

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.D-17 of 2017
Cr. Reference No.D-03 of 2017

PRESENT:

**Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,**

Appellant : Usman son of Raham Gul *alias* Akbar Ali Pathan,
through Mr. Mushtaq Ahmed, Advocate.

Respondent : The State, through Mr. Ali Anwar Kandhro,
Additional Prosecutor General.

Complainant : Syed Mohammad Shah, through Mr. Mazhar
Hussain Mangrio, Advocate.

Date of hearing : 25.02.2021.

Date of Judgment : 17.03.2021

JUDGMENT.

Mohammad Karim Khan Agha, J.- Through this appeal preferred from jail, appellant Usman Pathan has challenged the judgment dated 27.03.2017, passed by learned Judge, Anti-Terrorism Court, Shikarpur, in Special Case No.39/2016, re-State Vs. Usman Pathan, based on Crime No.106/2016, registered at Police Station Khanpur, whereby the appellant was convicted for offence under Sections 302(b) and 120-B, PPC and sentenced to death, and to pay fine of Rs.200,000/- (rupees two hundred thousand), in case of default thereof to suffer R.I. for six months more; the appellant was also convicted under clause (a) of sub-section (1) of Section 7, Anti-Terrorism Act, 1997 and sentenced to death and to pay fine of Rs.200,000/- (rupees two hundred thousand), in case of default thereof to undergo R.I. for six months more. The death sentences were subject to confirmation by this court. The appellant was further convicted for offence under Section 324, 120-B, PPC read with Section 7(c), Anti-

Terrorism Act, 1997, for causing injury to PC Sher Mohammad and PC Nazar Mohammad and sentenced to ten years on each count and to pay fine of Rs.50,000/- (rupees fifty thousand) to each injured as compensation under Section 544-A, Cr.P.C, in case of default thereof to suffer R.I. for six months more; the appellant was also convicted under clause (b) of Section 4 of Explosive Substances Act and sentenced to suffer R.I. for seven years; lastly, the appellant was convicted under Section 5 of Explosive Substances Act and sentenced to 14 years. All the above sentences were ordered to run concurrently and the benefit of Section 382-B, Cr.P.C was extended to the appellant.

2. The prosecution case as set out in the FIR is that:

"Complaint is that today I along with persons, namely 1) Sayed Zulfiqar Ali Shah s/o Sayed Mour Shah, 2) Sayed Khadim Hussain Shah s/o Sayed Kareem Shah, 3) Tahir Muhammad s/o Hidayatullah, 4) Nafees Ahmed s/o Ali Gohar Shah and other persons congregated at Imam Bargah Hazrat Abu Talib(a.s.) Eidgah Ahl-e-Shiayat at Mouchi Mohalla, Khanpur city, for offering Eid prayers. That time to time people were coming to Eidgah for Eid prayers. We were waiting for Eid prayers by arranging first three rows, then we saw two suspect persons wearing black dresses and 'Ajrak', who were considered as suspicious. I along with above-named witnesses asked for the body search of those suspected persons, then Tahir Muhammad took their body search and found the suspected persons having worn suicide bomb jackets inside their dresses. He cried and said, "He is suicide bomber" therefore he was apprehended, but the suspected person sitting in the front row escaped. For capturing him, we and police chased him. Then at some distance police shot him down. When police came close to him, the terrorist exploded hand grenade, consequently, HC Nazar Muhammad Malik, PC Muhammad Rafique Qureshi and PC Sher Muhammad Sanjrani of P.S Khanpur got injured and terrorist died. The other terrorist was handed over to police after taking off his suicide bomb jacket. Thereafter, the injured police personnel were immediately sent to the hospital on police mobile for treatment. The arrested accused told his name as Usman before the Mashirs at the place of incident and further disclosed that the name of dead suicide bomber was Abdul Rehman. On the spot, the arrested terrorist, by admitting the offence, disclosed that Moulvi Abdullah handed over them to Umar and Hafeez @ Ali Sher s/o Fareed Khan Brohi and further disclosed that they had to massacre people as many as possible during the Eid-ul-Uzha prayers at Eidgah Ahl-e-Shiyat by exploding suicide bomb, so as the religious hatred and terror could increase in the local area and the sovereignty of the State could be sabotaged. He further disclosed that two unknown terrorists met

