IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

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

Special Criminal Anti-Terrorism Appeal No.155 of 2021
Special Criminal Anti-Terrorism Appeal No.156 of 2021
Confirmation Case No.07 of 2021

Appellant in both Appeals:	Nazeer Ahmed S/o Sardar Muhammad through M/s. Peer Syed Asadullah Shah Rashidi and Muhammad Farooq, Advocates a/w Ms. Fariyal Alvi, Advocate
Respondent :	The State Through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General Sindh.
Date of Hearing:	16th August, 2022
Date of Judgment:	24th August, 2022

J U D G M E N T

ZULFIQAR ALI SANGI, J.– Being aggrieved and dissatisfied with the common judgment dated 18.09.2021 passed by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No.361/2019 arising out of FIR No.203/2019 for the offences punishable U/S 302/324/34 PPC r/w Section 7 ATA, 1997 registered at PS Darakshan, Karachi and Special Case No.361-A/2019 arising out of FIR No.40/2019 for the offences punishable U/s 23(i)A of Sindh Arms Act, 2013 registered at PS Sahil, Karachi; whereby the appellant was convicted U/s 302 PPC punishable U/s 6(2) punishable U/s 7 clause (a) of ATA and sentenced to hang by neck till death on two counts subject to confirmation by this Court. The appellant was also fined Rs.10,00,000/- each to be paid to the legal heirs of PC Khalid and Ramzan. The appellant was also convicted U/s 324 PPC for causing three firearm injuries to Saeed and sentenced to imprisonment for 7 years and fine of Rs.100,000/- to be paid to

the injured Saeed. The appellant was also convicted U/s 23(1)A SAA for possession of unlicensed 9 mm pistol and sentenced to RI for 7 years and fine of Rs.50,000/-. However, the benefit of Section 382-B Cr.P.C. was extended to the appellant by the trial court.

2. Brief facts of the case mentioned in the charge sheet are that FIR bearing No.203/2019 U/s 302/324/34 PPC r/w Section 7 ATA, 1997 of Police Station Darakhshan had been lodged on 07.04.2019 by ASI Mujahid Iqbal of Police Station Darakhshan and it has been mentioned by the complainant that on 07.04.2019, he along with police officials namely HC Qaiser Manzoor, HC Naeemullah, PC Ghulam Qadir and Driver Kosar Abbas in Mobile-II bearing No.SPD-963 were patrolling in the area when they had reached at Bara Bukhari, DHA in the morning at about 03:00 to 03:15 a.m. when they heard sound of heavy firing, as such, they went towards the place where from the sound of firing was heard and saw that near one white colour Vigo No.KV-0857 one young person having small beard wearing shalwar qameez was identified in the light of mobile and street light was firing and he went to nearby standing car bearing No.BAS-637 Suzuki Cultus dark blue colour and that young person sat in that Cultus car in which 3/4 persons were already sitting, who were armed with heavy weapons, and they escaped towards Chota Bukhari in the said car. The complainant ASI Mujahid Iqbal saw that one PC Khalid Mehmood, on intelligence duty of PS Darakhshan in civilian clothes, was found severely injured being hit with firearm bullet and at a distance of 10 to 15 paces one motorcycle without number black colour was also lying on the ground. Two persons who had also sustained firearm injuries were also lying at a little distance in injured condition and near them a motorcycle bearing Registration No.KKR-0456 Maker Super Power was lying. The said ASI immediately informed Police Station Darakshan and cordoned-off the area. The incident was seen by the police officials in the mobile, the driver of mobile and other persons also. Chippa ambulances were called and injured were sent to the Jinnah Hospital and the relevant proceedings were conducted on the spot. Memo was prepared, live rounds and other articles were taken in possession from the spot. Superior officers were informed accordingly.

