

CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Spl. ATA no. 01 of 2021

Javed Akhtar @ Baba Vs The State

HIGH COURT OF SINDH

Composition of Bench.

D.B.

Mr. Justice Muhammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

Dates of hearing: 30-08-2022

Decided on : 01-09-2022

(a) Judgment approved for Reporting

Yes

KAgL

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/. Over-rules/ reverses/ explains a previous decision.

\* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

IN THE HONOURABLE HIGH COURT OF SINDH AT  
KARACHI

Cr.Anti Terrorism Jail Appeal No. 8/1 2020

Javed Akhter @ Baba  
S/O Muhammad Mureed  
Presently Confined at  
Central Prison at Karachi -----Appellant

**VERSUS**

The State -----Respondent

FIR NO.32/2019  
U/S:302/396/34 PPC  
P/S:Soldier Bazar

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

Being aggrieved and dissatisfied with the Impugned Judgment Dated:23-11-2020 passed by learned VIII Anti-Terrorism Court at Karachi in Spl.C. No.33/2020 in FIR No.32/2019 U/S:302/396/34 PPC R/W Section 7 ATA, P.S. Soldier Bazar, That this Honourable Court kindly set a side Judgment on consideration of following facts and grounds:-

**"True Copy of Judgment is enclosed and marked as annexure A".**

**CONTD....P/2**



**IN THE HIGH COURT OF SINDH, KARACHI**

*Present:*

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

**SPL. CR. A.T. JAIL APPEAL NO.01 OF 2021.**

Appellant: Muhammad Jawed Akhtar s/o  
Muhammad Mureed through Mr.  
Muhammad Farooq, Advocate.

Respondent: The State through Mr. Muhammad  
Iqbal Awan, Additional Prosecutor  
General Sindh.

Date of Hearing: 30.08.2022

Date of Judgment: 01.09.2022.

**JUDGMENT**

*Mohammad Karim Khan Agha, J:-* The appellant Muhammad Jawed Akhtar son of Muhammad Mureed was tried before the Anti-Terrorism Court No.VIII, Karachi in New Special Case No.204 of 2019 (Special Old Case No.33 of 2020) pursuant to FIR No.32 of 2019 u/s.302/396/34 PPC r/w Section 7 ATA, 1997 registered at Police Station Soldier Bazar, Karachi and vide judgment dated 23.11.2020 the appellant was convicted and sentenced for Imprisonment for life u/s.7(1)(a) of ATA, 1997 with fine of Rs.5,00,000/-and in case of failure to pay fine, the accused would undergo one year more imprisonment in addition to the main sentence. However, the appellant was granted the benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution case as per F.I.R. are that on 21.01.2019 ASI Muhammad Khan received information about target killing of a person through PC Muhammad Akram and reached to the place of occurrence at Nishtar Road, opposite Kachra Kundi, Near Abu Ubaid Masjid, Garden East, Karachi and upon reaching there he found one expired person who was wearing traffic police uniform. From his pocket, police secured one wallet and one police card. On inquiry his name was found to be constable Ehtisahm s/o Muhammad Irfan. He secured two empties from the spot and took the deceased to Civil Hospital through Chipa Ambulance. After reaching Civil Hospital I.O. wrote letter to MLO Jawed Memon for proceeding under Section 174 Cr.P.C. After

obtaining permission of MLO, I.O. completed proceeding u/s. 174 Cr.P.C. in presence of uncle of the deceased namely Tahir Ahmed Niaz and his cousin Yameen s/o Ghayas Ahmed. The FIR was lodged on the same day.

3. After completion of investigation I.O. submitted charge sheet against the accused to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 8 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 false implication. He did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier in this judgment and hence, the appellant has filed this appeal against his conviction and sentence.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment 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 has been falsely implicated in this case by the police in order to show their efficiency; that the sole eye witnesses evidence cannot be safely relied upon and even the appellant's identification parade was legally defective; that no recovery was made from the appellant and his alleged confession before the police is inadmissible in evidence and that for any or all of the above reasons the accused should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Nazir Ahmed v. Muhammad Iqbal and another** (2011 SCMR 527), **Azhar Mehmood and others v. The State** (2017 SCMR 135), **Sardar Bibi and another v. Munir Ahmed and others** (2017 SCMR 344), **State/Government of Sindh through Advocate General Sindh, Karachi v. Sobharo** (1993 SCMR 585), **Khalil v The State** (2017 SCMR 960) and **Kanwar Anwaar Ali, Special Judicial Magistrate: in the matter of Criminal Miscellaneous**



Application No.183 of 2019 in Criminal Appeal No.259 of 2018 decided on 22<sup>nd</sup> February 2019 (PLD 2019 Supreme court 488)

8. On the other hand learned APG appearing on behalf of the State has fully supported the impugned judgment and contended that the appeal is without merit and should be dismissed. He has placed reliance on the evidence on record especially that of the sole eye witness to the incident PW 7 Muhammed Afzal

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's counsel, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. At the outset based on the prosecution evidence, especially recovery of empties at the scene and medical evidence we find that the prosecution has proved beyond a reasonable doubt that on 21.01.2019 at about 0515 hours Ehtisham Ahmed (the deceased) was shot and murdered by firearm whilst near soldier bazaar Nastar Road adjacent to Trash Bin near Ubeda Masjid Garden West Karachi.

