

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

CRIMINAL APPEAL NO.159 OF 2015

JEHAN ALI ALIAS JEE KHAN VS. THE STATE, ETC.

Appellant By: *Sardar Muhammad Aftab, Advocate*
State By: *Mr. Muhammad Akram Gondal, Advocate,*
state counsel
Mr. Muhammad Khan, S.I, P.S Tarnol.
Complainant By: *Ms. Humma Jamil Babar, Advocate for*
Respondent No.2

Date of hearing : *07.04.2016, 12.04.2016, 11.05.2016,*
12.05.2016 and 05.10.2016.

SHAUKAT AZIZ SIDDIQUI,J: Instant criminal appeal is directed against the judgment dated 29.09.2015 passed by the learned Additional Sessions Judge-III (West), Islamabad (hereinafter called as learned trial court), whereby the learned trial court convicted appellant /accused (hereafter called appellant) under Section 302(b) PPC, in case FIR No.30, dated 16.01.2011 and sentenced him to suffer life imprisonment (R.I) as Ta'zir for committing murder of deceased Raham Ali Son of Allah Dewia, with fine of Rs.100,000/- (one lac), in case of default, to further undergo 06 months R.I and also to pay Rs.300,000/- (three lac) in terms of Section 544-A Cr.PC, to the legal heirs of the deceased, as compensation, which directed to be recovered as arrears of land revenue. Learned trial court extended benefit of Section 382-B Cr.PC. However, Appellant earned acquittal in the charges under Section 201/148/149 PPC.

2. The case of prosecution as put forth in the FIR (Ex-PH) is that, complainant Muhammad Jamshaid (PW- 9) Driver of Truck No.AJKA/3233, on 16.01.2011 at about 11:45 p.m went to the brick Killen of Ch. Masood Ahmad, in order to collect bricks. After loading bricks, he along with Ghulam Akbar, Ghulam Abbas sons of Elahi Bakhsh, Raham Ali son of Allah Dewia, all r/o village Muradpur, Besti Heer

Pur, Tehsil Ali Pur, District Muzaffar Garh and Muhammad Adil son of Muhammad Akram r/o Dhooria, Tehsil Kharian, District Gujrat, were sitting in the Cabin and front seat of the truck, left the brick killen. At about 1:20 a.m. when they reached near Brick Killen No.4, all of a sudden, a person came in front of the truck, from the right side, having a Kalashnikov in his hands, covered in a shawl (شال) and was of a short height. He started firing at them, as a result whereof a bullet after breaking front mirror of the truck, hit Raham Ali on the right side of chest. Meanwhile, five other armed persons surfaced, two of them were armed with pistols, who had also fired, which landed on the body of the truck. Raham Ali along with others were being shifted to the hospital but he succumbed to the injuries on the way. The statement of complainant was adduced into writing, in shape of complaint (EX-PL) and was sent to the police station through Muhammad Imran, constable 7857, on the basis of which case FIR was registered, against unknown persons.

3. The investigation officer, after recording statement of complainant, prepared injury sheet and inquest report of the deceased Raham Ali, drafted application for postmortem and presented to the CMO and dispatched the dead body of the deceased to the mortuary. I.O inspected the place of occurrence and prepared unscaled site plan, recorded statements of witnesses under section 161 Cr.PC and after postmortem examination handed over the dead body to the legal heirs of the deceased, also prepared parcel of the last worn clothes of the deceased and took into possession the CNIC of the deceased. On 18.01.2011, Malik Aamir Shahzad (PW-6) prepared scaled site plan of the place of occurrence. During investigation five persons were arrested but were discharged after interrogation. On 21.01.2011, parcel of blood stained cotton and led bullet were sent to FSL and Chemical Examiner Lahore for analysis through constable Muhammad Imran, whose statement was also recorded under section 161 Cr.PC. On 29.01.2011, postmortem report was obtained from CMO. On 11.02.2011 accused Jehan Ali was arrested in case FIR No.70 under section 394/412 PPC r/w Section 17 Harabah (Offences

against Property) Ordinance 1979 registered at Police Station Tarnol, Islamabad. During the course of investigation, he made disclosure about the occurrence of case in hand. His arrest was effected in the instant case and he was sent to Judicial lock-up for identification parade at Central Jail Adyala Rawalpindi. On 21.02.2011 identification parade of the accused Jehan Ali was conducted, he was identified by complainant and supplementary statement of the witnesses were also recorded. Accused Lateef Khan was also arrested in the present case. On 13.03.2011 both the accused persons made pointation of the place of occurrence, on the basis of which recovery memo was prepared. During interrogation accused Lateef Khan got recovered the weapon of offence, whereas appellant statedly threw away his weapon of offence i.e Kalashnikov, therefore, not recovered, accordingly section 201 PPC was added and on 19.03.2011 accused persons were sent to judicial lock up.

