IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
MR. JUSTICE MUHAMMAD IQBAL KALHORO
MR. JUSTICE SHAMSUDDIN ABBASI.

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Special Criminal Anti-Terrorism Jail Appeal No.195 of 2018

Appellant	Hakim Ali @ Arshad son of Asad Khan through Mr. Abdul Razzak, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, DPG a/w Inspector Waheed Awan.
Dates of hearing	25.01.2021 and 10.02.2021
Date of Judgment	**25.02.2021**

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JUDGMENT

SHAMSUDDIN ABBASI, J. Hakim Ali @ Arshad son of Asad Khan, the appellant and two others were tried by Anti-Terrorism Court No.II, Karachi, in Special Case No.AI-05 of 2015, arising out of FIR No.166 of 2013 registered with Police Station Sharafi Goth for the offences punishable under Sections 302, 427 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997. By a judgment dated 07.06.2018 all three of them were convicted under Section 7{a} of Anti-Terrorism Act, 1997, and sentenced to life imprisonment for committing murder of four policemen namely, HC Zulfiqar Ali, HC Shabbir Hussain, PC Muhammad Afzal and PC Ghulam Sarwar, and to pay a fine of Rs.5,000/- each or suffer imprisonment for a further period of six months in default, however, the benefit in terms of Section 382-B, Cr.P.C. was extended in their favour and the conviction and sentences awarded in other cases viz FIR No.489, 490, 491 and 492 of 2015 through separate judgment delivered on the same day were ordered to run concurrently.

2. FIR in this case has been lodged on 03.08.2013 at 0730 hours whereas the incident is shown to have taken place on the same day at 0100 hours. Complainant SIP Noor Ahmed has stated that on the fateful day he was present at P.S. Sharafi Goth, Karachi, as duty officer. It was about 1:00 am when he received information that some

unknown assailants have attacked on official mobile-II of P.S. Sharafi Goth at Shah Faisal Bridge injuring policemen critically. On receipt of information, he first made entry in Roznamcha vide entry No.38 and then proceeded to the pointed place, accompanied by SIP Muhammad Ramzan, where they saw four policemen lying on the bridge near police mobile bearing Registration No.SP-7271, sustaining bullet injuries on different parts of their bodies, three of them namely, HC Zulfiqar Ali, HC Shabbir Hussain and PC Muhammad Afzal were found dead whereas PC Ghulam Sarwar was critically injured and he was shifted to JPMC through SIP Muhammad Ramzan in Chippa ambulance. The relatives of all three deceased were called at the crime scene and in their presence the complainant carried out the relevant proceedings, prepared memos of inspection of dead bodies and then shifted the bodies to JPMC for post-mortem through ambulance. On his arrival at JPMC, the complainant came to know that injured policeman PC Ghulam Sarwar also succumbed to his injuries so he completed formalities, prepared inspection memo of dead body. He also completed proceedings under Section 174, Cr.P.C. with the permission of MLO, obtained certificates of cause of death, shifted the dead bodies to Edhi mortuary. Thereafter, he returned back to P.S. Sharafi Goth vide entry No.42 and then lodged FIR No.166 of 2013 under Sections 302, 427 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was followed by SIO Abdul Baqi Rind, who conducted site inspection on the same day on pointation of complainant, secured empties and blood-stained earth, recorded the statements of witnesses and thereafter the investigation was transferred and entrusted to PI/SIO Abdul Wasay Jokhio, who tried his level best but failed to trace out the accused involved in the commission of offence and ultimately filed a report under "A" class on 23.11.2013. On 13.07.2015 Inspector Ejaz Ahmed Shaikh, SHO of P.S. Sharafi Goth, came to know through control that three persons namely, Hakim Ali @ Arshad son of Muhammad Asad, Liaquat son of Ghulam Nabi and Muhammad Asif son of Muhammad Rasheed have been arrested by P.S. Korangi Industrial Area {KIA} in Crime No.489 of 2015 under Sections 353, 324 and 34, PPC and other cases relating to recovery of unlicensed