Intelligence officials of Darakhshan Police Station HC Abdul Rauf, PC Muhammad Afzal, Driver PC Azam Khan reached at the spot. ASI Amjad Parvez, Duty Officer, went to the Jinnah Hospital where PC Khalid Mehmood, Muhammad Ramzan son of Allah Ditta had succumbed to firearm injuries and died. The third injured namely Saeed Ahmed son of Allah Bachaya was treated in Emergency Ward. The FIR was lodged with respect to Vigo bearing No.KV-0857 white colour in which a young person with small beard having fair complexions wearing shalwar qameez was firing escaped in Suzuki Cultus car bearing Reg. No.BAS-637 of dark blue colour in which 3/4 persons were sitting, said person had killed innocent people spread terrorism by firing on account of which PC Khalid Mehmood of PS Darakhshan and Muhammad Ramzan son of Allah Ditta were killed, and Saeed son of Allah Bachaya was injured. The act of the accused falls u/s 302/324/34 PPC r/w Section 7 of ATA, 1997, prima facie, case was made out and the said FIR had been lodged and the investigation was entrusted to the Investigating Officer Inspector Muhammad Aijaz Awan.

3. After completing the usual investigation, charge against the appellant was framed on 25.10.2019, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined 16 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all allegations leveled against him. After appreciating the evidence on record, the learned trial Court convicted the appellant as mentioned above; hence, the appellant has filed these appeals against his convictions.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 18.09.2021 passed by the learned trial Court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant have contended that the appellant is innocent and has falsely been implicated in this case; that the prosecution has miserably failed to prove the charges against the appellant; that the learned trial Court while

pronouncing the judgment did not assess the evidence properly; that the identification parade of the appellant was conducted after a delay of about 07 days for which no explanation was provided; that the alleged Vigo bearing No.0857 is not registered in the name of appellant, in fact, the same is in the name of one Nafas Khan, who was also not examined; that no CCTV footages were obtained from the scene by the police to corroborate its version; that no private witness was examined from the scene who might have heard the gunshot firing. They lastly pray for the acquittal of the appellant. They have placed reliance on Basharat Ali vs. Muhammad Safdar and another (2017 SCMR 1601), Zaheer Sadiq vs. Muhammad Ijaz and others (2017 SCMR 2007), Abdul Jabbar alias Jabbari vs. The State (2017 SCMR 1155), Kamal Din alias Kamala vs. The State (2018 SCMR 577), Nawab Siraj Ali and others vs. The State through P.G. Sindh and A.G. Sindh (2020 SCMR 119), Muhammad Ashraf vs. The State (2020 SCMR 1841), Muhammad Imran vs. The State (2020 SCMR 857), Naveed Asghar and 2 others vs. The State (PLD 2021 SC 600), Gul Zarin and other vs. Kamal-ud-Din and others (2022 SCMR 1085), Khalid Mehmood alias Khaloo vs. The State (2022 SCMR 1148) and Rafaqat Ali vs. The State (2022 SCMR 1107).

7. On the other hand, learned Addl. P.G. Sindh has fully supported the impugned judgment on the basis of evidence produced by the prosecution before the trial Court.

8. We have heard the learned counsel for the appellant in both the appeals as well as learned Addl. P.G. Sindh and perused the material available on record with their able assistance.

9. The ruthless and ghastly murder of two persons and receiving three firearm injuries by one person is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. The rule is that the cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. The gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly

involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow as has been held by the Supreme Court of Pakistan in the case of ***Naveed Asghar and 2 others v. The State (PLD 2021 SC 600).*** It is well settled by now that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case of **Wazir Mohammad v. The State (1992 SCMR 1134),** it was held by Supreme Court of Pakistan that *"In the criminal trial it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution."* The Supreme Court in another case of **Shamoon alias Shamma v. The State (1995 SCMR 1377)** held that *"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."*

