Murder Acquitted - Police worked : Chance witnesses

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CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 263 of 2017 r/w CC 11/17

Afsar Khan Vs. The State

HIGH COURT OF SINDH

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

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

Date(s) of Hearing: 14-11-19 & 15-11-19

Decide on: 28-11 -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 / 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.

Read asalaw 30/11/19

30/11/19

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THE HIGH COURT OF SINDH AT KATACHI

Special ATA Appeal No. 263/2017

PRESENTED
15-12-2017
Dy. Registrar (Judl.)

AFSAR KHAN S/O FAZAL KHAN
PRESENTLY CONFINED IN CENTRAL JAIL,
KARACHI

Appellant 4382

VERSUS

The state

Respondent

FIR NO.893/2012

U/S 302, 34 PPC

R-W 7 ATA 1997

P.S SOHRABGOTH

APPEAL UNDER SECTION 25
OF ANTI- TERRORISM ACT 1997

Being aggrieved and dissatisfied party/ appellant with the impugned judgment dated 06/12/2017 awarded death sentence under section 302 /34 PPC , R-W Section 7 ATA, They be hang by neck till his death, the appellant shall also pay Rs.200,000 (Two Hundred Thousand) compensation to the legal heirs of the deceased, awarded by the Learned Anti-terrorism Court No.IV at Karachi by Miss Kosar Sultana Husain Judge, In Special case No. A- 116 of 2013 to the appellant hence the appellant prefer this appeal with prayer to set-aside the impugned judgment- death sentence by calling the R&P of in special case No. A-116 of 2013 by the Learned Anti-terrorism Court No.4 at Karachi and then acquit the Appellant

ATC-IV/K-DIV./ 2270 of 2017 Karachi dated: 08-12-2017.

Special Case No. A-116/2013

Afsar Khan ..... Accused

FIR No. 893/2012
U/s: 302/34 PPc
R/w Sec 7 ATA 1997
P.S Shorab Goth Karachi

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

SUBJECT: - REFERENCE /SUBMISSION OF R&PS FOR CONFIRMATION OF DEATH SENTENCE AWARDED TO ACCUSED AFSAR KHAN S/O FAZAL KHAN IN COMPLIANCE OF SECTION 25(2) ANTI-TERRORISM ACT, 1997

I have the honour to submit that in the captioned case , this court vide Judgment dated 06-12-2017, found accused **AFSAR KHAN S/O FAZAL KHAN** , guilty of offence punishable under section 7 (a) of Anti –Terrorism Act 1997, read with section **302/34 PPc R/w Sec 7 ATA 1997 and accused convicted U/s 265-H (2) Cr.PC and awarded Death Sentence to him to be hanged by neck till death, subject to the confirmation by the Hon'able High Court of Sindh, Karachi .**

The proceedings are submitted herewith for placing before the Hon'able High Court of Sindh, Karachi, for confirmation of sentence of death awarded to above named accused, as required u/s 374 Cr.PC.

8/12/17

(KAUSAR SULTANA HUSSAIN)
Judge,
ANTI-TERRORISM COURT NO: IV,
KARACHI

JUDGE
Anti-Terrorism Court No. IV
Karachi Division

Murder Acquitted · Police worked
Charge witness

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IN THE HIGH COURT OF SINDH AT KARACHI

Special Crl. Anti-Terrorism Appeal No.263 of 2017.
Confirmation Case No.11 of 2017.

Present:

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

Appellant:	Afsar Khan S/o. Fazal Khan through M/s. Syed Mehmood Alam Rizvi and Zakir Laghari Advocates.
For State:	Through Mr. Zafar Ahmed Khan, Additional Prosecutor General Sindh.
Date of hearing:	14.11.2019 and 15.11.2019.
Date of announcement:	28.11.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Afsar Khan S/o. Fazal Khan has preferred this appeal against the impugned judgment dated 06.12.2017 passed by the learned Judge Anti-Terrorism Court No.IV, Karachi Division in Special Case No.A-116 of 2013, F.I.R. No.893 of 2012 u/s. 302/34 PPC r/w section 7 of ATA, 1997 P.S. Sohrab Goth, Karachi whereby the appellant has been convicted and sentenced to death under section 302/34-PPC read with Section 7(a) ATA, 1997 subject to confirmation by this court with fine of Rs.200,000/- as compensation to be paid to the legal heirs of the deceased Umar Farooq and in case of default the convict was ordered to undergo R.I. for two years more.