arms vide Crime No.491, 492 and 493 of 2015 under Section 23{1}{a} of Sindh Arms Act, 2013 so he went there and interrogated three accused, who confessed the commission of the present crime and disclosed that they alongwith their companions namely, Nabeel, Nadeem, Naeem @ Sunny Plast, Shani, Muharram @ Jamali and Tariq @ Taroo attacked on police mobile of P.S. Sharafi Goth with repeaters /pistols and fled away from the scene. On their admissions, Inspector Ejaz Ahmed Shaikh arrested three accused in this case and seized the fire-arms already recovered from their possession by P.S. KIA as weapons used in the commission of the present crime. Thereafter, the investigation was entrusted to DSP/SDPO Ali Muhammad Khoso, who again interrogated three accused at P.S. Sharafi Goth in presence of SIO, who again confessed their guilt and voluntarily led the police party, headed by DSP/SDPO Ali Muhammad Khoso, and identified the place of occurrence on their pointation. On 22.07.2015 he sent the recovered empties and crime weapons to the office of forensic division for matching purposes and obtained its report. On 25.07.2015 he produced three accused before Judicial Magistrate-V, Malir, where eye-witnesses Faizan Ashraf and Muhammad Arif had correctly identified them as same. After completing the usual formalities, he submitted challan before the Court of competent jurisdiction against three accused namely, Hakim Ali @ Arshad son of Muhammad Asad, Liaquat son of Ghulam Nabi and Muhammad Asif son of Muhammad Rasheed while accused Nabeel, Nadeem, Naeem @ Sunny Plast, Shani, Muharram @ Jamali and Tariq @ Taroo were shown as absconders.

4. The learned trial Court, on taking cognizance of the offence, took Oath as prescribed under Section 16 of Anti-Terrorism Act, 1997, charged the appellant and two others for the offences punishable under Sections 302, 427 and 34, PPC read with Sections 6{2}{m}{n} and 7 of Anti-Terrorism Act, 1997. All three of them pleaded not guilty and claimed a trial.

5. The prosecution, in support of its case, examined as many as 16 witnesses. **Asif Raza Mir** {Civil Judge & Judicial Magistrate} appeared as PW.1 Ex.P/1 in whose supervision the identification parade was held. **Tariq Ahmed** as PW.2 Ex.P/7. He is son of

deceased policeman HC Zulfiqar Ali and on receipt of information went to the place of incident and acted as witness of inquest report. **SIP Noor Ahmed** as PW.3 Ex.10. He is complainant and given the details of receiving information, visiting place of incident, conducting inspection of dead bodies, shifting the injured and dead bodies to JPMC and completing proceedings under Section 174, Cr.P.C. **Muhammad Aslam** {SIP Investigation} as PW.4 Ex.P/30. He is one of the mashirs of memo of site inspection and deposed that in his presence Inspector Abdul Baqi Rind secured 23 empties of 9mm, 01 of 30 bore, 02 of 12 bore rifle and blood-stained earth from the place of incident. **Arz Muhammad** {SIP} as PW.5 Ex.P/33. He is one of the mashirs of memo of pointation of place of incident by three accused. **Muhammad Arif** as PW.6 Ex.P/35. He is a private person and one of the eye-witnesses of the incident. He has given the details about incident of firing on police mobile and identification of three accused as Liaquat Ali, Hakim and Rashid Shah in a parade held before a Magistrate. **Asif Ali** {ASI} as PW.7 Ex.P/37. He is one of the mashirs of arrest and deposed that in his presence SHO Ejaz Ahmed Shaikh arrested three accused, who were already arrested and in custody of P.S. KIA. **Imdad Hussain** {PC} as PW.8 Ex.P/39. He is one of the mashirs of seizure memo of CDR report and deposed that in his presence Inspector Abdul Baqi Rind seized such report. **Aijaz Ahmed Shaikh** {Inspector} as PW.9 Ex.42. He is one of the investigating officers and deposed that on receipt of information he went to P.S. KIA and interrogated three accused, who already arrested by P.S. KIA and confined in the lock-up, and on their admissions arrested them in the present case. **Nabi Bux** {ASI} as PW.10 Ex.P/46. He is uncle of deceased HC Shabbir Hussain and on receipt of information went to the place of incident and acted as mashir of memo of inspection of dead body and inquest report. He further deposed that the dead body of his nephew HC Shabbir Hussain was handed over to him for burial. **Dr. Kaleem** {Additional Police Surgeon JPMC} as PW.11 Ex.P/47. He conducted post-mortem of all four policemen and issued certificates of their cause of death. **Abdul Baqi Rind** {Inspector} as PW.12 Ex.P/53. He is the first investigating officer, who conducted initial investigation viz memo of site inspection, seizure of empties, blood stained earth. He also sent the police

