

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Jail Appeal No.320 of 2019
Special Cr. Anti-Terrorism Jail Appeal No.323 of 2019

Appellants in
Spl. Cr.ATJA
No.320 of 2019

: Wahid alias Sajjad alias Imtiaz alias Phora and Ahsan Shabbir alias Babu alias Big Show through Mr. Muhammad Farooq, advocate.

Appellant in
Spl. Cr.ATJA
No.323 of 2019

: Qamar alias Kami alias Kamran through Mr. Muhammad Farooq, advocate.

State

: Through Ms. Seema Zaidi,
Additional Prosecutor General, Sindh.

Date of Hearing

: 11.12.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellants Wahid alias Sajjad alias Imtiaz alias Phora son of Muhammad Murtaza, Ahsan Shabbir alias Babu alias Big Show son of Ghulam Shabbir and Qamar alias Kami alias Kamran son of Muhammad Kamal were tried by learned Judge, Anti-Terrorism Court-X, Karachi in Special Case No. B-615 of 2015 [Crime No.50/2014, under sections 353/324/302/34 PPC read with Section 7 of ATA 1997}, registered at P.S. Iqbal Market, Karachi. On conclusion of the trial, vide judgment dated 29.08.2019, the appellants were convicted and sentenced under section 265-H (II) Cr. P.C. as under:-

01. Accused Wahid @ Sajjad @ Imtiaz @ Phora s/o Muhammad Murtaza is convicted u/s 7(1)(a) of ATA, 1997 and is sentenced to undergo Life Imprisonment with fine of Rs.10,00,000. In default in payment of such fine, he shall further suffer R.I. for one year.
02. Accused Wahid @ Sajjad @ Imtiaz @ Phora s/o Muhammad Murtaza is further convicted u/s 7(1)(h) of ATA, 1997 and is sentenced to undergo for ten years with fine of Rs.100,000/-. In default in payment of such fine, he shall suffer further R.I. for six months.
03. Accused Ahsan Shabbir @ Babu @ Big Show s/o Ghulam Shabbir is convicted u/s 7(1)(a) of ATA, 1997 and is sentenced to undergo Life Imprisonment with fine of Rs.10,00,000. In default in payment of such fine, he shall further suffer R.I. for one year.
04. Accused Ahsan Shabbir @ Babu @ Big Show s/o Ghulam Shabbir is further convicted u/s 7(1)(h) of ATA, 1997 and is sentenced to undergo for ten years with fine of Rs.100,000/-. In default in payment of such fine, he shall suffer further R.I. for six months.
05. Accused Qamar @ Kami @ Kamran s/o Muhammad Kamil is convicted u/s 7(1)(a) of ATA, 1997 and is sentenced to undergo Life Imprisonment with fine of Rs.10,00,000. In default in payment of such fine, he shall further suffer R.I. for one year.
06. Accused Qamar @ Kami @ Kamran s/o Muhammad Kamil is further convicted u/s 7(1)(h) of ATA, 1997 and is sentenced to undergo for ten years with fine of Rs.100,000/-. In default in payment of such fine, he shall suffer further R.I. for six months.

All sentences were ordered to run concurrently. Benefit of Section 382-B, Cr. P.C. was also extended to accused.

2. The prosecution story unfolded in the crime report (Exh.9/D) are that on **20.03.2014** at about 1100 hours, ASI Jan Muhammad Baloch got registered FIR No.50/2014, under sections 302/353/324/34 PPC read with Section 7 ATA, 1997 at P.S. Iqbal Market, Karachi stating therein that on such day viz. 20.03.2014, he was on patrolling duty along with his subordinate staff for prevention of terrorist activities in Government Mobile-II. While roaming around the areas, when the police party reached at Noor Imam Marriage Hall, Qureshi Market, Main Road Chishti Nagar Sector 11 ½ Orangi Town, Karachi at about 0530 hours, **they saw 03 persons on a motorbike**, who appeared to be suspicious, on such,

