

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. A.T.A 28/2016 a/w others

M. Shokat & others vs. The State

HIGH COURT OF SINDH

Composition of Bench: ~~S.B.~~/D. B.

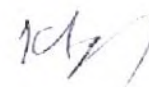
Mr. Justice Mohammad Karim Khan Agha,
Mr Justice Zulfikar Ali Sangi

Date(s) of Hearing: 22-10-19, 25-10-19 & 01-11-19

Decide on: 15-11-2019

(a) Judgment approved for reporting:

Yes



CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- NOTE:
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
 - (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

IN THE HIGH COURT OF SINDH AT KARACHI
(CRIMINAL APPELLATE JURISDICTION)

A.T.A APPEAL NO. 29 /2006.

Muhammad Shaukat

S/O Muhammad Sharif,
Muslim, adult, Presently
Confined at Central Prison,
Karachi.....

APPELLANT

V e r s u s

The State.....RESPONDENT.

**APPEAL UNDER SECTION 25 (1) OF ANTI
TERRORISM ACT 1997**

Being aggrieved and dis-satisfied with the judgment dated 31st of October, 2006, passed by Mr. Feroz Mehmood Bhatti Judge Anti Terrorist Court No:-II, Karachi Division in a case bearing FIR # 63/2003, Under Section 302/324/34, Read With Section 7 of Anti Terrorist Act 1997, having special case No:-30/2003 The State.....Versus....Shahnawaz @ Shani and Another, the above case was sent by the Maripur Police Station, Karachi. The Learned Judge awarded the conviction and sentence to the Present Appellant mentioned above as under:-

- (a) Convict the appellant/accused for causing callous offence of brutal day light Qatl-e-Amd of innocent deceased Persons namely Muhammad Qasim, Raza Ali, Ather Ali, Syed Hashim Raza Hawaldar Muhammad Rafique an Wasi Hussain, an offence Punishable Under section 302 (b) R/w 34 of Pakistan

Date to v.
hearing
adjourn

5

OFFICE OF THE JUDGE, ANTI-TERRORISM COURT NO: II KARACHI.No. ATC-II/K/Div/ 223 /2006. Karachi Dated 31st October 2006.**SPECIAL CASE NO: 30 OF 2003.**

The State

Vs.

1. Shahnawaz alias Shani alias Imran alias Usman
alias Bargar S/o Abdul Razzaq,
2. Shaukat alias Javed alias Chand
Son of Muhammad Sharif.....ACCUSED.
3. Asif alias Chhottoo alias Rizwan alias Nasir
s/o Ahmed Khan.....Absconding Accused.

FIR No: 63/2003.

U/S: 302/324/34 PPC and
7 Anti-Terrorism Act 1997.P.S. Mauripur, Karachi West.**SPECIAL CASE NO: 17 OF 2006.**

The State

Vs.

Shahnawaz alias Shani alias Imran alias Usman
alias Bargar S/o Abdul Razzaq.....ACCUSED.

FIR No: 229/2003.

U/S: 13(d) of the Pak. Arms. Ord. 1965.
P.S. Mochko, Karachi West.

To

The Registrar,
High Court of Sindh,
Karachi.

SUBJECT: REFERENCE UNDER SECTION 374 CR.P.C. R/W SECTION
30(2) OF THE ANTI-TERRORISM ACT, 1997.

This Court, vide judgement dated 31st October 2006, has
convicted both the accused persons namely Shahnawaz alias Shar
alias Imran alias Usman alias Barger son of Abdul Razzaq

(1-B)

معرفت: سپرنٹنڈنٹ صاحب سینٹرل جیل کراچی

بعض اوقات: سنلٹے موت و دیگر سزائوں کے خلاف خصوصی جیل اپیل

(1-B)

ایف، آئی، آر نمبر: 63/2003

زیر دفعہ: 02/324/34 P.P.C

پولیس سٹیشن ماٹری پور ضلع ویسٹ

جناب عالی!

موٹہ بانہ گذارش چیکہ میں مسمی شاہنواز ولد عبدالرزاق

سینٹرل جیل کراچی میں اسیر ہوں، مجھ پر قائم مقدمہ زیر

ایف، آئی، آر نمبر 63/2003 - پولیس سٹیشن ماٹری پور ضلع

السداد دہشت گردی کی خصوصی عدالت نمبر 2 کراچی میں زیر سماعت

جہاں سے مورخہ 2006-10-31 کو مجھے اس مقدمہ چھ مرتبہ سنا

اور قید و جرمانہ کی دیگر سزائیں سنائی گئی ہیں، جبکہ میں بالکل

اور بے گناہ ہوں اور مجھے بالکل غلط طریقے پر اس مقدمہ میں

غلط سزائیں سنائی گئی ہیں۔

لہذا میں آپ جناب کی معزز عدالت عالیہ میں اس فیصلہ کے خلاف اپیل

کرتا ہوں کہ برائے مہربانی سزائے موت اور قید و جرمانہ کی دیگر سزائوں

کے خلاف میری اس اپیل کو منظور کرتے ہوئے ماتحت عدالت کے فیصلہ

کا عدم قرار دیا جائے اور مجھے باعزت بری کرنے کے احکامات صادر

بندہ ہمیشہ جناب کے بلندی اقبال کیلئے دعا گو رہیگا۔

عین نوازش ہوگی۔ العارض

شاہنواز ولد عبدالرزاق

ایم جال: سینٹرل جیل کراچی

مورخہ: 02-11-2006

Before me

SUPERINTENDENT
CENTRAL JAIL KARACHI

IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.29 of 2006
Spl. Cr. Anti-Terrorism Jail Appeal No.27 of 2007
Spl. Cr. Anti-Terrorism Jail Appeal No.28 of 2007
Confirmation Case No.09 of 2006

Present:

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

Appellants: Muhammad Shaukat and Shahnawaz @ Shani
@ Imran @ Usman @ Burger, through Mr.
Abdul Razzak and M/s. Muhammad Ashraf
Kazi and Irshad Ali Jatui, Advocates.

Respondent: The State through Mr. Khadim Hussain, Addl.
Prosecutor General Sindh

Date of hearings: 22.10.2019, 25.10.19, 30.10 and 01.11.2019

Date of announcement: 15.11.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellants Muhammad Shaukat son of Muhammad Sharif and Shahnawaz @ Shani @ Imran @ Usman @ Bargar son of Abdul Razzaq have preferred the above appeals against the impugned judgment dated 31.10.2006 passed by the learned Judge Anti-Terrorism Court No.II, Karachi in Special Case No.30/2003, F.I.R. No.63/2008 u/s. 302/324/34 PPC r/w section 7 of ATA, 1997, registered at PS Mauripur, Karachi whereby the appellants have been convicted and sentenced as under:-

- (a) For causing callous offence of brutal and broad day light Qatl-i-Amd of innocent deceased persons namely Muhammad Qasim, Raza Ali, Athar Ali, Syed Hashim Raza, Hawaldar Muhammad Rafique and Wasi Hussain an offence punishable u/s. 302(b) r/w 34 PPC and r/w section 7(a) of the Anti-Terrorism Act, 1997 they are awarded death sentence as Ta'zir, on each count subject to confirmation by this court.
- (b) For causing two injuries, declared as Jurh Ghayr Jaifah Damiyah, to injured Ali Hasnain Jafri, an offence punishable u/s.337 F (i) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, they are sentenced to suffer R.I. for 1(one) year as Ta'zir;

