

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. Cr. ATA 213 & 214 of 18 r/w Conf. Case 9/18

M. Ashiq Khan Vs. The State

HIGH COURT OF SINDH

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

Mr. Justice Mohammad Karim Khan Agha,

Mr. Justice Zulfikar Ali Sangi

Date(s) of Hearing: 12-14-18

Decide on: 22-11-2019

(a) Judgment approved for reporting:

Yes

KM

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.

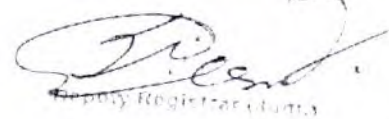
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- NOTE:
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
 - (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH, KARACHI
(Appellate Jurisdiction)

ATA
Sp/ Cr/Appeal No. D-213 of 2018

PRESENTED ON
11-08-2018


Deputy Registrar

2792

Mohammad Ashiq Khan
Son of Manzoor Khan,
Adult, Muslim R/O House
No.1103, Moch-J Gali No.13,
Sector 11 ½ Orangi Town,
Karachi (Now confined in
Central Prison, Karachi).....

Appellant

Versus

The State.....

Respondent

(ii) FIR No.01/2016
Dated 03-01-2016
U/S.23 (i) A. Sindh Arms Act
P.S. Orangi Town, Karachi

**Appeal U/S 25 of the A.T. Act,
1997 R/W Section 410, Cr.P.C.**

Humbly Sheweth:-

Being aggrieved by and dissatisfied with the Judgment thereby conviction awarded to the appellant by the Learned Anti-Terrorism Court No.XX, Karachi vide Judgment, date 28-07-2018 whereby the appellant has been convicted for the offence under section 302 (b), P.P.C. R/w section 7 (a) of the A.T.Act, 1997 with death sentence by hanging him by neck with fine of Rs. 400,000/- (Rupees Four Lac) to be paid to the legal heirs of the deceased person in equal amount or in default of which to suffer further imprisonment for two (2) years. He was also sentenced R.I. for give (5) years under section 25 of the Sindh Arms Act, 2013 and further ordered that the sentences shall run concurrently and also ordered to confiscate his movable and

IN THE HIGH COURT OF SINDH, KARACHI
(Appellate Jurisdiction)

Sp/ Cr/Appeal No. D- 214 of 2018

PRESENTED ON
11.08.2018

[Signature]
Deputy Registrar (Judicial)

2141

Mohammad Ashiq Khan
Son of Manzoor Khan,
Adult, Muslim R/O House
No.1103, Moch-J Gali No.13,
Sector 11 ½ Orangi Town,
Karachi (Now confined in
Central Prison, Karachi).....Appellant

Versus

The State.....Respondent

FIR No.07/2013
Dated 17-01-2006
U/S.302/427/34 PPC r/w
Section 7 of A.T. Act, 1997
P.S. Orangi Town, Karachi

**Appeal U/S 25 of the A.T. Act,
1997 R/W Section 410, Cr.P.C.**

Humbly Sheweth:-

Being aggrieved by and dissatisfied with the Judgment thereby conviction awarded to the appellant by the Learned Anti-Terrorism Court No.XX, Karachi vide Judgment, date 28-07-2018 whereby the appellant has been convicted for the offence under section 302 (b), P.P.C. R/w section 7 (a) of the A.T.Act, 1997 with death sentence by hanging him by neck with fine of Rs. 400,000/- (Rupees Four Lac) to be paid to the legal heirs of the deceased person in equal amount or in default of which to suffer further imprisonment for two (2) years. He was also sentenced R.I. for give (5) years under section 25 of the Sindh Arms Act, 2013 and further ordered that the sentences shall run concurrently and also ordered to confiscate his movable and

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IN THE COURT OF JUDGE, ANTI-TERRORISM COURT NO-XX, KARACHI
No.ATC-XX/K.Div 677 /2018 Dated: 30.07.2018