them, who brought them to Khanpur city on two motorcycles and said, "you have to commit suicide bomb blast at the Eidgah of Ahl-e-Shiyat for killing the people." Therefore, we reached at Eidgah and sat in the rows. Then, they were searched as suspects and he was apprehended by the people of Shia community and his companion tried to escape. And two terrorists namely Umar and Hafeez @ Ali Sher and two other unidentified terrorists standing outside Eidgah had also escaped on their motorcycles. The terrorists escaped away were seen by me (complainant), by witnesses and police standing outside, they would be identified if seen again. Now having appeared at P.S I complain that the terrorist killed and arrested terrorist along with their fellow terrorists by making plan to spread terror in broad daylight and have attempted to commit suicidal bomb attack that immediately we along with police made the plan unsuccessful. This is the complaint, investigation may be made."

3. On completion of usual investigation, the appellant/accused was sent up to face trial. The accused pleaded not guilty to the charge and claimed trial.
4. The prosecution to prove the charge examined 09 PW's, who exhibited various documents and other items in support of the prosecution case, whereafter the prosecution closed its side. The statement of accused was recorded under S. 342 Cr.P.C, in which he denied the allegations levelled against him by the prosecution witnesses and claimed false implication in this case. The accused neither examined himself on oath nor led any evidence in his defence.
5. Learned Judge, Anti-Terrorism Court, Shikarpur after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 27.03.20217, convicted and sentenced the appellant, as stated above, hence this appeal against conviction has been filed by the appellant.
6. 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.

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7. Learned counsel for the appellant has contended that there was an unexplained delay in lodging the FIR which was fatal to the prosecution case; that there was no proof that any one died as there was no post mortem report exhibited of the deceased person and as such it could not be a case of murder; that the prosecution case was unnatural and did not appeal to reason as when the second suicide bomber was escaping why did he not explode his suicide vest rather than blast a hand grenade; that the film showing the accused with the suicide vest was not made on the spot at the time of his capture but was made later; that there was no direct evidence of murder; that at the most the accused could be convicted for 14 years under the Explosives Substances Act 1908; that his extra judicial confession before the police was inadmissible; that he was under the age of 18 when the offence was committed and as such he could not be awarded the death sentence; that there was no evidence of any conspiracy and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **Intekhab Ahmad Abbas V The State** (2018 SCMR 495), **Muhammad Kamran V The State** (2003 SCMR 1070), **Abdul Mateen V Sahib Khan** (PLD 2006 Supreme Court 538), **Sajjan Solangi V The State** (2019 SCMR 872), **Imran alias Dully V The State** (2015 SCMR 155), **Hamid Nadeem V The State** (2011 SCMR 1233), **Wazir Muhammad V The State** (2005 SCMR 277), **Muhammad Mubeen V The State** (2002 P Cr. L J 729), **Ishtiaq Ahmed Mirza V Federation of Pakistan** (PLD 2019 Supreme Court 675), **Asfandiyar V Kamran** (2016 SCMR 2084), **Application by Hussain Nawaz Sharif: In the matter of** (PLD 2019 Supreme Court 196), **Sher Bahadur V Fayyaz** (2015 SCMR 955), **Sultan Ahmed V Addl. Sessions Judge-I** (PLD 2004 Supreme Court 758), **Sabir Ali V The State** (2005 YLR 821), **Umar Hayat v. Jahangir** (2002 SCMR 629), **Shamaal Khan Shah V The State** (2012 P Cr. L J 897), **Province of Punjab V Muhammad Rafique** (PLD 2018 Supreme Court 178) and **Muhammad Akram V Muhammad Haleem** (2004 SCMR 218).

