

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal ATA No.129 of 2017
Confirmation Case No.06 of 2017

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellant: Afaq Ahmed S/o. Ashfaq Ahmed,
presently confined in Central Prison, Karachi
through Mr. Mehmood A. Qureshi, Advocate.

Complainant: Through Mr. Pir Rehman, Advocate and also
heard in person (Muhammad Siraj Abbasi).

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

Date of hearing: 28.02.2019 and 07.03.2019
Date of Judgment: 15.03.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Afaq Ahmed S/o. Ashfaq Ahmed along with co-accused was tried by Anti-Terrorism Court No.II, Karachi in Special Case No.B-286/2014 arising out of Crime No.151/2010 U/s. 302/324/353/109/34 r/w Section 7(a) of ATA, 1997 registered at P.S. Baldia Town, Karachi and vide judgment dated 17.05.2017 the appellant Afaq Ahmed was convicted under section 302 PPC and sentenced to death. The appellant was also convicted u/s 7 clause (a) ATA and sentenced to death subject to confirmation by this court (the impugned judgment). The charge against the other two co-accused was not proved and they were acquitted from the charge vide the impugned judgment.

2. The brief facts of the prosecution case are that complainant Siraj Abbasi lodged FIR No.151/2010 on 03.03.2010 at about 0020 hours stating that his younger brother PC-13966 Muhammad Tariq Abbasi was working in police department as constable for past 17 to 18 years and during the period of his service, he had been working for the different agencies and had got criminal elements arrested. About a month back his brother was posted at PS Baldia Town on night duty. The drug dealers of Baldia Ashfaq Qurban Ellahi, Shakeel Afaq, Zauq had threatened to murder his brother. On 02.03.2010 his younger brother PC-13966 Muhammad Tariq

Abbasi and PC-24601 Muhammad Fayaz were on patrolling duty on motorbike in illaqa gusht in Rasheedabad between 1900 hours up till 0700 hours when at about 8.45pm his friend Haseeb telephoned him and told him that his brother Muhamunad Tariq Abbasi was seriously injured by firing of Zauq at Malik Chowk Comelpur Mohalla, Haji Qasim Colony, Karachi. He reached that Mohalla where people had assembled. He had taken his brother along with PC Ghazanfar Ali in Cheepa Ambulance to Civil Hospital but his brother had succumbed to his injuries. His case is against accused Afaq, Zauq, Ashfaq and Shakeel who in connivance with each other had fired at his brother and killed him.

3. After completing the usual investigation, the Investigation Officer submitted challan against the accused for trial according to law. Accused namely Zouq S/o. Malik Mushtaq was declared as proclaimed offender. The charge against the accused persons Afaq Ahmed, Ashfaq Ahmed and Shakeel Ahmed was framed to which all the accused pleaded not guilty and claimed for trial.

4. To prove it's case the prosecution examined 9 witnesses and exhibited various documents and other relevant items. Thereafter the prosecution side was closed. The statements of the accused Afaq Ahmed, Ashfaq Ahmed, and Shakeel Ahmed u/s. 342 Cr.P.C. were recorded wherein they denied the allegations against them and claimed that they had been falsely implicated in the case and in the case of Afaq he was not in Karachi at the time of the incident. The accused examined 2 witnesses in support of their defense.

5. In a nutshell the case of the prosecution is that on 02-03-2010 during the evening PC Tariq Abbasi (the deceased) along with PC Fayyaz were on patrol on a motor bike in the Baldia town area when they saw a motorbike violating S.144 Cr.PC which they signaled to stop. Instead of stopping the motor bike and its riders sped away and the police officers gave chase. The motor bike was chased into a street at Malik Chowk between 8.30 and 8.45 pm whereupon 4 persons came in the way of the police men and in effect asked them why they had come to this Mohalla to harass peaceful citizens. An exchange of hot words followed where upon the 4 persons fired at the police men and the deceased fell down injured. PC Ghanzafar who was nearby rushed to the scene along with the

deceased brother Siraj Abbasi who had been informed about the incident by his friend Hasseb Khan (not examined). PC Ghanzafar (not examined) took the deceased to hospital where he died from his injuries. Siraj Abbasi lodged an FIR about the incident in effect citing the accused as the suspects. The appellant was arrested on 09-03-2010 following a tip off by an informer and a 30 bore pistol was recovered from him. Eye witness Fayaz picked appellant Afaq out at an identity parade held by judicial magistrate Ms Erum Jahangir. As per the prosecution case based on the evidence of its witnesses, recoveries, medical, ballistic and chemical reports it had proved its case to the required criminal standard against the appellant.