To,

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

INWARD TO: 9437
BRANCH: R-10
DATE: 01/8/18
RECORDED: 01/8/18

SUBJECT: REFERENCE UNDER SECTION 374 CR.P.C IN SPECIAL CASE NO.1304/2016 FIR NO. 07/2013 U/S 302/427/34 PPC, R/W 7 ATA 1997 AND SPECIAL CASE NO.1342/2016 FIR NO. 01/2016 U/ S 23(i) A SINDH ARMS ACT-2013 PS ORANGI TOWN, KARACHI, THE STATE VERSUS MUHAMMAD ASHIQ KHAN & OTHERS, UNDER SECTION 25(2) OF A.T.A 1997.

It is to state that the aforesaid cases have been decided by this Court on 28.07.2018 and the accused Muhammad Ashiq-Khan S/O Manzoor Khan has been awarded death sentence including other sentences subject to confirmation by the Hon'able High Court of Sindh, Karachi 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 acknowledged the receipt of the same.



Encl. As above.

[Handwritten signature]

[Handwritten signature]
3.02/8/18.
A.R (criminal)

without Enclosure

(SADAF YOUSUF)
JUDGE

ANTI-TERRORISM COURT NO.XX
KARACHI

IN THE HIGH COURT OF SINDH AT KARACHI

Special CrI. Anti-Terrorism Appeal No.213 of 2018.
Special CrI. Anti-Terrorism Appeal No.214 of 2018.
Confirmation Case No.09 of 2018.

Present:

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

Appellant: Mohammad Ashiq Khan S/o. Manzoor Khan
through Mr. Mamoon A.K. Sherwani,
Advocate.

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

Date of hearing: 12.11.2019

Date of announcement: 22.11.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Mohammad Ashiq Khan S/o. Manzoor Khan has preferred these appeals against the impugned judgment dated 28.07.2018 passed by the learned Judge Anti-Terrorism Court No.XX, Karachi in Special Case No.1304 of 2016, F.I.R. No.07 of 2013 u/s. 302/327/34 PPC r/w section 7(a) of ATA, 1997 and another Special Case No.1342 of 2016, F.I.R. No.01 of 2016 u/s. 23(I)-A Sindh Arms Act, registered at P.S. Orangi Town, Karachi whereby the appellant has been convicted and sentenced to death under section 302 (b) PPC read with Section 7(a) ATA, 1997 subject to confirmation by this court with fine of Rs.400,000/- to be paid to the legal heirs of the deceased persons in equal amount and in case of default he was ordered to undergo imprisonment for two years more. The appellant was also sentenced to Rigorous Imprisonment for 05 years under section 23(I)(A) of the Sindh Arms Act, 2013. Both the sentences were ordered to be run concurrently. However, the benefit of section 382-B Cr.P.C. was extended to the appellant. The moveable and immovable properties of the appellant were also ordered to be forfeited to the Government.

2. The brief facts of the case as unfolded in the FIR are that on 17.01.2013 at about 1830 hours the complainant Syed Mohammad Azhar

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Imam S/o. Syed Naseeruddin, resident of House No.1103, Block-J, Street No.23, Sector 11-1/2, Orangi Town, Karachi recorded his statement under section 154 Cr.P.C. in which he stated that he is a Government officer and deceased MPA Syed Manzar Imam was his younger brother residing with him along with his family. On 17.01.2013 he was present in his office when he received information through telephone from his relative that the car of his brother MPA Manzar Imam has been attacked and his brother has received firearm injuries along with others and they have been shifted to Abbasi Shaheed Hospital. On such information the complainant proceeded to Abbasi Shaheed Hospital and reached at mortuary where he found the dead bodies of his brother MPA Manzar Imam, his gunmen PC Mohammad Sajid s/o. Javed, PC Imran s/o. Mohammad Yaseen and Driver Imran @ Murad s/o. Mukhtiyar. He found several firearm injuries on the different parts of their bodies. On enquiring the complainant was informed that his brother MPA Manzar Imam was going to Town Office, Orangi Town with his driver and gunmen on Government white colored car bearing registration No. GL-7281 when at about 2:30 p.m. near main road, Orangi Town at Chamcha Hotel his car was intercepted and attacked by six armed persons on 03 motorcycles. Thus F.I.R. was lodged against unknown persons for killing four persons for unknown reasons.

