

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No. 39 of 2017

Present

Mr. Justice Naimatullah Phulpoto

Mr. Justice Abdul Malik Gaddi

Date of Hearing : 23.10.2017.
Date of Judgment : 24.10.2017.
Appellant : Mohammad Athar Shaikh through Mr. Aftab Ahmed Advocate.
Respondent : The State through Mr. Mohammad Iqbal Awan DPG.

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Mohammad Athar Shaikh appellant was tried by learned Judge, Anti-Terrorism Court/ 1st Additional Sessions Judge, Karachi East in Special Case No. 73/2015. After full-dressed trial, by judgment dated 10.01.2017, appellant Mohammad Athar Shaikh was convicted under Section 353 PPC and sentenced to suffer 2 years R.I. and pay fine of Rs.10,000/- in default thereof to suffer 2 months SI more. Appellant was also convicted under Section 324 PPC read with Section 7 Anti-Terrorism Act, 1997 and sentenced to 7 years R.I and to pay fine of Rs.10,000/- and in default thereof to suffer 2 months S.I more. All sentences were ordered to run concurrently. Benefit of Section 382-B Cr.P.C was also extended to accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that PC Shakeel belt No. 9562 lodged report alleging therein that on 09.09.2014 at 2350 hours, he was performing duty at PS Baloch Colony. On the same night, he left for patrolling with PC Haris belt No. 31589, on motorcycle No. KEG-7931. When both the police constables reached at Track-III of Express Way Road at 2130 hours. It is alleged that two persons in suspicious manner appeared on motorcycle, it was without number. Police party signaled them to stop but they opened straight fires upon police with intention to kill. It is stated that complainant Shakeel Ahmed received fire arm injury at his right leg, whereas PC Haris received bullet injury at his abdomen. After police encounter, accused taking benefit of dark night ran away to the Malir sewerage line. It alleged that in the meanwhile, a police mobile of PS Baloch Colony headed by


ASI Khan Mohammad reached at the place of occurrence. Information regarding police encounter was conveyed to the SHO PS Baloch Colony through wireless. Both the injured police constables were shifted to Jinnah Hospital in the police mobile for their treatment and Certificates. It was claimed in the FIR by PC Shakeel that he would identify the unknown culprits if brought before him. FIR was recorded vide Crime No.676/2014 for offences under Sections 324/353/34 PPC read with Section 7 of Anti-Terrorism Act, 1997.

3. During investigation, place of wardat was inspected by I.O. 161 Cr.P.C statements of the P.Ws were recorded. Accused Mohammad Athar Shaikh was arrested in another FIR bearing Crime No.08/2015 for offence under Sections 392/34 PPC. I.O of this case was informed regarding involvement of the accused in this case. I.O interrogated him and arrested accused in this case. After usual investigation, challan was submitted against present accused under above referred sections and co-accused Danish was shown as absconder. Accused Danish was declared as proclaimed offender by trial Court.

4. Learned Judge, Anti-Terrorism Court-I, Karachi framed charge against the accused Mohammad Athar Shaikh under the above referred sections at Ex.6. Accused pleaded not guilty and claimed trial.

5. Learned Judge, Anti-Terrorism Court-I, Karachi examined seven prosecution witnesses. Thereafter, case was transferred to the learned Judge, Anti-Terrorism Court/ 1st Additional Sessions Judge, Karachi East for disposal according to law. Learned Trial Court examined three more prosecution witnesses. Thereafter, prosecution side was closed by learned DDPP vide statement at Ex.11.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex.12. Accused claimed false implication in the case and denied the prosecution allegations. Accused raised plea that P.W Haris had seen him at police station during his confinement before holding of identification parade. In a question what else he has to say, accused replied that he is innocent and he has been involved in this case for political reasons at the instance of his opponent political party. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led in defence.



7. Learned Trial Court, after hearing the learned counsel for the parties and examination of the evidence available on record, convicted and sentenced the appellant as stated above, hence this appeal is filed.

8. The facts of these cases as well as evidence produced before the trial Court find an elaborate mention in the Judgment dated 10.01.2017, passed by the learned trial Court, therefore, the same may not be reproduced here so as to avoid unnecessary repetition.

9. Mr. Aftab Ahmed learned Advocate for the appellant argued that arrival and departure entries have not been produced. It is argued that it was night time incident, source of identification has not been disclosed by the prosecution. No blood stained earth was collected from place of occurrence. It is further argued that identification parade was not conducted by the Magistrate as required by law. It is also argued that after arrest of the accused, nothing incriminating was recovered from his possession. In support of his contentions, learned counsel relied upon the case of **Hakeem and others vs. The State (2017 SCMR 1546)**.

10. Mr. Mohammad Iqbal Awan, learned DPG argued that appellant was identified by P.W PC Haris during the identification parade. PC Haris had no enmity with the appellant. Ocular evidence is corroborated by medical evidence. Learned DPG submits that appeal merits no consideration.

