# 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.218 OF 2020**
**CONFIRMATION CASE NO.01 OF 2021**

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| Appellants: | 1) Muhammad Ishaque alias Bobi alias Hussain son of Muhammad Ibrahim<br>2) Muhammad Asim @ Ahmad @ Capri @ Mamo through Mr. Hashmat Khalid, Advocate. |
| Respondent: | The State through Mr. Abrar Ali Khichi, Additional Prosecutor General, Sindh. |
| Date of Hearing: | 10.05.2022 |
| Date of Announcement: | 20.05.2022 |

## JUDGMENT

**Mohammad Karim Khan Agha, J.** Appellants Muhammad Ishaque alias Bobi alias Hussain and Muhammad Asim @ Ahmad @ Capri @ Mamo were charged sheeted to face their trial in Special Case No.AJ-2552 of 2016 (New Special Case No.216 of 2019) arising out of FIR No. 163 of 2016 under section 302/324/34 PPC 3/4 Explosive Substance Act 1908 r/w Section 7 Anti-Terrorism Act 1997 registered at PS Sharifabad, Karachi. Appellants were convicted vide impugned judgment dated 19.12.2020 passed by the learned Judge, Anti-Terrorism Court No.XVI, Karachi whereby they were awarded following sentences:

a) For causing death of the deceased Faraz Hussain through cracker/bomb blast, punishable under section 302 r/w 34 PPC both the present accused Muhammad Ishaque @ Bobi @ Hussain s/o Muhammad Ibrahim and Muhammad Asim @ Ahmed @ Capri @ Mamo s/o Abdul Rehman are sentenced to death subject to confirmation by this court;

b) For causing death of the deceased Faraz Hussain through cracker/bomb blast, punishable under section 7(A) of the Anti-Terrorism Act, 1997, both the present accused are sentenced to death subject to confirmation by this court with fine of Rs.200,000/- (two lacs) each;

c) For causing serious injuries to 25 innocent people, punishable under section 324 r/w 34 PPC both the present accused are sentenced to suffer rigorous imprisonment for ten (10) years on each count with fine of Rs.1,00,000/- (one lac) each and in case of failure to pay the fine, he shall suffer SI for six (06) months more;

d) For causing serious injuries to 25 innocent people, punishable under section 7(c) of Anti-Terrorism Act, 1997 both the present accused are sentenced to suffer rigorous imprisonment for ten (10) years on each count with fine of Rs.1,00,000/- (one lac) each and in case of failure to pay the fine, he shall suffer SI for six (06) months more;

e) For involvement in explosion by bomb blast and committing the act of terrorism, punishable u/s.7(ff) of Anti-Terrorism Act, 1997 both the accused persons are sentenced to suffer SI for (14) fourteen years.

f) For act of terrorism committed by both the accused, punishable u/s.7(1)(h) of Anti-Terrorism Act, 1997 both the accused are hereby also sentenced to undergo RI for (10) ten years and to pay fine of Rs.50,000/- (Fifty Thousand) each.

g) Both the accused are hereby also convicted for the offence u/s. 11-F and sentenced to RI for 06 months with fine of Rs.10,000/- (Ten Thousand) each and in case of failure to pay the fine, they shall serve R.I. for one month more.

h) Both the present accused are hereby also directed to pay an amount of Rs.2,00,000/- (two lacs) each for each deceased to the legal heirs as compensation, as provided under Section 544-A Cr.P.C. and in default of such payment the accused shall undergo S.I. for six months.

i) Both the present accused are hereby also directed to pay an amount of Rs.1,00,000/- (one lac) each for each injured as compensation, as provided under Section 544-A Cr.P.C. and in default of such payment the accused shall undergo S.I. for six months;

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

All the sentences are directed to run concurrently. The benefit of Section 382 (B) Cr.P.C. was also extended to the accused persons.

2. The brief facts of the prosecution case are that the complainant Syed Shamim Raza Naqvi resident of FC area lodged FIR wherein it is stated that on 17.10.2016 at Maghrib prayer at about 08:05 pm two identifiable persons on one motorcycle came at Imam Bargah Dar-e-Abbas

and hurled a bomb / cracker near the gate which exploded in result whereof 30 persons received explosive injuries out of them one Faraz Hussain succumbed to his injuries and died, hence the instant FIR lodged against the unknown persons for the above crime on the basis of statement of complainant u/s.154 Cr.P.C.

3. After registration of FIR, the investigation was assigned to Inspector Syed Zulqarnain Akhtar, PS Nazimabad, Karachi who after usual investigation filed the report under "A" class. Later on accused Muhammad Ishaq @ Bobi and Muhammad Asim @ Capri were arrested in other cases and during interrogation the accused admitted that they hurled the bomb/cracker on gate of Imam Bargah Dar-e-Abbas and after sufficient evidence, the I.O. of the case submitted challan against the said accused.

