

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Criminal Anti-Terrorism Appeal No.234 of 2016

Confirmation Case No.04 of 2017

Spl. Criminal Anti-Terrorism Appeal No.235 of 2016

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellant: Abdul Rasheed S/o. Abdul Razzak, presently confined in Central Prison, Karachi through M/s. Ahmed Nawaz and Nadeem Ahmed Azar, Advocates.

Respondent: The State through Mr. Farman Ali, Additional Prosecutor General Sindh.

Date of hearing: 11.03.2019.

Date of Judgment: 21.03.2019.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Abdul Rasheed S/o. Abdul Razzak was tried by learned Judge Anti-Terrorism Court No.III, Karachi in Special Case No.01(III)/2013 and Special Case No.02(III)/2013, arising out of Crimes No.331/2012 and 332/2012 U/s. 302, 324, 353, 427, 186, 34 PPC read with section 7(a) of ATA, 1997 and U/s. 13-(d) Arms Ordinance registered at P.S. Aram Bagh, Karachi vide judgment dated 30.08.2016 (the impugned judgment) the appellant was convicted and sentenced as under:-

- (i) Found guilty U/s. 265-H(ii) Cr.P.C. and awarded death sentence and fine of Rs.100,000/- u/s. 7(1)(a) Anti-Terrorism act, 1997 read with section 302 (b) 34 PPC. He was ordered to be hanged by neck till his death subject to confirmation by the High Court.
- (ii) Found guilty U/s. 265-H(ii) Cr.P.C. and awarded Rigorous Imprisonment for life u/s. 7(1)(b) of Anti-Terrorism Act, 1997 read with section 324 PPC with fine of Rs.50,000/-. In case of default, he was ordered to further undergo R.I. for one year.
- (iii) Found guilty U/s. 265-H(ii) Cr.P.C. and awarded Rigorous Imprisonment for two years u/s. 353 PPC and fine of

Rs.50,000/-. In case of default, he was ordered to further undergo R.I. for one month more.

- (iv) Found guilty U/s. 265-H(ii) Cr.P.C. and awarded Rigorous Imprisonment for two years u/s. 427 Cr.PC and fine of Rs.50,000/-. In case of default, he was ordered to further undergo R.I. for one month more.
- (v) Found guilty U/s. 265-H(ii) Cr.P.C. for an offence punishable u/s. 13-(d) of Arms Ordinance and awarded Rigorous Imprisonment for three years with fine of Rs.50,000/-. In case of default, he was ordered to further undergo R.I. for one month more.

All the sentences were ordered to run concurrently. Benefit of section 382-B Cr.PC was also extended to the appellant. The properties of the appellant were confiscated to the Government U/s. 7(2) ATA, 1997.

2. The brief facts of the prosecution case are that on 13.12.2012, a police party headed by ASI Ali Hussain of P.S. City Courts was busy in checking of suspicious persons at the road side near Sessions Court South and at about 12.30 a.m. (night), noticed two motorcyclists each on a separate motorbike in suspicious manner coming from Light House side, who on seeing the police party turned towards the Camble Street. The police party followed those motorcyclists and at about 1.45 a.m. (night) at Pakistan Chowk tried to stop them but they took out pistols and started firing upon the police party. Complainant PC Khalid Mehmood, PC Sikander Ali and PC Sahib Khan fired upon the accused persons from their SMGs, in the meantime, a police party headed by ASI Naseer-ul-Hasan of P.S. Aram Bagh came at the spot and apprehended an accused namely Abdul Rasheed. He had a pistol in his right hand. ASI Naseer-ul-Hasan took the pistol in his custody and found a live bullet in its chamber. Due to the firing of the accused persons, ASI Ali Hussain sustained fire arms injuries and a bullet struck their police mobile. ASI Naseer seized the motorcycle, KBO-8352 of accused and from his personal search recovered six mobile phones, wallets and different papers. Accused disclosed that his escaped companion was Irfan son of Raheem. The complainant brought the injured ASI Hussain Ali to Civil Hospital, who later died from his injuries, where his statement U/S. 154 Cr.P.C. was recorded by ASI Liaqat Ali of P.S. Arambagh which has been transcribed in FIR No.331/2012. ASI Naseer-ul-Hasan registered FIR No.332/2012 against

accused for an offence punishable U/s. 13-(d) Arms Ordinance. During the investigations it transpired that the accused had wrongly disclosed the name of his accomplice as Irfan Baloch son of Raheem, and his actual accomplice was Muhammad Nasir son of Abdul Raheem who after carrying out the necessary formalities by the trial court was declared a proclaimed offender.