4. On receipt of report under section 173 Cr.PC, learned trial court commenced the trial, after preliminary proceedings from the charge on 22.12.2011 to which accused persons did not plead "guilty" and claimed trial. On commencement of trial, accused Lateef Khan, absconded, therefore, proceedings under section 512 Cr.PC were initiated against him, vide order dated 19.07.2012 and prosecution was allowed to produce its evidence in absence of accused Lateef Khan. In order to prove the charge against the appellant, the prosecution produced 12 witnesses out of 17 and gave up remaining witnesses being un-necessary and closed the prosecution evidence. -

5. On closure of prosecution evidence, statement of accused under section 342 Cr.PC was recorded wherein, he refuted the charge leveled against him. However, neither he opted to appear for statement u/s 340(2) Cr.P nor produced defense evidence.

6. On conclusion of trial, learned trial court convicted and sentenced the appellant vide impugned judgement as mentioned above.

7. Learned counsel for appellant contended that impugned judgment is against the law and facts borne out on the record; that complainant did not mention

anywhere about the features and complexion of the persons in his complaint. That before conduct of identification parade, I.O of the case with malafide intention, captured few snaps of appellant, at police station Tarnol, Islamabad, which were showed to complainant and eye witnesses, therefore, pointation in the identification parade is of no significance. That learned trial court while passing the impugned judgement ignored the fact that according to the evidence of the prosecution, the height of the truck was 12 feet and the height of the person who fired was short then how was it possible that bullet hit the deceased straight away instead of traveling from down to upward, this aspect of the matter also caused serious doubts about the story narrated by complainant. That neither recovery of Kalashnikov nor any bullet of such nature allegedly been used in the occurrence has been recovered. That learned trial court while passing the impugned judgment withheld the benefit of doubt on all aspects, which is against the dictums laid down by the superior courts of the country. That the impugned judgment resulted into miscarriage of justice, therefore, same judgment being not sustainable in the eyes of law, may be set aside.

8. Conversely, learned counsel for complainant and learned State counsel argued that the learned trial court rightly passed the judgement and sentenced the appellant on the basis of confidence inspiring and trustworthy evidence. That there are no contradictions in the statement of the PWs and the eye witness count furnished by PWs fully corroborated by the medical evidence. Learned counsel further argued that learned trial court already took a lenient view by awarding life imprisonment, instead of death penalty. Therefore, Crl. Appeal should be dismissed.

9. I have considered the contentions of the learned counsel for the parties and gone through the record.

10. It is an admitted fact that accused persons who committed the offence were not known to complainant or any of his companions, therefore, complaint (EX-PL) contains following manifestation of accused persons;

،، جب قریب 1/20 بجیرات بھٹہ نمبر 4 کے قریب پہنچا تو یکدم ایک آدمی دائیں طرف سے دوڑ کر ٹرک کے سامنے آ گیا۔ جس کے ہاتھ میں کلاشنکوف تھی۔ اوپر چادر اوڑھی ہوئی قد چھوٹا نو جوان نے ہم پر چار فائر کیے۔ ایک فائر سامنے والا شیشہ توڑ کر میرے ساتھ بیٹھے ہوئے رحم علی ولد اللہ ڈیوایا کو سامنے چھاتی پر بانیں جانب لگا۔ ساتھ ہی پانچ اشخاص جن میں سے دو مسلح پستل تھے، نے بھی دو فائر ہم پر کیے، جو ٹرک باڈی پر لگے۔ رحم علی دیگر ہمراہیوں کے ساتھ ہسپتال لے جا رہا تھا کہ زخم کی تاب نہ لا کر راستے میں جاں بحق ہو گیا۔ ملزمان کے سامنے آنے پر شناخت کر سکتا ہوں۔ نامعلوم ملزمان کے خلاف دعوے دار ہوں۔،،

