

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 2112212 of 2016 9th Conf - Case 4/16

Syed Asif Ali Vs. The State

HIGH COURT OF SINDH

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

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfikar Ali Soofi

Date(s) of Hearing: 20-11-18 & 21-11-18

Decide on: 02-12-2019

(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.

452

IN THE HONORABLE HIGH COURT OF SINDH AT KARACHI

Cr. A.T.A. No. D- 211 /2016

Syed Asif Ali

s/o Syed Aziz,
Muslim, adult, Residing at F-1,
Anarkali Centre, Block 7,
Federal B. Area , Karachi
Presently confined at Central Prison,
Karachi.....

PRESENTED
20-08-2016
[Signature]
Appellant 2595

V/s.

The State.....Respondent

FIR No. 79/2015
U/S: 147/ 148/ 149/ 302/ 34 PPC
R/W section 7 A.T.A., 1997
P.S. Azizabad, Karachi

CRIMINAL APPEAL U/S. 25 OF THE ANTI TERRORISM ACT, 1997

Being aggrieved and dissatisfied with the Impugned Judgment dated 08.08.2016 passed by the learned IVth Anti Terrorism Court, Karachi, in Special Case no. B-695/2015 whereby the learned Trial Court has been pleased to convict the Appellant u/s. 147/ 148/ 149/ 302/ 34 PPC punishable u/s. 7(1)(a) of A.T.A., 1997 and awarded death sentence, while under section 25-(1) Sindh Arms Act also convicted and awarded a sentence of 07 years R.I. and fine of Rs.50,000/= in default, further R.I. for 04 months in Special Case No.696/2015 by the common Judgment for which a separate appeal is being filed. The Appellant prefers this appeal on considering the following facts and grounds:-

(C/o the impugned Judgment dated 08.08.2016 is appended herewith and marked as Annexure "A")

FACTS:

1. That the brief facts of the prosecution case are that on 11.03.2015, Saeed ur Rehman, the S.I. of P.S. Azizabad Karachi lodged FIR no. 79/2015 under u/s.147/ 148/ 149/ 302/ 34 PPC punishable

453

1

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Syed Asif Ali

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Anarkali Centre, Block 7,
Federal B. Area , Karachi
Presently confined at Central Prison,
Karachi.....Appellant

PRESENTED
20-08-2016

[Signature]
By. Registrar (C)

V/s.

The State.....Respondent

FIR No. 193/2015
U/S: 25-A(1) SAA
P.S. Azizabad, Karachi

CRIMINAL APPEAL U/S. 25 OF THE ANTI TERRORISM ACT, 1997

Being aggrieved and dissatisfied with the Impugned Judgment dated 08.08.2016 passed by the learned IVth Anti Terrorism Court, Karachi, in Special Case no. B-696/2015 whereby the learned Trial Court has been pleased to convict the Appellant u/s. 25(1) Sindh Arms Act and awarded a sentence of 07 years R.I. and fine of Rs.50,000/= in default, further R.I. for 04 months while in the main case u/s. 302 RWS 7 ATA also convicted and awarded death sentence in Special Case No.695/2015 by the common Judgment for which a separate appeal is being filed. The Appellant prefers this appeal on considering the following facts and grounds:-

(C/o the impugned Judgment dated 08.08.2016 is appended herewith and marked as Annexure "A")

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454

and c.	Date he ad
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OFFICE OF THE JUDGE ANTI TERRORISM COURT-IX, KARACHI.

No.ATC-IX/K-DIV/ 58/2016 Karachi

Dated: 09-08-2016

To,

The Registrar,
High Court of Sindh,
Karachi.

