

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Criminal Jail Appeal No.273 of 2013
Criminal Appeal No.231 of 2013

Appellant. Muhammad Ali s/o Yameen Khan
through Mr. Ahtesham Ullah Khan, Advocate.

Respondent. The State through Mr. Saleem Akhtar Buriro,
Additional Prosecutor General Sindh.

Criminal Acquittal Appeal No.213 of 2013

Appellant. Gul Wali Khan S/O Shah Wali Khan
Nemo

Respondents. Muhammad Ali S/O Yameen Khan
through Mr. Ahtesham Ullah Khan, Advocate.

The State through Mr. Saleem Akhtar Buriro, Additional
Prosecutor General Sindh.

Criminal Revision No.118 of 2013

Appellant. Abdul Rehman S/O Muhammad Azam Khan
Nemo

Respondent No.1 Muhammad Ali s/o Yameen Khan
through Mr. Ahtesham Ullah Khan, Advocate.

The State through Mr. Saleem Akhtar Buriro, Additional
Prosecutor General Sindh.

Date of hearing: 30.03.2020 and 01.04.2020.

Date of Announcement 10.04.2020.

J U D G M E N T

Zulfiqar Ali Sangi, J:- These Cr. Appeals, Cr. Acquittal Appeal and Cr. Revision are arising out of the single judgment passed by the learned IInd Additional District & Sessions Judge Karachi-East, in

Special Case No. 360 of 2003 and the same are arising out of Crime No.79/2003 U/S. 302/109/34 PPC registered at Al-Falah K.E. After trial vide judgment dated 27.05.2013 the appellant Muhammad Ali s/o Yameen Khan was convicted and sentenced to suffer Imprisonment for life for committing Qatil-i-Amd of deceased Azam Khan. He was also directed to pay Rs.50,000/- as compensation to the legal heirs of deceased in view of Section 544-A of Criminal Procedure Code and in default of payment he was ordered to suffer further SI for 6 months. The benefit of Section 382-B Cr.P.C. has also been extended to the appellant and the other accused Ali Bath Khan S/O Meer Hajat Khan, Missal Khan S/O Asmatullah were acquitted from the charges.

2. Being aggrieved and dissatisfied by the judgment passed by learned IInd Additional Sessions Judge Karachi-East, the aforesaid appeals have been preferred by the appellant Muhammad Ali, the complainant also filed the Cr. Acquittal Appeal and the son of the deceased being aggrieved filed Cr. Revision for enhancement of the sentence, therefore all the above appeals and revision are decided through this single judgment.

3. The brief facts of the prosecution case, in a nutshell, are that on 28.04.2003 the instant FIR was registered based on S.154 Cr.P.C. statement of Gul Wali Khan stating therein that on 27.04.2003 there was Valima Ceremony of Abdul Rehman son of Azam Khan at Shamsi Marriage Hall. After attending it, Azam Khan set out in his car bearing Registration No.AB-9410, Suzuki Khyber, for going to his house on 28.04.2003, at about 12.30 am along with his nephew Gul Wali Khan, his daughter's son Azizullah Khan and friend Chaudhry Ihsanul Haq. At about 12.45 am when they reached Malik Blocks Work, Al-Falah Society, Shams Road, all of a sudden three persons emerged and

stopped their car and started firing at Azam Khan Masood during which he sustained bullet injuries and succumbed to his injuries. The other passengers in the car became nervous and alighted from the car and raised cries upon which the culprits leaving black coloured Motorcycle bearing Regn. No: RP-169, Honda CG-125 and a Mobile Telephone Set of Nokia-3310 bearing No.0300/2316480 on the spot and made their escape good towards Al-Falah Society. While running, they asked one person of a black and yellow taxi, standing at some distance that “Khalid run away, we are coming at that very place” upon which the said Taxi walla drove away the taxi speedily. Gul Wali Khan Azizullah and Chaudhry Ihsanul Haq removed the deceased to the Jinnah Hospital, where from such information was laid at the Police Station Al-Falah from where ASI Wahid Bux went to the hospital, moved letter of request to the MLO on duty for permission to conduct the necessary formalities and after obtaining such permission he inspected the dead body, prepared inquest report and then handed over the dead body and papers to the MLO for conducting the autopsy which was conducted accordingly. He also recorded statement of the complainant Gul Wali Khan son of Shah Wali Khan on plain paper on the basis of which formal FIR bearing Crime No.79 of 2003 U/S 302/34 PPC was registered at P.S. Al-Falah investigation whereof was entrusted to S.I. Sami Jan.

