IN THE HIGH COURT OF SINDH, AT KARACHI.

PRESENT:-
Mr. Justice Abdul Mobeen Lakho.

Cr. Appeal No. 330 of 2018.

Appellant	Ayaz Ahmed Siddiqui s/o. Ansar Ahmed Siddiqui, through M/s. Mehmood Alam Rizvi, Zakir Laghari, Sadaat Ali and Jazib Aftab, Advocates.
Respondent	The State. through Mr. Zahoor Shah, D.P.G.
Date of hearing	24.2.2020 & 26.02.2020.
Date of Judgment	18.03.2020.

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JUDGMENT

Abdul Mobeen Lakho, J: Being aggrieved and dissatisfied with the judgment dated 25.04.2018 passed by learned Vth Additional Sessions Judge-East, Karachi in Sessions Case No.1839/2016, arising from Crime No.73/2011 of Police Station Khokhrapar, Karachi U/S 302/34 PPC, whereby the appellant was convicted and sentenced with imprisonment for the life and he shall pay fine of Rs.100,000/- with the benefit of Section 382-b Cr.P.C., the appellant has preferred this appeal on following facts and grounds.

2. The facts giving rise to this appeal, as narrated in FIR lodged by complainant Muhammad Naseem Ansari at P.S. Khokhrapar, are that he is running a bangles shop at B Market Khokhrapar, while his brother namely Abdullah Ansari was also running a bangles shop in same market. On 16.04.2011 some unknown persons due to unknown enmity murdered said brother of complainant with firearms and complainant after consultation with friends and family member reported the matter to the police. Hence such FIR was lodged.

3. After completing usual investigation charge sheet was submitted against accused persons Ayaz Ahmed @ Ajju son of Ansar Ahmed Siddiqui for offence punishable u/s 302/34 PPC.

4. NBW was issued against absconding co-accused Muzaffar @ Majhoo. Proceedings u/s 87 and 88 Cr.P.C were completed against co-accused Muzaffer according to law and he was declared as proclaimed offender.

5. Trial commenced against accused Ayaz Ahmed @ Ajju s/o. Ansar Ahmed Siddique and copies of statements were supplied to him at Ex.03. Charge was framed against the accused Ayaz @ Ajju on 03.12.2016 at Ex.04, to which he pleaded not guilty and claimed for trial vide his plea recorded as Ex.4/A.

6. At the trial, prosecution examined 08 witnesses in all. PW-01 complainant Nadeem Ansari son of Nafees Ansari was examined as Ex.06, who produced memo of inspection of dead body as Ex.6/A, inquest report as Ex.6/B, FIR as Ex.6/C, memo of site inspection as Ex.6/D, memo of pointation of place of incident as Ex.6/E. PW-02 first I.O/Inspector Muhammad Hussain was examined as Ex.7, who produced his retirement letter as Ex.7/A, photographs of place of incident as Ex.7/B to 7/D, request letter as Ex.7/E, chemical examiner report as Ex.7/F. PW-03 PC Sajjad Hussain was examined as Ex.8, who produced memo of arrest as Ex.8/A. Thereafter, NBW against witnesses (1) Muhammad Saleem son of Muhammad Nafees (2) Marqas Aziz son of Aziz Mashi, P.C Ghulam Ali, SIP Muhammad Ashraf was issued, which returned unserved, in this regard statement of I.O. was recorded as Ex.9. Statement of complainant with regard to witness Muhammad Saleem son of Muhammad Nafees was recorded as Ex.10. P.C Ghulam Ali was given up by the learned DDA/Prosecutor vide statement produced as Ex.11. PW-4 Marqas Aziz son of Aziz Masih was examined as Ex.12, who produced notice as Ex.12/A, memo of identification parade as Ex.12/B, his CNIC as Ex.12/C and envelope as Ex.12/D. PW-05/MLO Dr. Afzal Ahmed was examined as EX.13, who produced police request letter as Ex.13/A, postmortem report as Ex.13/B, certificate of cause of death as Ex.13/C. PW-06/ learned Judicial Magistrate-XXII Mr. Abdul Nabi was examined at Ex.14, who produced application conducting identification parade as Ex.14/A. PW-07/SIP/Muhammad Ashraf was examined as Ex.15, who produced receipt of handing over of dead body as Ex.15/A. PW-08/SIP Gul Baig was examined as Ex.16, who produced

