

Murder of Navy Case - Reduction
Death to Life

487

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA. 55/17 w/ Conf. Case 3/17

Muhammad Yasir 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: 27-11-18

Decide on: 10-12-2019

(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.

PRESENTED

23-01-2017

488

Dr. Registrar (Judg.)

315

IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Special ATA Appeal No. / 2017

MUHAMMAD YASIR @ KALA

S/o Muhammad Sultan,

Muslim, Adult, R/o H.No. _____

Punjab Colony, presently confined at
Central Jail,

Karachi

Appellant

VERSUS

THE STATE

Respondent

FIR No. 2018/2014
U/s 392/302/34 PPC
R/w Section 7 ATA
P.S. Defence, Karachi

CRIMINAL APPEAL U/S 259 CR.P.C. R/W
SECTION ATA 1997 (2A) Cr.P.C.

Being aggrieved and dissatisfied with the order
Dated: 16-01-2017, passed by the learned Judge of Anti
Terrorism Court No.03, Karachi in Special Case No.
399(iii)/2014, whereby the learned Court was pleased
to convict the appellant Yasir @ Kala S/o Muhammad
Sultan and was pleased to award him sentence to
death and fine of Rs.2,00,000/-. The Honorable Court
was further pleased to direct the appellant to pay
compensation of Rs.5,00,000/- U/s 544-A Cr.P.C. to the

THE ANTI - TERRORISM COURT NO. III AT KARACHI
NO.A.T.C.III/K/ 96 /2017, KARACHI DATED 18.01.2017

54
CRL
21/01/17

To,

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

SUBJECT: REFERENCE U/S 374 CR.P.C. IN SPECIAL CASE NO.
399(III)/2014, FIR NO. 218/2014, U/S.
392/302/34 PPC, READ WITH SECTION 7(1)a OF
ATA 1997, P.S. DEFENCE (THE STATE VERSUS
MUHAMMAD YASIR @ KALA & OTHERS).

It is submitted that the aforesaid case has
been decided on 16.01.2017 and accused Muhammad Yasir
@ Kala s/o Muhammad Asghar Khan has been found guilty
u/s 265-H(ii) Cr.P.C of offence punishable u/s 7(1)(a)
ATA read with section 302(b)PPC. He has been convicted
and sentenced to death, Reference u/s 374 Cr.P.C for
confirmation of sentence is submitted accordingly.

The R&P of aforesaid case is submitted
herewith in compliance with provision of Section 25(2)
of ATA 1997, accordingly.

Kindly acknowledge the receipt of the same.

Encl: As above (Sheets 734).



(Syed Shakeel Hyder) 17
JUDGE
ANTI TERRORISM COURT NO. III
KARACHI

IN THE HIGH COURT OF SINDH AT KARACHI

Special CrI. Anti-Terrorism Appeal No.55 of 2017.
Confirmation Case No.03 of 2017.

Present:

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

Appellant: Muhammad Yasir @ Kala S/o. Muhammad Sultan through Mr. Umar Farooq Khan, Advocate.

For State: Through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.

Date of hearing: 27.11.2019.

Date of announcement: 10.12.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Muhammad Yasir @ Kala S/o. Muhammad Sultan has preferred this appeal against the impugned judgment dated 16.01.2017 passed by the learned Judge Anti-Terrorism Court No.III, Karachi in Special Case No.399(III) of 2014, F.I.R. No.218 of 2014 u/s. 392/302/34 PPC r/w section 7 of ATA, 1997 registered at P.S. Defence, Karachi whereby the appellant has been convicted and sentenced to death for an offence punishable U/s. 7(a) ATA, 1997 read with section 302(b) PPC subject to confirmation by this court with fine of Rs.200,000/-. He was also ordered to further pay compensation of Rs.500,000/- u/s. 544-A Cr.P.C. to the legal heirs of deceased Fayaz Ali. The appellant was further sentenced to suffer R.I. for 10 years with fine of Rs.50,000/- U/s. 392 r/w section 34 PPC. In case of default in payment of fine he was ordered to undergo R.I. of one year more. The properties of the accused were also ordered to be confiscated to the Government U/S 7(2) of ATA, 1997. The benefit of section 382 (B) Cr.PC was extended to the accused.

