IN THE HIGH COURT OF SINDH AT KARACHI

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

SPECIAL CRIMINAL A.T. APPEAL NO.208 OF 2020

Appellant:	Moula Bux @ Molu son of Muhammad Juman through Ms. Humaira Memon, advocate.
Respondent:	The State through Mr. Abrar Ali Khichi, Additional Prosecutor General, Sindh.
Date of Hearing:	29.03.2022
Date of Announcement:	05.04.2022

JUDGMENT

Mohammad Karim Khan Agha, J. Appellant Moula Bux @ Molu son of Muhammad Juman was charge sheeted to face his trial in Special Case No.807 of 2018 arising out of FIR No.21 of 2012 u/s. 392/397/353/324/302/324/34 PPC r/w Section 7 ATA, 1997 registered at PS Sher Shah Karachi and was convicted vide impugned judgment dated 30.11.2020 passed by the learned Judge, Anti-Terrorism Court No.II, Karachi u/s.302(b) PPC for life imprisonment till he is alive as Tazi'r and u/s.7(1)(a) with Imprisonment for life but with no fine for the reasons that the accused was given advocate to defend him at State expense.

2. The brief facts of the prosecution case as narrated in the FIR lodged by the complainant Waseem son of Shoukat are that he lives in House Baba Wallayat Shah, Babar Manzil Karachi having phone No.0300-8275436 and works at Masha Allah Steel Godown near Tanga Stand which is owned by his maternal uncle. On 04-02-2012 at about 1530 hours he was present in Godown along with Mohammad Riaz son of Mohammad Anwar when two boys who looked like Baloch by appearance came and took out fire arms and snatched his mobile phone China and took two and half lacs which were in draws and from Riaz his mobile phone Nokia 10x01 was also snatched. They had informed the police who were sitting at Imambargah saying that two boys going on motorbike had committed dacoity in their Godown on fire arms whereupon police started chasing them. Those accused persons seeing police coming towards them started

firing at the police. The police retaliated meanwhile police mobile of Shershah also arrived at the scene whose officials also started firing. By the firing of the accused one policeman and one passerby and one child got injured. The criminals left their motorbike No.KEI-1709 maker Unique and escaped. The mobile officer whose name was known as SIP Naseer Magsi sent injured Raheemullah and other injured in Edhi Ambulance to Civil Hospital. The name of the child was known as Rida Shah daughter of Muneeb Shah aged about 14 years old and the name of passerby is Shahid. The name of injured ASI later on I came to know as Raheemullah. He can identify both accused persons if brought before him. His case is against those two persons for committing dacoity and taking two and half lacs, his mobile and mobile phone of his friend and for injuring ASI Raheemullah and child Rida Shah. His claim is against accused persons for killing ASI Raheem Shah, child Rada Shah and injured Shahid.

3. After usual investigation the case was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 11 PWs 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. 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 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 30.11.2020 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 the appellant is completely innocent and has been falsely implicated in this case by the police in order to show their efficiency; that the eye witness is a put up witness and was not present at the time of the incident and alternatively even if the eye witness was present his identification of the appellant as the person who fired upon the deceased cannot be safely relied upon; that there are major contradictions in the evidence of the PW's which makes it unreliable; that the empties were sent for

FSL after a delay of one month and as such the FSL report cannot be safely relied upon and as such the appellant for any or all of the above reasons should be acquitted of the charge by extending him the benefit of the doubt. In support of her contentions, she placed reliance on the cases of **Javed Khan alias Bacha and another v. the State and another** (2017 SCMR 524) and **Mian Sohail Ahmed and others v. the state and others** (2019 SCMR 956).

8. On the other hand learned APG who was also representing the complainant fully supported the impugned judgment and contended that since the prosecution had proved its case beyond a reasonable doubt the appeal should be dismissed.

9. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General Sindh and gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance 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 PW eye witnesses, the other witnesses including medical reports, recovery of empties at the scene of the incident we find that the prosecution has proved beyond a reasonable doubt that ASI Raheemullah (the deceased), on 04.02.2012 at about 1530 hours was shot and murdered by firearm after a robbery and during a police encounter with the persons who committed the robbery at Masha Allah Steel Godown Shershah Karachi.

11. The only question left before us therefore is who carried out the robbery, fired at the police during the encounter which lead to the murder of the deceased on account of firearm injuries 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) That the prosecution case hinges on the ability of the eye witnesses to correctly identify the appellant as one of the persons who took part in the robbery, the encounter with the police and was one of the persons who fired on and murdered the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 8 Waseem Shoukat** who was the complainant registered his FIR promptly against unknown persons who had robbed him and who then alerted the police to the robbery who entered into an encounter with the robbers whilst they were escaping on their motor bike. He gave his evidence to similar effect and noted in his FIR that the robbers were Baloch and were young and he could recognize them if he saw them again. He did **not** give any hulia of the robbers who also fired upon the police in his FIR. Admittedly it was a day time incident and he ought to have got a good look at the robbers however the robbers were not apprehended **until 6 years after the incident.** When the robbers which included the appellant appeared before an identification parade held by the judicial magistrate the eye witness was **not** able to identify the appellant as being one of the robbers due to in his own words lapse of over 8 years since the incident. He was declared as a hostile witness and cross examined by the prosecution whereby he denied that he refused to identify the accused because he was afraid.

