

Convicted : Eye witnesses believed

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi,

Spl. Criminal A.T Jail Appeal No.98 of 2021.

Spl. Criminal A.T Jail Appeal No.99 of 2021.

Appellant: Sher Zaman S/o. Meer Zaman
through Mr. Moula Bux Bhutto,
Advocate.

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

Date of hearing: 02.11.2022.

Date of Announcement: 07.11.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Sher Zaman S/o. Meer Zaman has preferred these appeals against the judgment dated 12.07.2021 passed by Learned Judge, Anti-Terrorism Court No.XX, Karachi in Special Cases No.406 of 2019 and 406-A of 2019 arising out of Crime No.94 of 2019 U/s. 353/ 324/ 302/186/ 34 PPC R/w. section 7 of ATA 1997 and Crime No.95 of 2019 U/s. 23(i)(A) of Sindh Arms Act registered at P.S. Quaidabad, Karachi whereby the appellant Sher Zaman S/o. Meer Zaman was convicted and sentenced as under:-

1. The appellant was convicted for offence under section 302/34 PPC and sentenced to suffer R.I. for life imprisonment and fine of Rs.50,000/-. In case of default in payment of fine the appellant was ordered to suffer S.I. for 06 months and also forfeiture of his property as required u/s. 7(2) of ATA 1997.
2. The appellant was convicted for offence under section 7(h) of ATA r/w section 353 PPC and sentenced to suffer R.I. for two years with fine of Rs.20,000/-. In case of default in payment of fine the appellant was ordered to suffer S.I. for 03 months.

3. The appellant was convicted for offence under section 7(i)(b) of ATA r/w section 324 PPC and sentenced to suffer R.I. for five years with fine of Rs.20,000/-. In case of default in payment of fine the appellant was ordered to suffer S.I. for 06 months.
4. The appellant was convicted for offence under section 23(i)(a) of Sindh Arms Act and sentenced to suffer R.I. for 05 years with fine of Rs.20,000/-. In case of default in payment of fine the appellant was ordered to suffer S.I. for 03 months.

All the sentences were ordered to run concurrently. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The facts of the prosecution case are that on 05.04.2019 ASI Ahmed Yar was busy in patrolling around the area along with his subordinate staff in official police mobile. During patrolling they received spy information regarding presence of two suspicious persons near Wakeel Hotel Bilal Colony who were armed with weapons whereupon complainant called PC Attaullah, PC Mohammad Tahir Khan, PC Faizan and PC Samiullah on two private motorbikes and sent them at the pointed place. In the meanwhile accused persons after seeing police officials started straight firing on the police party with intention to commit Qatl-e-Amd. In retaliation police officials also made some fire shots to accused persons. During encounter PC Attaullah, PC Mohammad Tahir and one passerby child namely Sajjad Ali received fire arm injuries, whereas the complainant managed to apprehend one accused person in injured condition on the spot who on enquiry disclosed his name to be Sher Zaman alias Dora S/o. Meer Zaman whereas other co-accused managed to make his escape good from the spot while making fire shots whose name was disclosed by the accused to be Murad alias Taachi. Upon the personal search of the accused ASI secured one 30 bore pistol bearing No.310688541 along with loaded magazine containing 02 rounds in it and one round in chamber from his right hand, one empty magazine from his pocket and Rs.300/- from his possession. During exchange of firing the accused had also received fire arm injuries. Thereafter, the injured police constables and the passerby child were shifted to JPMC through ambulance for their treatment. Thereafter ASI Ahmed Yar secured 11 empties of 30mm and one empty of 9mm bore from the place of incident.

The police came to know that the passerby injured child Sajjad Ali died on account of the firearm injuries which he received. Therefore, the police arrested accused person in the above crimes and brought him at the police station, where the present FIRs were registered against him.

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

4. The prosecution in order to prove its case examined 9 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed false implication by the police. The appellant however did not examine himself on oath and did not call any DW's 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 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 innocent and has been falsely implicated in this case by the police in order to show there efficiency; that the eye witnesses were not present at the time of the incident and as such there evidence should be ignored as they are planted witnesses; that the medical evidence does not support the prosecution case; that there are major contradictions in the prosecution evidence which renders it unreliable; that no independent mashir was associated with the case; that the pistol was foisted on the appellant; that there was a delay in sending the pistol and empties for FSL and that for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions, he placed reliance on the cases of **Naveed Asghar v The State** (PLD 2021 SC 600), **Tariq Pervez v The State** (1995 SCMR 1345), **Shamoon**

alias **Shamma v The State** (1995 SCMR 1377) and **Wazir Muhammad v The State** (1992 SCMR 1134).

8. On the other hand learned Additional Prosecutor General Sindh has contended that the evidence of the eye witnesses is reliable, trust worthy and confidence inspiring and is to be believed; that empties recovered at the spot were matched with the pistol which was recovered from the accused when he was arrested on the spot which lead to a positive FSL report; that the medical evidence corroborates/supports the prosecution case and as such the impugned judgment should be upheld and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of **Noor Muhammad v The State** (2010 SCMR 97), **Muhammad Mansha v The State** (2001 SCMR 199), **Mureed v The State** (PLD 2002 Karachi 530), **Sajid Mehmood v The State** (2022 SCMR 1882), **Mawas Khan v The State** (PLD 2004 SC 330), **Muhammad Ilyas v The State** (2011 SCMR 460), **Rooh Ullah v The State** (2022 SCMR 888) and **Muhammad Din v The State** (1985 SCMR 1046).