mobile, empties and wearing clothes of all four policemen to the offices of forensic division and chemical examiner for examination and reports. **Sher Khan** as PW.13 as Ex.P/61. He is brother of deceased PC Muhammad Afzal and acted as mashir of inspection of dead body and inquest report. **Faizan Ashraf** as PW.14 Ex.P/62. He is also an eye-witness of the incident and given the details of incident of firing and identification of three accused in the identification parade held before a Magistrate. **Ali Muhammad Khoso** {DSP} as PW.15 Ex.P/63. He is the last investigating officer. He has supported the investigation being carried out by him and after its completion submitted challan in Court. **Ashfaq** {SIP} as PW.16 Ex.P/75. He is the Incharge of police party of P.S. KIA with which the accused persons had an encounter and thereafter arrested alongwith unlicensed arms. Thereafter, the prosecution closed its side on 24.01.2018.

6. The appellant and two others were examined under Section 342, Cr.P.C. All of them denied the allegations imputed upon them by the prosecution, professed their innocence and stated their false implication. Appellant appeared on Oath under Section 340{2}, Cr.P.C. and also produced Sher Jan {Ex.95} and Allah Bachal {Ex.96} in his defence.

7. The trial culminated in conviction and sentence of the appellant and two others as stated in para-1 {supra}. The appellant is the only one, who has assailed the conviction and sentence recorded by the learned trial Court vide judgment dated 07.06.2018, impugned herein, through instant appeal.

8. It is contended on behalf of the appellant that he has been falsely implicated in this case with malafide intention and ulterior motives; that the FIR has been lodged against unknown persons as such possibility of false implication of appellant cannot be ruled out; that the prosecution had based its case on the extra judicial confessions of appellant allegedly made before police which was an inadmissible piece of evidence and unsafe to rely upon; that the eye-witnesses were not residents of the same locality where the incident alleged to have taken place as such their presence at the

scene of offence was highly doubtful and wrongly relied upon by the learned trial Court; that the identification test could not be the basis for conviction of appellant more particularly when it was held after 12 days of arrest of the appellant and without supporting strong corroborative piece of evidence; that the identification of appellant by the eye-witnesses before trial Court during trial is also quite unsafe because the witnesses had many opportunities of seeing the appellant on the dates of hearing before recording the date of their evidence; that nothing incriminating has been recovered from the possession of appellant and the alleged recovery of weapon is foisted upon him; that the prosecution has failed to produce any evidence either trustworthy or confidence inspiring against the appellant and in absence thereof the report of FSL is unsafe to rely upon; that the FIR has been lodged after the delay about 6½ without furnishing any plausible explanation as such the possibility of consultations and due deliberations cannot be ruled out; that the witnesses have contradicted each other and made dishonest improvements in order to bring the case in line with medical evidence; that the prosecution has not been able to produce any iota of evidence in support of its case as such the conviction and sentence recorded by the learned trial Court is not sustainable in the eyes of law; that the conviction and sentence recorded by the learned trial Court is bad in law and facts and without application of a judicial mind to the facts and surrounding circumstances of the case; that the matter needs sympathetic consideration with regard to innocence of appellant more particularly when he is facing the charges of capital punishment; that the learned trial Court has not properly evaluated the evidence brought on record as well the contradictions and discrepancies on material aspects of the matter which has demolished the whole case of the prosecution. The learned counsel while summing up his submissions has emphasized that the prosecution has miserably failed to prove the guilt of the appellant beyond shadow of reasonable doubt and, thus, according to him, under the abovementioned facts and circumstances of the case, the offence with which the appellant was charged, tried and convicted merits reversal by extending him the benefit of doubt.

9. Strongly opposing the contentions of the learned counsel for the appellant, the learned DPG has argued that the prosecution has successfully proved its case against the appellant beyond shadow of reasonable doubt. The story set-forth in the FIR is natural and believable. The ocular account furnished by the prosecution has been corroborated by medical evidence. The eye-witnesses had identified the appellant and two others in identification parade held before a Magistrate and the PWs in their respective statements have supported the case of the prosecution and implicated the appellant with the commission of offence and the minor discrepancies and contradictions are of no significance. The medical evidence is in line with the ocular account furnished by the prosecution coupled with the circumstantial evidence, which successfully proved the case of the prosecution. Per him, the witnesses were subjected to lengthy and taxing cross-examination but nothing favourable to the appellant could come out from their mouth. Finally, submitted that the findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken. He, therefore, prayed that the impugned judgment may be up-held and the appeal of the appellant may be dismissed.

