IN THE HIGH COURT OF SINDH, KARACHI

SPL. CRIMINAL A.T.A. NO.306 OF 2018.

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio,

Appellant:	**Syed Aijaz Shah Qadri S/o. Syed Qasim Qadri through Mr. Muhammad Jamil, Advocate.**
Respondent:	**The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General.**
Date of hearing	**13.01.2022.**
Date of Announcement	**18.01.2022.**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Syed Aijaz Shah Qadri S/o. Syed Qasim Qadri has preferred the instant appeal against the judgment dated 13.10.2018 passed by Learned Anti-Terrorism Court No.XVIII, Karachi in Special Case No.108/2013 arising out of Crime No.11/2006 u/s. 302, 324, 353, 186, 332, 109, 34 PPC read with section 7 of ATA, 1997 registered at Gizri Police Station, Karachi and Special Case No.109/2013 arising out of Crime No.07/2006 u/s. 13-E Arms Ordinance,1965 registered at Frere Police Station Karachi whereby the appellant was convicted and sentenced as under:-

1) Twice sentenced to life imprisonment for causing death of deceased ASI Muhammad Arif and HC Nadeem under section 302 PPC as well as he shall pay an amount of Rs.10,00,000/- as fine, and if such fine is recovered from the accused the same shall be distributed to legal heirs of both deceased equally as compensation as provided under section 544-A Cr.P.C. in default thereof, he shall further undergo S.I. for six months.

2) Sentence for Life Imprisonment for committing offence under section 7(a) of ATA, 1997.

3) Sentence R.I. for two years for committing offence under section 353 PPC.

4) Sentence R.I. for five years and fine of Rs.10,000/- in default thereof, he shall further undergo S.I. for three months for committing offence u/s 7-(h) Anti-Terrorism Act 1997.

5) Sentence R.I. for seven years and fine of Rs.10,000/- in default thereof he shall further undergo S.I. for three months for committing offence under section 324 PPC.

6) Sentence R.I. for ten years and fine of Rs.10,000/- in default thereof he shall further undergo S.I for three months for committing offence under section 7(b) of ATA, 1997 for attack on police party to endanger the life of PC Malik Khalid.

All the sentences were ordered to be run concurrently. Benefit of section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case as alleged in the FIR are that on 05.01.2006 complainant SP Muhammad Aslam, I/C CIA reported through written application under section 154 Cr.P.C, alleging therein that on the relevant day at about 1610 hours he departed from his home in a government police mobile No.SP-6334 along with ASI Muhammad Arif, HC Nadeem Akhtar and PC Malik Khalid for his office. When they reached at Street No.14, Punjab Colony, where one silver Alto Car No.AGR-185 was already available. On seeing police party four suspects loaded their Kalashnikovs, as such the complainant ordered his subordinates to load their arms. In the meanwhile accused started indiscriminate firing on the complainant party with intention to commit their murder, however, the police party also retaliated in self-defence. In consequence of encounter ASI Muhammad Arif and HC Nadeem Akhtar sustained firearm injuries in their heads, therefore, they were seriously wounded, while PC Malik Khalid also received firearm injury on his leg. The complainant saw that ASI Muhammad Arif and HC Nadeem had died at the spot. The local police also arrived there. It is asserted that since 9 months he is engaged in Lyari operation against anti-State elements as well as groups of Lyari Gang war, therefore, he suspects that this incident was the outcome of enmity with the said criminals or on their behalf by other persons. Accordingly written application as well as entry No.21 of daily roznamcha was incorporated in the book of 154 Cr.P.C. kept at P.S being instant FIR. However, a separate FIR bearing Crime No.7/2006 under section 13(e) Arms Ordinance 1965, was registered at Police Station Frere by S.I. Muhammad Rasheed, when four Kalashnikovs, ten load magazine, 236 live bullets, 39 empties, one dagger (Churra) were recovered from abandoned car No.AGR-185, Maker Suzuki Alto of silver colour, therefore, after the recovery of

above arms and ammunition FIR of offshoot case was registered against unknown accused.

3. After registration of the FIRs and after completion of usual investigation I.O. submitted charge sheet against the accused person.

