

No hulia, eye-witnesses dis relieved | VSB f no signature

CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

190

Criminal Appeal No-247 of 2020

Riaz

Vs.

State

HIGH COURT OF SINDH

Composition of Bench.

Single.

Mr. Justice Mohammad Karim Khan Agha

Dates of hearing : 30-10-2024

Decided on : 05-11-2024

(a) Judgment approved for Reporting

Yes

LAZ

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.

PRESENTED ON
16-03-2020

[Signature]
Deputy Registrar (Judicial)
1198

191

IN THE HONOURABLE HIGH COURT OF SINDH,
AT KARACHI

Criminal Appeal No. 247/2020

RIAZ S/O. PIR BUX

Muslim, adult, Resident of Karachi,

At presently confined in

Central Prison, Karachi..... **APPELLANT**

VERSUS

THE STATE..... RESPONDENT

FIR NO.82/2018

U/S.397/302/34 PPC

P.S. Gulistan-e-Johar

APPEAL UNDER SECTION 410 OF CRIMINAL
PROCEDURE CODE, 1898

Being aggrieved and dissatisfied with the **impugned Judgment dated: 19-02-2020, announced and passed by the 1st Additional District & Session Judge Karachi East (Mr. Haleem Ahmed) in Session Case No. 692/2018**, thereby convicted the accused U/s. 393 R/w. 34 PPC, and sentenced to five years simple imprisonment, the accused is also convicted U/s. 302(b) read with 34 PPC for committing Qatl-amd of the deceased and he is sentenced imprisonment for life. In addition to that the accused is required to pay compensation to the tune of Rs.500,000/- (Rupees Five Lac Only) to the legal heirs of deceased, in case of failure of payment of fine/ compensation, the accused

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OFFICE OF THE
PROSECUTOR
GENERAL
KARACHI

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL No. 247 OF 2020

Appellant: Riaz through M/s. Iftikhar Ahmed Shah, Raja Zeeshan and Muhammad Naeem Awan, Advocates.

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

Complainant: Jehanzaib through M/s. Muhammad Dauid Narejo and Muhammad Yousif Narejo, Advocates.

Date of Hearing - 30.10.2024

Date of Announcement 05.10.2024

J U D G M E N T

Mohammad Karim Khan Agha, J: Appellant Riaz son of Pir Bux was tried in the Model Criminal Trial Court/ 1st Additional District & Sessions Judge, Karachi, East, in Sessions Case No. 692 of 2018 in respect of Crime No. 82/2018 registered under Sections 397, 302, 34 P.P.C. at P.S. Gulstan-e-Johar, Karachi. After completion of the trial, vide judgment dated 19. 2.2020, the appellant was convicted under Section 393 r/w 34 PPC and sentenced to undergo five years for simple imprisonment. The appellant was also convicted under section 302(b) r/w 34 P.P.C. and sentenced to undergo imprisonment for life with direction to pay compensation of Rs.5,00,000/- to the legal heirs of the deceased and in default of payment whereof, he shall further undergo simple imprisonment of six months. All the sentences were directed to run concurrently. The benefit of section 382-B Cr.P.C. was extended to the appellant. The reason as disclosed in the impugned judgment for not awarding death penalty to the appellant is that he was under the age of eighteen years at the time of commission of offence; therefore, he was entitled to such benefit under section 16 of the Juvenile Justice System Act, 2018.

2. The brief facts of the case as narrated by complainant Jehnazeb son of Zaman Khan are that Asad Khan son of Zahid Khan ('deceased') was his grand maternal son. On 14.3.2018 at about 1715 hours, when the deceased was coming to his house, he received one shot near Masjid; it was about 1715 hours' time Asr prayer, he was proceeding to Masjid. He saw some people, along with children, running towards his house. Iqbal informed him that Asad Khan has sustained a bullet injury near the gate of Ayesha Masjid, thereafter, they took Asad Khan to Dar ul Sehat Hospital for treatment. The doctors advised them to take him to Agha Khan Hospital due to his critical condition. When they brought him to Agha Khan Hospital, he was pronounced dead on arrival. Thereafter, the complainant proceeded to his house. His son Shahzaib brought the deceased to JPMC for legal proceedings. Then Iqbal disclosed on the funeral of the deceased that he was going to perform Asr Nimaz, and then on one motorcycle, three unknown persons came, who were wearing Shalwar Qameez and having deadly weapons, and tried to snatch a mobile phone from him, and on his resistance, they opened straight fires upon the deceased, due to which he died, hence the instant FIR was registered.

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the appellant, to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined twelve (12) witnesses, who exhibited numerous documents and other items. Then statement of accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him and claimed his false implication by the police. However, he neither examined himself on Oath nor led any evidence in his defense.