10. Turning to the case in hand the prosecution to prove the ocular evidence has examined PW2 ASI Mujahid Iqbal the complainant, PW3 HC Qaiser Manzoor, PW4 Saeed Ahmed (injured) and PW10 Muhammad Akeel all claiming to be the eyewitness of the incident. The PW2 and PW3 are the police officials who have given their evidence almost on same line that on the night of incident they were on patrolling duty in the police mobile-11 and on reaching Bara Bukhari at 03:15 a.m. heard severe sounds of firing where they rushed and saw that one young boy having white cloths and little beard while standing close to Vigo having No.KV-0857 was firing. They also saw one Cultus car No. BAS-637 in which 3/4 persons having weapons were sitting and on seeing police party the boy who was making firing sat in the Cultus car and they all went towards Chota Bukhari. They also saw that one police constable namely Khalid Mehmood of their police station was lying near the foot path in injured condition and the motorcycle of Unique Company was available close to him. They also saw at some distance two persons were lying injured and another motorbike was lying there. Those injured were Ramzan and Saeed. The area was cordoned off by them and information was passed to the high-ups'. HC Abdul Rauf, PC Afzal and PC Azam Khan who were on intelligence duty also came there. PW2 the complainant recovered 12 empties and two live bullets of 9mm pistol from place of wardat and on search of Vigo recovered one license of firearm in the name of Nazeer Ahmed (appellant), documents of the vehicle and other articles, one mobile phone near the Vigo was also taken by the complainant in a broken condition, complainant also took the blood soil from there. He called chipa ambulance which shifted the injured persons to the Jinnah hospital. Complainant sealed the recovered articles and prepared the memo which was signed by the HC Qaisar and HC Naeemullah. Both the police witnesses were cross-examined and on reassessment of their evidence we find that they had not reached at the place of incident when the incident took place and were not witnesses to the incident nor the incident took place in the manner as narrated by them. Both the witnesses have deposed that the incident was seen on the street lights and on the light of headlights of the police mobile. The PW2 stated that only one ambulance of chippa came there and all the three injured were shifted alongwith the police officials on the one and the same ambulance. PW3 stated against such and deposed

that 2 to 3 ambulances had come and all the injured were sent separately in the ambulances. Further presence of the police officials at the relevant time at the place of wardat is doubtful from the fact that the complainant stated in his cross-examination that *"I see the register I have brought today and entry No. 40 says that at about 3.35 a.m. call was received by 15 and the caller was Mumtaz. Vol. says I had reached at 3:15 a.m. and this call was made at 3:35 a.m."* Whereas PW8 ASI Ajmal Parvez deposed that on the relevant time he was posted at PS Darakhshan where he received call from Mumtaz at 15 in respect of the incident at 3:35 a.m. and kept such entry No.40, he further deposed that immediately ASI Mujahid Iqbal (complainant) was called from PS and other high-ups were also informed. Again the complainant during his cross-examination has denied about receiving the call from PS and stated that *"I had not received any call from PS. I reached at the place of incident at hearing the firing."* The PW2 complainant during his examination-in-chief deposed that after the recovery from place of incident he came at police station kept entry No. 42 and then registered the FIR of the incident. The complainant during cross-examination stated that *"I had reached the PS at about 4:45 a.m. When I came at PS I had entered my arrival and by that very arrival entry I had lodged the FIR."* From perusal of the FIR it reflects that it was registered *on 07.04.2019 at 0430 hours* which too creates very serious doubt about the happening of incident at the relevant time. Even from the evidence of complainant and the other witnesses it has come on record that only one accused fired while standing at one place and he had not changed the position while making firing upon the deceased and the injured person and there is no allegation against any other person of firing which too is not believable as the medical evidence is not supporting this version of prosecution case. The doctor Shahzad PW12 during his cross-examination has stated that the injured had received 03 injuries from different directions.