4. The prosecution in order to prove its case examined 14 PWs and exhibited various documents and other items. The statement of accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them and claimed that they had been falsely implicated by the police after their release from prison and arrest from home respectively. They did not give evidence under oath or call any DW in support of their defence case.

5. After hearing the arguments of the respective parties and appreciating the evidence on record the trial court convicted the appellants and sentenced them as set out earlier in this judgment. Hence, the appellants have filed this appeal against 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 19.12.2020 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 appellants has contended that the appellants are entirely innocent of any wrong doing and have been falsely implicated in the case by the police; that the identification of the appellants at the crime scene cannot be safely relied upon; that the identification parade has not been carried out in accordance with the law; that no recovery was made from the appellants and that this is a case of no evidence and that for any or all the above reasons the accused should be

acquitted by extending them the benefit of the doubt. In support of his contention he has placed reliance on the cases of **Imran Ashraf v The State** (2001 SCMR 424), **Gulfam v The State** (2017 SCMR 1189), **Hayatullah v The State** (2018 SCMR 2092), **Muhammad Akram v The State** (2009 SCMR 230), **Noor Islam v Ghani ur Rehman** (2020 SCMR 310), **Muhammad Ali v The State** (PLD 2012 Sindh 272), **Manzar Ullah v Asghar & 3 others** (2018 YLR 1508), **Faisal Aleem v The State** (PLD 2010 SC 1080), **Alim v The State** (PLD 1967 SC 307), **Shafqat Mehmood v The State** (2011 SCMR 537), **Lal Pasand v The State** (PLD 1981 SC 142), **Province of Punjab through Education Secretary v Mufti Abdul Ghani** (PLD 1985 SC 1), **Tariq Pervez v The State** (1995 SCMR 1345), **Muneer Ahmad v The State** (1998 SCMR 752), **Fazal Subhan v The State** (2019 SCMR 1027) and **Mian Sohail Ahmed v The State** (2019 SCMR 956).

8. On the other hand Additional prosecutor General Sindh has fully supported the impugned judgment and has mainly relied on the correct identification of the appellants who carried out the attack on the Imambargah and other corroborative/supportive evidence on record and contended that the appeals should be dismissed and the confirmation reference answered in the affirmative as this was a very heinous offence where a place of worship had been attacked by terrorists and a young boy had lost his life and many others had been seriously injured. In support of his contentions, he placed reliance on the cases of **Muhammad Zaman v The State** (2007 SCMR 813), **Solat Ali Khan v The State** (2002 SCMR 820), **Sajid Sohail v The State** (2009 SCMR 356), **Islam Sharif v The State** (2020 SCMR 690), **Khadim Hussain v The State** (PLD 2010 SC 669), **Muhammad Ismail v The State** (2017 SCMR 713), **Farooq Khan v The State** (2008 SCMR 917), **Muhammad Ehsan v The State** (2006 SCMR 1857), **Sh. Muhammad Abid v The State** (2011 SCMR 1148), **Mumraiz v The State** (2011 SCMR 1153), **Naeemullah Niazi v The State** (SBLR 2016 Sindh 1334), **Dr. Javid Akhtar v The State** (PLD 2007 SC 249), **Abdul Baqi @ Talaha v The State** (SBLR 2014 Sindh 1472), **Dildar Hussain v Muhammad Afzaal alias Chala v The State** (PLD 2004 SC 663) and **Abdul Rehman v The State** (1998 SCMR 1778).

9. We have heard the arguments of the learned counsel for the appellants as well as learned Additional Prosecutor General Sindh, gone through the entire evidence which has been read out by the learned

counsel for the appellants, 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, including injured eye witnesses to the incident, other PW's, medical evidence and medical reports, DBU report we find that the prosecution has proved beyond a reasonable doubt that on 17.10.2016 at 2005 hours at Dar Abbas Imam Bargah main gate F.C Area Nazimabad Karachi persons caused a bomb blast which lead to the murder of Faraz Hussain and injuries to 31 others who suffered blast injuries. In fact this is an admitted position by learned counsel on behalf of the appellants and as such is not in dispute.

11. The only question left before us therefore is who threw the explosive device which blasted outside the main gate of the Imambargah which lead to the death of one young boy and caused serious injuries by bomb blast to 31 others at the said time, date and location?