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

6. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case hence the delay of one day in lodging the FIR; that the eye witnesses did not witness the incident and as such their evidence should be discarded; that even

otherwise the identification parade was defective; that no robbed amount or pistol was recovered from the appellant; that the USB which contains CCTV footage of the incident does not show any person murdering the deceased; that even otherwise the USB is inadmissible as its safe custody was not preserved; and as such for any or all of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Ghulam Akbar and others v. the State** (2007 YLR 1506), **Javed Khan alias Bacha and another v. the State and another** (2017 SCMR 524), **Hakeem and others v. the State** (2017 SCMR 1546) and **Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others** (PLD 2019 SC 675).

7. Learned APG and learned counsel for the complainant fully supported the impugned judgment. In particular, they contended that the eye witnesses evidence was trust worthy, reliable and confidence inspiring and could be safely relied upon; that the photo's in the USB supported the prosecution case; that the medical evidence supported the ocular evidence and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of their contentions, they placed reliance on the cases of **Aijaz Nawaz alias Baba v. the State** (2019 PCr. LJ 1775), **Ansar and others v. the State and others** (2023 SCMR 929) and **Atta Khan and 2 others v. the State** (2024 PCr.LJ 1448).

8. I have heard the learned counsel for the appellant as well as learned APG and learned counsel for the complainant; I have also perused the material available on record and the case law cited at the bar.

9. Based on my reassessment of the evidence of the PW's, especially the medical evidence I find that the prosecution has proved beyond a reasonable doubt that Asad Khan (the deceased) was murdered by firearm on 14.03.2018 at about 5pm at chowk near Masjid Ayesha Block one Gulistan-e-Jauhar when he resisted a robbery. In fact learned counsel for the appellant did not dispute this fact.

10. The only question left before me therefore is who murdered the deceased by firearm and attempted to rob him at the said time, date and location?

11. After my reassessment of the evidence on record, I 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 FIR was lodged after a delay of one day. This delay has largely been explained by the deceased being transferred between hospitals where he died on arrival at the Aga Khan Hospital and then the body being taken back to JPMC for legal formalities and post mortem which was not allowed by the complainant's side who immediately took the body for burial from the JPMC before lodging the FIR. The main concern was to save the life of the deceased who was seriously injured at the scene of the crime as opposed to lodging the FIR. The fact that the FIR was lodged against unknown persons also gives further weight to the fact that the complainant was not trying to falsely implicate any one. As such the slight delay in lodging the FIR is not fatal to the prosecution case. Although I find that the delay in lodging the FIR has been reasonably explained the fact that the PS was only 3KM away from the wardat puts me to some caution.

(b) I find that the prosecution case primarily hinges on whether I believe the evidence of the eye witnesses especially in terms of the correct identification of the appellant who robbed and murdered the deceased whose evidence I shall consider in detail below;

(i) Eye witness PW 2 Asad Javed. He is related to the deceased who was a shop keeper whose shop was allegedly robbed by the appellant and his accomplices. According to his evidence on 14.03.2018 at about 5pm he was present in a shop situated near Ayesha Masjid when three person's duly armed came on motor cycle and robbed him of cash. As the robbers were leaving the shop one person Asad who was from the neighborhood was attempted to be robbed by the appellant and his two accomplices. Asad/deceased however put up resistance which lead to one of the three robbers shooting him. A house opposite the shop owned by PW Naveed had CCTV footage of the incident who handed over to him the CCTV footage which he handed over to the IO at the time of the site inspection. On 27.03.2018 he picked the appellant out from an identification parade as one of the persons involved in this incident.

This witness was related to the deceased however he had no proven enmity with the appellant and as such his evidence can be taken at its own face value. The police recorded his eye witness S.161 Cr.PC statement within two days of the incident and he picked out the appellant from an identification parade 13 days later.

The eye witness did not know the accused before the incident and thus it was necessary for the identification parade to be held and it was also necessary that at the time of giving his S.161 Cr.PC statement he gave a hulia/description of the appellant which he failed to do which renders his correct identification of the appellant at the identification parade doubtful.

3

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 Zaidi 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.

Not only was no hulia/description given by this eye witness in his S.161 Cr.PC statement the appellant had even asserted he had been shown to the eye witness by the police before the identification parade. Even in the memo of identification it is noted as under;

"The witness identified accused by pointing at him and said, "Accused is standing at Serial No.03 from left who took me as hostage and who while fleeing started the bike and escaped along with his 02 co-accused accomplices"

Thus, as per the identification memo the eye witness did not give him the specific role of robbing and shooting the deceased but instead his role was to take him hostage whilst fleeing with his two accomplices. It is settled by law that not only must the eye witness pick out the accused at the identification parade but he must also state the specific role which he saw the accused play in the crime for his eye witness evidence to be relied upon. In this respect reliance is placed on the case of Hakeem (Supra). In this case the eye witness has assigned the accused the role of taking him hostage not shooting any one on resistance. This statement before the judicial magistrate is also contrary to the evidence which the eye witness later gave before the trial court where he makes no mention of being held hostage by anyone. Even in his evidence dishonest improvements seem to have been

made from his S.161 Cr.PC statement. The identification parade itself was not carried out in accordance with the law. For example, no CNIC numbers of the dummies were taken, the dummies were all dissimilar when they were meant to be the similar to the appellant; the same dummies were used in the second identification parade.

