Eye witness evidence not reliable

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CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Spl Criminal Anti-Terrorism Appeal NO. 189 of 2021
Spl Criminal Anti-Terrorism Appeal NO. 190 of 2021
Confirmation Case No. 11 of 2021

Muhammad Danish Rehmani

Vs

The State

HIGH COURT OF SINDH

Composition of Bench. *D.B.*

Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Date(s) of hearing: 17-08-2022

Decided on : 22-08-2022

Judgment approved for Reporting *Yes*

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.

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PRESENTED ON
02-12-2021
Deputy Registrar (Judl.)

(1)

5265

IN THE HIGH COURT OF SINDH AT KARACHI

Special Anti Terrorism Appeal No. 189 / 2021

Muhammad Danish Rehmani
S/o Muhammad Arif Rehmani
Presently confined in Central Prison at
Karachi ----------APPELLANT

VERSUS

The State ----------RESPONDENT

FIR No. 86 / 2013
U/s 302/119/109/34
R/w 7 ATA.
P.S. Gulbahar, Karachi.

CRIMINAL APPEAL U/S 25 OF ANTI TERRORISM ACT 1997.

Being aggrieved and dissatisfied with the Judgment dated 27-11-2021, passed by the learned Anti Terrorism Court II at Karachi, in Special Case No. B-491/2014 Vide FIR # 86/2013, U/s 302/119/109/34 R/w 7 ATA 1997 of P.S. Gulbahar, Karachi, thereby passed an impugned judgment awarded death sentence to the appellant / accused.

The appellant prefers this appeal before this Hon'ble Court on the following considering facts & grounds amongst others. **The certified copy of impugned judgment, FIR, Challan, Charge and prosecution Evidence annexed herewith and marked as annexure 'A, B, C, D & E-15'.**

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PRESENTED ON
02-12-2021
Deputy Registrar (Judl.)

(1)

5266

IN THE HIGH COURT OF SINDH AT KARACHI

Special Anti Terrorism Appeal No. 196 / 2021

Muhammad Danish Rehmani
S/o Muhammad Arif Rehmani
Presently confined in Central Prison at
Karachi ----------APPELLANT

VERSUS

The State ----------RESPONDENT

FIR No. 238 / 2014
U/s 23(i)-A SAA 2013
P.S. Nazimabad, Karachi.

CRIMINAL APPEAL U/S 25 OF ANTI TERRORISM ACT 1997.

Being aggrieved and dissatisfied with the Judgment dated 27-11-2021, passed by the learned Anti Terrorism Court II at Karachi, in Special Case No. B-492/2014 Vide FIR # 238/2014, U/s 23(i)-A SAA 2013 of P.S. Nazimabad, Karachi, thereby passed an impugned judgment awarded 07 year of imprisonment of jail with fine Rs.50,000/- on failure of payment of fine to suffer simple imprisonment 03 months to the appellant / accused.

The appellant prefers this appeal before this Hon'ble Court on the following considering facts & grounds amongst others. **The copy of impugned Judgment, FIR, Challan, Charge and prosecution Evidence annexed herewith and marked as annexure 'A, B, C, D & E_____'.**

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THE ANTI-TERRORISM COURT NO. II, KARACHI

No. ATC-II/K-Div/ 906 /2021 Karachi Dated: 27.11.2021

SPL. CASE NO. B-491/2014
The State
V/s.
Muhammad Danish Rehmani S/o Muhammad Arif Rehmani.....ACCUSED.
FIR No. 86/2013
U/S: 302/119/109/34
R/w 7 ATA, 1997
P.S: Gul Bahar.

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SPL. CASE NO. B-492/2014
The State.
V/s.
Muhammad Danish Rehmani S/o Muhammad Arif Rehmani.....ACCUSED.
FIR No. 238/2014
U/S: 23 (1) A. S.A.A
P.S: Nazimabad

INWARD TO ... BE ... DATE ... 2/12/21

To,

The Registrar,
Honourable High Court of Sindh,
Karachi.

