

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 118 of 2018 and others & Conf. Case

M. Hashim I 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: 5-11-19

Decide on: 18-11-2019

(a) Judgment approved for reporting:

Yes *KJA*

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.

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- 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.

IN THE HONOURABLE HIGH COURT OF
SINDH AT KARACHI.

Special Appeal No. 118 /2018

PRESENTED
13-4-2018

[Signature]
Deputy Registrar (Sindh)

1328

Special Case No. B-458 of 2015

FIR NO.31/2015

U/S 302/109/34 OF PPC, R/w Section 7 of ATA

P.S NORTH NAZIMABAD

Muhammad Hashim S/o Muhammad Nisar

Presently confined in central Jail Karachi ----- Appellant

VURSUS

The State though Prosecutor General ----- Respondent

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**IN THE HONOURABLE HIGH COURT OF
SINDH AT KARACHI.**

YHC
Appeal No. *119* /2018

13-4-2018

[Signature]

Special Case No. B-457 of 2015

1330

FIR NO.30/2015

U/S 23-1-A OF SAA,2013

P.S NORTH NAZIMABAD

Muhammad Hashim S/o Muhammad Nisar

Presently confined in central Jail Karachi ----- Appellant

VURSUS

The State though Prosecutor General ----- Respondent

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**IN THE HONOURABLE HIGH COURT OF
SINDH AT KARACHI.**

Sp/Cr ^{ATA} Appeal No. 120 /2018

PRESENTED ON

13-4-2018

[Signature]
Deputy Registrar (Judl.)

1329

Special Case No. B-456 of 2015

FIR NO.29/2015

U/S 353/324/3 of PPC

P.S NORTH NAZIMABAD

Muhammad Hashim S/o Muhammad Nisar

Presently confined in central Jail Karachi ----- Appellant

VURSUS

The State though Prosecutor General ----- Respondent

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and c.	Date to hear adjo
	5

OFFICE OF THE JUDGE, ANTI-TERRORISM COURT NO: VI, KARACHI.
No: ATC-VI/K-DIV/ 115 of 2018 Karachi dated: 29-03-2018

To,
The Registrar
Honorable High Court of Sindh
Karachi.

INWARD TO
BRANCH
DATE 13/4/18
HIGH COURT OF SINDH KARACHI

Subject:- REFERENCE FOR CONFIRMATION OF DEATH SENTENCE
U/S 374 CRPC IN SPECIAL CASE NO. B-458 OF 2015, FIR NO. 31 OF
2015, U/S 302/109/34 PPC OF PS NORTH NAZIMABAD, KARACHI.
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Respected Sir,

With reference to the above noted subject matter, I have the honor to submit that in the Special case No.B-458 of 2015, FIR No.31 of 2015, u/s 302/109/34 PPC of North Nazimabad, Karachi, judgment passed thereon by the undersigned vide judgment dated 29th March 2018, against accused namely, Muhammad Hashim alias Qari s/o Nisar Khan he has been convicted and sentenced as under:-

1. Under section 7 (1) (a) ATA 1997, R/w Section 302 (b) is convicted and he is sentenced to death as hanged till death with compensation of Rs.2,00,000 (Two Lac) to be paid to the LR's of the victim.
2. I also convict the accused under Section 7 (1) (b), (d) and (h) ATA 1997, R/w Section 324, 353, 34 PPC: Rigorous imprisonment for the period of 7 years and fine of Rs.1,00,000/- to accused and in case of default accused shall suffer R.I for 6 months more.
3. I also convict the accused Muhammad Hashim @ Qari s/o Nisar Khan under Section 23-1-A SAA of 2013 R.I for the period of 7 years and fine of Rs.10,000/- to accused and in case of default accused shall suffer S.I for 6 months more.

The record and the proceedings of the case are submitted for confirmation of death sentence of above named accused persons as required u/s 374 Cr.P.C.

Karachi,
Dated:-29-03-2018

(MUNIR BAKHSH BHUTTO)
Judge
Anti-Terrorism Court No-VI,
Karachi.



IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.118 of 2018
Special Cr. Anti-Terrorism Appeal No.119 of 2018
Special Cr. Anti-Terrorism Appeal No.120 of 2018
Confirmation Case No.05 of 2018

Present:

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

Appellant: Muhammad Hashim through Mr. Jahangir Rahujo, Advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan Deputy Prosecutor General Sindh

Date of hearing: 05.11.2019

Date of announcement: 18.11.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Muhammad Hashim son of Muhammad Nisar has preferred the above appeals against the impugned judgment dated 29.03.2018 passed by the learned Judge Anti-Terrorism Court No.VI, Karachi in Special Case No.B-458 of 2015, F.I.R No.31/2015 u/s. 302/109/34 PPC r/w section 7 of ATA, 1997, registered at PS North Nazimabad, Karachi, Special Case No.B-456 of 2015 F.I.R No.29/2015 u/s. 353/324/109/34 PPC read with section 7 of ATA, 1997 registered at PS North Nazimabad, Karachi and Special Case No.B-457 of 2015 FIR No.30/2015 u/s. 23-(1)-A, SAA of 2013, registered at PS North Nazimabad whereby the appellant has been convicted and sentenced as under:-

- i) Under Section 7(I) (a) ATA 1997 r/w Section 302(b) is convicted and awarded death sentence with compensation of Rs.2,00,000 (Two lacs) to be paid to the LR's of the victim.
- ii) Under Section 7(I) (b), (d) and (h) ATA 1997 r/w Section 324/353, 34 PPC: Rigorous imprisonment for a period of 7 years and fine of Rs.1,00,000/- and in case of default accused shall suffer S.I. for 6 months more.
- iii) Under Section 23-(1)-A SAA of 2013 to R.I. for the period of 7 years and fine of Rs.10,000/ and in case of default accused shall suffer S.I for 6 months more.

All the sentences by way of imprisonment shall run concurrently.

2. The brief facts of the prosecution case as per FIR are that on 18.02.2015 FIR No.31/2015 u/s. 302/324 PPC r/w. Section 7 ATA 1997 of PS North Nazimabad was lodged by SI Abdul Hakeem on the basis of the statement u/s. 154 Cr.PC of the complainant Syed Amir Rehman. On 18.02.2015, the police party of PS North Nazimabad was on patrol duty and during patrolling, they reached at double road near Al-Kareem Center, Block-E, North Nazimabad and found two persons on one motorcycle firing at two persons in car bearing Registration No.AYY-635. The police party then tried to apprehend the two persons on such motorcycle by raising voice to stop but the accused fired upon the police party with intention to commit their Qatl-i-Amd. The police party also fired upon the accused in self-defense. One accused on the motorcycle lost his senses and fell down. They arrested the said accused, who disclosed his name as Muhammad Hashim @ Qadri Sahab s/o. Muhammad Ishaque who disclosed his absconding companion as Khalid. The police made personal search of the arrested accused and recovered, one 30 bore pistol No.57011710-66, loaded with magazine containing one live bullet in its chamber and three live bullets in its magazine. From further personal search of the accused two magazines and an amount of Rs.320/- were recovered. The case property was sealed on the spot. Four empties of 30 bore, three empties of 9-MM bore and three empties of SMG were also secured from the place of incident. They then returned to the PS and lodged the FIRs Nos.29 of 2015 u/s. 353/324/34 PPC, FIR No.30 of 2015 u/s. 23-(1)-A, SAA of 2013. The persons sitting in car bearing registration NO.AYY-653 had expired due to firing of the accused, therefore, the separate FIR No.31 of 2015 u/s 302/34 PPC r/w. S.7 of ATA 1997 was lodged at PS North Nazimabad. Moreover, the accused Muhammad Hashim was also arrested in FIR No.31 of 2015 by SIP Abdul Hakeem at PS North Nazimabad.

