

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.**---Through this common judgment, I intend to decide the captioned, criminal appeals and jail appeals and criminal revision for arising out of same judgment dated 30.09.2015, whereby appellants namely Mst. Ayesha Bibi, Javed Shah, Jihad Ali and Sajjad Ahmad being booked in case FIR No.323, dated 14.06.2011, under Sections 302/34/496-B/109, P.P.C., Police Station Shahzad Town, Islamabad have been sentenced in the following manner:

- (i) Javed Shah/appellant has been sentenced to life imprisonment along with fine of Rs.200,000/-, in default whereof, he shall further undergo simple imprisonment for a period of 06 months.
- (ii) Jihad Ali/appellant has been sentenced to life imprisonment along with fine of Rs.200,000/-, in default whereof, he shall further undergo simple imprisonment for a period of 06 months.
- (iii) Mst. Ayesha Bibi/appellant has been convicted under Section 118, P.P.C. and sentenced to simple imprisonment for 07 years with fine of Rs.50,000/-, in default whereof, she shall further undergo simple imprisonment for a period of 03 months.

However, Sajjad Ahmad/accused has been acquitted of the charge by the learned trial Court.

2. Muhammad Khalid/complainant through his captioned Criminal Appeal No.183/2015 prayed for setting aside of the impugned judgment, whereby the learned trial Court has acquitted Sajjad Ahmad/accused of the instant case.

3. Similarly, Through the captioned criminal revision, Muhammad Khalid/complainant has called in question the impugned judgment of the learned trial Court dated 30.09.2015 and prayed for enhancement of sentence awarded to Mst. Ayesha Bibi/appellant as well as awarding of capital punishment to Javed Shah/appellant and Jihad Ali/appellant.

4. On the other hand, the accused persons i.e. appellants namely Mst. Ayesha Bibi, Javed Shah and Jihad Ali through their respective captioned criminal appeals and jail appeals have assailed the judgment of the learned trial Court dated 30.09.2015 and prayed for their acquittal in the instant case.

5. Brief and consolidated facts of the captioned cases are that on 14.06.2011, at about 12:00 a.m. midnight, Muhammad Khalid/complainant received information that his brother namely Shuakat Usman (hereinafter referred to as "deceased"), who was serving as police constable in Islamabad, has been shot by some unknown persons near Madrassa Khalid Bin Waleed while on his way to home after his duty at about 11:15 p.m. When Muhammad Khalid/complainant reached the hospital, his brother had succumbed to injuries. On the basis of application submitted by Muhammad Khalid/complainant, the case FIR No.323, dated 14.06.2011, under Sections 302/34/496-B/109, P.P.C., Police Station Shahzad Town, Islamabad has been lodged. During investigation, the appellants namely Mst. Ayesha Bibi, Jihad Ali, Javed Shah and Sajjad Ahmad were associated with the investigation and ultimately a challan was submitted against the said accused persons/appellants, to which they pleaded not guilty and claimed trial. Accordingly, the prosecution was called for production of evidence against the said accused persons and pursuant to recording of evidence together with statements of accused persons under Section 342, Cr.P.C., the appellants namely Javed Shah/appellant and Jihad Ali/appellant have been convicted and sentenced to life imprisonment along with fine of Rs.200,000/- each, in default whereof, they shall further undergo simple imprisonment for a period of 06 months each, whereas Mst. Ayesha Bibi/ appellant has been sentenced to simple imprisonment for 07 years along with fine of Rs.50,000/-, in default whereof, she shall further undergo simple imprisonment for a period of 03 months, while accused person Sajjad Ahmad has been acquitted of the charge. Hence, the captioned criminal revision, criminal appeals and jail appeals.

6. Learned counsel for Muhammad Khalid/complainant contended that the impugned judgment to the extent of quantum of sentence is against the law and facts of the case as the learned trial Court has ignored the law laid down by the apex Court that death is the normal penalty for murder; that the learned trial Court while awarding lesser sentences to the accused persons/ appellants extended no solid reasons in terms of Section 367(5) of the Cr.P.C. and

passed the impugned judgment; that the prosecution has successfully proved the case without any shadow of doubts against the accused persons/ appellants, but the learned trial Court has passed the impugned judgment in hasty manner and awarded lesser sentences, which are liable to be enhanced in accordance with law.