said ASI Jan Muhammad gave signal to stop them, who on seeing the police party, opened straight firing upon them with intention to take their lives. In result whereof, **H.C. Mehboob Alam and P.C. Farooq received 01 bullet (each)**, due to which they fell on the ground. In self defence, police party also fired back on said armed culprits. During exchange of firing, said armed persons somehow, managed to flee away from the crime scene by running towards the narrow lanes. Thereafter, ASI Jan Muhammad with the help of his subordinates took both the injured police officials to Qatar Hospital, Karachi for their medical treatment, so also informed to his high-ups regarding such incident. Before reaching at the hospital, injured HC Meboob Alam succumbed to the injuries and expired whereas, another injured police official namely PC Farooq was then shifted to PNS Shifa. Hence, this FIR was registered by said ASI Jan Muhammad Baloch against the **unknown culprits**.

3. After usual investigation, challan was submitted against the accused under the above referred sections.

4. Trial court framed charge against the accused at Exh.04 in the case, to which accused pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined thirteen witnesses and exhibited various documents and other relevant items. Thereafter, prosecution side was closed. Whereas, one witness was examined in defence.

6. Statements of accused under Section 342 Cr. P.C were recorded at Exh.27, 28 and 29, wherein the accused denied all the incriminating pieces of prosecution evidence brought against them on record and claimed false implication in this case. In a question what else they have to say, they replied that they were innocent and have not committed this offence and have falsely been implicated by police.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 29.08.2019 convicted and sentenced the appellants as stated above. Hence these appeals.

8. Before dealing with the instant case and assessing the evidence before us it is relevant to mention that initially co-accused Muhammad Ikhlq son of Muhammad Murtaza was acquitted by extending him benefit of doubt under section 265-H(1) Cr. P.C. and the case against Danish @ Pahari son of Muhammad Murtaza remains open as he is absconding and has been declared a proclaimed offender by the trial Court.

9. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. He further contended that learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that appellants/accused were booked by the police in this case falsely by foisting arms upon them. He further contended that no specific role has been assigned to the appellants. He also contended that the learned trial Court has erred in holding that the prosecution has proved the case against the appellants while there was contradictory evidence which is not trustworthy due to material contradictions and conviction handed down to the appellants is illegal and the same is result of mis-reading of facts and evidence on record. Learned counsel further contended that the appellants are innocent and have falsely been implicated in this fake and managed case of encounter and no features/descriptions of the culprits have been given by the PWs. Learned counsel further contended that the learned trial Court has miserably failed to appreciate the evidentiary value of evidence and also failed to prove the case beyond any shadow of doubt. Learned counsel further contended that no independent witness has been cited by the

prosecution in this case despite the fact that the place of occurrence was thickly populated area. In support of his contentions, learned counsel has relied upon the cases reported as *FAROOQ V. MUSAVIR AHMED and 3 others* (2020 P. Cr.L.J. 328), *AFAQ AHMED V. THE STATE* (2020 YLR 676), *MUHAMMAD IRABHEEM and another v. THE STATE and another* (2020 YLR 1662), *NAQEEBULLAH and others V. THE STATE and others* (2020 MLD 1492), *JUMA KHAN V. THE STATE* (2020 P. Cr. L.J. 1603) and *BAKHT NAWAS V. THE STATE* (2020 YLR 1685). Lastly, learned counsel has prayed for acquittal of the appellants.

10. Conversely, learned Additional Prosecutor General has argued that the prosecution has examined thirteen PWs and they have fully implicated the accused in the commission of offence. She further argued that police officials had no enmity to falsely implicate the accused person in this case and trial court has rightly convicted the accused. Learned Additional Prosecutor General prayed for dismissal of the present appeals.

11. We have carefully heard the learned Counsel for both the parties and scanned the entire evidence available on record.

