

Police murder : Unreliable eyewitnesses  
Defective ID parade

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## IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal ATJ Appeal No.49 of 2018  
Special Criminal ATJ Appeal No.191 of 2016  
Confirmation Case No.02 of 2016

### Present:

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Mohammad Karim Khan Agha

Appellants: 1. Fazal Hussain @ Faqeera S/o. Abdullah Shaikh  
2. Fayyaz alias Faizu S/o. Ameer Dad both  
confined in Central Prison, Karachi through Ms.  
Abida Parveen Channar, Advocate.

Respondent/State: The State through Mr. Mohammad Iqbal Awan,  
Deputy Prosecutor General Sindh.

Date of hearing 25.01.2019

Date of Judgment 07.02.2019

## J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Fazal Hussain @ Faqeera S/o. Abdullah Shaikh and Fayyaz S/o. Muhammad Ayaz @ Ameer Dad were tried by learned Judge, Anti-Terrorism Court No.IV, Karachi for trial of case Crime No.170/2013, U/s. 302/34 PPC r/w section 7 ATA 1997, P.S. Kalri, Karachi vide judgment dated 30.04.2016 (the impugned judgment) convicted the accused Fayyaz @ Faizu S/o. Mohammad Ayaz @ Ameer Dad for the offence punishable u/s. 302/34-PPC r/w section 7 (a) of Anti-Terrorism Act, 1997 and awarded death sentence to him and fine of Rs.100,000/- as compensation to the legal heirs of the deceased and in case of his failure to pay compensation to the legal heirs of the deceased he was ordered to suffer one year more imprisonment subject to confirmation of his death sentence by this court. The Accused Fazal Hussain @ Faqeera S/o. Abdullah Shaikh was awarded R.I. for ten years and fine of Rs.100,000/- for the charge of offence punishable u/s.302/34-PPC r/w section 7 (a) of Anti-Terrorism Act, 1997.

2. Brief facts of the prosecution case are that the law was set in motion through the complaint of Dildar Ali S/o. **Rajab** Ali a Karachi police officer who disclosed in his S.154 Statement that on 12-06-2013 at about 08: 45 pm when he was present in his house, he received information on the phone through his cousin Qamaruddin that Ashfaq Ahmed of P.S. Kharadar after completion of his duty was going in private mazda with Frontier Constabulary (FC) towards Baldia SRP Base-I, when they reached at about 08:30 pm at Maripur Road, near Edhi Ambulance Centre, opposite Ghulaman-e-Abbas School, Kalri, Liyari, people of vicinity told them that 03 dacoits were robbing them. When FC and police alighted from the said Mazda, on seeing them accused persons started firing upon them with deadly weapons with intention to kill them. Due to firing PC Ashfaq S/o. Khair Muhammad sustained severe bullet injuries and died on the spot. His dead body was then taken to Civil Hospital and thereafter the complainant rushed to Civil Hospital and saw the dead body of Ashfaq who was murdered by unknown accused persons with deadly weapons. After completion of legal formalities FIR was lodged for taking legal action against the accused persons.

3. After usual investigation the IO submitted the challan on 02.09.2013 followed by supplementary challan on 09-10-2013 against the accused. Two other co-accused were declared as absconders. Charge was framed on 14.02.2014 against the accused to which they pleaded not guilty and claimed trial. The prosecution to prove their case examined 10 PW's and exhibited a large amount of incriminating material against the accused in evidence. Both the accused denied the allegations in their S.342 statements and also denied the same under oath on the basis of false implication. However they did not call any witness in their defense.

4. Learned Sessions Judge, Central, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 30-04-2016 convicted and sentenced the appellants as stated above, hence this appeal has been filed.

5. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the judgment dated 30.04.2016 passed



by the trial court, therefore, the same **may not be reproduced** here so as to avoid duplication and unnecessary repetition.

6. In a nutshell the prosecution case is that PC Ishfaq Ahmed (the deceased) was driving with FC personnel in his private car when he was alerted by local people to the accused who were committing robberies on Maripur Road Karachi whereupon the deceased got down from his vehicle and was fired upon by the accused and the absconding co-accused from whom he received fatal injuries as a result of which he died on the spot. This was witnessed by PW 3 Qamaruddin who was also a police man who also informed the complainant, another police officer PW 1 Dildar Ali who was the cousin of the deceased who went to the hospital to receive the dead body and thereafter registered the FIR against unknown accused which was originally investigated by PW 7 Chuadhry Anwar but which was later transferred to IO PW 10 Shafiq Rehman. Both the accused had been arrested in different cases under the Sindh Arms Ordinance. IO Shafiq was informed on 28-07-2013 that during interrogation in the Arms case accused Fazal Hussain had admitted his involvement in this case. As such IO Shafiq interrogated him and during interrogation accused Fazal Hussain took him to the place of incident thereafter he was arrested in this case and later disclosed the name of his accomplices who included accused Fayyaz. On 13-08-2013 Fazal Hussain's confession u/s S.164 Cr.PC was recorded before judicial magistrate PW 8 Mumtaz Solangi where he admitted his involvement in the offense but stated that Fayyaz had fired the shot at the deceased. On 24-09-2013 IO Shafiq received information that accused Fayyaz had also been arrested in a different case. During interrogation accused Fayyaz confessed to IO Shafiq that he had shot the deceased and took IO Shafiq to the place of the incident and thereafter he was arrested in this case. Later accused Fayyaz was picked out at an identification parade by the eye witness PW 3 Qamaruddin which was held by PW 8 Mumtaz Solangi. Based on the aforementioned evidence, chemical report, FSL report and other documents exhibited at trial the Learned DPG contended that the prosecution had proved its case beyond a reasonable doubt against the accused and that the accused had rightly been convicted and sentenced as per the impugned judgment.

