IN THE HIGH COURT OF SINDH, AT KARACHI

Cr. A.T Appeal No. D-96& D-97 of 2018

Confirmation Case No. 03 of 2018

PRESENT:
Mr. Justice Muhammad Karim Khan Agha
Mr. Justice KhadimHussainTunio, JJ-

Appellant(s): Syed RiffatHussain& others through Mr. Shah Imroz Khan, advocate&Mr. Abdul Razzak, advocate.
Mr.Muhammad Farooq, Advocate for Syed Buturab Ali.

Respondent(s): The State through Mr.Ali Hyder, D.P.G.

Date of hearing: 21.08.2019

Date of decision: 27.08.2019

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- By this common judgment, we intend to dispose of the above captioned appeals arising from the same judgment dated 21.03.2018, passed by the Anti-Terrorism Court No.XVII, Karachi, whereby the appellants were convicted and sentenced as follows:-

> "Accused persons namely 1) Syed Furqan alias Babaji s/o Syed Hamid Hussain, 2) Faisal Mehmood s/o Muhammad Ibraheem, Syed Buturab Ali alias Irfan s/o Syed Murtaza Kamal
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> > *Under Section 302(b)/34 P.P.C Each & sentenced to death as (Tazir). Accused be hanged with the neck till their death with directions to pay Rs. 1,00,000/- each to the heirs of the deceased by way of compensation u/s 544-A Cr.P.C and in default of payment thereof. Undergo S.I for six months.*

Under Section 7(a) of Anti-Terrorism Act, 1997 each and sentenced to Death to each accused with fine of Rs.1,00,000/- each and in case of default of payment thereof, further undergo S.I for six months.

Under Section 7(c) of Anti-Terrorism Act, 1997 r/w section 324 P.P.C each and sentenced them R.I for 10 years and to pay fine of Rs. 50,000/- each and in default of payment thereof. Further undergo S.I for one month.

Accused AzharHussain s/o alias Faraz s/o NoshadHussain and accused RiffatHussainJaffari s/o Shakir Abbas

Under Section 7(a) of Anti-Terrorism Act, 1997 r/w Section 302/34 P.P.C for each & sentenced them to suffer Imprisonment for life, with directions to pay fine of Rs. 1,00,000/- each and in default of payment thereof, further undergo S.I for six months.

I also order for forfeiture of moveable and immoveable properties of accused persons to the extent of Rs. 1,00,000/- each."

2. Precisely, facts of the prosecution case are that A.S.I Muhammad Feroz, on receipt of information regarding one injured namely Muhammad Saad and a dead body of one Muhammad Faisal, proceeded to AbbasiShaheed Hospital. When seeking approval to record statement of injured, the same was refused due to the condition of the injured. However, A.S.I Feroz inspected the dead body, held inquest in the presence of P.W Majid&Azhar. After completion of the formalities, the dead body was handed over to the relatives whereas P.W Majid was asked to lodge the F.I.R, but after his refusal A.S.I Feroz returned to the police station. Then, on 28th of February 2014 at 8:35 a.m. A.S.I Ferozcame to the AbbasiShaheed Hospital where he was informed that the injured Saad was shifted to Agha Khan Hospital for better treatment. Thereafter, A.S.I Feroz reached at Agha Khan Hospital and recorded the statement of injured u/S 154 Cr.P.C at 1000 hours who disclosed that while they were returning from *Asr* prayers in Suzuki Cultus (No. ATZ-419), near

Ghareebabad Under Bypass at P.S.O Petrol Pump, unknown motorcycle riders came at 0930 to 0945 hours and shot at them, injuring him and killing Muhammad Faisal. Subsequently, the statement was incorporated as F.I.R No. 34 of 2014.

3. On completion of investigation and receipt of challan, a charge was framed by the Court to which the accused pleaded not guilty and claimed to be tried.After recording of evidence of P.W.1 SaadMohsin and P.W.2 MajidUmer, the charge was amended by the trial Court as names of the absconding accused Syed Abbas RazaZaidi&Raza had not been disclosed in the charge.

4. In order to substantiate its claims against the accused at trial, the prosecution examined as many as 11 witnesses, exhibited multiple documents and items. Thereafter, vide statement, side of the prosecution was closed.