7. Conversely, learned counsel for Javed Shah/appellant and Jihad Ali/ appellant by opposing the impugned judgment contended that the prosecution case is crammed with doubts and improvements as the occurrence allegedly took place in the midnight but no source of light has been mentioned in the site plan as well as the FIR was lodged with delay of five hours having no mention of any eye-witness or description of the culprits, even otherwise, Ghulam Mustafa/ ASI was shown as an eye-witness for being on patrolling duty at the relevant time, but the said police official failed to produce Roznamcha entry to prove his patrolling duty at the relevant time and day, even if the said police official was present there having official weapon, he never endeavor to stop such crime or for that matter report the incident to police; that the confession on the part of co-accused person namely Mst. Ayesha Bibi/appellant is against the law as the remaining co-accused persons have not been allowed to cross-examine Mst. Ayesha Bibi/ appellant; that the alleged incident is unseen having no ocular evidence, but even then the learned trial Court has passed the impugned judgment and sentenced the appellants unlawfully, therefore, the same may be set-aside.

8. Similarly, learned counsel for Mst. Ayesha Bibi/appellant contended that the impugned judgment has caused great miscarriage of justice as no evidence regarding conspiracy or facilitation came on record; that the alleged confession got recorded by Mst. Ayesha Bibi/appellant suffers from discrepancies and the learned trial Court has relied upon the same while awarding sentence to Mst. Ayesha Bibi/ appellant; that the learned trial Court relied upon documentary evidence produced by the prosecution in violation of the Qanun-e-Shahadat Order, 1984; that nothing incriminating has been recovered from Mst. Ayesha Bibi/ appellant on the basis of which she could be convicted; that on the same set of evidence the learned trial Court has acquitted one of the co-accused, while convicted and sentenced Mst. Ayesha Bibi/appellant in unlawful manner through the impugned judgment, which is liable to be set-aside.

9. Arguments heard, record perused.

10. Perusal of record reveals that appellants namely Jihad Ali, Javed Shah and Mst. Ayesha Bibi have been nominated as accused in case FIR No.323, dated 14.06.2011, under Sections 302/34/496-B/ 109, P.P.C., Police Station Shahzad Town, Islamabad (Exh.PW8/1), lodged on the complaint (Exh.PW5/1) of PW-5 Muhammad Khalid/complainant with the allegations that on 14.06.2011, he received information at about 12:00 in the midnight that his brother Shoukat Usman was shot dead by some unknown assailants near Madrasa Khalid Bin Waleed, Sohan, Islamabad and has been taken to hospital by a passerby, but he could not survive.

11. During the course of investigation, appellants Jihad Ali, Javed Shah and Mst. Ayesha Bibi i.e. wife of deceased as well as Sajjad Ahmad/accused were taken into custody with reference to this case. After completion of the trial, Jihad Ali/appellant and Javed Shah/ appellant were awarded life imprisonment, whereas Mst. Ayesha Bibi/ appellant has been sentenced to 07 years, while Sajjad Ahmad/accused was acquitted of the charge vide impugned judgment dated 30.09.2015, passed by the Additional Sessions Judge (East), Islamabad.

12. In order to prove the case, the prosecution has produced PW-7 Dr. Farrukh Kamal, who has conducted the autopsy of the deceased Shaukat Usman on 14.06.2011 and recorded the following facts.

**External Appearance:**

A young male height 5 ft 6 inches wearing blue colored pent, eyes closed, mouth semi opened, hair, moustaches, beard black, following injuries was found on the body:

1. Entry wound 1 x 1 cm, circular inverted margins bloodstained, left side of chest 5 cm from mid line and 11 cm from above.

2 Exit wound 9 cm from shoulder, 16 cm from mid line back of chest irregular avverted margins.

3. Entry wound 1x1 cm right post lateral mid forearm.

4. Exit wound 1.5 x .5 cm irregular avverted margins, blood stain fractured (#) right wrist.

5. Entry wound 1x1 cm lateral aspect of lower thigh left circular, inverted margin.

6. Exit wound 1.5 x 1.5 cm irregular avverted margins bloodstained medial aspect lower thigh left.

7. Grazed wound 12 cm from left arm pit on lateral aspect of left side chest.

Internal Examination:

Walls of thorax, pleurae, left lung, left pulmonary vessels and fractured radius ulna, fractured muscles of left thigh all were ruptured. All other viscera were intact.

Opinion:

In my opinion deceased died due to fire arm injuries which caused rupture of left lung vessels (pulmonary) were ruptured right for arm and left thigh muscles and fractured right radius and ulna which caused death. All injuries were ante-mortem in nature and sufficient to cause death in ordinary course of nature.

Time between injury and death:

Variable 1-2 are few minutes (5-10 approximately)

Time between death and postmortem:

3-4 hours approximately.