3. After registration of the cases, the investigation was assigned to Inspector Hameedullah Khan Niazi, who inspected the place of incident in presence of mushirs namely SIP Syed Idress Pasha and PC Mubashir Javed and also prepared the memo of site inspection in presence of the mushirs. He also recorded the statement of u/s.161 Cr.PC of PWs. After conclusion of investigation he submitted the challan before the competent

court of law. The charge was framed against the accused to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution 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 accused recorded his statement under S.342 Cr.PC whereby he denied all the allegations leveled against him and claimed that he was falsely implicated in this case as he was already in police custody at the time of the incident. However, he neither examined himself on oath nor produced any witness in his defense.

5. Learned Judge, Anti-Terrorism Court-VI, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 29.03.2018 convicted and sentenced the appellant as stated above, hence these appeals against conviction have been filed separately by the appellant. By this common judgment we intend to decide the same.

6. 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.

7. Learned counsel for the appellant contended that the appellant is completely innocent and has been falsely implicated in these cases; that there was an unexplained delay in lodging the FIR which gave time for the police to fabricate the case against the appellant; that the eye witnesses were managed witnesses and were not present at the scene; that no encounter took place; that there are major contradictions in the evidence of the police which shows that this was a false case and that the police have given false evidence; that there is a discrepancy in the number of empties which were recovered from the scene; that there was a delay of 5 days in sending the empties and recovered pistol for FSL and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on **Bashir Ahmed V Muhammad Siddique** (PLD 2009 SC 11), **Muhammad Rafique alias Feeqa V The State** (2019 SCMR 1068), **Mohammad Sami V The State** (SBLR 2019 Sindh 1205), **Wahid Bux @**

Bhutto V The State (SBLR 2019 Sindh 282) **Mian Dad Leghari V The State** (2009 P Cr. L J 1226) and **Shafiq-ur Rehman V State** (SBLR 2018 Sindh 229).

8. Learned DPG on behalf of the State who was also acting for the complainant contended that there was no unexplained delay in lodging the FIR; that there were two reliable eye witnesses who had seen the incident; that the accused had been arrested on the spot; that the pistol recovered from the accused matched the empties; that there was a delay in sending the empties but there had been no allegation of tampering and that the medical evidence supported the eye witness evidence and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and as such his appeal should be dismissed and his death sentence and other sentences upheld. In support of his contentions he placed reliance on **Muhammed Ashraf V State** (2011 SCMR 1046) and **Dadullah V State** (2015 SCMR 856)

9. 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.

10. Before proceeding further we would like to make it clear that we have not found the case law cited by the appellant as being of much significance and is distinguishable based on the particular facts and circumstances of this case.

11. 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) we do not consider that a four hour delay in lodging the FIR is fatal to the prosecution case based upon the particular facts and circumstances of this case where after the encounter with the police both the deceased needed to be taken to hospital and after their expiry FIR was lodged by complainant PW 2 Amir Rehman Syed once he reached the hospital and confirmed the deaths of the deceased who was the security in charge of Ai-Karim Textile Mills where one of the deceased Karim Hashwani was employed. Based on the particular facts and circumstances of the case as narrated below there was no time to concoct such events as the accused had already been arrested on the spot.

(b) That the evidence of the PW eye witnesses disclose that it was a target killing in broad day light whereby the accused and his absconding accomplice came up to the car in which one of the deceased was a driver and the other was a passenger and made numerous fires at the car and its occupants whereupon the police on patrol who witnessed the same gave chase to the motor bike which the appellant and his accomplice was riding in order to escape the scene of the offense during which time the appellant fell off the back of the bike. The evidence of the prosecution is fully supportive of these chain of events which ring true

(c) In our view we find the evidence of the police eye witnesses (PW 3 Syed Idress Pasha and PW 7 Mubashir Jawed) corroboratory in all material respects and regard them as reliable, confidence inspiring and trust worthy witnesses. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). Even if there are any contradictions in their evidence and that of any other prosecution witness 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)

(d) It is well settled by now that a police eye witness is as good as any other witness provided that no ill will, enmity, malafide or personal interest is proven against him vis a vis the appellant. In this respect reliance is placed on **Riaz Ahmad V State** (2004 SCMR 988), **Zafar V State** (2008 SCMR 1254) and **Abbas V State** (2008 SCMR 108). In this case there was none and the police eye witnesses had no reason to falsely implicate the appellant. No such enmity, ill will, malafide or personal interest was even suggested to the police eye witnesses or any other PW during their cross examination. With regard to the appellant's defense that he was fixed in this case as he was already under arrest at the time of the incident he has produced no reasons as to why the police would want to fix him. Furthermore, neither he nor any member of his family wrote any letter to the concerned authorities or moved any court in respect of his illegal confinement and no DW was produced by the appellant to support his stance which in our view has been raised as a defense in order to save his skin since he was apprehended on the spot.