roznamcha entry No.36 and 12 as Ex.16/A and 16/B, NOC of Sector Commander Bhitai Rangers alongwith covering letter as Ex.16/C and 16/D respectively, roznamcha entry No.26 as Ex.16/E, roznamcha entry No.15 and 21 as Ex.16/F and 16/G, notice to accused for identification parade as Ex.16/H, roznamcha entry No.28 and 18 as Ex.16/I and 16/J respectively. All the prosecution witnesses were subjected to cross examination. Thereafter, the learned DDA/Prosecutor for the state filed statement as Ex.17, whereby he has closed the side of prosecution evidence.

7. Statement of accused was recorded on 25.01.2018 under section 342 Cr.P.C vide Ex.18, wherein he denied the allegations leveled against him by the prosecution and stated that he is innocent and have been falsely implicated in this case. That the accused also examined himself on oath under section 340(2) Cr.P.C vide Ex.19. The accused produced DW-1 at Ex.20 in his favour and declined to give evidence on oath in disproof of prosecution allegations.

8. Trial Court, after hearing the learned counsel for the parties and assessment of the evidence available on record, vide judgment dated 25.04.2018 convicted the appellant in the terms as stated in paragraph No.1.

9. Learned counsel for the appellant contends that on 03.06.2016 the brother of the accused sent applications to the concerned authorities; that on 04.06.2016 the brother of the appellant filed C.P. No.3366/2016; that on 06.06.2016 concerned SHO was directed for the production of the appellant; that the appellant is falsely being narrated to be a member of political/linguistic party (MQM), however, not a single piece of evidence has been brought on record to establish such fact; that the presence of the said eye witness PW-4 Marqas Aziz is not established through any piece of evidence on record; that the PW-4 has contradicted the date, time & place of occurrence of the crime; that the PW-4 has admitted in his cross-examination that he has not given any physical description of the accused persons in his statement u/s 161 Cr.P.C; that there is delay of 5 ½ years in conducting the identification parade Ex:12(b) on 19.09.2016 of the appellant which makes the identification parade highly unreliable; that date of arrest after 5 ½ years; that as per the FIR the incident

took place at 09:30 hours and as per the PW-4 (the eye witness) the incident took place at 07.00 hours and further contradicted in his cross mentioning 09:00 hours; that as per the post mortem report by the Dr. Afzal Ahmed, MLO, JPMC, para 2(a) of the post mortem report the exact time of the receipt of body is 12:15 (16.4.11), however, para 22 of the same report mentions the time between death and post mortem to be (11-13 hours approximately); that as per the prosecution's case and the ocular evidence (PW-4) the time of the offence is within the bracket of 07:00 hours to 09:30 hours and the body was received for post mortem at 12:15 pm, however, as per the post mortem the occurrence took place at 12:00 hours or 01:00 hours at night because of which the entire pieces of evidence gets clouded with doubts; that there is no recovery of empties of the fire arm; that first challan "A" class submitted on 03.05.2011 and no name of the PW-4 is mentioned in the challan; that place of incident is contradicted; that the eye witness was shown the appellant before conducting the identification parade, said fact has been admitted by PW-08 in his cross examination. Such fact has also been deposed by the appellant in his statement on oath u/s 340(2) Cr.P.C; that the complainant PW-01 deposed that he was informed by one boy namely Faheem on phone call about the death of his brother, however, in his cross he admitted that he said in his 161 Cr.P.C. statement dated 16.4.2011 that he watched in on television and came to know about his brothers death, the same was further stated by the I.O (PW-08) in his cross examination that complainant came to know about his brothers death through the television; that no daily diary till the submission of challan under A class was produced just to cancel the timings of information and taking the injured/diseased at hospital. In support of his arguments, the learned counsel relied upon the cases of law reported in IMTIAZ ALI TAJ versus THE STATE (2018 SCMR 344), MUHAMMAD AKRAM Versus THE STATE And Others (2016 SCMR 2081), JAVED KHAN ALIAS BACHA AND ANOTHER Versus THE STATE AND ANOTHER (2017 S C M R 524), SYED ZAKI KAZMI versus THE STATE (2018 P Cr. L J 976), NAIMAT ALI versus THE STATE (2018 YLR 289), MST. ANWAR BEGUM versus AKHTAR HUSSAIN ALIAS KAKA (2017 SCMR 1710) and GULFAM AND ANOTHER versus THE STATE (2017 SCMR 1189).

