

IN THE HIGH COURT OF SINDH AT KARACHI

Special Crl. A.T. Appeal No.291 of 2018
Confirmation Case No.14 of 2018

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellants: 1. Shah Nawaz S/o. Dost Muhammad,
2. Muhammad Rafiq S/o. Abdullah, presently
confined in Central Prison, Karachi through
Mr. Ajab Khan Khattak, Advocate.

Respondent: The State through Mr. Farman Ali Kanasro,
Additional Prosecutor General Sindh.

Date of hearing: 12.02.2019.

Date of Judgment: 18.02.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Shahnawaz S/o Dost Muhammad and Muhammad Rafiq S/o. Abdullah were tried by the Anti-Terrorism Court No.VI, in Special Case No.88 of 2011 arising out of Crime No.491/2011 registered at P.S. Preedy, Karachi vide judgment dated 29.09.2018, whereby the appellants were convicted under section 7(1)(a) of ATA 1997 r/w section 302 (b)/34 PPC and awarded death sentence subject to confirmation by this court with direction to pay compensation of Rs.200,000/- each to the legal heirs of the deceased (the impugned judgment)

2. The brief facts of the prosecution case are that on 17.08.2011, complainant SIP Ghulam Mustafa of P.S. Preedy was busy in patrolling the area when at around 0400 hours the patrol party reached Hashoo Centre and saw one dead body with bullet injuries lying in front of Café Mazada. On inquiry from the gate keepers/chowkidars of the area namely Afzal Khan S/o. Samad Khan and Wahid Zaman S/o. Abdul Ghani, they disclosed that two boys on a motorcycle brought the said boy/deceased before Café Mazada, opened fire on him and then fled away. Afterwards, the dead body was taken to JPMC where he conducted proceedings u/s

9

174 Cr.P.C. and the MLO prepared postmortem report No.543/2011 and the F.I.R. No.491/2011 was lodged.

3. After registration of the case, the investigation was entrusted to P.I. Hatim Baig who received the police papers of the instant crime. He recorded the statement of the witnesses u/s 161 Cr.P.C. He wrote letters to the chemical examiner and sent the parchajat. He also wrote letter to SP South for obtaining permission for sending crime empties for FSL and then wrote a letter to Incharge FSL and sent crime empties. Thereafter the investigation was transferred from him. On 27.08.2011, the investigation was handed over to PI Muhammad Riaz vide order dated 27.08.2011 of SSP South. On 27.08.2011, he interrogated accused Shahnawaz and Muhammad Rafiq who had already been arrested in another case and were already in police custody, who admitted their guilt in the instant crime. Therefore, he formally arrested them in the present crime. He also recorded statements u/s 161 of the witnesses. On 30.08.2011, identification parade of both the accused was held before the learned Judicial Magistrate where eye witnesses Abdul Majeed and Aftab identified both the accused. On 30.08.2011, he also inspected the place of incident on pointation of the complainant and the accused. On 03.09.2011, he also sent crime empties of the instant case along with weapons so recovered from the present accused persons in other crimes to ascertain whether the same had any connection with the instant crime or not.

4. After completing the investigation, the Investigation Officer submitted challan against both the accused for trial according to law. The accused pleaded not guilty and claimed for trial vide plea at Ex. 07/A and Ex.07/B respectively.

5. To prove its case, the prosecution examined 08 prosecution witnesses and exhibited various documents and other recoveries. The statements of the accused u/s. 342 Cr.P.C. were recorded wherein they have denied the allegations of the prosecution and professed their innocence. The accused have in their statements in effect taken the plea that all the witnesses are police officials and due to enmity, the police have falsely implicated them in this case. However, they did not examine themselves or oath nor led any witness in their defence.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 29.09.2018 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 appellants mainly contended that the appellants were innocent and had been falsely implicated in this case so that the police could show their efficiency to their high ups; that there was no eye witness to the murder; that the identification parade was defective as it was a joint identification parade; that any extrajudicial confession which they had made before the police had no value in the eyes of the law and that the appellants had been acquitted in the police encounter case for which they had originally been in custody and the 13 (d) Arms Ordinance case which had flowed from the police encounter case and thus for each and all the above reasons the appellants were entitled to be acquitted based on the benefit of the doubt. In support of his contentions he placed reliance on **Muhammed Akram V State** (2009 SCMR 230), **Muhammed Nawaz V State** (PLD 2005 SC 40), **Lal Pasand V State** (PLD 1981 SC 142) **Abdul Jabbar V State** (2019 SCMR 129) and **Azhar Mehmood V State** (2017 SCMR 135)
8. On the other hand, learned Addl. PG fully supported the impugned judgment. In particular, he contended that the eye witnesses have identified both the accused at the identification parade which was conducted in accordance with the law; that the accused had confessed to the crime; that the police had been taken to the scene of the crime on the pointation of the accused; that the pistols recovered from the accused in the earlier encounter case matched the recoveries made at the scene and thus for all the above reasons the impugned judgment should be upheld and the appeal of each of the appellants may be dismissed.
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, the impugned judgment with their able assistance and have considered the relevant law.
10. From the evidence in our view it seems to be an undisputed position, as supported by both ocular and medical evidence, that the

