

Co-accused Acquitted on Same Set of  
evidence

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## IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Bohlo

### Special Criminal A.T.A. No.74 of 2022

Appellant: Syed Mushtaque Hussain Shah alias Shah Jee S/o. Raza Shah through Mr. Hashmat Khalid, Advocate.

Respondent/The State: Through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh

Complainant: Syed Rizwan Hussain through M/s. Sohail Ahmed and Riaz Ahmed Sabzoi, Advocates.

Date of hearing: 03.10.2023.

Date of Judgment: 09.10.2023.

## J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- The Appellant Syed Mushtaque Hussain Shah alias Shah Jee s/o Raza Shah has filed this appeal against the judgment passed by the Anti-Terrorism Court No.XII, Karachi dated 29.03.2022 in Special Case No.A-77 of 2014 arising out of F.I.R. No.758/2012 u/s. 302/324/427/379/34 of the Pakistan Penal Code, 1860, read with section 7 of the Anti-Terrorism Act, 1997 registered at P.S. Shah Latif Town, Karachi whereby the appellant was convicted u/s. 265-H(II) Cr.PC and sentenced to life imprisonment U/s. 302(b) PPC. Appellant was further convicted U/s. 265-H(II) Cr.PC and sentenced U/s.7(1)(a) ATA, 1997 to R.I. for life with fine of Rs.2,00,000/- (Rupees Two Lacs) and in case of failure to pay the fine, he shall suffer more 06 months S.I.

2. The brief facts of the prosecution case as per FIR are that on 29.12.2012, complainant Syed Rizwan Hussain alongwith his elder brother Syed Athar Hussain, younger brother Syed Muzahir Hussain and servant Mujahid Hussain was returning to his home from Green Town, Shah Faisal Colony via Toyota Hilux, of black color having registration

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No.1SA-2847, which was being driven by his younger brother Muzahir Hussain. On front seat his elder brother Syed Athar Hussain and on back seats Mujahid and complainant were sitting. At about 1945 hours, when they turned to street towards their house from National Highway, suddenly on two motorcycles four unknown persons arrived to their vehicle, for which his brother stopped the vehicle. Two accused persons got down from their motorcycles one of them was with muffled face having two pistols in his both hands, whereas other was holding one pistol as well in his hand. Then both of them started firing upon complainant party with intention to commit their murder, in result of such firing, bullets were hit on the vehicle, due to which it's front mirror broke and Mujahid Hussain saved his life by lying inside the vehicle. In retaliation and self-defense his brother Syed Athar Hussain got down from the vehicle while making fires upon accused persons from his 9mm pistol, due to which muffled face accused fell down, whereas other accused persons succeeded to flee away on motorcycles. Then complainant and Mujahid got down from the vehicle and saw that Syed Athar and Syed Muzahir Hussain were injured. In the meantime people gathered there and immediately shifted his injured brothers to Agha Khan Hospital, where his brother Syed Athar Hussain expired and his brother Syed Muzahir Hussain was injured due to receiving injuries on his ribs. Then he shifted the dead body to Jinnah hospital, where police official of police Chowki Khuldabad arrived, who prepared memo on his pointation, upon which he and his brother Muzahir Hussain put their signatures. Police official after completing proceedings U/s. 174 Cr.P.C, handed over the dead body for funeral. Hence, FIR was lodged against accused persons, to the above effect.

3. After completion of investigation charge was framed against the appellant and his co-accused Waqas who both plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 15 witnesses and exhibited various documents and other items. The statement of the appellant and co-accused were recorded under Section 342 Cr.P.C. whereby they denied the allegations leveled against them however,



neither the appellant nor his co-accused gave evidence on oath or called any D.W. in support of their defence case.

