

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 98 & 99 of 2018 r/w Conf Case 4/18

Syed Riffat Hussain
& others

vs. The State

HIGH COURT OF SINDH

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

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Khadim Hussain Tirmizi

Date(s) of Hearing: 28-8-18

Decide on: 03-09-2019

(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.

-
- 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.

PRESENTED ON
05-04-2018

Deputy Registrar (Judl.)

1204

IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI

ATA Criminal Appeal No. 92 2018

1. Syed Riffat Husain S/o Syed Shakir Abbas
Muslim, adult, resident of
G-7/2 Jacob lines, Lines Area, Karachi
Presently confined at Central Jail Karachi
2. Azhar Husain
S/o Naushad Husain
Muslim, adult, resident of
A-3 Adnan Center Block-7,
F.B.Area Karachi
Presently confined at Central JailAppellant

Versus

The State.....Respondents

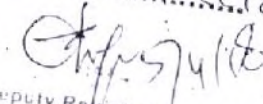
CRIMINAL APPEAL UNDER SECTION 25 OF ANTI-TERRORISM ACT 1997

Being aggrieved and dissatisfied by the Judgment dated 21-03-2018, passed by the Anti-terrorism Court No. XVII, Karachi, and whereby the appellants herein were convicted under section 7 (a) of Anti Terrorism Act, 1997 r/w section 302/34 PPC each and Sentenced them to suffer Imprisonment for Life as also to pay fine of Rs.100,000/- each in default to further suffer 1 for 6 months , the Appellant herein beg to prefer this appeal on the following facts and grounds.

**Certified copy of the Judgment dated 21-03-2018
is filed as annexure "A"**

FACTS

That, on 27-02-2014, at about 10:30 PM, one Waseem Ahmed S/o Aurangzaib resident of Quayoumabad, Karachi, was said to have been informed on telephone that his father Aurangzaib and his

PRESENTED ON
05-04-2018

Deputy Registrar (Judl.)

1203

IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI

ATA Criminal Appeal No. 78 2018

1. Syed Furqan alias Baba Ji
S/o Syed Hamid Hussain
Muslim adult, resident of
Gulistan-e-Joher, Karachi
Presently confined at Central Jail Karachi
2. Faisal Mehmood
S/o Muhammad Ibrahim
Muslim adult resident of
Scheme No.33, Rizvia Society-2
Presently confined at Central Jail
3. Syed Bu-Turrah Ali alis Irfan
S/o Syed Murtaza Kamal
Muslim adult resident of
FB Area, Karachi.
Presently confined at Central JailAppellant/Accused:

Versus

The state.....Respondent

**CRIMINAL APPEAL UNDER SECTION 25
OF ANTI-TERRORISM ACT 1997**

Being aggrieved and dissatisfied by the judgment dated 21-03-2018, passed by the Anti-Terrorism Court No. XVII, Karachi, and whereby the appellants herein were convicted under Section 302 (b) 34 PPC r/w section 7-A of Anti-Terrorism Act, and sentenced them to death, and to pay compensation under section 544-A, Cr.P.C in the sum of Rs. 100000 each to the heirs of the deceased as also further to pay fine

76

(3)

①

**OFFICE OF THE JUDGE ANTI - TERRORISM COURT NO. XVII,
AT KARACHI.**

No. ATC-XVII/K.DIV//116 /2018

dated.21-03-2018

To,

The Registrar,
Honourable High Court of Sindh,
Karachi

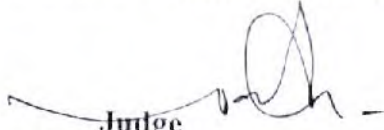
SUBJECT: REFERENCE U/S 374 OF CR.P.C IN SPECIAL CASE NO..
495/2015 OLD CASE NO. B-326/2014 FIR 47/2014 U/S 302/34
PPC R/W SECTION 7 OF ATA. 1997 P/S. AZIZABAD,
KARACHI ,THE STATE VERSUS SYED FURQAN &
OTHERS U/S 25(2) OF ATA. 1997

I have the honour to submit that the below mentioned case has been decided on 21-03-2018 and the accused persons namely 1) Syed Furqan alias Babaji s/o Syed Hamid Hussain, 2) Faisal Mehmood s/o Muhammad Ibrahim, 3) Syed Buturab Ali alias Irfan s/o Syed Murtaza Kamal have been awarded death sentence subject to confirmation by the Honourable High Court of Sindh, Karachi U/S 374 of Cr.P.C:

Sr. No.	Case No.	Accused Names	FIR No.	Police Station	U/s
01.	SPECIAL CASE NO.. 495/2015 OLD CASE NO. B- 326/2014	1. Syed Furqan alias Babaji s/o Syed Hamid Hussain 2. Faisal Mehmood s/o Muhammad Ibrahim 3. Syed Buturab Ali alias Irfan s/o Syed Murtaza Kamal	47/2014	AZIZABAD, KARACHI	302/34 PPC R/W SECTION 7 OF ATA. 1997

The R&Ps of the above case has already been sent in view of section 25(2) of ATA, 1997 for confirmation of death sentence of the above accused persons or otherwise.




Judge
Anti Terrorism Court No. XVII
Karachi

IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.98 of 2018
Special Cr. Anti-Terrorism Appeal No.99 of 2018
Confirmation Case No.04 of 2018

Present:

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

Appellants: Syed Riffat Hussain, Azhar Hussain through Mr. Shah Imroz Khan, Advocate, Syed Furqan alias Babaji and Faisal Mahmood through Abdul Razzak, Advocate and Syed Bu-Turab Ali alias Irfan through Mr. Muhammad Farooq, Advocate.

Respondent: The State through Mr. Abdullah Rajput
Deputy Prosecutor General Sindh

Date of hearing: 28.08.2019

Date of announcement: 03.09.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellants Syed Riffat Hussain S/o. Syed Shakir Abbas and Azhar Hussain S/o. Naushad Hussain, Syed Furqan alias Babaji S/o. Syed Hamid Hussain, Faisal Mehmood S/o. Muhammad Ibrahim and Bu-Turab Ali alias Irfan S/o. Syed Murtaza Kamal have preferred these appeals against the judgment dated 21.03.2018 (the impugned judgment) passed by the learned Judge Anti-Terrorism Court No.XVII, Karachi in Special Case No.495/2015, F.I.R. No.47/2014 U/s. 302/34 PPC r/w section 7 of ATA, 1997, registered at police station Azizabad, Karachi whereby the appellants have been convicted and sentenced as under:-

"Accused persons namely 1) Syed Furqan alias Babaji s/o Syed Hamid Hussain 2) Faisal Mehmood s/o. Muhammad Ibraheem 3) Syed Buturab Ali alias Irfan s/o. Syed Murtaza Kamal

Under Section 302(b)/34 P.P.C each and sentenced to death as (Tazir). Accused be hanged by neck till their death with directions to pay Rs.1,00,000/- each to the heirs of the deceased by way of compensation u/s. 544-A Cr.P.C. and in default of payment thereof undergo S.I. for six months more.

2

Under Section 7(a) of Anti-Terrorism Act, 1997 each accused is sentenced to death. Accused be hanged by neck till their death with directions to pay Rs.1,00,000/- each and in case of default of payment thereof, shall undergo S.I. for six months.

Accused Azhar Hussain alias Faraz son of Naushad Hussain and Riffat Hussain Jaffri s/o. Syed Shakir Abbas are convicted;

Under Section 7(a) of Anti-Terrorism Act, 1997 r/w. Section 302/34 PPC each and sentenced to suffer Imprisonment for Life; with directions to pay Rs.1,00,000/- each and in default of payment thereof, further undergo S.I. for six months. All the sentences shall run concurrently and accused shall be entitled to benefit u/s.382-B Cr.P.C.

2. The brief facts of the prosecution case as per FIR are that the complainant Muhammad Waseem has stated in the F.I.R. that he was residing in his House No.66/68, Gali No.4, Sector-D, near Jamia Masjid Qayyumabad, Karachi and doing his own business. On 27.02.2014 he was present in his house when his father's friend who used to go with his father on the night of Juma in Madani Masjid Azizabad has informed him that his father along with his friend Abdul Wahid after offering Esha prayer from Madani Masjid Azizabad when they were on their way back to their house were attacked by unknown culprits who made firing upon their Car AKX-146 Vitz white colour near Kaka Bawani School Usman Memorial Chowrangi at Main Road Block-2 Azizabad and also disclosed that the complainant's father and his friend Abdul Wahid have been injured and are being shifted to Abbasi Shaheed Hospital and asked the complainant to reach there. Upon such information he immediately rushed to the Hospital, where he came to know that his father Orangzaib and his friend Abdul Wahid had expired due to firing and their dead bodies were shifted to mortuary. The complainant went to the mortuary and saw the dead bodies. The complainant accused unknown persons for committing murder of his father and of Abdul Wahid who was friend of his father. The F.I.R. was registered vide Crime No.47/2014 u/s. 302/34 PPC r/w section 7 ATA, 1997 at P.S. Azizabad, Karachi.

