

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah,*

**SPECIAL CRIMINAL A.T. APPEAL NO. 257 OF 2019
SPECIAL CRIMINAL A.T. APPEAL NO. 258 OF 2019
CONFIRMATION CASE NO.13 OF 2019**

Appellant	Raheel son of Muhammad Rafique through Mr. Muhammad Farooq, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Additional Prosecutor General Sindh
Date of Hearing	12.08.2021
Date of Announcement	17.08.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Raheel son of Muhammad Rafique has assailed the judgment dated 30.08.2019 passed by Learned Judge, Anti-Terrorism Court No.XII, Karachi in two Special Cases being No.110 of 2019 arising out of Crime No.34 of 2014 under Section 302/353/324/186/34 PPC r/w Section 7 of ATA, 1997 registered at PS Arambagh, Karachi and Special Case No.81 of 2015 arising out of Crime No.110 of 2014 under Section 23(i)-A, SAA of 2013, PS Kharadar, Karachi whereby he was convicted u/s 265-H(II) Cr.PC in Special Cases being No.110 of 2019 u/s 302(b) PPC r/w Section 7 of ATA, 1997 and sentenced to death as Tazir subject to confirmation by this Court. He was also convicted u/s. 265-H(II) Cr.PC u/s.324/34 PPC r/w Section 7 ATA 1997 and sentenced to 10 years R.I. and to pay fine of Rs.50000/-. In case of default of payment of fine, he shall further undergo S.I. for six months. The appellant was further convicted u/s.265-H(II) Cr.P.C. and further sentenced u/s.353 PPC, r/w Section 7 ATA 1997 for two years R.I. He was also convicted u/s.265-H(II) Cr.P.C in Special Case No.81 of 2015 and sentenced u/s. 23(i)-A SAA 2013 to 10 years R.I. and to pay fine of Rs.50000/-. In case of default in payment of fine, appellant shall further undergo six months S.I. All sentences were ordered to run concurrently and the appellant was given the benefit of S.382 (b) Cr.PC.

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2. The brief facts of the prosecution case as per FIR No.34 of 2014 are that with reference to daily Roznamcha entry of PS Arambagh, according to SIP Ashfaq Ahmed Ranjha are that he after completion of proceedings u/s. 174 Cr.P.C. recorded the statement u/s. 154 Cr.PC of victim PW ASI Sohail Ahmed at Emergency Ward of Hospital on 19.10.2014 at about 2230 hours, such statement u/s.154 Cr.PC is reproduced as under:-

"ASI Sohail Ahmed s/o Manzoor Ahmed, K-13910, R/o House No.PV/124, street No.41, Cattle Colony near Jamiya Masjid, Karimabad, Karachi stated that he is residing at aforesaid place and has service in Karachi police department as ASI posted at PS Arambagh. On the same day his duty timing is from 1600 hours to 0000 hours, he alongwith PC Noman s/o Fateh Alam Buckle No.23991 left PS for patrolling in the area to curb crime on his private motorcycle No.KEA-9440. During patrolling two motorcycles with unknown numbers i.e. 125 motorcycle and 70 motorcycle, upon which two-two persons in Shalwar Qamees were riding, motorcyclists being suspected were chased by police. In the meantime as they passed through Hamdard Dakhana, police signaled those motorcyclists to stop, but they made firing upon ASI and PC at about 1950 hours with intention to commit their murder, in retaliation PC Noman also made firing in self-defence and both respective motorcyclists by making fires succeeded to make their escape their good. Due however to the firing of accused persons both police personnel fell down as PC Norman sustained bullet injury on his head, whereas ASI sustained bullet injury on his left knee and instantly both went to hospital through Rickshaw and ASI and PC were shifted to Emergency Ward. PC Noman (the deceased) succumbed to his injuries prior to reaching at Civil Hospital and blood was also oozing from the head of PC. Thereafter, two other persons were also shifted to hospital in injured condition who were also injured at DMC Signal. All accused persons on two motorcyclists in Shalwar Qamees seemingly as Balouch and young, who can be identified by complainant if come before him. Hence, such FIR was lodged to the above effect and investigation of this case entrusted SIO of PS Arambagh, Karachi".

3. Whereas brief facts of the case as per FIR No.110 of 2014 registered at PS Kharadar Karachi are that on 02.04.2014 at about 1505 hours at Fariya Street, near Star Medical Store, Kharadar, Karachi accused Raheel along with another accused Waqar were arrested and during search of arrested accused Raheel s/o Muhammad Rafique, one pistol of 9MM No.13001683 of black colour made in China alongwith loaded magazine of four live bullets was recovered by the police. Accused failed to produce

valid license of recovered fire arm and ammunition. Hence FIR u/s.23(i)-A SAA of 2013 was registered, to the above effect.

