

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cr. A. 343 of 16 old Conf. Case 8/16

Shahid Israr vs. The State

HIGH COURT OF SINDH

Composition of Bench: ~~S.B.~~/D. B.

Mr. Justice Mohammad Karim Khan Agha,

Mr. Justice Zulfikar Ali Sangi

Date(s) of Hearing: 7-11-19

Decide on: 21-11-2019

(a) Judgment approved for reporting:

Yes *KH*

CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

NOTE:

- (i) This slip is only to be used when some action is to be taken.
(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
(iv) Those directions which are not to be used should be deleted.

Deep
Arain
22/11/19

IN THE HONOURABLE HIGH COURT OF SINDH KARACHICriminal Appeal No. ³⁴³ /2016

PRESENTED
07-10-2016
[Signature]
[Stamp]
Appellant 3140

SHAHID ISRAN S/O DEEDAR ALI
R/O Larkana,
Presently confined in Central Prison, Karachi -----

VURSUS

he State though Prosecutor General ----- Respondent

Session Case 290/2012
FIR No.48/2012
U/S 302/34 Of PPC.
P.S FRER KARACHI.

CRIMINAL APPEAL UNDER SECTION 410 OF CRIMINAL
PROCEDURE CODE

Being a aggrieved and dis-satisfied with the impugned Judgment dated 30-
[Date] passed by Learned Additional Session Judge 5th South Karachi, in the
[Case] case No.290/2012 (The State V/S Shahid Isran & Others), where by
[Judge] Session Judge convicted and Sentenced the Appellant /accused with death
[Sentence] him to pay 1000000 (Rupees Ten Lac) as compensation to the legal
[Compensation] and in the default; appellant has to suffer six months simple
[Term] The Learned Additional Session Judge acquitted co-accused namely
[Co-accused] SO Mass. Khan, in the same case.

IN THE COURT OF V- ADDL.DISTRICT & SESSIONS JUDGE SOUTH KARACHI.

NO.Vth/AD&SJ/S/44/2016. Karachi 05th day of October, 2016.

752
CRL
06/10/16

①

To,

The Assistant Registrar, (Criminal)
Hon'ble High Court of Sindh, Karachi.

SUB:- REFERENCE FOR CONFIRMATION OF DEATH SENTNCE
AWARDED TO ACCUSED SHAHID ISRAN S/O DEEDAR ALI
IN SESSIONS CASE NO:290/2012. FIR NO. 48/2012 U/S:
302/34 PPC PS: FRERE

It is respectfully submitted that through Judgment passed in subject Sessions Case on 30-09-2016, accused Shahid Isran s/o Deedar Ali has been awarded death penalty as Tazir under section 302(b) PPC. The reference as required under section 374 Cr. P. C is being sent herewith for confirmation or otherwise alongwith R & Ps in two parts contained over pages-01 to 380 (Part-I) and Pages 01 to 760 (Part-II)

(Signature)
05/10/16

(SUHAIL MUHAMMAD LAGHARI)
ADDL. SESSIONS JUDGE-V,
SOUTH KARACHI.

ENCL.
R & P's S.C.NO.290/2012
(Two Parts)

Vth Addl. District & Sessions Judge
South Karachi

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.343 of 2016
Conf. Case No.08 of 2016

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Appellant: Shahid Isran S/o. Deedar Ali through
Mr. Jehangir Rahujo, Advocate.

Complainant: Aziz Hussain through Mr. Muhammad Akbar
Khan, Advocate.

For State: Mr. Muhammad Iqbal Awan, Deputy
Prosecutor General.

