

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. Cr. ATA No. 282 / 2015

Ifan @ Jabbar vs. The State

HIGH COURT OF SINDH

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

Mr. Justice Mohammad Karim Khan Agha,
Mr Justice Khedron Hussain Tania

Date(s) of Hearing: 30-08-18 & 02-09-18

Decide on: 06-09-2019

(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.

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IN THE HONORABLE HIGH COURT OF SINDH AT
KARACHI

(Criminal Appellate Jurisdiction)

PRESENTED

04-12-2015

Special Anti Terrorism Appeal No.

/2015

Gr. Registrar (

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Irfan @ Jabbal S/o Abdul Rasheed
Muslim, Adult presently confined at
Central Prison at Karachi.....Appellant

Versus

The State.....Respondent.

F.I.R. No.402/2013
U/S.302/324/353/109/
34 PPC R/W 7 ATA
Challan Submitted Under
Section 353/324/302/
34 PPC R/W 7 ATA
R/W 512 Cr.P.C.
P.S. Mehmood Abad.

CRIMINLA SPECIAL ANTI TERRORISAM APPEAL
UNDER SECTION 25 OF ANTI TERRORISM ACT 1997
READ WITH 561-A Cr.P.C.

Being aggrieved and dis-satisfied with the Judgment dated 30.11.2015 passed by the learned Anti Terrorism Court No. IXth, Karachi, in Special Case No.26 (iii)/2014 as title (The State V/s Irfan @ Jabbal & Others) in FIR No.402/2013 P/S MehmoodAbad, Karachi for the offence Under Section 302/324/353/109/34 PPC Read With 7 ATA 1997, convicting the Appellant above named above in following Section of Law.

- a) Accused/Appellant is convicted and sentenced to Suffer imprisonment of Life and fine of Rs.200,00,0/- for the Charge of Offence Under Section 302 PPC Read With Section 7 of ATA 1997, in case of default he suffer further R.I. for one year more. The fine amount if recovered shall be paid to the Legal heirs of the deceased HC Javed Iqbal.
- b) Accused/Appellant is found guilty of his Charge of offence Under Section 324 PPC as such is convicted

IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.292 of 2015

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.

Appellant: Irfan alias Jabbal son of Abdul Rasheed
through Mr. Habib Ahmed, Advocate.

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

Date of hearing: 30.08.2019 and 02.09.2019

Date of announcement: 06.09.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Irfan alias Jabbal son of Abdul Rasheed has preferred this appeal against the judgment dated 30.11.2015 passed by the learned Judge Anti-Terrorism Court No.IX, Karachi in Special Case No.26(III)/2014, F.I.R. No.402/2013 U/s. 302/353/324/34 PPC r/w section 7 of ATA, 1997, registered at police station Mehmoodabad, Karachi (the impugned judgment) whereby the appellant has been convicted and sentenced as under:-

- "A. Accused is convicted and sentenced to suffer imprisonment for life and fine of Rs.200,000/- for the charge of offence u/s 302 P.P.C r/w. Section 7 of ATA 1997, in case of default he shall further suffer R.I. for one year more. The fine if recovered shall be paid to the legal heirs of deceased HC Javed Iqbal.
- B. Accused is found guilty of the charge of offence u/s.324 PPC as such is convicted and sentenced to suffer R.I. for Ten years and fine of Rs.50,000/- in case of default he shall further suffer R.I for four months more.
- C. Accused is found guilty of the charge of offence u/s.353 PPC as such is convicted and sentenced to suffer R.I. for Three years and fine of Rs.10,000/- in case of default he shall further suffer R.I for one month more.

All the sentences shall run concurrently. The benefit of section 382 B Cr.P.C. shall be extended to the accused."

