

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

Date	Order with signature of the Judge
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**Cr. Appeal No.D-10 of 2021
Confirmation Case No.12 of 2021**

Syed Mansoor Ali Shah..... Vs.....The State &
others

Date of hearing: 14.03.2022 & 04.07.2022.

Date of judgement: 15.07.2022.

Mr. A.B. Francis, Advocate for appellant.

Mr. Ali Haider Saleem Addl. P.G.

None present for complainant.

JUDGEMENT

MUHAMMAD IQBAL KALHORO J: Appellant Syed Mansoor Ali Shah, having been convicted and sentenced, among others, to death in Sessions Case No.111/2018 bearing Cr. No.81 of 2017 U/s 302, 324, 337 F (iii), 337-D, 34 PPC of P.S. Dari District Larkana vide judgment dated 03.04.2021 by learned 1st Additional Sessions Judge/MCTC, Larkana, filed captioned appeal before this court at Larkana which was heard on 24.11.2021 by an honourable Division Bench. Mr. Justice Shamsuddin Abbasi writing for the court dismissed the appeal but commuted death sentence of the appellant into imprisonment for life with benefit envisaged u/s 382-B CrPC. Whereas, Mr. Justice Irshad Ali Shah disagreeing with his view allowed the appeal and acquitted the appellant. For such spilt view, the matter was put up before honourable Chief Justice, who has been pleased to nominate the undersigned as a referee judge on office note vide order dated 04.01.2022.

2. I have heard learned counsel for the parties and has gone through entire record including respective judgements rendered by their lordships. Learned defense counsel has pleaded for acquittal by stressing that there are irreparable discrepancies,

contradictions and omissions in the prosecution case. However, learned Addl. PG has not agreed with his propositions and has prayed for upholding life imprisonment of the appellant.

3. As per facts, at about 12.20 am on 06.09.2017, one unknown person armed with a pistol barged into room No.4 of a Medical Centre in Larkana where one Mst. Marvi Paras w/o Khalil Ahmed (the deceased) was admitted for delivery purpose. And where complainant and his two cousins Junaid Muzafar and Arif Hussain (PWs) were also present to ask after her health. The unknown person immediately fired two shots at complainant and one shot at Khalid Ahmed injuring them seriously. Both were taken to CMC hospital Larkana but Khalid Ahmed succumbed to his injuries and died. FIR was registered on 08.09.2017 based on a statement of complainant recorded in the hospital. The appellant was not named therein. On 10.09.2017, two days later, statement of aforesaid PWs u/s 161 CrPC, not disclosing name of appellant either, was recorded.

4. Subsequently in a further statement on 12.11.2017 complainant took name of the appellant and his father Syed Fakir Ali Shah as accused in the case followed by similar statements given by the said two witnesses on 13.11.2017. This led to further investigation and arrest of the appellant already in jail in some other crime. IO attempted to get him identified by the witnesses in the court of Magistrate concerned but failed. Nevertheless, during captivity in police remand, the witnesses allegedly identified him to be the culprit. Later on, the case took a new turn when complainant in his third statement dated 23.01.2018-exonerated father of the appellant Syed Fakir Ali Shah from the case. Notwithstanding, Challan, mentioning him in column No.II, was submitted in the trial court which took cognizance of offence against both the accused and after a full-fledged trial, while convicting the appellant in the terms as above, acquitted his father.

5. Admittedly, the appellant is not named in FIR. His and his father's introduction in the case materialized only when complainant and witnesses made a further statement, after about two months of the incident, implicating them. But, then complainant backed out from his statement to the extent of father of the appellant and exonerated him. PW Junaid Muzfar has asserted in his evidence that on 05.11.2017, he and PW Arif Hussain riding on a motorcycle had spotted a person near 'Linar' who, they had seen, had whisked

away accused on his motorcycle from outside the hospital. They approached him and asked his name, which he disclosed as Fakir Ali Shah, but made his escape good when they tried to catch him. Which is how they came to know of involvement of the appellant in the case. This is not a convincing piece of evidence, to say the least, for either forming an opinion about identity of the appellant or his involvement in the offence. Secondly, this episode has not been even hinted at by PW Arif Hussain in evidence rendering the picture more confounding on this point. In such circumstances, evidence of both the PWs identifying the appellant to be the real culprit in evidence, without actually revealing the source behind it, cannot be accepted without a pinch of salt.

6. Yet more mystifying in this connection is the evidence of the complainant, an eye witness and injured, who although has endorsed the incident in his evidence as reported but has categorically stated that appellant was not available at the time of incident meaning thereby that he is not involved. He was declared hostile at the request of learned Prosecutor, but in cross-examination, nothing suggesting that he was won over by the appellant or there was some other consideration tempting him to give such statement has come on record. His evidence, in fact, has dealt a several blow to the prosecution case as far as identity of the appellant being the real culprit is concerned. Failure of IO to get identification parade of the appellant held before the Magistrate concerned to expose his identity and involvement in the case to a level inspiring confidence is still another blow imbuing streaks of doubt in the mind over allegations against the appellant.

7. FSL report identifying pistol recovered from the appellant with crime empties found at the spot is not helpful to the prosecution either. For the reason, recovery of pistol was effected on 29.11.2017 after more than 02 months of the incident from an open plot not owned by the appellant. And, crime empties recovered allegedly on the day of incident viz. 06.09.2017 were sent for forensic examination on 30.11.2017 along with the pistol and not immediately after recovery as required by law to eliminate a chance of chicanery. This delinquency by IO has rendered positive FSL report meaningless in the eyes of law and therefore unreliable. As to five photographs, identifying the appellant, retrieved from CCTV footage by the staff of hospital, they don't seem to shore up prosecution case against him any further because the person in the photographs does not appear to

be armed with a pistol and/or shooting at the deceased. He is only seen either roaming in the corridor or talking on mobile phone. These photos have recorded activities of that person between 20:22 to 21:47 (8:22 to 9:47), at the most, which is at least two hours prior to the incident occurring in between 12.00 to 12.20 am. Then, much as aforesaid two PWs in their evidence have asserted they had followed the accused and saw him being sped away on a motorcycle by a person outside. However, in the photos none of them is seen visible and chasing the person, who is simply seen leaving the premises on his own. Apart from that, the relevant person(s) from the staff of the hospital who was responsible for recording/monitoring CCTV footage and the one who retrieved and provided photos from that footage to IO have not been made witness(es) to verify its recording and its provision as claimed. Moreover, this piece of evidence was not sent for forensic examination to confirm its authenticity and identity of the appellant beyond a reasonable doubt in view of his dispute to be him in the photographs.

8. All the above facts and circumstances when taken into consideration together would tend to show that prosecution has not been able to bring home guilt of the appellant beyond a reasonable doubt, and the conclusion reached by my brother Mr. Justice Irshad Ali Shah is correct. I, therefore, concur with his opinion, allow this appeal and acquit the appellant of the charge. He shall be released forthwith if not required in any other case. Consequently, death reference is replied in negative and is accordingly disposed of.

The appeal stands allowed.

JUDGE

A.K