11. After the evidence of above two police officials (eyewitnesses) we now considered the evidence of two private and independent witnesses' one of them received firearm injuries in the incident. PW4 Saeed Ahmed who received firearm injuries has deposed that while taking food he and Ramzan (deceased) were going in Gali No.25 on motorbike when one person stopped them on which Ramzan was confused and motorbike fell. The person who

stopped them fired upon Ramzan and he tried to escape and fires were also made upon him to which he received three fire shots on his person. He deposed that a person who fired upon them was in Cultus car, he was sent to Jinnah hospital for treatment. PW4 in clear words deposed that the person sitting in the court is not the accused who had fired. He had not identified the appellant as an accused of the incident and the APG for the state has requested the court to declare him as hostile and then he was cross-examined by the APG and denied all the suggestions made to him. Another independent eye witness is PW10 Muhammad Akeel who deposed that at the time of incident he was going to Chota Bukhari from Misri Shah and saw a boy was firing and after firing boy went away. As per his evidence he was taken to police station on the same day and later on was called for identification parade of accused before the Magistrate where he told the court that he could identify the accused and he had identified the accused at that time but he did not see that person whom he identified in the court. He was also declared hostile and during cross-examination conducted by the APG he had stated that *"it is incorrect to suggest that because I am under pressure therefore I am not identifying that accused in this court."* Though at the stage of investigation the PW10 appeared before the Magistrate for identification of accused and identified him, however the value of such identification parade will be discussed separately. From the reassessment of evidence of these allegedly two independent witnesses it established that they are not supporting the case of prosecution against the present appellant and their evidence cannot be safely relied upon.

12. The incident took place in the night hours and the accused was not known to any of the prosecution witness. The only source as per the evidence of complainant in respect of identity of the accused is that a copy of license which was recovered from the Vigo in the name of accused Nazeer Ahmed and his photograph was affixed on it. The other source of identification was a street light and the head light of police mobile on the basis of which an identification parade before the Magistrate was also held through PW Akeel Ahmed who subsequently denied the identification of present accused during recording his evidence. To the extent of mentioning the description (hulia) of accused in the FIR the complainant admitted during cross-examination and stated that

<u>"It is correct to suggest that I have given the description of accused that he is young and wearing white clothes and have little beard and I see the license which was recovered from Vigo also gives the same description."</u> We have also scanned the entire material/evidence and not found any mentioning of the street lights at the place of incident nor even the vehicle (police mobile) was examined by the investigation officer during the investigation and the same was also not produced before the trial court to prove that the witnesses actually saw the accused on the headlights of the vehicle. The apex courts have held such source of identification as doubtful and non-production of such source also cut the roots of the prosecution case. Hon'ble Supreme Court of Pakistan in the case of ***Sardar Bibi and others v. Munir Ahmed and other (2017 SCMR 344)*** has held as under:-

> ***"......... The source of light i.e. bulbs etc. was not taken into possession during investigation to establish that the witnesses who were allegedly at the distance of more than 100 feet could identify the assailants. So the identification of the assailants was also doubtful in such circumstances of the case."***

Hon'ble Supreme Court of Pakistan in another case of ***Khalil v. The State (2017 SCMR 960)*** has held as under:-

۷۔ چونکہ نہ صرف وقوعہ اندھیری رات کا ہے بلکہ رات کے آخری پہر کے قریب رونما ہوا ہے اور چونکہ دسمبر کا مہینہ تھا لہٰذا کہر اور دھند کے باعث کسی کو کچھ فاصلے پر شناخت کرنا اگر ناممکن نہ تھا تو مشکل ضرور تھا۔ چونکہ مقدمہ ہذا میں ابتدائی اطلاع وقوعہ میں اور نقشہ موقع میں بجلی کے روشن بلب کا ذکر کیا گیا ہے تاہم باقی متعلقہ اشیاء کو قبضۂ پولیس میں لینے کے باوجود بلب بجلی جو کہ واحد ذریعہ شناخت تھا کو قبضۂ پولیس میں نہیں لیا گیا۔ یہ صرف کوتاہی نہیں بلکہ دانستہ طور پر ایسا کیا گیا کیونکہ اگر بلب بجلی واقعی موجود ہوتا تو انتہائی اہمیت کا حامل ہونے کی وجہ سے تفتیشی افسر اس کو پہلی فرصت میں قبضے میں لیتا اور اس کی ساخت اور روشنی دینے کی صلاحیت کو ظاہر کرتا جبکہ ایسا دانستہ طور پر نہیں کیا گیا ہے۔ لہٰذا اس سے متعلق حسب اصول قانون مخالف نتیجہ اخذ کرنا لازمی ہے اور یوں مرتکبان جرم کی شناخت ایک بڑا سوالیہ نشان بن گئی ہے جس کا کوئی معقول جواب استغاثہ کے پاس نہیں ہے۔