8. On the other hand, learned Addl. Prosecutor General and the complainant fully supported the impugned judgment and contended that

the accused was arrested on the spot wearing a suicide jacket, that evidence of the PW's who were involved in the capture and arrest of the appellant on the spot was reliable, trust worthy and confidence inspiring; that the appellant had planned and conspired in the attack with the other killed suicide bomber and absconding accused with whom he shared common intention to murder as many people from the shia sect as possible at the Eidgah; that one policeman died and two others were seriously injured as a result on the attack on the Eidgah which the appellant fully participated in; that the appellant's suicide vest was defused at the scene and was found to contain explosives which would have caused massive loss of life if the suicide bomb had been let off with the potential of killing hundreds of people as a result of the attack on the Eidgah; that the appellant was over the age of 18 at the time of the attack and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and his conviction and sentence maintained. In particular they stressed that due to the heinous nature of the offences the death sentence was fully attracted in this case. In support of their contentions they have placed reliance on **Sarfraz alias Shaffa V The State** (2007 SCMR 758), **Qamar-uz-Zaman alias Kala V The State** (2011 SCMR 856), **Muhammad Raheel alias Shafique V The State** (PLD 2015 Supreme Court 145), **Muhammad Latif V The State** (PLD 2008 Supreme Court 503), **Khadim Hussain V The State** (PLD 2010 Supreme Court 669) and **Hameed Ullah V The State** (2016 YLR 2632).

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, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. After our reassessment of the evidence we find that the prosecution has 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 on the same day and the slight delay in lodging it has been explained by the facts and circumstances of the case whereby a suicide bomber was

apprehended and another suicide bomber was shot dead at Eidgah who injured 3 policemen by blasting a hand grenade after they shot him, the injured had to be taken to hospital and under these fearful, stressful and chaotic circumstances it was but natural there would be some delay lodging the FIR which has been fully explained. Even otherwise the appellant was apprehended on the spot wearing a suicide vest by persons at the Eidgah who was unknown to the complainant and the police and there was no enmity between them and thus they had no reason to implicate him in a false case. The appellant is named in the FIR with a specific role.

(b) The appellant was caught red handed at the Eidgah in disguise wearing a hidden suicide jacket full of explosives. His arrest on the spot wearing the suicide jacket is corroborated by the following eye witnesses.

(i) **Eye-witness PW 1 Muhammed Shah** who is the complainant in this case states in his evidence that on 13.09.2016 he along with Syed Zulfiqar Ali, Syed Khadim Hussain, Tahir Mahmood, Nafees Ahmed who were all his neighbors went to the Eidgah for Eid prayers at about 8.15 he saw two suspected persons come in black clothes and Ajrak to the Eidgah one of whom sat in the first row while the other sat in the fifth row. He told Tahir Muhammed to search these suspicious persons. He saw Tahir Muhammed search the suspicious person in the 5th row who found a jacket under his clothes and shouted that he was a suicide bomber. He saw the other suspect run away and be shot by the police officers and then blasting a hand grenade which injured 3 police officers. He saw the dead other suicide bomber who the police shot. He along with others removed the suicide jacket from the appellant which was handed over to HC Muhammed Sadiq. The appellant confessed his guilt before them that he and the dead suicide bomber had come to commit blast and kill people of Shia sect which confession was recorded on camera along with the suicide bomber and his explosive filled jacket. This film was exhibited along with photo's of the appellant and his suicide jacket at the time of his capture and arrest on the spot.

The appellant was caught on the spot red handed in front of many people and it was a day light incident so there was no need for any identification parade especially as the appellant was handed over to the police immediately on the spot. The appellant was also named and given the same specific role in the FIR lodged promptly after the incident. This eye witness is not related to the appellant or any other eye witness. He had no ill will or enmity towards him and had no reason to falsely implicate the appellant in this case which in any event was not possible as the appellant was captured and arrested on the spot before many people.