10. Learned D.P.G argued that according to FIR the time of incident is 09:30 am and he has supported the judgment of the trial Court. Lastly, by supporting the impugned judgment has prayed for dismissal of the instant appeal. In support of his arguments, the learned DPG relied upon the cases of law reported in MUHAMMAD EHSAN versus THE STATE (2006 SCMR 1857), MUHAMMAD ZAMAN versus THE STATE (2007 SCMR 813), ZULFIQAR AHMAD versus THE STATE (2011 SCMR 492), DILDAR HUSSAIN versus MUHAMMAD AFZAAL ALIAS CHALA AND 3 OTHERS (PLD 2004 Supreme Court 663) and MUHAMMAD HANIF versus THE STATE (PLD 1993 Supreme Court 895).

11. Heard both the counsels and have gone through the material available on record.

12. PW-4 Marqas Aziz examined by the prosecution has deposed that death of the deceased was caused by means of fire arm. It is proved that the deceased died his unnatural death as described by the Medical Officer.

13. PW-1 Nadeem Ansari, PW-2 first I.O/Inspector Muhammad Hussain, PW-7 SIP/Muhammad Ashraf and PW-8 SIP Gul Baig were unanimous with regard to the place of incident and stated that the incident took place at the Golden Ground. PW-8 also informed in his cross-examination that the custody of the accused was handed over to the Police by Rangers and no proof against him was given by Rangers.

14. As regards, PW-4 Marqas Aziz, he started contradicting himself from the very beginning when he stated in his examination-in-chief that the incident took place on 0700 hours but in his cross-examination he said the time of incident to be 0900, hours whereas according the prosecution story the incident took place at 09:30 hours. This contradiction can easily be brushed aside considering it to be a minor one but when it is read with medical evidence it assumes importance as in the medical evidence following times have been mentioned i.e. the time of receiving of the body is 12:15 p.m on 16.04.2011 and postmortem started on 12:30 pm and ended on 01:45 pm and the time between post-mortem and death is between

11 to 13 hours. Now the question arises that even if we take the time of occurrence to be 07:00, 09:00 or 09:30 hours the time between death and postmortem should have been 03 to 03 and half hours but when the medical report says 11 to 13 hours this contradiction in timing leaves a serious doubt in the prosecution story.

15. Important aspect of the case is that there is no recovery of any empty from the place of incident. The challan in the present case was submitted on 3.5.2011 which was approved in 'A' class on 9.5.2011 but the name of PW-4 was not mentioned, if he had witnessed the incident then challan in 'A' class could never have been approved. It is only after 05 years his name appears as a witness in the final challan submitted on 24.9.2016 which again makes the story of the prosecution doubtful because if he was available to the police for giving evidence why did they wait for 05 and half year to record statement of this witness.

16. No independent corroboration to the ocular account furnished by the eye-witness produced by the prosecution was forthcoming. The presence of the eye-witness at the 09:30 a.m. in the morning is not free from doubt because if he had been present at the spot at relevant time, then why did he not try to rescue the deceased especially when he saw the accused escaping from the crime scene. The place of occurrence was an open ground in a populated area. Marqas Aziz (PW-4) who admittedly is a scrap dealer on a *Thela* and a chance witness has failed to explain and establish the reason for his presence at the time of occurrence. A peculiar features of this case is that when Marqas Aziz (PW-4) saw the occurrence, he ran away from the place of occurrence and did not inform anyone but surprisingly he on the next day out of curiosity goes to the same place of incident and found the police party present there and volunteers information to the police party that he saw the crime and can recognize the criminal if shown to him again. What does not appeal to the prudent mind is that if he was ready to become a witness voluntarily then why he was not made a witness by the police at in first instance. He being a scrap dealer has also not been able to prove his presence in an open ground. He admitted in his evidence that he has given no physical description of the accused person to police at the time of

recording of 161 Cr.P.C which was the most important aspect and evidence coming from an eye witness. In the absence of all the above, the prosecution has miserably failed to establish the corroboration of his presence in the area beyond a reasonable doubt on the date of incident. It is in this context that the testimony of chance witness ordinarily is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. The testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence at the crime spot are put forth, when the occurrence took place otherwise his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt. Reliance may be placed on the case law reported as "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) and "Muhammad Javed v. The State" (2016 SCMR 2021).