5. Statements of appellants were recorded u/s 342 Cr.P.C in which they denied the allegations levelled against them and claimed to be falsely implicated. However, they neither examined themselves on oath nor produced any evidence to back up their defence.

6. After conclusion of the proceedings, Anti-Terrorism Court No.XVII, Karachi while finding the appellants guilty convicted and sentence them as *supra*.

7. Learned counsel for the appellants mainly contended that the impugned judgment is not sustainable under the law; that there is no evidence available on record to connect the appellants with the commission of offence; that the author of the J.I.T report

was not examined by the prosecution; that the crime was unwitnessed and the complainant himself stated that he could not identify any of the accused at the scene; that the appellants' confessions before the police were inadmissible and no confession was recorded before the magistrate; that the identification parade, being defective, cannot be relied upon; that there is a delay in the lodging of F.I.R and that the injured has not supported the prosecution case. The counsel, therefore, for the above reasons prays for the acquittal of the appellants while giving them benefit of the doubt. In support of the contentions, the counsel has relied upon the case law reported as ***PLD 2018 SC 178 & PLD 2019 SC 481.***

8. Conversely, the Deputy Prosecutor General has argued that the appellants were identified during the identification parade by P.W Ahmed Ali which in itself was not defective; that the appellants had confessed to the crime in front of the police;that all the P.Ws fully supported the prosecution case; that appellants admitted their guilt before J.I.T and the same has been produced in evidence during trial; that there is no enmity between the parties; that the F.S.L report is in positive; that after framing the amended charge, the trial Court did not recall and re-examine the P.W 1 & 2 namely SaadMohsin&MajidUmer respectively, committed illegality which is not curable under the law. Therefore, he prays that the case may be remanded back to the trial Court.

9. We have given due consideration to the arguments advanced by learned counsel for appellants, considered the

contentions of learned D.P.G for the State and examined the material available on record.

10. Before proceeding into the merits of the case, it is noted that the facts as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment and the same will not be reproduced herein for the sake of brevity and avoiding repetition.

11. It is an undisputed fact, after the perusal of evidence, that on 27.02.2014 the injured and deceased were fired upon and received multiple injuries, who were transferred to Abbasi Shaheed Hospital where Muhammad Faisal had been declared dead and complainant Saad was under treatment. As far as the delay in the lodging of F.I.R is concerned, the same is reasonably explained by the prosecution. The delay, therefore, is not fatal to the prosecution. A perusal of record shows that the crime was unwitnessed and the complainant, who was also one of the victims of the shooting, failed to identify any of the shooters in the heat of the moment. Moreover, even the appellants have not been identified by the injured P.W Saad Mohsin, who in his examination-in-chief deposed that *"I had not seen any person while making upon firing upon us"* and further deposed that *"I cannot say about the identity of the accused as I had not seen the accused"*. Besides the complainant-victim himself, no one had witnessed the alleged incident, thereby making the crime unwitnessed. As far as the confessions of the appellants before the police are concerned, same do not have any evidentiary value and are inadmissible under the law.

12. In our view, the crucial point involved is whether the identification parade, wherein the appellants were identified to be shooters, is one that can be safely relied on so as to uphold the convictions awarded to the appellants. It is a matter of record that the complainant had not disclosed any description of the culprits in his statement nor was any present in the F.I.R. The appellants were not known to the victim previously or to any other witnesses for that matter. Since no distinguishing features were available at the time of identification parade, it would make it highly doubtful that the appellants were correctly picked out of the dummies as it leaves the identifier with a chance to falsely net out anyone from the crowd. Therefore the contention that the appellants were picked out of the dummies because the police believed them to be the suspects or had to satisfy ulterior motives cannot be ruled out. It had been held by the Hon'ble Apex Court in the case of ***Javed Khan v. The State (2017 SCMR 524)*** while narrating the importance of availability of a description by an eye-witness that:-

> *"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sind 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In Alim v. State*

(PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In LalPasand 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.*
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> *9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) and Idrees 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 AjmalMian 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 NasirAslamZahid 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."*

Similar view had been taken by the Hon'ble Apex Court in the case of ***MianSohail Ahmed v. The State (2019 SCMR 956)***.