۱۱۔ "یہ عدالت کا مسلمہ اصول ہے کہ رات کو اس قسم کا وقوعہ سرزد کرتے وقت ملزمان/مرتکبان جرم کو سب سے پہلی تشویش یہ لاحق ہوتی ہے کہ اسے کوئی شناخت نہ کر سکے لہٰذا وہ نقاب لگا کر ہی اس قسم کی واردات کرتے ہیں تاکہ شناخت کے بغیر وہ موقعۂ واردات سے باآسانی راہِ فرار اختیار کر سکیں۔ نیز تاریک شب کے وقوعہ میں محض چند لمحے کے لئے کسی پر سرسری نظر ڈال کر شناخت کرنا بہت مشکل امر ہے اس لیے رات کی تاریکی میں شناخت کرنے کی شہادت کو شک وشبہ پر مبنی شہادت کا درجہ دیا جاتا ہے اور جب تک ایسی شہادت کو قابلِ یقین و ناقابلِ تردید حد تک تائید وتوثیق کسی مضبوط تائیدی شہادت سے نہیں ہوتی اس وقت تک ایسی شہادت پر انحصار کرنا انصاف کے زریں اصولوں کے خلاف ہوگا۔"

Coming to the identification parade conducted by the learned Magistrate through PW10 Muhammad Akeel. PW Muhammad Akeel at the time of recording his evidence has not identified the present appellant to be a same person who was identified by him at the time of identification parade as such in our view such identification of the accused has no such legal value to maintain conviction of accused in a case of capital punishment without any other corroboration. Further, though it is alleged by the prosecution that the complainant has also identified the accused at the time of incident but at the time of identification parade the accused was not identified through the complainant though he was present outside of the court alongwith PW Muhammad Akeel as has been deposed by the PW9 Abdul Raqeeb (Magistrate) in his evidence. Learned Magistrate also stated during cross-examination that he has not noted down the identification parade on the Performa which was provided by the High Court. The Magistrate also admitted that the identification parade memo which he produced in the court does not bear the seal of the court. Learned Magistrate also admitted that identification parade does not bear the signature of witness neither the signature of accused nor the signature of the dummies. After the test identification parade, the court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or estimator variables which we discussed above. The identification of an accused, therefore, becomes a two-step process. First, the suspect undergoes a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables. Applying the "estimator variables" to the instant case we have already discussed above that it was night time incident, the source of identification was street lights and the headlights of police mobile which have not been proved by the prosecution and that the evidence of PW10 Muhammad Akeel who has not identified the appellant during the trial. Based on the above "estimator variables," possibility of misidentification cannot be ruled out, thereby making it unsafe to place reliance on the identification evidence. From perusal of the Identification Parade which was conducted by the Magistrate it is fraught with several infirmities diminishing its probative and evidentiary value. Brief descriptions of the accused as mentioned by the complainant in the FIR are