7. In a nutshell the plea of the appellants is that they are innocent and have been falsely implicated in this case by the police in order to show their efficiency to their high ups. Learned defense counsel in essence submitted that the eye witness was unreliable, that the S.164 statement of Fazal Hussain was after a 5 day delay and as such could not be safely relied upon, that the ballistics report was contrary to the recovery of empties at the scene and thus the accused were entitled to the benefit of the doubt and as such should be acquitted of the charges against them. In support of her contentions she placed reliance on the cases of **Ali Akbar V The State** (2008 YLR 1056) and **Mst Irshad Bibi V State** (2008 SCMR 841)

8. 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, the impugned judgment with their able assistance and have considered the relevant law.

9. From the evidence in our view it seems to be an admitted position, as supported by both ocular and medical evidence, that the deceased was shot by fire arm and died on account of the firearm injuries which he received on the spot at about 8.30pm on the evening of 12-06-2013 when he left the car which he was in with FC men in order to apprehend looters.

10. The issue before us therefore based on the evidence on record is who shot and murdered the deceased? Without belaboring the point it is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take as many defenses as he likes to the allegations against him and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

*"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

11. The prosecution's case in our view seems to hinge on the following main elements (a) the eye witness account of the incident by PW 3 Qamaruddin (b) the S.164 Cr.PC confession of accused Fazal Hussain before the judicial magistrate (c) the identification of accused Fayyaz by PW 3 Qamaruddin at the identification parade held by the judicial magistrate (c) Fayyaz's extra judicial confession before the police and his pointation of the crime scene and (d) the empties recovered from the scene of the incident.

12. Before we turn to consider this evidence we deem it necessary to put this case in context. Namely, a police officer had been shot dead and undoubtedly the police wanted to find out who was responsible for murdering one of their own. Notably both the complainant and the key eye witness PW 3 were related to the deceased. Pressure might also have come from the high ups in this regard. However, on 12-07-2013 IO Shafiq had to submit a report in "A" class before the concerned court in effect conceding that after 28 days of investigation no solid evidence had been found against any person for the murder of the deceased. Then out of the blue 16 days later accused Fazal Hussain who had been booked in a case under the Arms Ordinance gave an extra judicial confession before the police that he is involved in this murder, takes IO Shafiq to the scene of the incident and implicates accused Fayyaz as being his accomplice. Conveniently, Fayyaz is also already in custody in another case who again gives an extra judicial confession to the police that he shot the deceased. It is in this backdrop that we now turn to consider the prosecutions evidence to determine whether they have proved their case against the appellants beyond a reasonable doubt.

13. Turning firstly to eye witness PW 3 Qamaruddin. In our view he is the most important part of the prosecution case as not only is he the eye witness to the incident but he also picked out accused Fayyaz from the identification parade as being responsible for shooting and killing the deceased and hence his evidence will be considered in detail.

14. PW 3 Qamaruddin who was the eye witness is also a police officer. He is the cousin of the deceased and cousin of the complainant who he immediately informed after the incident. According to his evidence on



finishing his duty at 8.05pm on 12-06-2013 another person gave him a lift on a motor cycle and when they reached Maripur Road at 8.30 pm he heard gun fire and;

*"he saw one of the accused, who was firing upon the policemen, who got down from the vehicle of FC. I then made commotion but none came to my voice however one ASI of traffic police came and he also cried. Then ASI Ghulam Mohammed came on police mobile from PS Kalri. I found the said police men who sustained bullet injuries and came to know that he was my cousin PC Ashfaq"*

15. It appears that PW 3 Qamaruddin was a chance witness who was a fellow police officer related to the deceased as such his evidence must be considered with great care and caution and requires independent corroboration. In this respect reliance is placed on **Muhammed Ali V State** (2017 SCMR 1468). In his evidence he gave no description of the accused whom he saw fire on the police man; it was night time and he claims that there was light yet no bulb or other proof of light was recovered and he did not know the accused and had never seen the accused before. In this respect reliance is placed on **Ashiq V The State** (2017 SCMR 188); that he says that there was a short distance between the accused and him when they were escaping yet he did not give chase despite being on a motor bike and having seen the accused shoot a brother policemen in uniform. He could have easily asked the person who owned the bike to dismount based on the serious situation which had arisen whilst he gave chase. This in our view does not appeal to reason. Furthermore, why was the person whose bike he was on not examined as a PW which would have given vital corroborative evidence. Likewise the traffic police men did not give evidence who according to PW 3 Qamaruddin cried at the scene. In our view, it does also not appeal to reason that none of the FC personnel who were traveling with the deceased came to his rescue or gave chase. None of them were even called as PW's. PW 3 Qamaruddin's S.161 statement was also recorded after an unexplained delay of 12 days. It is true that as a matter of law we can convict the accused on the evidence of a single eye witness without corroboration if we find his evidence to be trust worthy, reliable and confidence inspiring. In this respect reliance is placed on **Muhammad**