4. After completion of the investigation, the I.O. submitted the charge sheet before the trial court. Thereafter formal charge was framed to which the accused pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined 09 prosecution witnesses who exhibited certain documents and other items in support of its case and thereafter the side of the prosecution was closed. The statement of the accused was recorded U/S 342 Cr.P.C to which he

denied all the allegations leveled against him. He did not examine himself on oath nor lead evidence in his defence.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 27.05.2013 passed by the trial court and, therefore, the same may not be reproduced here to avoid duplication and unnecessary repetition.

7. Mr. Ahtesham Ullah Khan learned counsel for the appellant Muhammad Ali has contended that the appellant is innocent and involved in the present case due to enmity which is admitted by the complainant; that the prosecution has not proved the case against the appellant beyond a reasonable doubt; that there are material contradictions in the evidence of prosecution witnesses which make the entire case of the prosecution as doubtful; that ocular evidence conflicts with the medical evidence; that the Magistrate who conducted the identification parade was not examined by the prosecution and thus for any of the above reasons the appellant should be acquitted of the charge based on the benefit of the doubt being extended to him.

8. On the other hand, Mr. Saleem Akhtar Buriro learned Additional Prosecutor General has fully supported the impugned judgment and contended that the prosecution has proved its case against the appellant Muhammad Ali by producing confidence-inspiring evidence; that no major contradiction has been pointed out by the defence counsel; that oral as well as medical evidence is in line with each other; learned Add.P.G however, conceded that trial court has rightly acquitted the accused Ali Batt Khan and Missal Khan and he further contended that no case for enhancement is made out, therefore, he prayed that appeals filed by the appellant Muhammad Ali and the Acquittal Appeal and Revision for enhancement may be dismissed.

9. We had served notices on both the counsel who had respectively filed the appeal against acquittal and criminal revision application however they were called absent without intimation by relying on Supreme Court case of Gulsher V. The State, Cr. Appeal No. 304 Of 2013, order dated: 13-10-2014 (Unreported) and Allah Ditta, etc V. The State Cr. Appeal No: 263 of 3013 order dated 15-10-2014 (Unreported) due to the fact that the appellant had been behind the bar for a considerable period of time and the fact that APG could, and did, duly assist us in both the appeal against acquittal and Criminal Revision Application in the interest of justice we proceeded to decide this matter.

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 and the impugned judgment with their able assistance.

11. After our reassessment of the evidence on record we have found that the prosecution has **not** proved the case against the appellant, Muhammad Ali, beyond a reasonable doubt through trustworthy and confidence-inspiring evidence.

12. None of the accused persons were nominated in the complainant's statement U/S 154 Cr.P.C and the FIR. No description (Hulia) is given in the said statement and the FIR. No role has been assigned to any of the accused in the statement under section 154 Cr.P.C of the complainant and in the FIR. The Honourable Supreme Court of Pakistan in the case of **Mian SOHAIL AHMED and others Versus The STATE and others (2019 S C M R 956)**, has held as under:-

7. No role was assigned to the suspects by the witnesses, especially when the first information report

clearly describes two different roles to the appellants; one that of an assailant, while the other of a driver of a motorcycle who drove the assailant away. If a witness fails to give the description of the part played by the suspect in the crime, the credibility of the witness stands questioned as he fails to complete the picture of the crime scene, thus inviting caution and circumspection in assessing the evidentiary value of the identification evidence. This Court over the years has placed little reliance on such identification evidence. Even in the subsequent identification by the complainant in court, which has little evidentiary value, he failed to point an accusing finger at the appellants to say who did what, therefore the parts played by the appellants in the crime remain a mystery. See: In the matter of Kanwar Anwaar Ali (PLD 2019 SC 488) on the absence of a role assigned by the witness in an identification parade.

