IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No. D- 02 of 2014.
Crl. Jail Appeal No. D- 03 of 2014.

Date of hearing	Order with Signature of Judge

Present:
Mr. Justice Zafar Ahmed Rajput.
Mr. Justice Muhammad Iqbal Mahar.

1. Abdul Latif Unar.
2. Gulab Junejo.

.....Appellants.

Versus

The State. .....Respondent.

Mr. Aijaz Ahmed Bhatti, Advocate for the appellant Abdul Latif.
Mr. Rasool Bux Soomro, Advocate for appellant Gulab Junejo.
Mr. Sardar Ali Rizvi, A.P.G.

Date of hearing: 06.09.2016.
Date of Judgment: 06.09.2016.

JUDGMENT

Muhammad Iqbal Mahar, J-. By this common judgment, we propose to dispose of above captioned two criminal appeals, as the both are arising out of the same crime and the same judgment.

2. The above named appellants, through instant appeals have challenged the judgment dated 08.01.2014 passed by learned Judge, Anti-Terrorism Court, Larkana, in Special Case No.19/2012, emanating from Crime No. 47/2012 of P.S Ratodero, District Larkana, for offences punishable under Sections 302, 427, 404, 148, 149 P.P.C read with Section 7 (a) of the Anti-Terrorism Act, 1997, whereby they and proclaimed offenders Ghulam Nabi Jatt and Hussain Junejo have been convicted and sentenced as under:

(a) For offence punishable under Section 302 read with Section 149 PPC to suffer imprisonment for life and to pay Rs.50,000/-, each as compensation to be paid to legal heirs of deceased and

in case of default in payment of compensation, they shall suffer further S.I for six months more;

(b) For offence punishable under Section 427 read with Section 149 P.P.C to suffer imprisonment for two years with fine of Rs.5000/- each and in case of default in payment of fine further suffer S.I for three months more;

(c) For offence punishable under Section 404 read with Section 149 P.P.C to suffer R.I for three years and pay fine of Rs.5000/- each and in case of default of payment of fine to suffer S.I for one month more;

(d) For offence punishable under Section 148 PPC to suffer R.I for two years.

(e) For offence punishable under Section 7 (a) of the Anti-Terrorism Act, 1997, to suffer imprisonment for life with fine of Rs.50,000/- each and in case of default in payment of fine, to suffer further S.I for six months more.

All the sentences were ordered to run concurrently and benefit of Section 382-B Cr.P.C. was extended in favor of the appellants.

3. Briefly, the case of prosecution is that, on 26.02.2012 SIP Imamuddin Chandio, SHO, P.S Ratodero along with his subordinates, namely, PC Zameer Hussain Mahar, PC Deedar Ali, PC Ghulam Rasool and driver H.C Mashooque Ali left P.S, for patrolling vide entry No.18 and when at 2100 hours reached at link road leading from Khairo-dero to Lashari near Garhi Harsa diversion, saw six armed persons in the light of Vehicle whose faces were opened. Out of them three persons were having Kalashnikovs in their hands, while two were with pistols and one was having repeater gun. The culprits on seeing the police party started indiscriminating firing upon them with intention to commit murder. The police party also returned the same. Meanwhile, complainant informed the situation to Police-Control through wireless. During encounter P.C Zameer Hussain Mahar received fire-arm injuries and fell down on the ground and encounter continued for about 25 minutes, ultimately the culprits by taking advantage of darkness fled away. PC Zameer Hussain died on the spot. The police party found that the official walky-talky of P.C Zameer Hussain and his mobile phone

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set were missing. In the meantime, other police force reached at the scene of offence, who followed the culprits. The complainant along with his staff brought the dead body of P.C Zameer Hussain to Hospital and leaving it there, he went to police station where he lodged the report to the above effect, on behalf of the State.

4. The Police after completing usual investigation submitted challan. The learned trial Court after observing all legal formalities framed the charge against appellants, who did not plead guilty and opted to face the trial. Prosecution in order to prove its case examined following witnesses:

PW-1, Dr. Akhtiar Ali at Ex.14, who produced police letter and postmortem report of deceased at Ex.14-A and B.

PW-2, Sajjad Ahmed (Tapedar) at Ex.15, who produced sketch of place of vardat at Ex.15-A to 15-C.

PW-3, PC/Mashir Ghulam Abbas at Ex.16, who produced mashirnama of arrest of accused Abdul Latif at Ex.16-A.

PW-4, Muhammad Ameen at Ex.17.

PW-5, Complainant SIP Imamuddin Chandio at Ex.18, who produced F.I.R at Ex.18-A, letter No.1102 of SSP Larkana for constitution of J.I.T at Ex.18-B and roznamcha entry No.18 at Ex.18-C.