missing. Identification Parade can only commence, once suspects matching the description in the crime report or in the statements of the witnesses under section 161, Cr.P.C. Matching the description in the first information report is the starting point towards identification of the unknown accused. It is, therefore, uncertain how the appellant was lined-up for the identification parade without the Magistrate first matching the description given by the complainant. Selection of the suspects, without any correlation with description of the accused in the first information report, raises doubts and makes the identification proceedings unsafe and doubtful. This is just a shade apart from cases where there is no description of the accused in the FIR, the effect being the same, casting doubts on the credibility of the test identification parade. ***Reliance can be placed on the cases of State/Government of Sindh v. Sobharo (1993 SCMR 585), Muhammad Afzal alias Abdullah v. State (2009 SCMR 436), Sabir Ali alias Foji v. State (2011 SCMR 563) and Muhammad Abdul Hafeez v. State of A.P. (AIR 1983 SC 367). Mian Sohail Ahmed and others v. The State and others (2019 SCMR 956).*** Identification of an accused person by eye-witnesses before the trial court during a trial is generally considered to be quite unsafe because before such identification before the trial court during the trial the eye-witnesses get many opportunities to see the accused persons appearing before the court in connection with their remand, distribution of copies of statement of prosecution witnesses recorded under section 161, Cr.P.C., framing of the charge and recording of statements of other prosecution witnesses. Even in such identification before the trial court during the trial it is imperative that a witness must point towards a particular accused person present before the trial court and must also specify the role allegedly played by him in the incident in issue. The unsafe nature of identification of an accused person before the trial court during the trial has already been discussed by the Honourable Supreme Court of Pakistan in the cases of ***Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), Muhammad Afzal alias Abdullah and another v. The State and others (2009 SCMR 436), Nazir Ahmad v. Muhammad Iqbal (2011 SCMR 527), Shafqat Mehmood and others v. The State (2011 SCMR 537), Ghulam Shabbir Ahmed and another v. The***

State (2011 SCMR 683), Azhar Mehmood and others v. The State (2017 SCMR 135) and recently in the case of ***Kanwar Anwaar Ali (PLD 2019 SC 488).*** Thus based on the particular facts and the circumstances of the present case we hold the identification parade as unreliable and not free from the doubts and the same was also even not recorded as per the guidelines issued by the Honourable Supreme Court of Pakistan in the case of ***Kanwar Anwaar Ali (supra)***.

13. Another piece of the evidence against the appellant is recovery of crime weapon from him on his pointation being corroborative evidence produced by the prosecution in shape of PW11 HC Javed Hussain, SIO Muhammad Aijaz Awan and PW14 SIP Khuram Islam the investigation officer of the Arms case. The incident of main offence was occurred on 07.04.2019 and on the same day appellant was arrested from Agha Khan Hospital, nothing was recovered from him, however it is alleged that during interrogation appellant agreed to handover the pistol on 11.04.2019, and police party headed by SIO Muhammad Aijaz Awan alongwith his subordinates proceeded towards pointed place where from the appellant voluntary produced the pistol. The recovered pistol as per the case of prosecution is license pistol and the copy of license is also produced by the prosecution. Having possession of license weapon is no offence but its illegal use may constitute an offence. However, the appellant denied the recovery of pistol on his pointation from his house and claimed that it was foisted upon him. The prosecution examined PW16 the complainant of the arms case who during cross-examination stated that there are many bungalows in the vicinity of bungalow No. 97/II, Khyaban-e-Tariq, Phase VI, DHA Karachi. *No Chowkidar was found in the vicinity of bungalow No. 97/II, Khyaban-e-Tariq, Phase VI, DHA.* Whereas the mashir of recovery namely HC Javed Hussain PW11 stated during his cross-examination that *"It is correct to suggest that there were bungalows and there were Chowkidars near the place of recovery. I say that there was a Chowkidar at the house of recovery."* The complainant of the arms case who is also the investigation officer of the main case Muhammad Aijaz Awan has deposed that "*the accused led us inside the house to the main entrance of bungalow and then went towards the cabinet and got out pistol of 9mm bore, Zagana-F, silver & black color, Made in Turkey, alongwith 04 live*