3. Both the cases have been consolidated U/s. 21-M, ATA vide order dated 04.09.2013 as evidence in both the cases were the same. A formal charge was framed against the accused to which he pleaded not guilty and claimed his trial.

4. To prove its case the prosecution examined 10 witnesses and exhibited various documents and other relevant items and thereafter closed its side. The statement of the accused u/s. 342 Cr.P.C. was recorded wherein he has denied all the allegations of the prosecution against him and claimed false implication by the police as he was at the Ranger's HQ at the time of the incident. He did not give evidence under oath and declined to examine any witnesses in his defense. After hearing arguments of both parties and assessing the available evidence on record the accused was convicted and sentenced in terms of the impugned judgment as set out earlier in this Judgment. Hence this appeal against conviction.

5. Learned advocate for appellant contended that there was contradiction between the oral evidence and the medical evidence; that the eye witness PW 2 Khalid Mehmood was unreliable and his evidence could not be safely relied upon; that there were material contradictions in the evidence of the prosecution witnesses; that the co-accused who was tried separately and given the same role as the appellant had been acquitted based on the same evidence and as such the appellant was entitled to the same treatment; that all the PW's were interested witnesses being police officials and as such for any and all the above reasons the appellant was entitled to be acquitted based on the benefit of the doubt being extended to him. In support of his contentions he placed reliance on **Darey Khan and another Versus The State** (1972 SCMR 578), **Abdus Sattar and another Versus The State** (2014 YLR 1814), **Khuda Bakhsh**

Versus The State (2008 YLR 1829), **Amin Ali and another Versus The State** (2011 SCMR 323), **Muhammad Riaz Versus State** (PLJ 1996 Cr. C. [Lahore] 1789 [DB]), **Noor Muhammad Versus The State** (2010 SCMR 97), **Muhammad Mansha Versus The State** (2018 SCMR 772), **Muhammad Akram Versus The State** (2009 SCMR 230), **Ghulam Qadir and 2 others Versus The State** (2008 SCMR 1221) and **Tariq Parvez Versus The State** (1995 SCMR 1345).

6. On the other hand, Mr. Farman Ali, Additional Prosecutor General Sindh, contended that the eye witnesses were trust worthy and reliable; that there was no conflict between the ocular evidence and the medical evidence which fully corroborated the prosecution case; that PW's corroborated themselves in all material respects and that there were no major contradictions between them; that the appellant had been arrested from the spot and the pistol recovered from him on the spot and the recovered empties and pistol matched as per the FSL report and as such the impugned judgment should be upheld and the appeal may be dismissed. He did however, concede that it was a case of a life sentence as opposed to the death penalty.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30-08-2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

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 including the authorities cited at the bar.

9. Before dealing with the instance case and assessing the evidence before us it is relevant to mention that initially there was another co-accused Mohammed Nasir who had absconded and was declared a proclaimed offender however when he was later arrested and brought to trial for the same offense he was acquitted by the ATC No.II at Karachi vide Judgment dated 05-03-2019 on the evidence recorded by the same key PW's as in this appeal.

10. In our view based on the evidence on record, in particular that of the MLO PW 9 Parshotam Rathore and other PW's, it is not disputed that the deceased ASI Ali Hussain was injured by firearm in the vicinity of Pakistan Chowk Karachi on 13-12-2013 at about 0045am in the morning and succumbed to his injuries in civil hospital on 15-12-2012 two days later at 8.20am. What is in dispute is the identity of the person who murdered him.

11. 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 any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) 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) that 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. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

12. It would appear that the FIR was lodged within about one and a half hours after the incident and thus based on the particular facts and circumstances of this case we do not consider such delay to be fatal to the prosecution case as it leaves little time for concoction especially as it names the appellant and gives him a specific role in the firing. Eye witnesses PW 2 Khalid Mehmood and PW 5 Sikander Ali generally corroborate each other, recoveries of both the pistol and empties have been made at the scene.

13. On a **deeper appreciation** of the evidence however this eye witness evidence becomes less confidence inspiring. For example, PW 1 Syed Naseer ul Hassan who made the arrest and recovery of the pistol from the appellant states that eye witness PW 2 Khalid Mehmood was chasing on foot the appellant at the time when the appellant was apprehended

however there is no mention of this in either eye witnesses PW 2 Khalid Mehmood or PW 5 Sikander Ali's evidence who were both in the same mobile giving chase to the appellant who was apparently on a motor bike. Significantly PW 2 Khalid Mehmood was driving the police mobile at the time of the chase so how he came to be on foot leaving the mobile behind has gone completely unexplained. It has also gone completely unexplained why the appellant would dismount from his motorbike and run on foot when being chased by a police mobile. This does not particularly appeal to reason. The defense contends that the medical evidence contradicts the oral evidence in that in the FIR it is stated that the deceased received 2 bullet wounds and one bullet hit the chasing mobile whilst the medical report states that the deceased received 3 fire arms injuries. Although we do not consider this slight variation to be of huge significance what is of **greater significance** in our view is that there was "blackening" around two of the entry wounds which as per appreciation of the medical legal evidence means that 2 out of the 3 gunshot wounds were fired from a distance of less than 2 or at the most 3 feet. In this respect reliance is placed on the case of **Amin Ali** (Supra) where it was held at P.330 Para 11 as under:

" 11. All the three witnesses deposed that the deceased had received three injuries, but the Medical Officer found six injuries on the person of the deceased. **One of them had blackening.** None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased. **Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence.**"

14. To be more precise with respect to distance of firing of certain firearms Modi's Medical Jurisprudence and Toxicology (23 Ed) in its chapter dealing with firearm injuries and distance reads as under at P.721.

"Distance of Firearm

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt

grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a grayish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. **Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or pistol discharged within about two feet.**" (bold added)

15. This "blackening" on two out of the three firearm wounds on the deceased, **which were caused by a pistol**, indicate that the pistol shots must have been made within 2 feet of the deceased. When we put this information in juxtaposition with the police version of events that the police were chasing the motor cyclists when these fires were made and other material on record it becomes difficult to believe the police version of events for the following reasons (a) if the police were chasing the motorbikes which were in front of the police mobile how could a bullet hit the passenger door of the police mobile which would indicate that the motor bikes were level with the passenger door which was **not** the case of the prosecution **and** (b) how could the appellant and his accomplice fire from behind whilst driving the motor bike at speed as each of them were actually driving the motor bike and were **not** pillion riders and even if this was possible presumably their bullets would have hit the front of the police mobile such as its windscreen and not a side door **and** (c) if the deceased was sitting in the police mobile when he was hit by the bullets how was it possible for two firearm injuries to be on his stomach and hip when these two parts of the body would have been shielded by the police mobile especially as the fire did not come from downwards as the accused were not firing from an elevated height and if any thing were firing from a lower height from either their motor bikes or on foot (even if one bullet passed though the door of the mobile and hit the deceased in the stomach or the hip or vice versa this would only account for one of the two firearm injuries and according to the medical evidence there were two separate entry wounds) **and** (d) keeping in view that if the appellant and his accomplice who were driving their motorbikes at speed, how was it possible for them not to get shot by the police party who were armed with SMG's if they came **within 2 feet of them** which is an exceedingly short

distance (or not shoot more policemen) **which in our view simply does not appeal to reason, logic or common sense.** Likewise, **and** (e) why did the appellant chose to abandon his motor bike which was undamaged and run away on foot when he could easily be caught by police keeping in view that his co-accused escaped on his motorbike **and** (f) when the appellant was allegedly running away from the police despite having a pistol with live bullets, after already having shot at the police mobile from close range, why did he not fire at the police on foot whilst attempting to escape **and** (g) when he was caught by the police, after seriously wounding one of their colleagues, how was it that the police did not give him any kind of beating which under the circumstances would have been albeit an unlawful act but entirely expected based on the particular facts and circumstances of the case whereby the accused had seriously injured one of their brother officers and keeping in view the prevailing ground realities. Instead according to PW 10 Nazir Hussain on checking he found the accused to be physically fit. All of the issues discussed above do not appear to be natural human conduct, or appeal to logic, common sense or reason in such a situation. In this respect reliance is placed on **Askar Jan V Muhammed Daud** (2010 SCMR 1604), **Muhammed Asif V State** (2017 SCMR 486) and **Haq Nawaz V State** (2018 SCMR 95).

16. It was also admittedly from the evidence a night time incident and it was dark and no source of light has come in the evidence and as such once the appellant dismounted his motorbike and ran away how could the police have known that the person who they apprehended was the same as the person who fired on them especially as per the evidence Pakistan chowk where the incident took place was full of people.

17. We have also observed that the prosecution has not produced any evidence of the safe custody of the fire arm or the empties prior to them being taken to the ballistic expert and even other wise we do not consider it to be safe practice to send the empties and firearm together as the so called empties could have been discharged from the pistol from its remaining recovered live bullets in order to ensure a favorable FSL report. Furthermore, the police mobile which was allegedly hit by a bullet was not taken into safe custody which opened the possibility of the police

themselves firing on the door of the vehicle in order to strengthen there case.