- (c) For causing two injuries, declared as Jurh Ghayr Jaifah Damiyah, to injured Syed Asif Ali Jafri, an offence punishable u/s.337-F(i) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, they are sentenced to suffer R.I. for 1(one) year as Ta'zir;
- (d) For causing one injury, declared as Shajjah-i-Khafifah, to injured Itrat Hussain, an offence punishable u/s.337-A(i) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, they are sentenced to undergo R.I. for 2(two) years as Ta'zir;
- (e) Causing four injuries, declared as; (i) Shajjah-i-Mudihah punishable u/s.337-A(ii) r/w 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, (ii) Jurh Jaifah punishable u/s. 337-D r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, (iii) Jurh Ghayr Jaifah Damiyah punishable u/s. 337-F(i) r/w 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997 and (iv) Jurh Ghayr Jaifah Mutalahimah punishable u/s.337-F(iii) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997 to injured Pervez Akhtar for which they are sentenced as under:-
- (i) For causing Shajjah-i-Mudihah, R.I. for 5(five) years as ta'zir;
 - (ii) For causing Jurh Jaifah, R.I. for 7(seven) years as ta'zir;
 - (iii) For causing Jurh Ghayr Jaifah Damiyah, R.I. for 1(one) year as ta'zir;
 - (iv) For causing Jurh Ghayr Jaifah Mutalahimah, R.I. for 3(three) years as ta'zir;
- (f) For causing one injury, declared as Jurh Ghayr Jaifah Mutalahimah punishable u/s.337-F(iii) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, to injured Asghar Zaheer, they are sentenced to undergo R.I. for 3(three) years as Ta'zir;
- (g) For causing causing five injuries, declared as (i) two Shajjah-i-Khafifah, punishable u/s.337-A(i) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997, (ii) one Jurh Ghayr Jaifah Hashmiah punishable u/s.337-F(v) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997 (iii) one Jurh Jaifah punishable u/s.337-D r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997 (iv) one Jurh Ghayr Jaifah Mutalahimah punishable u/s.337-F(iii) r/w. 34 PPC and r/w. section 7(c) of the Anti-Terrorism Act, 1997 to injured Munawar Ali Zaidi, for which they are sentenced as under:-
- (i) For causing two injuries declared as Shajjah-i-Khafifah, R.I. for 2(two) years as ta'zir for each injury;
 - (ii) For causing one injury declared as Jurh Ghayr Jaifah Hashimah, R.I. for 3(three) years as ta'zir;
 - (iii) For causing Jurh Jaifah, R.I. for 7(seven) years as ta'zir;
 - (iv) For causing Jurh Ghayr Jaifah Mutalahimah, R.I. for 2(two) years as ta'zir;

- (h) It has come on the record that injured Aslam Abbas, who has also been examined at the trial, had also sustained injuries but he was hospitalized at the Liaquat National Hospital, Karachi and since he was unable to walk, therefore, he did not accompany the I.O. to the MLO for re-examination as such the nature of injuries sustained by him has not been declared so far, therefore, the injuries sustained by him are treated as other hurt, an offence punishable u/s 337-L r/w 34 PPC and r/w section 7(c) of the Anti-Terrorism Act, 1997 for which they are sentenced to suffer R.I. for 5(five) years as ta'zir;
- (i) It has also come on the record and proved that bus bearing Regn. No: JA-1629 in which the deceased and injured persons were boarded was fired at and it received damage to the tune of thousands of rupees and in this way both the accused committed an offence punishable u/s 427 r/w 34 PPC and r/w section 7(d) of the Anti-Terrorism Act, 1997, for which they are sentenced to undergo R.I. for 2(two) years and to pay fine of Rs.20,000/- (twenty thousand) or in default to suffer R.I. for a period of 6(six) months more;
- (j) For possessing unlicensed SMC bearing No: 32958 with double magazine each containing 30 live rounds and unlicensed .32 bore pistol bearing No: 328817 loaded with five live bullets in its magazine, an offence punishable u/s 13(d) of the Pakistan Arms Ordinance, 1965, accused Shahnawaz alias Shani is sentenced to suffer R.I. for 5(five) years and to pay fine of Rs:10,000/- (ten thousand) or in default to undergo R.I. for a period of 6(six) months more;
- (k) Both the accused are directed to pay compensation of Rs:1,00,000/- (one lac) to the legal heirs of each six deceased persons named above and Rs.30,000/- (thirty thousand) to each of the injured persons named above, as provided u/s 544-A Cr. P.C. or in case of failure to pay the compensation they shall undergo R.I. for 6(six) months more;

The amount of compensation, if paid, be given to the legal heirs of the deceased persons and the injured persons at the rate mentioned above and the amount of fine, if deposited, be given to the owner of the bus bearing Regn. No: JA-1629;

All the sentences are directed to run concurrently and benefit of section 382-B PPC is also extended to both the accused.

2. The brief facts of the prosecution case as per FIR are that on 03.10.2003 at 12:50 pm near outer check post SUPARCO Road, Karachi the present accused Shahnawaz alias Shani alias Imran alias Usman alias Bargar, Shaukat alias Javed alias Chand along with absconding co-accused Asif alias Chottoo alias Rizwan alias Nasir, duly armed with Kalashnikovs, in furtherance of their common intention, fired at bus bearing Regn. No:JA-1629 in which employees of SUPARCO were

boarded with intention to commit their Qatl-i-Amd, as a result of which bus driver namely Qasim and co-driver Raza Ali sustained bullet injuries and died on the spot while other employees namely Ather Ali, Hashim Raza, Hawaldar Muhammad Rafiq, Ali Hassan Jaffri, Masoom Ali, Syed Asif Ali Jaffari, Itrat Hussain, Pervez Akhtar, Asghar Zaheer, Wasi Hussain Zaidi, Munawar Ali Zaidi, sustained bullet injuries and while they were being shifted to the hospital, Ather Ali, Syed Hashim Raza and Hawaldar Muhammad Rafique succumbed to their injuries on the way to the hospital while Wasi Hussain succumbed to his injuries at the Abbasi Shaheed Hospital, Karachi. After firing at the above bus, the accused persons retreated back and while firing at the contract bus boarded the motorcycle already parked nearby and fled away from the scene of offence. Beside the injured witnesses, the above incident was witnessed by complainant Iftikhar Hussain Shah, Intikhab, Aslam Abbas, Security Guard Muhammad Younus and worker Anjum Abbas. Inspector Waqar Ahmed Khan, SHO, PS Mauripur, who, along with HC Ibrahim was patrolling in the area, received information about the incident on his mobile telephone. He immediately called for the re-enforcement of police force to reach the SUPARCO Check Post and himself rushed to the pointed place where he saw many persons lying injured in the bus and crying for help. Profuse blood was lying in the bus. He with the assistance of his sub-ordinate staff and employees of SUPARCO removed the injured from the bus. Meanwhile ambulances of SUPARCO and other vehicles also arrived there, the injured were evacuated and shifted to various hospitals through Ambulances. Security Guards of SUPARCO namely Shahzad and Younus were present there and then other employees of SUPARCO also arrived there. High ranking police officials and Rangers Personnel had also arrived there. On 03.10.2003, at 2:30 pm SHO Inspector Waqar Ahmed Jadoon inspected the scene of offence in presence of Muhammad Younus and Shahzad and collected 35 empty shells of Kalashnikovs, blood stained earth, blood stained chapels and blood from the scene of offence and sealed them at the spot. Police also seized the bullet riddled contract bus bearing Regn. No.JA-1629 and prepared the memo of inspection of the scene of offence in presence of Muhammad Younus and Shahzad. On 03.10.2003, at 6:30 pm. complainant Iftikhar Hussain Shah, employed as Manager in SUPARCO, appeared at Police Station Mauripur and lodged his report to the above

