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## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha*  
*Mr. Justice Khadim Hussain Tunio,*

### CRIMINAL JAIL APPEAL NO. 126 OF 2020 A/W CONFIRMATION CASE NO.03 OF 2020

Appellants: Mst. Hajira Bibi @ Seema w/o Abdul Hameed and Mst. Shaina Hameed @ Shado d/o Abdul Hameed through Mr. Muhammad Rafi, Advocate.

Complainant: Abdul Qaseem S/o Abdul Hameed through Mr. Amir Mansoob Qureshi, Advocate

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

### CRIMINAL JAIL APPEAL NO. 185 OF 2020

Appellant: Haroon @ Sher Wali S/o Ghulam Hazrat through Mr. Nadeem Ahmed Azar, Advocate.

Complainant: Abdul Qaseem S/o Abdul Hameed through Mr. Amir Mansoob Qureshi, Advocate

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

Date of Hearing: 14.04.2022

Date of Announcement: 22.04.2022

## JUDGMENT

Mohammad Karim Khan Agha, J. Appellants Mst. Hajira Bibi @ Seemi wife of Abdul Hameed and Mst. Shaina Hameed @ Shado d/o Abdul Hameed were charge sheeted to face their trial in Special Case No.681-A of 2019 arising out of FIR No.72 of 2019 under section 302/201/202/109/34 PPC registered at PS Tamoria, Karachi. The appellants, vide impugned judgment dated 27.01.2020

passed by learned Ist Additional Sessions Judge/Model Criminal Trial Court (MCTC) Karachi Central were convicted u/s.265-H (ii) Cr.P.C. for offence under Section 302 (b), 34 PPC r/w Section 109 PPC and both sentenced to death as Ta'zir u/s.302 (b) PPC subject to confirmation by this court. Both accused were also ordered under section 544-A Cr.P.C to pay compensation to the legal heirs of deceased Abdul Hamied Rs.10,00,000/- each (Rupees Ten Lacs each) and in case of default in payment, they shall suffer SI for six months more. The appellants Mst. Hajira and Mst. Shaina were further convicted u/s.202 PPC for intentional and deliberate omission to inform about the offence despite being well aware of the same in order to screen themselves from prosecution and were sentenced to suffer R.I. for 06 months or to pay fine of Rs.5,000/- (Rupees Five Thousand only) and in case of default thereof they shall suffer SI for 05 days more. The sentences were to run concurrently and the appellants were given the benefit of S.382 (B) Cr.P.C.

2. Appellant Haroon @ Sher Wali son of Ghulam Hameed was charge sheeted to face his trial in Special Case No.681 of 2019 arising out of FIR No.72 of 2019 under section 302/201/202/109/34 PPC registered at PS Tamoria, Karachi. Appellant, vide impugned judgment dated 27.01.2020 passed by learned Ist Additional Sessions Judge/Model Criminal Trial Court (MCTC) Karachi Central was convicted and sentenced to suffer Life Imprisonment as Ta'zir u/s.302(b), 34 PPC as he facilitated main absconding accused Saeed Wali by driving motorcycle to accomplish the murder of the deceased through the abetment of accused/appellants Mst. Hajira and Shaina. Appellant Haroon was also extended benefit of section 382-B Cr.P.C.

3. The brief facts of the prosecution case are that complainant Abdul Qaseem son of Abdul Hameed stated that on 18.02.2019 through phone call he came to know that his brother Abdul Habib son of Abdul Hameed has been murdered due to firing and dead body shifted to Abbasi Shaheed Hospital. On such information he reached the hospital where he saw the dead body of his brother. The police conducted legal formalities, thereafter dead body was handed over to them for funeral ceremony. He further disclosed that he inquired and came to know that on 18.02.2019 his brother Abdul Habib left the house to Pakistan House in his vehicle Black Color Land Cruiser. When he reached at about 2025 to 2045 at service road, Sarena Mobile Market road near Sakhi Hassan Chowrangi, some unknown accused have made fires upon him and injured him thus he died



at the spot. He further stated that his brother was member of Pak Sarzameen Party (PSP). He also remained candidate for MPA from PS-122, hence instant FIR was lodged against unknown accused.