13. As far as how the identification parade of the appellants is concerned which has been held after 20 days of their arrest and 2 and a half months after commission of the incident through P.W Ahmed Ali, who's name had not been disclosed during investigation proceedings by any of the witnesses, but has been introduced at the time of conducting the identification parade before the magistrate. Even otherwise, he has not been examined by the prosecution and has been given up. The presumption would be that if he would have been examined, he would not have supported the prosecution case. Furthermore, the memo of

identification test does not contain the name of the complainant, witness, mashir and C.N.I.C numbers and addresses of the dummies, neither in memo of identification parade nor in the list of dummies. Therefore, it is our firm belief that the same was not carried out while following the guidelines as jotted down in the case law reported as ***KanwarAnwaar Ali (PLD 2019 SC 488)*** which are reproduced as follows for the sake of convenience:-

> *"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 MuhammdYaqoob and another v. The State (1989 PCr.LJ 2227) and in the said judgment Mr. Justice Khalil-ur-RehmanRamday (as his lordship then was a Judge of the Lahore High Court, Lahore) had observed as follows:*
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> *' ...*
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> *23. 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 summarised as under:-*
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> *(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;*
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> *(b) a test identification, where the possibility of the witness having seen the accused persons 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;*
>
> *(c) identification parades should never be held at police stations;'*

4. It may also be observed that during a test identification parade the requirement regarding specifying by a witness the role of an individual accused person in commission of an offence had also been identified and emphasized by this Court in the cases of Ismail and another v. The State (1974 SCMR 175), Khadim Hussain v. The State (1985 SCMR 721), Ghulam Rasul and 3 others v.The State (1988 SCMR 557), Asghar Ali alias Sabah and others v.The State and others (1992 SCMR 2088), State/Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo (1993 SCMR 585), Mehmood Ahmad and 3 others v.The State and another (1995 SCMR 127), Siraj-ul-Haq and another v.The State (2008 SCMR 302), Ghulam Qadir and 2 others v.The State (2008 SCMR 1221), Muhammad Afzal alias Abdullah and another v. State and others (2009 SCMR 436), ShafqatMehmood and others v.The State (2011 SCMR 537), Sabir Ali alias Fauji v.The State (2011 SCMR 563), Muhammad Fayyaz v. The State (2012 SCMR 522), Azhar Mehmood and others v.The State (2017 SCMR 135), Hakeem and others v.The State (2017 SCMR 1546) and Kamal Din alias Kamala v.The State (2018 SCMR 577).

5. Identification of many accused persons in one line in one go during a test identification parade has also repeatedly been held by this Court to be improper and it has been clarified by this Court on a number of occasions that every accused person is to be put to a separate test identification parade and a reference in this respect may be made to the cases of Lal Pasand v. The State (PLD 1981 SC 142), Imran Ashraf and 7 others v.The State (2001 SCMR 424), Ziaullah alias Jajj v.The State (2008 SCMR 1210), BachaZeb v.The State (2010 SCMR 1189), Shafqat Mehmood and others v.The State (2011 SCMR 537), Gulfam and another v.The State (2017 SCMR 1189), Hakeem and others v.The State (2017 SCMR 1546) and Kamal Din alias Kamala v.The State (2018 SCMR 577)."

14. Conclusively, it is held that the identification parade, suffering from irregularities and illegalities, cannot be safely relied upon to uphold the conviction and sentence so awarded to the appellants by the trial Court.

15. Coming to the J.I.T report, the Hon'ble Apex Court has been pleased to opine in case titled ***Province of Punjab through Sec. Punjab Public Prosecution Department & another v. Muhammad Rafiq& others (PLD 2018 SC 178)*** that *"the said report is an opinion of the members of the J.I.T, and it can be considered, at the most, as a report u/s 173 Cr.P.C. It is well-settled by now that report u/s 173 Cr.P.C is inadmissible in evidence as laid down by this Court in case of* ***Saeed Muhammad Shah & another v. The State (1993 SCMR 550)."***

16. So far the contention of learned D.P.G that the learned trial Court has committed irregularities by not recalling and re-examining the P.W 1 & 2 namely Saad Mohsin & Majid Umer respectively after framing of the amended charge, therefore prayed that the matter may be remanded to the trial Court by setting aside the impugned judgment is concerned, it has been held in case of ***Abdul Ghaffar v. The State & another (2006 SCMR 56)*** that:-

