

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 441 of 2019

Appellant : Haris Shakeel @ Haris Sohail @ Bona
through Mr. Habib-ur-Rehman Jiskani, Advocate

Respondent : The State
through Mr. Muntazir Mehdi, Addl.P.G.

Date of hearing : 16th January, 2023

JUDGMENT

Omar Sial, J.: A police party led by S.I. Ghulam Mustafa of the Peerabad police station was on normal patrol duty on 09.05.2017 when they found Harris Shakeel, the appellant, standing on a road at 3:00 a.m., to be suspicious. What prompted the police to find him “suspicious” was not clarified; however, Harris was stopped and checked and a 0.30 bore pistol was recovered from his possession, the licence of which he could not produce. Harris was arrested and **F.I.R. No. 183 of 2017** was registered against him under section 23(1)(a) of the Sindh Arms Act, 2013.

2. The record of the case shows that while Harris was in custody in the case arising out of F.I.R. 183 of 2017, he confessed to his involvement in an earlier registered murder case that had originated from **F.I.R. No. 81 of 2017** which had been registered under sections 392, 302 and 34 P.P.C. at the Taimooria police station. F.I.R. 81 of 2017 had been registered on 03.04.2021 on the complaint of one Mohammad Sadiq. Sadiq had reported that his maternal uncle by the name of Mohammad Khan had been murdered by unknown persons on 02.04.2021 while he was performing his duty as a security guard at a CNG filling station. Giving details of the incident, Sadiq recorded that he had come to know that at 11:45 p.m., 3 persons on a motorcycle had come and snatched the pistol of his uncle, in the ensuing scuffle, shots were fired, as a consequence of which

Muhammad Khan died. The assailants had then left the scene taking away his pistol with them.

3. Harris Shakeel pleaded not guilty to the charge of murdering Mohammad Khan and claimed trial. At trial the prosecution examined 10 witnesses. **PW-1 S.I. Ghulam Mustafa** was the police officer who had arrested Harris Shakeel in F.I.R. No. 183 of 2017 and before whom, Harris had also confessed to his involvement in Mohammad Khan's murder. **PW-2 S.I. Mohammad Safdar** was the first responder to the information of shooting and murder at the CNG filling station and also registered F.I.R. No. 81 of 2017. **PW-3 P.C. Sajid Nazeer** was a member of the police party which had arrested Harris in the case arising out of F.I.R. No. 183 of 2017. **PW-4 Khalique Zaman** was the learned magistrate who conducted an identification parade in which 2 witnesses had identified Harris as the person they saw running away from the scene of offence. **PW-5 Mohammad Sadiq** was the complainant in F.I.R. No. 81 of 2017. **PW-6 Mohammad Naseem** and **PW-7 Mohammad Shiraz**, both claimed that they had seen Harris running from the scene of incident. **PW-8 Nadeem Hussain** was the son of the deceased Mohammad Khan and he served as a witness to various steps taken during the investigation. **PW-9 Dr. Mohammad Khalid** was the doctor who conducted the post mortem on the deceased. **PW-10 S.I. Mohammad Khalid Amjad** was the investigating officer of the case.

4. While recording his statement under section 342 Cr.P.C. Harris denied all wrong doing, professed innocence and further explained that he was arrested along with 8 or 10 others from his locality by the Peerabad police station personnel and all the boys were asked for bribes. Harris allegedly refused to pay the bribe hence F.I.R. No. 183 of 2017 was registered against him. According to him the complainant of F.I.R. No. 81 of 2017 and 2 to 3 other people with the assistance of the investigating officer had tortured him and had forced a confession from him in the murder case.

5. The learned 7th Additional Sessions Judge, Karachi Central, on 15.07.2019 found Harris Shakeel guilty for the murder of Mohammad Khan and while convicting him for an offence under section 302(b) P.P.C., sentenced him to a life in prison as well as directed him to pay a compensation of Rs. 50,000 to the legal heirs of the deceased or spend a further 3 months in prison. Harris Shakeel has challenged the judgment of the learned trial court through this appeal.

6. I have heard the learned counsel for the appellant as well as the learned Additional Prosecutor General and with their able assistance have re-appraised the evidence which was recorded at trial. Several notices were issued to the complainant on his address on file, however, each time the reply received was that there was some woman living at the known address and she told the police process server that Mohammad Sadiq had moved to an unknown location 5 years ago and that she did not have any lead to where he might currently be. The individual arguments of the counsel are not being reproduced for the sake of brevity, however, are reflected in my observations and findings below.