4. The prosecution in order to prove its case examined 15 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed that he had been abducted by the rangers from his house and then falsely implicated by the police in this case. In support of his defence case he produced 2 DW's who exhibited various documents.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated above, hence, the appellant has filed this appeal 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 dated 13.10.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and that he has been falsely implicated in this case by the police; that the eye witnesses are put up witnesses and were not present when the incident took place and as such there evidence cannot be believed; that his confession before the police is inadmissible in evidence; that no recovery was made from him 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 has placed reliance on the cases of **Muhammad Yasin vs. The State** (NLR 2003 Criminal 428), **Muhammad Saleem vs. The State** (NLR 1985 UC 208), **Asghar Ali alias Sabah and others vs. The State and others** (1992 SCMR 2088), **Saidullah vs. The State** (PLD 1994 Karachi 122), **Khadim Hussain vs. The State** (1985 SCMR 721), **Mah Gul vs. The State** (2009 SCMR 4), **Mehmood Ahmad and 2 others vs. State** (PLJ 1995 SC 1), **Ghulam Rasul and 3 others vs. The State** (1988 SCMR 557), **Zahid Hussain vs. Ajeeb & others** (SBLR 2019 FSC 1), **Javed Khan alias Bacha and another vs. The State and another** (2017 SCMR 524), **Mian Sohail Ahmed and others vs. The State** (2019 SCMR 956), **Sabir Ali**

alias Fauji vs. The State (2011 SCMR 563), **Azhar Mehmood and others vs. The State** (2017 SCMR 135), **Noor Islam vs. Ghani ur Rehman and another** (2020 SCMR 310), **Muhammad Pervez and others vs. The State and others** (2007 SCMR 670), **Dadan alias Allahdad vs. The State** (1999 CrLJ 589), **Ejaz Ahmad @ Fooji etc. vs. The State in Criminal Appeal No.327 of 2005, Muhammad Farooq vs. The State in Criminal Appeal No.339 of 2005 and The State vs. Ejaz Ahmad @ Fooji etc. in Murder Reference No.507 of 2005** (2014 CrLJ 475), **Qaiser and 2 others vs. The State** (2017 PCr.LJ 327), **Farman Ahmed vs. Muhammad Inayat and others** (2007 SCMR 1825), **Muhammad Nadeem alias Banka vs. The State** (2011 SCMR 1517), **Naveed Anjum alias Naveed Hussain vs. The State and another** (2014 PCr.LJ 93), **Sarfraz alias SAFU and others vs. The State** (2017 YLR Note 220), **Muhammad Wali Shah and another vs. State and another** (2017 PCr.LJ 779), **Qazi alias Dost Muhammad and another vs. The State** (2014 PCr.LJ 611), **Abdul Jabbar and another vs. The State** (2019 SCMR 129), **Shafiq-ur-Rehman vs. The State** (SBLR 2018 Sindh 779), **Mst. Marvi Bhatti vs. The State** (2018 MLD 1329), **Muhammad Sharif Shar vs. The State** (2000 PCr.LJ 1882), **Ghulam Qadir and 2 others vs. The State** (2008 SCMR 1221), **Mst. Rukhsana Begum and others vs. Sajjad and others** (2017 SCMR 596), **Muhammad Arshad Kiani vs. The State and others** (2018 YLR 1002), **Muhammad Idrees vs. Collector of Customs and others** (PLD 2002 Karachi 60), **Khalid Javed and another vs. The State** (2003 SCMR 1419), **Rehmatullah and another vs. The State** (2005 PCr.LJ 60), **Raja Zahid Hussain vs. The State in Criminal Appeal No.22-E of 2004, Abdul Nadeem Khan vs. Chairman NAB & another in Criminal Appeal No. 23-E of 2004, Sh. Muhammad Amin vs. Chairman NAB & another in Criminal Appeal No.24-E of 2004, Abdul Hayee Qamar vs. The State in Criminal Appeal No.25-E of 2004, Qazi Naeem Ahmad vs. The State in Criminal Appeal No.26-E of 2004, Padri Sharif Alam vs. The State in Criminal Appeal No.27-E of 2004** (2012 CrLJ 505), **Rajab Ali vs. The State and others** (2018 YLR 809), **Syed Anwar Badshah vs. Chairman, National Accountability Court, Islamabad and 2 others** (2013 PCr.LJ 1607), **Imran alias Dully and another vs. The State and others** (2015 SCMR 155), **Nasir Javaid and another vs. The State** (2016 SCMR 1144), **Allah Bakhsh vs. State** (PLJ 2015 Cr.C. Lahore 148) and unreported cases of **Muhammad Shoaib alias Shahoo vs. The State** in Special Criminal A.T.A. No.62 of 2021 and **Fahad Bin Shakeel alias Bandoo vs. The State** in Special Criminal A.T.A. No.63 of 2021 passed by Division Bench of this Court.

8. On the other hand learned Additional Prosecutor General appearing on behalf of the State has fully supported the impugned judgment and submitted that the appeal is without merit and should be dismissed.