4. After completing a thorough investigation charge was framed against accused Raheel in respect of both FIR's to which he pleaded not guilty and claimed trial of the case.

5. The prosecution in order to prove its case examined 13 PWs and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication by the police. He did not give evidence under oath and did not call any witness in support of his defence case

6. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed these appeals against his convictions.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30.08.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the police in order to show their efficiency to their high ups; that he was not present at the scene of the incident where one policeman was murdered and another was injured and that he has been wrongly identified by the sole PW eye witness; that his identification parade was defective; that he was arrested from hospital as opposed to on the street as per the police version; that the pistol recovered from him was foisted on him by the police and two injured passers by were not examined by the prosecution and for any of the above reasons by extending him the benefit of the doubt he should be acquitted of the charge. In support of his contentions he has placed reliance on the cases of **Sajid Mumtaz and others v Basharat and others** (2006 SCMR 231), **Kanwar Anwaar Ali** (PLD 2019 SC 488), **Abdul Wahab Afghani alias Khalid alias Jameel v The State** (2007 P Cr. L J 860).

9. On the other hand learned APG has fully supported the impugned judgment and has contended that the prosecution has proved its case against the appellant beyond a reasonable doubt through a trust worthy and confidence inspiring eye witness who had correctly identified the appellant as one of the persons who fired on him and the deceased which lead to the murder of the deceased and his injury; that the injuries caused to the deceased and the eye witness are corroborated by the medical evidence; that an unlicensed pistol was recovered from the appellant upon his arrest which has matched with the empties recovered at the scene of the encounter with the police and the appellant lead to a positive FSL report and as such the appeal should be dismissed.

10. We have heard the arguments of the learned counsel for the appellants as well as learned APG for the State, gone through the entire evidence which has been read out by learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

11. We find that the prosecution has **NOT** proved its case against the appellant beyond a reasonable doubt in respect of the charge against him for the following reasons;

- (a) The most important and indeed crucial aspect of this case is whether the prosecution through its evidence has been able to correctly identify the appellant as one of the persons who fired on the deceased and the other injured police officer PW 3 Mohammed Sohail through the evidence of PW 3 Mohammed Sohail who was the only eye witness to the incident keeping in view the fact that the law on identification is very stringent in order to ensure that there is no case of mistaken identify which is quite common in criminal cases.

The Law on identification.

- (b) In 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 it was 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 Sid 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)

(c) 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 as noted below) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

The conduct of the identification parade.

(d) In the recent case of **Kanwar Anwaar Ali** (PLD 2019 SC 488) **mandatory guidelines** were laid down for conducting an identification parade which flowed from and approved the earlier case of **Muhammed Yaqoob and Another V State** (1989 PCr.LJ 2227) which held as under in terms of guidelines at P.498;

"3. Before parting with this order we would like to point out that the matter of taking of different steps in holding of a proper test identification parade in connection with a criminal case has developed over many decades and the requirements of such a parade as well as the safeguards to be ensured during such a parade so as to make it a meaningful exercise and providing material in a criminal case to be considered in a trial have elaborately been detailed in the landmark judgment passed by a learned Division Bench of the Lahore High Court, Lahore in the case of Muhammad Yaqoob and another v. The state (1989 PCr. LJ 2227) and in the said judgment Mr. Justice Khalil-ur-Rehman Ramady (as his lordship then was a Judge of the Lahore High Court, Lahore) had observed as follows:-

"16. But before we undertake a deeper analysis of the evidentiary value of the test identification proceedings held in the present case, it would be of advantage to **first appreciate the object and the value of such an evidence as also to recapitulate the standards required to be met before such like identification parades could be credited with reliance.**

17. The evidence offered through identification proceedings is not a substantive piece of evidence but is only corroborative of the evidence given by the witnesses at the trial Muhammad Bashir v. The State (PLD 1958 SC (Pak) 1. It has no independent value of its own Muhamamd Afzal and another v. The State 1982 SCMR 129 and cannot as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record Sudhindranath v. The State AIR 1952 Cal. 423.