10. We have given anxious consideration to the submissions of learned counsel for the appellant and the learned DPG for the State and scanned the entire material available before us with their able assistance.

11. As regard unnatural death of four policemen is concerned, PW.11 Dr. Kaleem {Ex.P/47} has deposed that on 03.08.2013 he was Additional Police Surgeon at JPMC, Karachi, when four policemen namely, PC Muhammad Afzal, HC Shabbir Hussain, HC Zulfiqar and PC Ghulam Sarwar were brought dead from the jurisdiction of P.S. Sharafi Goth. He conducted post-mortem of all four policemen and issued post-mortem reports declaring cause of death as cardio respiratory failure due to abdominal and placate injuries resulting from fire-arm projectiles. He was subjected to cross-examination by defence, but nothing adverse to the prosecution story has been extracted that death of four policemen

occurred from any other cause other than fire-arm injuries. This piece of evidence is also supported by the chemical report, available on record at Ex.P/72, which shows that the last wearing clothes of four policemen {deceased} were received in the office of Director Laboratories and Chemical Examiner to the Government of Sindh, Karachi, on 26.08.2013 and on examination the same were found to be stained with human blood. Thus, the factum of death of deceased HC Zulfiqar Ali, HC Shabbir Hussain, PC Muhammad Afzal and PC Ghulam Sarwar has been independently established through strong and convincing evidence as a result of abdominal and placate injuries leading to cardio respiratory failure caused from fire-arm projectiles.

12. It is an undisputed fact that the appellant is not nominated in the FIR, which has been lodged against unknown persons claiming therein that 8 to 10 unknown assailants had attacked on the police mobile of P.S. Sharafi Goth and committed murder of four policemen by firing with deadly weapons. The record is suggestive of the fact that neither the complainant is eye-witness of the incident nor any eye-witness is named in the FIR, but the investigating officer during investigation recorded statements of two eye-witnesses under Section 161, Cr.P.C. A keen look of the record reveals that the case in hand pertains to an occurrence alleged to have taken place on 03.08.2013 at odd hours of night, which is 1:00 am, at Shah Faisal Bridge, and the FIR had been lodged on the same day at 7:30 am i.e. after 6½ hours of the incident. No source of identification has been disclosed either by both eye-witnesses, Muhammad Arif and Faizan Ashraf, in their Section 161, Cr.P.C. statements or in their depositions or even by the complainant in FIR. Failure to prove source of identification in an occurrence which took place at odd hours of night is always considered fatal for prosecution as it gives room to the possibility of false implication of accused through mistaken identification. Reference may well be made to the case of *Gulfam and another v The State* {2017 SCMR 1189} wherein the Hon'ble Supreme Court observed that:-

> *"The occurrence in this case had taken place at about 11:45 p.m. during the fateful night and the*

> *source of light at the spot had never been established by the prosecution. It had been presumed by the courts below that as the occurrence had taken place at a medical store, therefore, some electric light must be available at the spot. The courts below ought to have realized that presumptions have very little scope in a criminal case unless such presumption is allowed by the law to be raised."*

13. The prosecution has claimed that both eye-witnesses, Muhammad Arif and Faizan Ashraf, had identified the appellant in identification parade held before a Magistrate. Suffice it to observe that the identification parade had been held after about two years of the incident and 12 days of the arrest of the appellant. It does not appeal to a prudent mind that a person, who is a witness of incident allegedly took place at odd hours of night had seen 8 to 10 persons, in absence of any source of light, identified some of them in a row of 10 people, which is unsafe to rely upon. Both the eye-witnesses have admitted that they have not given descriptions and features of the accused in their Section 161, Cr.P.C. statements. PW Faizan Ashraf has stated that all policemen were lying dead in the police mobile whereas PW Muhammad Arif has stated that three policemen instantly died whereas one was injured. PW Muhammad Arif has deposed that soon after the incident police reached at the place of incident and he narrated the whole story to police and police had taken his cell number but this statement has been denied by the complainant, who categorically deposed that when he reached at the place of incident, no body was present at the scene of offence except deceased /injured policemen. PW Faizan Ashraf has stated in his cross-examination that at the time of identification parade, out of 20 to 25 people in a row, there were about 6 to 8 persons in handcuffs and rests were without handcuffs, but this statement is belied by memo of identification parade, which speaks only 10 dummies were arranged through Court staff and called inside the Court room. The appellant in his Section 342, Cr.P.C. statement had taken the plea they were brought alongwith the witnesses in same police mobile for identification parade and at that time they were not muffled faces. A keen look of the record reveals that the proceedings of the test of identification parade brought on the record of this case clearly show