5. After appreciating the evidence on record, the learned trial Court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence. The co-accused Waqas however was acquitted of the charge. The State did not file any appeal against his acquittal and the complainants appeal against his acquittal was dismissed for non prosecution and no restoration application was filed.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.03.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the evidence of the eye witnesses cannot be safely relied upon especially in terms of correctly recognizing the appellant as it was dark and there was no source of light; that the identification parade of the appellant was not carried out in accordance with the law and thus could not be relied upon; that there was no other evidence against the appellant and that the appellant be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of *Meero v. The State* (2021 P. Cr.LJ 1237), *Farooq Ahmed v. The State* (2020 SCMR 78), *Mst. Rukhsana Begum and others v. Sajjad and others* (2017 SCMR 596), *Bahar v. The Crown* (PLD 1954 Federal Court 77), *Muhammad Idrees and another v. The State and others* (2021 SCMR 612), *Tariq Pervez v. The State* (1995 SCMR 1345), *Fayyaz Ahmad v. The State* (2017 SCMR 2026), *Ghulam Hussain and others v. The State and others* (PLD 2020 Supreme Court 61), *Lal Khan v. The State* (2006 SCMR 1846), *Muhammad Pervez and others v. The State and others* (2007 SCMR 670) and *Patoo and another v. The State* (2012 MLD 1358).

8. Learned APG and learned counsel for the complainant placed reliance on the impugned judgment. They placed reliance on the case of *Ansar and others v. The State* (2023 SCMR 929).



9. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General Sindh and learned counsel for the complainant, gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. At the outset based on the prosecution evidence and in particular the medical evidence we find that the prosecution has proved beyond a reasonable doubt that on 29.12.12 at about 7.45pm at turning street, Gulshan Society near National Highway road Malir Karachi deliberate firing was made on Rizwan Hussain, Syed Athar Hussain and Syed Mazahar Hussain which resulted in the murder of Athar Hussain (the deceased) and firearm injury to Mazahir Hussain.

11. The only question left before us therefore is who murdered the deceased by firearm at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) Admittedly the FIR was lodged by the complainant two days after the incident. We however based on the particular facts and circumstances of the case we do not consider such delay to be fatal to the prosecution case as the delay has been explained by the complainant who took the body of the deceased to hospital and then after post mortem took the body for burial although we are put on caution by the fact that the complainant was a police officer and knew the law well and had ample opportunity to give his S.154 Cr.PC statement at the hospital when the police arrived straight after the firing incident.

(b) We find that the prosecution's case rests on the evidence of the eye witnesses to the incident and their ability to correctly identify the appellant who allegedly came on a motor bike and opened fire on the deceased along with others who escaped from the crime scene whose evidence we shall consider in detail below;

(i) Eye witness PW 7 Rizwan Hussain. He is the complainant and brother of the deceased. According to his evidence on 29.12.2012 he, his brother Athar Hussain (the deceased), brother Muzahir Hussain and servant Mujahid Hussain were driving home in his Toyota hi-lux when at about 7.45pm four unknown people on two motor cycles intercepted them and the pillion riders opened fire on them.



In retaliation the deceased returned fire and one of the assailants was hit and died on the spot. That both of his brothers were hit by firearm shots by the pillion riders and both were injured with the deceased dying on account of his injuries before reaching JPMC whilst his other brother Muzahir Husain received treatment for his injury at hospital. On 13.03.14 he identified the accused before an identification parade held before a judicial magistrate with a specific role and on 25.02.2017 he identified the acquitted co-accused Waqas before an identification parade held before a judicial magistrate with a specific role.

According to his evidence he did not know either the appellant or the acquitted co-accused before the incident. It has also come in evidence through PW 1 Muhammed Younis and PW 2 Noor Hussain who were police officers posted at the nearby picket and who were first responders at the crime scene that at 7.45pm in December when the incident occurred that it was dark and that there was no source of light. During the brief chaotic shoot out this eye witness would only have got a fleeting glimpse of the appellant and his acquitted co-accused under stressful circumstances. In his FIR however he gave no hulia/description of the appellant. This eye witness was a police man and knew the importance of giving a hulia/description of the assailants yet he failed to do so.

An identification parade was held nearly 18 months after the incident in respect of the appellant and almost 5 years after the incident in respect of the acquitted co-accused wherein the eye witness identified both the appellant and the acquitted co-accused with a specific role. The appellant also claimed that he was shown to the eye witness who himself was a policeman prior to the identification parade and that there are some procedural defects in the identification parade especially in terms of the dummies not having their names recorded and CNIC's copied also put us on caution as to the legality of the identification parade. In this respect reliance is placed on Kanwar Ali's case (PLD 2019 Supreme Court 488).