11. The only question left before us therefore is whether it was the appellant who shot and murdered the deceased 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 keeping in view that each criminal case is based on its own particular facts, circumstances and evidence.

(a) In our view the prosecution's case rests almost exclusively on the evidence of the sole eye witness to the incident and his ability to correctly identify the appellant who allegedly came on a motor bike along with others and fired on the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 7. Muhammed Afzal.** He is a rickshaw driver. According to his evidence on 21.01.2019 at about 5.15am whilst he was standing near Abu Obaida Masjid he saw three persons on motorcycle who tried to stop another motor cyclist who failed to stop where upon they opened fire on him and thereafter ran away from the scene of the offence. The police arrived and inquired about the occurrence and he told them that he was an eye witness to the incident who took his particulars and on the same day PW 4 Inspector Mithal the first IO recorded his S.161 Cr.PC statement. On 21.02.2019 he identified the accused at an identification parade



conducted by PW 2 Rana Saifullah.

The FIR was recorded on the same day by the police however significantly there is no mention of the name of the eye witness in the FIR which raises eye brows.

By occupation the eye witness was a rickshaw driver and had no particular reason to be around the crime scene at 05.15am in the morning and gives no explanation for his presence when the incident occurred and as such we consider him to be a chance witness. In this respect reliance is placed on the cases of **Mst. Sughra Begum and another v. Qaiser Pervez and others** (2015 SCMR 1142), **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 596) and **Muhammad Irshad v. Allah Ditta and others** (2017 SCMR 142).

During cross examination he admitted that between 0500 and 0515am there is some darkness and that he saw the motor cycle of the accused from about 20-25 paces and as such he was not particularly close to the incident at the time of some darkness which would enable him to readily recognize the accused who he had never seen before and who he would only have got a fleeting glance of in a chaotic situation. Significantly he gave **no hulia** of the accused in his S.161 Cr.PC statement which tends to indicate that he did not get a particularly good look at the accused. The importance of hulia in establishing a correct identification has been emphasized in the case of **Javed Khan V State** (2017 SCMR 524). Like wise the care and caution which must be taken by the court in ascertaining the correct identity of the accused has been emphasized in the case of **Mian Sohail Ahmed V State** (2019 SCMR 956). The eye witness also states that nothing was recovered from the scene in his presence yet the police PW's claim to have recovered 2 empties which also casts doubt on whether he was actually present at the scene of the incident.

It is true that the eye witness picked out the accused from an identification parade with a specific role however the identification parade was carried out three weeks after the arrest of the accused during which period he was kept in police custody could easily have been shown to the eye witness before the identification parade. It is even recorded by the magistrate in his identification parade memo that the accused claimed that the eye witness had been shown to him in police custody and that pictures of him were already circulating in the media which would make the identification parade of no significance. In this respect reliance is placed on the case of **Kanwar Anwaar Ali, Special Judicial Magistrate: in the matter of Criminal Miscellaneous Application No.183 of 2019 in Criminal appeal No.259 of 2018 (PLD 2019 Supreme Court 488)**

It is true that we can convict based on the evidence of a sole eye witness however based on the particular facts and circumstances of this case as discussed above we find that even if the eye witness was present at the time of the incident, which we very much doubt, based on the reasons mentioned above he would not have been able to correctly, safely and reliably identify the appellant and



as such we veer on the side of caution in this case especially as there appears to be hardly any cogent corroborative or supportive evidence and find that the eye witness was **not** able to correctly identify the appellant as the person who shot and murdered the deceased.

(b) With no eye witness evidence as to the identity of who carried out the attack the medical evidence becomes inconsequential as it can only reveal what kind of weapon/device was used and the seat of the injuries of the dead and injured. It cannot identify the person who inflicted the injuries.

(c) It is notable that the appellant confessed to the offence whilst in police custody however he was not produced before a magistrate to record his confession under S.164 Cr.PC despite being produced before a magistrate for an identification parade and thus we place no reliance on his confession allegedly made before the police.

(d) It is note worthy that the two other co-accused who also confessed to the crime whilst in police custody were not put before an identification parade without any explanation by the police which failure mainly lead to their acquittal which prima facie shows that the police were acting in a malafide manner towards the appellant.


(e) It does not appeal to logic, reason or commonsense that the appellant would confess to such a serious crime as the present one which carried the death penalty whilst in police custody when there was no evidence against him at the time of his arrest and he was only in custody in an Arms case which carried a maximum sentence of up to 14 years in jail.

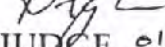
(f) No pistol was recovered from the accused at the time of his arrest as he was in jail and the prosecution did not call any PW to give evidence about the arrest and recovery of the accused in the separate arms case in which he was apparently booked for having an illegal fire arm and as such no recovery of the pistol from the accused has been proven in this case let alone the safe custody of the pistol and empties as such we find the positive FSL report in respect of the recovered empties and pistol to be of no relevance in linking the appellant to the crime.

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).

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.

  
JUDGE  
01/09/2022.

  
JUDGE 01/09/22