that the appellant had not been picked up by the eye-witnesses in that parade with reference to specific role played by him during the occurrence in issue. It is a well settled that identification of an accused without specific reference to the role allegedly played by him during the occurrence is shorn of any evidentiary value. Reference may well be made to the cases of *Azhar Mehmood and others v. The State* {2017 SCMR 135} and *Shafqat Mehmood and others v. The State* {2011 SCMR 537}.

14. The prosecution machinery came into motion when complainant SIP Noor Ahmed lodged FIR, therefore, we would like to refer the statement of complainant for the reason that his testimony touches the very roots of the case. He while appearing as PW.3 {Ex.P/10} has stated that on the day of incident he was duty officer at P.S. Sharafi Goth when he received information about the incident of this crime so he proceeded to the place of incident, accompanied by SIP Muhammad Ramzan, where he saw three policemen lying dead and one policeman in critical condition, who was shifted to JPMC through SIP Muhammad Ramzan. He called the relatives of deceased and in their presence completed formalities at spot and then shifted the bodies of three policemen to JPMC for post-mortem. On his arrival at hospital, he came to know that injured policeman also succumbed to his injuries so he completed legal proceedings under Section 174, Cr.P.C. with the permission of MLO and then returned back to P.S. and lodged FIR. He did not utter a single word with regard to source of light through which he inspected the dead bodies of three policemen, prepared memos and completed other formalities at odd hours of night. He admitted in his cross-examination that entry No.38, under which he left P.S. for proceeding to place of occurrence, does not disclose that SIP Muhammad Ramzan was accompanied with him and the injured policeman was shifted by him to JPMC through the said SIP. **He further admitted that he has not stated so in his Section 161, Cr.P.C. statement.** The complainant has also admitted that he has not recorded the statement of injured policeman. He admitted that no person was present at the scene of offence when he reached there. The complainant has made certain improvements as compared to what he stated in his FIR and Section 161, Cr.P.C. statement.

15. The prosecution had also examined Muhammad Arif and Faizan Ashraf PW.6 and PW.14 respectively claiming to be the eye-witnesses of the incident, but their names were not mentioned in the FIR despite of the fact that FIR had been lodged at 7:30 am after 6½ hours of the incident. PW Faizan Ashraf was stated to be working at the tyre punctured shop/cabin, situated near the place of incident, and according to him police arrived at the scene of offence after about 20/25 minutes of the incident and he narrated the whole story to police and at that time one old man was also present at the scene of offence alongwith him. It is noteworthy that usually people do not cooperate and give consent to become a witness in criminal cases, but his presence at the scene of offence has not been established through FIR. Furthermore, the sketch of place of incident, produced by the prosecution and available on record at Ex.P/56, did not show tyre punctured shop/cabin near the place of incident. On the other hand, PW.3 complainant SIP Noor Ahmed has deposed that he reached at the place of occurrence within an hour, but did not utter a single word as to the presence of witnesses and specifically deposed that when he reached at the place of incident none was present there. This contradiction in the statements of complainant and eye-witnesses has caused a serious dent to the prosecution case. Insofar as the other eye-witness Muhammad Arif, who appeared as PW.6 has deposed that on the day of incident he had come to the house of his maternal niece/son-in-law and while returning to home when he reached near the place of incident he saw that a police mobile parked on the Bridge and from Naddi 8 to 10 persons appeared and fired at police mobile. It is noteworthy that usually people do not cooperate and give consent to become a witness in criminal cases, but his presence at the scene of offence till arrival of police shows his interest to become a witness. He further deposed that other persons were also available at the scene of offence and accused persons asked him and others to sit down and thereafter they fired at police mobile. This witness has admitted that he also identified the accused in FIR No.232 of 2012 under Section 302, PPC of P.S. Brigade and that he appeared in many cases as witness of the police. In view of these admissions, a presumption can be drawn that he is a stock witness/ tout of police. The record is also

suggestive of the fact that both eye-witnesses have admitted that they have not given features/ descriptions of accused persons in their Section 161, Cr.P.C. statements.