6. The appellant's case in a nutshell was that he was not present at the scene of the incident as he was outside of Karachi and he has been falsely implicated in this case by the complainant and the police and that the recovered pistol was foisted upon him and as such he was entitled to be acquitted of the charge.

7. Learned advocate for appellant contended that the prosecution case was doubtful from the very outset as immediately after the incident PW 3 eye witness Fayaz had made entry 61 whereby he had named unknown persons as attacking him yet despite the entry 61 being incorporated in the FIR the FIR gave a different story whereby the accused were named and thus entry 61 and the FIR were self contradictory which showed that the contents of the FIR had been cooked up in order to implicate the accused; that despite many Mohalla people gathering at the time when the hot words were exchanged between the accused and the deceased and PW 3 eye witness Fayaz none of them had been made PW's; that PW 1 Siraj Abbasi who was the complainant was a false witness who never went to the scene of the incident as alleged by him; that the evidence of eye witness PW Favez was not trust worthy and reliable and in fact he was not present at the time of the incident. This was shown by the fact that his conduct on the spot was not natural in that he did not go to the assistance of his colleague when he was shot despite being armed; that his S.161 statement was taken whereby he names the accused as firing on the deceased is contradicted by his earlier entry 61; that the medical evidence contradicted eye witness PW 3's oral evidence; that no motive

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has been proved against any of the accused; that the other co-accused who had been given the same role as the appellant in PW eye witness Fayaz's evidence in chief had been acquitted and thus the appellant was entitled to the same treatment; that due to the delay in sending the empties to the ballistic expert the FSL report could not be relied upon; that the identification parade whereby the appellant was identified by eye witness PW 3 Fayaz was defective and could not be relied upon; that the appellant had been acquitted in the S.13 (d) Arms Ordinance case and for any and all of the above reasons he was entitled to the benefit of the doubt and as such he should be acquitted of the charge or alternatively this was a case which fell under S.302 © PPC as it was an act of extreme provocation after the exchange of hot words between the accused and the police and as such the appellant should only be convicted and sentenced in respect of that offense. In support of his contentions he placed reliance on **Ali Sher and others v. The State** (2008 SCMR 707), **Muhammad Asif v. The State** (2017 SCMR 486), **Muhammad Ali v. The State** (2015 SCMR 137), **Shah Bakhsh and another v. The State and 2 others** (1990 SCMR 158), **Yar Muhammad and 3 others v. The State** (1992 SCMR 96), **Ata Muhammad and another v. The State** (1995 SCMR 599), **Shah Nawaz and another v. The State** (2011 YLR 674), **Altaf Hussain v. The State** (2019 SCMR 274), (unreported) Judgment of Hon'ble Supreme Court of Pakistan, **Mansoor Khan alias Danish v. The State (in Criminal Appeal No.11-K of 2018) dated 25.02.2019** and another unreported Judgment of Hon'ble Supreme court of Pakistan, **Criminal Misc. Application No.183 of 2019 in Criminal Appeal No.259 of 2018 dated 22.02.2019**.

8. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, contended that eye witness PW 3 Fayaz was a trust worthy and confidence inspiring witness which this court should believe especially as he had produced his departure entry along with the deceased on the day of the incident; that entry 61 had been disowned by PW 3 eye witness Fayaz; that PW 3 Fayaz's S.161 statement had been recorded promptly within 24 hours of the incident; that the FIR had been lodged promptly not allowing for any time to falsify the incident or falsely implicate the accused and PW 3 Fayaz had no reason to falsely implicate the accused who he had no enmity with; that any contradictions in PW 3 Fayaz's evidence and that of other witnesses was only minor in nature; that the

