Murder ; 164 Defective IP parade : Acquitted

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CERTIFICATE OF THE COURT IN RECORD [illegible]

Sp. Cr A TA No. 03 of 2014 t/w Ccon 01/14

Shah Faisal vs. The State

SINDH HIGH COURT

Composition of Bench. ~~Single~~/D.B.

Mr. Justice Muhammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

Dates of hearing: 8-10-19 & 9-10-19

Decided on 16-10-19

(a) Judgment approved for reporting. Yes / ~~No~~ Ktg

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a princip-le 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) Rerder 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.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

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IN THE HIGH COURT OF SINDH AT KARACHI

APPELLATE JURISDICTION
UNDER ANTI TERRORISM ACT 1997

CRIMINAL APPEAL NO. 03 /2014

Shah Faisal,
S/o Hayat Khan, Muslim,
Adult, Resident of House No:
A-14, Sector No-3, Monghopir,
Sultanabad, Karachi.
Presently Confined in Central Jail,
At Karachi. ---------- Appellant

06-2-14
D.R Grant
On leave

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VERSUS

The State. ---------- Respondent

1) **FIR No: 42/2012**
U/S: 302/392/353/34 P.P.C
R/W Section 7 ATA 1997.
P/S: Manghopir, Karachi (west)

2) **FIR No: 149/2012**
U/S: 13-D Arms Ordinance
P/S: Manghopir, Karachi (west)

CRIMINAL APPEAL UNDER SECTION 25 OF THE ANTI TERRORISM ACT 1997

Being aggrieved by and dissatisfied with the impugned Judgment of convection dated 31-01-2014 passed by the learned judge A.T.C No-2 at Karachi (M.S Khalida Yaseen) in special case No: B-112/2012 (The State VERSUS Shah Faisal

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OFFICE OF THE JUDGE, ANTI-TERRORISM COURT NO.II, KARACHI.

No.Reader/ATC-II/K.Div/ 124 /2014, Karachi, dated 03.02.2014

INWARD No. 832
BRANCH: Cr.
DATE 3/2/14
High Court of Sindh
Karachi

To,

The Registrar,
Honourable High Court of Sindh,
Karachi.

SUBJECT: SUBMISSION OF R&Ps UNDER SECTION 25 OF ATA 1997 -- STATE VS. SHAH FAISAL KHAN & OTHERS.

Enclosed please find herewith following Record & Proceedings of Special Cases, decided by this Court on 31.01.2014, details of case is as under:-

S.No.	Case No.	State Vs.	FIR No.	P. S. & U/S.
01.	B112/2012	Shah Faisal & Others	42/2012	Manghophir 302/392/353/34/PPC r/w 7 ATA
02.	B113/2012	Shah Faisal	149/2012	Orangi Town 13-D, Arms Ord.

Encl.02 R&Ps.

This is for your kind information and necessary action.

3.2.14

(Ms. KHALIDA YASEEN)
JUDGE
ANTI TERRORISM COURT NO: II
KARACHI

Judge

IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.03 of 2014
Confirmation Case No.01 of 2014

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.

Appellant:	Shah Faisal through Mr. Salahuddin Khan Gandapur, Advocate.
For State:	Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.
Date of hearing:	08.10.2019 and 09.10.2019
Date of announcement:	16 .10.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Shah Faisal s/o. Hayat Khan has preferred this appeal against the impugned judgment dated 31.01.2014 passed by the learned Judge Anti-Terrorism Court No.II, Karachi in Special Case No.B-112 of 2012, F.I.R. No.42/2012 u/s. 302/392/353/34 PPC r/w section 7 of ATA, 1997 and Special Case No.B-113 of 2012 , F.I.R. N.149/2012 u/s. 13-D Arms Ordinance, registered at Manghopir police station, Karachi whereby the appellant has been convicted and sentenced to death under Section 7(a) of Anti-Terrorism Act, 1997 (subject to confirmation by this court) with fine of Rs.2,00,000/- (Rupees two lacs only) to be paid at the rate of rupees one lac each to the legal heirs of both the deceased and also to suffer R.I. for 07 years under section 13-D Arms Ordinance.