12. At the trial, prosecution examined PW-01 ASI Muhammad Afzal deposed that on **19.03.2014**, he was busy in routine work in his office, he was informed by his concerned SHO that some **unknown assailants** opened fire on police party with intention to take their lives and in result of said firing HC Mehboob Alam and PC Farooq got seriously injured, who were shifted to hospital, then he came to know that HC Mehboob Alam had expired. On **11.05.2015**, he was on patrol duty along with his subordinates and received information from an **informer that one of accused persons who was involved in murder of HC Mehboob**

Alam, was present at Football Chowrangi, Alam Bakery Wali Gali, he proceeded to the pointed place and at the pointation of the said informer he arrested said accused, who disclosed his name as Ahsan Shabbir @ Babo @ Big show s/o Ghulam Shabbir, recovered one 9 mm Pistol along with loaded magazine contained five live rounds and interrogated the accused who admitted that on 20.03.2014 he along with his accomplices namely Imtiaz, Sunny and others had attacked on police party and injured two police officials. During his cross-examination he admitted that he made Roznamcha entry of his arrival but he did not produce the same before the Court, he left PS on 20.03.2014 and also made his Roznamcha entry of his departure but neither he remember the number of said entry nor produced the same before the Court and further admitted that he did not mention his statement under section 161 Cr. P.C. that after receiving such information he made Roznamcha entry of his departure in respect of visit to Qatar Hospital and he did not specifically mention in his statement under section 161 Cr. P.C. that in which vehicle and at what time he left Qatar Hospital along with injured PC Farooq for PNS Shifa Hospital and did not produce any receipt of PNS Shifa Hospital in respect of admission of injured PC Farooq, and he did not take any discharging slip from Qatar Hospital.

13. PW-02 PC Muhammad Bux deposed that on 12.03.2015 one SI Fayaz Qureshi was interrogating two accused persons namely Wahid and Qamar, who were already arrested in Crime No. 35/2015, they also disclosed that on 20.03.2014, they were on 03 motorcycles along with their accomplices duly armed, they further disclosed that some police officials had given signal to them at Noor Imam Shaadi Hall, Qureshi Market, but instead of stopping they had opened fire shots upon said police officials and HC Mehboob Alam got expired, whereas, PC

namely Farooq got injured and SI Fayyaz had re-arrested both accused persons in Crime No.50/2015. During his cross-examination he stated that he had made hectic efforts to produce his posting order at PS Iqbal Market but he failed to produce the same before the Court, and admitted that he did not specifically mention in his examination-in-chief that at what time he had interrogated the accused persons and he did not know the name of complainant of FIR No.35/2015.

14. PW-03/Complainant ASI Jan Muhammad, while stating the whole prosecution story, deposed that during exchange of firing he made 04 fire shots, whereas, PC Tariq made 04 fire shots, PC Ajmeri made 05 fire shots, PC Farooq made 05 fire shots and PC Savan made 07 fire shots. During his cross-examination he admitted that he did not produce any departure entry from Chowki Puri Bangish as well as his arrival entry at PS Iqbal Market and he did not make the Koth entry while taking the official arms and ammunitions, it is the duty of the Koth Incharge and usually he writes or enters such entry in the Koth Register and description of accused persons was not mentioned in the FIR and it was not specifically mentioned in the FIR as well as in his statement under section 161 Cr. P.C. that at the time of incident who was firing from which weapon, and it was not mentioned in memo of inspection of place of incident that accused persons while making fire shots had turned into the street and no any private witness was taken by the I.O. while conducting inspection of place of incident and also no any private Mashir was taken while preparing memo of arrest and recovery. He further admitted that FIR was lodged after a delay of 5 ½ hours and he did not know whether he made his entry in Qatar Hospital or not and did not produce Koth Register before the Court, he did not remember the number of his official SMG used by him at the time of incident and did not know the

exact date when the accused persons were arrested. He further admitted that registration number of the motorbike, on which the accused persons were available at the time of incident, was not mentioned in the FIR as well as his statement under section 161 Cr. P.C., and it was not mentioned in FIR that three accused persons were wearing police uniform.