The Honourable Supreme Court of Pakistan in the case of **HAKEEM and others V. The STATE (2017 S C M R 1546)**, has also held as under:-

4. It has come on record that there was an old blood feud between the parties, therefore, the possibility that accused were already known to the complainant cannot be ruled out yet neither the present appellants nor the petitioner were nominated in the FIR except Ramzan son of Allah Bux. They were picked up by the prosecution witnesses in the identification parade. As to the identification parade, the same was not held in accordance with the guidelines contained in the Police Rules, 1934. The Rule 26.32(1)(d) inter alia require "the suspects shall be placed among other persons similarly dressed and of the same religion and social status, in the proportion of 8 or 9 such persons to one suspect. Each witness shall then be brought up separately to attempt his identification. Care shall be taken that the remaining witnesses are " still kept out of sight and hearing and that no opportunity is permitted for communications to pass between witnesses who have been called up and those who have not." PW-5, Imdad Ali, Assistant Mukhtiarkar, Mirpursakro, in whose presence the identification parade was conducted, has stated in his deposition that he arranged 22 dummies. He deposed "the accused persons namely Ghulam Mustafa, Bodo, Noor Mohammad, Khuda Bux, Usman, Hakim and Imdad were mixed up in the row with dummies (sic) according to their choice and thereafter the complainant Wali Muhammad and PWs Jan Mohammad and Abdullah picked them up from the row." So in-fact seven accused were lined up with dummies for identification. Furthermore, during the identification parade, no specific role played in the incident was assigned to any particular accused. This Court in the case of Azhar Mehmood v. State (2017 SCMR 135) has held that in an identification parade, **if the accused were identified without reference to any role played by them in the incident, the same is of no evidentiary value.** A quote from the judgment of Azhar Mehmood's case is as follows:-

"We have gone through the statements made by the supervising Magistrates, i.e. PW5 and PW10 as well as the proceedings of the test identification parades and have straightaway noticed that in the said parades the present appellants had not been identified with reference to any role played by them

in the incident in issue. It has consistently been held by this Court that such a test identification parade is legally laconic and is of no evidentiary value and a reference in this respect may be made to the cases of 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), 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), Shafqat Mehmood and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563) and Muhammad Fayyaz v. The State (2012 SCMR 522)"

13. Appellant Muhammad Ali was arrested on 21-05-2003 and the identification as alleged was conducted on 26-05-2003 with the delay of 05 days and the same was not explained by the prosecution. The identification parade is also doubtful and disputed as the complainant deposed during his examination in chief that he attended the court on 26-05-2003 where identification parade was held in which he had correctly picked out the three accused persons whom he identified before the court Accused Missal Khan and Ali Batt Khan present in court are also same but he has not taken the name of appellant Muhammad Ali. During cross-examination, he stated that he was not asked by the Magistrate about the specific role of the culprits. PW Azizullah (Eye witness) deposed that on 26-05-2003 he appeared before Magistrate where he identified accused, Muhammad Ali, Younus, and Taufeeq who were standing in a row of about 13/14 dummies (He has not given the role of the appellant). During cross-examination, he stated that he saw accused persons in the headlight of the car and as well as lights coming from the nearby houses. PW Mudasil Khan in his cross-examination stated that he was asked by some family member of deceased Azam Khan for appearing before the Magistrate for an identification parade, he further stated that he also did not know those three persons who came running and boarded in the taxi, prior to this incident and he had not identified those three persons in the identification parade. PW Bahadur Shah stated in his cross-

examination that those three persons who had come running and occupied the taxi were not put in identification parade through him before the Magistrate. The Magistrate had not inquired from him if he knows those three persons or not. PW Ahsanullah (Eye witness) in his examination in chief deposed that investigation officer produced him before the Magistrate where his statement under section 164 Cr.P.C was recorded so also he identified the accused persons namely Muhammad Ali, Taufeeq and Younus but their names he knows later on through police at the time of identification parade he identified only appellant Muhammad Ali while he did not identify other accused before the trial court hence his evidence on the point of identification is not reliable. We do not find any mashirnama of identification parade in respect of the appellant Muhammad Ali in the entire file. The important aspect of the case is that the Magistrate who conducted the identification parade has not been examined by the prosecution and thus the accused had no chance to cross-examine him which may have led to his evidence being discarded. The identification parade also appears to be a joint one which has been deprecated by the superior courts.