18. The identification parades (as they are normally called) are necessary only where the offender was a complete stranger to the witnesses Ismail and another v. The State 1974 SCMR 175. **And the whole object of the identification proceedings is to find out whether the suspect was or was not the real offender** Satya Narain v. The State AIR 1953 All. 385 and Kind v. Christle (1914 AC 545)

19. Such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. These gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could also wrap the vision of a man. When mistakes are possible in the recognition of a man known from before, then the possibility of such mistakes in identifying

strangers is definitely greater. And more so when the witnesses have seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorized state of mind.

20. It was primarily for these reasons that Dorab Patel, J. (as his Lordship then was) cautioned the Courts to beware of the dangers inherent in the identification of strangers and quoting from the Criminal Law Revision Committee Report (1972), observed in Lal Pasand's case PLD 1981 SC 142 that mistaken identifications were:-

".....by far the greatest cause of actual or possible wrong convictions....."

A similar note of caution was given by Monir in his Evidence Act Pak. Edition, Vol. 1 where the advice is that:-

".....the evidence as to identification ought in each case, to be subjected to a close and careful scrutiny."

What then are the standards required to be satisfied by such an evidence before the same could be accepted by a Court of law?

The answer is that the vital factor determinative of the worth and value of identification proceedings is the effectiveness of the precautions taken, before and during the course of such proceedings which are designed to eliminate the possibility of unjustified convictions.

Although there is no law, which prescribes any such precautions yet the necessary guidelines are available in the form of executive instructions and judicial pronouncements. Some of them are summarized as under:

(a) Memories fade and visions get blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between the occurrence and the identification proceedings, should be viewed with suspicion. **Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence;**

(b) A test identification, where the possibility of the witness having seen the accused person after their arrest cannot be ruled out, is worth nothing at all. It is, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects are put to identification tests as early as possible. **Such suspects should preferably, not be remanded to police custody in the first instance and should be kept in judicial custody till the identification proceedings are held. This is to avoid the possibility of overzealous I.Os showing the suspects to the witnesses while they are in police custody. Even when these accused persons are, of necessity, to be taken to Courts for remand etc. they must be warned to cover their faces if they so choose so that no witness could see them;**

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(c) identification parades should never be held at police stations;

(d) the Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings;

(e) in order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused person should be as much as possible. But then there is also the need to ensure that the number of such persons is not increased to an extent which could have the effect of confusing the identifying witness. The superior Courts have, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. **This ratio must be followed unless there are some special justifiable circumstances warranting a deviation from it;**

(f) if there are more accused persons than one who have to be subjected to test identification, then the rule of prudence laid down by the superior Courts is that separate identification parades should ordinarily be held in respect of each accused person;

(g) it must be ensured that before a witness has participated in the identification proceedings, he is stationed at a place from where he cannot observe the proceedings and that after his participation **he is lodged at a place from where it is not possible for him to communicate with those who have yet to take their turn.** It also has to be ensured that no one who is witnessing the proceedings, such as the members of the jail staff etc. is able to communicate with the identifying witnesses;

(h) the Magistrate conducting the proceedings must take an intelligent interest in the proceedings and not be just a silent spectator of the same bearing in mind at all times that the life and liberty of someone depends only upon his vigilance and caution;

(i) the Magistrate is obliged to prepare a list of all the persons (dummies) who form part of the line-up at the parade along with their parentage, occupation and addresses;

(j) the Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons

or by the identifying witnesses before, during or after the proceedings;

(k) where a witness correctly identifies an accused person, the Magistrate must ask the witness about the connection in which the witness has identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate this statement in his report;

(l) and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;

(m) the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings; and

(n) the Magistrate has to give a certificate at the end of his report in the form prescribed by CH. H.C of Vol. III of Lahore High Court Rules and Orders.

The measures above listed should, however, not be taken as exhaustive of the steps which are required to be taken before, during and after the identification proceedings. **All these requirements no doubt mandatory but at the same time they are only illustrative of the precautions which the Courts of law demand before some respect can be shown to the evidence offered through the test identification proceedings" (bold added).**

Conclusion on the correct identification of the appellant in the case in hand considering the facts and circumstances of the case and the relevant law on identification;

(e) After having considered the evidence in detail and the law on identification as mentioned above we find that we **cannot** safely conclude that the appellant has been correctly identified by PW 3 Mohammed Sohail as one of the persons who fired at the police party which firing lead to the murder of the deceased and caused injury to PW 3 Mohammed Sohail for the following reasons;

- (i) that prior to the incident PW 3 Mohammed Sohail who was the sole eye witness did not know the appellant; he only got a fleeting glance at him from at least 5 meters away in poor light under the stressful circumstances of being under attack and thus an identification parade was necessary which was carried out in accordance with law.
- (ii) that in his FIR PW 3 Mohammed Sohail who is the complainant in this case and was injured by the firing gave his FIR with promptitude on the same day of the incident however it does **not** provide any meaningful

hulia/description of any of the persons who made fire at him and the deceased except to describe them all as wearing shalwar Qameez, being of young age and looking Baloch from their faces along with the catch all phrase that he could identify them again.