(e) That it was a day light incident and the appellant was arrested from the spot and as such there is no question of mis identification.

(f) That the appellant's pistol was recovered from him on the spot at the time of his arrest as well as live rounds and magazines containing live bullets.

(g) That the FSL report proved positive in respect of the pistol recovered from him and the empties recovered at the scene in so far as they related to his pistol.

(h) It may be that there was a 5 day delay in sending the pistol and the empties for forensic analysis however the IO PW 9 Hameedullah Khan has explained this delay in his evidence by stating that it was a requirement of the ATC at that time to produce the crime weapon at the time of remand which lead to the delay.

Even otherwise the appellant did not suggest that any tampering had been made to the evidence during this period of delay and as such it can be ignored. In this respect reliance is placed on **Muhammed Ashraf's case** (Supra)

(i) That the FSL report on the car of the two deceased showed that the holes in it had been made by firearm projectiles. That the holes were on the car at the scene of the incident according to PW 4 Sheeraz Iqbal an SI who reached the scene of the incident and thus were not later manufactured by the police.

(j) That the medical evidence of PW 6 Dr. Abid Haroon fully corroborates the oral evidence of the eye witnesses namely that the cause of death of both the deceased was from multiple firearm injuries. Importantly she confirms that the firearm injuries were caused by pistol and not SMG and that the firing was from over three feet away and thus there was no blackening around the wounds which fits in the with the prosecution evidence.

(k) That there was a positive chemical report in respect of the blood which was recovered from the car.

(l) That PW 5 Noshad Ali who is a private independent witness whose statement was recorded on the day of the incident after hearing the firing came out of her house and saw the two deceased lying dead in their car who were taken to hospital and is thus supportive of the prosecution case.

(m) The fact that neither the police nor their mobile was hit by bullets fired by the appellant does not make this automatically a case of a fake encounter. Based on the particular facts and circumstances of the case where the appellant and his accomplice were fleeing the scene on a motor bike with the accomplice driving and the appellant on the back it is likely that the accomplice who was driving the motorbike and attempting to escape was not able to make any fire on the police and the appellant who was sitting at the back of the motor cycle was unable to get many rounds off as they tried to make their escape good hence it is unlikely that either the police mobile or police officers would be hit by the appellants fire. On the contrary all the evidence points to the police interrupting a target killing and then chasing the culprits who fired to keep them at bay and during such escape the appellant who was sitting on the back of the bike fell off and was arrested on the spot with his pistol

12. Now turning to the sentences to be imposed keeping in view that we have come to the conclusion that the prosecution has proved its case beyond a reasonable doubt against the appellant in terms of the murder of the two deceased; the police encounter and the recovery of the unlicensed fire arm from the appellant.

13. We have no doubt that this was a target killing of a prominent businessman and his driver outside his home which was intended and designed to create fear amongst the business community of the city who refused to pay bhatta or go along with the demands of other unscrupulous criminal elements of what the consequences would be. The motive to murder the deceased especially deceased Kareem-e-Shahwami was to send a clear message to all business men in Karachi that they should not resist demands made of them by unscrupulous elements or they would meet the same fate.

14. As to the murder of two innocent persons this was carried out in the most brutal and cold blooded manner by the appellant and his accomplice. According to PW 6 Dr. Abid Haroon who was the MLO who carried out the post mortem of both the deceased the deceased Kareem-e-Shahwami received 4 separate firearm injuries whilst his driver who was not even spared deceased Muhammed Nawaz received 3 firearm injuries.