4. During investigation evidence was found that appellants Mst. Hajira Bibi and Mst. Shaina Hameed (the lady accused/appellants) had abetted the murder of the deceased by absconding accused Syed Wali who was facilitated by appellant Haroon. After completion of investigation I.O. submitted charge sheet against the lady accused for abetting the murder of the deceased to which they both plead not guilty and claimed trial. Since appellant Haroon was a minor his trial for facilitating the murder of the deceased was separated from that of the lady appellants and a separate charge was framed against him to which he also plead not guilty and claimed trial.

5. Although the lady appellants and Haroon were tried separately and convicted by separate judgments since there appeals are interconnected and arise out of the same FIR where virtually the same evidence was lead in each case we intend to dispose of both these appeals and confirmation reference by this common judgment.

6. The prosecution in order to prove its case examined 22 witnesses in each trial and exhibited various documents and other items. The statements of the accused were recorded under Section 342 Cr.P.C in each trial in which they denied all the prosecution allegations and claimed false implication. The accused declined to give statement on oath under section 340(2) Cr.P.C in disproof of the prosecution allegations and did not call any DW in support of their respective defence cases.

7. After appreciating the evidence on record the trial court convicted and sentenced the appellants (the two lady appellants and appellant Haroon) as set out earlier in this judgment vide two separate judgments as mentioned above. Hence, all three appellants have filed appeals against their convictions.

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



9. Learned counsel for the lady appellants has contended that the appellants are completely innocent and have been falsely implicated in this case by the police and the complainant and this is why the FIR was lodged after a delay of three days during which time the complainant party had cooked up a false case in league with the police; that the appellants are not even named in the FIR; that the only evidence against them was the voice recording found in a mobile phone which had been foisted on them by the police; that there was no eye witness against them; that there was no other evidence to connect them to the murder of the deceased and thus for any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. With respect to appellant Haroon learned counsel contended that he was completely innocent and like the lady appellants had been falsely implicated in this case by the complainant party in league with the police hence the three day delay in lodging the FIR; that the two alleged eye witnesses were planted witnesses and at best were chance witnesses whose evidence could not be safely relied upon and even otherwise would not have been in a position to safely recognize him; that he was shown to the eye witness prior to the identification parade which was not held in accordance with the law; that no recovery had been made from him; that there was no other evidence to connect him to the murder of the deceased and thus 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 their contentions they placed reliance on the cases of **Muhammad Khan Versus Maula Baksh and another** (1998 SCMR 570), **Ghulam Qadir and 2 other Versus The State** (2008 SCMR 1221), **Lal Pasand Verus The State** (PLD 1981 Supreme Court 142), **Sahib Gul Versus Ziarat Gul and others** (1976 SCMR 236), **Syed Saeed Muhammad Shah and another versus The State** (1993 SCMR 550), **Mir Afzal Versus The State** (2008 P.Cr.L.J 881), **State through Advocate-General, Sindh, Karachi Versus Farman Hussain and others** (PLD 1995 Supreme Court 1), **Rahat Ali Versus The State** (2010 SCMR 584), **Shakeel Nawaz and another Versus The State and others** (PLD 2013 Peshawar 78), **Liaquat Versus The State** (2014 YLR 2148), **Kanwar Anwaar Ali, Special Judicial Magistrate** (PLD 2019 Supreme Court 488), **Mst. Asia Bibi Versus The State and others** (PLD 2019 Supreme Court 64), **Muhammad Fiaz Khan Versus Ajmer Khan and others** (2010 SCMR 105), **Muhammad Asif Versus The State** (2017 SCMR 486), **Iftikhar Ahmed Versus The State** (2020 MLD 1862), **Noor Muhammad Versus The State and another** (2010 SCMR 97), **Bakht Nawas and another Versus The State and**



another (2020 YLR 1685), **Muhammad Ashraf alias Acchu Versus The State** (2019 SCMR 652), **Muhammad Saddique Versus The State** (2018 SCMR 71), **Mansabdar Versus The State** (2020 P.Cr.L.J Note 47), **Nazeer Ahmed Versus The State** (PLD 2009 Karachi 191), **Muhammad Akram Versus The State** (2009 SCMR 230), **Abdul Baqi Versus Dawood and another** (2020 P.Cr.L.J 368), **Rasheed Akbar Khan Versus The State** (2018 P.Cr.L.J 1495) and **Shahzada Khan Versus The State** (2020 YLR 1048).