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2. The brief facts of the prosecution case as per FIR lodged by the complainant on 19.12.2013 are that on the same date he along with HC Yaqoob Shahid, HC Javed Iqbal and HC Ansar Khan were on patrolling on government mobile, during which they received a tip-off about presence of notorious narcotics dealers Sardar Saqib, Irfan @ Jabal, Nadir @ Nado and Moosa in armed position at street No.01 (Alamri Wali Gali) at Ashraf Colony Karachi, whereupon the complainant alongwith aforesaid staff at around 2050 hours went to such place where the accused persons seeing the police party coming towards them hide themselves in the streets. In the meanwhile Mst. Shabana and 2/3 other women who could be identified if seen again started fighting with the police party in order to prevent them arresting the accused. Mst. Shabana called the accused Nadir @ Nadu s/o Shoukat Baloch and instigated him for killing the police officials by firing at them on which the aforesaid persons made firing on the police party with intention to commit their murders. The firing was returned by the police party in defense at the directions of the complainant/ ASI Khalid Yaqoob. As a result of the encounter HC Javed Iqbal got injured seriously at his abdomen and fell down. The accused persons taking advantage of the darkness and narrow streets made their escape good. There after the complainant took the injured HC Javed Iqbal (the deceased) in the police mobile at Jinnah Hospital for treatment where he succumbed to his injuries shortly after his arrival. It is also alleged that firing of accused created terror and panic amongst the people. The complainant thereafter came at PS where he lodged such FIR.

3. The accused Irfan alias Jabal was arrested on 19.04.2014 from KPK by police sent from Karachi where he was in custody and was brought back to Karachi as he was allegedly one of the accused who opened fire on the police party as narrated in the above mentioned FIR. On his arrest he voluntarily lead the police to his house where the police recovered a 30 bore pistol with 11 rounds for which a separate FIR was lodged. A supplementary charge sheet was submitted in the court showing the remaining accused as absconders. After completion

of investigation challan was submitted and charge was framed against the accused person to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined 08 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The accused in his S.342 Cr.PC statement denied the allegations against him and claimed that he had been falsely implicated in this case by the Mehmoodabad police due to an old enmity which existed between them. He did not give evidence under oath or call any witness in support of his defense.

5. Learned Judge, Anti-Terrorism Court-II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 30.11.2015, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

6. 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.

7. Learned advocate for appellants contended that that the eye witnesses were unreliable being police witnesses, that it was a night time incident and no hulia has been given of the accused; that there was no source of light; that since the police did not know the accused before the incident it was essential to hold an identification parade which was not done; that it was not believable that the spy could have given the names of the accused **and** the parents names of the accused; that material contradictions had been made in the evidence of the PW's in terms of the location, whether the complainant was armed, who else amongst the police party was armed, who actually fired from the police party; that the PW who stated that he made fire did not have his SMG taken into possession let alone forensically examined; that few empties were recovered from the scene despite an intense encounter; that the pistol had been foisted on the accused and had not been recovered from

his house as alleged by the police; that the medical evidence does not support the prosecution case; that there had been overwriting on Exhibit 23 B which created doubts as to the genuineness of the prosecution case; that an enmity existed between the family of the accused and the Mehmoodabad police which lead to them falsely implicating him in this case and that for any or all the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on **State V Farman Hussain** (PLD 1995 SC 1)

8. On the other hand Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, contended that the prosecution had fully proved its case to the required standard and that the impugned judgment did not require interference and as such the appeal should be dismissed. In particular he contended that that apart from the complainant who was an eye witness there are two other witnesses who corroborate the complainant in all material respects; that there was sufficient light to identify the accused; that there was no need to conduct an identification parade as the accused has been correctly identified in court by the eye witness PW's; that the pistol used for the offense was recovered by the police on the pointation of the accused and the FSL report was positive. In support of his contentions he placed reliance on **Muhammad Amjad v. The State** (1998 SCMR 1775), **Muhammad Akbar v. The State** (1995 SCMR 693), **Bashir Ahmed v. The State** (2004 P. Cr. L.J 1326) and **Ali Imran v. The State** (PLD 2007 Supreme Court 87).

9. We have heard the arguments of the learned counsel for the appellants and DPG, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including the cases cited at the bar.

10. After carefully reviewing the prosecution evidence including the evidence of those present at the scene at the time of the encounter and the MLO report we are satisfied that the prosecution has proved beyond a reasonable doubt that on 19-12-2013 at about 20.50pm the

deceased was murdered by firearm injury in the vicinity of street No.01 (Alamri Wali Gali) at Ashraf Colony Karachi, after an encounter with miscreants.

