

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Amjad Ali Bohio.

Spl. Criminal A .T. Appeal Nos. 49 and 50 of 2022

Appellant : Noor Wali alias Kargha son of
Umar Gul through Mr. Habib-ur-
Rehman Jiskani, Advocate.

Respondent : The State through Mr. Siraj Ali Khan
Chandio, Additional Prosecutor
General, Sindh.

Date of Hearing : 27.09.2023

Date of Judgment : 05.10.2023

J U D G M E N T

Amjad Ali Bohio, J: Appellant Noor Wali alias Kargha s/o Umar Gul faced trial of a case in FIR No. 27/2019 P.S. Civil Lines, Karachi before the Anti-Terrorism Court No.IV in Karachi, for offences under sections 302, 353, 324, and 34 of the Pakistan Penal Code, read with section 7 of the Anti-Terrorism Act, 1997. Appellant Noor Wali alias Kargha also faced trial in FIR No.70/2019 P.S. Civil Lines Karachi under section 23(1) (a) of the Sindh Arms Act, 2013. On conclusion of trial, appellant was convicted and sentenced in the following manner:

- Accused Noor Wali alias Kargha s/o Umer Gul found guilty for the charge of the offence u/s 302(b) /34-PPC award imprisonment for life, and to pay sum of Rs.100,000/- (Rupees one hundred thousand) as compensation u/s 544-A Cr. P.C. to the legal heirs of the deceased PC Jahangir, which shall be recovered by way of arrear of land revenue and in default of payment/recovery thereof undergo further imprisonment for six months.
- Accused Noor Wali alias Kargha s/o Umer Gul found guilty of offence u/s 6(1)(b) of ATA 1997 and convicted u/s 7(1)(a) of ATA 1997, for life imprisonment, and fine of Rs.50,000/- (Rupees Fifty Thousand), in case of default in payment of the fine, he shall further suffer for six month imprisonment.

- Accused Noor Wali alias Kargha s/o Umer Gul found guilty of the charge of offence u/s 324/34-PPC, R/W Section 7(h) of ATA 1997 he is convicted and sentenced to suffer seven years imprisonment, and fine of Rs.10,000/- (Ten thousand Rupees), in case of default in payment of the fine, he shall further suffer imprisonment for six months more each.
- Accused Noor Wali alias Kargha s/o Umer Gul found guilty for the charge of the offence u/s 353/34-PPC, R/W Section 7(h) of ATA 1997, is convicted and sentenced to suffer for one year imprisonment, and fine of Rs.10,000/- (Rupees ten thousand), in case of default in payment of fine, he shall further suffer six months more.
- Accused Noor Wali alias Kargha s/o Umer Gul found guilty of the charge of offence punishable u/s 23(1)(a) of Sindh Arms Act, 2013, he is convicted and sentence to suffer R.I for three years and fine of Rs.10,000/- (Rupees Ten Thousand) in case of default he shall further suffer imprisonment for three months.

2. The facts of the case are that on March 3, 2019, Head Constable Shahzad Khan from Police Station Civil Lines, along with a police party, was patrolling near Street No.36 leading towards the Sea in Hijrat Colony, when at about 2340 hours two unknown suspects riding a motorcycle were seen on the source of street lights and that of nearby shops. These unknown accused persons then opened fire on the police party intending to kill them and obstruct them from performing their lawful duties. As a result of such firing, one Police Constable Jahangir sustained a bullet injury and fell down. In retaliation, complainant HC Shahzad Khan fired towards them with his official 9 mm pistol, however both assailants managed to escape from the scene successfully. Injured Police Constable Jahangir was immediately taken to Jinnah Postgraduate Medical Centre (JPMC) in police vehicle but he could not survive and died. Following such incident, HC Shahzad Khan, lodged First Information Report (FIR) being complainant against two unknown persons, who he could identify.

3. After registration of such FIR, investigation followed and report under section 173 Cr.P.C. was submitted in the Court by sending up both appellant Noor Wali and Rehan Gul who has not filed an appeal against his conviction, to face the trial. The main case and case of recovery under Sindh Arms Act were

amalgamated under section 21-M of the Anti-Terrorism Act, 1997, and Special Case No.30/2019 was treated as main case.

4. On October 29, 2019, a joint charge was framed against both accused persons. In response thereto, they pleaded not guilty and opted for trial.