7. Counsels agree that the only evidence against the appellant was in the shape of the respective testimonies of PW-6 Mohammad Naseem and PW-7 Mohammad Shiraz. Naseem said at trial that he worked as a cashier at the Star CNG station and that at 11:30 p.m. on 02.04.2017 he heard a gunshot and saw that the security guard at the CNG station i.e. Mohammad Khan had fallen on the ground. He further saw 2 persons running away to a motorcycle on which was their 3rd companion. The 3 men then had driven away. On 15.05.2017, he was called by the police to an identification parade where he identified Harris Shakeel as being one of the persons who he had seen running away. PW-7 Mohammad Shiraz testified that he was working as the manager of Star CNG station on 02.04.2017 when at about 11:30 or 11:45 p.m. there was an electricity breakdown and while the generator operator was putting on the generator he heard a gunshot, saw the security guard Mohammad Khan fallen on the ground and 2 persons running away to their 3rd companion, who was on a motorcycle. Just like

PW-6 Mohammad Naseem, Shiraz was also called by the police to attend an identification parade on 15.05.2017, on which date he identified Harris Shakeel as being one of the persons he had seen running away.

8. The reasons for my not being persuaded that the testimonies of the 2 eye witnesses were of such a nature where it would be safe to base a conviction on, are as follows:

(i) PW-6 Mohammad Naseem recorded his section 161 Cr.P.C. statement 3 days after the incident whereas PW-7 Mohammad Shiraz recorded his statement after 4 days of the incident. While no reason for the delay in recording section 161 Cr.P.C. statements was given at trial by the prosecution, the delay, in any case seems unexplainable as Naseem claimed that he was the one who took the deceased to the hospital and was there till the dead body was handed over to the legal heirs of the deceased after which he had returned to the CNG station. Similarly, Shiraz claimed that while Naseem had taken the deceased to the hospital, he had stayed back and was present at the station throughout the proceedings conducted by the police. The delay is suspicious keeping in view the fact that the investigating officer claimed that it was 03.04.2017 when he had inspected the scene of occurrence and had also recorded the statement of PW-8 Nadeem Hussain, who ostensibly had nothing to do with the incident apart from serving as a witness to the inspection and recovery. Why would the statements of the 2 witnesses, being the only 2 who claimed having partially seen the incident, not be recorded and they not being asked as to what did the assailants look like, was not explained at trial and in the circumstances of the case, raise doubt as to the accuracy and credibility of their statements recorded later. Honorable Supreme Court of Pakistan has repeatedly held that an unexplained delay in recording statements of an eye witness would reduce the evidentiary value of such a statement to zero. Reference in this regard may be made to **Shahid Hussain alias Jogi vs The State (PLD 2021 SC 898)**, **Abdul Khaliq vs The State (1996 SCMR 1553)**, **Noor Mohammad vs The State (2020 SCMR 1049)** and **Mohammad Asif vs The State (2017 SCMR 486)**.

(ii) The record reflects that it was a night time incident. According to PW-7 Mohammad Shiraz, there was an electricity breakdown at the time of the incident and that he had heard the gunshot while the operator was putting on the generator. Then too, he had only seen 2 persons running away. Neither witness claimed that they had seen the faces of the 2 men running away. While they do not explicitly say it at trial, their testimonies and the site sketch indicate that the 2 men were running away from the station when the 2 witnesses claim they saw the appellant. I find it difficult to be persuaded that the 2 eye witnesses had accurately and reliably identified the appellant keeping in view the fact that it was a night time incident, admittedly the light source was weak if not non-existent, neither witness saw fires being shot, at best the 2 eye witnesses would have had a fleeting glimpse of the assailants and therefore it seems unnatural that one month and 13 days later they could with such accuracy identify the appellant who they had not known or seen before.

(iii) Absolutely no description of any of the assailants was given by either eye witness prior to them identifying the appellant in the parade. In **Mian Sohail Ahmed and others vs The State (2019 SCMR 956)** it was observed that "*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 rendering the identification evidence inconsequential. 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. See 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).*" In **Sabir Ali alias Fauji vs The State (2011 SCMR 563)** it was observed that "*It is also settled principle of law that when witnesses giving no description of the accused previous to identification, such type of identification cannot be reliable. See Maula Dad's case (AIR 1925 Lah. 426).*"

(iv) It was admitted by the prosecution witnesses that there were operational CCTV cameras installed at the premises of the station where the incident occurred. The fact that the investigating officer did not bother to see what was recorded by the cameras, apart from the fact that he also did not bother to seize the CCTV footage, in my mind points to a deliberate lapse of investigation on the part of the investigation officer. Of recent times, the first port of call in such investigations has been the review of CCTV footage, especially where a crime is committed by unknown persons. The lapse is therefore most conspicuous and raised doubt as to whether the recording would have supported the prosecution case.

(v) While both the eye witnesses claimed that they were at work as cashier and manager respectively, when the incident occurred, yet according to Naseem there were 14 staff members present whereas according to Shiraz there were 7. Such a substantial divergence further creates doubt as to whether these eye witnesses were even present at the scene as they claimed. No evidence of the 2 actually being employees of the station was produced at trial.