deceased was shot by fire arm and died on account of the firearm injuries which he received at around 3am in the early hours of 16-08-2011 when his dead body was found by the police whilst on patrol in front of the café Mazda.

11. The issue before us therefore based on the evidence on record is who shot and murdered the deceased?

12. Without belaboring the point it is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take as many defenses as he likes to the allegations against him and if there is any doubt in the prosecutions case the benefit must go to the accused. In this respect reliance is placed on **Tariq Pervez V/s. The State** (1995 SCMR 1345)

13. Admittedly no eye witness gave evidence before the trial court.

14. The prosecution's case therefore, in our view, is one mainly based on supportive/circumstantial evidence and seems to hinge on the following main elements (a) the identification parade carried out by CJ/JM South PW 6 Inayatullah (b) the extra judicial confession of the accused before the police and their pointation of the crime scene and (c) the recovery of the pistols from the accused and (d) the empties recovered from the scene of the incident along with the FSL report.

15. Turning firstly to the identification parade. According to the prosecution they had two eye witnesses PW's Abdul Mujeed and Aftab Ahmed who were supposed to give evidence at the trial in favour of the prosecution but in the event these eye witnesses did not give evidence at the trial as they could not be traced out. Both these eye witnesses identified each of the accused at the identification parade held by CJ/JM South PW 6 Inayatullah and eye witness Abdul Majeed gave each of the accused a specific role with accused Shahnawaz firing at the deceased and accused Rafiq standing at his back whilst eye witness Aftab gave accused Shahnawaz the specific role of firing on the deceased.

16. In our view we cannot give any legal value to this identification parade for the following reasons;

- (a) the eye witnesses themselves never appeared at trial and therefore did not record any evidence under oath and the accused did not have the opportunity to cross examine those eye witnesses and test their evidence. The eye witnesses in their evidence at trial may even have resiled on their evidence in respect of the identification parade and may have been declared hostile. This is more so as in this case the prosecution has conceded that the eye witnesses did not even record S.161 statements and thus did not even describe the accused and the accused are not mentioned let alone described in the FIR. No examination of the eye witnesses at trial would be fatal to the prosecution's case. Furthermore, identification parades are generally regarded as only supportive/corroborative evidence and not primary evidence of which in this case there is very little if any.
- (b) Furthermore, even if the eye witnesses would have given evidence their evidence would have to have been assessed with a great deal of care and caution and would have required independent corroboration as it appears that they were **chance witnesses** and not natural witnesses. For instance eye witness Aftab in the remarks column of the identification parade stated as under:

"Thereafter witness said that in between dated 16 and 17 night he was come from Zainab Market after shopping at about 3 to 3.30 when reached back at Tibet centre three persons came in motor cycle and when reached at crossing side to which one accused Shahnawaz fired on one unknown person."

The question would therefore emerge as to what kind of shopping could he have been doing at Zainab market at 3am when it is known that Zainab market is not open at that time. In this respect reliance is placed on **Muhammed Ali V State** (2017 SCMR 1468). In addition there is no evidence on record as to the source of light at 3am as to how the eye witnesses could have seen and identified the accused.