15. In order to prove unnatural death of HC Mehboob Alam, prosecution has examined PW-04/Dr. Muhammad Saleem, Senior MLO of Abbasi Shaheed Hospital, who conducted the postmortem of dead body and furnished cause of death that death occurred due to hemorrhagic shock, leading to cardio-respiratory failure, resulted by fire-arm injury.

16. PW-05 ASI Ashiq Ali deposed that on 19.03.2019 SHO of P.S. Iqbal Market informed him on mobile phone that police encounter had taken place and HC Mehboob and PC Farooq had sustained bullet injuries, who were taken to the Hospital for medical treatment by ASI Jan Muhammad Baloch and he was asked to reach there to help him, he reached at Abbasi Shaheed Hospital where he was informed that HC Mehboob had succumbed to the injuries and expired while injured PC Farooq was taken to PNS Shifa by ASI Afzal. During his cross-examination he admitted that he had not produced any entry before the Court regarding his departure from P.S. towards Abbasi Shaheed Hospital and I.O. did not call any private person to act as a witness of memo of inspection of place of wardaat.

17. PW-06 Afzal Roshan, Ex-Civil Judge and Judicial Magistrate, who conducted identification test parade of the accused Wahid and Kamran on the request of I.O. SIP Fayyaz Qureshi on 27.03.2015. During his

cross-examination he admitted that **joint identification test parade** of both the accused persons was conducted by him and he did not direct the accused persons to change their positions, during their second identification parade and he did not mention the addresses of the dummies as well as their features, and he had not changed the dummies and he had held identification test parade of each accused one time and the accused persons had not changed their dresses prior to the identification test parade, and he had not gone through the contents of FIR before conducting identification test parade of the accused persons.

18. PW-07 Aijaz Ali, Senior Civil Judge, Karachi-East, who conducted identification test parade of accused Ahsan Shabbir @ Baboo @ Big Show on 25.05.2015 at the request of I.O/SIO Muhammad Fayyaz Qureshi. During his cross-examination he admitted that **copy of CNIC of PW Muhammad Zahid was not available with the memo of identification test parade** and he did not mention the height and complexion of dummies, in list of dummies and complete residential addresses of some of the dummies were not available in list of dummies.

19. PW-08 PC Muhammad Zahid deposed that on 19.03.2014 he was on patrolling duty of area, they saw **three persons on one motorcycle (wearing police uniforms)**, signaled them to stop but instead of stopping they made direct firing upon them, **HC Mehboob sustained two bullet injuries on his Chest**, due to which he fell on the ground and died instantly while PC Farooq also sustained bullet injury on his right ribs, **the assailants managed to flee away from the crime scene while taking advantage of darkness**. During his cross-examination he admitted that he did not mention Huiyas of absconding accused persons in his statement under section 161 Cr. P.C.

20. PW-09 PC Muhammad Lateef almost stated/repeated the same prosecution story. During his cross-examination he admitted that he did not produce notice under section 160 Cr. P.C. issued by I.O. to him in Court and did not mention Huiyas of absconding accused persons in his statement under section 161 Cr. P.C.

21. PW-10 PC Rustom Ali deposed that on 10.05.2015 a spy informant informed to ASI Afzal that one culprit of this case was available at football Chowrangi near Alam Bakery Lane, on such information, they went to pointed place, encircled one person standing there and apprehended him on the spot and ASI Afzal conducted personal search of apprehended person and recovered 9 mm pistol from right fold of his pent along loaded magazine having 05 live bullets, who disclosed his name as to be Ahsan Shabbir. During his cross-examination he admitted that the spy/informant was himself present at Khalil Market and Alam Bakery is situated at the place of arrest of the accused.