SUBJECT: REFERENCE UNDER SECTION 374 CR.P.C. IN SPECIAL CASE NO. B-491/2014, FIR NO. 86/2013, U/S. 302/119/109/34 PPC, R/W SECTION 7 OF ATA 1997 OF P.S. GULBAHAR, KARACHI AND SPECIAL CASE NO. B-492/2014, FIR NO.238/2014, U/S. 23 (I)(A) OF SINDH ARMS ACT, 2013, P.S. NAZIMABAD, KARACHI. STATE VERSUS DANISH REHMANI S/O ARIF REHMANI, UNDER SECTION 25(2) OF A.T.A. 1997.

Special Case No. B-491/2014, FIR No. 86/2013, U/S. 302/119/109/34 PPC, R/W Section 7 of ATA 1997 of P.S. Gulbahar, Karachi and Special Case No. B-492/2014, FIR No.238/2014, U/S. 23 (I)(A) of Sindh Arms Act, 2013, P.S. Nazimabad, Karachi have been decided on 27.11.2021 and the accused Danish Rehmani S/o Arif Rehmani is sentenced and convicted U/s 302(b) PPC to death sentence to be hanged by neck till death.

The accused Danish Rehmani S/o Arif Rehmani is also sentenced and convicted U/s 7 (a) of Anti Terrorism Act, 1997 to be hanged by neck till death sentence for committing act of terrorism and causing death of Zain ul Abideen, however for confirmation by the Hon'ble High Court of Sindh, Karachi.

The R&P of the aforesaid two special cases are sent herewith in view of Section 374 Cr.PC and Section 25(2) of ATA 1997 for confirmation of death sentence or otherwise.

Kindly acknowledge the receipt of the same.

Encl: R&P of above Special Cases.

(Ms. NUZHAT ARA ALVI)
J U D G E
ANTI-TERRORISM COURT NO: II
KARACHI

IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal A.T. Appeal No.189 of 2021.
Spl. Criminal A.T. Appeal No.190 of 2021.
Conf. Case No.11 of 2021.

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

Appellant:	Muhammad Danish Rehmani S/o. Muhammad Arif Rehmani through Mr. Hassan Sabir, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh assisted by Rana Khalid, Special Prosecutor Rangers.
Date of hearing:	17.08.2022.
Date of Announcement:	22.08.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Danish Rehmani S/o. Muhammad Arif Rehmani has preferred these appeals against the judgment dated 27.11.2021 passed by Learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No.B-491 of 2014 arising out of Crime No.86 of 2013 U/s. 302, 119 and 34 PPC R/w section 7 ATA 1997 registered at PS Gul Bahar, Karachi and Special Case No.B-492 of 2014 arising out of Crime No.238 of 2019 U/s. 23(1)(A) of Sindh Arms Act registered at P.S. Nazimabad, Karachi whereby the appellant Muhammad Danish Rehmani was convicted and sentenced to death (subject to confirmation by this court) U/s. 302(b) PPC as well as U/s. 7(a) of Anti-Terrorism Act, 1997. The appellant was also convicted and sentenced for Rigorous Imprisonment of 07 years with fine of Rs.50,000/- U/s. 23(1)(A) of Sindh Arms Act, 2013.

