

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

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

SPL. CRIMINAL A.T. APPEAL NO.217 OF 2020  
CONFIRMATION CASE NO.02 OF 2021

Appellant:	Muhammad Ishaque alias Bobi alias Hussain son of Muhammad Ibrahim through Mr. Hashmat Khalid, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.
Date of Hearing:	09.05.2022
Date of Announcement:	16.05.2022

### JUDGMENT

**Mohammad Karim Khan Agha, J.** Appellant Muhammad Ishaque alias Bobi alias Hussain was charge sheeted to face his trial in Special Case No.39 of 2017 (New Special Case No.225 of 2019) arising out of FIR No. 157 of 2014 under section 302/34 PPC registered at PS Gulshan-e-Iqbal, Karachi. The appellant was convicted vide impugned judgment dated 21.12.2020 passed by the learned Judge, Anti-Terrorism Court No.XVI, Karachi whereby he was awarded following sentences:

- a) For causing death of the deceased Advocate Waqar Nadeem Shah, punishable under section 302 r/w 34 PPC the present accused Muhammad Ishaque @ Bobi @ Hussain s/o Muhammad Ibrahim is sentenced to death subject to confirmation by this court;
- b) For causing death of the deceased Advocate Waqar Nadeem Shah, punishable under section 7(a) of the Anti-Terrorism Act, 1997, the present accused Muhammad Ishaque @ Bobi @ Hussain s/o Muhammad Ibrahim is sentenced to death subject to confirmation by this court;
- c) For the act of terrorism committed by the accused, punishable u/s 7(1)(h) of Anti-Terrorism Act, 1997, the accused is hereby also sentenced to undergo RI for (10) ten years, and to pay fine of Rs.50,000/- (fifty thousand).
- d) The accused is directed to pay an amount of Rs.2,00,000/- (two lacs) to the legal heirs of deceased as compensation, as provided under Section 544-A Cr.P.C. and in default of such payment the accused shall undergo SI for six months.



e) The property of the accused is directed to be forfeited as required u/s 7(2) of Anti-Terrorism Act, 1997.

However, the benefit of Section 382-B Cr.P.C. is extended to the appellant.

2. The brief facts of the prosecution case arising out of FIR No.157/2014 lodged by complainant Raees-ul-Hassan are, that he was residing with his son Waqar Nadeem Shah Advocate in House No.FL/8-1/B, Gulshan-e-Iqbal, Karachi. On 10.04.2014 his driver came to his house with shouting that while Waqar Nadeem Shah was going to his office in car No.AUD-550 Toyota Corolla black colour with his driver Zahoor and reached at Excellency Beauty Parlour, Shabbir Ahmed Usman road, Karachi, four unknown accused persons opened fire upon him, resultantly he received serious firearm injuries as informed by driver Zahoor. Accordingly his younger son Kashif took him to Ibn-e-Seena Hospital where his son Waqar Nadeem Shah was declared dead, accordingly the FIR was registered against unknown accused persons for the above crime.

3. After thorough investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and stated that he was implicated in this case falsely with malafide intention.

4. The prosecution in order to prove its case examined 09 PWs and exhibited various documents. The statement of accused person was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He did not give evidence on oath or call any DW in support of his defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. 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 21.02.2020 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 there is no evidence against him except the sole eye witness whose evidence cannot be safely relied upon in terms of identifying the appellant as the person who fired upon the deceased especially as the identification parade was carried out



after a period of two years and the identification parade was not conducted in accordance with the law; that his confession before the police was of no evidentiary value; that no recovery was made from him and thus for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Hayatullah vs. The State** (2018 SCMR 2092), **Noor Islam vs. Ghani ur Rehman and another** (2020 SCMR 310), **Gulfam and another vs. The State** (2017 SCMR 1189), **Muhammad Akram vs. The State** (2009 SCMR 230), **Fazal Subhan and another vs. The State** (2019 SCMR 1027), **Manzar ullah vs. Asghar and 3 others** (2018 YLR 1508), **Muhammad Ali vs. The State** (PLD 2012 Sindh 272), **Faisal Aleem vs. The State** (PLD 2010 Supreme Court 1080), **Shafqat Mehmood and others vs. The State** (2011 SCMR 537), **Alim vs. The State** (PLD 1967 Supreme Court 307), **Lal Pasand vs. The State** (PLD 1981 Supreme Court 142), **Province of Punjab through Education Secretary and another vs. Mufti Abdul Ghani** (PLD 1985 Supreme Court 1), **Muneer Ahmad and another vs. The State** (1998 SCMR 752), **Mian Sohail Ahmed and others vs. The State and others** (2019 SCMR 956) and **Tariq Pervez vs. The State** (1995 SCMR 1345).

