

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

*Mr. Justice Mohammad Karim Khan Agha
Mrs. Justice Kausar Sultana Hussain*

SPL. CR. AT APPEAL NO.47 OF 2018

Appellant: Nadeem alias Manga son of Abdul Aziz
Through Mr. Khalid Hashmat,
Advocate

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

SPL. CR. AT APPEAL NO.48 OF 2018

Appellant: Zeeshan @ Mani son of Muhammad
Shareef through Mr. Rawas Khan and
Ms. Shabana Khan, Advocates

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

Date of Hearing: 26.10.2021

Date of Announcement: 02.11.2021

J U D G M E N T

Mohammad Karim Khan Agha, J. We intend to dispose of the above captioned two appeals by one common judgment. The Appellants Nadeem alias Manga son of Abdul Aziz and Zeeshan son of Muhammad Shareef have preferred these appeals against the impugned judgment dated 31.01.2018, passed by the learned Judge, Anti-Terrorism Court No.VII, Karachi in Special Cases No.241 of 2015 (Old Special Case No.A-74/20-15) in Crime No.272 of 2014 under Sections 302/324/114/34 PPC r/w Section 7 ATA 1997, PS Korangi Karachi whereby the appellants were convicted u/s.265-H (ii) Cr.PC for offence u/s. 7(a) of Anti-Terrorism Act, 1997 r/w Section 302(b)/34 PPC for committing the murder of deceased Kamran Hussain s/o Abrar Hussain and sentenced them both to suffer

R.I. for life and to pay fine of Rs.2,00,000/- each. In case of non-payment of fine they shall suffer further S.I. for six months each. If fine recovered, same shall be paid to the legal heirs of deceased Kamran Hussain s/o Abrar Hussain. The appellants were also extended the benefit of Section 382 (B) Cr.PC.

2. The brief facts of the case are that on the day of the incident the complainant went to Gulshan-e-Iqbal where he received a telephonic call that his brother Kamran Hussain while available at his mobile shop situated on plot No.L-12, Sector 35-C Madina Bakery Korangi No.3 received bullet shot injuries and was taken to Jinnah Hospital. The complainant then went to Jinnah Hospital, where he came to know that his brother Kamran Hussain had succumbed to his injuries. According to the complainant his brother was present at his shop when at about 1615 hours two persons in trouser and shirt came on motorcycle, fired at his brother, resultantly one passer by Zeeshan s/o Shakir also received injuries and his brother died on the way to the hospital. The case therefore was registered against unknown persons and the investigation was conducted. In the meantime applicants and co-accused were arrested in different cases, wherein they disclosed their complicity in this case, thus the appellants were put to the identification test, during which, PW Aijaz Ali Khalhoru running fruit cart at the spot identified the accused Ubaid-ur-Rehman, Nadeem Iqbal and Zeeshan alias Mani who were the same, arrived at spot and caused bullet shot injuries to deceased Kamran Hussain and a passer by Zeeshan s/o Shakir, hence this FIR.

3. After registration of FIR, investigation was entrusted to SIP Muhammad Abid, who visited the place of occurrence and prepared such memo at spot, took photographs and recorded 161 Cr.PC statements of PWs at spot. Thereafter he wrote a letter to the FSL for examination and report in respect of empties collected from the spot. He collected report of chemical analyzer in respect of blood stained clothes and remained in search of the culprits when on 19.12.2014 the appellants and other co-accused were arrested in FIR No.291/2014 of PS Korangi for the offence falling u/s 302/324/353/34 PPC. On 20.12.2014 all the accused were produced before J.M. concerned for remand. During interrogation the

appellants admitted their complicity in the instant crime. During identification parade the three appellants were identified by the eye witness Aijaz Ali Kalhoro. After completing legal formalities I.O. submitted challan before the learned trial court, Karachi.

4. The charge was framed against the accused persons to which the accused persons denied all the allegations leveled against them. They claimed to be an innocent and prayed for trial.

5. The prosecution in order to prove its case examined 11 witnesses and exhibited various documents and other items. The statement of the appellants was recorded under Section 342 Cr.P.C in which they denied all the prosecution allegations and claimed false implication at the hands of the police. None of the appellants gave evidence under oath or called any witness in support of their defence case.

6. After appreciating the evidence on record the trial court convicted and sentenced the appellants as set out earlier in this judgment. Hence, the appellants have filed these appeals against their convictions.