13. The star witness in this case is PW-9 Ghulam Mustafa/ASI, who stated that on the intervening night of incident, he along with Ghulam Mustafa/Constable were on patrolling duty via official vehicle bearing registration No.IDP-1694 and at about 11:50 p.m., when they reached link road of Sohan, a vehicle bearing registration No.FDT-278 (Toyota Corolla) was parked on a roadside and a clean shaved person was standing next to the vehicle, whereupon when they turned towards Madrasa Khalid Bin Waleed, they saw the murder of deceased in the following manner:

"The moment we took the turn of Mudrassa we saw two persons, who were firing at a police official clad in official uniform. Out of these two persons one was with beard and other was without beard. Both the persons are today present in the Court the person who at that time without beard his name is Jihad Ali, present in the Court and the person who at that time was having beard is also present in the court his name is Javaid Shah. Both these two persons after seeing the official vehicle ran away to the jungle. The two persons were seen by us in the light of vehicle and in the lights of the market. I suspect that both these persons came to the place of occurrence in vehicle No.FDT-278. Later on we shifted the injured Shoukat Usman, to hospital in a vehicle. I conveyed this information of occurrence through wireless to local police."

14. During the course of cross-examination, PW-9 Ghulam Mustafa/ASI has acknowledged the following facts.

- (i) I made entry in the Roznamcha regarding my arrival and departure. I cannot produce the copy of the Roznamcha today in Court.
- (ii) During the said duty we keep official weapon with us. The official weapons for our safety and in case of any eventuality we can use the same, and can also use with the criminals.
- (iii) I have not mentioned about a person who was standing on road side in worried state of mind in my statement under section 161, Cr.P.C.

- (iv) The injured was shifted to hospital in a private vehicle. I cannot tell the time period during which the injured person was alive.
- (v) My uniform was not blood stained as I carried the injured with the help of my hands.
- (vi) I have not noted the number of that private vehicle through which the injured person was shifted to the hospital. Similarly I do not know the name and address of the driver of the said vehicle.
- (vii) I along with Ghulam Mustafa Constable and some other persons carried the injured person in a private vehicle. Approximately few persons help us in carrying the injured person. I cannot tell the name of anyone of those private persons. The private vehicle arrived at the spot as a lot of people attracted to the scene of occurrence.

15. The Investigating Officer of this case i.e. Arshad Ali/S.I. appeared as PW-10 and stated that he reached to emergency ward of PIMS Hospital on receiving information about the occurrence, where the dead body of deceased was lying. Muhammad Khalid/ complainant was also present there, on whose statement complaint (Exh.PW5/1) was drafted, on the basis of which the case FIR (Exh.PW5/1) was lodged by him. He further stated that he also prepared inquest report Exh.PW5/7. The last worn clothes of deceased, which include blue pent (P-10), blue shirt (P-11) and white vest (P-12), were taken into possession vide recovery memo Exh.PW5/5, whereafter the dead body was taken to police headquarters for funeral ceremony.

16. PW-10 Arshad Ali/S.I. conducted spot inspection, prepared site plan without scale in presence of PW-9 Ghulam Mustafa/ ASI and Ghulam Mustafa/ Constable, prepared the recovery memo of blood-stained earth as Exh.PW5/8, took into possession 06 criminal empties of .30 bore pistol (Exh.PW-10/1-6) vide recovery memo Exh.PW-5/9 and deposited the same with the Moharrar Malkhana of the Police Station.

17. During the course of investigation, PW-10 Arshad Ali/S.I., when came to know that the deceased was usually locking the door of his house leaving his wife i.e. Mst. Ayesha Bibi/ appellant in the house, obtained CDR of Mst. Ayesha Bibi/appellant having mobile numbers 0345-9355380 and 0321-5280151 through application Exh.PW10/ 2. PW-10 Arshad Ali/S.I. through the CDR observed that Jihad Ali/ appellant having mobile number 0345-9355380 was in frequent contact with Mst. Ayesha Bibi/ appellant as the later called Jihad Ali/ appellant for 871 times in last 16 days. PW-10 Arshad Ali/I.O. further stated that as per CDR Jihad Ali/appellant was found present at the time and place of occurrence. Jihad Ali/appellant being the taxi driver of vehicle bearing registration No.FTD-278 was arrested on spy information on 02.07.2011 along with Javed Shah/appellant. During the personal search of Jihad Ali/appellant, mobile phone Nokia Exh.P2 along with SIM No.0301-8344979 and other articles (Exh.P3 to Exh.P7) were recovered and taken into possession vide recovery memo Exh.PW4/3. The mobile phone Exh.P2 was checked and its IMEI was found to be the same which was of the mobile phone number of Jihad Ali/appellant which is 0301-8344979. PW-10 Arshad Ali/I.O. also conducted personal search of Javed Shah/appellant, whose mobile phone of brown color having SIM No.0306-5733902 in broken condition (Exh.P8) was also taken into possession vide recovery memo Exh.PW4/ 4.