2. The brief facts of the case as narrated in FIR No.893/2012 u/s. 302-PPC by the complainant Manzoor-ul-Haq are that his younger brother namely Umar Farooq S/o. Muhammad Moosa aged about 26/27 years was residing with him who was a student. His brother went from the house on 17.12.2012 at about 04:00 p.m. on his motorcycle bearing registration No.KFV-2032 but did not come back. On the same day at about 06:00 p.m. he received information that Umar Farooq has been killed and his dead body was lying in Aga Khan Hospital. The complainant rushed to Aga Khan Hospital with his father and brother

where they identified the dead body of Umar Farooq who sustained bullet injury on his chest. The police disclosed to the complainant that some persons came on motorcycle and fired upon him and committed his murder near Katcha Road, Dildar Umrani Goth. The police inspected the dead body and prepared such memo of inspection of dead body and Inquest Report and after postmortem the dead body of the deceased was handed over to the parents of the deceased.

3. After formal investigations Inspector Muhammad Hussain Chandio submitted the charge sheet in the present crime on 25.11.2013 before the Anti-Terrorism Court-I, Karachi wherein accused Afsar Khan S/o. Fazal Khan was shown in custody and his name was mentioned in column 03 of the Charge Sheet and the name of the accused namely Jahangir S/o. Jan Nisar Khan and two unknown persons have been shown as absconding accused in column No.02 of charge sheet with red ink. NBW has been issued against the absconding accused Jahangir.

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

5. In order to prove its case the prosecution examined 11 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under S.342(1) Cr.PC where denied the evidence against him and claimed false implication on account of enmity. Neither the accused examined himself on oath nor produced any defense witness in support of his defense case.

6. Learned Judge, Anti-Terrorism Court-IV, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 06.12.2017, convicted and sentenced the appellant 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 impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that there was a 40 hour delay in lodging the FIR which lead to the case being fabricated against the appellant; that the PW eye witnesses are chance witnesses and are completely unreliably and untrustworthy; that the appellant had no motive to murder the deceased as there was no evidence that the deceased was a polio worker, that the appellant had no enmity with the deceased and had no reason to murder him; that the oral evidence contradicts the medical evidence as to the time of death of the deceased; that this was not a case falling under the purview of the ATA and as such the appellant could not have been convicted under any section of the ATA and that for any of the above reasons the appellant should be acquitted of the charge by this court extending to him the benefit of the doubt. In support of his contentions he has placed reliance on an unreported judgment of Hon'ble Supreme Court of Pakistan in the case of **Ghulam Hussain, Muhammad Azeem, etc. Tanvir Sikandar Hayat v. The State** in Criminal Appeals No.95 and 96 of 2019 dated 30.10.2019, **Kareem Nawaz Khan v. The State** (2019 SCMR 1741), **Waris Ali and 5 others v. The State** (2017 SCMR 1572), **Dilawar Mehmood alias Dulli and another v. The State and others** (2018 SCMR 593), **Tahir Mehmood @ Achoo v. The State and another** (2018 SCMR 169), **Shahzad alias Pakora and others v. The State** (2018 P.Cr.LJ 396), **Sameer v. The State** (2018 P. Cr.L.J. Note 128), **Sikandar alias Sani v. The State** (2018 MLD 1220), **Abdul Karim alias Patni and another v. The State** (2018 P.Cr.LJ 1358), **Zubair Ahmed alias Ladu v. The State** (2018 YLR Note 160), **Aqeel Ahmed alias Tiloo v. The State** (2018 P. Cr.LJ Note 12), **Abdur Rehman and another v. The State and another** (2018 YLR 1629), **Tariq Pervez v. The State** (1995 SCMR 1345), **Muhammad Nawaz and another v. The State and others** (PLD 2005 Supreme Court 40), **Muhammad Pervez and others v. The State and others** (2007 SCMR 670), **Ghulam Mustafa v. The State** (2009 SCMR 916), **Tasirullah v. The State** (2018 YLR Note 182), **Mst. Sughra Begum and another v. Qaiser Pervez and others** (2015 SCMR 1142), **Liaquat Ali v. The State** (2008 SCMR 95), **The State v. Syed Mustafa Abbas and 5 others** (1986 P. Cr.L.J 1283), **Akhtar Ali and others v. The State** (2008 SCMR 6), **Ghulam Qadir and 2 others v. The State** (2008 SCMR 1221), **Noor Muhammad v. The State and another** (2010 SCMR 97), **Ahmed Khan and 2 others v. The State** (2018 YLR 1515), **Muhammad Asif v. The State** (2017 SCMR 486), **Muhammad Nawaz v. The State** (2016 P. Cr.LJ Note 72), **Muhammad Javed and**