2. The brief facts of the case are that SHO/Inspector Ghulam Rasool Rajper of PS Manghopir has lodged FIR No.42/2012 on 03.02.2012 at 2045 hours stating therein that he along with his police party were on illaqa gushat in police mobile when by wireless, he received information that firing has taken place at Sultanabad Sector-3. On this information he had reached opposite Mashah Allah General Store, Sector-3, Sultanabad at 1915 hours. He saw a silver colored Cultus Car having Registration No.AFX-364 in which HC Nadeem Abbasi and PC Muhammad Sajid were

lying drenched in blood who by entry No.32 alongwith their private licensed weapons HC Nadeem Abbasi 9MM TYF-363 with license No.5991 whereas PC Muhammad Sajid had pistol number A-2514 30 bore license No.106727 were on duty in illaqa gushat in search of terrorists. Both injured were sent through S.I. Ali Muhammad and other police party in government mobile for treatment to Abbasi Shaheed Hospital. While going to Abbasi Shaheed Hospital SI Ali Muhammad informed him that both injured have succumbed to their injuries and for legal proceedings he is present in the hospital. He had informed the high-ups and reached Abbasi Shaheed Hospital where doctors were busy in the postmortems of the deceased. He had given instructions to Sub-Inspector and he on his own found out that two to three terrorists had fired at the police officials and had killed them and had also taken their weapons and as such he lodged this FIR to take action against unknown accused persons. The investigation of the case was given to Inspector Younis Raza Jafferi.

3. The co accused Muhammad Yaseen Khan alias Haji S/o. Abdul Rehman alias Naik Dil was arrested but escaped from PS Taimuria on 17.06.2012. He was declared proclaimed offender by the Court on 29.11.2012 and the case against him was kept on dormant file to decide the same as and when he was arrested. The accused Shah Faisal was arrested in this case on 02.07.2012.

4. After usual investigation the challan was submitted and the charge was framed against the accused Shah Faisal on 07.12.2012 in which he pleaded not guilty and claimed his trial.

5. In order to prove its case the prosecution examined 16 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under S.342 Cr.PC and also gave evidence on oath u/s. 340 Cr.P.C. whereby he denied the allegations against him and claimed his false implication in the case and thereafter the defense closed its side.

6. Learned Judge, Anti-Terrorism Court-II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on

record, vide the impugned judgment dated 31.01.2014, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the appellant is not named in the FIR and no witnesses are named in the FIR; that initially the S.173 report was filed in "A" class and subsequently the appellant was falsely implicated in this case; that all the eye witnesses are chance witnesses and cannot be relied upon and in fact are put up witnesses by the police; that the identification parade was not carried out in accordance with law and after an unexplained delay of 7 days after the arrest of the appellant and that for one or all the above reasons the appellant was entitled to be acquitted by extending him the benefit of the doubt. In support of his contentions he placed reliance on **Zafar Hayat v. The State** (1995 SCMR 896), **Asghar Ali alias Sabah v. The State** (1992 SCMR 2088), **Muhammad Ayaz v. State** (2011 SCMR 769), **State v. Bashir and others** (PLD 1997 SC 408), **Tariq Pervez v. The State** (1995 SCMR 1345), **Muhammad Nawaz and another v. The State** (PLD 2005 SC 40), **Irfan and another v. Muhammad Yousuf and another** (2016 SCMR 1190), **Ayub Masih v. The State** (PLD 2002 SC 1048), **Ghulam Mohy Ud Din alias Haji Babu & another v. The State** (2014 SCMR 1034), **Amjad Shah v. The State** (PLD 2017 SC 152) and **Muhammad Mansha v. The State** (2018 SCMR 772).

9. On the other hand Mr. Muhammad Iqbal Awan, Deputy Prosecutor General for the State has argued that this was a brutal murder of two policemen; that there are at least 3 eye witnesses all of whose evidence is reliable, trustworthy and confidence inspiring who had no enmity with the appellant and as such had no reason to give false evidence against him; that the eye witnesses evidence was corroborated by the medical evidence; that the identification parade was carried out in accordance with law; that the weapon from one of the deceased was recovered from the appellant who confessed to the crime and lead the police to the place of

the incident; that the FSL report is positive and also the chemical report and as such the prosecution had succeeded in proving its case beyond a reasonable doubt and the appeal should be dismissed and the death sentence maintained as this was a particularly brutal crime which involved the murder of two police men.

10. 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, the impugned judgment with their able assistance and have considered the relevant law.

11. From the evidence in our view it seems to be an undisputed position and indeed admitted position by both parties, as supported by both ocular and medical evidence, that both the deceased were shot by fire arm and died on account of the firearm injuries sustained by them at around 18.55 hours on 03-02-2012 whilst the deceased were sitting in a silver colored Cultus Car opposite Mashah Allah General Store, Sector-3, Sultanabad Karachi.

12. The issue before us therefore based on the evidence on record is who shot and murdered both the deceased?

13. In our view the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the convictions and sentences against the appellant and the impugned judgment are set aside for the following reasons;

(a) In our view the case against the appellant largely turns on whether or not we find the eyewitnesses as reliable, trustworthy and confidence inspiring and thus we will examine the evidence of each of the 4 alleged eyewitnesses.