5. To establish its case, the prosecution examined eighteen (18) witnesses. Amongst them, important witnesses are three eye-witnesses of the incident i.e. complainant/Head Constable Shahzad Khan (PW-1), Police Constable Ghulam Fareed (PW-02) and Shop Keeper Tariq Gondal (PW-17). Judicial Magistrate Sibghatullah Hingorjo (PW-10) was examined, before whom identification parade of accused was conducted through complainant Shahzad Khan and PC Ghulam Farid. These witnesses were subjected to cross-examination by the counsel representing the appellant/accused. Subsequently, the prosecution concluded its production of evidence on November 3, 2021, as documented in Exhibit 22.

6. In statement recorded under section 342 Cr.P.C., appellant denied the allegations brought against him by the prosecution. He stated that he has been falsely implicated in the case and asserted his innocence. However he did not opt to testify on oath or produce witnesses in his defence.

7. At the end of the trial and after considering the arguments presented by both parties and evaluating the evidence provided, the trial court found the appellant guilty as described in paragraph No. 1 of this judgment. Being aggrieved with such verdict, the appellant/accused has challenged the legality and propriety of the judgment through these appeals.

8. The intricate details of the case and the evidence produced by the prosecution before trial court have been meticulously discussed in the judgment dated 07.01.2022 and therefore there is no need to reproduce the same.

9. The counsel representing the appellant argued in favor of the appellant's innocence and against the validity of the case, claiming that he has been falsely implicated by the complainant; he has agitated the delay of fifteen hours in lodging the F.I.R., without a

satisfactory explanation, questioning the credibility of the complainant's account; he further asserts that since the incident occurred at night and the accused was not known to the complainant, the FIR lacks detailed description of his features, making the identification doubtful; counsel further questions the credibility of the complainant and Police Constable Ghulam Fareed, labeling them as interested witnesses due to their affiliation with the police force; that their testimony, without independent corroboration, can not be relied upon; that the identification parade was flawed as the sole independent witness, Qadeer Khan, who was present during the incident, was not involved in the identification parade. Furthermore, the procedure followed during the parade, including the use of police officials as dummies, is criticized as improper; that the authenticity of the weapon produced as evidence against the accused, as well as, the credibility of the Forensic Science Laboratory (FSL) report, suggests manipulation. Defence counsel further has pleaded that there are material contradictions in the evidence of complainant and Police Constable Ghulam Fareed regarding the identification parade, which have not been considered by the trial court. Lastly, the counsel contends that the implication of the accused in the case is doubtful and therefore has concluded by praying to set aside the judgment by extending him benefit of the doubt. To support these contentions, the counsel cited legal precedents, including the case of Tariq Pervaiz v. The State (1995 SCMR 1345) and the cases of Hashim Qasim and another v. The State and Jehangir Elahi v. Shoaib Ahmed and others (2017 SCMR 986).

10. The Additional Prosecutor General, has supported the judgment. His arguments are; that the accused were not initially named in the FIR as such the delay of fifteen hours in lodging the report becomes inconsequential; that this delay holds no significance as the accused were subsequently identified during identification parade conducted immediately after their arrest; that there is no evidence to suggest malice, ill-will, or any adverse motive on the part of the witnesses in implicating the accused/appellant falsely; that the prosecution witnesses, in this case, are law enforcement officials and their testimony holds

weight, especially considering the severity of the offense – the murder of a police official; that the trial court properly evaluated the evidence; that the implication of the appellant/accused is substantiated not only by the testimony of the involved police officers but also by that of independent witnesses. Furthermore, the weapon allegedly used in the crime was reportedly found in the appellant's possession upon his arrest and that the positive Forensic Science Laboratory (FSL) Report supports this claim. He concluded that prosecution has successfully proved the case against the accused beyond a reasonable doubt. Consequently, the appeals, according to the prosecution are liable to be dismissed. To support these assertions, the Additional Prosecutor General in support of his contentions cites the case of Arbab Tasleem v. The State (PLD 2010 SC 642).

11. We have considered the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General and re-examined the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment and have also considered the relevant law including the case laws cited by them.

12. In our view the prosecution's case primarily rests on the evidence of eyewitnesses, complainant/HC Shahzad Khan, PW/PC Ghulam Fareed and PW Qadeer Khan. According to the prosecution's account, the incident took place at approximately 2340 hours. Upon arrival at the scene, according to complainant, he found that the gaming shop was open as such he asked the shopkeeper to close it. In contrast, PW Ghulam Fareed stated that they observed a Carom Board shop open with some boys inside. They asked the shopkeeper to close the shop, which he did. Notably, PW Qadeer Khan, who operates the game shop at the location of the incident, testified that he was present at his shop when the police party was conducting checking in front of his shop. He witnessed two persons on a motorcycle being suspected by the police, who then started firing at the police party and killed PC Jahangir in his presence. Subsequently, he left his shop. He being the independent witness of the incident, did not specify as

to whether he was asked to close the shop rather according to him, police was conducting checking outside his shop.