18. PW-10 Arshad Ali/I.O. further stated that on 03.07.2011, when Mst. Ayesha Bibi/appellant was produced in the Police Station by her father-in-law along with the complainant, Jihad Ali/ appellant disclosed that at the behest of Mst. Ayesha Bibi/appellant they have committed murder of the deceased. At the time of arrest of Mst. Ayesha Bibi/ appellant, mobile phone Nokia (2600) along with SIM No.0345-9355380 was taken into possession through recovery memo Exh.PW4/5. Later on, Mst. Ayesha Bibi/ appellant recorded her confessional statement through application Exh.PW10/5 before the Magistrate.

19. On 22.07.2011, PW-10 Arshad Ali/I.O. along with eye-witness PW-9 Ghulam Mustafa/ASI and Ghulam Mustafa/Constable visited Adiala Jail for the purpose of identification of the accused persons, whereby the witnesses have identified Jihad Ali/appellant and Javed Shah/appellant. PW-10 Arshad Ali/I.O. also transmitted the recovered crime empties to FSL, Lahore on 13.07.2011. PW-10 Arshad Ali/I.O. further stated that on 31.07.2011, during the course of interrogation, both Jihad Ali/appellant and Javed

Shah/appellant separately made disclosure that they can lead to recovery of .30 bore pistol with which they committed murder of deceased. The first disclosure was made by Jihad Ali/appellant followed by Javed Shah/appellant, pursuant whereof, the said appellants were separately taken to the place known to the accused persons, where Jihad Ali/appellant got recovered .30 bore pistol from bushes having two live bullets, which were taken into possession through recovery memo Exh.PW5/51 and PW-5/49. In this regard, a separate FIR under Sections 13/20/65 of the Arms Ordinance, 1965 was registered in P.S. Shahzad Town Islamabad having FIR No.392/2011 (PW-10/15-1). PW-10 Arshad Ali/I.O. further stated that Javed Shah/appellant also got recovered his weapon of offence having 03 live bullets underneath the stones, whereas the pistol was taken into possession vide recovery memo Exh.PW5/52, regarding which a separate FIR under Sections 13/20/65 of the Arms Ordinance, 1965 has been registered.

20. During the course of cross-examination, PW-10 Arshad Ali/S.I. acknowledged the following important facts.

- (i) He received the information of the alleged incident at about 11:45 p.m. from the night Moharrar of the police station.
- (ii) He reached the hospital within 15 minutes after receiving the information.
- (iii) He did not know who brought the dead body to hospital, nor he had any knowledge about the number of persons who had brought the dead body to hospital.
- (iv) He met the complainant after ten minutes of his arrival in hospital i.e. at about 12:45 a.m.
- (v) He failed to produce copy of Roznamcha through which the time of his departure to hospital could be justified.
- (vi) When he reached at the place of occurrence, PW-9 Ghulam Mustafa ASI and Ghulam Mustafa/Constable were already present there.
- (vii) He recovered 06 empties from the spot, however the produced empties were 10 in number, including the test empties.
- (viii) He has not prepared the site plan (Exh.PW6/4) on spot, which was prepared by the Draftsman.
- (ix) He admitted that no bullet marks were present on the wall behind the deceased as all the fires were effective and hit the deceased's body.
- (x) He has not prepared the injury sheet.
- (xi) He had not made any request of DNA of Mst. Ayesha Bibi/ appellant to verify if the later was having any illicit relationship.
- (xii) On the CDR, the name Mst. Ayesha Bibi/appellant has not been mentioned, nor there is any name of the issuing authority or company.
- (xiii) The complainant has not disclosed or shown any source of information regarding suspicion of illicit relationship between Mst. Ayesha Bibi/ appellant and Jihad Ali/ appellant.
- (xiv) The complainant is not an eye-witness.
- (xv) He acknowledged that his application for recording of Mst. Ayesha Bibi/appellant's statement under Section 164, Cr.P.C. is silent qua the willingness to record her statement.
- (xvi) He did not collect any documentary proof of registration number of SIM as well as about the possession of the mobile used and possessed by Mst. Ayesha Bibi/appellant.