(i) **Eye witness PW 2 Zahid Hussain Rizvi** in our view is a chance witness whose evidence must be viewed with a great deal of caution since he had no cogent believable explanation for his presence at the scene of the incident. In this respect reliance is placed on **Ms Rukhsana Begum V Sajjid** (2017 SCMR 596).He does not say how far away he was when he saw the appellant firing on the deceased in their car; other evidence indicates that it was already getting dark; that in his evidence he states that two persons were talking to Nadeem who then opened fire on him

which indicates that the firing was made from close range however this is not supported by the medical evidence as no evidence of any gun powder residue, tattooing or even blackening was found by the MLO on any of the wounds received by either of the deceased which indicates that the shots were made from at least 3 feet away which contradicts his oral evidence. In this respect reliance is placed on **Amin Ali and another Versus The State** (2011 SCMR 323); that he gives no hulia or description of the appellant. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524). His conduct also in our view does not tend to accord with natural human conduct since after witnessing the firing incident instead of going to the car to see if either of the deceased required medical assistance or phoned for help he went to the house of one of the deceased (Nadeem) to narrate the incident to those who may have been present. In this respect reliance is placed **Muhammed Asif V State** (2017 SCMR 486). With regard to the identification parade we do not consider that this has been carried out in accordance with the guidelines laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488).In particular the accused was kept in police custody after his arrest and could have easily been shown to the eye witnesses which is the defense taken by the appellant in his S.342 Statement and under oath (and was put to the PW 1 Azizullah the judicial magistrate during his cross examination as well as this eye witness) especially as on the very day that the FIR was lodged the police had already contacted two eye witnesses and thus for the safe administration of criminal justice the appellant should have been sent to judicial custody until after the identification parade. There was also an unexplained delay of 7 days in carrying out the identification parade after the arrest of the appellant which again raises doubts as to whether the identification parade can be safely relied upon. Furthermore no CNIC's were taken from the dummies. In court identification has not been approved of by the Supreme Court in terms of its reliability or credibility. Thus for the above reasons we place no reliance on the evidence of this eye witness.

(ii) **Eye witness PW 4 Jawed Ansari** in our view is also a chance witness whose evidence must be viewed with a great deal of caution. He does not say how far away he was when he saw the appellant firing on the deceased in their car; in his own evidence he concedes that it was already getting dark at the time of the incident; he does not say how far from the car the accused were firing; in our view the huila that he gives concerning beards is insufficient to ensure that

he could safely identify the appellant again and interestingly at the identification parade according to his evidence the appellant only had a light beard. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524).There are some variations in his evidence and his S.161 statement and surprisingly by his own admission he has reached the PS at 8pm on the day of the incident before the FIR was registered at 9pm.Being an eye witness it is suspicious that he did not register the FIR instead of the police. With regard to the identification parade we do not consider that this has been carried out in accordance with the guidelines laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488).In particular the accused was kept in police custody after his arrest and could have easily been shown to the eye witnesses which is the defense taken by the appellant in his S.342 Statement and under oath (and was put to the PW 1 Azizullah the judicial magistrate during cross examination and as well as this eye witness) especially as on the very day that the FIR was lodged the police had already contacted two eye witnesses and thus for the safe administration of criminal justice the appellant should have been sent to judicial custody until after the identification parade. There was also an unexplained delay of 7 days in carrying out the identification parade after the arrest of the appellant which again raises doubts as to whether the identification parade can be safely relied upon. Furthermore no CNIC's were taken from the dummies. The eye witness even admits in his own evidence during cross examination that when you are standing in the corridor of the court the accused brought in handcuffs can be seen. In court identification has not been approved of by the Supreme Court in terms of its reliability or credibility. Thus for the above reasons we place no reliance on the evidence of this eye witness.