As is evident from above, complainant claimed that person who fired from klashankov was young person, short in height and covered in shawl. For the remaining five accused, complainant provided no description at all. Onus to prove that appellant was the culprit, who fired at truck, as a result of which deceased died was on prosecution, and in order to discharge it. Entire reliance is placed on identification parade and report (Ex-PM), therefore, I find it appropriate, firstly, to dilate upon the same;

- i) It looks strange but a reality that, identification parade report (Ex-PM) is in respect of case FIR No.32 dated 16.01.2011 and not in case FIR No.30 and there is no explanation/clarification by PW-12, so much so no reference of FIR is available in his statement before the court.
- Purported Identification Parade, conducted by Mr. Kamran Ali Cheema (AC-City) who appeared as PW-12 and stated that, as Magistrate Rural Islamabad he conducted Identification Parade on 26.02.2011 at Central Jail Adyala, Rawalpindi. Proceeding of identification parade/report contained in the sealed envelope was unsealed before him and he got it exhibited as Ex-PM. Salient features of same are as under;
- Complainant, Muhammad Jamsheed s/o Muhammad Aslam took part in the identification part, his part in proceedings, described in the following words;

،، اس نے فوراً ہی نمبر 6 پر موجود جہان علی ولد شاہ جی کو پہچان لیا ہے۔ اب اس سے پوچھا ہے کہ وہ اسکو کیسے پہچانتا ہے تو گواہ نے کہا ہے کہ اس کے ذیل ڈول اور ساخت سے پہچانتا ہے۔،،

- From the contents of report it is difficult to know that who was witness No.2. However, following statement is attributed to him;

،،اب گواہ نمبر 2 کو بلایا گیا ہے۔ گواہ اندر تقریباً 3 منٹ بعد آ گیا ہے تو اس کا شناختی کارڈ طلب کیا گیا تو اس نے کہا ہے کہ وہ واردات کے دوران ہی گم ہو گیا تھا۔ کوئی فوٹو کاپی یا تصویر مانگی گئی ہے تو اس نے کہا ہے کہ کوئی نہیں ہے۔ اب اس کو بتایا گیا ہے کہ سامنے موجود لوگوں میں اگر کسی کو پہچانتا ہے تو بتائے۔ تقریباً ایک منٹ غور کرنے کے بعد اس نے نمبر شمار 6 پر موجود جہان علی ولد شاہ جی کو پہچان لیا۔ اب اسکو پوچھا گیا ہے کہ اس نے کیسے شناخت کیا ہے تو گواہ نے بتایا ہے کہ اس نے اسکا ٹرک روکا تھا اور اس وقت ٹرک کی روشنی میں اس نے اس کا چہرہ واضح طور پر دیکھا۔،،

- Since third witness namely Ghulam Akbar S/o Ellahi Bukhsh, did not identify any, therefore, his part needs not to be reproduced.

ii. Although, number of illegalities committed during the course of identification parade, but following are striking:-

- Particulars of dummies are not provided.
- Numerous cuttings made in the report, without initials of the author.
- No verification of the identity of witnesses.
- Conduct of identification parade in two cases on the same date in which appellant was to be identified i.e case FIR No.30 & 31 of 2011.
- Non-observance of the High Court Rules and Orders, relating to identification parade.
- Despite claiming himself to be the author of report (Ex-PM) PW-12 showed ignorance about its contents by saying that:-

- * *I cannot tell that third witness did not identify the accused Jehan Ali because Jehan Ali had changed his dress/clothes.*
- * *I have not provided to the accused any opportunity to raise any objection.*

11. It is beyond the comprehension that an officer, assigned with judicial work, can make false statement on oath before, the learned trial court. Content of report Ex-PM, claimed to be written by PW-12 does not appear unified with the

signatures on it. Defence, put specific suggestion in this regard, which for convenience reproduced hereunder;

“It is incorrect that the identification proceedings are not in my hand but written by the reader. It is also incorrect that whole proceedings are fictitious.”