21. The prosecution has produced PW-5 Muhammad Khalid/complainant i.e. the real brother of deceased, who acknowledged that his deceased brother was living along with his

wife Mst. Ayesha Bibi/appellant in Sohan and as such, he used to depart from his house locking the outer door of the house and leaving his wife inside the house locked. PW-5 Muhammad Khalid stated that he was present during the course of investigation on 31.07.2011 when Jihad Ali/appellant and Javed Shah/appellant had made a disclosure for recovery of .30 bore pistol, which was used by them for the murder of deceased. Both the said appellants were boarded on vehicle along with police officials as well as the complainant, whereas the Investigating Officer stopped the vehicle on the pointation of appellants on 111 Stop, Islamabad Highway, whereafter firstly Jihad Ali/appellant in pursuance of his disclosure pointed out and led to recovery of .30 bore pistol from bushes in jungle area, from which 02 live bullets were recovered on its unloading, which were taken into possession vide Exh.PW5/ 29, while the pistol was taken into possession vide recovery memo Exh.PW5/50. PW-5 Muhammad Khalid further stated that, later on, Javed Shah/appellant in pursuance of his disclosure got recovered .30 bore pistol lying underneath a stone from bushes near jungle area, which has been taken into possession vide recovery memo Exh.PW5/52. However, during the course of cross-examination, PW-5 Muhammad Khalid / complainant acknowledged that he has neither given any proof of character/ illicit relationship of Mst. Ayesha Bibi/ appellant before the police nor he is able to produce any such proof before the Court, even he has no proof that mobile number (0345-9355380) is owned by Mst. Ayesha Bibi/appellant. Similarly, he acknowledged that he has no proof that the SIM was registered in the name of his deceased brother.

22. The prosecution has also brought on record the identification parade report (Exh.PW2/ 1) through PW-2 Hussain Bahadur/ Magistrate, ICT. However, during the course of evidence, he stated that 02 suspects namely Jihad Ali/appellant and Javed Shah/appellant were present and identified during their identification parade by PW-9 Ghulam Mustafa/ASI, however both the said appellants have raised objection that their photographs were taken in the Police Station.

23. The last important witness produced in this case is PW-1 Umar Asad/Assistant Commissioner, who recorded the statement of Mst. Ayesha Bibi/appellant under Section 164, Cr.P.C., referred Exh.PW1/2, however he acknowledged that the statement was neither recorded in his handwriting nor he has suggested the same in the certificate.

24. Keeping in view the entire evidence, the prosecution intended to prove their case on the basis of statement of Mst. Ayesha Bibi/appellant recorded under. Section 164, Cr.P.C. (Exh.PW1/2) by the PW-1 Umar Asad/ Assistant Commissioner, but surprisingly the statement was neither recorded by the later in his own handwriting nor he has referred in his certificate (Exh.PW1/1) that the said statement was recorded by his staff or reader on his instructions, although he admitted during the course of cross-examination that he and Mst. Ayesha Bibi appellant were alone in the room during recording of her Statement. This factor contradicts his position of recording the statement on factual side and as such, the Magistrate is under legal obligation to record the statement in a mode and manner provided under Section 164 read with Section 364, Cr.P.C. whereas the Magistrate has to write down the certificate in terms of Section 364(3), Cr.P.C., which refers that, "such memorandum shall be written and signed by Magistrate or a Judge with his own hand and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability." If the said requirement has not been observed in conformity with the said provision, the mandatory provisions seem to be violated and are not curable. Reliance is placed upon 1998 MLD 288 Federal Shariat Court (Gul Jehan v. The State), 2000 MLD 270 Federal Shariat Court (Gul Rehman v. The State). Similarly, the apex Court has also laid down certain principles for recording of the statement under Section 164, Cr.P.C. in PLD 2006 SC 30 (Manjeet Singh v. The State). Although, Mst. Ayesha Bibi/appellant has not retracted her confession in a proper manner before this Court as claimed by the prosecution side, however, this Court assumes the retraction of the statement of Mst. Ayesha Bibi/appellant recorded under Section 342, Cr.P.C., whereby she has been confronted regarding the factum of recording of statement under Section 164, Cr.P.C. (Exh.PW1/1) in Question No.12, whereby she in categorical terms has denied recording of such statement. Hence, the retracted confession is on record from the prosecution perspective, therefore, while applying the principles laid down in the case of Manjeet Singh supra and on the touchstone of PLD 1964

SC 813 (The State v. Minhum), it is the duty of the prosecution to corroborate the material particulars of the retracted confession independently and if no such corroboration is available, the confessional statement under Section 164, Cr.P.C. could not validly be made sole basis of conviction.