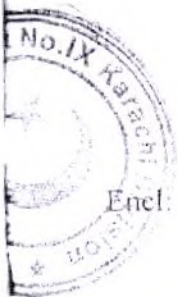
641
CRL
18/8/16

SUBJECT: REFERENCE UNDER SECTION 374 CR.P.C. IN SPECIAL CASE NO B-695/2015 FIR No.79/2015, U/S.147/148/149/302/34 PPC AND IN SPECIAL CASE NO. B-696/2015 FIR NO. 193/2015 U/S 25(1A) SAA P.S. AZIZABAD) (SYED ASIF ALI VERSUS THE STATE), UNDER SECTION 25(2) OF A.T.A. 1997

It is to state that the aforesaid case has been decided on 08-08-2016 and the accused Syed Asif Ali s/o Syed Aziz has been awarded death sentence including other sentences subject however to confirmation by the Hon'ble High Court Under Section 374 Cr.P.C. The R&Ps of the aforesaid special cases are sent herewith in view of Section 25(2) of ATA 1997 for confirmation of death sentence of above accused or otherwise.

Kindly acknowledge the receipt of the same.

Encl: As above.



9/8/2016

(FARMAN ALI KANASRO)
JUDGE
ANTI TERRORISM COURT NO. IX
KARACHI

D-B - 21
12/4/18

IN THE HIGH COURT OF SINDH AT KARACHI

Special Crl. Anti-Terrorism Appeal No.211 of 2016.
Special Crl. Anti-Terrorism Appeal No.212 of 2016.
Confirmation Case No.04 of 2016.

Present:

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

Appellant: Syed Asif Ali S/o. Syed Aziz through Mr. S. Mehmood Alam Rizvi, Mr Zakir Laghari and Ms. Akhtar Rehana, Advocates.

For State: Through Mr. Rana Khalid Hussain, Special Prosecutor Rangers.

Date of hearing: 20.11.2019 and 21.11.2019

Date of announcement: 02.12.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Syed Asif Ali S/o. Syed Aziz has preferred these appeals against the impugned judgment dated 08.08.2016 passed by the learned Judge Anti-Terrorism Court No.IX, Karachi in Special Case No.B-695 of 2015, F.I.R. No.79 of 2015 u/s. 147/148/149/302/34 PPC r/w section 7 of ATA, 1997 and another Special Case No.B-696 of 2015, F.I.R. No.193 of 2015 u/s. 23(I)-A Sindh Arms Act 2013, registered as P.S. Azizabad, Karachi whereby the appellant has been convicted and sentenced to death under section 7-1(a) of ATA 1997 read with section 302 PPC subject to confirmation by this court along with fine of Rs.500,000/- to be paid to the legal heirs of the deceased, if recovered and in case of default he was ordered to undergo R.I. for four months more. The appellant was also convicted and sentenced to suffer Rigorous Imprisonment for 07 years under section 23 (I)-A of the Sindh Arms Act, 2013. However, benefit of section 382-B Cr.P.C. was extended to the accused.

2. The brief facts of the case are that SI Din Mohammad Barfat had recorded statement of SI Saeed-ur-Rehman (complainant) u/s 154 Cr.P.C. which was incorporated in the FIR book on the same date i.e. 11.03.2015 at 1500 hours. It is stated by the complainant SI Saeed-ur-Rehman that he

5. In order to prove its case the prosecution examined 11 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under S.342 Cr.PC in which he denied the allegations of the prosecution and claimed false implication. He examined himself on oath and also examined two defense witnesses in support of his defense case.

was Sub-Inspector at PS Azizabad and on the night of 10th or 11th March 2015 he was on patrolling duty along with his subordinate staff on government mobile in Azizabad and it was about 0500 hours that Rangers personnel and officers conducted a raid at Block No.8 of Azizabad and where after at 0830 hours when the Rangers (forces) were leaving and withdrawing from their operation a large number of persons converged there and in the meanwhile some unknown miscreants started firing as a result of which one person namely Syed Waqas Ali Shah S/o. Syed Yaqoob Shah died on the spot on account of firearm injury and one Waseem Abid also got injured. It is further alleged in the FIR that some unknown miscreants by making firing committed murder of Syed Waqas Shah and injured one Waseem Abid.