another v. The State and another (2019 YLR Note 1), **Asmatullah and others v. The State** (2018 P. Cr.LJ 1042), **Aftab Ahmad v. The State** (2004 MLD 1337), **Asif Khan v. The State** (2018 YLR 661), **Fareed Ahmed Langra v. The State** (1998 P Cr.LJ 1368), **Salman alias Lamba and another v. The State** (2018 YLR 1092), **Siraj Ahmed v. The State** (2011 P Cr.LJ 48), **Muhammad Jamshaid and another v. The State and others** (2016 SCMR 1019),**Sher Ali v. The State through Advocate General Khyber Pukhtunkhwa** (2018 YLR 1836) and **Muhammad Ilyas v. Muhammad Abid alias Billa and others** (2017 SCMR 54)

9. Learned APG who is also representing the complainant contended that the prosecution had proved its case against the appellant beyond a reasonable doubt for the reasons that the prosecution case as narrated by the PW's showed an unbroken chain of evidence proving that the appellant had murdered the deceased; that there was no delay in lodging the FIR; that the evidence of the PW eye witnesses were reliable, trustworthy and confidence inspiring which proved that the appellant had murdered the deceased; that the ocular evidence was corroborated by the medical evidence; that neither the complainant nor the police had any enmity with the appellant so as to fix him in a false case; that the appellant had admitted murdering the appellant before the police and it was a clear case of terrorism as the deceased was murdered because he was a polio worker and as such the appeal should be dismissed and the conviction and sentence maintained. In support of his contentions he placed reliance on **Dr. Syed Muhammad Khalid Moin and 3 others v. The State** (PLD 2004 Karachi 687), **Mst. Dur Naz and another v. Yousuf and another** (2005 SCMR 1906), **Zakir Khan and others v. The State** (1995 SCMR 1793), **Wilayat Ali v. The State** (2004 SCMR 477) and **Anwar Shamim and another v. The State** (2010 SCMR 1791).

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. To murder a polio worker is a particularly heinous crime since the polio worker is helping to eradicate this most damaging of diseases from being contracted by our young children which may adversely effect their

physical well being for the rest of their lives and leave a social stigma on them and any attack on such a worker designed and intended to terrorize other polio workers from carrying out their duties is even more condemnable. However we cannot allow our emotions and abhorrence to the offense to outweigh our strict adherence to the golden principles of criminal law which requires the prosecution to prove its case beyond a reasonable doubt with any benefit of the doubt being extended to the accused.

12. In our view the first issue to be decided is whether the deceased was murdered at the date time and place as alleged in the charge and if so whether the appellant committed such murder and if so whether the murder falls within the purview of the ATA since not all murders attract the necessary mens rea in terms of design, purpose and intent to raise them to the level of offenses under the ATA. Thus, if we find that the prosecution has not proved its case against the appellant for the murder beyond a reasonable doubt then the question of the applicability of the ATA falls away and becomes a moot point which will not need to be determined by us. If however we find that the prosecution has proved its case against the appellant for the murder beyond a reasonable doubt only then will we need to make a finding on whether the provisions of the ATA are attracted or not in this case based on its own particular facts and circumstances.

13. In our view after our reassessment of the evidence based on the evidence of the PW's including the IO's, the PW MLO, post mortem report and other medical evidence we are satisfied that the prosecution has proved beyond a reasonable doubt that on 17.12.2012 at about 1600 to 1800 hours at Katcha Road Dildar Umrani Village adjacent to Ali Garh Society Scheme 33 Karachi Afsar Khan (the deceased) was shot and murdered by firearm.