9. We have heard the arguments of the learned counsel for the appellant as well as learned APG, gone through the entire evidence which has been read out by learned counsel for the appellant along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the medical evidence, the medical reports and certificates, recovery of empties at the scene, we find that the prosecution has proved beyond a reasonable doubt that on 15.01.2006 at about 16.10pm at Street No.14 Punjab Colony persons got out of an alto car silver in colour and made straight fire on a police party headed by Muhammed Aslam Choudhry (SSP) with intention to kill the police party and as a result of such firing ASI Muhammed Arif and HC Nadeem Akhtar (collectively referred to as the deceased) were injured by firearm and died on the spot as a result of such firearm injuries and that PC Malik Khalid received a fire arm injury.

11. The only question left before us therefore is who engaged in the encounter with the police and who seriously injured the deceased by firearm which lead to their deaths (murder) at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) No doubt the FIR was registered with promptitude by the complainant SP Muhammed Aslam Khan who was present at the time of the incident which left no time for the police to cook up a false case against the appellant. Had the complainant wanted to falsely implicate the appellant he could have named him in the FIR. Instead the FIR is against unknown terrorists of Lyari gang war. He also states in his FIR that PC Malik Khalid can identify the terrorists along with people on the spot. PC Malik Khalid appeared as PW 14 and supported the contents of the FIR lodged by the complainant who was unable to give evidence as he had expired. We will discuss the evidence of PW 14 Malik Khalid later in this judgment.

(b) In our view the prosecution's case rests on the reliability of the evidence of the eye witnesses and in particular their ability to correctly identify the appellant as one of the accused who fired on the police party

during the encounter and caused the death of the deceased and as such we shall consider such eye witness evidence in detail as set out below;

(i) That the challan was filed in "A" class one year after the incident and in that challan none of the so called independent eye witnesses are mentioned (PW 8 Shamshad Ahmed and PW 9 Ali Muhammed) which in our view castes doubt on how and why the so called independent eye witness popped up a number of years later to appear before an identification parade of the appellant especially as even in their own evidence they did not say that they recorded their S.161 Cr.PC statements on the spot but only apparently gave their names and contact details to the police.There names were also not mentioned in the FIR.

(ii) **Eye witness PW 8 Shamshad Ahmed**. According to his evidence on 15.01.2006 he left his home in Bath Island at about 2pm to do some shopping at Delhi Colony and after making such purchases he met his friend PW 9 Ali Muhammed at a bus stop at Punjab Chowrangi where they witnessed the encounter between the culprits and the police at about 4pm.He saw the culprits after making fire leave the scene of the incident in two cars.He stated that two police officers received fire arm injury as well as SP Chaudhry Aslam. He did not know if the police officers died as he left the scene. According to his evidence in chief he states that the police recorded his statement and he also gave them his address and phone number whilst in his cross examination he states that he only gave his name and address to the police without mention of any statement and thus it is doubtful when he gave his S.161 Cr.PC statement (if at all). On 03.10.13 he picked out the appellant from an identification parade as one of the persons who fired on the police party.

We find this eye witness to be a chance witness especially as he does not mention in his evidence that he had arranged to meet PW 9 Ali Muhammed who was his old friend and he indicates that he met him by chance at a bus stop for a chat whereas PW 9 Ali Muhammed states that he called this eye witness and arranged to meet him for a chit chat. If this is so why did this eye witness not go to PW 9 Ali Mohammed's house for tea and a chit chat or meet in a café rather than at a bus stop on a busy street where in his own evidence he states that there was no peaceful area where they could stand and have a chit chat. This circumstance creates doubt in his evidence that he was even present. If he gave his S.161 Cr.PC statement at all there is no mention of any hulia or description of the appellant's features. Although it was a day time incident it is unknown how far away from the incident he was or whether he could get any kind of clear and unobstructed view of the faces of the person's who carried out the firing on the police especially as he was on a busy road and the public were running here and there out of fear and he also ran for cover. He allegedly identified a person who he did not know from before who he only saw a fleeting glimpse of at a chaotic moment before an identification parade held over 7 years later when the appellant who was in police custody for nearly 3 weeks claimed that he had been earlier shown to the witness by the police. He also stated in his evidence

that SP Muhammed Aslam had been injured by the firing which was not the case.

The witness might not have had any enmity with the appellant or any reason to falsely implicate him in this case however based on the reasons mentioned above and the particular facts and circumstances of this case we find that even if the eye witness was present at the time of the incident he would not have been able to correctly, safely and reliably identify the appellant especially after a lapse of nearly 7 years since he allegedly witnessed the incident without giving any hulia.

In this respect reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524) concerning the necessity for an early hulia/description of an accused by an eye witness before an identification parade and the need to strictly follow the rules governing identification parades where it was held as under at P.528 to 530:

"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. ***As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted.*** *In Ramzan v Emperor (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that,* ***"The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases"*** *(page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that,* ***"Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier"*** *(page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court,* ***held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case"*** *(page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that,* ***it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible"*** *(page 485P).*

8. The Complainant **(PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after**

over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect....