12. We are acutely aware that this is a very sensitive case where one young boy lost his life and 31 other innocent persons have been injured by an explosive device in the most brutal manner without apparent reason by a group of terrorists at their place of worship. However, as Judges we have to put such aspects aside and decide the guilt or innocence of the appellants by dispassionately assessing the evidence before us and coming to a decision which is supported by the evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the evidence and the law and nothing else. This aspect of the judges role in such like cases was emphasized in the case of **Naveed Asghar V State** (PLD 2021 SC 600) at P.617 para 10 in the following terms:

> *"Heinous nature of allegations and appraisal of evidence*
>
> *10. The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused.* ***Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the***

*accused person, as possibility of an innocent person having* ***been wrongly involved in cases of such nature cannot be ruled out.*** *An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10 A cannot be taken away from the accused.* ***It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow.*** *It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10 A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person" (Bold added)*

13. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons;

(a) In our view the prosecution's case rests on the evidence of the sole eye witness to the incident and his ability to correctly identify the appellants who allegedly came on a motor bike and threw the explosive device outside the main gate of the Imambargah which exploded killing one and injuring 31 others whose evidence we shall consider in detail below;

(i) **Eye witness PW 8 Syed Shamim Raza.** He is the complainant of the case and was Mutawali of the Imambargah. According to his evidence on 17.10.2016 at 2005pm he was sitting with others at the Imambargah as the ladies Majlis ended when he saw two accused on a motorcycle throw a cracker bomb at the Imambargah which exploded which lead to the death of child Faraz Ali and caused serious injuries to at least 30 others. He was injured at the place of incident on account of the ball bearings /pellets which were a part of the explosive device and treated at hospital for his injuries.

The witness was a natural as opposed to a chance witness as he worked at the Imambargah and was also injured at the scene on account of the bomb blast for which he has

produced a MLC. He lodged the FIR a day after the incident which slight delay is explained by the fact that he had to first receive medical treatment for his injuries which were caused by the blast and as such there was no unexplained delay in lodging the FIR. The FIR was lodged against unknown persons and there was no attempt to falsely implicate any person let alone the accused who the complainant had no enmity with. Thus, we believe the presence of the witness at the spot at the time of the incident and his evidence in respect of the incident. He correctly identified each of the appellants with a specific role at an identification parade held around 6 weeks after the incident and about 12 days after the arrest of the accused.

What goes against the eye witness being correctly able to identify the appellants is that (a) he had not seen them before and only got a fleeting glimpse of them (b) he did not give any hulia of the appellants in the FIR and his S.161 Cr.PC statement which greatly undermines his ability to pick out any accused with certainty/accuracy at an identification parade (c) he apparently made sketches of the accused but **not** immediately after the incident **but** shortly before the identification parade and after the accused were arrested which raises doubt as to whether he was shown the accused before he made the sketches and even otherwise it is not clear that the sketches matched the appearance of the accused (d) That it was 8pm in the month of October when the incident occurred and as such it would have been quite dark and therefore extremely difficult for the witness to accurately identify both of the appellants especially as they both remained on one bike and did not dismount before speeding away keeping in view that there was no evidence as to the source of light (e) That it is unclear how far away the witness was from the accused and from what angle he saw them from. He does not claim that he saw them form close range and as such this also goes against his accurate and correct identification of the accused (f) it is difficult to believe keeping in view the above factors and especially the facts unfolding on the ground at the crime scene i.e a chaotic situation where a blast had just occurred in which many were injured including himself and crying out for help with dust and smoke every where that he would have been able to hang onto his fleeting recollection of the appellants.

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 based on the reasons mentioned above he would **not** have been able to correctly, safely and reliably identify the appellants 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 either of the appellants.

In this respect reliance is placed on 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 in his S.161 Cr.PC statement before an identification parade and the need to strictly follow the rules governing identification parades where it was 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).*

*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....***

*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 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. In fact such extra care and caution in relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

**Thus, having found that the sole eye witness would not have been able to correctly, safely and reliably identify the appellants the conduct of the identification parade becomes in consequential.**

(b) With no eye witness evidence 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 appellants confessed to the offence whilst in police custody however they were not produced before a magistrate to record their confessions under S.164 Cr.PC despite being produced before a magistrate for an identification parade and thus we place no reliance on their confessions made before the police.

(d) It does not appeal to logic, reason or commonsense that the appellants would confess to such a serious crime as the present one which carried the death sentence when they were only booked in an Arms and Explosive Substances case which only carried a maximum prison sentence of 14 years on conviction.

(e) According to the evidence of the complainant he, Salman and Afzal were all eye witnesses who were called to the court for the identification parade. Afzal appeared before the identification parade however he did not give evidence as a PW whilst Salman was listed as a PW but was given up by the prosecution which leads to the inference that he would not have supported the prosecution case under A.129 (g) Qanun-e Shahdat Ordinance 1984 in terms of the identification of the appellants.

(f) The appellants taking the police to the place of wardat is irrelevant as the police already knew where the place of wardat was.

14. 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), wherein the Supreme Court has observed as follows:-

> *"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

15. For the reasons discussed above by extending the benefit of the doubt to the appellants they are both acquitted of the charge, the impugned judgment is set aside, their appeal is allowed, the confirmation reference is answered in the negative and the appellants shall be released unless wanted in any other custody case.

16. The appeal and confirmation reference stand disposed of in the above terms.