2. The brief facts of the prosecution case as per F.I.R. No.86/2013 lodged on 18.05.2013 at about 2100 hours on the basis of statement U/s 154 Cr.PC of Complainant Khalid S/o. Muhammad Riaz brother of deceased Zain-ul-Abideen are that on 17.05.2013 he was present at House No.A-456, Block-D, North Nazimabad, Karachi when he received information at about 1215 am in the night that his younger brother Zain-ul-Abideen alias Abid Ilyas S/o. Shaikh Muhammad Ilyas aged about 48 to 50 years, had got down from his office at Hanifia Heaven near Jamia Masjid Nazimabad No.2, Opp. Al-Farooq ground to sit in his Car No.ADU-223, Make Honda City Silver Colour for going to his House No.1-A-9/3, Nazimabad, Karachi when at about quarter to eleven on 16.05.2013, he was fired upon by firearm which lead to his death. The people of the locality took him to Abbasi Shaheed Hospital where he was stopped and was given the information that law and order situation has developed, and the office bearers of Jamat-e-Islami had taken the dead body to Jinnah Hospital and as such he should stay at the house for preparation of the burial of his brother who was Ex-UC Nazim, UC-10 Liaquatabad Town, coordinator of City Nazim, Naimatullah, and was Co-Worker of Jamat-e-Islami; after 'Qul', he had come to the Police Station and lodged the FIR against unknown person for killing his brother. Special Case No.B-492 of 2014 having FIR No.238/2014 was amalgamated. Case No.B-491/2014 having FIR No.86/2013 was treated as a main leading case and the appellant was convicted and sentenced through a consolidated judgment as mentioned earlier in this judgment.

3. After completion of investigation I.O. submitted charge sheet against the accused person on 04.02.2015 to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 14 witnesses 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 and claimed false implication.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier

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in this judgment and hence, the appellant has filed these appeal against his conviction and sentences.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 27.11.2021 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; that the sole eye witnesses evidence cannot be safely relied upon and even the appellant's identification parade was legally defective; that key witnesses Naqvi and Waji who were with the deceased at the time of his death were not examined; that the vehicle in which the victim was driving was not taken into possession and thus it cannot be ascertained whether any bullet struck it; that the pistol was foisted on the appellant by the police; that no attempt was made to track down any of the co-accused and that for any or all of the above reasons the accused should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he has placed reliance on the case of **Maqbool alias Booli v Shaukat Ali** (2011 YLR 1207).

8. On the other hand learned APG appearing on behalf of the State assisted by special prosecutor rangers has fully supported the impugned judgment and contended that the appeal is without merit and should be dismissed with the confirmation reference being answered in the affirmative.

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's counsel, 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, especially recovery of empties at the scene and medical evidence we find that the prosecution has proved beyond a reasonable doubt that on 16.05.2013 at about 2345 hours Zainul Abideen (the deceased) was shot and murdered by firearm whilst sitting in his car on the way home to his house at No.1

A-9/3 Nazimabad Karachi. In fact this is an admitted position by learned counsel on behalf of the appellant and as such is not in dispute.

11. The only question left before us therefore is who shot and murdered the deceased 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 keeping in view that each criminal case is based on its own particular facts, circumstances and evidence.

(a) Although there was a delay of over a day in lodging the FIR we do not consider this fatal to the prosecution case based on the particular facts and circumstances of this case as such delay has been explained by the complainant who lodged the FIR after the funeral of the deceased. What is of significance however is that the FIR is against unknown persons without any description of those persons being given in the FIR.

(b) In our view the prosecution's case rests almost exclusively on the evidence of the sole eye witness to the incident and his ability to correctly identify the appellant who allegedly came on a motor bike along with others and fired on the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 12. Muhammed Faisal.** According to his evidence on 16.05.2013 whilst he was going through Farooq ground he heard the sound of firing. He was afraid and hid himself in a gali. He saw four boys going on two motor cycles while firing. That on 19.05.2013 whilst using the same route he saw a rush of people and police interrogating them. He voluntarily became a witness and gave his statement to the police who took his address and telephone number. In 2014 IO Abdul Rehman contacted him and on 11.07.2014 he picked out the accused at an identification parade held by a judicial magistrate without assigning him any role in his evidence.