medical evidence corroborated PW Fayaz's eye witness account; that the murder weapon (pistol) had been recovered from the appellant and matched the empties which had been recovered at the scene as per the FSL report; that the accused were criminal elements and although he conceded that there may have been some defects in the identification parade the prosecution had still proved its case beyond a reasonable doubt against the appellant and as such he contended that the impugned judgment should be upheld, the appeal dismissed and the death penalty maintained. The complainant and his counsel adopted the arguments of the learned DPG and in particular stressed that entry 61 had nothing to do with eye witness PW 3 Fayaz who had disowned the same. In support of their contentions they placed reliance on *Shams-ul-Islam v. The State* (2006 SCMR 1778), *Qadan alias Qadir Bux and another v. The State* (PLD 2015 Sindh 426), *Muhammad Ashraf v. The State* (2011 SCMR 1046), *Nizamuddin v. The State* (2010 SCMR 1752), *Zahid v. The State* (PLD 1993 Karachi 337), *Muhammad Ashraf Khan Tareen v. The State* (1995 P.Crl.LJ 313), *Atta-ur-Rehman and another v. The State* (2018 SCMR 372), *Abdur Rauf v. The State and another* (2003 SCMR 522), *Misroo v. The State* (2004 MLD 1276), *Takdir Samsuddin Sheikh v. State of Gujrat and another* (2012 SCMR 1869)

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 17.05.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

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

11. Before dealing with the instance case and assessing the evidence before us it is relevant to mention that initially there were two other co-accused in this case along with the appellant. Co-accused Ashfaq Ahmed and Shakeel Ahmed were acquitted vide the impugned judgment and the case against Zauq remains open as he is absconding and has been declared a proclaimed offender by the trial court.

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12. In our view based on the evidence on record, in particular that of the MLO and other PW's, it is not disputed that the deceased Tariq Abbasi was murdered by firearm injury in the vicinity of Malik Chowk Karachi on 02-03-2010 at about 8.30 to 8.45 pm. What is in dispute is the identity of the person who murdered him.

13. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345) that 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. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

14. In our view the most important piece of evidence in this case is that of eye witness PW 3 Muhammed Fayaz who was on the motorbike with the deceased and was allegedly present when he was shot and killed thus we need to deeply appreciate his evidence.

15. In this case there is only one eye witness and according to this sole police eye witness PW 3 Muhammed Fayaz he was on patrol on 02-03-2010 with the deceased on his private motor bike which he was driving and the deceased was sitting behind him. He saw 3 motor bike riders without number plates who were in violation of S.144 Cr.PC. He signaled them to stop which they failed to do and proceeded towards Raseedabad, Qasim Coloney, Camel Pur Mohalla towards Malik Chowk. He gave chase and the motor bike they were chasing went into a gali at Malik Chowk in order to escape. At Malik Chowk at between 8.30 and 8.45pm 4 persons stopped them and exchanged hot words with them. According to him he was in front and the deceased was behind him when they had turned to get back on their motor bike after the exchange of words when all the four

accused fired at the deceased in order to kill them. The 4 accused escaped from the scene after shooting the deceased. After hearing the firing PC Ghanzafar arrived at the scene. Siraj Abbasi, who later became the complainant, and who is the brother of the deceased also arrived on the scene who took his brother to hospital in an ambulance and he (Fayaz) returned to the PS.

16. From the evidence when read as a whole a number of aspects concern us about (a) the presence of eye witness PW Fayeze at the scene **when the firing occurred on the deceased** and (b) PW Fayeze's identification of the appellant at the subsequent identification parade.

With regard to the presence of eye witness PW Fayeze at the scene when the firing occurred on the deceased.

17. It is true that there is a departure entry of Fayaz leaving the PS for patrolling along with the deceased and that he is not a chance witness however numerous aspects of his evidence do not particularly appeal to reason, logic or commonsense which the court must apply in assessing the evidence of an eye witness as was held in the cases of **Askar Jan V Muhammed Daud** (2010 SCMR 1604), **Muhammed Asif V State** (2017 SCMR 486) and **Haq Nawaz V State** (2018 SCMR 95).