3. SIP Abdul Sattar of P.S. Orangi Town collected spent bullets casing of different bores from the place of incident, sent the same for FSL and seized the car of deceased bearing registration No.GL-7281. I.O. also obtained photographs of place of incident. After investigation the report in "A" class was submitted by the I.O. On 21.12.2015 a letter was received from Rangers Authority regarding confession of the crime of instant offence by the present accused Mohammad Ashiq S/o. Manzoor Khan who was detained for 90 days under section 11 EEEE of ATA 1997. The accused during interrogation confessed commission of crime of the instant case and also confessed before JIT which was constituted by the Home Department after issuing notification. On such information SIP Gulzar Ahmed proceeded to Central Jail. During interrogation accused confessed that on 17.01.2013 at about 1430 hours he along with his companions Saqib, Shafqat and Pervez @ Choha and some 5-6 persons fired on the car of Manzar Imam which was coming on Shahrah-e-Orangi, near Chamcha Hotel, Sector 11-A, due to which two policemen/guards, MPA Manzar

Imam and his driver were murdered. On 13.01.2016 on the order of high-ups investigation was transferred to Inspector Mohammad Muqem Khan who interrogated the accused and during interrogation accused showed his readiness/willingness to produce the crime weapon and to point out the place of incident. On such disclosure, police party in the police mobile proceeded to the pointed place with the accused. The accused got the mobile stopped near ZMC office and from the garbage collection beneath the ground he recovered a concealed 30 bore pistol available in a polythene bag and he himself also led the police party and showed the place of incident where said offence was committed.

4. On 14.07.2016 I.O. Mohammad Muqem Khan recorded statement under section 161 Cr.P.C. of eye witness Ashfaq Ahmed S/o. Mohammad Mushtaque. He also got his statement recorded under section 164 Cr.P.C. and identification parade conducted before JM-III, however, earlier his request was declined and after filing revision No.25/2016 and on the orders of learned D.J. such exercise was completed by JM on 23.8.2016. The charge sheet was then submitted before the Administrative Judge High Court of Sindh, Karachi.

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

6. 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 and claimed his false implication in the case. He neither examined himself on oath nor called any witness in support of his defense case.

7. Learned Judge, Anti-Terrorism Court-XX, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 28.07.2018, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

8. 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.

9. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the police; that the timings of the incident, FIR and post mortems indicate that this is a cooked up case; that the sole eye witness is not reliable; that the appellants confession before the police is inadmissible; that the recovery of the pistol (murder weapon) on the pointation of the appellant is of no evidentiary value; that there was an unexplained delay of 4 days in sending the empties for FSL report; that no reliance could be placed on the JIT report and for any of the above reasons the appellant was entitled to be acquitted based on this court extending him the benefit of the doubt which was his legal right. In support of his contentions he placed reliance on *Muhammad Arif v. The State* (2019 SCMR 631), *Khalid Javed and another v. The State* (2003 SCMR 1419), *Mian Sohail Ahmed and others v. The State and others* (2019 SCMR 956), *Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259* (PLD 2019 Supreme Court 488), *Mst. Rukhsana Begum and others v. Sajjad and others* (2017 SCMR 956), *Mst. Sughra Begum and another v. Qaiser Pervez and others* (2015 SCMR 1142), *Nasir Javaid and another v. The State* (2016 SCMR 1144), *Mushtaq and 3 others v. The State* (PLD 2008 Supreme Court 1), *Asad Rehmat v. The State and others* (2019 SCMR 1156), *Muhammad Asif v. The State* (2017 SCMR 486), *Province of Punjab through Secretary Punjab Public Prosecution Department and another v. Muhammad Rafique and others* (PLD 2018 Supreme Court 178), *Nazir Ahmed and another v. The State and others* (PLD 2014 Supreme Court 241), *Syed Muhammad Shah and another v. The State* (1993 SCMR 550), *Sajjan Solangi v. The State* (2019 SCMR 872), *Tariq Pervez v. The State* (1995 SCMR 1345), *Abdul Jabbar and another v. the State* (2019 SCMR 129) and *Mursal Kazmi alias Qamar Shah and another v. The State* (2009 SCMR 1410).

