentencing.

18. Thus, based on the particular facts and circumstances of this case keeping in view the brutality of the crime where two innocent persons were shot to death and one injured by firearm brazenly in broad day light outside their house the motivation of which was to rob their personal golden ornaments, the complete lack of mitigating circumstances and the need to discourage such kind of offenses and street crime in Karachi which regrettably are becoming more common day by day we are of the view that a deterrent sentence is the appropriate one.

19. In this respect reliance is placed on **Dadullah's case** (Supra) which at P.862 Para 9 held as under;

"9. Conceptually punishment to an accused is awarded on the concept of retribution, deterrence or reformation. The purpose behind infliction of sentence is two fold. Firstly, it would create such atmosphere, which could become a deterrence for the people who have inclination towards crime and; secondly, to work as a medium in reforming the offence. **Deterrent punishment is not only to maintain balance with gravity of wrong done by a person but also to make an example for others as a preventive measure for reformation of the society.** Concept of minor punishment in law is to make an attempt to reform an individual wrongdoer. However, in such like cases, where the appellants have committed a pre-planned dacoity and killed two person, no leniency should be shown to the culprits. Sentence of death would create a deterrence in the society due to which no other

person would dare to commit the offence of murder. If in any proved case lenient view is taken, then peace, tranquility and harmony of society would be jeopardized and vandalism would prevail in the society. The Courts should not hesitate in awarding the maximum punishment in such like cases where it has been proved beyond any shadow of doubt that the accused was involved in the offence. Deterrence is a factor to be taken into consideration while awarding sentence, specially the sentence of death. Very wide discretion in the matter of sentence has been given to the courts, which must be exercised judiciously. Death sentence in a murder case is a normal penalty and the Courts while diverting towards lesser sentence should have to give detailed reasons. The appellants have committed the murder of two innocent citizens and also looted the bank in a wanton, cruel and callous manner. Now a days the crime in the society has reached an alarming situation and the mental propensity towards the commission of the crime with impunity is increasing. Sense of fear in the mind of a criminal before embarking upon its commission could only be inculcated when he is certain of its punishment provided by law and it is only then that the purpose and object of punishment could be assiduously achieved. If a Court of law at any stage relaxes its grip, the hardened criminal would take the society on the same page, allowing the habitual recidivist to run away scot-free or with punishment not commensurate with the proposition of crime, bringing the administration of criminal justice to ridicule and contempt. Courts could not sacrifice such deterrence and retribution in the name of mercy and expediency. Sparing the accused with death sentence is causing a grave miscarriage of justice and in order to restore its supremacy, sentence of death should be imposed on the culprits where the case has been proved.

10. This Court in *Noor Muhammad v. State* (1999 SCMR 2722) has also adverted to this aspect of the matter and has observed as under:-

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences. One of us (Ajmal Mian, C.J., as he then was) has highlighted this aspect, inter alia in the case of *State through the Advocate General Sindh, Karachi v. Farman Hussain and others* (PLD 1995 SC 1), relevant portion whereof at page 19 reads as follows:-

(3) It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial Court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it.

The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice". (bold added).

20. Likewise in the more recent cases of **Tariq Iqbal V State** (2017 SCMR 594) and **Khalid Mehmood V State** (2017 SCMR 201) the Supreme Court has confirmed the death penalty in cases of a brutal and merciless nature as in this case.

21. As such we uphold all the sentences for each offense **except** for the provisions under the ATA in the impugned judgment and confirm the death sentences handed down to the appellant whilst dismissing this appeal.

22. The appeal and confirmation reference are disposed of in the above terms

Arif