3. Thereafter SIP/First I.O. Mansoor Warsi inspected the place of incident on the same date, secured empties and object of bullet and bloodstained earth, prepared the sketch and took photographs of the scene of offence and prepared such memo. Initially the case was deposed of in "A" class however on 26.6.2015 the accused Asif was arrested in this case by Duty Officer SI Nisar Ahmed when custody of the accused was handed over to him by Ranger Inspector Tufail. On 01.07.2015 accused admitted that he had murdered Syed Waqas and on his pointation took the police to where he had hidden the murder weapon (pistol) which was recovered by the police from Yasinabad Nala. On 05.07.2015 the empties and pistol in sealed condition were sent to the office of FSL. The empties were also previously sent to the FSL on 12.03.2015 when still the arrest of the accused was not affected and weapon was not recovered. The bloodstained earth was also sent for Chemical Examination. On 11.7.2015 the identification Test of the accused was conducted before learned Magistrate and he was identified by the witnesses Farhan and Ansar and such memo was prepared. With regard to the collection of the evidence the relevant memos were prepared and each witness was examined by the I.Os under section 161 Cr.P.C. where after charge sheet was submitted against the accused.

4. The charge was framed against the accused to which he pleaded not guilty and claimed his trial.

Ahmad and 3 others v. The State and another (1995 SCMR 127), Aurangzeb v. The State through Advocate-General (2008 PSC (CrL.) 965), The State/Anti Narcotic Force Regional Directorate Sindh through its Deputy Director (Law), Clifton, Karachi v. Shakeel Ahmed Siddiqui (2003 PSC (CrL.) 912), State (Federal Government of Pakistan) through the Collector of Customs (Preventive) v. Anwar Khattak and another (2005 YLR 3280) and Shahid Zafar and 3 others (PLD 2014 Supreme Court 809).

9. On the other hand Special Prosecutor Rangers has contended that all the PW's supported the prosecution case; that the two eye witnesses were reliable and had correctly identified the appellant at the identification parade with a specific role; that recovery of the murder weapon was on pointation of the appellant; that the FSL report was positive and that it was a case falling within the purview of the ATA as the intention of the appellant was to create fear and terror in the minds of the public by murdering the deceased. In support of his contentions he placed reliance on **Muhammad Akram alias Akrai v. The State** (2019 SCMR 610), **Abid Ali v. The state and another** (2011 P Cr.LJ 628), **Arif v. The State and 2 others** (PLD 2006 Peshawar 5) and **Shamsud Doha v. The State and another** (2005 P. CrL.LJ 310).

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 and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. In our view after our reassessment of the evidence based on the evidence of the PW's including the PW MLO, post mortem report and other evidence on record including the chemical report and the recovery of empties at the scene we are satisfied that the prosecution has proved beyond a reasonable doubt that on 11.03.2015 at about 0830 hours at Road Block No.8 Federal B Area Karachi Syed Waqas (the deceased) was murdered by firearm.

12. The only issue therefore, in our view, left before us is whether the appellant was the person who shot the deceased by firearm which lead to his death.

4

13. 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 for the following reasons;

(a) The context to the case is that the incident took place at about 0830 hours on 11.03.2015 when the Pakistan Rangers carried out a raid on the political party known as the MQM's head quarters known as Nine Zero in Azizabad as a result of which a large number of charged MQM workers gathered in order to confront the rangers who were carrying out the operation. An FIR was promptly lodged against unknown persons on the same day by the State and investigations were conducted however since the police were unable to find the suspect the report was initially filed under "A" class. We do not consider that based on the facts and circumstances of the case that there has been any unexplained delay in registering the FIR keeping in view that the police went to the hospital after the incident to check on the injured who had expired and prepared the S.174 report. No relatives of the deceased registered an FIR probably out of fear as the situation in terms of law and order and the relationship between the MQM political party and the rangers and police was probably at that time very tense and highly sensitive and also throughout the city as a result of the raid and thus it was up to the State to register the FIR. If the police or rangers had wanted to fix the appellant in this case they could have simply named him in the FIR rather than lodging the FIR against unknown persons especially as they had over 6 hours to concoct such a case against the appellant. In this respect reliance is placed on **Liaqat Ali Fani V State** (1989 MLD 1738)