Date of hearing: 07.11.2019

Date of announcement: 21.11.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Shahid Isran s/o Deedar Ali has preferred this Criminal Appeal against the impugned judgment dated 30.09.2016 passed by the learned Additional Sessions Judge-V, Karachi (South) in Sessions Case No.290 of 2012, F.I.R. No.48 of 2012 u/s. 302/34 PPC registered at P.S. Frere, Karachi whereby the appellant has been convicted and sentenced to death as Tazir for causing Qatl-e-Amd of deceased Mussarat Hussain subject to confirmation by this court. The appellant was also penalized to pay compensation of an amount of Rs.10,00,000/- (Rupees ten lac only) to be paid to the legal heirs of the deceased as provided under section 544-A Cr.P.C. In case of failure to pay such compensation he was ordered to undergo S.I. for six months.

2. The brief facts of the case are that on 20.04.2012 at about 1310 hours FIR was lodged at Police Station Frere whereby statement of complainant Aziz Hussain was incorporated who stated that he along with his brother Mussarat Hussain were residing at Flat No.A-902, Bona Vista Apartment Block-II, Clifton, Karachi. On 19.04.2012 he along with his brother deceased Mussarat Hussain and driver Bashir on their insistence took their guests accused namely Shahid and Shaman in their Car No.ARK-367, make Corolla and proceeded towards Bus Stop Taj Complex for dropping

off Shahid and Shaman. It is further stated by the complainant that it was 3:00 PM on 19.04.2012 and en route when they reached at Khayaban-e-Iqbal, opposite PSO building, accused Shahid suddenly took out his pistol and made fire upon his brother namely Mussarat Hussain who was occupying the seat on the left side of drivers seat, which bullet hit on the right side of the neck of Mussarat Hussain, whereafter accused Shahid and Shaman escaped as the car stopped. It is further stated that thereafter injured Mussarat Hussain was taken to Ziauddin Hospital for treatment and was admitted in Surgical Theater ICU where said injured Mussarat Hussain died on 20.04.2012 at 6:50 a.m.

3. After registration of the above FIR, investigation was carried out and the Investigation Officer then submitted report under section 173 Cr.P.C. before learned Judicial Magistrate against accused persons Shahid Isran and Shaman which was accepted and the case was sent up for trial to Sessions Judge, Karachi.

4. The charge was framed against the appellants on 07.02.2012 to which they both pleaded not guilty and claimed for trial.

5. The prosecution to prove the charge examined 09 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The S.342 Cr.P.C statements of accused Shahid Isran and Shaman were recorded in which they denied the allegations leveled against them by the prosecution witnesses and claimed that they had been falsely implicated in this case on account of a matrimonial dispute. Neither of the accused examined themselves on oath nor produced any defence witness. However, during his statement the appellant Shahid Isran produced a license for his recovered pistol which has been exhibited.

6. Learned Additional Sessions Judge-V, Karachi South after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 30.09.2016, convicted and sentenced the appellant Shahid Isran as stated above, whereas the other accused Shaman was acquitted by extending him the benefit of doubt, hence this appeal has been filed by Shahid Isran against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the sole eye witness is a fake and put up witness; that there was a 22 hour delay in lodging the FIR which has lead to the case being cooked up against the appellant; that there was also a 4 to 6 hour delay in conducting the post mortem which again supports his contention that this was a cooked up case; that the recovery made from the car is of no evidentiary value because it was seized after the car had been driven around for about 23 hours; that no motive has been assigned to the appellant; that star eye witness Aziz who was the brother of the deceased failed to give evidence so an adverse inference may be drawn against him under A.129 (g) Quanoon -e- Shahadat Order 1984 that he would not have supported the prosecution case; that admittedly there was enmity between the deceased and the complainant over another murder case pending in Larkana and as such for any of the above reasons the appellant should be acquitted from the charge by extending to him the benefit of the doubt. In support of his contentions he has placed reliance on **Muhammad Sharifan Bibi V. Muhammad Yasin** (2012 SCMR 82), **Muhammad Asif V The State** (2017 SCMR 486), **Farman Ahmed V Muhammad Inayat** (2007 SCMR 1825), **Zafar V The State** (2018 SCMR 326), **Khalid @Khalidi V The State** (2012 SCMR 327), **Muhammad Javed V The State** (2016 SCMR 2021) and **Akhtar Ali V The State** (2008 AC 432).