2. The brief facts of the case as unfolded in the FIR No.218 of 2014, P.S. Defence are that on 30.04.2014 at 06:10 pm at PNS Shifa Hospital, Karachi statement of complainant Khurram Rasheed S/o. Muhammad Arshad was recorded U/s. 154 Cr.P.C. wherein he narrated that he was

servicing in the Pakistan Navy as MTD driver and was deputed with C/O Captain Iftikhar Ahmed. He narrated that on the same date he with Captain Iftikhar Ahmed and gunman Fayaz Ali LPM, in Cultus staff car white color came at the PNS Shifa and after the checkup of the Captain, they came at Faisal Bank DHA Phase-I, where from they were proceeding to Keonari and at about 12:15 pm due to closure of the traffic light stopped at Abul Bakar Masjid Defence Library Traffic Signal. In the meantime two persons wearing pant shirt on a black color motorcycle came on the left side of the car and a person holding pistol knocked at the glass of window of Captain Iftikhar while the second brought motorcycle in front and stood away. Captain Iftikhar opened the door and gave envelope of Rs.500,000/- to the bandit. He narrated that gunman Fayaz Ali tried to pick-up his gun but the person who had stopped the motorcycle in front of the car noticed his movement towards his gun and started firing upon gunman Fayaz Ali who sustained serious injuries and fell towards him. The accused persons fled away on their motorcycle towards Punjab Colony. He narrated that on the directions of Captain Iftikhar, he brought the injured gunman Fayaz Ali at PNS Shifa where he succumbed to the injuries. He narrated that he can identify both the accused persons if he sees them again. The statement of the complainant Khurram Rasheed was transcribed in the FIR No.218/2014 at PS Defence.

3. After usual investigation the accused were arrested for an offence under section 302/392/34 PPC read with section 7 of ATA, 1997 and was sent up for trial. Charge was framed against the accused Yasir @ Kala to which he pleaded not guilty and claimed his 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 appellant/accused recorded his statement under S.342 Cr.PC. in which he has denied the allegations of the prosecution leveled against him and claimed his false implication by the police of PS Defense who he earlier had an argument with over the payment of his costs for fixing one of the tyres on one of their cars. In support of his defense he examined himself on Oath and produced two DW's.

5. Learned Judge, Anti-Terrorism Court-III, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 16.01.2017, convicted and sentenced the appellant as stated above, hence the appellant has filed this appeal against his convictions in the impugned judgment.

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 counsel for the appellant has contended that the charge is defective and as such the case should be remanded for a re trial; that no name and features of the accused have been given in the FIR; that the place of incident is in doubt; that there is only one eye witness who cannot be safely relied upon; that no private party has been associated as mushir in violation of S.103 Cr.PC; that the police had enmity with the accused over a dispute that had occurred between the accused and the police over payment for fixing the tyres of one of the policemen's cars and therefore they have deliberately falsely implicated him in this case and for any one of the above reasons the appellant be acquitted of the charge based on him being extended the benefit of the doubt. In support of his contentions he has placed reliance on **Habibullah Khan v. Amir Zaman and 9 others** (1995 SCMR 135), **Muhammad Irfan v. The State** (2016 P. Cr.LJ 1178) and **Kamran alias Ghulam Rasool alias Kaloo v. The State** (PLD 1997 Karachi 484).

8. On the other hand learned DPG has contended that the prosecution has proved its case against the accused beyond a reasonable doubt and that the impugned judgment did not require any interference and the appeals should be dismissed and the death penalty maintained and in particular pointed to the facts that the prosecution evidence fully supported the prosecution case; that the PW eye witness is reliable and correctly identified the accused; that the accused was correctly picked out at the identification parade by the PW eye witness which was held in accordance with law. In support of his contentions he placed reliance on **Aijaz Awan alias BABA v. The State** (2019 P. Cr. LJ 1775), **Dadullah and another v. The State** (2015 SCMR 856), **Muhammad Yayat and 2 others v.**

The State (2015 YLR 1326), Muhammad Ashraf and others v. The State (2010 SCMR 407), Muhammad Amin v. The State (2002 SCMR 1017), Tahir Mehmood @ Achoo v. The State and another (2018 SCMR 169), Waris Ali and 5 others v. The State (2017 SCMR 1572), Amjad Ali and others v. The State (PLD 2017 Supreme Court 661), Muhammad Ehsan v. The State (2006 SCMR 1857) and Muhammad Afzal and 2 others v. The State (2003 SCMR 1678).