3. The investigation was transferred to Incharge Inspector Nisar Ahmed Qureshi SWIO of PS Azizabad, Karachi who received FIR along with 174 Cr.P.C. proceedings and started investigation and conducted the

same to some extent. Thereafter said investigation was handed over to Inspector Mir Aslam Khan SIO/CIA, who arrested the accused persons Syed Furqan alias Babaji s/o. Syed Hamid Hussain, Faisal Mehmood s/o. Muhammad Ibrahim, Syed Bu-Turab Ali alias Irfan s/o Syed Murtaza Kamal, Azhar Hussain s/o Nausahd Hussain and Syed Rifat Hussain s/o. Shakir Abbas on spy information from Block-2 PECHS Karachi on 25.04.2014 whilst they were riding motor bikes. During interrogation the accused disclosed that they are involved in Crime No.34/2014 u/s. 302/324/34 PPC r/w Section 7 of ATA, 1997 of PS Sharifabad as well as Crime No.47/2014 u/s. 302/34 PPC r/w Section 7 of ATA, 1997 of PS Azizabad Karachi. After completion of investigation challan was submitted and charge was framed against all the accused persons to which they pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined 12 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The accused persons recorded their statements under S.342 Cr.PC whereby they claimed their false implication in the case and plead not guilty. However, they did not examine themselves on oath or produce any defense witnesses in support of their defense which was in essence that they had been arrested by the police before the crime occurred and were then falsely implicated in it by the police.

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 21.03.2018, convicted and sentenced the appellants as set out earlier in this judgment, hence these appeals have been separately filed by each accused against their conviction. By this common judgment we intend to decide all of the appeals.

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 appellant Syed Bu-Turab Ali alias Irfan contended that this was a completely false case which had been foisted

upon the appellant; that the same accused had been said to have committed a similar crime through FIR 24/2014 at PS Sharifabad on the same day at the same time by the same IO which was not humanly possible; that the so called eye witness was a false eye witness who never witnessed any such incident; that the identification parade of the accused had not been carried out in accordance with the law and as such could not be safely relied upon; there was an unexplained delay of over 2 months in sending the empties for FSL report which rendered it suspect and since it was a case of no evidence all the accused should be acquitted. Learned counsel for the other appellants adopted the arguments of learned counsel for appellant Syed Bu-Turab Ali and in addition stressed that Syed Riffat Hussain and Azhar Hussain had not even been picked out at the identification parade. All the appellants in support of their contentions placed reliance on Notice in pursuance of the order passed by this Court on 13.02.2019 in Criminal Appeal No.238-L of 2013 to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement made before the trial Court in a Criminal Case (PLJ 2019 SC (Cr.C.) 265), **Mushtaq and 3 others v. The State** (PLD 2008 Supreme Court 1) **Kanwar Anwaar Ali Special Judicial Magistrate: in the matter of Cr. Misc. Application No.183 of 2019 in Cr.Appeal No.259 of 2018** (PLD 2019 Supreme Court 488) **The State v. Imam Bakhsh and others** (2018 SCMR 2039), **Khalil ul Bashir v. The State** (2019 SCMR 930) and **Minhaj Khan v. The State** (2019 SCMR 326).

8. On the other hand Mr. Abdullah Rajput Deputy Prosecutor General, supported the impugned judgment and contended that the prosecution had proved its case against all the accused beyond a reasonable doubt through a reliable and trustworthy eye witness to the incident who had also identified most of the accused from a legally carried out identification parade whereby each had been prescribed a specific role and positive chemical and FSL report was also available on record and as such the appeals be dismissed and the convictions and sentences up held. In support of his contentions he placed reliance on **Solat Ali Khan v The State** (2002 SCMR 820)

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 PW's, the MLO's and the post mortems of the deceased and the other evidence on record, we are satisfied that the prosecution has proved beyond a reasonable doubt that on 27-02-2014 at approx 2200 hours near Kaka Bawani School Usman Memorial Chowrangi at Main Road Block-2 Azizabad that both Abdul Wahid and Orangzaib were murdered by fire arm.