> *"6. Moreover, if it is taken to be an irregularity by not recalling, re-summoning or examining the witnesses after the alteration of the charge 537, of the nature as in the instant case, then it is curable under section 537 Cr.P.C. and the conviction and sentence passed against the petitioner cannot be reversed and moreso when the objection was not raised at the trial and even, later on, during the hearing of appeal which negate the occasion of any failure of justice in view of the explanation to section 537, Cr.P.C. which reads as under:--*
>
> > *'**Explanation**.--- In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'"*

17. The law developed in our country is based on the maxim that it is better that ten guilty persons are acquitted rather than one innocent person is convicted, reference in this regard may respectfully be placed on the case law titled ***The State v. Mushtaq Ahmad (PLD 1973 SC 418)*** and ***Khalid Mehmood v. The State (2011 SCMR 664).*** While parting, we feel compelled to also add that the term *'justice'* shall not stand satisfied unless at the end of the day *'truth is not found'* because justice is not meant to follow the dotted line(s) of prosecution or defence but is the name of *'finding the truth'*. Courts can neither swipe off a tear falling from the eye of a victim nor it can bring a single moment of liberty back for which an accused otherwise was entitled. The Court is hoped and believed to hold the scale of justice strongly without being influenced with sorrow of a victim or heinousness of an allegation. No doubt, conviction is one of the two scales of *Criminal Administration of Justice*, but it shall never over-weigh the scale of acquittal unless all reasons of law and judicial logic deny the acquittal because the whole structure of Criminal Administration of Justice revolves around the golden principle of *benefit of doubt* and the principle of benefit of doubt only fulfils its meaning when the principle laid down in ***Mushtaq Ahmad's*** *(supra)* is followed.

18. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellants beyond any shadow of doubt. Therefore, the above captioned appeals are allowed, the conviction and sentence awarded to the appellants is set aside and they are acquitted of the charge while extending benefit of doubt to them. They be released forthwith if not required in any other custody case. The reference made by the trial Court for confirmation of death sentences is answered in the negative.

J U D G E

J U D G E

Mohammed Karim Khan Agha. J. I have had the privilege to go through the judgment authored by my learned brother and am in complete agreement with the same and hence I have signed it. I would however like to add a separate note to emphasize the issue concerning the remand of the case back to the trial court which has been ably dealt with in the judgment and which was greatly insisted upon by learned DPG.

2. The background to the DPG seeking remand of the *case* to the trial court for re recording the evidence of PW's 1 and 2 is that after the framing of the charge the evidence of PW's 1 and 2 was completed. The charge was re framed as an amended charge after one of the absconding accused joined the trial but the evidence of PW's 1 and 2 was not re recorded before either the earlier absconding accused nor his counsel who had now joined the trial and thus he had no opportunity to cross examine these witnesses whose evidence was relied upon by the trial court in the impugned judgment which convicted all the appellants.

3. In a capital case such as this if a witnesses evidence is not recorded in the presence of the counsel of the accused or a counsel appointed for him by the court in the absence of his own counsel this will usually justify the remand of the case back to the trial court for the rerecording of that witnesses evidence in front of the accused and his counsel who were absent at the original trial.

4. S. 231 of the Cr.PC, which was relied upon by the DPG to justify the remand of the case, also provides as under;

> **"S.231- Recall of witnesses when charge altered**. Whenever a charge is altered or added to by the court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material."