effect before the Duty Officer SIP Muhammad Nawaz, who registered the FIR bearing No.63/2003, under Section 302/324/34 PPC read with Section 7 of the Anti-Terrorism Act, 1997 and entrusted its investigation to Inspector Syed Abid Hussain Shah. The articles recovered from the place of incident were sent to the Chemical Examiner in duly sealed condition for analysis. The bullet riddled contract bus was sent to FSL for inspection. On 22.10.2003 accused Shahnawaz alias Shani alias Imran alias Usman alias Bargar was arrested by police on a tip off, from House No.425, Hazarvi Mohalla, Gulshan-e-Ghazi and police secured illicit arm and ammunition from his possession and as such a separate FIR bearing Crime No.229 of 2003 was registered against him at PS Mochiko under Section 13(d) of the Pakistan Arms Ordinance, 1965. On 23.10.2003, he was formally arrested by police in this case after interrogation at AVCC Garden in presence of mashirs. On 31.10.2003, he was correctly identified by eyewitnesses Iftikhar Hussain, Intikhab, Muhammad Younus, Ali Hassan and Anjum Abbas before Judicial Magistrate that they had seen him firing at the contract bus from its left side by means of Kalashnikov, the Magistrate prepared the memo of identification test and obtained the signatures of above eyewitnesses.

3. That after completion of investigation the I.O. submitted his report under Section 173 Cr.P.C, vide charge sheet No.59/2003 before Administrative Judge, ATC, Karachi on 20.12.2003, forwarding accused Shahnawaz @ Shani @ Imran @ Usman @ Bargar in custody to face his trial while the names of other accused Shaukat alias Javed alias Chand and Asif alias Chottoo alias Rizwan alias Nasir were declared as absconders. Later on Shaukat was arrested on 16.05.2005 and was also sent upto face trial. Thereafter the charge was framed to which the accused pled not guilty and claimed trial.

4. In order to prove its case the prosecution examined 32 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The accused recorded their statements under S.342 Cr.PC whereby they claimed false implication in the case as they were arrested from their homes and kept in illegal police detention and that they were shown to the eye witnesses before the identification parade at the police station. However, the

accused did not examine themselves on oath or produce any defense witnesses in support of their defense case.

5. Learned Judge, Anti-Terrorism Court-II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide impugned judgment dated 31.10.2006 convicted and sentenced the appellants as stated above, hence these appeals have been separately filed by the appellants against their conviction. By this common judgment we intend to decide the same.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned advocate for appellant Shaukat contended that the FIR was lodged after an unexplained delay of 5 hours against unknown persons; that in the FIR only two eye witnesses from SUPARCO are named being Muhammed Younis and Aftab Aslam; that the complainant in his FIR has not given any description of the accused; that the eye witnesses who identified the accused Shaukat are chance witnesses and were too far away to correctly identify him; that the identification parade was not carried out in accordance with the law as no description of the dummies were given and from where they were found; that the medical evidence of the MLO's contradicts the oral evidence as to where the incident occurred; that the accused was illegally arrested; that the bus was not produced in court and that based on any one of the above reasons the accused was entitled to be acquitted based on the benefit of the doubt. In support of his contentions he placed reliance on **Hayatullah V State** (2018 SCMR 2092), **Mst Sughra Begum V Qaiser Pervez** (2015 SCMR 1142), **Muhammad Asif V State** (2017 SCMR 486), **Fazal Bibi V The State** (1988 SCMR 645), **Barkat Ali V Muhammed Asif** (2007 SCMR 1812), **Muhammed Shah V The State** (2010 SCMR 1009) **Muhammed Asghar V The State** (2010 SCMR 1706), **Shafqat Mehmood V The State** (2011 SCMR 537), **Ali Sher V The State** (2008 SCMR 707), **Fayyaz Ahmad V The State** (2017 SCMR 2026), **Mah Gul V. The State** (2009 SCMR 4), **Abdul Jabbar V The State** (2019 SCMR 129), **Khyber Khan V Shahid Zaman** (2019 P Cr. L.

J 979), **Muhammad Ahmed V The State** (1997 SCMR 89) and **Aurengzeb V The State** (1990 SCMR 619).

8. Learned advocate for appellant Shahnawaz admitted that the incident had taken place but contended that the appellants were not the culprits and had been wrongly implicated in this case either deliberately or by mistake; that according to him none of the eye witnesses was present at the scene and were all put up witnesses; that the complainant was also not present at the scene as no one had seen him on the bus or at the hospital where he allegedly went and he was not a signatory on any post mortem report or S.174 Report and he did not give any description of the assailants in his FIR which was delayed by an unexplained period of 6 hours so that a false story could be concocted which was shown by the fact that only one eye witness out of the two named in the FIR gave evidence whilst 4 unnamed eye witnesses gave evidence as PW's; that the inquiry had already started before the FIR was lodged; that no motive was alleged for the attack on the bus and no motive was proven; that even if the eye witnesses were present they could not be safely relied upon as their identification of the appellants was insufficient to establish that the appellants were the actual persons who committed the offenses as charged and that the identification parade had not been carried out in accordance with the law; that no independent eye witness despite being available had been associated with the case; that the ocular evidence was not supported by the medical evidence because according to all PW's the appellants fired upon the bus with KK's yet one of the deceased was found to be hit by pellets; that there was an unexplained delay in sending the empties for forensic analysis; that the tapedars sketch could not be relied upon as it did not even mark the position of the complainant; that for any one of the above reasons appellant Shahnawaz was entitled to be acquitted based on the benefit of the doubt. In support of his contentions he placed reliance on **Mehmood Ahmad and 3 others v. The State and another** (1995 SCMR 127), **Muhammad Rafiq v. The State** (2014 SCMR 1698), **Abdul Qayoom and another v. The State** (2018 P. Cr.LJ Note 229), **Kamran Ahmed Farooqui and another v. The State** (SBLR 2013 SC 18), **Kanwar Anwaar Ali** (PLD 2019 Supreme Court 488), **Mst. Sughra Begum and another v. Qaiser Pervez and others** (2015 SCMR 1142), **Amin Ali and another v. The State** (2011 SCMR 323), **Jehangir v. Nazar Farid** (2002

SCMR 1986), **Muhammad Ashfaq v. The State** (1995 SCMR 1321) and **Allahando v. The State** (1969 SCMR 714).