9. Learned DPG for the State has contended that there are no legal infirmities in the impugned judgment which should be upheld by this court. In particular he has contended that there was no delay in lodging the FIR which has named the appellant with a specific role; that the eye witness is reliable, trustworthy and confidence inspiring and that we may convict on his evidence alone; that the eye witness evidence is corroborated by the medical evidence, the recovery of the empty from the car, the recovery of the pistol from the appellant and a positive FSL report and as such since the prosecution has proved its case against the appellant beyond a reasonable doubt the appeal should be dismissed and the sentence maintained. In support of his contentions he has placed reliance

on **Muhammad Ehsan V The State** (2006 SCMR 1857) and **Nizamuddin V The State** (2010 SCMR 1752).

10. Learned counsel for the complainant has adopted the contentions of the DPG and has emphasized that the eye witness evidence and the medical evidence fully prove the guilt of the appellant. In support of his contentions he has placed reliance on the same cases as the DPG.

11. 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 and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

12. In our view after our reassessment of the evidence based on the evidence of the PW eye witness, PW MLO's, post mortem report and other medical evidence, PW police witnesses and IO along with the positive FSL and the car in which the deceased was shot with a bullet hole we are satisfied that the prosecution has proved beyond a reasonable doubt that on 19.04.2012 at about 3pm at main Khayaban-e-Iqbal Road, opposite PSO building Musarrat Hussain (the deceased) whilst being driven in a car was shot by firearm in the neck and was taken to hospital where he later died on 20.04.2019 on account of his firearm injury.

13. The only issue therefore, in our view, left before us is whether it was the appellant or some other third party who shot the deceased by firearm which lead to his death.

14. In our view after our reassessment of the evidence we find that the prosecution has proved its case against the appellant beyond a reasonable doubt and hereby uphold the convictions in the impugned judgment for the following reasons;

(a) In our view there has been no lengthy unexplained delay in lodging the FIR. This is because straight after the incident the PW 3 Bashir Ahmed driver of the deceased who was in the car with him at the time he was shot by the appellant registered a complaint with the police at Ex 32 45 minutes after the incident which in a nut shell states the same facts as were later incorporated in the FIR although the complainant was later denied by him. Thus the incident itself was reported to the police very promptly and there was no time for later concoction in the FIR. Even otherwise the delay of lodging the FIR by 22 hours has been explained as when the deceased was shot in the car he did not die immediately. Instead he was seriously

injured and as such the first priority of the driver and his brother Aziz who was in the car with him was to take his brother to hospital which they did for treatment. The deceased was seriously injured when he reached the hospital and thus he was operated on and then taken to an ICU ward where he died the next day. The FIR was lodged immediately after the expiry of the deceased by his brother Aziz who was also in the car at the time when the appellant shot the deceased and gives the specific role to Shahid of shooting his brother in the neck whilst his brother was sitting in the front of the car and he was sitting in the back seat with Shahid.

(b) The key witness in this case in our view is eye witness PW 3 Bashir Ahmed who was the driver of the deceased. He had been driver of the deceased for about 8 years and thus was a natural witness and was not a chance witness. He was also an independent witness as he had no family relationship with the deceased and he had no reason to falsely implicate the appellant. He knew the appellant who was related to the deceased and who had earlier been meeting with him at his house and was driving the deceased, his brother (Aziz) and the appellant and his co-accused to the bus stop located at Taj complex. During this journey he gave evidence that the appellant who was sitting in the back of the car shot the deceased who was sitting in the front of the car in the neck. The appellant and his co-accused escaped when the car stopped and he then drove the deceased to hospital for treatment along with Aziz. The deceased after treatment at the hospital and being placed in the ICU died the next day at about 0600am on 20.04.2012. It was Aziz (the deceased's brother) who registered the FIR on the expiry of the deceased. He was present when the empty was recovered from the car and was mashir for its recovery. He was cross examined at length and was not shaken in his evidence. We consider him to be a reliable, trust worthy and confidence inspiring witness whose evidence we believe. In this respect reliance is placed on **Muhammad Ehsan's case (Supra)**.