18. For example:

- (a) when they were chasing the motor bike in violation of S.144 Cr.PC why was no message called into PS Baldia Town either by wireless set or mobile phone to update the PS and SP control office on the situation and perhaps seek assistance **and**
- (b) the place of the incident appears to be in some doubt vide entry 61. Was it Niazi Chowk or Malik Chowk which are about 80 paces apart (as per independent PW 5 Musharaf Khan who is a resident of the locality) which should have been easily differentiated. This should have been clear to the eye witness as entry 61 was made very shortly after the incident (although he denies making it) he admitted that it was produced before the judicial magistrate during his cross examination in earlier evidence **and**
- (c) entry 61 also states that **unknown persons** attacked yet the next day when his S.161 statement is recorded he names those who attacked along with their father's name. The question arises that if he did not know the persons who had fired at him at the time how did he the next day know both their names **and their fathers name and**

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- (d) according to his evidence-in-chief 4 persons fired at the deceased (*"Those 4 persons had fired at Tariq Abbasi to kill him"*) however during cross examination when he was confronted with the fact that in his evidence in earlier judicial proceedings only one person fired he states that only one person fired. Such a glaring inconsistency on such a **key aspect** of the case casts serious doubt on his version of events and his presence at the scene **and**
- (e) according to his own evidence the deceased was hit by 10 to 13 bullets but according to the medical evidence the deceased only received 3 entry wounds caused by firearm **and**
- (f) why was only the deceased targeted with a hail of bullets when both police men had been involved in the heated exchange of words with the accused and were **standing close together** and the accused had no enmity with the deceased **and**
- (g) in his evidence he states that the firing was done from behind yet according to the medical report the entry wounds on the deceased were all on the front of his body **and**
- (h) the deceased received at least 3 entry wounds to the head, stomach and arm respectively and 12 recoveries were made at the scene yet PW 3 eye witness Fayez who was **standing close to the deceased** did **not** receive a scratch let alone a firearm injury and no injury was caused to any by stander of which apparently there were around 50, no damage was caused to his motor bike, or any other surrounding buildings or cars through this heavy firing **and**
- (i) why would the 4 accused have spared him especially as he had driven the motor bike into the Mohalla with the deceased sitting behind him and could have recognized them. In such type of cases usually no eye witnesses are left alive (in this respect reliance is placed on *Rukhsana Begum V Sajjad* (2017 SCMR 596) **and**
- (j) once the deceased was shot despite having an SMG and 30 rounds he failed to respond in order to protect the injured deceased from further injury and save his own life by returning fire on the 4 accused in self defense or even resort to aerial firing **and**
- (k) why would the 4 accused simply leave the scene if they were not fired upon by the eye witness **and**
- (l) why did the eye witness not give chase to any of the 4 accused and try to capture them on his motor bike especially as they were all on foot and he was armed with an SMG **and**
- (m) according to his own evidence the deceased was injured after the shooting yet it appears that despite having a mobile phone he made **no attempt** to call for an ambulance or any other assistance for his injured brother officer in order to save his life **and**
- (n) there are material inconsistencies with his earlier evidence under oath about the incident in SC 269/2010 Before 1st Addl. D&S Judge Karachi West (who was hearing this case before its transfer to the ATC court where after all the evidence had to be re recorded), for

example, the number of riders they were initially chasing on the motor bike, that one person fired instead of all the accused, that only one bullet hit the deceased as opposed to 10 to 13, that he produced Entry 61 as Ex 10/A which he now denies, that the deceased was taken to hospital by Suzuki instead of by ambulance **and**

- (o) despite being the only eye witness he did not take the IO to the place of wardat **and**
- (p) apart from his own evidence **no one else** in their evidence saw him at the scene of the incident, for example, PW 1 Siraj Abbasi who had allegedly arrived promptly at the scene of the incident, PC Ghanzafar who arrived immediately at the scene of the incident did **not** give evidence as a PW, PW 5 Musharaf Khan a local who arrived shortly at the scene did not see him at the scene and his name does not appear on any mashirnama. **There is only his evidence that he was present at the scene and**
- (q) in his own evidence he states that at the time when the hot words were exchanged about 50 Mohalla people had gathered yet none of them were made PW's **and**
- (r) none of these Mohalla people who had gathered were made Mashirs **and**
- (s) in his own evidence he states that the complainant Siraj Abbasi had gone with the deceased to hospital in the ambulance but Siraj Abbasi in his evidence does not state this which creates further doubts as to his presence and his narration of the incident **and**
- (t) he seems to have made dishonest improvements in his S.161 statement and his evidence in order to improve the prosecution case **and**
- (u) that on being questioned as to why he was dismissed from service shortly after the incident he remained cagey and did not truthfully answer the question and specifically states that, "It is *incorrect* to suggest that I was dismissed because when dacoit fired I had run away" which answer is completely belied by his show cause notice and Final Dismissal Order dated 30-05-2010 which lead to his dismissal from service on account of him cowardly running away from the scene after his brother officer was shot and for ease of reference reads as under;