10. On the other hand learned Additional Prosecutor General appearing on behalf of the State and learned counsel for the complainant fully supported the impugned judgments against the lady appellants and appellant Haroon. With regard to the lady appellants they contended that numerous witnesses had heard the lady appellants conspiring, instigating and planning absconding accused to murder the deceased on account of business and internal differences; that after the murder a number of phones had been recovered from the lady appellants one of which disclosed that the murderer had sent them a voice message confirming that the murder of the deceased had been carried out which had been forensically examined by experts to prove its veracity and as such the appeals of the lady appellants should be dismissed and due to the particularly brutal nature of the offence whereby the deceased had received 4 bullet wounds including one to the head the confirmation reference should be answered in the affirmative. With respect to appellant Haroon they contended that he had been recognized as being with the absconding co-accused at the time when the absconding co-accused fired at and murdered the deceased; that he was seen driving the bike from which the deceased fired from and escaped the scene; that the two eye witnesses were not chance witnesses and there evidence could be safely relied upon in terms of the correct identification of Haroon at the scene of the murder and as such his appeal should also be dismissed. In support of their contentions they placed reliance on the cases of **Muhammad Nadeem alias Deemi Versus The State** (2011 SCMR 872), **Shoukat Ali Versus The State** (PLD 2007 Supreme Court 93), **Shamsher and another Versus The State etc** (1973 SCMR 69), **Muhammad Arshad and 2 others Versus The State** (PLD 1996 Supreme Court 122).

11. We have heard the arguments of the learned counsel for the appellants (lady appellants and appellant Haroon) as well as learned Additional Prosecutor General and learned counsel for the complainant and have gone through the



entire evidence which has been read out by counsel for the appellants, and the impugned judgment with the able assistance of learned counsel and have considered the relevant law including the case-laws cited at the bar.

12. In essence the prosecution case divides into two parts:

(a) Whether the appellants Ms.Hajira and her daughter Shaina (the lady appellants) step wife and step daughter of Abdul Habib (deceased) abetted the murder of the deceased and (b) Whether the deceased was murdered with abetment of the aforesaid lady appellants by the absconding co-accused Syed Wali who was facilitated in the murder by appellant Haroon.

**The first issue is whether the deceased was actually murdered.**

13. Based on our reassessment of the evidence of the PW's, especially the two PW eyewitnesses, and the other prosecution witnesses especially the medical evidence including the post mortem report of the deceased, recovery of empties and the vehicle in which he was murdered at the crime scene we find that the prosecution has proved its case beyond a reasonable doubt that the deceased was shot and murdered by firearm on 18.02.2019 from 2025 to 2045 at service road, opposite Serina mobile market near Sakhi Hassan Chowrangi Sector 15-A/1 Buffer Zone Karachi.

**The next issue is whether the two lady appellants abetted the murder of the deceased.**

14. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the lady appellants for which they were convicted for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances;

(a) We do not find the delay in lodging the FIR to be fatal in this case based on the particular facts and circumstances of this case. The complainant was informed about his brother's murder whereupon he reached the hospital. After the post mortem he took the body for burial and then lodged his FIR. There is no evidence that he consulted with the police. The lady appellants are not even named in the FIR as at that time he did not know that they were involved in the murder. If he had wanted to falsely implicate the lady appellants he would have named them in the FIR. Even otherwise he had no enmity against the lady appellants and had no reason to implicate them in a false case and no benefit has been gained by the prosecution in the delayed FIR and no prejudice caused to the appellants. In this respect reliance is placed on the case of