9. On the other hand Mr. Khadim Hussain, Addl. Prosecutor General, supported the impugned judgment and contended that the prosecution had fully proved its case against both the appellants beyond a reasonable doubt and as such the appeals should be dismissed. He contended that the delay in the FIR had been explained; the fact that the FIR had been against unknown persons showed the FIR was honest and did not set out to falsely implicate any person; that all the eye witnesses against both the accused were natural eye witnesses and were present on the spot; that the eye witnesses had all correctly identified both the appellants and that the evidence of these eye witnesses was reliable, trust worthy and confidence inspiring and since the medical evidence supported the over whelming eye witness evidence we could convict on these grounds alone; that the identification parade had been carried out in accordance with the law and as such as the prosecution had proved its case beyond a reasonable doubt the appeals be dismissed. In support of his contentions he placed reliance on **Solat Ali Khan v. The State** (2002 SCMR 820), **Muhammad Asghar and four others v. The State** (2004 SCJ 387), **Muhammad Arshad v. The State** (2015 SCMR 258), **Muhammad Arshad alias Achhu v. The State** (2002 SCMR 1806) and **Muslim Khan and others v. The State** (2002 YLR 2813).

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. Before deciding this case we would reiterate that cold bloodied murder and injury to many others on sectarian/religious grounds is an extremely abhorrent and heinous crime for which the most severe penalty is applicable if proven against the accused as it hits at the stability of the State. However, although we are cognizant of the fact that the law needs to be dynamic in criminal cases we cannot be so cavalier in our outrage as to caste aside some of the golden principles of criminal jurisprudence. Namely that it is for the prosecution to prove its case beyond a reasonable doubt against the accused based on cogent, reliable and trustworthy

evidence on record (both oral, documentary and circumstantial) and that the accused is entitled to the benefit of the doubt and that it is the evidence on record and not our emotions or personal feelings or gravity or heinousness of the offense which must form the basis our decisions.

12. This view was recently emphasized by the Supreme Court in the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274) which was a case concerning kidnap for ransom and murder of a pre teenager which is also a crime of the most heinous nature which held as under at P.290 Para 32.

"It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty."(bold added)

13. We are of the view that in the prevailing circumstances of chaos after the deadly firing incident on the bus and the need to get the injured to hospital as soon as possible a delay of about 5 hours in registering the FIR based on the particular facts and circumstances of this case has been adequately explained and as such this delay is not fatal to the prosecution case as there was also insufficient time to concoct a case after consultation which is bolstered by the fact that the FIR is against unknown persons who are not even described in the FIR which indicates that there was no plan or intention to falsely implicate any particular person in this case.

14. In our view after our reassessment of the evidence based on the evidence of the PW eye witnesses, PW MLO's, post mortem reports, PW police witnesses and IO along with recoveries of the Kalashnikov, empties, blood and chapels at the scene of the offense along with the positive FSL and chemical reports and bullet riddled bus we are satisfied that the prosecution has proved beyond a reasonable doubt that on 03.10.2003 at about 12.50pm near outer check post SUPARCO Road Karachi 5 employees of SUPARCO of the shia sect were murdered by

Kalashnikov (KK) firearm injuries and 8 others were injured on account of KK firearm injuries whilst being passengers on a contract bus en route to perform Friday prayers and that the murderous attack on the bus was made on religious/ sectarian grounds. This position has even been admitted by the appellants bar the contention that one injured received an injury caused by pellets and not KK although the other injuries appear to be by KK and the cause of death is by firearm.

15. The only issue therefore, in our view, left before us is whether it was the appellants or some other third party who carried out the attack on the bus which lead to 5 people being murdered in cold blood and 8 others being injured.

16. In essence therefore, in our view, the fate of the appellants will depend on whether their identification can be safely relied upon keeping in view that neither of the appellants was arrested on the spot nor were they known to any of the eye witnesses who allegedly identified them at the time of the incident.

17. In this regard we need to consider the relevant law on identification and then see if based on a detailed analysis of the evidence of the eye witnesses who allegedly saw and identified the appellants whether or not the law on safe identification has been complied with especially as this is a capital case.

The Law on identification.

18. In the case of **Javed Khan V State** (2017 SCMR 524) concerning the necessity for an early hulia/description of an accused by an eye witness before an identification parade and the need to strictly follow the rules governing identification parades it was held as under at P.528 to 530:

"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. 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 Sid 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).

8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect. There is yet another aspect to the matter of identification of the culprits of this case. The Complainant had named three other persons who could recognize the assailants, but he did not mention Subedar Mehmood Ahmad Khan (PW-6) as one of them. Nonetheless Subedar Mehmood Ahmad Khan came forward to identify the appellants. Significantly, none of the three persons mentioned by the Complainant participated in the identification proceedings and two were not even produced as witnesses by the Prosecution. During the identification proceedings both the appellants had informed the Magistrates who were conducting the identification proceedings, and before the identification proceedings commenced, that they had earlier been shown to the witnesses. The Magistrates recorded this objection of the appellants in their reports but surprisingly did not attend to it, which can only be categorized as a serious lapse on their part. Therefore, for all these reasons reliance cannot be

placed upon the report of the identification proceedings in which the appellants were identified.

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) AND Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. *In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential.*" (bold added)

19. The recent supreme court case of **Mian Sohail Ahmed V State** (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified. In fact such extra care and caution in relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan as noted below) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

The conduct of the identification parade.

20. In the recent case of **Kanwar Anwaar Ali** (PLD 2019 SC 488) mandatory guidelines were laid down for conducting an identification parade which flowed from and approved the earlier case of **Muhammed Yaqoob and Another V State** (1989 PCr.LJ 2227) which held as under in terms of guidelines at P.498.

"3.Before parting with this order we would like to point out that the matter of taking of different steps in holding of a proper test

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identification parade in connection with a criminal case has developed over many decades and the requirements of such a parade as well as the safeguards to be ensured during such a parade so as to make it a meaningful exercise and providing material in a criminal case to be considered in a trial have elaborately been detailed in the landmark judgment passed by a learned Division Bench of the Lahore High Court, Lahore in the case of Muhammad Yaqoob and another v. The state (1989 PCr. LJ 2227) and in the said judgment Mr. Justice Khalil-ur-Rehman Ramady (as his lordship then was a Judge of the Lahore High Court, Lahore) had observed as follows:-

"16. But before we undertake a deeper analysis of the evidentiary value of the test identification proceedings held in the present case, it would be of advantage to first appreciate the object and the value of such an evidence as also to recapitulate the standards required to be met before such like identification parades could be credited with reliance.

17. The evidence offered through identification proceedings is not a substantive piece of evidence but is only corroborative of the evidence given by the witnesses at the trial Muhammad Bashir v. The State (PLD 1958 SC (Pak) 1. It has no independent value of its own Muhamamd Afzal and another v. The State 1982 SCMR 129 and cannot as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record Sudhindranath v. The State AIR 1952 Cal. 423.

18. The identification parades (as they are normally called) are necessary only where the offender was a complete stranger to the witnesses Ismail and another v. The State 1974 SCMR 175. And the whole object of the identification proceedings is to find out whether the suspect was or was not the real offender Satya Narain v. The State AIR 1953 All. 385 and Kind v. Christle (1914 AC 545)

19. 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 terrorized state of mind.

20. It was primarily for these reasons that Dorab Patel, J. (as his Lordship then was) cautioned the Courts to beware of the dangers inherent in the identification of strangers and quoting from the Criminal Law Revision Committee Report (1972), observed in Lal Pasand's case PLD 1981 SC 142 that mistaken identifications were:-

".....by far the greatest cause of actual or possible wrong convictions....."

A similar note of caution was given by Monir in his Evidence Act Pak. Edition, Vol. 1 where the advice is that:-

".....the evidence as to identification ought in each case, to be subjected to a close and careful scrutiny."

What then are the standards required to be satisfied by such an evidence before the same could be accepted by a Court of law?