(iii) **Eye witness PW 11 Muhammed Wasim Khan** in our view is a chance witness whose evidence must be viewed with a great deal of caution. He does not say how far away he was when he saw the appellant firing on the deceased in their car; other evidence indicates that it was already getting dark; that he saw the appellant come on a motorbike and fire at the car in which the deceased were sitting which is in direct contradiction to the other two main eye witnesses who apparently saw the appellant talking to the deceased when the fire was made and make no mention of any motor bike and that the appellant escaped on foot; that he gives no hulia or description of the appellant and did not take part in the identification parade in respect of the appellant for unexplained reasons best known to the police. In

court identification has not been approved of by the Supreme Court in terms of its reliability or credibility. Thus for the above reasons we place no reliance on the evidence of this eye witness. In this respect reliance is placed on **Javed Khan V State** (2017 SCMR 524)

(iv) **PW 13 SI Akber Jan** relates the evidence of co-accused confessing before the police that he and the appellant killed both of the deceased. This evidence is hearsay and is inadmissible. Furthermore, even otherwise, this is evidence of one co-accused against another co-accused which is inadmissible in evidence. Since the co-accused confession has been made before the police it is of no value in the eyes of the law. This evidence cannot be treated as eye witness evidence. In any event for the reason's mentioned above no reliance can be paced on it.

(b) Thus, for the reasons mentioned in (a) (i) to (iv) above we do **not** find any of the alleged eye witnesses evidence to be reliable, trustworthy or confidence inspiring and thus we place no reliance on the same.

(c) It appears to us suspicious that PW 3 Ghulam Rasool had checked and found that the weapons of the deceased had been taken when they had not been issued official weapons. So how did PW 3 Ghulam Rasool know that the deceased were armed? Just because the licensed weapons of the deceased were in the car does not mean that the deceased were carrying weapons. It also seems a bit of a convenient co-incidence that the licenses were kept in the car of the deceased so that they could be found by the police. PW 3 Ghulam Rasool was the first police officer to reach the scene of the incident and interviewed shop keepers but found no eye witnesses and yet he is the person who asked PW 6 IO Younis Jaffery to call the eye witnesses. Again it seems rather convenient that two eye witnesses pop up shortly thereafter and are told to report to the police station. Why were they not taken immediate to the police station for registering the FIR and recording their S.161 statements? The FIR does not even mention any eye witnesses despite one of them apparently sitting in the police station before the FIR was recorded. This chain of events tends to caste some doubt on the prosecution case.

(d) When there was no evidence of the deceased firing their weapons and as there was no blackening on any of the firearm injuries sustained by the deceased which indicates that the shots were fired from at least 3 feet away how could an empty have been recovered from **inside** the vehicle in which the deceased was sitting as per the evidence of PW 3 Ghulam Rasool? This fact again weakens the prosecution case

(e) Any confession made by the appellant is inadmissible in law as it was made before the police.

(f) The appellant was already in custody in respect of another case under the Arms Ordinance which did not carry the death penalty and as such it does not particularly appeal to reason that he would simply confess to murder in another case without even being interrogated in respect of that case especially as that case carried the death penalty.

(g) The appellant leading the police to the scene of the crime is of no assistance to the police as the police already knew the location of the scene of the crime.

(h) There is no evidence to suggest that the deceased although being policemen were on duty at the time of the incident; they were in a vehicle which was not a police vehicle and has not been proven to be owned by either of them; they were not in uniform; they had no official weapon with them and no evidence has been placed on record to show that they were on duty on the day of the incident and as such whoever killed the deceased may not even have known that they were policemen and may have killed them due to personal enmity or any other reason.

(i) The medical evidence can only corroborate the fact that the deceased were killed by firearm and **not** who it was who made such fire.

(j) In terms of circumstantial evidence which must touch the foot of the deceased and lead to the neck of the appellant we do not find that there was been an unbroken chain of evidence linking the appellant to the offenses for which he has been charged. In this

respect reliance is placed on **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274).The only remaining pieces of evidence seems to be a positive FSL report and chemical report which even when taken together by no stretch of the imagination can lead to the conviction of the appellant. With regard to the recovered pistols belonging to the deceased it does not appeal to reason that the appellant would have retained one of these especially as the case according to the prosecution is that the deceased were killed because they were police officers fulfilling their lawful duties. Even otherwise there is no evidence of safe custody of the recovered pistols or the empties and if the pistol recovered from the appellant belonged to the deceased how could any empties have come from it as there is no evidence that any of the deceased made any fire from any weapon. Even one eye witness says that the deceased were shot in the car whilst they had there hands up. PW 12 Aijaz Mughal in his evidence states that the pistols used to murder the deceased were both recovered from co-accused Yaseen and not the appellant and that no crime weapon was recovered for the appellant.

14. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) **and** if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that 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. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

15. Thus, based on our reassessment of the evidence for the reasons mentioned above the prosecution has not been able to prove its case against the appellant for the offenses for which he has been charged beyond a reasonable doubt and as such the appellant is acquitted of the

charge by extending him the benefit of the doubt. The appeal is therefore allowed and the impugned judgment is set aside with the confirmation reference being answered in the negative with the result that the appellant shall be released unless wanted in any other custody case.

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

Arif