The complainant is **not** a chance witness as he came with his neighbors to offer Eid prayers at the Eidgah on Eid day. His evidence reflects that of his FIR and there have been no significant improvements in the same so as to render his evidence unreliable. His evidence was not dented despite lengthy cross examination. We find his evidence to be reliable, trust worthy and confidence inspiring and believe the same and we can convict on this evidence alone. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857), **Muhammad Pervez V State** (2007 SCMR 670) and **Mst Sughra Begum v Qaiser Pervez** (2015 SCMR 1142). As also found in **Farooq Khan v. The State** (2008 SCMR 917), what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

(ii) **Eye-witness PW 2 Zulfiqar Shah.** He corroborates eye-witness **PW 1 Muhammed Shah** in all material respects. He is named in the FIR as an eye witness shortly after the incident and gave his S.161 Cr.PC eye witness statement promptly which left no room for concoction and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 1 Muhammed Shah**

(iii) **Eye-witness PW 3 Tahir Muhammed.** He corroborates eye witness **PW 1 Muhammed Shah** and eye witness **PW 2 Zulfiqar Shah** in all material respects. He was the witness who on being ordered to search the appellant by the complainant found the suicide jacket on him. He is named in the FIR as an eye witness which was lodged shortly after the incident and gave his S.161 Cr.PC eye witness statement shortly after the incident which left no room for concoction and there has not been any significant improvements in his evidence so as to render it doubtful and the same considerations apply to him as to **PW 1 Muhammed Shah** and eye witness **PW 2 Zulfiqar Shah**.

(iv) **Eye-witness PW 4 HC Nazar Muhammed** was on security duty at the Eidgah at the time of the incident. In his evidence he states that at about 8.15 am he heard cries from within the Eidgah (as he was on security duty outside the Eidgah). In his evidence he states that he saw complainant and other PW's apprehend one suspect while the other started running who was wearing black clothes and had an Ajrak. He fired on this person who fell down however when he and the other police on duty came close to the shot bomber he exploded a grenade as a result of which he, PC Rafiq Ahmed and PC Sher Muhammed sustained injuries. He was not a chance witness. He had no enmity with the

appellant. He was injured at the scene which is proven through medical evidence of PW 5 Sunil Kumar MLO. His evidence of shooting the other suicide bomber and being injured by hand grenade is also corroborated by the medical evidence of PW 5 Sunil Kumar MLO who also medically examined the dead body of the person who he shot whose cause of death was found to be on account of hand grenade blast and firearm injuries. His evidence corroborates the other three above referred eye witness PW's in so far as it relates to the capture of the appellant and the death of the other suicide bomber who he shot and was thereafter injured when the shot suicide bomber blasted a grenade. He was not dented during cross examination and we find this witnesses evidence to be reliable, truthful and confidence inspiring and we believe his evidence.

(v) **Eye-witness PW 7 Muhammed Siddiq** at the time of the incident was present and organized police security. According to his evidence at about 8.15am he heard people shouting "bomber bomber". He saw that the complainant and PW Zulfiquar Shah and others had apprehended a person wearing black cloth whilst another ran away. He along with other police including PW 4 HC Nazar Muhammed chased this person and fired at him who fell down however as they approached he blasted a grenade due to which HC Nazar Muhammed, PC Muhammed Rafiq and PC Sher Muhammed received injuries. According to his evidence the suicide bomber died at the spot. He took custody of the appellant from the complainant who confessed to his involvement in attempting to blow up the Eidgah with his suicide jacket and the dead suicide bomber. Through his evidence he corroborates the evidence of all the other eye witnesses and the arrival of PW 6 Badar Din the BDU expert who defused the bomb in the suicide jacket. This witness was not a chance witness. He had no enmity or ill will towards the appellant and also like the accused was a sunni muslim and had no reason to falsely implicate him in this case. He was not dented during cross examination and we find this witnesses evidence to be reliable, truthful and confidence inspiring and we believe his evidence.

Thus, based on our believing the evidence of the 5 PWs eye-witnesses what other supportive/corroborative material is there against the appellant?

(c) The appellant was arrested on the spot.

(d) The suicide jacket full of explosives was recovered from him on the spot.

(e) That the explosives in the jacket tested positive.

(f) That the evidence of the 5 eye-witnesses is corroborated by PW-6 Badar Din the bomb disposal expert who arrived at the scene when the appellant was still present along with HC PW-7 Muhammed Siddiq who had arrested the appellant and recovered the suicide jacket. He defused the bombs in the suicide jacket which explosives were sent off for examination.