11. The question before us in essence is whether the appellant was one of the persons who fired at and caused the death of the deceased or was present at the time of the encounter.

12. In our view after re assessing the evidence on record the prosecution has not been able to prove beyond a reasonable doubt that the appellant was either the person who fired upon the deceased or was even present at the time of the incident for amongst others the following reasons:

- (a) Only general allegations against the accused have been made in the FIR of firing.
- (b) That the three PW eye witnesses in our view can at best be described as eye witnesses to the encounter but **not** to who the miscreants were who allegedly fired on the police for the reasons set out below
- (c) It was a night time incident at around 9 pm and according to the evidence in chief of PW 1 complainant Khalid Yaqoob who was also an eye witness to the incident the "accused taking benefit of **darkness** fled away from the spot by taking benefit of dark and narrow streets." In cross examination he stated that, "When this incident took place at that time electricity was not available in the area". Other later PW's who were present at the time of the incident have tried to improve the prosecution case by claiming that some source of light was present but no light bulb was recovered and the account of what kind of light was available is contradictory and as such their account regarding the light cannot be believed and as such based on the principle of "*falsus in uno, falsus in omnibus*" their evidence is disbelieved in its entirety. In this respect reliance is placed on **Notice to Police Constable Khizar Hayat (PLD 2019 SC 527)**. The question therefore arises as to how he or any other of the alleged eye witnesses was able to identify the accused in such darkness? In the FIR the accused is not named as one of those who fired on the police party and neither in the FIR or the statement of PW 1 complainant Khalid Yaqoob is any hulia or facial description given of the appellant and the same is the case with regard to the other PW's who were present at the time of the incident. The PW's did not know the accused before and could not have seen him by face in the darkness especially as according to the police an exchange of fire was going on and as such the police would

have kept themselves under cover. No identification parade of the appellant was also ever carried out. In cases of unknown accused where the PW's have only a fleeting glance of them the Supreme court has placed very little, if any weight, on in court identification as the accused can be shown to the PW's before the trial and as such we cannot safely rely on the in court identification of the accused by the PW's in this case which we discard. Under these circumstances in our view the prosecution has not been able to prove that the person who fired upon the police was the accused.

- (d) The manner in which the accused was identified also does not appeal to a prudent mind. Apparently the informant gave the names **and fathers names** of the accused and the initial IO called up all CRO's and from pictures/photo's attached to the CRO's the so called eye witnesses identified the accused. Likewise the alleged recovery of the pistol does not appeal to natural human conduct whereby a person who had used a pistol in an encounter with the police where a police officer was killed would casually keep the weapon at his house. It cannot be ruled out that this pistol was foisted on the accused by the police as he was a known criminal. The logical thing to do was to dispose of the pistol. In this respect reliance is placed on **Askar Jan V Muhammed Daud** (2010 SCMR 1604), **Muhammed Asif V State** (2017 SCMR 486) and **Haq Nawaz V State** (2018 SCMR 95). The alleged confession of the accused before the police is also of no evidentiary value.
- (e) There are material contradictions in the evidence of the PW's who are all police officials in terms of the availability of light, the number of injuries the deceased received, who fired from the police party. Some overwriting on some of the documents exhibited also appears to have been changed/alterd. For example Ex 23 B which makes their evidence doubtful
- (f) There is no post mortem report available for the deceased so the only medical evidence available to the prosecution is that the deceased was killed by firearm injury.
- (g) That there is no evidence of safe custody of the empties from the time of their recovery till they were sent for FSL report and as such no reliance can safely be placed on the recovered empties. It is also unclear whether the police at the scene of the incident were issued official SMG's and bullets and how many rounds were fired by the police at the scene since there appears to be no record of this. One SMG which was allegedly used was not even taken into possession yet alone forensically tested.

13. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus

rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) **and** if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345) 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. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

14. In our view for the reasons mentioned above the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the appeal is allowed and the appellant is acquitted of the charge and shall be released unless he is wanted in any other custody case.

15. The appeal is disposed on in the above terms

MAK/PS