9. We have heard the arguments of the learned counsel for the appellant and 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 the medical evidence and other medical reports, recovery of empties and blood at the crime scene we find that the prosecution has proved beyond a reasonable doubt that the child Sajjad (the deceased) was shot and seriously injured by firearm on 04.05.2019 at about 2115 hours at Bilal Coloney near Wakeel Hotel Landhi Karachi and died as a result of his firearm injuries shortly after reaching hospital and at the same date, time and location PC Muhammed Tahir Khan and PC Attaullah (the other injured) were also injured by firearm following an encounter with miscreants.

11. The only question left before us therefore is whether it was the appellant who seriously injured the deceased which injuries lead to his death and injuries to the other injured by firearm at the said time, date and location?

12. At the very outset we do **not** find that this case falls within the purview of the ATA as defined by a larger bench of the Supreme Court in the case of **Ghulam Hussain v. State** (PLD 2020 SC 61) where in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of such act. Whether people were terrorized as a by product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Based on the particular facts and circumstances of this case it appears that the intent of the appellant was to avoid his arrest by the police and as such he opened fire on the police with the sole purpose of evading his arrest at the hands of the police keeping in view that 9 FIR's were outstanding against him and he was wanted for many serious offences which firing had no object, intent, purpose or design to create terror and as such the appellant is acquitted of any offence under the ATA.

13. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant in respect of all the PPC offences so charged and the offence under the SAA and **not** for any offence under the ATA keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That the FIR was lodged with relative promptitude after only three hours of the incident and this slight delay was caused because the complainant had to arrange taking the injured to hospital which was a priority as at least two of the injured had received life threatening injuries and it was necessary to prioritize them in order to attempt to save their lives and recording the memo of arrest and recovery on the spot took some time as such he had no time to consult with anyone in order to cook up a false case against the accused who in any event had been arrested on the spot and is named in the FIR as his mind would have been in turmoil following the incident and at that point in time his main concern would have been the condition of the seriously injured rather than putting together a false narrative in order to implicate the accused.

Thus, we find that there has been hardly any delay in lodging the FIR and even such slight delay has been fully explained. This slight delay has neither lead to any benefit to the prosecution nor caused any prejudice to the accused and as such we find this slight delay in lodging the FIR based on the particular facts and circumstances of the case not to be fatal to the prosecution case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872)

(b) We find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and injuries to the other injured and whether we believe their evidence whose evidence we shall consider in detail below;

(i) **Eye witness PW 3 Muhammed Tahir.** According to his evidence the duty officer sent him, PC Faizan, PC Attuallah and PC Samiullah to report to PW 1 Ahmed Yar who is the complainant in this case at star ground. They were informed by PW 1 Ahmed Yar that he had received information that 2 suspects equipped with deadly weapons were present at Bilal Coloney near Wakeel hotel and told them to go with the informer to the pointed place and he would follow them. At about 9.15pm when they reached the pointed place as shown by the informant they found two suspects armed with pistols who fired at the police party with intention to take their lives when they tried to apprehend them. On account of the firing he received three bullet injuries. One on his wrist, one on his right hand and one on his belly. He also saw his colleague PC Attalluah receive a fire shot on his chest and one passer by child receive a fire shot to his head. The police returned fire which lead to one of the miscreants being injured by fire shot. Meantime PW 1 Ahmed Yar reached the place of incident and apprehended the accused whilst his co-accused escaped. He was shifted to hospital. The injured accused was also shifted to hospital.

This eye witness was not a chance witness as he was a police men on duty sent to arrest suspects. He was injured at the scene as supported by the medical evidence. He had no enmity or ill will to falsely implicate the accused in this case who in any event was arrested on the spot by another police men. He was not dented despite a length cross examination. He gave his S.161 Cr.PC statement a few days after the incident despite his injuries which was not materially improved on during his evidence. We have no reason to disbelieve his evidence which we find to be reliable, trust worthy and confidence inspiring and as such we believe the same and place reliance on it. It is well settled, by now that the evidence of police officers can be safely relied upon provided that they have no enmity or ill will towards the accused. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474). Since the accused was arrested on the spot there was no need for any

identification parade.

(ii) **Eye witness PW 4 Attaullah.** He was also injured at the scene of the incident by firearm during the encounter with the miscreants as is corroborated/supported by the medical evidence. His evidence corroborates PW 3 Muhammed Tahir's evidence in all material respects and as such the same considerations apply to him as to PW 3 Muhammed Tahir which has been discussed above.

(iii) **Eye witness PW 7 Akhtar.** According to his evidence he was drinking tea at the Wakeel hotel on 05.04.2019 when he recognized 4 police officers who he had seen on patrol before come to the hotel. He saw the police officers park there bikes and when they approached the two suspects the suspects opened fire on the police men. On account of the fire two police men and one child were injured. The police also returned fire. He saw a police mobile arrive and a policeman apprehend an injured suspect whilst the other suspect escaped. He gave evidence that he could identify the accused if he saw him again and identified the accused in court.