14. PW Ahsanullah (Eye witness) in his examination in chief deposed that investigation officer produced him before the Magistrate where his statement under section 164 Cr.P.C was recorded so also he identified the accused persons namely Muhammad Ali, Taufeeq and Younus but their names he knows later on through police at the time of identification parade, said statement under section 164 Cr.P.C was not exhibited nor the mashirnama of identification in respect of appellant Muhammad Ali was exhibited in the evidence even the recording Magistrate was not examined as discussed above.

15. The complainant has given contradictory evidence on the point of

the role played by the accused persons at the time of the incident. In his statement U/S 154 Cr.P.C he has stated that three-person intercepted their vehicle, opened fire with the firearm at his uncle Azam Khan Masood and fled away towards Al-Falah Society, whereas in examination in chief he deposed that a motorcycle on which three-persons were riding appeared, they alighted from the motorcycle, one went ahead while out of those three persons two came in front of their vehicle while one came on the driver's side. All three persons were having T.T pistols, Azam Khan inquired from the person of small height who had come on the driver side if he needed money, that person replied that he was not a dacoit and soon thereafter he made three fires straight at Azam Khan. He during cross-examination stated that he has not stated in his FIR specifically how many culprits had made firing at the deceased.

16. The complainant in statement U/S 154 Cr.P.C did not state a single word that the accused left their motorcycle and mobile phone at the place of the incident after murdering the deceased Azam Khan though the same was recorded at the mortuary of Jinnah Hospital Karachi on 28-04-2003 at 0310 hours, whereas he in his cross-examination deposed that they shifted the Azam Khan on the rear seat and took him to the O.T Hospital. Azizullah was left by us at the spot to keep surveillance over the motorcycle abandoned by the culprits. The complainant explained such fact and deposed that since there was the darkness of night and they were disturbed therefore he could see the motorcycle left by the culprits and nothing else, which is also self-contradictory and when he has not seen the motorcycle due to darkness of the night then how he left Azizullah for the surveillance of said motorcycle.

17. The approach of the accused persons at the place of incident and murdering the deceased Azam Khan is also doubtful from the evidence of prosecution witnesses as some of the witnesses deposed that appellant Muhammad Ali came at the place of incident on the motorcycle and some of them deposed that he along with two others was sitting in the taxi. PW Mudasil Khan deposed in examination-in-chief that he saw that accused Muhammad Ali, Younus, Abdul Aziz and Toufique present in court are the same who came running and boarded in the taxi in which Ali Batt and Missal Khan were sitting on co-driver's seat and rear seat respectively while accused Khalid Mehmood was sitting on its driving seat. Another PW Bahadur Shah also deposed the same. The complainant, PW Azizullah and PW Ahsanullah have given different versions about Muhammad Ali and deposed he came on a motorcycle along with two other accused persons and both the two sets of witnesses are contradictory to each other on this aspect.

18. The complainant during cross-examination stated that the deceased Azam Khan was fired from a distance of about 6 inches, whereas according to the post-mortem report there is **no blackening and charring** at the site of injuries. The postmortem report issued by the doctor also suggests some doubts about its authenticity as the incident took place on 28-05-2003 and the postmortem report showed it's date as 28-04-2003. Thus, we disbelieve the evidence of the complainant.

19. The complainant stated during cross-examination that four accused persons were arrested on 21-05-2003 and he also came to know that the accused persons were arrested from Lahore whereas mashirnama of the arrest of those four persons including the appellant Muhammad Ali shows that they were arrested from the shrine (Dargah)

Misri Shah situated in Karachi which is completely contradictory and creates doubt in the prosecution case.

20. PW Azizullah during cross-examination stated that he saw the accused persons in the headlight of the car and as well as lights coming from the nearby houses. While the complainant deposed in his examination in chief that there was the darkness of night and they were disturbed. Even the lights are not mentioned in the mashirnama of the inspection of the place of the incident. Such darkness alone, therefore, makes the identification of the accused doubtful.