8. On the other hand, learned Addl. Prosecutor General Sindh has fully supported the impugned judgment and has in particular contended that the sole eye witness has correctly identified the appellant as being the person who fired on and murdered the deceased and his identification evidence could be safely relied upon especially as he picked out the appellant from an identification parade with a specific role; that empties were recovered at the scene along with blood from the car in which the appellant was shot and the car itself; that the medical evidence fully supported the eye witness evidence and as such the prosecution had proved its case against the accused beyond a reasonable doubt and as such his appeal should be dismissed. In support of his contentions, he placed reliance on the cases of **Muhammad Ismail vs. The State** (2017 SCMR 713), **Islam Sharif vs. The State** (2020 SCMR 690), **Muhammad Zaman vs. The State** (2007 SCMR 813), **Farooq Khan vs. The State** (2008 SCMR 917), **Sajid Sohail vs. The State** (2009 SCMR 356), **Khadim Hussain vs. The State** (PLD 2010 Supreme Court 669), **Muhammad Ehsan vs. The State** (2006 SCMR 1857) and **Solat Ali Khan vs. The State** (2002 SCMR 820).

9. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and have gone through the



entire evidence which has been read out by learned counsel for the appellant, and the impugned judgment with the able assistance of learned counsel and have considered the relevant law including the case-laws cited at the bar.

10. Based on our reassessment of the evidence of the PW's especially the medical evidence and other medical reports including the post mortem report of the deceased, recovery of empties and blood and car which the deceased was shot inside of at the crime scene we find that the prosecution has proved beyond a reasonable doubt that Waqar Nadeem Shah (the deceased) was shot and murdered by firearm on 10.04.2014 at about 0835am near Excellency beauty parlor Block 07, Gulshan-e-Iqbal, Karachi.

11. The only question left before us therefore is who murdered the deceased by firearm at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant except under the ATA for he was convicted for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances;

(a) That the FIR was lodged after a delay of one day. The reason for the delay in lodging the FIR was that the complainant had to receive the dead body of the deceased at the hospital after its postmortem and then arrange its burial and thereafter the FIR was lodged. We find it quite natural that when a father's son is murdered he would be in great shock and grief and his first priority would be attending to his son's funeral as in this case there after the FIR was immediately lodged. As such any delay in lodging the FIR has been fully explained. **Importantly** the FIR is against unknown persons and as such there was no attempt to falsely implicate the accused or any other person or else the accused would have been specifically named in the FIR. **Furthermore**, the complainant had no enmity with the accused and had no reason to falsely implicate him and as such we find that the delay in lodging the FIR is not fatal to the prosecution case as the delay has been explained, the accused was not nominated in the FIR and as such the delay in filing the FIR has not benefited the prosecution or prejudiced the accused. In this respect reliance is placed on **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872)

(b) We find that the prosecution's case primarily rests on the sole eye witness to the murder of the deceased and in particular his correct identification of the appellant as the person who shot and murdered the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 4 Zahoor Ahmed. He was the driver of the deceased in his black colour corolla.** According to his evidence as per his routine he reached the home of the deceased at



0745am and dropped the deceased's son at school and then returned to the home of the deceased about 20 minutes later. The deceased got in the car at his home and they proceeded to court. After about one and half minutes of leaving the deceased's house a cycle rickshaw came in his way which caused him to slow down and then firing commenced. **He saw at the back seat that the deceased had received 3/4 fire shots by one person who he saw firing at the deceased.** The total accused were four. He reversed back to the deceased home where the deceased's brother boarded the car which he then drove to the hospital where the deceased was pronounced dead.

The witness was not a chance witness as he was the driver of the accused who came to drive him to court and as such was a natural witness as corroborated by PW 2 Rais-ul Hasan who was the complainant in the case and the father of the deceased. He is named in the FIR. He gave his S.161 Cr.PC eye witness statement within a day of the incident and there have been no material improvements in it from his evidence. He was not related to the deceased and was an independent witness who had no reason to falsely implicate the accused. **It was a day light incident and as the firing was from close range the witness would have gotten a good look at the accused for a reasonable period of time.** He picked out the accused at an identification parade with a specific role about 2 years after the incident as corroborated by PW 1 Imtiaz Ali who was the judicial magistrate who conducted the identification parade about 12 days after the arrest of the accused which delay has been explained in the evidence. Even otherwise the slight delay in holding the identification parade is not of much consequence and in this respect reliance is placed on the case of **Muhammad Zaman v. The State** (2007 SCMR 813). Although two years might seem quite a long time it transpires from the evidence **that the eye witness was constantly in contact with the police after the incident and looking at photo's of potential suspects as according to him he could recognize the accused if he saw him again** and as such based on the particular facts and circumstances of this case we do not find the two year lapse between the incident and the identification parade to be of much consequence. In this respect reliance is placed on the case of **Solat Ali Khan** (Supra). We also find that all procedural requirements were in place during the identification parade. The eye witness gave his evidence in a natural and straightforward manner and emerged undented from a lengthy cross examination and as such we have no reason to doubt his evidence.