This eye witness was not a chance witness as he lived in the area and was drinking tea at a local tea shop. He was an independent witness. He was not dented on cross examination and he gave his S.161 Cr.PC statement a few days after the incident. We note that this witness was an accused in a narcotics case registered at the same PS as the policemen involved in the incident and since he gave no hulia of the accused he would be unlikely to be able to correctly identify him especially as it was a night time incident and he did not know the accused from before. Thus, we only give a little weight to the evidence of this witness so far as the incident is concerned and none in respect of the identify of the accused which is of no relevance anyway because as mentioned earlier the accused was arrested on the spot.

We can convict on the evidence of a sole eye witness provided that we find his evidence to be reliable, trust worthy and confidence inspiring **however in this case we have 3 eye witnesses.** It however would be of assistance by way of abundant caution if there is some corroborative/supportive evidence. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) and **Muhammad Ismail vs. The State** (2017 SCMR 713). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of at least two of the eye witnesses to be of very good quality and one of only very average quality,

but none the less believe even his evidence although giving it lesser weight than the two police men eye witnesses

Thus, based on our believing the evidence of the PW eyewitness what other supportive/corroborative material is there against the appellant? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(c) PW 1 Ahmed Yar who is the complainant of the case a part from him not being present at the time when the accused opened fire on the police and during the encounter corroborates the evidence of the eye witnesses in all material respects. He also made the arrest of the accused on the spot in an injured condition which is corroborated/supported by the medical evidence in relation to the accused and the arrest and recovery memo and recovered an unlicensed firearm from him. It is true that he did not send the accused to hospital at the same time as he sent the other injured but about an hour later on but this was because the other injured had life threatening injuries whilst the accused's injuries were on non vital parts of his body and he was busy completing the other legal formalities. The injuries to the accused were to his buttock and thigh hence the reason why he could not escape.

(d) PW 2 Mohammed Rehman also corroborates PW 1 Ahmed Yar in all material respects being the mashir of the memo of arrest and recovery and the eye witnesses apart from his absence at the time of the encounter.

(e) That it has not been proven through evidence that any particular police PW's had any enmity or ill will towards the appellant and had no reason to falsely implicate him in this case for instance by foisting a pistol on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon and as such we rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(f) That nearly all required police memo's and entries have been exhibited which fully support the evidence of the PW's and the prosecution case.

(g) That the medical evidence and medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased died from a firearm injury to the head, that PW 3 Tahir received firearm injuries to his wrist, hand and belly and that PW 4 Attaullah received a firearm injury to his chest and that the accused received a firearm injury to his buttock and thigh. There was no blackening around any of the wounds which fits in with the eye witness evidence that the encounter took place from about 20 paces from the police party and the accused and his co-accused.

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(h) That the accused was arrested on the spot in an injured condition as proven by the evidence of the police PW's mentioned above and the medical evidence and an unlicensed pistol was recovered from him on his arrest on the spot.

(i) That the empties which were recovered at the scene lead to a positive FSL when they were matched with the pistol which was recovered from the accused on his arrest on the spot.

(j) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the time the complainant received the spy information about the whereabouts of the suspects to the complainant calling for police reinforcements to the police reinforcements being fired upon and injured with a child by stander being injured and killed when the police went to arrest the suspects who opened fire on the police on sight to the police returning fire to the arrest of the accused on the spot in injured condition from whom an unlicensed pistol was recovered to a positive FSL report in respect of the recovered pistol and empties recovered at the crime scene.

(k) The fact that S.103 Cr.PC was not complied with based on the particular facts and circumstances of this case and the other available evidence on record we do not give much significance to as it has now virtually been judicially recognized that in such type of criminal cases now a days due to general apathy in the public and fear of reprisals independent people are not willing to act as mashirs and unnecessarily embroil themselves in the legal process which may have repercussions on both them and their family. In this respect reliance is placed on the cases of **Salah-uddin v. The State** (2010 SCMR 1962) and **Ibrarullah v. State** (2021 SCMR 128)

(l) That the prosecution exhibited 9 FIR's in respect of heinous offences in which the accused in the instant case is a nominated accused and hence the reason why the accused fired on the police when they came to arrest him. This also indicates that the accused is a habitual offender and hardened criminal which also goes against him

(m) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The defence case is simply one of false implication by the police. The accused did not give evidence on oath. According to him he was arrested from a bus stop but he did not produce any DW to support his case as such we disbelieve the defence case as an afterthought in the face of reliable, trust worthy

and confidence inspiring eye witness and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case. As per the song of the well known punk/rock group the clash in the 1970's and 1980's it was a case of *"I fought the law but the law won"*.

14. Thus, based on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eyewitness evidence and other corroborative/supportive evidence mentioned above, we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offences for which he has been convicted and hereby maintain his convictions and sentences **except** in respect of the ATA offences for which he is acquitted.

15. The appeals are dismissed except as modified above.