15. The object of punishment under criminal law and penal jurisprudence can be for a number of purposes for example, reformatory, deterrent or retributive. The sentence which is handed down will depend on the particular facts and circumstances of each case and the individual accused and the manner in which he committed the crime, the heinousness of the crime and the motivation behind the crime, whether there are any mitigating or aggravating factors amongst other things and as such sentencing can never be mechanical. In this respect reliance is placed on **Muhammad Juman V State** (2018 SCMR 318).

16. Based on the facts and circumstances of this case keeping in view the brutality of the crime where two innocent persons were shot to death by 4 and 3 separate firearm shots respectively brazenly in broad day light outside their house the motivation of which was to create terror and fear amongst a certain segment of the society, the complete lack of mitigating circumstances and in fact the presence of aggravating circumstances as mentioned earlier and the need to discourage such kind of offenses in Karachi which regrettably was most common at the time when these offenses were committed we are of the view that a deterrent sentence is the appropriate one.

17. In this respect reliance is placed on **Dadullah's case** (Supra) which at P.862 Para 9 held as under;

"9. Conceptually punishment to an accused is awarded on the concept of retribution, deterrence or reformation. The purpose behind infliction of sentence is two fold. Firstly, it would create such atmosphere, which could become a deterrence for the people who have inclination towards crime and; secondly, to work as a medium in reforming the offence. **Deterrent punishment is not only to maintain balance with gravity of wrong done by a person but also to make an example for others as a preventive measure for reformation of the society.** Concept of minor punishment in law is to make an attempt to reform an individual wrongdoer. However, in such like cases, where the appellants have committed a pre-planned dacoity and killed two person, no leniency should be shown to the culprits. Sentence of death would create a deterrence in the society due to which no other person would dare to commit the offence of murder. If in any proved case lenient view is taken, then peace, tranquility and harmony of society would be jeopardized and vandalism would prevail in the society. The Courts should not hesitate in awarding the maximum punishment in such like cases where it has been proved beyond any shadow of doubt that the accused was involved in the offence. Deterrence is a factor to be taken into consideration while awarding sentence, specially the sentence of death. Very wide discretion in the matter of sentence has been given to the courts, which must be exercised judiciously. Death sentence in a murder case is a normal penalty and the Courts while diverting towards lesser sentence should have to give detailed reasons. The appellants have committed the murder of two innocent citizens and also looted the bank in a wanton, cruel and callous manner. Now a days the crime in the society has reached an alarming situation and the mental propensity towards the commission of the crime with impunity is increasing. Sense of fear in the mind of a criminal before embarking upon its commission could only be inculcated when he is certain of its punishment provided by law and it is only then that the purpose and object of punishment could be assiduously achieved. If a Court of law at any stage relaxes its grip, the hardened criminal would take the society on the same page, allowing the habitual recidivist to run away scot-free or with punishment not commensurate with the proposition of crime, bringing the administration of criminal justice to ridicule and contempt. Courts could not sacrifice such deterrence and retribution in the name of mercy and expediency. Sparing the accused with death sentence is causing a grave miscarriage of justice and in order to restore its supremacy, sentence of death should be imposed on the culprits where the case has been proved.

10. This Court in Noor Muhammad v. State (1999 SCMR 2722) has also adverted to this aspect of the matter and has observed as under:-

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal courts for the reason that they either acquit the

accused persons on technical grounds or take a lenient view in awarding sentence. **It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences.** One of us (Ajmal Mian, C.J., as he then was) has highlighted this aspect, inter alia in the case of State through the Advocate General Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1), relevant portion whereof at page 19 reads as follows:-

(3) It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial Court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. **The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice".** (bold added).

18. Likewise in the more recent cases of **Tariq Iqbal V State** (2017 SCMR 594) and **Khalid Mehmood V State** (2017 SCMR 201) the Supreme Court has confirmed the death penalty in cases of a brutal and merciless nature as in this case.

19. As such we uphold all the sentences for each offense in the impugned judgment and confirm the death sentence handed down to the appellant whilst dismissing these appeals.

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