17. As regards the identification parade the prosecution evidence as it stands suggests that the incident had happened on 16.04.2011 whereas the identification parade of the appellant took place after about 05 and a half years. For the said PW-4 to remember the appellant vividly and to identify him after such a long time is not humanly possible. This is relevant because in the statement under section 161, Cr.P.C. the said witness has not given specific description of the appellant. Evidence of this witness in respect of identification also becomes doubtful as the PW-8 in his statement admitted that the accused and the complainant during the remand of the accused the complainant and PW-4 had visited the P.S and the identification period took place after PW-4 had visited the P.S. Statement of P.W-8 is reproduced for ready reference: -

> *It is correct that except the interrogation of accused no other evidence could be collected during investigation, which can prove the affiliation of present accused with political party Mutahida Qaumi Movement. It is incorrect to say that the present accused did not make any confession during investigation. It is correct that during police custody remand of present accused the complainant and PW-4 Marqas Aziz visited police station and met with me. The complainant had come to P.S on third day of arrest of present accused, whereas PW-4 Marqas had come to PS*

> *on eighth day of arrest of present accused. It is correct that the identification parade of present accused was got conducted after PW-4 Marqas Aziz visited police station. It is correct that the identification parade of accused was got conducted on thirteenth day of arrest of present accused. It is correct that the present accused has been challaned in this case only on the basis of identification parade. Vol. says that other evidence of PWs is also against the present accused. I have gone through the contents of memo of identification parade. I see memo of identification parade already produced before this court as Ex. 12/B and say that it is mentioned therein that PW-4 Marqas Aziz stated date of incident as 16.03.2011 and place of incident is shown as ground of graveyard. It is incorrect to say that despite contradiction of date and place of incident I have wrongly challened the present accused in this case. I do not know as to whether or not prior to arrest of accused in this case, his petition for missing person was pending before the Honorable High Court of Sindh. It is incorrect to say that the custody of present accused was handed over to us by Rangers and no proof against him was given by Rangers officials.*

18. The record also reflects that the appellant was re-arrested on 16.6.2016 as he was already in remand for 90 days with Pakistan Rangers but his identification parade was held on 19.9.2016, after about 05 years of the incident. During that period he remained in police custody and as per the evidence of I.O. In view of above reasons in my view, the identification parade of the appellant by the said witness becomes doubtful and dents the case of the prosecution. The Magistrate had certified that in the identification proceedings the other persons, amongst whom the appellant was placed, was a 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 are 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 Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P) and the latest pronouncement of the Hon'ble Supreme Court in the matter of KANWAR ANWAR ALI, Special Judicial Magistrate (PLD 2019 SC 488) giving guideline for identification parade that:

> 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:-
>
> *(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;

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

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

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

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

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

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

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

> *accused persons or by the identifying witnesses before, during or after the proceedings;*
>
> *(k) where a witness correctly identifies an accused person, the Magistrate must ask the witness about the connection in which the witness has identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate this statement in his report;*
>
> *(l) and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;*
>
> *(m) the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings and*
>
> *(n) the Magistrate has to give a certificate at the end of his report in the form prescribed by CH.II.C. of Vol. III of Lahore High Court Rules and Orders.*

19. Keeping the above in mind the PW-4 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 appellant, who he had identified after over five years of the crime, and who he had seen, was in fact the actual culprit.

20. It is also well established that if there is a single circumstance which creates doubt regarding the end of the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In "Muhammad Akram v. The State" (2009 SCMR 230), the Hon'ble Supreme Court of Pakistan, at page 236, was pleased to observe as under:--

> "13. ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

21. In view of what has been discussed above, the conviction of the appellant/accused recorded by the learned trial Court is not legally sustainable. Therefore, I allow this appeal, set aside the impugned judgment dated 25.4.2018 rendered by the trial Court. Resultantly the appellant Ayaz Ahmed Siddiqui is acquitted of the charge leveled against him. He shall be released forthwith if not required in any other case.

JUDGE

Jamil Ahmed/P.A