(b) In this case there are two eye witnesses to the incident both being members of the Pakistan Rangers. In our view the case will mainly turn on whether we find the evidence of the eye witnesses to be reliable, trustworthy and confidence inspiring and whether we consider that the eye witnesses have correctly identified the appellant.

(c) In considering the evidence of the eye witnesses we have taken into account the fact that this was a day time incident so the light was good; that the two eye witnesses had no ill will or enmity towards the appellant and thus had no reason to falsely implicate him in this case; that **neither of the eye witnesses were chance witnesses** as they were both rangers officials who had every reason to be present at the time of the raid by the rangers; that the eye witness evidence concerning the raid and the conduct of the people who gathered at nine zero during and after the raid tends to ring true and most importantly that **the appellant in his evidence under oath and his wife DW 1 Norren Asif has admitted the appellant's presence at the scene at the time of the murder.** So the question of the appellant not being at the scene of the incident is not in issue

Turning specifically to the evidence of the eye witness.

Eye witness PW 3 Farhan who was an Inspector in the rangers and in his evidence in respect of the identification of the appellant he

states that he heard 4/5 fire shots and **he saw** the person firing with the TT pistol. The number of shots roughly ties in with the number of empties recovered. The accused was **only 10 feet away** from him at the time of the firing so he got a good view of him especially as it was day time. The deceased was **five yards** away from where the accused was standing when he shot him which ties in with the medical evidence of their being no blackening around the wound of the deceased. He was not named as an eye witness in the FIR which is understandable as this was lodged on the same day by the police and the police would not have known that he was an eye witness at the time of lodging the FIR so this is irreverent in our view. Admittedly the eye witness gave a delayed S.161 statement after the incident. However based on the facts and circumstances of this case we do not consider this fact to be fatal to the prosecution case because as mentioned above he was not a chance witness, he had no enmity with the accused, it was a day light incident and he got a clear view of the appellant being only 10 feet away and it was for the police to find out the eye witnesses (if any) during the course of their investigation. Likewise his evidence is corroborated by the medical evidence and the recovered empties at the scene. The identity parade was held one day after he gave his S.161 statement and he correctly picked out the appellant from the identification parade and assigned him the specific role of firing on the deceased. He was unscathed during cross examination. In our view we consider that the identification parade as mentioned below was carried out in accordance with the guidelines laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488)

Eye witness PW 4 Ansar Mehmood who was also a member of the rangers who was assigned with PW 3 Farhan at the time of the rangers operation against Nine Zero and his evidence in respect of the identification of the appellant almost mirrors that of PW 3 Farhan who he was on duty with at the time of the incident. He also remained unscathed during cross examination.

In our view we find the evidence of the rangers eye witnesses (PW 3 Farhan and PW 4 Ansar) corroboratory in all material respects and consider their evidence as reliable, trustworthy and confidence inspiring who have correctly and safely identified the appellant as the person who shot the deceased outside MPA hostel during the rangers operation at Nine Zero and we may convict the appellant on the basis of their evidence alone although the safer course would be to seek some independent corroborative or supportive evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857) and the case of **Muhammed Akram** (Supra).

PW 5 Zaheer Ahmed was the magistrate who carried out the identification parade of the appellant where both eye witnesses PW 3 Farhan and PW 4 Ansar Mehmood identified the appellant and gave him a particular role in the incident. In our view the identification parade has been carried out keeping in view most, if not all, of the legal precautions and guidelines for carrying out an identification parade as are laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488) which in our view means that the identification of the appellant made at the identification parade by

the two eye witnesses can be safely relied upon.