"FINAL ORDER

Constable no.24601 Muhammad Fayez of PS Baldia, baldia Town, CCP, Karachi, was issued Show Cause Notice, vide this office SCN No.SP/Baldia/DP/1495, Dated 04-05-2009 on the following grounds:-

"On 02-03-2010 in night shift you along with Constable 13966 Muhammad Tariq Abbasi were detailed on motorcycle patrolling from Chandio Chowk up to Rasheedabad and 29-D. During patrolling accused persons Ashfaq S/o. Qurban along with his three sons namely Aafaq, Zaoq and Shakil brutally killed your colleague in front of you. Although, having government SMG you have shown timidity and cowardice

attitude and didn't fire a single bullet to secure your partner's life. It reflects that you have knitted conspiracy with accused persons and provided ample chance to them for killing of police official".
(bold added)

He submitted reply to the Show Cause Notice. He also appeared before the undersigned and heard in person. His written as well as oral explanation was found Un-Satisfactory, because with little courage he could have saved the life of his colleague PC; Tariq Abbasi of PS Baldia, But instead of that he displayed great Show of cowardice in front of hundreds of people gathered there and witness the crime and fleeing the fellow Constable leaving behind his colleague in pool of blood. Hence to me, he does not deserve to serve police department at any cost. Therefore, he is awarded Major Punishment of "DISMISSAL FROM SERVICE" with immediate effect.(bold added)

SUPERINTENDENT OF POLICE
BALDIA TOWN, CCP
KARACHI.

19. Interestingly this final dismissal order which is dated 3 months after the incident does not say that Afaq (the appellant) only fired on the deceased but that all 4 accused were involved in his brutal murder and that he could have saved the life of his colleague which shows that the deceased was initially only injured by the firing. Even when he was reinstated the charge against him was not withdrawn/dismissed. He was simply given a lesser punishment on account of that charge which remained proved against him perhaps for agreeing to give false testimony in this case. He also had reason to lie in respect of the actual firing incident in order to redeem himself from running away from the scene of the incident where his colleague was killed and to ensure that someone paid for the murder of the deceased through false allegations. Giving false evidence in return for his re-instatement also gave him a motive not to tell the truth about his non presence at the scene at the time of firing. In this respect reliance is placed on the case of **Ata Muhammed** (Supra)

20. Thus, all the above mentioned factors cast severe doubts as to whether eye witness PW 3 Fayez was present at the scene and even if his presence is believed it appears that he ran away at the time of the firing and thus all his evidence from this point is in severe doubt and indicates that he has not been truthful during his examination in chief where he has stated on oath that he was present when PC Ghanzafar and Siraj

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Abbasi arrived and when Tariq Abbasi was taken to hospital by ambulance (when he could not have been if he had runaway when the firing started) as under:

"As we tried to go back I was in front and Tariq Abbasi was behind me. Those 4 persons had fired at Tariq Abbasi to kill him. Tariq Abbasi had received serious injuries and fell and the 4 accused persons had escaped. PC Ghazanfer Ali who was on intelligence duty hearing the noise of firing he came. The elder brother of Tariq Abbasi, Siraj Abbasi had also came and had taken the injured Tariq Abbasi to Hospital in the ambulance and I came back to PS for information and I informed Sub Inspector Taj Muhammad, SIP Taj Muhammad immediately when to the Hospital".(bold added)

21. It may be that he was later re-instated in service but it cannot be ruled out that he was re-instated in return for giving false evidence at the trial of the appellant. Thus, for the above reasons, we tend to disbelieve the evidence of this eye witness especially his evidence in respect of the firing incident on the deceased as we have extreme doubts as to his actual presence at that time.