The answer is that the vital factor determinative of the worth and value of identification proceedings is the effectiveness of the precautions taken, before and during the course of such proceedings which are designed to eliminate the possibility of unjustified convictions.

Although there is no law, which prescribes any such precautions yet the necessary guidelines are available in the form of executive instructions and judicial pronouncements. Some of them are summarized as under:

(a) Memories fade and visions get blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence;

(b) a test identification, where the possibility of the witness having seen the accused person after their arrest cannot be ruled out, is worth nothing at all. It is, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects are put to identification tests as early as possible. 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 is to avoid the possibility of overzealous I.Os 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 if they so choose so that no witness could see them;

(c) identification parades should never be held at police stations;

(d) the Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings;

(e) in order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused person should be as much as possible. But then 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. The superior Courts have, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. **This ratio must be followed unless there are some special justifiable circumstances warranting a deviation from it;**

(f) if there are more accused persons than one who have to be subjected to test identification, then the rule of prudence laid down by the superior Courts is that separate identification parades should ordinarily be held in respect of each accused person;

(g) it 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 also has to be ensured that no one who is witnessing the proceedings, such as the members of the jail staff etc. is able to communicate with the identifying witnesses;

(h) 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;

(i) 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;

(j) 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;

(k) 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;

(l) and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;

(m) the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings; and

(n) the Magistrate has to give a certificate at the end of his report in the form prescribed by CH. H.C of Vol. III of Lahore High Court Rules and Orders.

The measures above listed should, however, not be taken as exhaustive of the steps which are required to be taken before, during and after the identification proceedings. All these requirements no doubt mandatory but at the same time they are only illustrative of the precautions which the Courts of law demand before some respect can be shown to the evidence offered through the test identification proceedings"(bold added).

21. The Addl. PG in terms of identification evidence has placed great emphasis on **Muhammed Asghar's case** (Supra) however in our view that case is distinguishable from the case at hand based on their own particular facts and circumstances. In **Muhammed Asghar's case** (Supra) the culprits were in the house for a long time with light provided by bulbs which enabled the complainant and other eye witnesses in that case to get a good look at them at close range who they even spoke to and some of whom they knew and the horrific event was of witnessing his two minor children being slaughtered by churri blows in front of his very eyes. In the instant case however the eye witnesses got a fleeting view of the accused for a short period of time and not at close range whilst they were under attack and needed to dive for cover in order to save their own lives. They knew neither of the accused before the attack and in our view witnessing the stabbing to death of your two minor children close up where you hear their screams cannot in our view be equated to being present when some of your work colleagues are shot from a longish range and either killed or injured.

22. Before turning to the correctness of the identification of both Shahnawaz and Shaukat we are of the view that not naming all the eye witnesses in the FIR based on the particular facts and circumstances of this case where terror, chaos, confusion and trauma would have reined both during and immediately after the incident is not particularly significant in respect of the credibility and reliability of the evidence of the eye witnesses not named in the FIR especially as in the FIR after specifying two names **the words and others** is specifically written.

What is the evidence of the eye witnesses in this case who actually claim they saw the appellants at the scene of the incident.

Eye witness evidence in respect of appellant Shahnawaz.

23. PW 16 Muhammad Younus. Was a security guard at SUPARCO at the time of the incident and was present when the incident occurred along with another security guard named Sherzade **and was named in the FIR as an eye witness.** He saw two terrorists fire at the bus with Kalashnikov's. One fired at the front whilst the other came to the left of the bus. The two terrorists escaped on a motor bike driven by another person. He recorded his S.161 statement on the day of the incident in the evening. At the identification parade which took place on 31.10.2003 he identified Shahnawaz and gave him the specific role of firing at the bus from the left side. **He gave hulia of the appellant in his S.161 and described him as wheatish colour and wearing pants whereas he admitted in court that the appellant is of fair complexion.** The bus was parked at about 5 feet from where he was standing. He did not know appellant Shahnawaz prior to the incident and there was no enmity between them. He was a natural witness being a guard and his presence at the scene is explainable. **We thus believe his presence at the scene. The only issue is whether he has correctly identified Shahnawaz.**

24. PW 31 Mohammed Sherzade. Was a security guard at SUPARCO at the time of the incident and was present when the incident occurred along with security guard PW 16 Muhammed Younus and is **not** named as an eye witness in the FIR. He only identifies Shahnawaz in court which identification has been disapproved of by the Supreme Court as noted earlier in this judgment.

25. PW 17 Iftikhar Hussain Shah. Is the complainant and was an employee of SUPARCO who was on the bus when it was attacked. He saw one person firing with a KK at the front of the bus and one person firing with KK on the left of the bus. In his evidence he states that he clearly sees the person firing at the front of the bus and left of the bus. He lodges the FIR on the same day of the incident against unknown persons **but gave no hulia or description of the assailants in his FIR.** On 31-10-2003 he identified Shahnawaz who was firing from the left hand side of the bus and was wearing pants. Shahnawaz was about 3 yards away from

the bus when he was firing. He did not know appellant Shahnawaz prior to the incident and there was no enmity between them. He was a natural witness being a SUPARCO employee and his presence at the scene is explainable. **We thus believe his presence at the scene. The only issue is whether he has correctly identified Shahnawaz.**

26. **PW 18 Intikhab Hussain.** Was an employee of SUPARCO who was on the bus when it was attacked. He is **not** named as an eye witness in the FIR. He saw one person firing with a KK at the front of the bus and one person firing with KK on the left of the bus. In his evidence he states that he saw clearly the faces of the two assailants who were firing on the bus. He recorded his S.161 statement on the same day and **gave features and hulia of the appellant who was of wheatish complexion** and wore pants. On 30.10.2003 at the identification parade he picked out the person who was firing at the bus from the left side who was Shahnawaz **but in his evidence admitted that Shahnawaz in court is of fair complexion.** That the firing on the bus lasted for about one and half minutes to two minutes. He did not know Shahnawaz prior to this incident and there was no enmity between them. He was a natural witness being a SUPARCO employee and his presence at the scene is explainable. **We thus believe his presence at the scene. The only issue is whether he has correctly identified Shahnawaz.**

27. **PW 22 Syed Ali Hussain.** Was an employee of SUPARCO who was on the bus when it was attacked and was injured by the firing. He is **not** named as an eye witness in the FIR. He saw one person firing with a KK at the front of the bus and one person firing with KK on the left of the bus. In his evidence he states that he saw clearly the faces of the two assailants who were firing on the bus. He received bullet injuries and became unconscious and awoke in the JPMC hospital which discharged him on the same day and thereafter he was a patient of Khokrapar Hospital. He recorded his S.161 statement on 20-10-2003 **(17 days after the incident and after the arrest of Shahnawaz)** whereby he gave the hulia of the appellant as being of wheatish complexion and wearing pant shirt. On 31.10.2003 he attended an identification parade where he identified Shahnawaz who had fired at them from the left side of the bus however he **admitted in court that Shahnawaz was of fair complexion and not wheatish.** He did not know Shahnawaz prior to the incident and there

was no enmity between them. He was a natural witness being a SUPARCO employee and his presence at the scene is explainable especially as he was also injured at the scene. **We thus believe his presence at the scene. The only issue is whether he has correctly identified Shahnawaz.**

28. **PW 30 Syed Anjum Abbas.** He identified both Shahnawaz and Shaukat. He is **not** named as an eye witness in the FIR. He is a son of a SUPARCO employee who was living at the SUPARCO coloney who caught the bus which was attacked as he used it in order to travel to get a connection with another bus so he could go to GETTRON Industries where he was working. As he got down from the bus he saw a motor cycle with 3 persons on it a **few yards away** from the bus. He saw two persons from the motorcycle get down from motorcycle. He saw one of these persons firing with a KK at the front of the bus and the other person firing with KK on the left of the bus. After the firing the assailants ran to the motorcycle which was about **50 to 60 paces away** and escaped from the scene of the incident. After witnessing the incident he boarded his connecting bus and left for hub Chowki. **On 06-10-2003 (3 days after the incident) his S.161 statement was taken by the police.** On 31.10.2003 he attended an identification parade where he identified Shahnawaz who he saw firing at the bus from the left side with a KK. He did not know Shahnawaz prior to the incident and had no enmity with him. We will come to whether he was even present at the scene of the incident and if so the reliability of his evidence vis a vis the identification of the appellants later in this judgment

Eye witness evidence in respect of appellant Shaukat.