22. PW-11 SIP Muhammad Fayyaz Qureshi, I.O. of the case, deposed that he interrogated already arrested accused persons namely Wahid and Qamar, who during interrogation disclosed the incident took place on 20.03.2014, on such disclosure he re-arrested both the accused persons. During his cross-examination he admitted that he had not produced any entry in Court regarding entrustment of investigation of this case to him, and present accused persons were already arrested in some other cases, and signatures of PWs and accused persons were not available on notice under section 160 Cr. P.C. as required under law, further admitted that neither he had produced departure entry nor arrival entry in Court, and he neither issued notice under section 160 Cr. P.C. to accused nor PWs and he did not

produce the accused persons before the learned Judicial Magistrate for recording their confessional statements under section 164 Cr. P.C. and P.I. Aurangzaib Jadoon did not record his statement under section 161 Cr. P.C.

23. PW-12 Inspector Aurangzaib Jadoon deposed that he produced the accused persons before ATC-II for their PC Remand. During his cross-examination he admitted that he had not produced any document showing that the investigation of this case was assigned to him and he had not produced any arrival as well as departure entry in Court and neither he called PWs to verify their previous statements under section 161 Cr. P.C. nor he inspected the place of wardaat to verify the incident and he did not conduct investigation of this case.

24. PW-13 ASI Muhammad Safdar deposed that from the place of wardaat, late SIP Muhammad Riaz recovered 10 empty shells of 222 bore rifle and 10 empty shells of SMG and sealed them on the spot in cloth parcel and also produced all the relevant documents during his examination-in-chief.

25. DW-01, namely, Musarrat Shaheen, mother of accused Ahsan Shabbir deposed that on 02.05.2015 at about 02:00 or 03:30 a.m. her son was sleeping, someone knocked the door, she opened the door and some police officials (in uniform and civil dresses) stormed inside her house and inquired about her son, she pointed out at her son, who was standing with her at that moment and without any reason they took away her son. Thereafter, she along with her husband and other children proceeded to P.S. Iqbal Market and inquired regarding her son but they denied the custody of her son. She used to visit P.S. on daily basis and also approached to the different police stations of Karachi but no any

clue of her son was found and after 11 days of this incident she received a call from some police official who called her at Orangi Town No.05, Karachi where she along with her husband went, said police official demanded illegal gratification to the extent of Rs.500,000/- from them, in lieu of release of their son, which they could not pay and due to non-payment of illegal gratification her son was illegally and falsely implicated in this case. During her cross-examination she admitted that neither she submitted any application before any forum nor she approached the Court of law, regarding illegal arrest of her son at the hands of police; she further admitted that except this case, other cases were also registered against her son in different police stations of Karachi but he was acquitted from charges of those offences.

26. It was the case of the prosecution that on 20.03.2014, a police party was on patrolling duty and they stopped three persons who were coming on a motorbike but the said three persons opened straight firing upon them, in result thereof, HC Mehboob Alam and PC Farooq received bullet injuries, later on HC Mehboob Alam expired and injured PC Farooq was under treatment in PNS Shifa. Prosecution has cited/examined thirteen witnesses but failed to produce the injured PC Farooq for recording of his statement before the Court, who was victim of the incident and also miserably failed to examine PCs Tariq, Ajmeri and Savan, who according to PW-03 made fire shots during alleged encounter.

27. Record reflects that accused Wahid @ Sajjad @ Imtiaz @ Phora and Qamar @ Kami @ Kamran were arrested on 12.03.2015, vide re-arrest memo Ex.8/A by SIP Muhammad Fayyaz of P.S. Iqbal Market in FIR No.35/2015, they were produced before Civil Judge and Judicial Magistrate-VI, Karachi-West (PW-06) on 27.03.2015 for their