(d) The medical evidence supports the eye witness oral evidence. There is also no blackening around the wound of the deceased which indicates that the shot which killed the deceased was fired from over 3 feet away which is in consonance with the oral evidence given by the eye witnesses in respect of how far the appellant was from the deceased when the shot was fired.

(e) That the recovery of the weapon on the pointation of the appellant is also of significance as the weapon was hidden in such a place that only the appellant would have known about.

(f) That the empties recovered at the scene of the incident matched with those from the recovered pistol resulting in a positive FSL report.

(g) A positive chemical report was also a part of the evidence.

(h) That the PW's are all corroborative of each other and that there are no major contradictions in their evidence which would adversely impact on the prosecution case. Admittedly most of the PW's are ranger or police witnesses. It is well settled by now that a police witness is as good as any other witness provided that no ill will, enmity, malafide or personal interest is proven against him vis a vis the appellant. In this respect reliance is placed on **Riaz Ahmad V State** (2004 SCMR 988), **Zafar V State** (2008 SCMR 1254) and **Abbas V State** (2008 SCMR 108). In this case there was none and the ranger eye witnesses and the police PW's had no reason to falsely implicate the appellant in this case. No such enmity, ill will, malafide or personal interest was even suggested to the police eye witnesses or any other PW during their cross examination.

(i) Even if there are any contradictions in the evidence of the PW's we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to affect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793)

(j) That the prosecution evidence provides a believable chain of evidence from the time of the rangers raid to the shooting of the deceased, his death, the arrest of the appellant and recovery of the murder weapon which is corroborated by the medical, chemical, FSL evidence and reports.

(k) Although it is for the prosecution to prove its case beyond a reasonable doubt and it is not for the accused to prove his innocence we do not find the defense of the appellant believable and regard it as an after thought in an attempt to save his skin. Namely, when cross examining eye witness PW 3 Farhan it is suggested to him that the appellant was not present at the time of the incident when in fact the appellant in his own evidence has admitted his presence at the scene at the time of the incident. Likewise he does not suggest to PW 3 Farhan that the rangers shot the deceased and not himself.

(1) The pistol was recovered on the pointation of the accused for which he had no license and thus he has also been rightly convicted under S.23 (I) (a) of the Sindh Arms Act 2013

14. The next issue is of sentencing. We are of the view that the prosecution has neither alleged any motive against the appellant nor has it proven any motive against the appellant for his murdering the deceased. Generally it has been accepted by the superior courts that if the prosecution fails to prove the motive for the murder the courts are justified in imposing the alternate sentence of life imprisonment as opposed to the death penalty. Reliance in this respect is placed on the case of **Amjad Shah V State** (PLD SC 2017 P.152) where it was held as under at P.156 Para 9;

*"Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore, unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to **Zeeshan Afzal v. The State** (2013 SCMR 1602)." (bold added)*

15. We are also of the view that this was not an act of terrorism falling within the purview of the ATA. This is because based on the evidence on record we are of the view that there was no design or intention to create any fear or insecurity in society by murdering the deceased and in fact this was simply a murder case falling under S.302 PPC. In this respect reliance is placed on the recent Supreme Court case of **Ghulam Hussain V State** (unreported) dated 30-10-2019 in Criminal Appeals 95 and 96 of 2019 and Civil Appeal No.10 L of 2017 and Criminal Appeal 63 of 2013.

16. Thus, we hereby uphold the convictions in the impugned judgment against the appellant apart from the convictions under any section of the ATA but in respect of the offense of murder under S.302 (b) PPC which conviction is upheld the sentence is reduced from death to life imprisonment and the confirmation reference is answered in the negative otherwise all other convictions, sentences, penalties, fines etc for any other

offense in the impugned judgment are upheld which shall remain in tact and the appeals are dismissed. The sentences shall run concurrently and the appellant shall have the benefit of S.382 B PPC.

17. The appeals and confirmation reference stand disposed of in the above terms.

Arif