(vi) The deceased was said to be an employee of a registered security providing company who was in uniform at the time of the incident and it was alleged that the weapon assigned to him by the company was stolen from him which had led to the shoot-out. In these circumstances, I find it unusual that no authorised person of the security company was introduced as a witness nor, it appears, was any statement recorded by the investigating officer which would have supported the prosecution claim. Accordingly, whether or not a weapon was even assigned to him by the company remained unproved. The weapon was also not subsequently recovered.

(vii) PW-7 Mohammad Shiraz agreed to the suggestion that in his section 161 Cr.P.C. statement he had recorded that the assailants had snatched the weapon of the deceased, and that was the reason they had fired upon the deceased. I do not believe this statement as this witness himself in his

examination-in-chief said that *"I was present at above CNG station when I heard sound of firing on which I turned and saw that security guard namely Mohammad Khan was lying on the ground and 2 persons were running away."* If this witness had his back towards the deceased and only saw him after he had fallen to the ground, it seems improbable that he witnessed the assailants snatching the deceased's weapon and shooting him to obtain it. The statement of his made at trial i.e. he had his back towards the deceased when he was shot, dilutes the accuracy of his statement recorded when he identified the appellant at the parade and said that he was the one who had shot the deceased.

(viii) PW-10 Mohammad Khalid Amjad, the investigating officer of the case, testified that when he arrested Harris, Harris told him that he had shot the deceased and had snatched his weapon and then run away. The pistol ostensibly seized was never recovered from Harris nor did he say what he did with it. This also I find unusual. The reason being that one I think it is not natural that a person arrested for possessing an unlicensed weapon would on his own free will admit to a murder that he had committed a month and a half ago, secondly, even if he did confess on his own free will that he had murdered someone, what was there stopping him from also revealing what he did with the weapon which he had snatched. This fact coupled with the fact that none from the security company testified about the weapon having been assigned to the deceased, makes the prosecution case further doubtful and suspicion is raised as to whether a weapon was even taken away by the assailants.

(ix) No recovery of any empty was effected from the place of incident though the prosecution case is that it was a quiet night with very little or no people around and that the police had reached the scene of offence soon thereafter. It raises doubt whether the incident even took place at where the prosecution claimed it did.

(x) The appellant was arrested in the arms case on 09.05.2017 and had immediately confessed to his involvement in the murder the very same day

i.e. on 09.05.2017. The identification parade should have been held immediately thereafter however for reasons best known to the prosecution, the investigating officer did not do so and waited another 6 days before making an application to hold a parade. I am also not satisfied with the memo of the identification parade prepared by the learned magistrate. It is unusual to see a memo in the form in which it has been recorded. It is also unusual that all details in the memo are typed except the name of the appellant and the part that the witness identified him. The list of dummies does not specify their NIC nor their addresses. It does not state that the dummies were similar in description to the accused. It does not contain sufficient details of the precautions taken by the magistrate to ensure that the witnesses do not see the accused prior to the identification.

In **Kanwar Anwaar Ali, Special Judicial Magistrate: In the matter of (PLD 2019 SC 488)**, amongst others, the Honorable Supreme Court had directed that *“(vii) Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons had remained in police custody after their arrest and before the test identification and must incorporate such fact in his report about the proceedings.”* and that *“(xiii) Magistrate was obliged to prepare a list of all the persons (dummies) who formed part of the line-up at the parade along with their parentage, occupation and addresses.”* Also that *“(xvii) Magistrate was required to record in his report all the precautions taken by him for a fair conduct of the proceedings.”* It appears that the learned magistrate erred in not complying with the aforementioned directions. Perhaps an oversight but the learned magistrate also forgot to certify the memo of the identification parade as required by Chapter V Part C of the Sindh Criminal Courts Circular. In **Muhammad Yaqoob and another v. The State (1989 P.Cr.L.J 2227)** approved in the *Kanwar Anwaar Ali case* (supra), the Lahore High Court observed that *"Such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. These gifts of God may vary*

from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could also wrap the vision of a man. When mistakes are possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers is definitely greater. And more so when the witnesses have seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorised state of mind." In **Javed Khan alias Bacha and another vs The State and another (2017 SCMR 524)**, the Court observed:

"As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sind 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001

SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P)."

(xi) At the identification parade, both witnesses said that the incident had occurred on 04.04.2017; this was incorrect. Any value which the identification parade may have had for the prosecution was completely demolished when the record reflects that on 09.05.2017 i.e. 6 days before the parade, the appellant was taken by the police to the same CNG station where the 2 witnesses were employed, in the company of the complainant, ostensibly for the purpose of pointing out the place of incident.

9. In view of the above discussion, it would not be safe to rely solely on the identification parade in order to convict the appellant. There is no other evidence which was brought on record to otherwise corroborate the prosecution case. The prosecution therefore failed to prove its case against the appellant beyond reasonable doubt. The conviction and sentence awarded to him by the learned trial court is set aside and the appellant is acquitted of the charge. He may be released forthwith if not required in any other custody case.

Appeal allowed.

JUDGE