identification test parade. PW-06 in his cross-examination has admitted that the joint identification test parade of both the accused persons was conducted by him and he did not direct the accused persons to change their positions, during their second identification parade and he did not mention the addresses of the dummies as well as their features, and he had not changed the dummies and he had held identification test parade of each accused one time and the accused persons had not changed their dresses prior to the identification test parade, and he had not gone through the contents of FIR before conducting identification test parade of the accused persons. While accused Ahsan Shabbir @ Babu @ Big Show was arrested on 11.05.2015 during patrolling by ASI Muhammad Afzal of same police station and he has been produced before Judicial Magistrate-VII, Karachi-West on 25.05.2015 for his identification test parade and at the time of identification test parade PW-08 PC Muhammad Afzal was present in Court Room. PW-07 Aijaz Ali, the then Judicial Magistrate has also admitted that he did not mention the height and complexion of dummies, in list of dummies and complete residential addresses of some of the dummies were not available in list of dummies. It can be seen that all the above three accused persons were produced before the Court for their identification test parade after fifteen days of their arrest. PWs 08 and 09 have also admitted that they did not mention Huiyas of absconding accused persons in their statements under section 161 Cr. P.C.

28. In our considered view, identification of the accused in the present case at night time by the PWs 08 and 09 was highly doubtful for the reason that in the mashirnama of place of wardat there is no mention of source of light. There is nothing on record that P.Ws had seen accused clearly for sufficient time at the place of incident. We have no hesitation to hold that identification parade through PC

Muhammad Zahid was legally laconic and identification of accused through said PC in Court was unsafe for maintaining conviction. Moreover, identification parade was not held in accordance with the guidelines contained in the Police Rules, 1934. In this regard reliance can be placed upon the case reported as **Hakeem and others vs. The State (2017 SCMR 1546)**, wherein the Honourable Supreme Court has held as under:

“The Rule 26.32(1)(d) inter alia require “the suspects shall be placed among other persons similarly dressed and of the same religion and social status, in the proportion of 8 or 9 such persons to one suspect. Each witness shall then be brought up separately to attempt his identification. Care shall be taken that the remaining witnesses are “ still kept out of sight and hearing and that no opportunity is permitted for communications to pass between witnesses who have been called up and those who have not.” PW-5, Imdad Ali, Assistant Mukhtiarkar, Mirpursakro, in whose presence the identification parade was conducted, has stated in his deposition that he arranged 22 dummies. He deposed “the accused persons namely Ghulam Mustafa, Bodo, Noor Mohammad, Khuda Bux, Usman, Hakim and Imdad were mixed up in the row with damies (sic) according to their choice and thereafter the complainant Wali Muhammad and PWs Jan Mohammad and Abdullah picked them up from the row.” So in fact seven accused were lined up with dummies for identification. Furthermore, during the identification parade, no specific role played in the incident was assigned to any particular accused. This Court in the case of Azhar Mehmood v. State (2017 SCMR 135) has held that in an identification parade, if the accused were identified without reference to any role played by them in the incident, the same is of no evidentiary value. A quote from the judgment of Azhar Mehmood's case is as follows:-

“We have gone through the statements made by the supervising Magistrates, i.e. PW5 and PW10 as well as the proceedings of the test identification parades and have straightaway noticed that in the said parades the present appellants had not been identified with reference to any role played by them in the incident in issue. It has consistently been held by this Court that such a test identification parade is legally laconic and is of no evidentiary value and a reference in this respect may be made to the cases of Khadim Hussain v. The State (1985 SCMR 721), Ghulam Rasul and 3 others v. The State (1988 SCMR 557), Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), Mehmood Ahmad and 3 others v. The State and another (1995 SCMR 127), Siraj-ul-Haq and another v. The State (2008 SCMR 302), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Shafqat Mehmood and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563) and Muhammad Fayyaz v. The State (2012 SCMR 522)”

5. *This Court in the case of Bacha Zeb v. The State (2010 SCMR 1189) after relying upon earlier decision of this Court in the case of Lal Pasand v. The State (PLD 1981 SC 142) held that it would be unreasonable to mix five accused persons with several other persons for the purposes of identification as such a larger number of persons would only confuse the identifying witnesses and the proper course is to have separate identification parades for each accused. Keeping in view the manner in which the identification parade was held, such identification parade cannot be relied upon to award the accused punishment of life imprisonment, who on account of old blood feud may also be already known to the complainant.”*