5. For assistance and ease of reference the original charge and amended charge are set out below.

> The original charge framed on 01-11-2014 reads as under:
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> **"CHARGE"**
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> That on 27.02.2014 at about 2200/2215 hours at Gareebabad under pass near PSO Petrol Pump, Sir Shah Suleman Road you accused Syed RifatHussain, AzharHussain, Syed Buturab @ Han, Syed Faisal Mehmood and Syed Furqan @ Babaji duly armed with pistol came on motorcycles made firing upon Muhammad Faisal and Muhammad Saad seated in Car Registration No.ATZ-419 "Suzuki Cultus" colour White with intention to commit their murders with sole object to create religious and sectarian violence. In the result, whereof Muhammad Faisal and Muhammad Saad had received serious fire arm injuries and both were taken to AbbasiShaheed Hospital where Muhammad Faisal succumbed to his injuries. By above act you had created terror, panic, sense of fear and insecurity in the public and section of community. Thereby, you have committed an offence punishable U/s.7(1)(a)(c) of ATA, 1997 R/w Section 302/324/34 PPC and within the cognizance of this court.
>
> And I hereby direct that you be tried by *this* Court on the above said charge."
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> The amended charge framed on 17-11-2015 reads as under;
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> **AMENDED CHARGE**
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> "I AkhlaqueHussainLarik, Judge, Anti-Terrorism Court No.VII, Karachi, charge you, as follows:
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> That on 27.02.2014 at about 2200/2215 hours at Gareebabad under pass near PSO petrol pump, Sir Shah Suleman Road you accused Syed RifatHussain, AzharHussain, Syed Buturab alias Irfan, Syed Faisal Mehmood, and Syed Furqan alias Babji alongwith absconding accused Syed Abbas Raza Zaidi & Raza duly armed with pistol came on motorcycle made firing on

> Muhammad Faisal and Muhammad Saad, who were in car bearing registration No.ATZ/419 with intention to commit their murders for sectarian reason, as a result of which they received fire arm injuries and were taken to Abbasi Shaheed Hospital, where Muhammad Faisal succumbed to injuries in hospital. Thereby you have committed an offence punishable us.7(a) of ATA, within the cognizance of this Court.
>
> And I hereby directed that you be tried on the said charge."

6. Hence as a matter of law the case prima facie should be remanded to the trial court for at least the re recording of the evidence of PW1 and 2 in the presence of all the accused and their counsel and indeed this was one of the main arguments of the DPG. The question therefore arises if there can be any circumstances which might in exceptional situations based on the particular facts and circumstances of the case which might justify this law not being followed by the court.

7. Before proceeding further I would point out that I fully concur with the principle that in a capital case where a person's life is at stake all procedural safeguards which an accused is entitled to must be jealously safeguarded and ensured are made available to him especially with the inclusion of Article 10(A) in the Constitution.

8. It is well known that the accused is regarded as the favored child of the law and that in nearly all criminal trials the onus lays on the prosecution to prove the case against him beyond a reasonable doubt. Thus, if the appellants sought a remand based on the scenario which arose in this case then the court should remand the case or even if the appellants counsel did not request a remand the case should be remanded especially if the accused had been convicted at first instance and the evidence against him prima facie appeared to be strong then again the court should remand the case in order to protect the accused right to a fair trial.

9. To my mind however the case should not be automatically remanded on the request of the prosecution for such lapses without application of judicial mind by the judge especially if such a remand might prejudice the convicts and benefit the prosecution. For example, by giving the prosecution a chance to fill in any

lacuna's in its case or make its case even stronger against the accused/convict or unnecessarily extend the convicts time *in* jail. Much will depend on the facts and circumstances of each case and no hard and fast rule can be set down in this regard but I consider that the court does have discretion whether to remand the case in the scenario which arose in this case.

10. In this case none of the appellant's counsel, despite being aware of the above lapse, wanted the case to be remanded for re recording of the evidence of PW 1 and 2 and all the appellant's counsel wanted the case to be decided on the evidence on record by this court despite all the appellants being convicted and sentenced to death since they did not consider the evidence of PW's 1 and 2 to be of particular significance to the case against them.

11. In my view the two *PW's* who had not been re examined had not given any evidence which could lead to the conviction of the convicts and was not particularly relevant to bring home a conviction against the accused and thus if the case was remanded the prosecution by re examining Pw's 1 and 2 would get in my view an unjust opportunity to improve their case to the detriment of the accused/convicts and it is certainly not the role of the court to allow the prosecution the premium of improving its case especially when it was for the trial court or the prosecution at trial to recall the witnesses for their fresh examination. The accused/convicts should therefore not be prejudiced at the expense of the failings of the prosecution or the trial court.