As such this eye witness was **not** able to correctly identify the robbers including the appellant who also had an encounter with the police and caused the death of the deceased by firearm and as such his evidence is of no relevance in determining whether the appellant was one of the persons who committed the offences so charged.

(ii) **Eye witness PW 7 Wazir Sultan** was a police officer who was present with the deceased at the time of the incident. According to his evidence PW 8 Waseem informed them that dacoits had robbed them and are going on motor bike whereupon he and the deceased chased them on foot whereupon the dacoits fired at them which lead to one passer by and one girl being injured. They returned fire and one dacoit was injured and took shelter behind a bus and fired upon the deceased who received bullet injuries to his chest and died on the spot.

He gave **no hulia** of the appellant and did not even say in either his S.161 Cr.PC statement or evidence that he could recognize the dacoits if he saw them again. Admittedly this was a day time incident however the eye witness did not know the appellant before this incident and would have only got a fleeting glimpse of him as he was escaping on his motor bike who they were chasing after on foot. The exchange of fire was not from particularly close range as the deceased had no blackening around his firearm wound and this eye witness would have had in the heat of a chaotic exchange of fire where he and the appellant were both taking cover very little opportunity to get a good look at the appellant.

The identification parade where the eye witness picked out the appellant as being one of the robbers who shot the deceased by firearm was **held 6 years after the incident** and due to this long time lapse, the fact that the appellant would have only got a fleeting glimpse of an unknown appellant and his failure to give any hulia of the appellant we find that we **cannot** safely rely on this eye witness as having correctly identified the appellant as being one of the dacoits who fired on the deceased especially as it was

put to him in cross examination that he was shown the appellant before the identification parade who had been in police lock up.

With regard to the importance of an eye witness giving **hulia** of a suspect 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 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).*
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> *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. There is yet another aspect to the matter of identification of the culprits of this case. The Complainant had named three other persons who could recognize the assailants, but he did not mention Subedar Mehmood Ahmad Khan (PW-6) as one of them. Nonetheless Subedar Mehmood Ahmad Khan came forward to identify the appellants. Significantly, none of the three persons mentioned by the Complainant participated in the identification proceedings and two were not even produced as witnesses by the Prosecution. During the identification proceedings both the appellants had informed the Magistrates who were conducting the identification proceedings, and before the identification proceedings commenced, that they had earlier been shown to the witnesses. The Magistrates recorded this objection of the appellants in their reports but surprisingly did not attend to it, which can only be categorized as a serious lapse on their part. Therefore, for all these reasons reliance cannot be placed upon the report of the identification proceedings in which the appellants were identified.

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 later 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.

With regard to the conduct of the identification parade itself in this case we note that the rules governing a safe identification parade were also largely not followed as for instance all of the dummies were different and not the same which would make the appellant stand out and no CNIC's or address was taken from most of the dummies and the accused being in police lock up for 6 days prior to the identification parade would have given the eye witness who was a police officer ample opportunity to be shown to him prior to the identification parade as claimed by the appellant. In this respect reliance is placed on the case of **Kunwar Anwar Ali** (PLD 2009 SC 488).

As such now that we have found that the prosecution has not been able to prove the correct identification of the appellant as the one of the person's who carried out the robbery, engaged in the encounter with the police and fired at the deceased the prosecution case must fail against the accused.

Even otherwise we have also noted the following defects in the prosecution case;

(b) That no weapon was recovered from the appellant and as such the empties recovered at the scene and positive FSL are of no assistance to the prosecution case in linking the appellant to the crime.

(c) The prosecution made no effort to bring on record the evidence on the independent injured eye witness Shahid who would have been one of the best eye witnesses or Mohammad Riaz who was also present at the time of the robbery and would have got a good look at the robbers.

(d) That it does not appeal to logic, commonsense and reason that a person in lock up for offences under the Sindh Arms Act 2013 and Explosive Substances Act 1908 would confess before the police to an offence **6 years after the incident which carried the death penalty when prior to such confession there was not a shred of evidence against him especially when the offences for which he was arrested only carried a maximum sentence of 14 years under the ATA**. Even otherwise confessions before the police are inadmissible in evidence and further doubt is caste on such confession when the appellant was not produced before a magistrate to record his confession despite being produced before a magistrate for an identification parade.

(e) It is also some what suspicious that no departure entry was ever produced for the deceased who was in plain clothes as opposed to police uniform and eye witness PW Wazir who was also a police man and no evidence was produced that they were on duty or had been issued arms and ammunition.

(f) How were two police men on foot able to chase down a speeding motor bike which logically ought to have already passed them if they were informed by the complainant who had just been robbed that the robbers had escaped after the robbery on motor bike?

(g) How was it possible for the appellant, who was shot in the leg, to escape especially as another police mobile turned up and joined the encounter as per evidence of PW 2 Naseer Magsi who was also a police officer.

(h) The fact that the appellant and his acquitted co-accused took the police to the wardat is irrelevant as the police already knew where the wardat was.

(i) In short the entire prosecution case does not appear to ring true.

13. It is a golden principle of criminal jurisprudence 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. Thus, for the reasons discussed above by extending the benefit of the doubt to the appellant the appellant is acquitted of the charge, the impugned judgment is set aside, the 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.