Turning to eye witness PW Fayez's identification of the appellant at the identification parade before the judicial magistrate.

22. As already discussed it is very doubtful that eye witness PW 3 Fayez was present at the time of the incident or at least after the firing started when he appears to have run away and we have already disbelieved his evidence to this extent. Even otherwise it was a night time incident and it was dark and he has disclosed no source of light in which he could identify Afaq (the appellant). No light bulb or any other source of light was taken into custody and by his own admission he did not know Afaq (the appellant) before the incident and only saw him, if at all, briefly (in this respect reliance is placed on **Gulfam V State** (2017 SCMR 1189); that since there was no blackening on the firearm wounds to the deceased and the eye witness himself was not hit in the alleged hail of bullets he could not have been at a close distance to Afaq (the appellant) and indeed his evidence is silent about how close he was to the appellant at the time of the firing. That according to his own evidence he states that after the exchange of hot words, *"as we tried to go back I was in front and Tariq Abbasi was behind me. Those four persons had fired at Tariq*

Abbasi to kill him" thus the question arises that if he had his back turned how was he able to know which of the 4 persons had fired upon Tariq Abbasi and by his own admission he did not see the actual firing. That he was produced before the judicial magistrate 7 days after his arrest which delay has not been explained. **Importantly** when his S.161 statement was recorded shortly after the incident he does not say that Afaq (the appellant) fired at him and even in his own evidence in chief he states that all 4 accused fired at him and in his S.161 statement he gives no hulia's/description of any of the accused however he does name them along with fathers name which as mentioned above does not appeal to reason when by his own admission he had not seen the accused before and did not know them or their names let alone their father's name. In fact it seems extremely likely that he added these names from the complainant's (Siraj Abbasi's) FIR which was lodged **before** his S.161 statement was recorded and which we shall deal with later in this judgment. He was posted at PS Baldia town and although he was suspended this is where the appellant Afaq was also kept in custody after his arrest and as such we cannot rule out the possibility that appellant Afaq was seen by PW 3 eye witness Fayaz or shown to him before the identification parade especially as this is the contention of the appellant. **As such for all the above reasons we give no weight to Fayeze's identification of Afaq (the appellant) at the identification parade** the purpose of which is to ensure that the witness correctly identifies the accused which we do not believe he could have done based on the reasons mentioned above and on the particular facts and circumstances of this case. In this respect reliance is placed on **Javed Khan V The State** (2017 SCMR 524). **Furthermore**, the identification parade does **not** meet the legal requirements (at the least in terms of the eye witness not seeing the identified person before the identification parade, non verification by the magistrate as to how long the appellant remained in police custody after his arrest and before the identification parade, no names of the dummies being listed along with parentage, objections by the appellants not being recorded, silence in the magistrates report that all required precautions as to a fair identification parade were adhered to; no certificate at the end of the report in the prescribed form) as laid down in the case of **Muhammed Yaqoob V State** (1989 PCr.LJ 2227) as was recently approved by the

supreme court in the case of Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018: Notice in compliance with the order dated 12.02.2019 passed in Criminal Appeal No.259 of 2018 to Mr. Kanwar Anwaar Ali, Special Judicial Magistrate on account of dereliction of duty and lack of sufficient legal knowledge dated 22.02.2019.

23. In conclusion, on our assessment of the evidence of PW 3 eye witness Fayeze when read in the light of the other evidence on record and his conduct on the night of the incident **we do not find it to be reliable, trustworthy or confidence inspiring and disbelieve it at least to the extent of the particulars relating to the shooting of the deceased and thus exclude this aspect of his evidence from our consideration and deem it in so far as it relates to the shooting of the deceased to be of no evidentiary value.**

24. We now need to consider what other material there may be on record which might justify the conviction of Afaq (the appellant) such as circumstantial evidence.