16. The meticulous examination of record gives a lead that the acclaimed presence of these eye-witnesses is a sheer coincidence. It needs no elaboration that presence of eye-witnesses at the spot is not to be inferred rather is to be proved by prosecution beyond scintilla of doubt. We have also taken note of the fact that in an occurrence, wherein four policemen lost their lives, the eye-witnesses remained unhurt. In absence of any confidence inspiring explanation regarding their presence at crime scene, PW Muhammad Arif is found to be a chance and interest witness whereas PW Faizan Ashraf seems to be an interested witness, and their testimony can safely be termed as suspect evidence. In arriving at such conclusion, we are enlightened from the case of *Mst. Sughra Begum and another v. Qaiser Pervez and others* {2015 SCMR 1142} wherein the Hon'ble Supreme Court while dealing with a case of chance witness observed as under:-

> *"A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. 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. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on 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."*

17. From review of record, it emerged that narrators of ocular account, besides being chance and interested witnesses, also failed to satisfactorily explain the source of identification in an occurrence, which took place at odd hours of night, which is 1:00

am. The testimony of both eye-witnesses in the absence of any confidence inspiring explanation is termed as suspect evidence, which give rise to a reasonable doubt, benefit of which could not be withheld from the appellant.

18. The another piece of evidence which prevailed before the learned trial Court for recording conviction of the appellant is the positive FSL report about the crime empties allegedly recovered from the place of incident and the crime weapon shown to be recovered from the possession of appellant. The record is suggestive of the fact that incident had taken place on 03.08.2013 and on the same day the crime empties were secured while conducting site inspection and the same were sent to the office of Forensic Division on the same day i.e. 03.08.2013 and report thereof was received by the investigating officer on 19.08.2013. The appellant alongwith two others was shown arrested by P.S. KIA on 12.07.2015 after about two years of the incident in a case of police encounter and a 12 bore repeater had been shown recovered from his possession and subsequent thereto he was arrested in this case on 13.07.2015 on his extra-judicial confession before PW.9 Inspector Ejaz Ahmed Shaikh. Surprising to note that the weapons and crime empties were sent to FSL and the same were received in the office of Forensic Division on 22.07.2015 after about two years of incident and nine days of recovery of crime weapon and this fact has also been admitted by I.O. in his cross-examination. No explanation much less plausible has been furnished by the prosecution as to where and in whose custody the pistol and empties remained for this period and whether these were in safe hands. Neither the name of police official, who had taken the case property to the office of Forensic Division, has been mentioned nor examined by the prosecution at trial in order to prove safe transit of the case property to the expert. In view of this background of the matter, two interpretations are possible, one that the alleged empties and weapon have not been tampered and the other that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive FSL report qua the crime empties and weapon being delayed without furnishing any plausible explanation, would not advance the

prosecution case, therefore, has wrongly been relied upon by the learned trial Court. The prosecution has failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence. Reliance may well be made to the case of *Ikramullah & others v The State* {2015 SCMR 1002}, wherein Hon'ble apex Court has settled principle for keeping recovered narcotic substance in safe custody and proving its safe transit to the chemical examiner was emphasized in the following terms:-