**Muhammad Nadeem alias Deemi Versus The State (2011 SCMR 872),**

- (b) It has come in evidence that the lady appellants were step wife and step daughter respectively of the deceased who had some internal/business dispute with him.
- (c) According to the evidence of PW 2 Abdul Qasim two days before the murder of the deceased he went with his nephew Abdul Aziz to shop for vegetables for his step mother. After buying the vegetables he entered the house of his step mother where he heard the lady appellants and the absconding co-accused making a plan to murder the deceased. He told the deceased about the plan who told him that God would protect him. His evidence is corroborated by PW 3 Abdul Aziz in all material respects. The evidence of these witnesses was not dented during cross examination. Admittedly the witnesses were related to the deceased but no enmity or ill will was suggested against either of them and as such we have no reason to disregard there evidence. Furthermore PW 18 Ms Wardat Izar who was an independent witness and friend of appellant Shaina gave evidence that in the second week of February when she visited Shaina's house she heard her mother (Hajira) and Shaina saying that the deceased had not done well with them and that they would take there revenge through Hajira's brother i.e Syed Wali who was involved in criminal activities (as revealed by his exhibited CRO) and was the brother of appellant Hajira. Appellant Shaina also told her later in effect that the murder of the deceased had been carried out and the next day she found out the deceased was dead. She had no reason to falsely implicate the lady appellants and her evidence was not at all dented during cross examination and as such we believe her evidence.
- (d) PW 20 Muhammed Nazim Rao who was the 2<sup>nd</sup> and last IO of the case having taken over from the original IO PW 11 Zulqarnain. According to his evidence on 07.03.2019 he received spy information that appellant Hajira was involved in the crime so he went to her house. At her home he seized 3 mobile phones including an i-phone which phones according to appellant Hajira belonged to her daughter appellant Shaina. He found an audio message in Pashto on the i-phone and he called PW 6 Moosa to translate the message as he could not understand Pashto whilst PW 6 Moosa could. According to PW Moosa the message concerned the murder of the deceased on 18.02.19 which stated about the deceased being shot in the head and for her (appellant Hajira) to keep quiet and delete the messages. Appellant Hajira disclosed that the voice message was left by her brother absconding co-accused Syed Wali and informed him that Syed Wali had murdered the deceased on payment of 12 lacs. He arrested Appellant Hajira who informed him that deleted messages on i-phone had been done by appellant Shaina so he also arrested her. The translation of the audio message is reproduced as under for ease of reference;

"Exh.27/I

Hijra's brother Syed Wali

Audio message No.1 Urdu Translator.

⚡



Keep quiet, sit down, I did not see your any cleverness and I did not see your smartness. (Talked twice time). Don't show smartness).

Don't expose yourself before anyone. Keep quite this way as you have no knowledge. I fled by hitting fires on his head.

(Sir time of message is 18.02.2019 at 08:50 p.m. It is clear from voice that this audio message has been sent by running motorcycle. Our crime time is from 08:40 to 08:43 pm.)

Audio message No.2

Now how are you and how is your health and what are you doing. (This message is additional one that it not does relate to it).

Audio message No.3

First & Third message are same.

Audio message No.4

You remain normal as you were. Bullet shot hit on his head. Delete all messages from mobile of mother/Ammi and from your mobile too.

Audio No.5

Switched off I.D even delete I.D and absolutely delete it.(bold added)

Sd/- in English,  
Station House Officer  
Taimoria Police Station  
Disst. Central Karachi"

(e) The evidence of PW 20 Muhammed Nazim Rao regarding the recovery of the phones and the translation of the voice message is corroborated in all material respects by PW 6 Moosa Jadoon who was called to translate the voice message which is also largely reproduced in his evidence. PW 10 Yousaf Zai also corroborates the evidence of PW 20 Muhammed Nazim Rao and PW 6 Moosa who was a police man who was present at the house when the mobiles were seized from the appellant Hajira and when PW 6 Moosa arrived and translated the voice message which was in pashto. The above evidence is also corroborated by PW 1 Abdul Qaseem the complainant who was present in the house when the phones were seized and checked from appellant Hajira. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474).Significantly, the first audio message is sent about 10 to 15 minutes after the murder of the deceased and describes the manner in which the deceased was killed as confirmed by the eye witnesses and the medical evidence and ties the lady appellants directly to the abetment of the murder especially as they were told to delete such messages and e-mails concerning the same. The murderer is clearly



reporting back to his planners, instigators and abettors that the job has been done. A motor bike is also heard in the back ground which according to the eye witnesses the murderer escaped on after the murder.

(f) The phones which we seized from Ms. Hajira were sealed and sent for forensic examination in Islamabad to PW 21 Masood Ali who received them in sealed condition. There might have been a delay in sending the phones and voice messages but these phones were sealed on the spot, kept in safe custody and were received in Islamabad by PW 21 Masood Ali under seal and no suggestion has ever been made that the phones were tampered with. After examining the phones PW 21 Masood Ali through internationally recognized methods gave his expert report which revealed that the i-phone belonged to Ms Hajira and that many messages had been deleted from it which he was unable to recover and that the voice message was authentic. This indicates that the lady appellants followed the voice message to delete all messages which may have linked them to the absconding accused Syed Wali who had allegedly murdered the deceased and the voice message creates a direct link between the alleged murder of the deceased and the lady appellants which they planned, instigated and abetted with the alleged murderer absconding co-accused Syed Wali.