(c) The evidence of eye witness PW 3 Bashir Ahmed is also corroborated by the medical evidence. The Dr.Ziauddin Hospital (where the deceased was initially admitted) Surgical record at P.325 of the paper book shows that the deceased was admitted to the hospital on 19.04.2012 **on account of a firearm injury to the neck with blackening surrounding the wound** which would indicate that not only was the deceased shot in the neck as alleged by PW 3 Bashir Ahmed but he was also shot from close range which is consistent with his evidence from being shot from behind at close range whilst sitting in the car. The later MLO's evidence (PW 2 Dr.Abdul Razzak) and report did not contain the word "blackening" as the wound had already been stitched up after the deceased expired and he was shifted from Dr.Ziauddin Hospital to JPMC where his post mortem was carried out.

(d) That the empty which was recovered from the car matched with the pistol which was recovered from the appellant at the time of his arrest which pistol belonged to him.

(e) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these

contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793). Their evidence provides a corroborated chain of events from the murder of the deceased in the car to the arrest of the appellant.

(f) Diary sheet dated 06-04-2013 which is a part of the trial courts record also records the appellant admitting his involvement in the crime.

(g) That there was some enmity between the parties due to the court case in Larkana and as such the appellant had some enmity with the appellants and vice versa.

(h) The defense has greatly emphasized the failure of Aziz the other star eye witness to give evidence in this case and that an inference should be made against him that he would not have supported the prosecution case. We note however that we can still convict if we find only **one eye** witness to be a reliable, trust worthy and confidence inspiring witness whose evidence we believe as we have found in the case of PW 3 Bashir Ahmed if it is corroborated by medical evidence as it has been as alluded to earlier in this judgment. Even otherwise the prosecution has explained Aziz's failure to give evidence as he had been declared a P.O in the criminal case proceeding in Larkana. Although we do not find favour with this explanation in our view it is not enough to detract from the evidence of PW 3 Bashir Ahmed and the corroboratory medical evidence and other supportive evidence even if we make such an adverse inference.

15. Thus, for the reasons mentioned above we find that the prosecution has proved its case against the appellant for the offense for which he has been charged and thus uphold his conviction in the impugned judgment.

16. **The next issue is of sentencing.** We are of the view that the prosecution has neither alleged any motive against the appellant nor has it proven any motive against the appellant for his murdering the deceased. Generally it has been accepted by the superior courts that if the prosecution fails to prove the motive for the murder the courts are justified in imposing the alternate sentence of life imprisonment as opposed to the death penalty. Reliance in this respect is placed on the case of **Amjad Shah V State** (PLD SC 2017 P.152) where it was held as under at P.156 Para 9;

"Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore, unproven. In such

like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to Zeeshan Afzal v. The State (2013 SCMR 1602)." (bold added)

17. In our view taking into account the fact that no motive has been proved against the appellant and that there may be some doubts in the prosecution case albeit insufficient to lead to an acquittal such as the disputed Ex 32 as discussed above whilst exercising judicial caution by taking guidance from the Supreme Court authority of **Ghulam Mohyuddin V State (2014 SCMR 1034)** where it was stressed as under whilst dealing with sentencing in a murder case in the following terms;

"A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. **If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.**" (bold added)

18. We hereby uphold the conviction in the impugned judgment against the appellant but reduce his sentence to that of imprisonment for life with the confirmation reference being answered in the negative. Apart from the above variation in sentence all other fines, penalties etc imposed upon the appellant in the impugned judgment shall remain in tact. The appellant shall have the benefit of S.382 (B) Cr.PC.

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