9. 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.

10. In our view after our reassessment of the evidence based on the evidence of the PW's including the PW MLO, post mortem report, recoveries of empties at the scene, and a positive FSL report on the car, the human blood found in the car and other evidence on record we are satisfied that the prosecution has proved beyond a reasonable doubt that on 30.04.2014 at about 1215 hours near Abu Bakr Masjid Defense Library, Traffic signal, DHA Phase II, Karachi Captain Iftikhar was robbed of cash and thereafter his gunman Fayyaz Ali (the deceased) was fired upon by pistol which lead to his death on account of receiving such firearm injuries

11. The only issue therefore, in our view, left before us is whether the appellant was the person who murdered the deceased by shooting him with a firearm which lead to his death.

12. 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) That in our view the amended charge is not so defective as to warrant the remand of the case for retrial. Essentially what has happened in the charge is that absconder Munazzam has been named in the charge as the person who fired the shots instead of the accused which killed the deceased. It is quite apparent from the charge in our view that this was a typo/bona fide mistake and the intention was that the name of the accused should have been added in place of Munazzam. During the course of the trial counsel for the accused made no complaint about this error and cross examined the PW's on the basis that the accused was the one who had been charged with making the firing and lead his defense in that manner

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and thus in our view no prejudice has been caused to the accused by this typo/bonafide mistake in the amended charge and it would serve no useful purpose to remand the case to the trial court for a re trial. In this respect reliance is placed on **Nazir Ahmed V State** (PLD 2005 Kar 18)

(b) That the FIR has been lodged promptly by the eye witness who has set out the facts of the incident and thus there has been no time or chance to cook up a false case against the accused and what little delay there was has been fully explained by the complainant driving the deceased to hospital who was injured at that time. The fact that the FIR was registered against unknown persons is entirely logical based on the particular facts and circumstances of the case and shows that the complainant who was also the eye witness had no intention of falsely implicating anyone in the offense.

(c) In our view there are two key prosecution witnesses both of whom were traveling in the car at the time of the incident. The first is PW 3 Iftikhar who was the naval captain who was being driven by his naval driver PW 2 Khurram Rasheed. PW 3 Iftikhar narrates in his evidence that he was collected by his driver who waited for him whilst he went into the bank and collected money and came out again before they proceeded on their way accompanied by the deceased. He gives evidence that his official car was intercepted at the traffic lights near Phase two DHA library by two persons on motor bike one of whom robbed him by taking away the money which he had received from his friend in the bank whilst the other kept watch and fired at the deceased. His evidence of the robbery and the shooting is corroborated in all material respects by his driver PW 2 Khurram Rasheed. The only difference in their evidence is that eye witness PW 2 Khurram Rasheed saw the person who fired on the deceased and was in a position to identify him whilst PW 3 Captain Iftikhar was not. We find this discrepancy to be quite logical based on the particular facts and circumstances of the case. This is because PW 2 Khurram Rasheed was the driver who was sitting in the front seat of the car along with the captain's guard (the deceased) and the person who fired the shots at the deceased was standing right in front of the driver PW 2 Khurram Rasheed. Whereas PW 3 Captain Iftikhar was sitting in the back seat of the car and gave the envelope containing the cash to the accomplice out of the rear side window and as such his view of the person who fired from the front of the vehicle at his gunman was obscured by both his gunman and the driver both of whom were in the front seats of the car whilst he was in the back passenger seat of the car. Despite being cross examined at length the accused counsel was unable to make any dent in his evidence. In this respect we find the evidence of PW 3 Captain Iftikhar to be reliable, trustworthy and confidence inspiring as if he wanted to he could easily have claimed to have had a good view of the accused and malefidently picked him out at an identification parade instead he very honestly stated that he did not see the face of the person who fired at the deceased. In this respect we refer to the case of **Aijaz Awan alias BABA** (Supra) where at P.1785 Para 21 it was held as under:

"strictly speaking, human behavior varies from person to person; different people behave and react differently in different situations. Human behavior depends upon facts of each case; how a person reacts and behaves in particular situation can never be predicted. Every person who witnesses a serious crime, reacts in his own way; some are stunned, some are speechless; some would see the incident whereas some would flee from the spot. There is no set of rule of natural conduct."