bullets and magazine." The mashir has given another version in respect of the recovery of pistol and in his examination-in-chief he deposed that *"We took search of the house, went inside the kitchen and from the cabinet of the kitchen we had taken out pistol from the cabinet."* The mashir did not depose that 04 live bullets and the magazine were recovered but he stated that the live bullets present in court are same. Nowhere in the entire evidence it comes that at the time of recovery of pistol there was also a lady searcher but the mashir PW11 Javed Hussain during cross-examination stated that there was a lady searcher alongwith them. The most important thing is that as to whether one pistol was recovered from the appellant or there were two pistols? The property which was produced before the trial court reflects that there was only one pistol and the FSL report also reflects that only one pistol was sent. The investigation officer PW16 Muhammad Aijaz Awan stated during his cross-examination that *"The weapon alongwith 12 empties had already been recovered by the complainant ASI Mujahid Iqbal, and pistol had been handed over to PS Sahil by me, and sent Ex.P/68 to FSL for cross match."* PW16 also during cross-examination stated that "*The license is of different weapon than the pistol which I had recovered from the accused."* From careful perusal of evidence of this witness it reflects that one pistol was recovered by ASI Mujahid Iqbal the complainant and one was recovered by investigation officer SIO Muhammad Aijaz Awan but only one pistol was produced before the trial court which makes the recovery of pistol as doubtful. Even otherwise, recovery of weapon of offence is only a corroborative piece of evidence; and in absence of substantive evidence, it is not considered sufficient to hold the accused person guilty of the offence charged. When substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution case.

14. Medical evidence being supportive to ocular evidence produced by the prosecution in the shape of PW12 Dr. Shahzad who examined the injured and conducted the postmortem of the deceased persons and exhibited such postmortem reports and the MLC is also scanned. This evidence proves only the factum that death of the deceased persons was caused by firearm weapon; it does in no way indicate who had fired upon the deceased and the

injured. Medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person. Reliance can be placed on the cases of ***Yaqoob Shah v. State (PLD 1976 SC 53); Machia v. State (PLD 1976 SC 695); Muhammad Iqbal v. Abid Hussain (1994 SCMR 1928); Mehmood Ahmad v. State (1995 SCMR 127); Muhammad Sharif v. State (1997 SCMR 866); Dildar Hussain v. Muhammad Afzaal (PLD 2004 SC 663); Iftikhar Hussain v. State (2004 SCMR 1185); Sikandar v. State (2006 SCMR 1786); Ghulam Murtaza v. Muhammad Akram (2007 SCMR 1549); Altaf Hussain v. Fakhar Hussain (2008 SCMR 1103) and Hashim Qasim v. State (2017 SCMR 986).***

15. The recovery of crime empties and other articles including blood stained soil etc from the place of wardat and the positive FSL in respect of the empties and the recovered crime weapon from the appellant being the circumstantial evidence also cannot connect the accused with the commission of murders of the two deceased persons and one injured in the case once the identity of the accused has not been proven as in this case. Mere sending the crime weapons and the empties recovered from the place of wardat to the chemical examiner would not serve the purpose of the prosecution to prove the case against the accused in absence of strong oral/direct or other circumstantial evidence with unbroken chain. Even otherwise, recovery of weapon of offence is only a corroborative piece of evidence; and in absence of substantive evidence, it is not considered sufficient to hold the

accused person guilty of the offence charged. When substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution case. The Honourable Supreme Court of Pakistan in case of ***Saifullah v. State (1985 SCMR 410)***, has held as under:-

> ***"Considering all the facts on the record we are of the view that it was an unwitnessed occurrence... We have therefore no option but to exclude the testimony of the aforementioned two witnesses from consideration with the result that no evidence is left on the record to connect the accused with the crime in question, as the recovery of the blood-stained knife, even if believed, could only be used as evidence corroborating the testimony of the eye-witnesses, if any. But since evidence of the eye-witnesses in this case has been excluded this recovery is hardly of any use."***