12. Even if the 2 PW's gave fresh evidence which was the same as before this would have no effect on the outcome of the trial court judgment or the fate of this appeal which even taking into account the evidence of the 2 PW's who were not recalled was a case of acquittal as found by us. Thus, by remanding the case would have again prejudiced the accused/convicts as they would have spent possibly a further year or two more in jail while there trial was completed and before their appeal was heard by this court with the same result as we have found in this judgment which is an

acquittal.

13. Even, otherwise based on the particular facts and circumstances of the case in my view the language of 5.231 as set out above did not call for remanding the case as the amended charge was essentially the same as the original charge in that hardly any alteration or addition of any substance or relevance had been made to the amended charge as can be seen by a comparison of the wording in the original charge with the wording in the amended charge as set out earlier in this note so the PW's evidence would have most likely been the same and no cross examination would have been required by the defense counsel who were deprived their right of cross examination at the original trial since their evidence was not particularly relevant for their conviction and even none of the other accused who were present choose to cross examine either of the PW's who had completed their evidence before the charge was amended. Thus, overall, remanding the case at the insistence of the prosecution would have had either two results (a) being prejudicial to the accused/ convicts or (b) being a pointless exercise which would only have lead the accused/convicts spending more time in jail before their ultimate acquittal on appeal which in my view would not have met the ends of justice. The case of **Abdul Ghaffar**(Supra) as cited in the judgment is also applicable based on the facts and circumstances of this case.

14. It may be that a judge is a neutral umpire who is not to favour any party but in my view in a criminal case the judge should step in if what is contemplated by the prosecution will help strengthen their case after it has been closed to the detriment of the accused/ convicts. In the case of Muhammad Naeem V The State (unreported) dated 10.05.2019 in Criminal Appeals 81-L and 82-L of 2017 the supreme court held as under:

> "In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking

> sides,**The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning, strikes at the very foundations of fair trial, which is now recognized as a fundamental right under article 10-A of our Constitution.**
>
> In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner **amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution.** See *Dildar v. State; PaindaGul v. State and State v. Arniad Ali*".(bold added).

15. Of course, as mentioned above, if the appellants had sought a remand of the case the situation would have been different or if for example the failure of one party not to have the evidence of a PW recorded in the presence of his lawyer would have disadvantaged/prejudiced him especially vis a vis his right to cross examination.

16. In short I am of the view that judges should apply the law dynamically in criminal cases so that fair, common sense decisions are made within the four corners of the law based upon the evidence before them without giving the prosecution any unjust premium which may enable it to improve or fill in the lacuna's in its case after the case has been closed by the side of the prosecution to the disadvantage/prejudice of the accused/convict. Such view I consider fits in with long settled view of the supreme court where if the prosecution failed to put any question to an accused in *his* 5.342 Cr.PC statement which was relied upon by the trial court to convict him the case could not be remanded back to the trial court, if the appellant objected, because this would enable the prosecution to fill in lacuna's in its case to the detriment/prejudice of the accused/convict and thereby giving the prosecution a second

unjustified so called second bite of the cherry. In this respect in the recent supreme case of **Nusrat All Shah and other V the State** (unreported) dated 20-02-2019 in Criminal Appeal No.24-26-K of 2018 it was held as under:

> "The law is settled by now that a piece of evidence or a circumstances not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against the accused person facing the trial. **In the case in hand through an act or omission of the Court a serious lacuna in that regard had crept into the case of the prosecution and the accused persons could not be prejudiced on account of the said act or omission of the Court. Through the impugned judgment passed by it the High Court had allowed that lacuna to be filled through remand to the detriment of the appellants. The High Court was expected to hold the scales of justice in balance and not to tilt the same in favour of the prosecution. In this view of the matter remand of the case by the High Court to the trial court to fill that lacuna to the detriment of the accused persons has been found by us to be militating against the interests of justice.** These appeals are, therefore, allowed, the impugned judgment passed by the High Court remanding the case to the trial court is set aside, the matter is remanded to the High Court for deciding the appeals filed by the convicts against their convictions and sentences on their merits on the basis of the existing record and in accordance with the law," (bold added)

17. Thus, based on the particular facts and circumstances of this case and the above discussion I am of the considered view that this was an exceptional case where this court rightly did not remand the case back to the trial court for re recording the evidence of PW'1 and 2 or for any other reason.