PW-6, SIP Uris Khan Jatoi at Ex.23, who produced mashirnama of arrest of accused Abdul Latif and recovery of pistol from his possession at Ex.23-A, mashirnama of identification of accused Abdul Latif at Ex.23-B.

PW-7, PC/Mashir Nisar Ahmed at Ex.25.

PW-8, PC/ Deedar Ali at Ex.26, who produced mashirnama of inspection of dead body of deceased at Ex.26-A, inquest report at Ex.26-B, Receipt at Ex.26-C, mashirnama of place of incident at Ex.26-D, mashirnama of inspection of police Mobile at Ex.26-E.

PW-9, PC/ Mashooque Ali at Ex.28.

PW-10, H.C Bagh Ali at Ex.29, who produced mashirnama of identification of accused Gulab at Ex.29-A, mashirnama of arrest of accused Gulab at Ex.29-B, mashirnama of recovery of walky-talky at Ex.29-C, attested photocopy of mashirnama of arrest of accused Gulab and recovery from him at Ex.29-D.

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PW-11, SIP Mumtaz Ali, investigation officer at Ex.30.

PW-12, SIP Maqsood Ahmed, investigation officer at Ex.31.

PW-13, Javed Hyder, Civil Judge and Judicial Magistrate at Ex.31, who produced 164 Cr.P.C statement of PW Ghulam Rasool at Ex.34-A, 164 Cr.P.C statement of PW Deedar Ali at Ex.34-B, 164 Cr.P.C statement of PW Mashooque Ali at Ex.34-C.

5. Thereafter, learned DDPP closed the prosecution side vide statement at Ex.35. The statements of appellants were recorded under Section 342 Cr.P.C. at Ex. 36 & 37, whereby they denied the allegations and claimed their innocence. However neither they examined themselves on oath under Section 340 (2) Cr.P.C, nor examined any witness in their defence. The learned DDPP filed an application under Section 540 Cr.P.C for recalling of PWs SIP Imamuddin and SIP Uris Khan Jatoi and ultimately SIP Uris Khan Jatoi was examined at Ex.39, who produced chemical report at Ex.39-A, letter No.2212-16 issued by SSP Larkana for constitution of J.I.T at Ex.39-B, Ballistic report at Ex.39-C. Then learned DDPP again closed the prosecution side, vide his statement at Ex.40.

6. After hearing the learned counsel for the appellants, learned DDPP and considering the material available on record, the learned trial Court passed impugned judgment.

7. Learned counsel for the appellants contended that the impugned judgment passed by learned Special Judge Anti Terrorism Court Larkana is against the law; that the identification of accused persons on headlight of vehicle at night time is a weak piece of evidence; that neither the names of the appellants nor descriptions of the culprits were given by the complainant and PWs in their respective FIR and 161 Cr.P.C statements. He further contended that no identification parade was held before the Magistrate; that the identification parade held before the Investigating Officer has no value. He also added that for the first time on 17.4.2012 names of the accused were disclosed by Ali Gohar

M. Ali Lahar

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and Muhammad Ameen in their 161 Cr.P.C statements recorded after about 50 days of the alleged incident but it is made clear that both the persons were not cited as witnesses in F.I.R. He further submitted that P.W Mashooque Ali, the driver of Police Mobile who was all along with complainant did not identify the accused in Court at the time of his examination. Learned counsel further added that Uris Khan, the second Investigating Officer of the case was declared hostile by learned DDPP, therefore, his evidence cannot be used against the appellants. He lastly urged that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt, therefore they are entitled for the acquittal. In support of his arguments the learned counsel relied upon the case of *Muhammad Aamir V. The State* (2001 YLR 1546), *Muhammad Khan V. The State* (1998 SCMR 570) and *Siraj-ul-Haq V. The State* (2008 SCMR 302).

8. As against above, learned A.P.G. submitted that all the prosecution witnesses have fully supported the case of prosecution which is corroborated by medical evidence and recovery of crime weapons and by two private witnesses, therefore the appellants were rightly convicted by learned Special Judge.

9. We have heard the learned counsel for the appellants, learned A.P.G. and have gone through the material available on record minutely and have also examined the case-law, cited by the learned counsel for the appellants.

10. Perusal of record reflects that the FIR neither contain the names, requisite detail qua identification of accused nor their descriptions in sufficient detail hence the omission so made was fatal towards the prosecution case, particularly when the accused persons after their arrest were not put to identification parade nor it was claimed by any of the witnesses that the appellants were known to them previously. In these circumstances non holding of the identification parade was fatal to the prosecution. In this regard we are fortified by the decision in the

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case of *Danial Boyd and another V. The State* (**1992 SCMR 196**), in which it has been held by Honourable Supreme Court that when accused was charged in FIR and Statements u/s 161 Cr.P.C by the description of their stature, their identification in a formal parade was must.