According to the evidence of this witness he was working in Nazimabad at a printing press at the time of the incident but at the time of giving evidence he gave his occupation as a rickshaw driver which tends to caste doubt on what the actual job of the witness was and whether in fact he was a chance or planted witness. According to his evidence he witnessed the incident from a gali at 11.45pm at night when it was dark. There is no evidence on record that there was any source of light at that time and it is unclear how far away he was from the firing which would only have gone on for a brief moment and under chaotic circumstances. Under such circumstances it is doubtful that even if the witness was present he would have been able to correctly identify the appellant of whom he would have only got a fleeting glance

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on seeing him for the first time.

According to his evidence he gave his statement to the police 3 days after the incident along with his name and address however he was not contacted by the first IO despite him being a really important witness who originally submitted his report in "A" class without any mention of the eye witness which again raises doubt that he was even present at the time of the incident.

It is true that the eye witness recognized the appellant one year and 2 months after the incident before an identification parade when called by the new IO Abdul Rehman who some how **miraculously** came across his details despite the eye witness not even being mentioned in his supplementary challon dated 08.09.2014. The eye witness had **not** given any hulia of the appellant to any one prior to the identification parade. The appellant was in police custody until the identification parade and claims that he was shown to the eye witness by the police prior to the identification parade and even in his evidence the eye witness states that, **"I had identified the accused six years back and now I cannot memorize who I had identified and therefore today (in court) I will not be able to identify the accused who I identified before the magistrate".** It is also relevant that the identification parade was carried out one month after the alleged arrest of the accused by the police and no explanation has been given for such delay and throughout this time the appellant remained in police custody who could be shown to any potential eye witness prior to any identification parade.

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 , which we very much doubt, based on the reasons mentioned above he would **not** have been able to correctly, safely and reliably identify the appellant 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 the appellant.

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

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(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 appellant the conduct of the identification parade becomes in consequential.

(c) With no eye witness evidence to the identity 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.

(d) It is notable that the appellant confessed to the offence whilst in police custody however he was not produced before a magistrate to record his confession under S.164 Cr.PC despite being produced before a magistrate for an identification parade and thus we place no reliance on his confession allegedly made before the police.

(e) It does not appeal to logic, reason or commonsense that the appellant would confess to such a serious crime as the present one which carried the death penalty whilst in police custody when there was no evidence against him at the time of his arrest.

(f) In fact it appears from the evidence on record that the appellant was arrested by the rangers after he returned to Karachi at Karachi international airport which lead to his relatives moving a petition before the Sindh High Court about his abduction and illegal detention. Thereafter it appears that it was revealed that the accused was kept in rangers custody under S.11 (EE) ATA before

Muhammad Arif

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being handed over to the police based on the findings in a JIT report which allegedly implicated the accused in this case. The JIT report was not exhibited at trial and in any event its evidentiary value is only equivalent to that of a S.173 Cr.PC report. There is no evidence a part from the police witnesses that the accused was ever held in Central prison Karachi and released from the same and then immediately arrested by the police. No prison entry or departure entry by the so called arresting police was ever exhibited at trial. Even one of the arresting police witnesses PW 8 Rehan was declared hostile on this aspect of the case. It appears that the accused was handed over to the police by the rangers who implicated him in this case based on the JIT report which was not exhibited **and thereafter the evidence against him began to miraculously flow** such as the newly found eye witness, the recovery of the pistol on the pointation of the accused which is denied by him and did not even produce a positive FSL report when matched with the empties found at the scene. Conveniently, the police did not even take the statements of Waji and Naqvi who were with the accused at the time of the shooting and were very vital witnesses both of whom they were aware of. In short we find that the whole prosecution story is full of holes and does not ring true. Even PW 13 Tahir Islam who was one of the mashirs of the recovered pistol's evidence appears to be wholly unreliable and the aspect of the pistol being foisted on the accused by the police cannot be ruled out

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

(h) We have also examined the defence case which is one of false implication which when placed in juxtaposition with the prosecution evidence discussed above cannot be completely ignored out of hand especially as the accused had no CRO.

13. 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."*

14. For the reasons discussed above by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed, the confirmation reference is

answered in the negative and the appellant shall be released unless wanted in any other custody case.

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