(g) That there are no major contradictions in the evidence of the PW's and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

15. It is true that the evidence against the lady appellants is based on circumstantial evidence however when the evidence mentioned above is taken in a holistic manner it proves that the lady appellants on account of an internal dispute planned, instigated and abetted the murder of the deceased through conversations overheard by at least three PW's, that the murder did in fact take place allegedly by the person who they had arranged to carry out the murder namely the absconding co-accused their close relative Syed Wali, that shortly after the murder based on spy information phones were recovered from them which belonged to them which contained an incriminating voice message from the murderer as reproduced above which directly linked them to the plan, instigation and abetment of the murder of the deceased which was also linked back to the lady appellants through forensics evidence and that the lady appellants complied with the voice mail by deleting other incriminating messages on their phones as directed by the caller in the voice message who admitted murdering the deceased by shooting him in the head as found by the forensic evidence and as such the prosecution has proved its case against the lady appellants beyond a reasonable doubt and their convictions are maintained



as each piece of circumstantial evidence links the dead body of the deceased to the neck of the lady appellants.

16. With regard to sentencing we find that in cases of circumstantial evidence extra care and caution must be taken before handing down the death penalty and in this case since the lady appellants did not actually fire on the deceased and their role was confined to abetment, planning and instigation and even it is doubtful whether the prosecution has asserted and proved the motive for the murder of the deceased we hereby reduce the death sentences handed down to each of the lady appellants to one of life imprisonment each with all other fines, compensation and other sentences in the impugned judgment remaining in tact.

**Turning to the appeal of the appellant Haroon.**

17. After our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant Haroon for which he was convicted for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances;

- (a) Although as discussed above we do not find the delay in lodging the FIR to be fatal to the prosecution case we note that Haroon was not mentioned in the FIR which was against unknown person's.
- (b) We find that the prosecution's case primarily rests on the two eye witnesses to the murder of the deceased and in particular his correct identification of the appellant as the person who was present at the time of the murder of the deceased and facilitated the absconding co-accused in the murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 15 Ghulam Murtaza.** He was working as a car worker near Sarina mobile market for the last 2 years. According to his evidence on 18.02.2019 he was in front of Sarina mobile washing a car when he saw a motor bike come with two person's on it. He saw the pillion rider get down from the bike and make straight fire on the land cruiser and then escaped on the same motor bike. He informed the police shortly after the incident **that he saw the accused and he could identify them.** This is corroborated by PW 20 IO Muhammed Nazim Rao. He also appeared before an identification parade and picked out the appellant as the person who was driving the motor cycle without weapon and made no fire at the time of the murder of the deceased as corroborated by judicial magistrate PW Adil Hyat Sindu.

It seems that this witness was not a chance witness although he did not produce any document to show that he was employed as car washer by anyone at Sarina market. He is an independent witness who is not related to the deceased and his evidence was not dented during cross examination and as such we have no reason to



disbelieve his evidence which we find to be reliable and confidence inspiring in respect of the murder and believe the same to that extent.

However we also note that he had not seen the appellant before, that at 8.30pm it would have been dark in February, that no source of light was given in evidence, that he was about 25 paces from the incident when it occurred and at such time the situation would have been chaotic with people diving for cover during the firing as stated by the other eye witness PW 17 Ayoub Niyazi in his evidence which is discussed below and he would only have got a fleeting glance of the appellant at best. He did **not** give any hulia of the appellant and recorded his S.161 Cr.PC eye witness statement **after a few days** of the incident. As such keeping in view the above we find that we cannot rely on this witness as having correctly identified appellant Haroon as being present at the scene of the incident despite him picking out Haroon in the identification parade.

With regard to the importance of an eye witness giving **hulia** of a suspect 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 before an identification parade and the need to strictly follow the rules governing identification parades 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 Sind 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, Imran 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. There is yet another aspect to the matter of identification of the culprits of this case. The Complainant had named three other persons who could recognize the assailants, but he did not mention Subedar Mehmood Ahmad Khan (PW-6) as one of them. Nonetheless Subedar Mehmood Ahmad Khan came forward to identify the appellants. Significantly, none of the three persons mentioned by the Complainant participated in the identification proceedings and two were not even produced as witnesses by the Prosecution. During the identification proceedings both the appellants had informed the Magistrates who were conducting the identification proceedings, and before the identification proceedings commenced, that they had earlier been shown to the witnesses. The Magistrates recorded this objection of the appellants in their reports but surprisingly did not attend to it, which can only be categorized as a serious lapse on their part. Therefore, for all these reasons reliance cannot be placed upon the report of the identification proceedings in which the appellants were identified.