11. It is pertinent to mention here that identification parade is not only, preferred and approved method of identification of suspects by Court but is also requirement of the police Rule as well. Rule 26.32 of the police Rule 1934 is explicit in this regard. Under Sub rule (1) thereof it has been provide that the Rules shall be strictly observed in confronting arrested suspects with such witnesses, who claim to be able to identify them and under Rule 1(c) it is has been made obligatory for the police officers to arrange for identification parade of suspects soon after their arrest. Sub Rule (2) further provide that though, it is not duty of officer conducting them or of the independent witness to record statement or cross examine either suspects or identifying witnesses yet they should be requested to question the latter as to other circumstances in which they saw the suspects whom they claim to identify. As stated above, in the instant case since the appellants were not put to identification parade before learned Magistrate, therefore ocular evidence was of no help to prosecution.

12. It may further be observed that the alleged incident took place at 2100 hours, pitch dark hours of the night, and source of identification of the culprits is shown as head lights of the police vehicle, such type of evidence has always been treated as weak piece of evidence hence question of mistaken identity cannot be ruled out. However, after arrest of the appellants, they were not put into identification parade before any learned Magistrate, but the identification test was held before the Investigation Officer, which has got no evidentiary value in the law. In this regard reference can be made to case of *Muhammad Aamir* (supra), wherein it has been observed by a Division Bench of this Court that:-

> *"identification parade should be exclusive under the supervision of the Magistrate which would include*

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the arrangements of dummies etc. so as to avoid possibility of false implication of the accused."

13. Adverting to the submission of learned A.P.G that names of the appellants were disclosed by private witnesses, namely, Ali Gohar and Muhammad Ameen in their statements recorded under Section 161 Cr.P.C. Suffice it to say that the evidence of these witnesses cannot be taken into consideration as substantial piece of evidence; firstly for the reason that according to F.I.R none of them was shown as witness or associate of the police party at the time of alleged incident and secondly that their 161 Cr.P.C statements were recorded after lapse of about 50 days without furnishing plausible explanation; as such these belated statements have also lost their sanctity. Furthermore, during trial only PW Muhammad Ameen was examined but he implicated only one accused while PW Ali Gohar was not produced by the prosecution, hence the presumption would be that he was not ready to support the prosecution case. PW Muhammad Ameen did not take the name of appellant Gulab during his examination before trial Court. He in his cross-examination has clearly stated that:-

> *"I had not disclosed the name of accused Gulab in my 161 Cr.P.C statement. I was not produced by the Police for the purpose of identification of accused Gulab before the Court of Civil Judge and Judicial Magistrate."*

14. Moreover, these witnesses too, disclosed the source of identifying the culprits as torchlight, which is a weak type of evidence. It is settled law that belated statement of witness recorded under section 161 Cr.P.C is looked with serious suspicion. In this regard reference can be made to case of *Muhammad Khan* (supra).

15. Furthermore, as per case of prosecution, P.W/driver H.C Mashooque Ali, who allegedly participated in the encounter and after arrest of the accused Gulab, this witness identified him in the police-lockup during identification parade held by the Investigating Officer,

M. Ishaq

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but when he came into witness box, he did not identify the appellants and stated that:

> *"both accused present in Court are not same accused who committed the offence of this case."*

Since, PW Mashooque Ali being eyewitness of the incident and member of the Police party, did not identify the accused/appellants in Court, it cast doubt upon the entire case of the prosecution.

16. So far as recovery of pistol from possession of appellant Abdul Latif and Kalashnikov from appellant Gulab is concerned, it is stated by the learned counsel at the bar that such recovery is not proved against the appellants and those cases under Arms Ordinance already stood ended into their acquittal. So far as the recovery of walky-talky from possession of appellant Gulab is concerned, suffice it to say that it is a common thing and can easily be arranged and foisted upon anybody. Furthermore the alleged incident occurred on 26.2.2012, appellant Gulab was arrested on 18.9.2012 and recovery was made on 21.9.2012 after about seven months of the incident and after three days of the arrest and it is also settled law that recovery is a corroborative piece of evidence, which by itself is not sufficient to convict the accused.

17. In view of above discussion, we are of the firm view that the prosecution could not produce trustworthy evidence at trial connecting the appellants with the commission of offence and miserably failed to prove its case against the appellants beyond shadow of doubt. It is well-settled law that for giving benefit of doubt to an accused, there need not be a number of circumstances but single circumstance creating doubt in a prudent mind about the guilt of accused is sufficient for acquittal. In this respect reference can also be made to case of *Tariqe Parvez v. The State* (1995 SCMR-1345).

18. Resultantly, while extending the benefit of doubt to the appellants, the appeals were allowed; impugned judgment passed by the learned trial Court was set aside and the appellants were acquitted

M Shahzad

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of the charge by our short order dated 06.09.2016 and these are the reasons of short order.