11. The only real issue in the case is whether the prosecution has proved beyond a reasonable doubt that the accused have murdered the deceased at the said date, time and place by firearm or the deceased were murdered by some other third party.

12. In essence the prosecution case hinges upon whether we find the evidence of the prosecution's star eye witness PW 9 Muhammed Anness to be truthful, reliable and confidence inspiring. After carefully considering the evidence of this eye witness it is apparent that he is a chance witness (as admitted by the prosecution) and as such very little weight if any can be given to his evidence without the strongest of corroboration. Even otherwise he states that he witnessed the incident but he gives no hulia or description of any of the accused in his evidence and nor is any such huila or description given in the FIR where it is alleged the offense was committed by unknown persons. It was also a night time incident and there is no evidence of any source of light or how far away the eye witness was from the incident. The eye witness did not know the accused before the incident and appears to have had only a fleeting view of all five accused. Even at the identification parade he was not even able to pick out accused Syed Riffat Hussain and Azhar Hussain. As such we do not find the eye witness to be truthful, reliable or confidence inspiring especially as he only surfaced out of the blue months after the incident and at the time of the identification parade. His lack of description of the features/ hulia of the accused is highly damaging to his reliability and castes severe doubts on his ability to safely identify any one of the real accused out of the identification parade. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524). Even otherwise the identification

parade in our view has not been carried out in accordance with the guiding principles of law in such matters as laid down in the case of **Kanwar Anwaar Ali** (Supra) in that all the same 8 dummies were used for all the 5 separate identifications of the accused which means after the third identification parade the witness would have been aware of who had not been dummies before and therefore who to pick out; that the addresses and CNIC's of the dummies had not been taken; that there was an unexplained delay of holding the identification parade for 18 days and since the accused were all in police custody during this period there was ample opportunity for the accused to be shown to the identifier and that there was no mandatory certificate of identification.

13. Furthermore, the empties at the scene were recovered on 28.02.2014 and were not sent to the FSL for over two months which delay has not been explained by the prosecution; that there is no evidence of the safe custody of the empties and quite conveniently they were only sent for FSL after the pistols had been recovered from the accused on their arrest (which was not made on the spot but after a delay of nearly two months based on spy information when the accused claim that they were already in police custody) and as such the possibility that the pistols once in police custody had not been used to generate the empties which were sent to the FSL along with the pistol cannot be ruled out. Even otherwise the FSL report was not put to the accused during the recording of their S.342 Cr.PC statements and as such it cannot be relied upon to convict the appellants. At this juncture we would like to point out that due to this lapse we declined the request of the DPG to remand the case back to the trial court for the re recording of the S.342 Cr.PC statements of the accused as it has been held by the supreme court that the prosecution through such tactics cannot fill up the lacuna's in their case to the detriment of the defense. In this respect reliance is placed on **Nusrat Ali Shah and other V the State** (unreported) dated 20-02-2019 in Criminal Appeal No.24-26-K of 2018.

14. Even otherwise we find the prosecution case to be highly doubtful concerning the truth of the matter as it appears that the same accused were involved in a similar offense on the same day at the same time a few KM's away in Sharifabad where the same IO was present. How could the accused have been at two places at once? It also seems to be quite a co-

incidence that the IO initially disposed of the case in "A" class however on the same day that the case is then entrusted to IO Mir Aslam Khan of the special investigation unit he immediately receives spy information of the whereabouts of the accused who he arrests on the same day.

15. In short, we do not find the evidence of the eye witness PW 9 Muhammed Anness to be reliable, truthful or confidence inspiring; that the identification parade has not been carried out in accordance with the law and for the other reasons discussed above the prosecution has failed to prove its case beyond a reasonable doubt against any of the appellants for the murder of the deceased on the date, time and place as alleged. This being the case all of the appeals are allowed and all of the appellants are hereby acquitted of all the charges against them in the impugned judgment and each of the appellants shall be released unless he is wanted in any other custody case. The confirmation reference is answered in the negative.

16. The appeals are disposed of in the above terms.