7. Learned counsel for the appellants have contended that the appellants are completely innocent and have been falsely implicated by the police; that the identification of the appellants by the eye witnesses cannot be safely relied upon as no hulia of the appellants was given by them at the time when they recorded their S.161 Cr.PC statements and that there were major procedural defects in the subsequent identification parade which only one of the eye witnesses was subject to and in fact both the alleged eye witnesses were planted witnesses; that no recovery was made from the appellants at the time of their arrest; that there were material contradictions in the prosecution evidence and that for any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of their contentions they placed reliance on the cases of *Hayatullah v The State* (2018 SCMR 2092), *Noor Islam v Ghani ur Rehman* (2020 SCMR 310), *Muhammad Ayaz v The State* (201 SCMR 769), *Gulfam and another v The State* (2017 SCMR 1189), *Muhammad Akram v The State* (2009 SCMR 230), *Fazal Subhan v The State* (2019 SCMR 1027), *In the matter of Cr. Misc. No.183*,

264

of 2019 in Cr. Appeal No.259/2018 (PLD 2019 SC 488), **Zahid Imran v The State** (PLD 2006 SC 109), **Manzar Ullah v Asghar and 3 others** (2018 YLR 1508), **Muhammad Ali v The State** (PLD 2012 Sindh 272), **Ameer Khan v The State** (2014 P Cr. LJ 989), **Rasool Bakhsh v The State** (PLD 1970 SC 316), **Faisal Aleem v The State** (PLD 2010 SC 1080), **Shafqat Mehmood v The State** (2011 SCMR 537) and **Muhammad Zaman v The State** (2014 SCMR 749).

8. On the other hand learned APG appearing on behalf of the State as well as the complainant who had reposed full faith and confidence in him has fully supported the impugned judgment. He has contended that the eye witness evidence was trustworthy, reliable and confidence inspiring and that they have correctly identified the appellants as the persons who murdered the deceased at the identification parade and injured one other by stander Zeeshan; that the appellants after their arrest took the police to the place of the wardat and confessed their guilt to the offence before the police; that the medical evidence also corroborated the prosecution case; that empties and blood stained earth were recovered from the scene which produced positive FSL and chemical reports; that there were no material contradictions in the evidence of the PW's and as such the evidence of the prosecution witnesses could be safely relied upon; that it was an act of terrorism and that all the convictions and sentences be maintained and the appeals dismissed. In support of his contentions he placed reliance on the cases of **Muhammad Zaman v The State** (2007 SCMR 813) and **Ghazanfar Ali @ Pappu v The State** (2012 SCMR 215).

9. We have heard the arguments of the learned counsel for the appellant as well as learned APG who was also acting for the complainant, gone through the entire evidence which has been read out by learned counsel for the appellants along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

10. Based on our reassessment of the evidence of the PW's especially PW 10 Muhammed Siddique MLO who carried out the post mortem of the deceased, the medical reports and certificates, recovery of empties at

the scene and the recovery of blood at the scene we find that the prosecution has proved beyond a reasonable doubt that on 29.11.2014 at about 4.15pm Kamran Hussain (the deceased) received firearm injuries from persons at mobile shop plot No.L/12 Sector 35/C which lead to his death (murder).

11. The only question left before us therefore is who seriously injured the deceased by firearm which lead to his death (murder) at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons;

(a) PW 12 Jaffer Khan Baloch who was the last IO in the case stated in his evidence as under;

"It is a fact that except identification parade, pointation of place of occurrence by the accused and the disclosure by accused by themselves no other tangible evidence is on record against them."

(b) the pointation of the wardat by the accused after the commission of the crime is of no relevance as the police already knew where the wardat was. In this respect reliance is placed on **Hayatullah v. The State** (2018 SCMR 2092)

(c) The confessions of the appellants before the police that they committed the murder is inadmissible in evidence. It is note worthy that no effort was made by the police to record the confession of the appellants under S.164 Cr.PC before a judicial magistrate despite them being produced before a judicial magistrate for an identification parade. It also does not appeal to logic, reason or common sense that the accused whilst in custody in a non capital case would admit to their involvement in a capital case without their being a shred of evidence against them for that offence.

(d) Thus, we find that the entire prosecution case hinges on the correct identification of the appellants at the scene of the murder of the deceased by the two eye witnesses whose evidence we will consider in detail below;

(i) **Eye witness PW 5 Ali Aijaz Kalhoro.** According to his evidence on 29.11.2014 he was in the area of the incident at about 4.15pm selling fruit from his pushcart. He saw three persons come on a motor cycle near his thelha two of whom got off the motorcycle and went into the shop of the deceased and fired on him with pistols which caused his death. Six weeks later he picked out all the appellants at an

identification parade held by PW 2 Abdul Razzaque who was a judicial magistrate. Although it was a day light incident we note from his evidence that he appears to be a chance witness. Furthermore, he did not know any of the appellants prior to the incident and would have only got a fleeting glance at them during a dangerous and traumatic incident.

He also states in his cross examination as under;

"I had not seen the weapons in the hands of the culprits. I had not seen culprits when they were firing.....It is correct that I had stated in my statement (u/s 161 Cr.PC) that I cannot help in preparation of sketch of the culprits. I was under pressure and therefore I was not able to describe the features of the accused for preparation of the Sketch."(bold added)

If the eye witness could not prepare a sketch of the appellants on the day of the incident as he was unable to describe the features of the appellants it begs the question as to how he could have possibly correctly identified the appellants at the identification parade which was held 6 weeks later?