As such based on the above discussion I find that although the eye witness might have been present at the time of the incident I cannot safely rely on him correctly identifying the appellant as one of the persons who robbed or murdered the deceased.

- (ii) **Eye witness PW 3 Abdul Sattar.** According to his evidence on 14.03.18 at about 5.15pm he was on his way home on motor bike and when he reached Ayesha Masjid he heard firing. He continued his journey and saw three persons on a motor cycle who were fleeing away. Shop keepers informed him that dacoits had shot the deceased. On 27.03.2018 he attended an identification parade where he picked out the appellant as the person who was driving the motor cycle. The witness is not related to the deceased and as such he is an independent witness who had no reason to falsely implicate the appellant in this case. This eye witness however did not give any description/hulia at the time of giving his S.161 Cr.PC statement of the appellant. He also appears to be a chance witness. He did not witness the murder and only saw three persons on a motor cycle fleeing away. During his cross examination he stated that he was on his feet which contradicted his evidence that he was on a motor bike; he could not make out the make, model or even color of the motor bike as it passed him at speed; he could not even remember the color of the Shalwar Qameez of the persons who were riding the motor cycle; he saw no one firing at the deceased and as such was not an eye witness to the murder.

Based on the above discussion I find it impossible that he could have identified correctly the appellant which by his own admission was on a motor cycle which was being driven speedily. If he could not remember the make, model or even color of the bike or the even the color of any of the clothes being worn by any three of the persons who were riding the bike I find it impossible that he could correctly identify the appellant at the identification parade when he had not given any Hulia/description of him, even otherwise his identification parade suffered from the same procedural defects as the eye witness mentioned above. Thus for the reasons mentioned above I find that I cannot safely rely on this eye witnesses correct identification of the appellant even if he was near the crime scene at the relevant time which appears doubtful.

Thus, based on my disbelieving the evidence of two eye witnesses in respect of correctly identifying the appellant as being one of the persons who murdered the deceased what other supportive/corroborative material is their against the appellant?

(c) The prosecution has placed heavy reliance on photo's taken from recovered CCTV footage from the house of PW 6 Naveed which faced opposite the shop and would have captured the entire incident as per evidence of PW 6 Naveed which is reproduced below in material part;

"Shop of PW-Asad Javed is located in front of my house. Three CCTV's are installed at my house. Shop of Asad and Masjid e Ayesha could be viewed in the CCTV installed at my house. The incident dated 14.03.2018 at 1700 hours was captured by CCTV installed at my house"

However when reviewing the photo's taken from the USB which came from the CCTV which were exhibited none of them showed any shooting taking place outside the shop. There is only one clear picture of 3 persons on a motor bike which could have been taken any where and at any time and at any place. The appellant claims that he is not in the picture showing three persons on a motor bike and even if it is this picture alone is insufficient to connect him to the crime of robbery and murder of the deceased as it only shows him on a motor bike with two others. Thus, without going even into the question of admissibility, safe custody etc these photo's from the CCTV taken from outside Naveed's house are of no assistance to the prosecution in proving the presence of the appellant at the crime scene at the time of the incident.

(d) Admittedly the medical evidence supports the eye-witness/ prosecution evidence that the deceased died from firearm injuries. However the medical evidence cannot indicate who actually caused the injuries.

(e) That no recovery of any pistol or robbed items was made from the accused at the time of his arrest.

(f) That the accused was already under arrest in a police encounter case when out of the blue with no evidence against him in this case he confessed to the murder which carries the death penalty. This does not appeal to logic, reason or commonsense and is simply unbelievable. Significantly the police did not produce him before a magistrate to record his confession despite producing him before the magistrate for an identification parade. The alleged confession before the police by the appellant which the appellant claims was a result of torture whilst in police custody is also inadmissible in evidence.

(g) The empty which was recovered from the crime scene was a 9mm one however a 30 bore empty was found to match with a pistol which was not recovered from the appellant so this recovered empty does not link the appellant to the crime.

12. Thus, based on the above discussion, by extending the appellant the benefit of the doubt, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and sentenced in the impugned judgment and as such he is acquitted of the charge, the appeal is allowed, the impugned judgment is set aside and the appellant shall be released unless he is wanted in any other custody case.