14. The next issue therefore is whether based on the evidence on record the appellant was one of the persons who murdered the deceased through causing him a firearm injury.

15. In our view after our reassessment of the evidence we find that the prosecution has not been able to prove beyond a reasonable doubt that the

appellant murdered the deceased on the above mentioned date, time and place for the following reasons;

(a) that based on the particular facts and circumstances of the case there has been an unexplained delay of 40 hours in registering the FIR against unknown persons and thus there has been a opportunity to concoct a false case against the accused. The complainant was a serving police officer and would have known well that such a delay can be fatal to a case and as such this is a factor which goes against the prosecution. In this respect reliance is placed on **Akhtar Ali's case** (Supra) and **Mehmood Ahmed V State** (1995 SCMR 127)

(b) In our view the most important aspect of the case is whether we can safely rely on the identification of the appellant by the two eye witnesses PW 4 Asghar and PW 6 Niaz. The evidence of the eye witnesses is that they were going to view a plot on the evening of 17.12.2012 when the incident happened in their presence. They have given no proof that they were visiting any plot in respect of giving a plot number or the real estate agent they were dealing with or even the registration number of the motor bike which they were riding on and thus in our view they have not given sufficient reason for being at the place of the incident when it allegedly occurred and as such we find them to be **chance witnesses** whose evidence we must consider with a great deal of care and caution and seek other independent corroboration. In this respect reliance is placed on **Mst Sughra Begum's case** (Supra). Two days after witnessing the incident they again just happened to be going to view a plot without giving any evidence as to which plot and who their real estate agent was when they came across the IO of the case inspecting the place of the incident **about one hour** after the FIR had been lodged and offered themselves as eye witnesses to the police. We find such a co-incidence hard to believe. The two eye witnesses then in the evening gave their S.161 statements to the police 2 days after the incident. It is settled by now that a delay in the eye witness giving his S.161 statement can be fatal to that eye witnesses' evidence. In this respect reliance is placed on **Muhammed Asif's case** (Supra) The eye witnesses did not appear to have given any hulia in their S.161 statements and generally have stated that they could identify the accused if they saw him again which cannot be regarded as a safe way to later identify an accused who you did not know before or had not seen before the incident and only saw brief glimpses of. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524)). Instead of the eye witnesses immediately being taken to record their S.164 statements before the concerned magistrate this was done **after an unexplained delay of over 9 months**. Interestingly the S.164 statements of the eye witnesses are recorded 8 days **after** the arrest of the accused and also contain some huila of the accused who is present when their S.164 statements are recorded where his absence from the scene of the incident is suggested to the eye witnesses during his cross examination of them. In our view based on this chronology of events it cannot be ruled out that the accused was shown to the eye witnesses before they recorded their S.161

statements hence their ability to give some hulia and identify the accused who was right in front of them. It is notable that at the time of recording his S.342 Cr.PC statement the accused specifically stated that he **had been shown to the eye witnesses before they gave their S.164 statements.** Since the accused was not known to the eye witnesses and the eye witnesses only got a fleeting glimpse of the accused at the time of the incident who were moving quickly on motor bikes and because they hid as they were afraid in our view the safer course in determining the correct identification of the accused was to hold an identification parade however this was not done and the prosecution has not explained why an identification parade was not held in order to identify the accused. It is also unknown how far the eye witnesses were from the accused when the incident took place so once again this dents the prosecution's case in terms of correctly identifying the accused as for all we know the eye witnesses could have been 500 meters or more from the incident and would have hardly been able to see the accused from such a distance let alone be able to correctly identify him 9 months later. The eye witnesses have also not stated how far the accused was from the deceased when the accused shot him which was an important piece of evidence as according to the medical evidence the shot was fired by the accused from within 2-3 feet because blackening was present on the wound according to the evidence of PW 5 MLO Dr.Altaf Ahmed who carried out the post mortem of the deceased. The evidence regarding the conduct of the eye witnesses at the time of the incident also does not appeal to logic, common sense or accord with natural human behavior. Namely, they witnessed the deceased being shot on a quiet road and then when the murderers had left by motor bike they did not come forward to help the deceased who according to the evidence of some other PW's was injured and not dead after being shot as he was later taken by rickshaw to a private hospital and then the Aga Khan hospital where he later expired on account of his firearm injury yet the eye witnesses did **not** attempt to help the injured deceased who they had just seen being shot in front of their eyes. Instead they fled away on a motorbike and did not even report the incident to the police or bother to call for an ambulance. In this respect reliance is placed on **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 956). We have also noticed contradictions in the S.164 statements between each eye witness and their evidence before the trial court. Thus, for all the reasons mentioned above we do not find the evidence of either of the eye witnesses to be reliable, trustworthy or confidence inspiring and we harbor severe doubts that the so called eye witnesses were present at the scene of the incident and even if they were present we are of the view for the reasons which we have discussed above that we cannot safely rely on their identification of the appellant and we hereby discard their evidence in respect of the identification of the appellant.