(d) With regard to the offense of murder in our view the case will mainly turn on whether we find the evidence of the eye witness PW 2 Khurram Rasheed to be reliable, trustworthy and confidence inspiring **in terms of his identification of the accused.** Eye witness PW 2 Khurram Rasheed gives direct evidence of the accused coming in front of the car whilst his accomplice robbed PW 3 Captain Iftikhar and the accused firing on the deceased. Eye witness PW 2 Khurram Rasheed was a natural witness as he was the driver of PW 3 Captain Iftikhar and as such it was natural for him to be with him at the time of the incident. He was not a chance witness. The incident happened in broad day light right in front of him as the accused was facing the front of the car and there is no evidence that the accused wore any kind of muffler. That the accused would have been right in front of the driver for a long enough period for him to have had a good look at him as the accused stopped his bike, dismounted and waited in front of the car while his accomplice robbed PW 3 Captain Iftikhar and then opened fire when he realized that the deceased was going for his gun. He correctly picked out the accused at the identification parade and assigned to him the specific role of shooting at the deceased which identification parade was carried out within a few days of the arrest of the accused and mainly in accordance with the guild lines laid down for the conduct of identification parades as set out in the case of **Kanwar Anwaar Ali** (PLD 2019 Supreme Court 488). He has no ill will or enmity with the accused or any other reason to falsely implicate the accused and would not have wanted the wrong person to have been punished for the death of his colleague. He corroborates the evidence of PW 3 Captain Iftikhar in all material respects. He was also subject to lengthy cross examination but no dent could be made in his evidence. We have no reason to disbelieve the evidence of eye witness PW 2 Khurram Rasheed which we consider to be reliable, trustworthy and confidence inspiring **and are of the view that he has correctly identified the accused as being the person who shot the deceased.** We can convict the accused based on this evidence provided it is corroborated by some supportive evidence. In this respect reliance is placed on **Muhammad Ehsan** (supra) although notably in the case of **Muhammed Afzal** (Supra) it is held that corroboration was not a mandatory requirement of eye witnesses evidence but was only required by way of abundant caution and was only required if the eye witness evidence was doubtful or lacking in veracity. In this case we do not find the eye witnesses identification of the accused as being doubtful or lacking in veracity but instead to be entirely believable.

(e) That the medical evidence supports the eye witness oral evidence in that the deceased died as a result of sustaining over 10 firearm injuries which were the cause of his death which shows

that the deceased was murdered in the most brutal manner with there being no possible chance of his survival.

(f) That the motive of the murder was robbery which turned into murder once the deceased went for his gun and was brutally shot by the accused.

(g) That empties were recovered from the scene and the bullet holes in the car were found to be caused by firearm

(h) That the blood found in the car was found to be human following a positive chemical report.

(i) 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 naval or police witnesses. However 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 ill will and malafide has been alleged against only one police officer and even if the police wanted to falsely implicate the accused in an offense over a monetary dispute we do not consider that such false implication would stretch beyond falsely implicating the accused in a false Arms case under S.13 (I) (a) of the Sindh Arms Act 2013 as opposed to a case of such a serious nature entailing the death sentence. Even otherwise such suggestions were not put to the police PW's and the key witness being eye witnesses PW 2 Khurram Rasheed and PW 3 Captain Iftikhar had no ill will or enmity against the accused whatsoever and had no reason to falsely implicate him in this case. In our view the defense of the accused seems to be more of an afterthought which has been put up by his brother and bother in law.

(j) 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)

(k) That the prosecution evidence provides a believable chain of evidence from the time of the accused and his accomplice following the naval officers car from the bank, robbing the captain at the traffic lights and then firing upon the deceased until the arrest of the accused and his correct identification by natural eye witness PW 2 Khurram Rasheed at an identification parade carried out in most material respects in accordance with the law.

13. **Turning to the offenses under the ATA.** After our reassessment of the evidence we are 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

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impugned judgment in terms of imprisonment fines, penalties etc **except** that the sentence under S.302 (b) PPC for murder is reduced from the death sentence to that of life imprisonment with the confirmation reference being answered in the negative and that the appellant is acquitted of all offenses under the ATA and as such is convicted and sentenced only for offense u/s. 392 PPC, 302 (b) PPC and 34 PPC. The sentences for imprisonment shall run concurrently and the appellant shall have the benefit of S.382 B Cr.PC. Apart from the above modification in sentences the appeals are dismissed.

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

Arif