13. Further according to complainant Shehzad Khan, he attempted to apprehend the accused and fired at him. However, the accused managed to escape towards Sultanabad, taking advantage of the darkness. It is important to note that during his testimony, the complainant failed to mention the source of light on which he saw the accused, although he mentioned the same in FIR. He further stated that the accused had a beard, a detail not included in the FIR. This discrepancy indicates an embellishment and exaggeration of the accused's features during the testimony, which is a legal issue referenced in the case law. It is settled maxim when a witness improves his version to strengthen the prosecution's case, his improved versions subsequent made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest cast serious doubts on the veracity of such witness as held in Hadi Bukhsh's case (PLD 1963 Karachi 805). It is also an admitted fact that FIR was lodged by the complainant after considerable delay of 5/6 hours without explaining the said delay. Similar view was held in another case reported as Muhammad Rafiq and others v. The State and others (2010 SCMR 385). During cross-examination, when questioned by the defense counsel regarding this matter, the complainant responded as follows:

"I have mentioned in my statement u/s 154 Cr.P.C that both accused persons were wearing shalwar kameez however I have not given any other descriptions."

14. The site plan/sketch Exh-12/M, prepared by Tapedar Roohal Amin Qazi, does not indicate the availability of bulb/light in the area. The Investigating Officer did not collect the evidence of any electric bulb or any source of light from the crime scene, as claimed by the complainant in the FIR. During cross-examination, PW Qadeer Khan stated that he could not identify the accused individuals due to the darkness at the time of the incident. Therefore, given these circumstances, the availability of light

source is not proved. This is the main evidence to support the prosecution version, as one witness deposed that he could not identify the accused because of darkness, then how it can be presumed that there was sufficient visibility to identify the accused persons. In support of this argument, reference is made to the case of “Arshad Khan v. The State” (2017 SCMR 564), wherein the Supreme Court of Pakistan observed as follows:

“The occurrence in this case had taken place before Fajar prayers at about 05.00 a.m. and according to the FIR, the occurrence in issue had been witnessed by the eye-witness in the light of an electric bulb but during the investigation no such electric bulb has been secured by the investigation officer”.

15. It is well settled law that each case has its own particular facts and circumstances and that is to be decided keeping in view the peculiar facts and circumstances spelled out from the facts brought on record on a case by case basis. The identification parade of the appellant was held before the Magistrate on 21.05.2019, wherein police officials PWs H.C Shahzad Khan (complainant) and PC Ghulam Fareed (eyewitness) identified them. However, the other private eye witness Qadeer Khan (PW-15) was not brought on record to identify the accused. His statement was recorded by the Investigating Officer on 27.04.2019 under section 161 Cr.P.C. He was a natural witness, but not associating him in the identification parade before the Magistrate without any reason creates a doubt in the prudent mind. The prosecution has failed to provide explanation for such omission, as such adverse impression has to be drawn.

16. It may also be highlighted that identification parade memo produced at Exh-18/D is also surrounded by various inconsistencies. Complainant HC Shahzad Khan, asserted that the parade was held in the court's corridor. In contrast, eyewitness Ghulam Fareed claimed that he was called into the courtroom by a peon, where he identified the accused among ten individuals in a row as directed by the Magistrate. However, the place mentioned by the prosecution witnesses contradicts the Magistrate's certificate at the end of the identification parade memo. According to the certificate, the parade took place in the open compound at

the backside of the Courtroom. The Magistrate explained that the identification parade could not be held inside the courtroom due to its small size, making it impossible to accommodate all the dummies and the accused. Consequently, contradictory statements regarding the place where such identification parade has been held by the prosecution witnesses makes the identification parade proceeding questionable, especially when the independent witness PW Qadeer Khan was not even summoned by the Investigating Officer (I.O) to be associated in such identification parade. Additionally, essential detailed physical features of appellant including physique, height, color, and characteristics, were not provided by the complainant in his report under Section 154 Cr.P.C. raising doubts about the identity of the accused. In light of these contradictions and variations, reference may be made to the case of Majeed alias Majeedi and others v. The State and others (2019 SCMR 301) to emphasize the uncertainties surrounding the identification process.