18. According to eye witnesses PW 2 Khalid Mehmood the so called encounter between the police and the appellant and his accomplice went on for 15 to 20 minutes which again does not seem to fit into the police version of events when the evidence is looked at in a holistic manner and how indeed one of the co-accused was able to escape.

19. Furthermore, it appears that no serious efforts were made to record the statement of the deceased who expired two days after the incident. It is true that the police have produced an application to record the statement of the deceased which is signed by PW 9 MLO Rathore stating that "he is not fit for statement", yet the same PW in his evidence also stated as under;

"On 13.12.2012, I was posted as Medico Legal Officer at Civil Hospital Karachi, and on the same date at about 1.00 p.m. I received an injured through PC Sahib Khan Buckle No.91 of P.S Arambagh. **Injured had three fire arm injuries over his person and he was conscious and was able to talk. On enquiry he disclosed his name as Ali Hussain.** I examined the injured and found the following three injuries (bold added)

20. Thus, it appears that for reasons best known to themselves the police showed a lack of determination in recording the statement of ASI Ali Hussain before he died which would probably have been the best evidence available to the prosecution but it was withheld.

21. It is also not without significance that after the conviction of the appellant his absconding co-accused Mohammed Nasir was arrested and was tried for the same offense which relied mainly on the same witnesses and evidence as in this case and the **co-accused was acquitted** vide judgment dated 05-03-2019 largely on account of the reason that the learned trial judge was not convinced by the evidence of Khalid Mehmood and Nasser Ul Hassan who both gave evidence in this case with Khalid Mehmood being an eye witness in the following terms at Para's 56 to 58.

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"56. The main prosecution witness PW-1 Khalid Mehmood and PW-2 ASI Naseer ul Hassan are inconsistent with their statement made by them in the trial of convicted accused then in this case ASI in his previous statement before the Court had stated that he had recovered the pistol from the hand of Abdul Rasheed when in this court he had stated that accused had thrown the pistol at the staircase of the building which he had picked.

57. ASI Naseer ul Hassan in his statement u/s 161 CrPC dated 13-12-2012 had stated that when he reached the place of incident he saw one accused running and PC Khalid Mehmood running after him.

58. No doubt that the accused was absconding but that cannot be the sole ground of his conviction. **PW-1 the complainant Khalid Mehmood and PW-2 ASI Naseer ul Hassan are hiding some facts. Even the I.Os have not carried their duties honestly and in professional manner. They do not seem to be skilled."**(bold added)

22. Thus, since it appears that PW 2 eye witness Khalid Mehmood and PW 1 Naseer ul Hassan have in effect been disbelieved/discredited in their evidence in respect of the case against the appellant's co accused Mohammed Nasir which largely lead to his acquittal in the same case (although tried separately) for the same offense **and having the same role of firing on the police party and the murder of ASI Ali Hussain** (as per eye witnesses PW 2 Khalid Mehmood and PW 5 Sikander Ali in the instant case) it is difficult to safely rely on their evidence (especially keeping in view the other doubts expressed earlier in this judgment and in particular in respect of the medical evidence in terms of "blackening" surrounding two of the three entry wounds) to convict the appellant in this case without strong independent corroboration which appears to be lacking in this case. In this respect reliance is placed on **Imtiaz V State** (2018 SCMR 344). Furthermore, the Hon'ble Supreme Court in the recent case of **Altaf Hussain V State** (2019 SCMR 274) has laid down the following principle which is directly applicable to this case that:

"When a set of witnesses was disbelieved to the extent of some accused then the same could not be believed to the extent of the remaining accused facing the same trial without there being any independent and strong corroboration".

23. It also appears that the aforesaid PWs in their evidence against the co-accused (Mohammad Nasir) have deliberately attempted to make dishonest improvements in their evidence as compared to the evidence given in this case so that any loopholes can be filled in. For example, whilst no distance of the firing is given in their evidence in the instant case in their evidence in the later and separate trial against the co-accused (Mohammed Nasir) PW-2 eye-witness Mehmood Khalid has attempted to give short distances of the firing in order to cover up the issue concerning the blackening surrounding two of the deceased firearm injuries.

24. Thus, for all the reasons mentioned above, we consider that there is a reasonable doubt in the prosecution case, that the appellant fired at and murdered ASI Hussain and an unlicensed firearm was recovered from him, which as a matter of law must go to the accused and thus the benefit of the doubt is extended to the accused who stands acquitted of the charges, the impugned judgment is set aside and the appeal allowed and the confirmation reference is answered in the negative and the appellant shall be released unless he is wanted in any other custody case.

25. The appeal and the confirmation reference stand disposed of in the above terms.