10. On the other hand learned DPG has contended that the prosecution has proved its case against the appellant beyond a reasonable doubt and as such the impugned judgment should be upheld and the appeal dismissed. In particular he has emphasized that the eye witness is reliable, trust worthy and confidence inspiring; that the eye witness is fully

supported by the medical evidence; that the recovery of the pistol was made on the pointation of appellant and the scene of the incident was also shown to the police on the pointation of the appellant and that there was a positive FSL report and as such the appeal should be dismissed. In support of his contentions he has placed reliance on **Hayatullah v. The State** (2018 SCMR 2092) and **Sabir Ali Waseem v. The State** (2006 P Cr.LJ 1400).

11. 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.

12. In our view after our reassessment of the evidence based on the evidence of the Police PW's including the IO, the PW MLO, post mortem reports and other medical evidence along with the car in which the deceased were shot which has bullet holes in it and was found at the scene of the incident along with the deceased who had all sustained firearm injuries we are satisfied that the prosecution has proved beyond a reasonable doubt that on 17.01.2013 at about 2.30pm at Shahra-e-Orangi near Chamch Hotel Orangi town Syed Manzoor Khan, Muhammed Sajjid, Muhammed Imran and Imran @Murad (collectively referred to as "the deceased") whilst driving a car were all shot and murdered by firearm by a targeted attack.

13. The only issue therefore, in our view, left before us is whether the appellant was one of the assassins who shot the deceased by firearm which lead to their deaths.

14. In our view after our reassessment of the evidence we find that the prosecution has **not** been able to prove 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 2.30 pm on 17.01.2013 and an FIR was lodged on 17.01.2013 at about 6.30pm by a private complainant against unknown persons for unknown reasons. Where after the police started investigating the case. After carrying out their investigation the police had not uncovered any solid evidence against any suspect so the case was disposed of in "A" class.

(b) On 21.12.2015 (almost 3 years after the incident and lodging of the FIR) PW 2 Gulzar Ahmed who was posted as SIP PS Orangi Town received information from his high ups that the appellant whilst following his detention by the Pakistan Rangers under S.11 (EEEE) ATA was now confined in Central Jail Karachi and he was ordered to interrogate the appellant. During his interrogation the appellant confessed to taking part in the target killing as mentioned in the FIR along with his accomplices and as such was arrested in that case. His confession to such serious and heinous crime which carried with it the death penalty is in our view some what implausible. Even otherwise his confession before the police is inadmissible in evidence.