29. **PW 31 Mohammed Sherzade.** Was a security guard at SUPARCO at the time of the incident and was present when the incident occurred along with security guard PW 16 Muhammed Younus. He was **not** named as an eye witness in the FIR. He saw 3 persons come riding on a motorcycle parked **some distance** from the bus. He saw two persons from the motorcycle get down from motorcycle. He saw one of these persons firing with a KK at the front of the bus and the other person firing with KK on the left of the bus. One person remained on the motorcycle and kept it running in stand by condition. All three persons fled from the scene on the motorbike. He states in his evidence that he saw all three

persons clearly and could recognize them again if they came before him. His S.161 Cr.PC statement was recorded on the same day. He attended an identification parade on 23.05.2005 (**over 2 years after the incident**) where he identified Shaukat as the person on the motorcycle who came with two other persons and escaped with them from the scene of the incident after the firing on the bus. In his S.161 Cr.PC statement he had stated the features, complexion and height of the culprits. **The motorcycle was parked 40/50 paces away from the bus at the time of the incident.** He did not know Shaukat prior to the incident and there was no enmity between them. At the identification parade he identified Shaukat. We are of the view that he was a natural witness and was present at the scene of the incident but we will deal with the reliability of his evidence vis a vis the identification of the Shaukat later in this judgment.

30. **PW 30 Syed Anjum Abbas.** As mentioned earlier in the case of Shahnawaz he is a son of a SUPARCO employee who was living at the SUPARCO colony who caught the bus which was attacked as he used it in order to travel to get a connection with another bus so he could go to GETTRON Industries where he was working. As he got down from the bus he saw a motor cycle with 3 persons on it a **few yards away** from the bus. He saw two persons from the motorcycle get down from motorcycle. He saw one of these persons firing with a KK at the front of the bus and the other person firing with KK on the left of the bus. After the firing the assailants ran to the motorcycle which was about **50 to 60 paces away** and escaped from the scene of the incident. After witnessing the incident he boarded his connecting bus and left for hub Chowki. **On 06-10-2003 (3 days after the incident) his S.161 statement was taken by the police where he described the accused as being of wheatish complexion and wearing pant and shirt.** On 23.05.2005 (**over two years later**) he attended an identification parade where he identified Shaukat who he saw on the motor bike who took the other assailants away from the scene of the incident after they had made firing on the bus. He did not know Shaukat prior to this incident and there was no enmity between them. He gave a further statement after the arrest of Shaukat. He gave hulia of the assailants in his S.161 statements. Shaukat was wearing unclean clothes at the time of the identification parade. He also admits knowing the name of the accused prior to the identification parade. As mentioned earlier we will come to whether he was even present at the scene of the incident and

if so the reliability of his evidence vis a vis the identification of the appellants later in this judgment

31. It is note worthy that eye witness Aftab Aslam who is named in the FIR as an eye witness and who was originally on the list of PW's was given up by the prosecution without any explanation which can lead to the adverse inference under A.129 (g) Quanon-e-Shahdat Order 1984 that he might not have supported the prosecution case in terms of the identification of the appellants.

32. In our view however, whilst examining the eye witness evidence in terms of its reliability in identifying the appellants the evidence of **PW 32 Muhammed Yousaf** is also very important in that context especially as he was a police officer with 37 years of experience and **who remained IO virtually throughout the entire investigation and recorded all S.161 statements and took all the accused to the identification parades.**

33. At typed pages 1 and 2 of his evidence in chief (paper book P.268 to 269) he states as under starting from the 15th line from the top:

"On the same day (03.10.2003) I also recorded the 161 Cr.P.C. statements of **P.W.s Iftikhar Hussain Shah, Muhammad Younus, Shahzad**, Nayyar Urooj, Shahid Iqbal, Abdul Rasheed, Rafique Saleemi, Hameed-ul-Hassan, Hav: Raza Muhammad, Naib Sobedar Haq Nawaz, Nawab Alam Zaidi, Shakeel, Malik Afzal, Sher Muhammad and **Intikhab Hussain** at SUPARCO security guard room. On 05-10-2003 I went to the SUPARCO where I enquired regarding the injured, where I came to know that injured persons are admitted in various private hospitals.

On 06-10-2003 I recorded the 161 Cr.P.C. statement of **Syed Anjum Abbas**. On 07-10-2003 I submitted a letter to Mukhtiarkar District West Karachi, requesting for directing the Tapedar to prepare the sketch of the scene of offence. I see request letter as Exh:99, it is same correct and bears my signature and endorsement made by the Mukhtiarkar Kiamari Town Karachi. On 09-10-2003 I alongwith Tapedar of the beat went to the scene of offence where P.W. Anjum Abbas was already present, who pointed the place of vardat to Tapedar, who prepared the sketch. The place of vardat was situated near the outer check post and SUPARCO MOR near Watan Yar Hotel. On 13-10-2003 I recorded the 161 Cr.P.C. statement of **P.Ws. Shahzad Hussain, Aamir Ali, Farooq Waheed, Syed Raza, Syed Itrat Hussain**. On 20-10-2003 I recorded the 161 Cr.P.C. statement of **P.Ws Ali Hussain, Munawar Zaidi and Asif Ali Jaffri.**" (bold added in respect of each eye witness who allegedly recognized Shahnawaz and Shaukat)

This means by his own admission he recorded all the S.161 statements of all the eye witnesses who recognized and later identified the accused.

34. On typed Page 6 (paper book P.273) of his cross examination he gives evidence as under;

"I am working in the police department since last 37 years. I prepared the Hulla Form of accused Shahnawaz at the time of his arrest, which I produce as Exh:119, it is same correct and bears my signature. It is correct that in Hulla Form Exh:119, I have mentioned the Hulla of accused having *fair* complexioned, thin built and height five feet four inches. All the eye witnesses examined by me u/s.161 Cr.P.C. did *not* state in their statements that accused was fair complexioned having thin built and medium height." (bold added)

This confirms that the hulla of Shahnawaz was of fair completion and *not* wheatish as stated by all the eye witnesses (who allegedly gave a hulla) in their S.161 statements or FIR.