25. On the other hand, it is on record that Mst. Ayesha Bibi/ appellant was usually left locked in house and even at the alleged day of incident, while the only piece of evidence brought on record is the CDR (Exh.PW5/11 to Exh.PW5/42) and (Exh.PW5/43 to Exh.PW5/48), but the said CDRs, if placed in juxtaposition with the statement of PW-10 Arshad Ali/SI, who admitted that he has not placed any evidence qua the SIM and mobile phone of Mst. Ayesha Bibi/appellant, nor he could justify the CDR to establish the link of Mst. Ayesha Bibi/appellant with Jihad Ali/appellant or Javed Shah/appellant. The Investigating Officer has not placed any documentary proof of registration number of SIM and mobile phone used and possessed by Mst. Ayesha Bibi/ appellant, therefore, the entire prosecution evidence is silent qua the corroboration of statement under Section 164, Cr.P.C. recorded by PW-1 Umer Asad/Assistant Commissioner in any manner.

26. The other important evidence is the sole testimony of PW-9 Ghulam Mustafa/ASI, but his conduct seems to be unnatural as he claimed to be the eye-witness of alleged murder of deceased because he on the date of incident was allegedly performing his patrolling duty along with his driver Ghulam Mustafa/ constable boarded in vehicle (IDP-1694) near Link Road Sohan as he himself stated that:

"We entered the service road through link road and went towards to Madrasa Khalid Bin Waleed. The movement we took the turn of Madrasa we saw two persons, who were firing at police official clad in official uniform."

Surprisingly, despite the fact that PW-9 along with another police official while on duty, have not intervened in the alleged incident and confronted the accused persons, neither they made any fire to protect their own colleague, nor they chased the accused persons after the alleged incident. Similarly, this portion of the statement, if seen in the light of statement recorded by PW-10 Arshad Ali/I.O., who is not aware that who had shifted the dead body to hospital despite the fact that as per the statement of alleged eye-witness i.e. PW-9 Ghulam Mustafa/ASI the injured was shifted to hospital in a private vehicle, could not be relied upon. However, there was no justification placed on record that why the injured was moved to hospital in a private vehicle, especially when PW-9 Ghulam Mustafa/ASI was on a patrolling duty on his official vehicle, which otherwise proves that PW-9 Ghulam Mustafa/ASI was introduced later on in this case. This fact has also been justified from the statement of PW-10 Arshad Ali/I.O., who stated that after completion of all codal formalities in the hospital, when he had gone to the place of occurrence he met PW-9 Ghulam Mustafa/ASI and Ghulam Mustafa/Constable i.e. approximately after passing of 4/5 hours of the alleged incident.

27. The prosecution has also not produced the second eye-witness namely Ghulam Mustafa/Constable/Driver, who was allegedly present with PW-9 Ghulam Mustafa/ASI at the time of occurrence, which shows that the prosecution has withheld one of the key witness of the alleged incident and adverse presumption in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984 could be taken that if such witness could have been produced, the same would have been fatal for the prosecution case. Reliance is placed upon 2010 SCMR 846 SC (Riaz Ahmad v. The State) and 2019 YLR 1470 SC AJ&K (Azkar Hussain Shah v. The State).

28. In view of above position, there is no direct evidence in this case and the only star witness i.e. PW-9 Ghulam Mustafa/ASI has not justified his patrolling duty and even he has not brought the injured police official to hospital without any substantial reason.

29. The other important evidence brought by the prosecution is the identification parade report (Exh.PW10/1) conducted in presence of PW-2 Hussain Bahadur, Magistrate, ICT, who stated that both the appellants were identified by eye-witnesses namely PW-9 Ghulam Mustafa/ASI and Ghulam Mustafa/ Constable in a proper manner, whereas the appellants have raised the objection that their photographs were taken when they were in police custody, therefore, I have attended this issue in the light of principles laid down in PLD 2019 SC 488

(Kanwar Anwaar Ali, Special Judicial Magistrate, in the matter of Crl. Miscellaneous Application No.183/2019), whereby the following tests have been laid down by the apex Court:

"Art. 22---Test identification parade-Guidelines, requirements and safeguards necessary for holding a test identification parade in connection with criminal cases stated.

Following are the guidelines, requirements and safeguards necessary for holding a test identification parade:

- (i) Vital factor determinative of the worth and value of test identification proceedings was the effectiveness of the precautions taken, before and during the course of such proceedings which were designed to eliminate the possibility of unjustified convictions.
- (ii) Test identification proceedings were not the testimony of a witness but the testimony of the senses of the witness. It was essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. Such gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. Tricks of memory and its conscious and unconscious activity could also warp the vision of a man. When mistakes were possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers was definitely greater. And moreso when the witnesses had seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorised state of mind.

Lal Pasand's case PLD 1981 SC 142 ref.

