

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI.

Before:-

Mr. Justice Muhammad Iqbal Kalhoro.

Spl. Cr. Anti-Terrorism Jail Appeal No.233 of 2019

Muhammad Kamran @ Baba

Versus
The State

For hearing of main case

Date of hearing : **18.01.2021.**

Date of Judgment : **22.01.2021**

Mr. Raj Ali Wahid Kunwar, Advocate for Appellant
Mr. Khadim Hussain, Addl: P.G. Sindh

J U D G M E N T

Muhammad Iqbal Kalhoro, J:- This appeal was heard and decided by my learned brothers Mr. Justice Nazar Akbar and Mr. Justice Zulfiqar Ahmed Khan vide a judgment dated 11.12.2020. My lord Mr. Justice Nazar Akbar was pleased to set aside conviction and sentences of the appellant and acquit him. Whereas, my lord Mr. Justice Zulfiqar Ahmed Khan decided conversely and maintained the punishment awarded to the appellant vide a judgment dated 09.08.2019 in Special Case No.315/2015, Crime No.331/2013, u/s 302, 324, 34 PPC r/w Section 7 ATA, 1997, registered at Police Station Kharadar, Karachi by learned Ant-Terrorism Court No.XVII, Karachi. In view of dissenting views regarding acquittal of the appellant, the file was placed before the Honourable Chief Justice, who was pleased to nominate the undersigned as a referee judge on an office note vide order dated 16.12.2020.

2. I have gone through the respective findings recorded by my brother judges along with the material available on record, besides, hearing the parties. The learned Additional Prosecutor General has not supported conviction and sentences of the appellant.

3. The crime report in this case was registered on 28.08.2013 by Muhammad Rafiq reporting an incident occurring on 27.08.2013 in which four persons lost their lives due to indiscriminate firing made by 13 unknown accused at Machera Square near Young Husband Road, Kharadar, Karachi, and who made their escape good from the spot. Later on, in the investigation, allegedly police came to know of involvement of the appellant and others in the said incident. Appellant was arrested in

November, 2013 in Crime No.312/2013, and during interrogation admitted his hand in the present case. Based on his disclosure, an identification parade was arranged on 07.11.2013 before the Magistrate concerned, where PW-5 namely Rustam reportedly identified him. Meanwhile, the pistol recovered from him and the empties collected from the spot were sent to forensic lab for examination to determine similarity between them, if any, and the report came in positive. Co-accused namely Muhammad Ameer Mirchi, already confined in jail in some other crime, on the basis of his disclosure before the police of his involvement was also arrested and challaned along with the appellant. However, he was set at liberty by the trial court vide impugned judgment, and the appellant was convicted and sentenced to suffer, among others, life imprisonment. His challenge to the same before this court has been decided in the terms as stated above.

4. The only evidence incriminating the appellant is the evidence of the PW-5 and identification parade. The incident as shown in FIR took place at about 08:30 p.m. in August, 2013. At that time admittedly darkness shrouds whole surroundings and it is difficult for someone to identify a person standing at some distance from him sans strong source of light. This PW has neither disclosed the distance appellant was standing at from him nor the source of light in his evidence. On the contrary he has revealed that deceased Farhan was about 100 paces away from his shop, where he was present. Going by that calculation, it is not hard to extrapolate the distance the culprits were at from him and which shall make impossible for him to identify them. Next, in his cross examination he has revealed that during the firing he remained in the shop and had come out of it only after the firing had stopped, which puts further ambiguity qua his ability to identify the accused. His evidence shows that identification parade was held in the court room, whereas, the memo of identification parade evinces that it was held on the back side of the court room in an open compound for the reason the court room was too small to accommodate the dummies and the accused. In addition, he has admitted in cross examination that Inspector, Aijaz Muhammad had already shown him the accused at the Police Station and that at the time of identification parade he was handcuffed, which shall make him stand out in the row of dummies and easy to pick up. Further in the identification parade, he has not assigned him any specific role to give some credence to his evidence on this point. The authenticity of his statement in regard to identification parade in such circumstances is not beyond a doubt. In my view these disclosures are sufficient to put caution on veracity of his evidence qua

identification of the appellant and it cannot be accepted without an extra care. And when it is put in juxtaposition to the facts of the case, night time of incident and the fact that appellant was arrested after more than two months thereof; the usual credibility, which otherwise is attached to identification parade held within a reasonable time of the incident taking place during day time within sight of witnesses standing at a reasonable distance, would stand percolated.

5. The other piece of evidence is positive report of forensic expert in regard to matching of the pistol with 04 empties out of 30 recovered from the place of incident. The law requires sending of empties immediately after the incident and not with the pistol recovered afterwards. As in such scenario, falsification and managing the empties from the same pistol cannot be ruled out. In this case, the empties were sent after more than two months of the incident along with the pistol. No value can be attached therefore to the positive forensic reports. More so, although it was claimed by the prosecution that the pistol recovered from the appellant was a crime weapon but as per record it was never produced and exhibited in the evidence to afford an opportunity to the appellant to put up his defence against it, and which in my view has seriously prejudiced him on this point.

6. The impugned judgment shows that co-accused Muhammad Ameer Mirchi whose case otherwise was on same footing sans identification parade was acquitted by the trial court on same set of evidence. Authenticity of identification parade for the appellant as discussed above is not confidence inspiring and cannot be made a sole basis of his conviction without corroborative evidence, which is completely lacking in this case. Minus that, the case of the appellant was exactly on the identical footing to that of acquitted accused and hence he was entitled to the same treatment. In the circumstances, I respectfully concur with the reasons propounded by my lord Mr. Justice Nazar Akbar, allow the appeal and set aside conviction and sentences awarded to the appellant, and acquit him of the charge. He shall be released forthwith if not required in some other custody case.

JUDGE

Rafiq/P.A.