21. It is a well-settled principle of law that each incriminating piece of evidence available on the record are required to be put to the accused if the same is against him while recording his statement under section 342 Cr.P.C so that he has an opportunity to explain the same as has been held by Honourable Supreme Court of Pakistan in the case of **Muhammad Shah v. The State (2010 SCMR 1009)**. We have also carefully examined the statement of the appellant Muhammad Ali recorded under section 342 Cr.P.C and found that medical evidence, recovery from the place of incident, recovery of the pistol from his possession, motorcycle and the mobile phone recovered from the place of wardat and the evidence about the identification parade was not put to him while recording his statement under section 342 Cr.P.C. The Honourable Supreme Court has held in the case of **Imtiaz @ Taj v. The State 2018 SCMR 344, Qadan and others v. The State 2017 SCMR 148 and Mst: Anwar Begum v. Akhtar Hussain alias Kaka and 2 others 2017 SCMR 1710** that a piece of evidence or a circumstance not put to an accused person at the time of recording his statement under Section 342 Cr.P.C. could not be considered against him. Thus we disregard these pieces of evidence against the accused.

22. As discussed above, we are of the view that prosecution has failed to establish its case against the appellant beyond any reasonable doubt. The concept of benefit of the doubt to an accused person is deep-rooted in our country. For giving the accused the benefit of doubt there does not need to 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 as has been held by Honourable Supreme Court of Pakistan in case **Tariq Pervez v. The State (1995 SCMR 1345)**. **We, therefore, allow the appeals filed by the appellant Muhammad Ali with the result that the conviction and sentences awarded by the trial court vide judgment dated: 27-05-2013 are set-aside and he is acquitted of the charges by extending the benefit of the doubt to him.** He shall be released from the jail forthwith if not required to be detained in connection with any other case.

23. Turning to the case of complainant in Cr. Acquittal Appeal and the Cr. Revision filed by the son of the deceased as explained earlier in this judgment we issued direct intimation notices to their counsel and also through telephonic messages and adjourned the matter from time to time to give them a fair opportunity of hearing but they failed to appear before this court. These appeals are very old and pertaining to the year 2013 therefore in these circumstances we could not wait for them for an indefinite period and thereby prejudice the accused who had been behind the bar for many years and requested the Additional P.G to assists the court on their behalf. We have heard the learned Add. P.G and perused the record. Learned Add. P.G contended that the case against the respondents in acquittal appeal has not been proved by the prosecution and they were rightly acquitted by the trial court after

proper appreciation of evidence and as regards to the revision for enhancement he submitted that no case is made out for the enhancement of sentence as name of the respondent does not mention in the FIR and the case is based on circumstantial evidence and the trial court has rightly taken the lenient view while awarding the sentence for the imprisonment of life to the appellant Muhammad Ali.

24. We have already considered the entire evidence on record whilst dealing with the appeal of Muhammad Ali and as such, there is no need for repetition while deciding this appeal against acquittal. We have carefully scrutinized the evidence of the prosecution and the findings of the learned trial court in the judgment and have found no case for interference in the judgment with regard to the acquitted accused. The respondents did not make any fire upon the deceased so also upon the prosecution witnesses, the name of respondents have not transpired in the FIR nor their description was mentioned, no active role was assigned to them, an identification parade was conducted in violation of the law as has been discussed in detail above, nothing was recovered from them, prosecution witnesses have given contradictory evidence on each aspect of the case which are sufficient grounds with the trial court to acquit the respondents and they were rightly acquitted. It is well settled by now that the scope of appeal against acquittal is very narrow and there is a double presumption of innocence and that the Courts generally do not interfere with the same unless they find the reasoning in the impugned judgment to be perverse, arbitrary, foolish, artificial, speculative and ridiculous as was held by the Supreme Court in the cases of **State Versus Abdul Khaliq and others (PLD 2011 SC 554)**. In these circumstances and the evidence discussed above the Cr. Acq. Appeal No. D – 213 of 2013 is hereby dismissed.

25. As regards to the Cr. Revision, we have already acquitted the appellant Muhammad Ali while allowing his appeals against his conviction therefore, the Cr. Revision No. 118 of 2013 filed by the son of the deceased has become infructuous and is hereby dismissed.

26. All the appeals, Acquittal Appeal and Cr. Revision are disposed of in the above terms.

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