(c) **Turning to other circumstantial or supportive evidence.** The appellant taking the police to the place of the incident is in our view irrelevant as the police already knew where the incident took place.

(d) The appellant's admission before the police that he committed

the crime with other co-accused is inadmissible in evidence and has no legal value and in any event was later retracted. The fact that he made his admission whilst he was under arrest whilst in police custody in another case which did not entail the death penalty also adds further doubt to his admission and pointation as after a period of 9 months when there was no evidence against him and the case had been disposed of in "A" class why would the accused admit to an offense which carried the death penalty. This to us seems rather implausible.

(e) That no empty was recovered from the scene of the incident

(f) That no pistol was recovered from the accused whether on his pointation or otherwise and thus the murder weapon was not recovered. If the accused was so keen to take the police to places on his pointation and he had already admitted to the crime then logically he should have also taken the police to where the murder weapon was hidden or explained to the police how he disposed of it which he did not do.

(g) That the prosecution has not in our view satisfactorily proved that the accused had a motive to murder the deceased because he was a polio worker. When he came to submit the challan on his own admission the second IO PW 11 Inspector Muhammed Hussain added S.7 ATA without conducting any investigation in respect of whether the offense did or did not fall under the ATA. Even otherwise there was no evidence that the accused even knew that the deceased was a polio worker, if indeed he was one, and the deceased could have been murdered for any number of other reasons.

(h) The prosecution has not been able to prove any ill will or enmity between the accused and the deceased which would give the accused a motive to murder the deceased.

(i) In our view the circumstantial evidence against the appellant is completely lacking in that the only evidence against the appellant once the eye witnesses evidence of the appellant's identification is discarded is the medical evidence which is only supportive or corroboratory of direct evidence (of which we have found there is none having discarded the identification testimony of the eye witnesses) and can only tell us, amongst other things, the cause of death of the deceased and possibly what kind of weapon/instrument caused the death of the deceased. It **cannot** tell us who murdered the deceased. Thus, in our view there is completely insufficient circumstantial evidence available to meet the legal requirement of convicting an accused based on circumstantial evidence being that it must link the body of the deceased to the neck of the accused through an unbroken chain of evidence leading to the inference that the accused was the only person who could have murdered the deceased which as mentioned earlier is badly lacking in this case. In this respect reliance is placed on **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274) and **Wazir Muhammad and another v. The State** (2005 SCMR 277).

16. Thus, based on the above discussion there is neither any reliable, trust worthy or confidence inspiring direct oral evidence against the appellant (since we have discarded the direct evidence of identification of the appellant by the eye witnesses) and no circumstantial evidence to link the appellant to the murder of the deceased and as such we do not need to delve into whether or not this case fell within the purview or not of the ATA as there is insufficient evidence to support a conviction for the offense of simple murder under S.302 (b) PPC.

17. Therefore keeping in view the case of **Tariq Pervez V The State** (1995 SCMR 1345) which held that if there is a **single circumstance**, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right which principle was recently reiterated by the Supreme Court in the case of **Abdul Jabbar V State** (2019 SCMR 129) we hereby acquit the accused of the charge by extending to him the benefit of the doubt and set aside the impugned judgment and allow the appeal. The confirmation reference is answered in the negative and the appellant shall be released unless he is wanted in any other custody case.

18. The appeal and confirmation reference stand disposed of in the above terms.

Arif