25. With regard to the complainant PW 1 Siraj Abbasi who is the brother of the deceased he is **not** an eye witness to the firing and allegedly reached the place of the incident within a few minutes of the occurrence after being informed of the incident by his friend Haseeb Khan through mobile phone. **Haseeb Khan** appears to be a foundational witness of the prosecution case as it appears that it was his narration of the events to Siraj Abbasi over the phone which lead to Siraj Abbasi going to the scene and this phone conversation between Siraj Abbasi and Haseeb as narrated by Haseeb to Siraj Abbasi which seems to have formed the basis of the FIR lodged by Siraj Abbasi as narrated by Haseeb to Siraj Abbasi over the phone a few hours after the incident (who Siraj Abbasi seems to have wrongly believed) which is the basis of Siraj Abbasi's hearsay FIR and who has **not** been examined by the prosecution to corroborate Siraj Abbasi's FIR especially in respect of the shooting of the deceased nor has any CDR been produced by the prosecution in support of such conversation. Although in the impugned judgment it is mentioned that Haseeb did not give evidence due to security concerns in our view this is a weak argument for him not to give evidence as the court can always

ensure adequate security to a witness especially as witness protection has been provided for in S.21 of the ATA 1997 which was applicable to this case and by other legislation. In our view this is an important omission by the prosecution as their case seems to have been built on the hearsay evidence of a witness who did not give evidence during the trial and has significantly weakened the foundations upon which the prosecution's case has been built as hearsay evidence or a S.161 statement can never replace the value/weight of evidence given under oath which is tested through cross examination. Since Haseeb was also originally on the calendar of witnesses and was later on given up by the prosecution A.129 (g) of the Qanun-e-Shahadat 1984 may also come into play whereby it could be presumed that Haseeb's evidence might not have been favorable to the prosecution's case especially in a case such as this where the single eye witness' evidence (PW 3 Fayaz) is of a very poor quality and in respect of the crucial aspect of firing on the deceased has been disbelieved by us. Likewise PW PC Ghazanfar who was allegedly at the scene of the incident shortly afterwards was also given up by the prosecution and PW Taj Muhammed who PW 3 eye witness Fayaz had initially immediately reported the incident to and who was associated with the important entry 61 - In this respect reliance is placed on the case of **Muhammed Rafique V State** (2010 SCMR 385)

26. When complainant Siraj Abbasi arrives at the scene he sees the body of his brother which is taken to hospital. He also calls PW 4 Ijaz Abbasi his other brother who comes to the scene. **All Siraj Abbasi's evidence is hearsay** in so far as it concerns the incident of firing on the deceased as it was told to him either by Haseeb or Mohalla people none of whom gave evidence as eye witnesses at trial. He says Afaq (the appellant) fired at the deceased and that the accused had given life threats to his brother **which is hearsay evidence and cannot be relied upon**. However in his FIR which was **recorded promptly** approx 2 and a half hours after the incident he names all the accused along with their father's name for giving murderous threatens to his brother (interestingly as observed earlier in this judgment in his S.161 statement given the next day PW 3 eye witness Favez also gives the names of all the accused along with their father's name which he could not have known and thus is a strong indication that he took these names from the FIR which had **already** been

lodged by Siraj Abbasi whilst being in league with the complainant). The complainant PW 1 Siraj Abbasi in his FIR also states;

"Haseeb son of Umer Khan through phone informed that my brother Tariq Abbasi son of Ashfaq Ahmed has been murdered through firearm by Zoaq son of Malik Mushtaq at Malik Chowkand complaints against the accused" (bold added).