29. It is settled law that identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence, since memories fade and visions get blurred with the passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between occurrence and identification proceedings, should be viewed with suspicion. Moreover, it is imperative to ensure that, after their arrest, the suspects are put to identification tests as early as possible and 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 will avoid the possibility of overzealous investigation officers 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 so that no witness could see them. Identification parades should never be held at police stations and the Magistrate, supervising the identification proceedings, must verify the period, for which the accused persons have remained in police custody after their arrest and before the test and identification must incorporate this fact in his report. In order to guard against the possibility of a witness identifying an accused person by chance, a number of dummies showed to be intermingled with the accused persons as much as possible, but 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. Ratio between the accused persons and the dummies should be 1 to 9 or 10. It also 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 should also be ensured that nobody from those who are witnessing the proceedings, such as the members of the jail staff etc., is able to communicate with the identifying witnesses. 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 someone depends only upon his vigilance and caution. 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. 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 and 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 and if a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked up by the witness. The Magistrate is also required to record in his report all the precautions taken by him for a fair conduct of the proceedings and should also issue certificate at the end of his report. Such guidelines have elaborately been mentioned in the order of the Honourable Supreme Court dated 22.02.2019, passed in Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018.

30. It is crucial to note that PW-04/MLO deposed that deceased HC Mehboob Alam had received one firearm bullet injury, whereas, PW-08 PC Muhammad Zahid stated that due to firing the deceased sustained two bullet injuries on his Chest, therefore, it is crystal clear that PC Muhammad Zahid was not present at the time of incident and his testimony cannot be relied upon safely and we do not find his evidence to be reliable, trustworthy or confidence inspiring and disbelieve it at least to the extent of the particulars relating to the shooting of the deceased. Furthermore, during exchange of firing, PW-03 ASI Jan Muhammad made 04 fire shots, PC Tariq made 04 fire shots, PC Ajmeri made 05 fire shots, PC Farooq made 05 fire shots and PC Savan made 06 fire shots but the said PCs have not been examined by the prosecution, which creates serious doubt in the prosecution story.

31. Now coming to the issue of not sending official weapons for forensics alongwith the empties, reference is made to Rule 6.8 of Police Rules titled "Register of distribution of arms" which permits issuance of police weapons. It provides that *"(1) The distribution and movement of individual arms on charge, shall be recorded in Part I of the Arms distribution Register (Form 6-8), to be kept by the kot head constable under the supervision of the line officer. In this register shall be shown only actual arms and those accessories which are issued with them, and the register shall be divided so that a record of each item may be kept separately vide instructions in the form. Columns 3 and 4 of the form shall be balanced daily, the balance being shown in red ink, provided that no balance need be struck on any day when no transaction has taken place. The normal transaction is an issue from one sub-column of column 3 balanced by a receipt in another, the district total being unaffected; whenever an entry affecting the latter is made, e. g., the return of a musket to the arsenal or the transfer of a bayonet scabbard*

to condemned stock-an explanatory entry shall be made a column 5. Care must be taken that when a weapon is moved, the necessary entries are made respecting any accessory moved with it. The Lines Officer shall check this register at frequent intervals. (2) In Part II of the register shall be maintained a nominal roll of the distribution of revolvers on charge in the district. (3) A separate register in form 6-8(3) shall be maintained by the Kot Head Constable under the supervision of the Lines Officer, in which a history sheet of each weapon on charge in the district be entered.

32. According to the defence plea, more particularly, DW-01 Musarrat Shaheen, mother of accused Ahsan Shabbir stated that police official demanded illegal gratification of Rs.500,000/- from them in lieu of release of their son which they could not pay and due to non-payment of illegal gratification, her son was illegally and falsely implicated in this case but such plea has been disbelieved by the trial Court without assigning any reason. No doubt, police officials as citizen are as good witnesses in Court proceedings as any other person yet, some amount of care is needed when they are the only eye witnesses in a case. It is not on account of an inherent defect in their testimony, but due to the possibility that an individual police official in mistaken zeal to see that the person he believes to be a culprit is convicted, might blur line between duty and propriety. It is settled law that in the exercise of appreciation of evidence it is necessary as prerequisite, to see whether witness in question is not such an overzealous witness. It is very unfortunate that the learned trial Court ignored the defence plea without assigning the sound reasons.

