

CERTIFICATE OF THE COURT IN REGARD TO

Spl. Cr. A.T. Jail. NO. 165/17

Saleem Deida s/o Alam Jam Masood vs The State.

SINDH HIGH COURT

Composition of Bench.

~~Single/D.B.~~

Mr. J. Mohammed Karim Khan Agha.
Mr. J. Zulfiqar Ali Saugji.

Dates of hearing: 22.04.2020.

Decided on 05.05.2020.

(a) Judgment approved for reporting.

Yes
~~No~~



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.

JAIL APPEAL

IN THE HONORABLE HIGH COURT OF SINDH, KARACHI

615

SPECIAL A.T.C. APPEAL OF 2017

165

(1)

Sabeen Devda

s/o

Muhammad Masood

presently confined
at central prison,
Karachi

VERSUS

The State

Respondent

Special Case NO A-80/2012.

FIR NO: 306/2011

U/S : 386/302/34 PPC

S/W FATA 1997.

P.S: Mohin Town, Karachi

APPEAL UNDER SECTION 25 OF THE

ANTI-TERRORISM ACT, 1997, R/W SECTION

OF CRIMINAL PROCEDURE CODE

being aggrieved and dis-satisfied
The impugned judgment dated

THE HIGH COURT OF SINDH AT KARACHI

Spl. CrI. Anti-Terrorism Jail Appeal No.165 of 2017.

Present:

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

Appellant: Saleem Devda S/o. Alam Jan Masood
through Mr. Muhammad Farooq, Advocate.

Respondent/State: Through Mr. Ali Haider Saleem, Deputy
Prosecutor General.

Date of hearing: 22.04.2020.

Date of Judgment: 05.05.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Saleem Devda S/o. Alam Jan Masood was tried by learned Judge, Anti-Terrorism Court No.X, Karachi in Special Case No. A-80/2012 arising out of Crime No.306/2011 U/s. 386/302/34 PPC r/w Section 7 of ATA, 1997 registered at P.S. Mobina Town, Karachi vide judgment dated 24.08.2016 the appellant was convicted U/s. 302 PPC r/w section 6(2)(a)/7 (1) of ATA, 1997 and was sentenced to undergo R.I. for Life with fine of Rs.50,000/-. In default in payment of fine he was ordered to suffer further S.I. for 06 months. Benefit of section 382-B Cr.P.C. was extended to the accused.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.X, Karachi, the aforesaid appeal has been preferred by the appellant against his conviction.

3. The brief facts of the prosecution case in a nutshell are that on 14.08.2011, ASI Azadar Hussain recorded statement u/s 154 Cr.P.C. of the complainant Munawwar Ali wherein he stated that on 08.08.2011 he along with deceased Umair Hassan @ Zain, Mansoor, one Asim Imam and a child aged about 6/7 years were sitting outside their shop. At about 6:00/06:15 pm three armed persons came there on two motorcycles and made firing upon them and as a result of such firing deceased Mansoor and Zain sustained fire arm injuries who later on succumbed to the injuries and died. The complainant further stated in his complaint that

prior to this incident a few culprits used to come at his shop and demanded/received the extortion amount from them. He further stated that the culprits were known to them and their names were Saleem Devda, Yar Muhammad and Azmat. In the light of the complainant's statement, FIR was lodged against the culprits.

4. After completion of the Investigation by the I.O. formal charge against the accused Saleem Devda was framed to which he pleaded not guilty and claimed trial of the case.

5. In order to prove its case, the prosecution examined 10 witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s. 342 Cr.P.C. wherein he denied all the allegations leveled against him and claimed false implication on the basis of political rivalry. He did not examine himself on oath or call any witness in support of his defense case.

6. Learned Judge, Anti-Terrorism Court No.X, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 24.08.2016, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 24.08.2016 passed by the concerned trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that there was a 6 day unexplained delay in recording the FIR which lead to the complainant cooking up a false case against him, that eye witness PW Asim Imam cannot be relied upon as he gave his S.161 statement many days after the event, that both the eye witnesses are completely unreliable, that no pistol was recovered from the appellant, there was a delay in sending the empties to the FSL, that there was no safe custody of the same, that no evidence of any prior extortion demands or payments have been

furnished and thus for any of the above reasons he should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **Abdul Ghaffar V The State** (2006 SCMR 56), **Zeeshan @ Shani V The State** (2012 SCMR 428), **Shewaiz Rasool alias Shabi V The State** (2019 SCMR 1448), **Sabir Hussain V The State** (2014 SCMR 794) and **Notice to Police Constable Khizar Hayat** (PLD 2019 SC 527).