Thus, for the reasons mentioned above, whilst being on caution, we find the evidence of the eyewitness to be reliable, trustworthy and confidence inspiring and we believe the same **especially with regard to the correct identification of the appellant as the person who shot and murdered the deceased** and can convict on the evidence of this eye witness alone though it would be of assistance by way of caution if there is some corroborative/ supportive evidence. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State** 9



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and another (2011 SCMR 725) and **Muhammed Ismail** (supra). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this sole eye witness to be of good quality and believe the same **especially** in terms of the correct identification of the accused who fired on and murdered the deceased.

Thus, based on our believing the evidence of the PW eyewitness especially in terms of him correctly identifying the appellant as the person who murdered the deceased what other supportive/corroborative material is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(c) That the medical evidence and medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased was hit at least 3 times by firearm bullets and in most cases in the head as deposed by the PW eye witness Zahoor Ahmed.

(d) That the car which was recovered by the police was the car which was driven by the driver (eye witness **PW 4 Zahoor Ahmed**) and in which the deceased was shot in which as per exhibited photographs had bullet marks and also had blood stains inside which lead to a positive chemical report and empties were also recovered from the spot.

(e) That it does not appeal to logic, commonsense or reason that a father would let the real murderer of his son get away scott free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammed Ashraf V State** (2021 SCMR 758)

(f) Most of the relevant police entries have been exhibited concerning the shooting and murder which fully support the prosecution's case.

(g) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon and as such we rely on the police evidence. In this respect reliance is placed on **Mushtaq Ahmed V The State** (2020 SCMR 474).

(h) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the driver taking the deceased to court to the deceased being fired upon whilst he was in the car to the eye witness seeing and recognizing the accused as the person who he saw firing upon the deceased then to deceased being pronounced dead on arrival in hospital due to firearm injuries to the



arrest of the accused to the identification of the accused before the identification parade.

(i) That the appellant was already under arrest in a similar type case which indicates that he had a propensity to commit such like crimes.

(j) The fact that no pistol was recovered from the accused is irrelevant as when he confessed he was already in custody in another case so he would have got rid of the murder weapon before he was arrested in the other case.

(k) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is simply one of false implication by the police. The appellant did not give evidence on oath and did not produce any DW in support of his defence case or produce any other evidence which could dent the prosecution case. Thus, for the reasons mentioned above we disbelieve the defence case as an afterthought in the face of a reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

13. Thus, based on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eyewitness evidence and other corroborative/supportive evidence mentioned above, we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and hereby maintain his convictions and sentences **except** with regard to the ATA offences for which he is acquitted for the reasons set out below.

14. We do **not** find that this case falls within the purview of the ATA as defined by a larger bench of the Supreme Court in the case of **Ghulam Hussain V State** (PLD 2020 SC 61) where in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of such act. Whether people were terrorized as a by product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Based on the particular facts and circumstances of this case it appears that the offence was simply a murder by way of target killing which had no object, intent, purpose or design to create terror and as such the appellant is acquitted of all offences under the ATA.

15. With regard to sentencing in the case of **Ghulam Mohy-ud-din V State** (2014 SCMR 1034) it was held that where the prosecution had proved its case beyond a reasonable doubt in a capital case where there were some very **minor** doubts but not sufficient to prevent the prosecution from discharging



its burden of proof, as in this case, where the alternate sentence of life imprisonment is available based on the particular facts and circumstances of each case it is some times preferable to preserve life as we find in this case and as such reduce the death sentence handed down to the appellant to RI for Life.

16. As such the appellant is convicted **only** under 302 (b) PPC r/w 34 PPC and sentenced to RI for life with the confirmation reference being answered in the negative. However he shall be liable to pay the legal heirs of the deceased RS 200,000 u/s 544-A Cr.PC and in default of such payment the accused shall undergo SI for six months. He shall however have the benefit of S.382 (B) Cr.PC and any remission available to him under the law now that the appellant has been acquitted of the ATA offences.

17. The appeal is partly allowed in respect of the ATA offences and dismissed in respect of the PPC offences **except** as modified above in terms of sentencing and the confirmation reference is answered in the negative.

18. The appeal is disposed of along with confirmation reference in the above terms.