- (iii) Memories faded and visions got blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period had 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.
- (iv) Test identification, where the possibility of the witness having seen the accused persons after their arrest could not be ruled out, was worth nothing at all. It was, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects were 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 were held. This was to avoid the possibility of overzealous investigating officers showing the suspects to the witnesses while they were in police custody. Even when these accused persons were, 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.
- (v) Identification of an accused person by eye-witnesses before the trial court during a trial was generally considered to be quite unsafe because before such identification during the trial the eye-witnesses got many opportunities to see the accused persons appearing before the court in connection with their remand, distribution of copies of statement of prosecution witnesses, framing of the charge and recording of statements of other prosecution witnesses.

Asghar Ali alias Sabah and others v. The State and others 1992 SCMR 2088; Muhammad Afzal alias Abdullah and another v. The State and others 2009 SCMR 436; Nazir Ahmad v. Muhammad Iqbal 2011 SCMR 527; Shafqat Mehmood and others v. The State 2011 SCMR 537; Ghulam Shabbir Ahmed and another v. The State 2011 SCMR 683 and Azhar Mehmood and others v. The State 2017 SCMR 135 ref.

- (vi) Identification parades should never be held at police stations.
- (vii) Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons had remained in police custody after their arrest and before the test identification and must incorporate such fact in his report about the



proceedings.

(viii) 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 persons should be as much as possible. But then there was also the need to ensure that the number of such persons was not increased to an extent which could have the effect of confusing the identifying witness. Superior Courts had, 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. Such ratio must be followed unless there were some special justifiable circumstances warranting a deviation from it.

(ix) If there were more accused persons than one who had to be subjected to test identification, then the rule of prudence laid down by the superior Courts was that separate identification parades should ordinarily be held in respect of each accused person. Identification of many accused persons in one line in one go during a test identification parade was improper. Every accused person was to be put to a separate test identification parade.

Lal Pasand v. The State PLD 1981 SC 142; Imran Ashraf and 7 others v. The State 2001 SCMR 424; Ziaullah alias Jajj v. The State 2008 SCMR 1210; Bacha Zeb v. The State 2010 SCMR 1189; Shafqat Mehmood and others v. The State 2011 SCMR 537; Gulfam and another v. The State 2017 SCMR 1189; Hakeem and others v. The State 2017 SCMR 1546 and Kamal Din alias Kamala v. The State 2018 SCMR 577 ref.

(x) It must be ensured that before a witness had participated in the identification proceedings, he was stationed at a place from where he could not observe the proceedings and that after his participation he was lodged at a place from where it was not possible for him to communicate with those who had yet to take their turn. It also had to be ensured that no one who was witnessing the proceedings, such as the members of the jail staff etc., was able to communicate with the identifying witnesses.

(xi) During a test identification parade the witness had to specify the role allegedly played by an accused person in commission of the offence. [pp. 502, 503] T & W

Ismail and another v. The State 1974 SCMR 175; Khadim Hussain v. The State 1985 SCMR 721; Ghulam Rasul and 3 others v. The State 1988 SCMR 557; Asghar Ali alias Sabah and others v. The State and others 1992 SCMR 2088; State/ Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo 1993 SCMR 585; Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127; Siraj-ul-Haq and another v. The State 2008 SCMR 302; Ghulam Qadir and 2 others v. The State 2008 SCMR 1221; Muhammad Afzal alias Abdullah and another v. State and others 2009 SCMR 436; Shafqat Mehmood and others v. The State 2011 SCMR 537; Sabir Ali alias Fauji v. The State 2011 SCMR 563; Muhammad Fayyaz v. The State 2012 SCMR 522; Azhar Mehmood and others v. The State 2017 SCMR 135; Hakeem and others v. The State 2017 SCMR 1546 and Kamal Din alias Kamala v. The State 2018 SCMR 577 ref.

(xii) 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 depended only upon his vigilance and caution.

(xiii) Magistrate was obliged to prepare a list of all the persons (dummies) who formed part of the line-up at the parade along with their parentage, occupation and addresses.

(xiv) 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.

(xv) Where a witness correctly identified an accused person, the Magistrate must ask the witness about the connection in which the witness had identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate such statement in his report.

- (xvi) Where a witness identified a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness.
- (xvii) Magistrate was required to record in his report all the precautions taken by him for a fair conduct of the proceedings.
- (xviii) Magistrate had to give a certificate at the end of his report in the form prescribed by C.H.II.C. of Vol. III of Lahore High Court Rules and Orders. [p. 501] R.
- (xix) Said measures listed should, however, not be taken as exhaustive of the steps which were required to be taken before, during and after the identification proceedings. All said requirements were no doubt mandatory but at the same time they were only illustrative of the precautions which the Courts of law demanded before some respect could be shown to the evidence offered through the test identification proceedings.