(g) That the medical evidence of the injured police at the scene and the dead suicide bomber corroborates the prosecution version of events in their evidence.

(h) The film made at the scene and photo's taken at the scene on the capture of the appellant prove his presence with the suicide jacket at the Eidgah. He also fully confesses to how the plan was made to travel from Afghanistan, stay in Pakistan, collect the suicide jackets and then attack the Eidgah in order to create terror and religious disharmony and showed the police the route and the places where they stayed en route from Afghanistan to Shikarpur and those others involved in the plan/common intention which only he would have known about and not the police. Those others involved in the plan had records as terrorists/militants

(i) 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

Zakir Khan V State (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669).

(j) The evidence of the PW's provides a believable corroborated unbroken chain of events from entry of the appellant and other suicide bomber into the Eidgah to the appellant being searched and found with a suicide jacket to the other suicide bomber being alerted to such search and running away to the police firing upon him to him letting off a grenade which lead to the injuries of 3 police officers on the spot and the death of this suicide bomber.

(k) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up his arrest or foisting the suicide jacket on him. In such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(l) That there is sufficient PW evidence (including medical) to prove that one policeman PC Muhammed Rafiq died as a result of his injuries incurred due to the grenade blast and that two policemen (PW 4 Nazir Muhammed and PC Sher Muhammed) were badly injured by the hand grenade blast which was exploded by the second suicide bomber who was also wearing a suicide jacket.

(m) That the appellant had a motive for the murder as his parents had been killed in a drone attack in Waziristan.

(n) That the age of the appellant has been proven to be over 18 years at the time of the offence as evidenced by the result of the ossification test at P.277 of the paperbook which found him to be over 18 years of age. Furthermore, this issue of the appellant being under 18 years of age was never raised at trial and as such this argument of the appellant is without merit. In this respect reliance is placed on the case of **Sarfraz alias Shaffa** (Supra)

(o) From the evidence of the PW's it has been proven that the appellant in league with the dead suicide bomber had the common intention under S.34 PPC read with S.302/324 PPC to murder the dead policeman and injury the other policemen and kill as many shia's at the Eidgah as possible in order to terrorise the shia community. In this respect it is notable from the evidence that both the appellant and the deceased suicide bomber came to the Eidgah together at the same time wearing the same dress with suicide jackets concealed under them and when the appellant was caught the other suicide bomber tried to avoid capture. It is a matter of logic, common sense and reason that you only go to a busy place wearing a suicide jacket full of deadly explosives and take a seat in that place if you intend to set off the explosives in the suicide jacket in order to murder as many innocent people as possible which was precisely the appellants intention which was only prevented due to the watchfulness of the complainant and the other PW's. Neither the appellant nor his dead colleague came from Shikarpur let alone Pakistan. They came from Waziristan and the only logical and reasonable inference that can be drawn from them sitting in the Eidgah at Shikarpur whilst wearing suicide jackets was to murder as many shia's as possible in order to spread fear and terror within that religious sect and create hatred between other religious sects.

(p) 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 cast doubt on or dent the prosecution case. The defence case is simply one of false implication simpliciter. The appellant did not give evidence on oath or call any DW in support of his defence case. Thus, for the reasons mentioned above we disbelieve the defence case as an afterthought. Thus, in the face of five reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) has not at all dented the prosecution case.

11. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness 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 conviction.

12. With regard to sentencing the intention and design of the appellant and his dead colleague was to kill as many innocent shia persons at their place of worship on Eid day (including children) as possible in order to create terror amongst that religious sect. His act was one which falls squarely within the ATA 1997 and is also barbaric in nature and deserves no leniency. The public need to be protected from such horrific attacks which target civilians including men women and children and aim to spread religious hatred and destabilize the State and as such the only appropriate sentence is a deterrent one. As such all the sentences handed down to the appellant in the impugned judgment are maintained and the confirmation reference is answered in the affirmative.

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

Announced by us

For Aui, 17/03/2021
(Shamimuddin B. Sami, J)

For Aui, 17/03/2021
(Zulfiqar Aui (argi-J))