(c) The key PW is PW 10 Ashfaq Ahmed who is allegedly **the sole eye witness** to the incident. He is of great significance because he also gives his statement under S.164 Cr.PC and picks out the appellant in an identification parade conducted by PW 9 Judicial magistrate Salman Amjad Siddiqui. **The prosecution case will thus to a great extent turn on whether we believe this eye witness.** In our view this eye witness is a **chance** witness who had no compelling reason to be where he allegedly was when he witnessed the incident in that he gave no evidence that he was in the ceiling business or the person he was supposed to meet at the location of the incident and thus his evidence must be considered with great care and caution. In this respect reliance is placed on **Mst Sughra Begum's case** (Supra). At about one and a half hours after the incident he came to know that Manzoor Inam had been killed in the target killing which he witnessed however he did not come forward as a witness and preferred to remain mum and did not tell a single person that he had witnessed this incident for almost 3 years. Quite incredibly, however, about 3 years later when he came to know of the arrest of the appellant in this case he came forward as an eye witness. Such conduct does not appeal to natural human conduct. In this respect reliance is placed on **Mst Rukhsana Begum's case** (Supra). This means that his S.161 statement was recorded **nearly 3 years after** the incident. It is well settled by now that little, if any, reliance can be placed on a S.161 statement given by an eye witness almost 3 years after allegedly witnessing an incident. In this respect reliance is placed on **Muhammed Asif's case** (Supra). In his S.161 statement he gives no hulia of the appellant which begs the question as to how he was able to pick him out at an Identification parade. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524)). As he admits in his own evidence the area was in a total panic and terror once the incident started and people were running hear and there and in such a chaotic environment it is difficult to believe that the eye witness got more than a fleeting glance of the appellant as he himself would have been terrified, panicked and seeking to escape the scene. Furthermore, in is evidence in chief **he claims to be illiterate** and yet during his cross examination he gives evidence that **he came to know about the arrest of the appellant by reading the news telecasted in a T.V channel.** Thus, for the reasons mentioned above we do **not** find the evidence of this eye witness to be reliable, trust worthy or confidence inspiring and we do **not** believe the evidence of this eye witness who we consider to be a put up witness and as such his evidence is discarded by us.

(d) Having disbelieved the evidence of this eye witness it follows that we disbelieve his S.164 Cr.PC statement which was made 3 years **after** the incident and also contains overwriting.

(e) Having disbelieved the evidence of this eye witness it follows that we also place no reliance on his identification of the appellant at the identification parade especially as the identification parade took place 3 years **after** the incident, **that he gave no hulia of the appellant at the time of the incident**, that initially the identification parade was disallowed because the magistrate was of the view that the witness had seen the accused whose face was unmuffled and such identification parade was only allowed after a successful revision application. Furthermore, we have also noted that the identification parade was not carried out in accordance with the guidelines as laid down in the case of **Kanwar Ali** (Supra) and as such in any event his evidence cannot be safely relied upon.

(f) Turning to other circumstantial evidence. The appellant taking the police to the place of the incident is irrelevant as the police already knew where the incident took place.

(g) With regard to the pistol (the alleged murder weapon) being recovered on the pointation of the appellant we note that no diary entry was made by the police indicating that they were leaving the PS with the appellant who would take them to the given location in order to recover the pistol and as such this recovery is inconsequential especially as it was kept in a place where others had access to it for over 3 years.

(h) The empties were sent for FSL after a delay of 4 days but even then there was no murder weapon for them to be matched with. Before being sent to FSL and after being returned from FSL there is no evidence that the empties were kept in safe custody. Furthermore, it is somewhat surprising that the pistol even worked and was not rusted having been kept out in the open for over 3 years albeit in a polythene bag. Thus, we place no reliance on the positive FSL report. Reliance is placed on **Asad Rehmat's case** (Supra)

(i) It does also not appeal to reason that a person would retain a murder weapon used in a particularly heinous high profile crime. Logic, common sense and natural human conduct would dictate that you got rid of such weapon so that neither it nor you could be connected to the crime through its recovery. This is more so since weapons are easily available in Karachi for such replacement. Reliance is placed on **Mst Rukhsana Begum's case** (Supra).

(j) As to the JIT report it is of no evidentiary value and can at best be considered as a report under S.173 Cr.PC. In this respect reliance is placed on **Province of Punjab V Muhammed Rafique** (PLD 2018 SC 178)

15. Based on the above discussion and keeping in view the case of **Tariq Pervez V The State** (1995 SCMR 1345) which held that if there is a

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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.

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

Arif