35. On typed Page 7 (paper book P.274) of his cross examination he gives evidence as under;

"All the eyewitnesses did *not* mention before me during the recording of their 161 Cr.P.C. statements, feature, complexions and statures of accused. **Voluntarily states that they had only stated that they can identify the accused if they are produced before them.**" (bold added)

36. On typed P.10 (paper book P.277) with regard to appellant Shaukat of his cross examination he gives evidence as under;

"It is correct that witness Shahzad and Anjum Abbas had **not** stated in their 161 Cr.P.C. statements the complexions, statures and the clothes worn by the accused at the time of incident."

37. It is also **significant** that all the above PW eye witnesses (except PW 17 Iftikhar Hussain Shah who was the complainant and admits giving no hulla/description of the appellants) were specifically confronted in their cross examinations by the appellants that they gave no hulla/description especially in terms of features, complexion and stature of the appellants in their S.161 statements. The appellants also cross examined most of the eye witness PW's that they were shown to the appellants prior to the identification parades either at the PS or through photographs prior to the identification parade which they both specifically mentioned in their statements under S.342 Cr.PC. Such cross examination is consistent with

both their defenses that they were falsely implicated in this case and were arrested from home (and not elsewhere as claimed by the police) and held at PS garden before being falsely implicated in this case. The mother of appellant Shahnawaz even sent letters to concerned officials in this respect which were duly exhibited at trial.

38. From what flows from the above evidence of the IO with regard to both the appellants is that **none** of the eye witnesses mentioned above who allegedly recognized the accused at the identification parades gave any hulia or description of either of the accused at the time of their S.161 Cr.PC statements or when the FIR was lodged and that **at best** all described the hulia of the appellant **Shahnawaz as wheatish** when in fact as per the IO's hulia and their recognition in court **Shahnawaz was of fair skin**.

39. Since this was a day light incident we find it almost impossible to believe that **all** the eye witnesses (if they gave any hulia at all) described Shahnawaz as wheatish instead of fair as wheatish in effect means of brown/dark colour whereas fair in effect means of light colour skin. We may have been able to overcome our anxiety on this issue of color if at least one of the eye witnesses had described Shahnawaz as being of fair complexion keeping in view the panic and terror which would have seized all the eye witnesses when the firing started on the bus but when **all of them got the complexion/color wrong** especially as apparently one or two of them were close to Shahnawaz when he was allegedly making fire for about one and a half minutes we find it hard to believe that they have definitely correctly identified Shahnawaz based on the relevant law as mentioned earlier on hulia (**Javed Khan's case**) (Supra) keeping in view that they had never seen him before, only caught a brief glimpse of him and most of the eye witnesses would have been diving for cover in order to escape the carnage unfolding before them and whose main priority would have been to save their own lives.

40. Furthermore, the tapedar's sketch only shows the position of PW's Muhammed Younis and Muhammed Sherzad both of whom are unarmed security guards who are shown **behind** the bus and as such it is unlikely that they could have safely/correctly identified either Shahnawaz or Shaukat who they were also a considerable distance from especially

Shaukat keeping in view that they would have been diving for cover in order to save their own lives since they were unarmed and would not have been able to return fire. In fact if Shahnawaz's and PW Anjum's positioning on the tapedar's sketch is at all accurate it begs the question why Shahnawaz and the other absconding shooter did not also kill eye witness PW Anjum while they were retreating to the motor bike as they would have passed by him and presumably they would not have wanted to take the risk that PW Anjum could recognize them. Killing one more after killing so many would not have been an issue for them. It is also significant in terms of the accuracy and the reliability of the sketch that no other eye witness including the complainant is shown in the sketch let alone there position. It is also intriguing that it is not the complainant who assists the tapedar in preparing the sketch but an eye witness who came forward 3 days **after** the incident.

41. In fact it seems to us very coincidental/odd that a person whom all the eye witnesses allegedly describe as being wheatish in their S.161 Cr.PC statements is picked out by **all** of them at the identification parade **despite being fair**. Keeping in view that all the eye witnesses came from SUPARCO consultation and manipulation between them cannot be ruled out. It is also in our view some what suspicious that all the eye witnesses who claim to have identified the appellants had given extremely similar statements.

42. We are also of the view that a number of the rules and guidelines concerning safe identification parades as mentioned in the above law (**Kanwar Anwaar Ali's case**) (Supra) have not been complied with. For example, when Shahnawaz was arrested 18 days after the incident he was taken into police custody and remained there a further 9 days before he was put to an identification parade when he should have immediately been sent to judicial custody to ensure that he could not be shown to the eye witnesses. Instead the police had a 9 day opportunity to show him to the eye witnesses before the identification parade as was put to the relevant PW at the time of cross examination and is a defense taken in his section S.342 Cr.PC statement. No explanation has been provided for this unexplained delay of 9 days in putting the appellant before an identification parade

43. We have also noted from the evidence of some of the eye witnesses who participated in the identification parades that some of the dummies were of different features and complexions and that in some cases NIC's and addresses of the dummies were not taken. It is also not clear whether a fresh set of dummies was used for each and every identification parade as 4 eye witnesses attended 4 separate identification parades on the same day in Shahnawaz's case. That the magistrates failed to note for how long the accused had been in police custody; that two of the eye witnesses who identified Shahnawaz left together after the identification parade after identifying Shahnawaz in order to say Friday prayers together. We are also of the view that bringing most of the eye witnesses together at the same time in the SUPARCO van and leaving them in the same room prior to the identification parade might not have been a safe practice as all the eye witnesses could have discussed the type of person they would all pick out and then done exactly that or at worst passed around a photograph of the accused which had been given to them by the police. In this respect it is interesting that all PW's are SUPARCO employees and not a single **independent** PW was taken from either the tea shop or the pan shop which were very close to the incident and where people were also present who witnessed the incident.

44. It has also in our view not been fully explained as to how the appellant Shahnawaz came to be arrested in this case. He was arrested on spy information that some **suspects** were present in House No.425-A, Hazara Colony. Though it is not mentioned what the persons were suspected of. When Shahnawaz was arrested after leaving the house a bag containing an SMG, magazines, pistol and live ammunition was found on him and he was arrested in a separate case under the Arms Ordinance. However according to the evidence of the IO there is no extra judicial confession and the IO arrested him after interrogation and before an identification parade after satisfying himself about Shahnawaz's involvement in the bus case. But how did he reach this conclusion? There is nothing in evidence to point to this. Furthermore, when Shahnawaz left the house just prior to his arrest in the unlicensed arms case he locked the door yet quite inexplicably no key was found on him during his search and arrest which took place as soon as he locked the door and nor is one mentioned in his memo of arrest and recovery which gives credence to the fact that Shahnawaz may not have been arrested from that place and

castes doubt on the prosecution's version of his arrest. It also seems to us a little too convenient that Shahnawaz was arrested carrying a bag containing an SMG and live rounds which also matched the empties recovered at the scene according to the FSL report. Surely, after such a high profile massacre where all the apparatus of the various law enforcement agencies would have been vigorous hunting for the murderer's logic, common sense and reason would dictate that the fire arm used in the massacre should be immediately disposed of. Shahnawaz keeping the murder weapon (SMG) and even carrying it around with him after participating and using it in the bus massacre does not in our view appeal to natural human behavior based on the particular facts and circumstances of this case.

With regard to the identification of Shaukat.

45. As with appellant Shahnawaz we have also taken into consideration the evidence mentioned earlier of the IO with respect to Shaukat in terms of hula/description in the eye witnesses S.161 statements.