17. Admittedly, the appellant was a stranger to the prosecution witnesses and, as such it was obligatory upon the prosecution to prove that the eye witnesses had described the physical features of accused in the FIR and statements u/s 161 Cr.P.C. so as to be able to identify the accused accurately during the identification parade. But besides absence of such features, there are other substantial contradictions between the testimony of Magistrate Sibghatullah and the two eyewitnesses who identified the accused during the parade. Therefore, due to the lack of description of the appellant in the First Information Report (FIR), the evidence from the identification parade cannot be considered reliable under Article 22 of the Qanun-e-Shahadat. Another material aspect of the case is that according to PW Qadeer Khan, he was at distance of 13/15 paces away from the accused and because of darkness he could not identify the accused. Police officials too being the eye witnesses of occurrence were available at such distance or even further from the accused make it quite unbelievable that they could correctly and safely identify the accused in darkness.

18. In summary, the lack of a proper description of the accused in the FIR, coupled with the inconsistencies in the identification

parade process and the darkness during the incident, significantly weakens the prosecution's case. As a result, the court cannot rely on the evidence presented to establish the appellant's guilt in terms of their correct identification.

19. Admittedly, the assailants were previously unknown to the prosecution witnesses, and the incident occurred at night time at 2340 hours. It is crucial to note that this was a sudden encounter, unfolding in the heat of the moment. In such situation, the accused persons fired upon the police party and promptly fled the crime scene. Given these circumstances, the evidence concerning the identification of the accused, who were not previously familiar to the prosecution witnesses, demands the utmost caution when being considered. In a similar vein, the case of *Ramzan v. Emperor* (AIR 1929 Sindh 149) is pertinent. In this case, Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh), held the following:

“The recognition of the dacoit or other offender by a person who has not previously seen him is, I think a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases (Page 149, Column 2)”

20. The prosecution was unable to prove the charge against the appellant (the accused individual) for the murder of PC Jahangir. This failure is related to the fact that the co-accused, Rehan Gul alias Taaba, was also convicted based on the same evidence presented by the prosecution. However, upon re-assessment of the evidence, it was determined that the prosecution failed to prove the charge against Rehan Gul as well. Since Rehan Gul was unable to prefer an appeal, he is still entitled, as a matter of law, to the same relief that is extended to the appellant. In this respect reliance is placed on case of *Shabbir Ahmed v. The State* (2011 SCMR 1142). This means that both the appellant and Rehan Gul are acquitted of the charge except in respect of the offence U/S 23 SAA as discussed below due to the lack of evidence proving the murder charge against them by extending them the benefit of the doubt.

21. In the matter of the recovery of the unlicensed pistol, the prosecution examined ASI Tariq Khan, who testified that during the investigation, he received information about the appellant heading home from Hijrat Colony for *Sehri*. Acting on this information, they set up a checkpoint at Shahid Autos Shop where the accused arrived on his motorcycle. He was intercepted and apprehended at 0200 hours. Upon searching him, a 30-bore pistol was found tucked in the fold of his shalwar. The pistol was unloaded, with a magazine containing five live bullets, and it did not bear a serial number. Additionally, Rs.300/- rupees were recovered from his pocket. The pistol was sealed, and ASI Tariq Khan prepared a memo in the presence of HC Hazoor Bux and PC Abdul Wahab, who corroborated these details. Both prosecution witnesses were extensively cross-examined by the defense counsel. However, their testimonies regarding the recovery of the unlicensed pistol on the specified date, time, and location remained consistent. The weapon was sent to the forensic lab, and the positive FSL report was recorded. Consequently, the conviction and sentence recorded by the trial Court regarding the recovery of the unlicensed pistol are based on sound reasoning and do not warrant interference.

22. Therefore, based on the discussion above, appeal No.49/2022 is allowed and appellant Noor Wali alias Kargha, son of Umar Gul and Rehan Gul alias Taaba S/o Zarminosh, are acquitted of the charges in Special Case No.30/2019 for the offenses under sections 302, 353, 324, and 34 PPC read with section 7 ATA 1997. Accordingly appellant Noor Wali alias Kargha and Rehan Gul alias Taaba S/o Zarminosh are acquitted and are ordered to be released forthwith unless required in any other custody case. However, the conviction and sentence of the appellant Noor Wali alias Kargha in Crime No.70/2019 under section 23(1)(a) of Sindh Arms Act, 2013, at Police Station Civil Lines, Karachi, as per the impugned judgment dated 07.01.2022, passed in Special Case No.30-B/2019, are upheld and maintained. This appeal No.50 of 2022 is dismissed to that extent.

JUDGE

JUDGE