16. The motive for commission of offence has not been asserted by the prosecution. Even not a single word has been deposed by the prosecution witnesses against the appellant in respect of the motive and only it is alleged that on the night of offence accused/appellant made firing which resulted death of two persons and one received firearm injuries. The investigation officer did not bother to investigate as to why accused made firing while standing in front of his own house. Therefore, the prosecution has failed to prove any motive against the appellant hence, the real cause of occurrence remained shrouded in mystery. In this context, reliance is placed on the case of ***Mst. Nazia Anwar v. The State (2018 SCMR 911)*** wherein the Hon'ble Supreme Court has held that;-

> "***4........ that the real cause of occurrence was something different which had been completely suppressed by the both the parties of the case and that real cause of occurrence had remain shrouded in mystery."***

17. 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 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, motorcycles and the two vehicles so also one mobile phone from the place of wardat was not put to him while recording his statement under section 342 Cr.P.C. The Honourable Supreme Court has held in the cases 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. the same could not be considered against him. Thus we discard these pieces of evidence against the accused. However the same has been discussed above for the safe administration of criminal justice and found unreliable. We are also surprised to see the Question No. 4 of the statement under section 342 Cr.P.C, where it was put to the appellant that he was identified by the complainant alongwith eyewitness being accused standing in front of the bungalow No.81/2 Khayaban-e-Bukhari and was firing. From the evidence it does not appear to us that the appellant was ever identified by the PW2 complainant (ASI Mujahid Iqbal) during the identification parade conducted by the Learned Magistrate. The appellant also produced two defence witnesses both have deposed that they were present in the bungalow of the appellant and before the incident took the appellant to Agha Khan Hospital as he was unwell and was vomiting and the appellant was arrested by the police from the Hospital. DW Irshad also deposed that before the arrest of appellant he saw on TV that the police was showing the copy of license of appellant. Since we are following the principle in respect of casting duty upon the prosecution to prove the case beyond a reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence which we do not find much in the present case.

18. The rule of giving the benefit of doubt to an accused person is essentially a rule of caution and prudence and is deep-rooted in our jurisprudence for the safe administration of criminal justice. In common law, it is based on the maxim, "***It is better that ten guilty persons be acquitted rather than one innocent person be convicted***". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (peace be upon him): ***"Avert punishments (hudood) when there are***

doubts" and "Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment." The Hon'ble Supreme Court has quoted probably the latter part of the last-mentioned saying of the Holy Prophet (peace be upon him) in the case of *Ayub Masih v. State (PLD 2002 SC 1048)* ***"Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."***

19. Keeping in view the said golden rule of giving the benefit of doubt to an accused person for safe administration of criminal justice, we are firm in the opinion that all the evidence discussed above is completely unreliable and utterly deficient to prove the charge against the appellant beyond a reasonable doubt. Resultantly, the Spl. Criminal A.T Appeals No.155 and 156 of 2021 are allowed and the Judgment dated: 18.09.2021 passed by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No.361/2019 arising out of FIR No.203/2019 for the offences punishable U/ss 302/324/34 PPC r/w Section 7 ATA, 1997 registered at PS Darakhshan, Karachi and Special Case No. 361-A/2019 arising out of FIR No.40/2019 for the offences punishable U/s 23(i)A of Sindh Arms Act, 2013 registered at PS Sahil, Karachi is set aside and the appellant Nazeer Ahmed s/o Sardar Muhammad by caste Durani is acquitted of the charges. He shall be released forthwith if he is not required to be detained in some other custody case. Thus the confirmation reference made by the trial court as required under section 374 Cr.P.C. is answered in negative.

20. The Appeals and the confirmation reference are disposed of in the above terms.

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