30. The apex Court while dealing with similar proposition of identification parade has further imposed a duty upon the Court to verify the credibility of eye-witness by assessing the evidence on the basis of factors or estimator variables which negatively affect the memory process like stress, weapon focus, duration, distance and lightening, witness characteristics, characteristics of perpetrator and memory decay as held in case reported as 2019 SCMR 956 (Mian Sohail Ahmad and others v. The State and others), therefore, while applying those principles and guidelines of the apex Court, it is not possible to believe that the deceased was seen by PW-9 Ghulam Mustafa/ASI when he was being murdered, especially when the later was on his official duty and as such, the prosecution is under heavy onus to prove that as to;

- a) Whether PW-9 Ghulam Mustafa/ ASI was on his official patrolling duty in a particular area where the incident took place?
- b) Whether PW-9 Ghulam Mustafa/ ASI had produced the Roznamcha report of his official duty on a particular official vehicle and on the said date of incident?
- c) Why Ghulam Mustafa/Constable/ Driver, who was driving the official vehicle, was not produced as witness to corroborate the statement of PW-9 Ghulam Mustafa/ASI?
- d) Why PW-9 Ghulam Mustafa/ASI had not taken the deceased to hospital in the official vehicle, which would be the normal human reaction in such type of incident?
- e) Why PW-9 Ghulam Mustafa/ASI i.e. eye-witness, left the deceased to be shifted to hospital in a private vehicle?
- f) Why PW-9 Ghulam Mustafa/ASI remained on spot i.e. alleged place of occurrence as there was neither to protect anything on the place of occurrence, nor any belongings of the deceased were available on spot?
- g) Why PW-9 Ghulam Mustafa/ASI had not made any attempt to arrest the accused persons?
- h) Why PW-9 Ghulam Mustafa/ASI and Ghulam Mustafa/Constable had not made any effort to stop the alleged crime of murder? and;
- i) Whether the prosecution has explained that they have made every effort to protect the identity of the appellants from date of arrest till sending them to jail for identification parade and whether picture of appellants was taken or the appellants were not visited or seen by PW-9 Ghulam Mustafa/ ASI?

31. The above referred questions remained unanswered by the prosecution in the entire case, which led to a serious doubt on record as the entire case mainly rests upon the testimony of PW-9 Ghulam Mustafa/ASI, whose conduct is not justifiable from his character, official duty, being a police official, and as such, PW-10 Arshad Ali/I.O. has failed to explain why the other eye-witness i.e. Ghulam Mustafa/Constable/Driver has not been produced in the Court, which strongly impinge on the prosecution case.

32. I have also gone through the impugned judgment of the learned Trial Court dated 30.09.2015, whereby the above mentioned questions determined by this Court in Para-30 of

this judgment have not been answered in any manner as there was no link established through any corroborated evidence against the appellants namely Mst. Ayesha Bibi, Jihad Ali and Javed Shah in this case, nor the alleged eye-witness namely PW-9 Ghulam Mustafa/ ASI justified his own conduct, which is required to be in normal state of affairs, but these facts were not appreciated by the learned Trial Court while passing the impugned judgment dated 30.09.2015, even otherwise, one of the accused namely Sajjad Ahmad has ready been acquitted on similar set of evidence, hence doubt emerges on record, all the accused are entitled for the benefit of doubt in this case.

33. In view of above discussion, the captioned appeals i.e. Criminal Appeal No.166/2015 (Mst. Ayesha Bibi v. The State and 2 others), Criminal Appeal No.172/2015 (Javed Shah v. The State and another), Jail Appeal No.169/2015 (Jihad Ali v. The State) and Jail Appeal No.170/2015 (Mst. Ayesha Bibi v. The State) are hereby ALLOWED, the impugned judgment dated 30.09.2015 is SET-ASIDE and the appellants namely Mst. Ayesha Bibi, Jihad Ali and Javed Shah are ACQUITTED of the charge in case FIR No.323, dated 14.06.2011, under Sections 302/34/496-B/109, P.P.C., Police Station Shahzad Town, Islamabad.

34. On the other hand, since PW-5 Muhammad Khalid/complainant has failed to point any legal defect or missing ground in the impugned judgment regarding the acquittal of Sajjad Ahmad/ co-accused in the case as well as regarding enhancement of sentence awarded to the appellants namely Mst. Ayesha Bibi, Jihad Ali and Javed Shah, therefore, the captioned Criminal Revision No.92/2015 (Muhammad Khalid v. The State) and Criminal Appeal No.183/2015 (Muhammad Khalid v. Sajjad Ahmad and another) are hereby DISMISSED

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