**Ehsan v. The State** (2006 SCMR 1857). In our view, however, for the reasons mentioned above we find ourselves unable to convict the accused on the evidence of PW 3 Qamaruddin which we do not find free from doubt, particularly reliable or confidence inspiring for the reasons as discussed above **unless** there is very strong and compelling corroborative evidence from an unimpeachable source.

16. Admittedly the medical evidence corroborates PW 3 Qamaruddin's ocular account of how the deceased died. In our view however this is not sufficient corroborative material alone as it was known that the deceased died on account of fire arm injury. **The real issue based on the particular facts and circumstances of this case is the identity of the person who shot the deceased and not the cause of death.**

17. With regard to the judicial confession of accused Fazal Hussain u/s 164 Cr.PC before the judicial magistrate it is true that we can convict an accused on the basis of a retracted confession if we are of the view that it was made voluntarily i.e. without threat or inducement **and** its object must be to state the truth; assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession. In this respect reliance is placed on **Ch.Muhammad V Yaqoob V The State** (1992 SCMR 1983)

18. In this case we have doubts as to whether the object of the confession was to state the truth when the context of the case is considered or whether it was made without inducement. For example, accused Fazal Hussain was already in custody in another case under the Arms Ordinance and he had absolutely no need or reason to give a confession in this case whether extra judicial or otherwise which he must have known would have left him open to serious criminal charges including potentially the death penalty on conviction and as such it does not appeal to reason that under such circumstances he would make such a confession at all. Even in his confession he does not confess to the murder but rather blames co-accused Fayyaz. His confession seems at best to be motivated at saving his own skin which is hardly indicative of its truthfulness and in

any event cannot be used legally to convict his co-accused Fayyaz. Furthermore, the confession was recorded 5 days after his arrest in this case which delay has not been explained. It appears from the evidence of the magistrate that the accused had not been given all the required warnings/cautions before making his confession. Thus, on balance we do not believe that the object of the confession was to tell the truth and thus in our view the confession cannot be safely relied upon to convict the accused. In this respect reliance is placed on **Azeem Khan V Mujahid Khan** (2016 SCMR 274)

19. With regard to the extra judicial confession of Fayyaz and the police being taken to the scene of the incident by the accused we find this piece of evidence to be inconsequential based on the particular facts and circumstances of this case. Namely, that the police already knew the place of the incident so they could easily have concocted this aspect of the case and Fayyaz was never even produced before a magistrate to record his confession under S.164 Cr.PC. It is settled law that relying on such evidence is to be done only with great care and caution. In this respect reliance is placed on **Sajid Mumtaz V Basharat** (2006 SCMR 231)

20. With regard to the accused Fayyaz being picked out at the identification parade by PW 3 Qamaruddin we have already found the evidence of this PW eye witness as being doubtful, unreliable and not confidence inspiring as he was in our view a chance witness who had never seen the accused before and in his evidence he has given no description of Fayyaz as the shooter, plus the fact that it was dark and the source of light has not been proved, that he was a fellow police officer and related to the deceased and his S.161 Cr.PC statement was recorded after an unexplained delay on 12 days where he gives no description of the accused and only says that he could identify the accused if he saw him again which in effect gives him a license to implicate anyone. The role of the accused was also well known.

21. It is also in our view significant that the empties recovered at the scene were 9mm yet the FSL report found them to be of 30 bore. No weapons were recovered from the accused and they were both acquitted in the case against them under the Arms Ordinance. It is also, in our view,



not without significance that all the PW's are police officers some of whom are related to the deceased and that no independent person, Mushir or otherwise has been associated with the case notwithstanding the provisions of S.103 Cr.PC especially when a crowd had gathered after the shooting at the place of incident.

22. Thus, when we consider the prosecution evidence in its totality taken with the background to this case as discussed earlier we find that the eye witness is not reliable and even otherwise lacks unimpeachable corroboration from an independent source, that the judicial confession of accused Fazal Hussain cannot be safely relied upon, like wise any extra judicial confessions of the accused, that pointation of the scene of crime is not of much significance based on the particular facts and circumstances of the case and even otherwise there is not sufficient corroborative material or other circumstantial evidence or evidence which appeals to reason which can sustain a conviction against the appellants.

23. As such we find that the prosecution has not proved its case against the appellants beyond a reasonable doubt and that the appellants are entitled to the benefit of the doubt and thus, we, by extending the benefit of the doubt to the appellants set aside the impugned judgment and acquit them of the charges. The confirmation reference is answered in the negative and the appellants shall be released forthwith unless they are wanted in any other custody case.

24. The appeals and confirmation reference are disposed of in the above terms.