- (iii) that the identification parade was held 3 months after the incident and as such the incident would not have been fresh in the eye witnesses mind.
- (iv) that the identification parade was conducted 5 days after the arrest of the appellant during which period he was detained in police custody and could have been shown to the eye witness during this period as claimed by the appellant.
- (v) **that Quite astonishingly the appellant was the only one of the dummies at the identification parade with a bandaged leg and crutches and thus this was a clear pointer to the identifier who he was meant to pick out at the identification parade. In this respect reliance is placed on the case of Abdul Wahab Afghani alias Khalid alias Jameel (supra)**
- (vi) that no details were taken of any of the dummies.
- (vii) that interestingly other private eye witnesses were listed in the prosecutions calendar of witnesses but none of these eye witnesses who may have fortified the complainants identification of the appellant were called as PW's or even to the identification parade and as such an adverse inference may be drawn against them that they would not have supported the prosecution case under Article 129 (g) Qanoon-e-Shahadat Ordinance 1984

(f) Since we have come to the conclusion that the sole eye witness's identification of the appellant cannot be safely relied upon the case of the prosecution against the appellant collapses.

Other aspects of the case.

(g) that with regard to the recovery of the pistol from the appellant this could have easily been foisted on him by the police as claimed by the appellant especially as he was not arrested on the spot and there was no independent mashir. Furthermore, it does not appeal to logic, common sense and reason that a person who had shot dead a police men and injured another by firearm or had been involved in the firing at such incident would (i) have retained the pistol and kept it on his person for 3 months. Instead he would have disposed of it and (ii) that being such a cold bloodied killer despite having an unlicensed firearm on him he would stop on the police's signal and allow himself to be searched rather than open fire on the police or at least attempt to make his escape good on his motor bike. As such we find the recovery of the pistol from the appellant on his arrest to be doubtful and as such the recovered empties and FSL report to be of no relevance.

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(h) that the appellant was arrested when he was stopped by the police 3 months after the incident in an unlicensed Arms case so once again it does not appeal to logic, common sense or reason that he would then freely admit to being involved in the murder of a policeman which carried the death penalty. This admission before the police is inadmissible in evidence and if it was true it begs the question as to why the appellant's confession was not recorded before a judicial magistrate. **Significantly** prior to the appellant's alleged admission before the police the police had no suspect in the murder case and no other evidence to link the appellant to the murder. The appellant was therefore a convenient escape goat

(i) that once again it is suspicious that the appellant's arresting officer did not give any evidence without any reason.

(j) that it is also notable that no entry of the deceased and PW 3 Mohammed Sohail being on patrol was produced; that they were on patrol on a motorbike which was not recovered from the wardat and that they were on patrol with absolutely no means of communication. They did not even have a mobile phone between them let alone a wireless set which tends to cast doubt on the entire prosecution case and in particular the eye witness evidence of PW 3 complainant Mohammed Sohail who also states in his evidence that he took the seriously injured deceased and wounded self to hospital by rickshaw yet the MLO states that the deceased was brought by police mobile which based on the particular facts and circumstances of the case is quite a significant contradiction. **Significantly**, neither the rickshaw driver nor any other independent person who witnessed the incident and sustained injuries were called to give evidence in support of PW 3 Mohammed Sohail's evidence despite such witnesses being available.

(k) that the appellant's consistent defence was that he was falsely implicated in this case and was not present and that he was arrested from hospital where he had been admitted which is supported by a medical report which states that he was in hospital after falling from a roof. His father had even written letters to the concerned authorities that his son had been implicated in a false case and as such we need to consider this defence when placed in juxta position with the prosecution case and find that it is worthy of being given some weight and cannot be ignored out of hand.

12. Thus for the reasons mentioned above and mainly on the basis of the unreliable identification of the appellant as one of the persons who committed the offense we by extending the benefit of the doubt to the appellant set aside the impugned judgment, allow the appeal, acquit him of the charge and answer the confirmation reference in the negative. The appellant shall be released unless wanted in any other custody case.

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13. The above appeals and confirmation reference stand disposed of in the above terms.