- (c) This was a joint identification parade and under the law no reliance can be placed on such identification parades. In this respect reliance is placed on **Hakeem V State** (2017 SCMR 1546). In addition there was an unexplained delay of 11 days in holding the identification parade by eye witnesses who had not previously described the accused, did not know them, at best only had a fleeting glance of the them, in the dark since there was no evidence as to source of light so such identification parade evidence even otherwise cannot be relied upon. In this respect reliance is placed on **Javed Khan V The State** (2017 SCMR 524).

17. With regard to the extrajudicial confession made by the accused before the police. This was made to the police while the accused were in

custody in other cases and there was absolutely no reason for the accused to make such a confession especially to an offense which carries the death penalty which confession does not appeal to reason at all based on the particular facts and circumstances of the case. Notably, the accused were not taken to have their confession recorded u/s 164 Cr.PC before the magistrate and it is settled law that extra care and caution must be taken before convicting on the basis of such confessions without strong corroboration as there is a serious risk that such extra judicial confessions have been concocted by the police. Thus, based on the particular facts and circumstances of this case we give very little, if any, weight to the alleged extra judicial confessions of the accused before the police. In this respect reliance is placed on **Sajid Mumtaz V Basharat** (2006 SCMR 231)

18. With regard to the accused taking the police to the scene of the crime again we give no weight to this aspect of the case as the police already knew where the scene of crime was and could easily have simply taken the accused there bearing in mind that the police discovered the dead body and the FIR was registered on behalf of the State.

19. As to the recovery of the pistols these had been recovered from the accused in another case and not by the police in this case which concerned a police encounter and a case had been registered against the accused for their part in the encounter from which the accused have been acquitted. Furthermore, there is no evidence of any safe custody of either of the pistols or of the empties and as such we also give very little weight to these aspects of the case.

20. We also note that in the FIR lodged by the State through Ghulam Mustafa PW 1 against unknown persons in relevant part it reads as under

"I came to know from the nearby chowkidars namely Afzal Khan son of Samad Khan and Wahid Zaman son of Abdul Ghani that two accused took him on motor cycle and murdered him at the above said place and fled away".

21. These two private eye witnesses Afzal Khan and Samad Khan who are named in the FIR and are both natural witnesses and based on the FIR seem to be one of the main foundations on which the case against the accused was built quite surprisingly were not even called as PW's and did

not give any description of the accused in the FIR. Instead all the PW's were interested policemen and no motive has even come on record as to why the accused should murder the deceased. In the impugned judgment the learned trial judge has indicated that 7 private PW's have not appeared as witnesses as they have been silenced. We find no basis for the trial court making such assumption. Furthermore the trial court has specifically held that the absence of the summoned PW's cannot benefit the accused which we disagree with in terms of A.129 (g) of the Qanun-e-Shahadat Order 1984. Likewise it appears that the learned trial judge in the impugned judgment has given far too much unjustified weight to the evidence of CJ/JM South PW 6 Inayatullah who conducted the identification parade in the absence of any primary eye witness evidence

22. In addition no motor bike was recovered from the accused which seems an important aspect of the prosecution case which appears to be that the accused came on a motorbike and then shot the deceased. Instead it appears that when the accused were arrested in another case the next day they were riding in a rickshaw.

23. With regard to the circumstantial evidence in our view it falls well short of the test of unbroken chain of evidence linking the dead body to the neck of the accused as was held in **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274). In fact we find what little circumstantial evidence there is not very convincing based on the particular facts and circumstances of this case.

24. It is also not without significance that the incident took place in the early hours of 17-08-2011, the accused were arrested in the police encounter case on the next day 18-08-2011 and taken to PS North Nazimabad and yet on 17.08.2011 (a day before their arrest in the police encounter case) according to his own evidence the accused made an extra judicial confession before PW 3 Mohammed Riaz at PS Napier.

25. In our view we would also like to observe that since this was a night time incident and only 3 or 4 rounds were discharged when everyone in the vicinity was asleep we do not find it to be a case which falls under the ATA 1997 based on its particular facts and circumstances since there seems to be no intent or design to cause insecurity in the minds

of the public and no such insecurity was actually caused in this case.

26. Based on the above appraisalment of the evidence we find that legally there are too many holes in the prosecution case to allow the conviction of the appellants to stand. Thus, by extending the benefit of the doubt to the appellants the appeals are allowed and both the appellants are acquitted of the charge and the confirmation reference is answered in the negative. Both the appellants are ordered to be released unless they are wanted in any other custody case.

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

Arif