> *"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit".*

19. The prosecution has also claimed that appellant while in police custody on 21.07.2015 voluntarily led the police party, headed by DSP Ali Muhammad Khoso, and identified the place of incident on his pointation in presence of SIP Arz Muhammad and PC Ghani-ur-Rehman, who both are police officials. Admittedly, I.O. had a prior information about pointation of place of occurrence despite he did not pick any independent person either from police station or from the place of pointation. PW.15 DSP Ali Muhammad Khoso has admitted that he reached at the place of pointation at 7.30 pm and at that time a Baloch man was also present at tyre punctured shop, but he refused to act as witness. The record did not reveal that as to whether any effort was made to persuade any person from the locality or for that matter the public was asked to act as witness. Even the said Baloch man was neither served with any notice nor was warned with the consequences to be faced by him if he refuses to become a

witness. Even otherwise the pointation of place of occurrence by the appellant is not a new fact which was not in the knowledge of police. Likewise, it is irrelevant for positive report of FSL as the empties alleged to be recovered much prior to the admission and pointation of the appellant. In this view of the matter the case in hand is not a fit case wherein the Court could even consider the confession before police and pointation of place of occurrence attributed to the appellant. In order to give a cover to Article 40 of Qanun-e-Shahadat Order, 1984, the investigating officer seized 12 bore repeater allegedly recovered by P.S. KIA in a case of police encounter and alleged to be used in the commission of present crime. The recoveries of fire-arms and empties are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the appellant more particularly when the other material put-forward by the prosecution in respect of guilt of the appellant has been disbelieved. It has been affirmed by the Hon'ble Supreme Court in the case of *Imran Ashraf and 7 others v The State* {2001 SCMR 424} in the following manner:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other judgment is needed on the same analogy, reference can be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* reported as 2007 SCMR 1427, wherein the relevant citation (c) enunciates:

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

20. The another intriguing aspect of the matter is that the prosecution has based its case on confession allegedly made by the appellant before police. It is well settled principle of law that disclosure of an accused before police is inadmissible being hit by

Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984. There is no cavil to the legal proposition that the extra judicial confession is a very weak type of evidence and no conviction could have been awarded without having strong corroboration which is lacking in this case. Reliance may well be made to the cases of *Wazir Muhammad and another v. State* {2005 SCMR 277}, *Liaquat Ali v. The State* {1999 P.Cr.LJ 1469 Lahore}; *Tahir Javed v. The State* {2009 SCMR 166} and *Zafar Iqbal and others v. The State* {2006 SCMR 463}. Hence, no weight can be given to such disclosure of appellant before police. Even otherwise, in case, if such extra judicial confession was made by the appellant during the course of investigation, it was incumbent upon the Investigation Officer to get his confessional statement recorded before the Judicial Magistrate, which has not been done in the case in hand. Hence, a strong corroborative piece of evidence has been withheld by the prosecution without furnishing a plausible explanation. This fact, thus, caused a big dent to the prosecution case and benefit thereof must go to the appellant.

21. We, while sitting in appeal, are under heavy obligation to assess by thinking and rethinking, lest an innocent person fall a prey to our ignorance of facts and ignorance of law. The Court must not close its eyes to human conducts and behaviours while deciding criminal cases, failing which the results will be drastic and impacts will be far from repair. The cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons along with guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of *Riaz Masih alias Mithoo v The State* {1995 SCMR 1730} and *Sardar Ali v Hameedullah and others* {2019 P.Cr.LJ 186}. Likewise, it is a well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until

found guilty at the end of the trial, for which the prosecution is bound to establish its case against the accused beyond shadow of any reasonable doubt by producing confidence inspiring and trustworthy evidence. It is a cardinal principle of administration of justice that in criminal cases the burden to prove its case rests entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is either taken or established by the accused and no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish. The prosecution has not been able to bring on record any convincing evidence against appellant to establish his involvement in the commission of murders of four policemen namely, HC Shabbir Hussain, HC Zulfiqar Ali, PC Muhammad Afzal and PC Ghulam Sarwar beyond shadow of reasonable doubt. Rather, there are so many circumstances, discussed above creating doubts in the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Accordingly, we are of the humble view that the prosecution has not been able to prove the involvement of the appellant with the offence charged with and the conviction and sentence awarded to him under Section 7{a} of Anti-Terrorism Act, 1997 is without appreciating the evidence in its true perspective, rather the same is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellant, therefore, the instant appeal is liable to be allowed in terms of his acquittal on the principle of benefit of doubt.

22. The final and eventual outcome of the entire discussion is that the prosecution has failed to discharge its onus of proving the guilt of the appellant beyond shadow of reasonable doubt. Accordingly, this appeal is accepted, the conviction and sentence awarded to the appellant by the learned trial Court vide impugned judgment dated 07.06.2018 are set-aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant shall be set free forthwith, if not required to be detained in any other case.

JUDGE

JUDGE

NAK/PA