33. Prosecution failed to prove that appellant assaulted or used criminal force to police officials to deter from discharge of their duty. Appellant had been convicted under section 324, PPC was without any

evidence. From the prosecution evidence available on record, offence had no nexus with the object of Anti-Terrorism Act, 1997 as contemplated under sections 6 and 7 of the Anti-Terrorism Act, 1997. Therefore, evidence available on record makes it clear that encounter had not taken place. Above stated circumstances created doubt about the very commencement of the encounter.

34. It appears that the Investigation Officer to conduct fair investigation in this case has failed, as no independent person of locality was examined in order to ascertain the truth beyond any reasonable doubts. The above stated circumstances in our view created serious doubts about the very occurrence of the encounter. The standard of the proof in such a case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter is day time. It was desirable that it should have been investigated by some other agency. Such dictum has been laid down by the Honourable Supreme Court in the case of **Zeeshan alias Shani versus The State (2012 SCMR 428)**. Relevant portion is reproduced as under:-

“11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case.”

35. Admittedly, arrival and departure entries have not been produced by the prosecution. We are unable to rely upon the evidence of the prosecution witnesses without independent corroboration which is

lacking in this case. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case.

36. In criminal cases the burden of proving its case lies on the prosecution and the prosecution is duty bound to prove the case against the accused through reliable evidence, direct or circumstantial and that too beyond reasonable doubt. Besides this, it is a settled principle of law, that if there is an element of doubt as to guilt of an accused, the benefit of that doubt must be extended to him. The doubt of-course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. In presence of such lacunas in the prosecution case we are of the considered view that the conclusion drawn and reasons advanced by learned trial Court do not show fair evaluation of evidence, which is not in accordance with the settled principles in criminal cases, therefore, impugned judgment is a result of erroneous and unreasonable lines of reasoning and merits interference by this Court to erase the effect of miscarriage of justice.

37. It is also well-settled principle by now that one there appears a single doubt as to the presence to discard his testimony as a whole. A reference may be made to case titled *Mst. Rukhsana Begum and others v. Sajjad and others* (2017 SCMR 596), wherein it has been held as under:-

“A single doubt reasonably showing that a witness/witnesses’ presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/their testimony as a whole. This principle may be pressed into service in cases such witness/witnesses are seriously inimical or appears to be a chance witness because judicial mind would remain disturbed about the truthfulness of the testimony of such witnesses provided in a murder case, is a fundamental principle of our criminal justice system.”

38. After careful reappraisal of the evidence discussed above, we are entertaining no amount of doubt that the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same.

39. Needless to mention that while giving the benefit of doubt to an accused, it is not necessary that there should be countless circumstances creating doubt, if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of *Tariq Pervez v. The State (1995 SCMR 1345)*, *Ghulam Qadir and 2 others v. The State (2008 SCMR 1221)*, *Muhammad Akram v. The State (2009 SCMR 230)* and *Muhammad Zaman v. The State (2014 SCMR 749)*. The above principle was also recently reiterated by the Hon'ble Supreme Court in the case of *Abdul Jabbar v. State (2019 SCMR 129)*.

40. From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the appellants' implication in this case is not free from doubts. They thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story.

41. For the above stated reasons, we reached to an irresistible conclusion that prosecution has utterly failed to prove its case against

the appellants and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellants could not be ruled out. Resultantly, these appeals were allowed and conviction and sentence recorded by the trial Court vide judgment dated 29.08.2019 were set aside and appellants are acquitted of the charges. Appellants were ordered to be released forthwith if not required in any other custody case.

42. These are the reasons for our short order dated 11.12.2020.

JUDGE

JUDGE

Karachi,
Dated: 11.06.2021

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