46. There are only two eye witnesses against Shaukat and we must keep in view that Shaukat did not carry out any firing. He allegedly brought the two other assailants on motorbike who then disembarked and made the firing on the bus while Shaukat remained with the motor bike and then helped the two assailants escape by driving the motor bike away from the scene of the incident. Although this does not lessen his role/responsibility and liability in the massacre on the bus it is relevant and significant in terms of **how far away** Shaukat was from the eye witnesses who claimed to have identified him and whether their identification of him can be safely relied upon

47. The first eye witness against Shaukat is **PW 31 Mohammed Sherzade** who in our view has failed to safely identify Shaukat. This is because in his own evidence he claims to have given hulia of Shaukat in his S.161 Cr.PC statement but does not state what hulia he actually gave. More emphasis is placed on his statement that he could recognize Shaukat again if he saw him; in his evidence he states that he saw 3 persons come riding on a motorcycle parked **some distance** from the bus; in his evidence he states that the motorcycle was parked **40/50 paces away from**

the bus at the time of the incident and thus we find it hard to believe that from such a great distance away in the heat of a gun battle when the unarmed eye witness would have been scared and trying to save himself he could have accurately identified the appellant Shaukat. The credibility of this witness is further damaged when he states that while removing the injured his uniform was **not** stained with blood which is not believable when considered in the light of the other evidence that the bus was full of blood and that all the injured or dead were bloody or bleeding having received in some cases multiple fresh gun shot wounds who he helped move to ambulances. We must also take into account that the identification parade was held **over 2 years after the incident** in which time memories can fade. Although we accept the presence of this eye witness at the scene of the incident we do not consider that we can safely rely on his identification of appellant Shaukat for the reasons mentioned above.

48. The other eye witness against appellant Shaukat is **PW 30 Syed Anjum Abbas** who again states in his evidence that the motor bike was **50-60 paces away from the bus** at the time of the incident and thus once again we find it hard to believe that from such a great distance away in the heat of a gun battle when the unarmed eye witness would have been scared and trying to save himself he could have accurately identified the appellant Shaukat. Furthermore, on 06-10-2003 (**an unexplained delay of 3 days after the incident** keeping in view that he was allegedly living at the **SUPARCO coloney**) his S.161 statement was taken by the police where he described the accused as being of wheatish complexion which was not the case. He appears to be a **chance witness** who it appears did not give his correct address before the trial court, IO and magistrate by his own admission; he did not produce any evidence that he was working at GETTRON Industries or why he was going to start work at such an unusual time; no one else saw him on the bus and his S.161 statement was recorded after an unexplained delay of three days. It also does not appeal to reason that after witnessing a deadly gun battle where many were killed and injured he then just casually jumped on his connecting bus and went to work and did not bother to give any statement to the police for another 3 days despite allegedly living in the SUPARCO colony which incident during those days must have been the only subject of conversation. Natural and logical human behaviour would have dictated

that after witnessing the gun battle the witness would have gone and helped transport the injured to hospital or go home and forget about his connecting bus and his own work which would have paled into insignificance after witnessing such a horrific and traumatic incident. It is also suspicious that he was the person who took the tapedar to the scene of the incident whose sketch does not show the presence of the complainant and shows only two other eye witnesses who were not in a position from where they could have seen the accused since as mentioned earlier they were positioned **behind** the bus. Thus, although this eye witness **might** have been present at the time of the incident we do not consider him to be reliable, trust worthy or confidence inspiring at least in terms of his identification of Shaukat.

49. With regard to the conduct of the identification parade the same considerations apply as were mentioned for appellant Shahnawaz. It also appears that Shaukat was the only one in the line out who was produced in unclean clothes which would have made him stand out from the other dummies and this fact of him being in unclean clothes was conceded to by both PW's (PW 31 Mohammed Sherzade and PW 30 Syed Anjum Abbas) who both picked him out from the identification parade.

50. The upshot of the discussion of the evidence of the two eye witnesses against Shaukat is that we do not consider that the evidence of either of them can be safely relied upon with regard to the accurate and correct identification of Shaukat at the scene of the incident and as such there is no direct oral evidence linking Shaukat to the offenses for which he has been charged. There is also no circumstantial or other kind of evidence linking Shaukat to the offenses for which he has been charged.

51. Furthermore, we also note that no person on a motor bike was mentioned in the FIR and no motor bike was recovered from the appellant or anyone else. Even if a motor bike had been recovered at the time of Shaukat's arrest two years after the incident how could it have been proven that it was the same motor bike used in the offenses committed over two years ago? That like appellant Shahnawaz it is not exactly clear as to how he came to be linked with this case since once he was interrogated **almost 2 years later** whilst in custody in another case as he neither made any extrajudicial confession of his involvement in this case

and nor had he been named by Shahnawaz as being his accomplice. Like Shahnawaz he also stuck to his defense as mentioned in his S.342 statement throughout the trial and he cross examined each relevant witness on his defense which remained consistent throughout the trial.

52. Apart from the identification issue we note that the empties which were collected from the scene were not immediately sent for FSL test but were kept with no evidence of safe custody for about one month and were sent only after the alleged KK used in the commission of the offense was recovered from Shahnawaz on his arrest on 23-10-2003 together with the recovered KK which unexplained delay in sending the empties for a forensic report also casts doubt on the FSL report as it appears that the empties were deliberately retained until the alleged murder weapon had been recovered so that a positive FSL report could be maneuvered.

53. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that if there is a **single circumstance**, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Such principle was recently reiterated by the Supreme Court in the case of **Abdul Jabbar V State** (2019 SCMR 129). Such benefit of the doubt applies equally whether the offense is a very minor criminal offense or an extremely heinous one such as this where many innocent people were murdered and injured solely on the basis of their faith.

54. It may be that the country was at the time of the offense and still is passing through a difficult phase in terms of law and order and terrorism both within and outside Pakistan but it is still remains the duty of the court to be watchful to ensure that an innocent person's liberty is not sacrificed on the alter and mantra of the war against terror or public outrage at a particularly heinous offense such as in this case where so many innocent people were brutally murdered in a pre meditated cold

bloodied manner on account of their faith and ensure that only those against whom there is reliable, credible and trustworthy and cogent evidence of their guilt in respect of a particular offense are convicted of the same. It is the duty of the prosecution to prove its case beyond a reasonable doubt through such kinds of aforementioned evidence and a cardinal principle of criminal jurisprudence that a person is innocent until proven guilty and it is on such principles that the edifice of the criminal justice system rests and it is the duty of the courts to sacredly and jealously ensure that such principles are followed without fear or favour whatever the outcome of the case may be. Such conduct of the courts will go along way in ensuring that the rule of law is maintained and the public have faith and confidence in the criminal justice system whatever their station in life may be.

55. Thus, based on our reassessment of the evidence for the reasons mentioned above the prosecution has in our view **not** been able to safely identify the appellants (Shahnawaz and Shaukat) as being the persons who committed the offenses as charged which may have been committed by some other parties and thus the prosecution has not been able to prove its case against the appellants for the offenses for which they have been charged beyond a reasonable doubt and as such the appellants are acquitted of all the charges in the impugned judgment by extending them the benefit of the doubt. The appeals are therefore allowed and the impugned judgment is set aside the convictions and sentences contained therein are also set aside with the confirmation references being answered in the negative with the result that the appellants shall be released unless wanted in any other custody case.

56. The appeals and confirmation reference stand disposed of in the above terms.