It is true that we can convict based on the evidence of even a sole eye witness however based on the particular facts and circumstances of this case as discussed above we find that even if the eye witness was present at the time of the incident based on the reasons mentioned above he would not have been able to correctly, safely and reliably identify the appellant and as such we veer on the side of caution in



this case especially as there appears to be hardly any cogent corroborative or supportive evidence and find that the eye witness was not able to correctly identify the appellant.

In this respect reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524) concerning the necessity for an early hulia/description of an accused by an eye witness in his S.161 Cr.PC statement before an identification parade and the need to strictly follow the rules governing identification parades where it was held as under at P.528 to 530:

*"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a 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). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Inran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P).*



8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect....

9. As regards the identification of the appellants before the trial court by Nasir Meliboo (PW-5), Subedar Mehmood Ahmed Khan (PW-6) and Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential." (bold added)

The Supreme Court case of Mian Sohail Ahmed V State (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified. In fact such extra care and caution in relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

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(ii) Eye witness PW 8 Mazahir Hussain. He is the brother of the complainant and the deceased. His evidence corroborates that of his brother who is the complainant regarding the incident. He was injured by the gun fire of the assailants but produced no medical certificate to this effect and according to his evidence he was released the day after the incident. He is named in the FIR but gave his Section 161 Cr.PC eye witness statement three days after the incident without explanation especially as he was up and about one day after the incident despite his injury. Significantly he was not produced before any identification parade without any explanation and as such did not identify the appellant or the acquitted co-accused before an identification parade. As with his brother the complainant the same chaotic situation prevailed during the shoot out. He did not know the appellant or the acquitted co-accused from before and only got a fleeting glance at them. It was dark and there was no evidence that there was any source of light. He also gave no hulia/ description of the appellant or the acquitted co-accused. As mentioned earlier he was not put before an identification parade. Thus, although the incident might have occurred as narrated by him and he might have been present we find that the same considerations apply to him as the complainant. Namely, he would not have been able to correctly, safely and reliably identify the appellant.

(c) It is notable that probably the best prosecution eye witness was given up by the prosecution without explanation namely, Mujahid Hussain who was the servant of the complainant and an independent witness and as such the adverse inference can be drawn under Article 129 (g) Qanoon-e-Shahadat Ordinance 1984 that he would not have supported the prosecution case.

(d) With no eye witness evidence as to the identity of who carried out the attack the medical evidence becomes inconsequential as it can only reveal what kind of weapon/device was used and the seat of the injuries of who was injured or killed. It cannot identify the person who inflicted the injuries or caused the death.

(e) It is notable that the appellant and the acquitted co-accused both confessed to the offence whilst in custody. Confessions before the police are inadmissible in evidence and thus we place no reliance on such confessions. Significantly despite both the appellants and acquitted co-accused confessing to the offence neither of them were brought before a magistrate to record their confessions despite them being brought before a magistrate for an identification parade which raises eye brows.

(f) It does not also appeal to logic, commonsense and reason that



the appellant and the acquitted co-accused would confess to a murder which was a capital offence which had been disposed of in "A" class when there was no evidence against them to link them to the murder when they were only facing minor charges whilst already in custody. Under these circumstances why would they stick their hand up to a potential death penalty?

(g) No weapon was recovered from the appellant which makes the recovery of empties irrelevant as their recovery alone cannot link the appellant to the crime.

(h) Significantly, the evidence against the acquitted co-accused Waqas was the same as the evidence against the appellant yet while Waqas was acquitted the appellant was convicted on the same set of evidence. It is well settled by now that if the evidence of an acquitted co-accused is the same as a convicted accused then the convicted accused should also be acquitted especially when the State did not file an appeal against acquittal and the complainant allowed his appeal against acquittal be dismissed for non prosecution and did not even bother to file a restoration application. In this respect reliance is placed on the cases of *Soba Khan V State* (2016 SCMR 1325), *Imtiaz alias Taj v State* (2018 SCMR 344) and *Rehmat alias Rehman Masih V State* (1995 SCMR 733).

13. That the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of *Tariq Pervez V/s. The State* (1995 SCMR 1345).

14. For the reasons discussed above by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed and the appellant shall be released unless wanted in any other custody case.

15. The appeal stands disposed of in the above terms.