9. On the other hand, learned Deputy Prosecutor General, who is also acting on behalf of the complainant, has fully supported the impugned judgment. He has contended that two eye witnesses have identified the appellant as having fired at the two deceased who are reliable, trustworthy and confidence inspiring, that it was a day light incident and both of the eye witnesses knew the appellant who had demanded extortion money from them in the past and that their evidence is corroborated by the medical evidence and as such we can convict the appellant based on this evidence and as such since the prosecution had proved its case beyond a reasonable doubt against the appellant the appeal should be dismissed. In support of his contentions he has placed reliance on **Mubasher V The State** (PLD 2015 Lahore 426), **Muhammad Ehasan V The State** (2006 SCMR 1857), **Dadullah and another V The State** (2015 SCMR 856), and **Niaz Ud Din V The State** (2011 SCMR 725).

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. In our view after our reassessment of the evidence based on the evidence of the PW witnesses, PW MLO, post mortem report and other medical evidence, IO's evidence and positive chemical and FSI reports, we are satisfied that the prosecution has proved beyond a reasonable doubt that on or about 08.08.2011 at 18.15 hours at shop No.18 Usman Terrace, Kamran Kool Palace, Metroville III, Block I Gulshan-e-Iqbal Karachi Umair Hussain and Mansoor Ali were murdered by persons who fired at them and caused their death through firearm injuries.

12. In our view therefore the only issue before us is whether the appellant was one of the persons who murdered the two deceased at the aforesaid shop on 08.08.2011 at about 18.15 hours.

13. After our reassessment of the evidence we find that the prosecution has **not** been able to prove beyond a reasonable doubt that the appellant murdered either of the two deceased at the aforesaid shop on 08.08.2011 at about 18.15 hours by causing them firearm injuries for the following reasons;

- (a) The prosecution case rests primarily on the evidence of 2 eye witnesses namely the complainant PW 2 Munawar Ali and PW 4 Asim Imam who according to their evidence were both present at the shop when the appellant came along with his accomplices and fired at and murdered the two deceased with firearms. The incident was in broad day light and the eye witnesses were close to the incident and both knew the appellant (hence an identification parade was not essential) and as such **ordinarily** the correctness of the identification could not be doubted **provided that** we found such eye witness evidence to be reliable, trust worthy and confidence inspiring **however we do not find their evidence to be without doubt for the following reasons;**

(i) It is trite law that an FIR must be lodged with promptitude in order to give it reliability and credibility unless such delay can be explained. It is regarded as the cornerstone of the prosecution case which gets the ball rolling in a criminal case. In this respect reliance is placed on **Khalid Javed V State** (2003 SCMR 1419). In this case the incident took place on 08.08.2011 and yet the S.154 statement of the complainant PW 2 Munawar Ali who was also an eye witness to the incident was lodged on 14.08.2011 i.e **after a delay of 6 days** despite him knowing the culprits. This long delay has gone completely unexplained. During his cross examination this PW has stated in his evidence as under;

"It is correct to suggest that the delay of lodging FIR is not explained in my statement,.....It is correct to suggest that when SI Zulfiqar asked me to record my S.154 Cr.PC on 08.08.2011 I replied to him that I will be able to record my statement after consultation with my elders"
(bold added).

The two key points to note here are that (a) the complainant did **not** approach the police to record his S.154 Cr.PC statement but rather the police approached him and (b) he could only record his statement **after consultation with his elders.**

Significantly, it was not necessary that the S.154 Cr.PC statement be made by the complainant. It could have been made by any one of the PW eye witnesses and even the police could have registered the FIR for instance SI Zulfiqar as referred to above. In this respect reliance is placed on **Muhammad Younis V Muhammad Khan** (1999 YLR 2135). For example, PW 4 eye witness Asim Imam who was also present at the shop at the time of the murders or any one else present in the shop at the time of the murders or any one else acquainted with the basics facts of the case. The basic concept behind lodging an FIR promptly is to ensure that there is no time for consultation and concoction between the complainant and the police and any other third party who might want to fix a person in a false case. *In this case the complainant actually admits delaying lodging the FIR for 6 days as he wants to consult with his elders which is completely contrary to the concept behind lodging an FIR promptly.* In the context of this case where admittedly there appears to be some ill will between the accused and the complainant's side as they had accused him and others of demanding extortion money before and the accused has claimed that he has been fixed in this case on account of political rivalry it was **essential** that the FIR was lodged without delay. Such unexplained delay in this admitted background gave the chance to the complainant to consult with his elders and the police in order to fix the accused in a false case and the accused was also prejudiced by this delay in lodging the FIR and consultation before the FIR was lodged by the complainant. It has been held that a delay of one hour in lodging an FIR may be fatal to the prosecution case based on the particular facts and circumstances of the case. In this respect reliance is placed on **Zeeshan @ Shani V State** (2012 SCMR 428). Thus, in our view the delay in lodging the FIR has not been adequately explained which is **near fatal** to the prosecution case and casts severe doubts on the prosecution case. In this respect in the case of **Farman Ahmed V Muhammed Inayat** (2007 SCMR 1825) it was held as under in respect of a 17 hour delay in lodging the FIR in the presence of eye witnesses at Para 6 P.1828 as under:

"We have considered the submissions made by learned counsel for the parties and perused the record. It is admitted fact that incident took place on 30.6.1993 at 7-15 a.m. whereas FIR was got registered on a written complaint on 1.7.1993 at 12-10 a.m. The place of occurrence is at a distance of 10 miles from the police station. The FIR was lodged by the complainant after considerable delay of 17 hours without explaining the said delay inspite of the fact that complainant had stated in the written complaint that there was two eye-witnesses at the spot and none of them informed the police before filing a written complaint by the complainant. 17 hours delay in FIR provides sufficient time for deliberation and consultation when complainant has given no explanation for delay in lodging the FIR. It is enough time for complainant to fabricate the story, therefore, possibility cannot be ruled out qua false implication of the respondent. It is also a settled law that delay of 17 hours in making FIR

not explained leads to inference that the occurrence was unwitnessed. It is also a settled law that unexplained delay in registration of FIR specially when the place of occurrence is at distance of 10 miles from the police station and there were two other eye-witnesses present at the spot along with the complainant, therefore, such situation indicates that the eye-witnesses were procured and induced to be eye-witnesses, therefore, finding of the learned High Court that neither the complainant nor the eye-witnesses were present at the spot. We do not find any infirmity or illegality in the finding recorded by the learned High Court in para.7 of the impugned judgment." (bold added)

(ii) With regard to the evidence of eye witness PW 4 Asim Imam we also have severe doubts about the reliability of his eye witness evidence. In his cross examination he states as under in his evidence;

"I do not know why my statement u/s 161 Cr.PC was recorded 26 days late by the IO. I was never contacted by the IO before recording my statement" (bold added)

The two key points to note here are that (a) This eye witnesses statement under S.161 Cr.PC was recorded **26 days after the incident** and (b) He did not go to the police for recording his S.161 Cr.PC statement rather the IO had to come to him.

It is completely unexplained as to why he did not register the FIR as according to him he was present at the shop when the incident occurred, why he failed to go to the police to report the incident and why it took **26 days** for him to record his S.161 Cr.PC statement **which in our view keeping in view the admission by the complainant that he went to consult with his elders before lodging the FIR which may have also included consultation with this eye witness who very belatedly came forward** we find that we cannot safely rely on the evidence of this eye witness. It has been held that a delay in an eye witness recording his S.161 Cr.PC statement after 48 hours has been fatal to the evidence of that eye witness unless a good explanation is given. In this case no explanation is given for this **26 day delay**. The inference is that the eye witnesses were busy cooking up a false case against the accused. In this respect reliance is placed on **Muhammed Asif V State (2017 SCMR 486)** and **Farman Ahmed (Supra)**

This eye witness also claims to have known the appellant yet in the inquest report which he signed soon after the incident at the hospital it is stated in column 8, *"that unknown accused persons came on motor cycle and fired on deceased."* Furthermore, he also claims to be unrelated to deceased Umair alias Zain and specifically denies that he is his real cousin yet the dead body of Umair alias Zain is handed over to him and the receipt reads, *"I received dead body of deceased Zain who is my real cousin."* As hospitals usually hand over dead bodies to the relatives of the deceased why would the hospital hand over the body to PW 4

Asim Imam unless Zain was his cousin? Thus, other aspects of this PW's evidence do not appear to ring true especially the fact that he identified the appellant as one of the persons who fired on the two deceased **26 days after the incident in his S.161 statement yet less than 24 hours after the incident according to him unknown persons fired on the deceased.**

- (b) Having disbelieved the eye witnesses we find no other evidence to support the prosecution case against the appellant. For example,
- (i) No pistol was recovered from him which makes the recovery of empties and positive FSL report inconsequential.
 - (ii) There is no evidence that the compliant or any one from his party ever paid extortion money to the appellant apart from bald allegations as the complainant party never made any complaint to the police or any other person about such demands and payments or produced any other type of evidence in respect of this allegation.
 - (iii) Circumstantial evidence linking the appellant to the offense is almost entirely lacking and will certainly not meet the guidelines which would enable a conviction based on circumstantial evidence in the absence of direct ocular evidence. In this respect reliance is placed on **Wazir Muhammad and another v. The State (2005 SCMR 277)** and **Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274)**,

14. Thus, since we are of the view that the evidence of the eye witnesses cannot be safely relied upon and we have disbelieved the same for the reasons mentioned above and we have found no other corroborative evidence or circumstantial evidence to link the appellant to the offense so charged but rather doubts in the prosecution case thus by extending the benefit of the doubt to the appellant we hereby allow the appeal, acquit him of the charge and he shall be released unless he is wanted in any other custody case.

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