Even otherwise we find the identification of this eye witness of the appellants at the identification parade to be of little value as **prior to the identification parade a news paper published a picture/photograph of all the appellants allegedly involved in the murder** which could easily have been seen by the eye witness which was also pointed out by the appellants to the judicial magistrate during their identification parade. It is also notable that the eye witness was also called to the PS where the appellants were being detained prior to the identification parade who had every chance of seeing them **before the identification parade.**

His identification evidence of the appellants is further undermined by the other eye witness PW 8 Faizan Khan who states during his evidence the following concerning the shooting of the deceased which he saw;

"One of the culprits was wearing a black colour mask who restrained me and caused fire shots to Zeeshan, the remaining one was with green mask and third one was wearing helmet. Zeeshan was not residing in the mohalla although he was known to me".(bold added).

If the evidence of PW 8 Faizan Khan is to be believed then it directly contradicts the evidence of PW 5 Aijaz Ali Kalhoro as according to PW 5 Aijaz Ali Kalhoro he was able to recognize the appellants which would have been impossible if the appellants were wearing masks. **We find this to be a material contradiction which cannot be over looked with**

regard to the sensitive and crucial issue of identification keeping in view the other holes in the evidence of the eye witness identification evidence of PW 5 Aijaz Ali Kalhoro as discussed above.

PW 5 Aijaz Ali Kalhoro also appears to be a stock police eye witness who gave evidence for the prosecution in a different case for offenses u/s 7(a) and (c) ATA read with Sections 302/324/325/114/109 PPC as eye witness on behalf of the police being ATC case 37/2014 **State V Muhammed Dawood** before the Judge Anti Terrorism Court Hyderabad whereby the accused in that case was acquitted vide judgment dated 26.04.2018.

With regard to **PW 8 Faizan Khan** it would have been impossible for him to identify the masked assailants which he did so in court. Even otherwise identification in court has been deprecated by the Supreme Court. Like PW 5 Aijaz Ali Kalhoro he did not know any of the appellants prior to the incident and would have only got a fleeting glance at them during a dangerous and traumatic incident. He was not produced before an identification parade without any explanation and he did not give his eye witness S.161 Cr.PC statement until 5 days after the incident. He too would also have been able to see the photograph of the appellants in the news paper before he identified them in court. He also provided no sketch or hulia of the appellants which is only natural as according to his evidence the appellants were masked at the time of the incident.

Admittedly, the eye witnesses had no enmity with the appellants and we can convict based on the evidence of a even a sole eye witness however based on the particular facts and circumstances of this case we find that even if the eye witnesses were present at the time of the incident based on the reasons mentioned above they would **not** have been able to correctly, safely and reliably identify any of the appellants.

In this respect reliance is placed on 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 where 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)

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.

Thus, having found that the eye witnesses would **not** have been able to correctly, safely and reliably identify the appellants if seen again the conduct of the identification parade becomes in consequential.

267

It is also of significance that the best eye witness Zeshan who was allegedly injured at the scene at the same time when the deceased was murdered and is named in the FIR and charge as being injured at the scene by firearm did not appear as a PW despite being listed as a prosecution witness who would have been an extremely important natural eye witness in corroborating the other eye witnesses evidence and in particular that of the correct identification of the appellants and as such the presumption can be drawn under Article 129 (g) Quoon-e-Shahadat Ordinance 1984 that he would not have supported the prosecution case especially in terms of a correct identification of the appellants. The prosecution has therefore for reasons best known to itself deliberately withheld the best evidence. In this respect reliance is placed on the cases of **Riaz Ahmed v. The State** (2010 SCMR 846) and **Shakeel and another v. The State** (2019 MLD 1554). Significantly PW 11 Muhammed Abid who was the first IO of the case states in his evidence as under regarding Zeeshan,

"It is a fact that 161 Cr.PC statement of said Zeeshan who sustained injury did not speak/disclose the features, structure and glimpses of the culprits and also did not disclose that he can identify the culprits as and when they appear or are brought before him. It is a fact that statement of Zeeshan recorded by me reveals that one of the culprits was having muffled face and for the others he also narrated with masks and helmets. It is a fact that said Zeeshan disclosed vocally that he could not identify any other culprit. It is a fact that place of occurrence had been visited by me earlier which later on was allegedly pointed out by accused. It is a fact that I did not recover any weapon or ammunition during interrogation and investigation of accused on their pointation."
(bold added)

(e) With no eye witness evidence as to the correct identity of the persons who allegedly committed the murder of the deceased the medical evidence becomes inconsequential as it can only reveal how the deceased died, what kind of weapon was used and the seat of the injuries. It cannot identify the person who inflicted the injuries.

(f) That as no pistol was recovered from any of the appellants at the time of their arrest and exhibited before the court the FSL report on the empties recovered at the scene cannot link the appellants to the murder of the deceased.

13. 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), wherein the Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.”

14. For the reasons discussed above by extending the benefit of the doubt to the appellants all three appellants are acquitted of the charge, the impugned judgment is set aside, their appeals are allowed and all the appellants shall be released unless wanted in any other custody case.

15. The appeals stand disposed of in the above terms.