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) AND Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential." (bold added)

The recent supreme court case of **Mian Sohail Ahmed V State** (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified. In fact such extra care and caution in relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

(iii) **Eye witness PW 9 Ali Mohammed**. Gave similar eye witness evidence as eye witness PW 8 Shamshad Ahmed. The same considerations apply to him as to eye witness PW 8 Shamshad Ahmed. This is more so since although he identified the appellant at the identification parade about 7 years after the incident he was unable to identify him in court only 5 years after the identification parade which raises doubt about his identification of the appellant at the identification parade in the first place.

(iv) **Eye witness PW 14 Malik Khalid**. He was the driver of the police mobile at the time of the incident. In his evidence he narrated the incident as per the FIR in which he was named as witness and as such we believe his presence at the scene and his evidence with regard to the incident. He gave his S.161 Cr.PC eye witness statement on the same day and there are no material improvements in the same. He was named in the promptly

filed FIR as a person who could recognize the terrorists **however we find that we cannot rely on him as having correctly and safely identifying the appellant as one of those persons who fired upon the police party and caused the death of the deceased.** This is because although he gave his S.161 eye witness Cr.PC statement on the same day he gave no hulia or description of the appellant which he being a serving policemen must have known was essential in such cases where the accused was not previously known to him or arrested on the spot.It is unclear how far away he was from the appellant during the incident but it must have been more than 3 feet as there was no blackening on the wounds of the deceased as per the medical evidence. At best he would have only got a fleeting glance at the appellant in a chaotic situation where he was slightly wounded and apparently passed out after being shot. In explicably he was not called to attend the identification parade and his identification of the appellant in court 13 years after the incident cannot be safely relied upon especially as the superior courts have deprecated in court identification even after a short passage of time in respect of unknown assailants let alone 13 years.

Thus, having found that the eye witnesses would not have been able to correctly, safely and reliably identify the appellant after a lapse of 7 and 13 years respectively of the incident the conduct of the identification parade becomes in consequential.

(c) With no eye witness evidence to the murders the medical evidence becomes inconsequential as it can only reveal how the deceased died, what kind of weapon was used and the seat of the injuries. It cannot identify the person who inflicted the injuries.

(d) It is notable that the appellant confessed to the offence whilst in police custody. Confessions before the police are inadmissible in evidence and thus we place no reliance on such confession. Even other wise, it does not appeal to logic, reason or commonsense that a person behind bars who there was no any evidence against would confess to an offence which carried the death penalty. The appellant's confession was also not recorded before a magistrate despite the appellant being taken before a magistrate for an identification parade.

(e) The appellant taking the police to the place of wardat and where the car was abandoned is irrelevant as the police already knew where the place of wardat was and had already found the abandoned car and there is no evidence to link the appellant to the abandoned car.

(f) No weapon was recovered from the appellant as such the recovery of any empties at the crime scene and any FSL report is irrelevant and does not connect the appellant to the commission of the offence.

(g) Having found that the prosecution was not able to correctly and safely identify the appellant as one of the persons who fired on the police party and murdered the deceased it follows that he can also not be convicted of his involvement in any encounter with the police in which the deceased was killed.

(h) That according to the FIR the incident was carried out by terrorists involved in the Lyari gang war however there is no evidence that the appellant was involved in that gang war.

(i) The appellant has raised the defence that he was picked up by the rangers on 06.09.2013 from his house and thereafter was falsely implicated in this case and other cases. He produced two DW's in support of his defence case who filed a C.P. in the Sindh High Court concerning his alleged abduction whereby in their comments the police disclosed that he had been arrested on 12.09.2013 as opposed to 24.09.2013 in FIR 659/2013 u/s 353/324/427/34, FIR 660/2013 u/s S.23 (a) (i) SAA and FIR 661/2013 u/s 4/5 Explosive Substances Act all lodged at PS CTD Karachi. At trial the appellant was acquitted of all offences under these 3 FIR's and in so doing the trial court placed heavy reliance on the defence plea of the appellant's abduction and false implication by the rangers/police in these cases. Keeping in view that the same defence evidence was lead in this case which has been largely believed in another trial which lead to the acquittal of the accused we cannot ignore the defence case out of hand and therefore give some weight to it when placed in juxtaposition with the prosecution case especially as all documents relied upon by the defence were exhibited at trial which leads to doubt in the prosecution case.

13. That the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

> *"It is settled law that it is not necessary that there should be many circumstances creating doubts. 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."*

14. For the reasons discussed above by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed and the appellant shall be released unless wanted in any other custody case.

15. The appeal stands disposed of in the above terms.