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (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 recent 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.

Although it has now become inconsequential as we have found that the eye witness was not in a position to correctly identify the accused at the time of the incident we also note a serious defect in the identification parade which raises doubt as to its legal value as the eye witness during cross examination admitted that before the identification parade, *"the IO made him understand all the things in PS about identification of accused"* which is a clear indication that either the eye witness was shown to the accused prior to the identification parade or was described to him by the IO prior to the identification parade which the appellant claimed to be the case in his S.342 statement where he stated that the eye witness was shown to him whilst he was in the custody at the PS and even claimed that this eye witness was a servant of the complainant and was a put up witness.

(ii) **Eye witness PW 17 Ayoub Niyazi.** On 18.02.2019 he was waiting to catch a bus at Sarina market to go home. According to his evidence he heard firing and people were running here and there due to such firing. He saw two motor cycles whereupon 4 persons were available. One boy got down from the motor cycle and fired on the black parado. Then he saw that the person who was driving the motor cycle was of a tender age. He informed the police shortly after the incident that he saw the accused and he could identify them. This is corroborated by PW 20 IO Muhammed Nazim Rao. His evidence regarding the attack on the deceased is some what corroborative of eye witness PW 15 Ghulam Murtaza except in respect of the number of bikes and number of persons who came at the scene on the motor bikes.

We find that even if he was not a chance witness at best we can only rely on his evidence in respect of the murder and not as to the correct identification of appellant Haroon. This is because as with the other eye witness whose evidence we discussed above it was quite dark, the eye witness only got a fleeting glance of Haroon in an admittedly chaotic situation where every body was running to save there lives, as per his own evidence he was **200 yards away** from the incident and could not recognize the type of weapons which the co-accused carried which begs the question as to how he was able to recognize appellant Haroon from such a long distance in the dark when no source of light was ever given in evidence, he gave his eye witness S.161 Cr.PC statement **7 days after** the incident and he did **not** give any hulia in the same and did **not** even appear before an identification parade and as such based on the particular facts and circumstances of his eye witnesses evidence we find that he was not in a position to correctly identify appellant Haroon as being present at the scene at the time of the firing on the



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deceased.

Since we have disbelieved the correct and safe identification of appellant Haroon at the scene of the murder by the two eye witnesses what other evidence is there to connect appellant Haroon to the murder. The answer is none.

- (a) That appellant Haroon was **not** arrested on the spot but was later arrested by the police in an illegal arms case. Despite there being no evidence against him in this case he confessed to the police to an offence which carried the capital punishment which does not appeal to logic, reason or commonsense. **Significantly**, he was not produced before any magistrate in order to record his confession despite being produced before an identification parade. In any event his alleged confession before the police is inadmissible in evidence.
- (b) Even if we believe the eye witness that one person fired at the scene of the crime according to their evidence that person was not appellant Haroon.
- (c) There is no evidence that any empties recovered at the scene matched the pistol which was recovered from appellant Haroon when he was arrested in the arms case
- (d) The later recovered motor bike which was allegedly used in the crime was not in the name of Haroon and PW.4 Shahid Syed who recovered the motor bike which was allegedly used in the crime stated in his evidence that Zameer who was the person who was living in the house from where the motor bike was recovered told him that the absconding co-accused Syed had asked him to look after the motor bike and not Haroon and as such there is no connection with the recovered motor bike to Haroon.
- (e) Apart from the eye witnesses no other PW deposed against appellant Haroon apart from his inadmissible confession before the police. He was not mentioned at all in any plan, instigation or even abetment to murder the deceased.

18. It is a golden principle of criminal jurisprudence 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).

19. Thus, for the reasons discussed above by extending the benefit of the doubt to the appellant Haroon the appellant Haroon is acquitted of the charge, the impugned judgment in respect of him is set aside, the appeal is allowed and the appellant Haroon shall be released unless wanted in any other custody case.



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**Summary:**

1. The appeals of appellants Mst. Hajira Bibi and Mst. Shaina Hameed are both dismissed however both their sentences are both reduced from the death penalty to life imprisonment and the confirmation reference is answered in the negative. There convictions shall run concurrently, they shall have the benefit of S.382 (b) Cr.PC and any remission applicable under the law.
  2. The appeal of appellant Haroon is allowed and the impugned judgment in respect of him is set aside and he shall be released unless wanted in any other custody case.
20. The appeals along with confirmation reference stand disposed of in the above terms.