27. Significantly, as mentioned earlier, Haseeb who gave him this information did not give evidence as a PW despite the fact that it was Haseeb who told the complainant that **Zoaq had fired at the deceased**. Not only is this **hearsay evidence** but despite blaming Zoaq for murdering his brother in the FIR which was lodged **promptly** after the incident during his evidence he takes a **somersault** and states that it was Afaq (the appellant) who fired at his deceased brother. He also names all the accused in the FIR despite not being an eye witness. The above circumstances reek of the false implication of the appellant by the complainant probably in league with PW 3 eye witness Fayaz who was either not present during the incident or at best ran away on his motor bike at the time of firing without being able to identify anyone and has potentially given false evidence in order to get re-instated into service (which he has been) after his dismissal for cowardly fleeing the scene. With regard to PW 4 Ijaz Abbasi who is the brother of PW 1 Siraj Abbasi and the deceased **his evidence is hearsay in respect of the firing incident** which is not legally admissible in evidence as narrated to him by his brother Siraj Abbasi. Interestingly according to his evidence PW 1 Siraj Abbasi phoned him **shortly after** the incident and told him that the deceased had received injuries from Asfaq, Zouq, Shakeel and Afaque through their firing at him and **not** by any one individual alone. PW 5 Musharaff Khan who is **not** an eye witness but who is a resident of the locality who came to the scene **shortly after** the incident **gives hearsay evidence in respect of the firing incident** and that all the accused fired on the deceased. Thus, we are not particularly impressed/persuaded by the evidence of complainant Siraj Abbasi whose evidence is mainly hearsay and even in material respects differs from his FIR which was lodged **promptly after the incident**. Namely that in the FIR he was informed that Zouq fired and murdered the deceased but in his evidence he has stated that Afaq (the appellant) fired on the deceased. **The evidence of PW 4 Ijaz**

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Abbasi and PW 5 Musharraf Khan in so far as it relates to the shooting is also of no legal value as it is based on hearsay and even otherwise there are some doubts as to the reliability of PW 5 Musharraf Khan's evidence as he says that the deceased was taken to Abbasi Shaheed hospital when in fact he was taken to civil hospital.

28. With regard to the medical evidence in our view this is only supportive of the fact that the deceased was hit by 3 difference bullets which is **contrary** to the ocular account of PW 3 eye witness Fayeaz that the deceased received 10 to 13 bullet injuries all over his body. Thus the medical evidence is of little, if any, assistance to the prosecution which in any event is only supportive in nature and gives further support to the fact that PW 3 eye witness Fayaz fled the scene before the firing on the deceased.

29. We have also observed that empties were recovered on the day of the incident and yet these were **not** sent for ballistic examination immediately **but after** an unexplained delay of 7 days with no proof of safe custody **along with** the firearm which had apparently been recovered from the accused at about that time when he was allegedly arrested from a bus stop 7 days after the incident and as such on account of the delay in sending the empties before the firearm was recovered and **sending them together (firearm and empties) to ballistics** it cannot be ruled out that the empties came from the firearm once it was recovered and then fired and as such the FSL report cannot be safely relied upon which in any event is only supportive evidence. In this respect reliance is placed on the case of **Ali Sher (Supra)**

30. It is also noteworthy that the accused was not arrested from the spot with a pistol and that he has been acquitted in the separate S.13 (d) Arms Ordinance case which had been registered against him and the state has not appealed this acquittal.

31. With regard to motive the alleged motive as put forward by the prosecution in the FIR has not been proven and we do not find that a brief hot exchange of words between the accused and the police whereby the police conceded to the demand of the accused not to enter the Mohalla to

be a sufficient motive so as to lead to this extreme reaction of the accused firing on the deceased.

32. We also note that two of the other co-accused were acquitted (and no appeal against their acquittal has been made so far) despite being also named by eye witness PW 3 Fayaz as firing on the deceased yet the appellant was convicted despite there being no strong other independent corroborative legally admissible evidence against him which appears to be contrary to the dictum as laid down in the case of **Altaf Hussain** (Supra).

33. We do not consider that we need to address any further material on record as in short for the reasons mentioned above we do **not** find the eye witness evidence of PW 3 Fayeze to be confidence inspiring and believable **at least in respect of the firing incident**, that the identification of Afaq (the appellant) by PW 3 Fayeze at the identification parade carries no weight, that the other material on record is supportive only and **even then** that supportive evidence such as medical and ballistic does not strengthen the prosecution case or legally cannot be relied upon and as such we find the prosecution case to be **riddled with doubt** in respect of appellant Afaq and that appellant Afaq is entitled to the benefit of such doubt. The answer, it seems, to the real identity of the person who actually killed Tariq Abbasi, is therefore in the words of the well known American singer and song writer Bob Dylan left, "Blowin' in the wind."

34. For the above stated reasons we set aside the impugned judgment, and by extending the benefit of the doubt acquit the appellant of the charge in the judgment, answer the confirmation case in the negative and direct that the appellant be released from custody unless he is wanted in any other custody case.

35. The appeal and the confirmation reference stand disposed of in the above terms.