11. We have carefully heard the learned counsel for the parties and scanned the evidence.

12. We have come to the conclusion that prosecution has failed to prove its' case against the appellant for the reasons that it was night time incident. PC Shakeel has deposed that he left police station along with PC Haris for patrolling on the motorcycle when they reached at Expressway Track-III, two suspected persons appeared on the motorcycle. Police signaled them to stop, but suspects started firing upon the police with intention to kill and he received four fire arms injuries at his left leg and PC Haris also received injury at his abdomen. He has further deposed that after incident, accused ran away by taking benefit of dark night. He has further deposed that he had identified the accused on street lights. Learned DPG conceded that in the mashirnama of place of wardat there is ^{no} mention of electric bulbs. Learned DPG has also

submitted that no blood stained earth was found at the place of incident at the time of inspection. Another injured PC Haris has also deposed that he left along with PC Shakeel on motorcycle for patrolling when they reached at Expressway at 9:25 pm, two persons appeared on the motorcycle in the suspicious manner. Police gave them signaled to stop but they started firing upon the police, police also fired. In result, he received injuries so also PC Shakeel. Both injured witnesses have claimed that they identified accused in the identification parade. Mr. Waseem Ahmed Judicial Magistrate has deposed that on 23.01.2015, Inspector Jafar Baloch of PS KIA produced accused Mohammad Athar Shaikh arrested in Crime No. 676/2014 for offences under Sections 353/324/34 PPC read with Section 7 Anti-Terrorism Act, 1997 for holding his identification parade. He held identification parade on 09.09.2014 and P.W/P.C Haris identified the accused. In the cross-examination, Magistrate has replied that there were total nine dummies which were arranged by his staff. He has admitted that he has not mentioned names and addresses of the dummies in the memo of identification parade, but stated that ages and features of the dummies were more or less similar.

13. In our considered view, identification of the accused in the present case at night time by the injured witnesses was highly doubtful for the reason that in the mashirnama of place of wardat there is no mention of electric bulbs. No blood stained earth was collected from place of wardat. Accused was arrested on 11.01.2015 but identification parade was held after long delay on 23.01.2015. There is nothing on record that P.Ws had seen accused clearly for sufficient time at the place of incident. We have no hesitation to hold that identification parade through PC Haris was legally laconic and identification of accused through PC Shakeel in Court was unsafe for maintaining conviction. Moreover, identification parade was not held in accordance with the guidelines contained in the Police Rules, 1934. Rightly reliance has been placed upon the case reported as **Hakeem and others vs. The State (2017 SCMR 1546)**, wherein the Honourable Supreme Court has held as under:

"The Rule 26.32(1)(d) inter alia require "the suspects shall be placed among other persons similarly dressed and of the same religion and social status, in the proportion of 8 or 9 such persons to one suspect. Each witness shall then be brought up separately to attempt his identification. Care shall be taken that the remaining witnesses are " still kept out of sight and hearing and that no opportunity is permitted for communications to pass between witnesses who have been called up and those who have not." PW-5, Imdad Ali, Assistant Mukhtiarkar, Mirpursakro, in whose presence the identification parade was

conducted, has stated in his deposition that he arranged 22 dummies. He deposed "the accused persons namely Ghulam Mustafa, Bodo, Noor Mohammad, Khuda Bux, Usman, Hakim and Imdad were mixed up in the row with damies (sic) according to their choice and thereafter the complainant Wali Muhammad and PWs Jan Mohammad and Abdullah picked them up from the row." So in-fact seven accused were lined up with dummies for identification. Furthermore, during the identification parade, no specific role played in the incident was assigned to any particular accused. This Court in the case of *Azhar Mehmood v. State* (2017 SCMR 135) has held that in an identification parade, if the accused were identified without reference to any role played by them in the incident, the same is of no evidentiary value. A quote from the judgment of *Azhar Mehmood's* case is as follows:-

"We have gone through the statements made by the supervising Magistrates, i.e. PW5 and PW10 as well as the proceedings of the test identification parades and have straightaway noticed that in the said parades the present appellants had not been identified with reference to any role played by them in the incident in issue. It has consistently been held by this Court that such a test identification parade is legally laconic and is of no evidentiary value and a reference in this respect may be made to the cases of *Khadim Hussain v. The State* (1985 SCMR 721), *Ghulam Rasul and 3 others v. The State* (1988 SCMR 557), *Asghar Ali alias Sabah and others v. The State and others* (1992 SCMR 2088), *Mehmood Ahmad and 3 others v. The State and another* (1995 SCMR 127), *Siraj-ul-Haq and another v. The State* (2008 SCMR 302), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Shafqat Mehmood and others v. The State* (2011 SCMR 537), *Sabir Ali alias Fauji v. The State* (2011 SCMR 563) and *Muhammad Fayyaz v. The State* (2012 SCMR 522)"

5. This Court in the case of *Bacha Zeb v. The State* (2010 SCMR 1189) after relying upon earlier decision of this Court in the case of *Lal Pasand v. The State* (PLD 1981 SC 142) held that it would be unreasonable to mix five accused persons with several other persons for the purposes of identification as such a larger number of persons would only confuse the identifying witnesses and the proper course is to have separate identification parades for each accused. Keeping in view the manner in which the identification parade was held, such identification parade cannot be relied upon to award the accused punishment of life imprisonment, who on account of old blood feud may also be already known to the complainant."

14. There are several circumstances in the case as highlighted above, which create reasonable doubt in the prosecution case. It is settled principle of law for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of *Tariq Pervez vs. The State* (1995 SCMR 1345), wherein the Honourable Supreme Court has held as under:-

"The concept of benefit of doubt to an accused persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be

many circumstances creating doubts. If there is a circumstance which crates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as matter of race and concession but as a matter of right."

15. In the view of above, we have come to the conclusion that the prosecution has failed to prove the aforesaid case against the appellant beyond any shadow of doubt. Therefore, we extend benefit of doubt to the appellant and allow Special Criminal Anti-Terrorism Jail Appeal No. 39 of 2017. Consequently, the conviction and sentence recorded by the Trial Court vide judgment dated 10.01.2017 are set aside. Appellant Mohammad Athar Shaikh is acquitted of the charges. Appellant Mohammad Athar Shaikh shall be released from custody forthwith, if he is not wanted in some other custody case.


JUDGE

24.10.2017
JUDGE