By no stretch of imagination, it can be assumed that an officer of the rank of Magistrate was not aware of the requirement of law that in case of cuttings, initials are required to be put on the document. I must observe here that learned Trial Courts are supposed to take notice of such aspects, instead of acting in a mechanical fashion. Nothing is more sacred than the life and liberty of a human being, therefore, learned trial courts being custodian of the rights of people are expected to act with due care, caution and diligence. When courts are empowered to conduct the trial and regulate the proceedings, vast powers vest in the courts to take judicial notice of certain aspects, without waiting for objections to be raised by the parties. Guidance on the point is sought from the wisdom showered through the judgements reported as PLD 2011 SC, 350, 2009 P.CR.L.J 573 and 2005 YLR 301.

12. In the matter in hand more tenacity and vigilance was required as identification parade (report Ex-PM) appeared to be best available evidence with the prosecution. Learned trial court gave much credence to the report (Ex-PM) and statement of PW-12 but surprisingly, learned trial court did not give any finding or observation on the report itself. I am certain that had the learned trial court been regardful of the illegalities and infirmities in the report, same would have been taken out of equation.

13. It is well settled law that identification of an accused person during the parade is of no significance, if witness taking part in the identification parade fails to ascribe any role or an act performed by accused. Reliance in this regard is placed on the following dictums laid down by the august Supreme Court in the cases reported as:-

2011 SCMR 527, Nazir Ahmad Vs. Muhammad Iqbal & another

2011 SCMR 683, Ghulam Shabbir Ahmad & another Vs. The State

2001 SCMR 424 & Imran Ashraf Vs. The State

1992 SCMR 2088 Asghar Ali alias Sabah & others Vs. The State & others.

In the light of above noted facts and circumstances of the case, I am fully persuaded that Ex-PM is not a piece of evidence requiring any consideration to inflict punishment/sentence upon appellant and the learned trial court fell in error by awarding conviction/sentence on the basis of same, more so as, same is not the substantive piece of evidence, as is held by superior courts of the country, reference is made to 1991 SCMR 643 and 2013 P.Cr.LJ 1829.

14. Appraisal of the statement of PW-9 (complainant) further shows that he did not mention that;

"Accused present in the Court".

I also appreciated the Urdu version of statement as well, but failed to find any reference in this regard. There are so many other infirmities in the prosecution case, creating serious doubts about its story, but benefit of same has been denied to appellant, without any plausible reasons, on the contrary same has been extended in favour of prosecution, which is illegal. For example, PW-9 complainant produced five photographs of the truck, AJKA 3233 (Ex-P9) which exhibited by learned trial court as Ex-P10 to 14, claimed to be captured after the occurrence. Careful perusal of Ex-P12 & P-14 does not show any bullet mark/point penetrating into wind screen, as a result whereof deceased died. It is against the ordinary prudence that bullet of assault rifle AK-47 known as Klashankov, would penetrate into wind screen, without damaging it. Admittedly, these pictures were not taken at the place of occurrence. It is carnial principle of law that one tainted piece of evidence cannot corroborate the other tainted piece of evidence. It is also a fundamental principle of law that single circumstance creating doubt in prosecution case is sufficient to extend its benefit to accused as a matter of right. In this regard reliance is placed on 2010 SCR 1813, 2009 SCMR 230, 2008 SCMR 1221, 2011 P.Cr.LJ 1643, 2010 P.Cr.LJ 477 & 2008 P.Cr.LJ 613.

15. It is the case of prosecution itself that at the time of occurrence, complainant was accompanied by the Raham Ali (Deceased), Ghulam Akbar, Ghulam Abbass both sons of Ellahi Bukhsh and Muhamamd Adil s/o Muhammad Akram. It is not explained that why prosecution did not produce any of three eye witnesses. Another, important witness, to whom prosecution gave up being unnecessary was Ghulam Shabbir, S.I who drafted the complaint and conducted investigation and collected evidence in this case. To my mind his appearance before the learned trial court was necessary to own the evidence like Ex-P10 to P-14. It is not understandable that how these documents got exhibited in the statement of complainant (PW-9) when neither the photographer who purportedly took the images and got it developed, nor the I.O, on whose instruction, they were taken, put appearance during trial as they could have advanced any explanation in respect of Ex-P-10 to P-14. Ghulam Shabbir was the I.O, who manage conduct of identification parade, and claimed recognition of witnesses, who took part in it. But, somehow these lacunas in prosecution case, eluded just estimation in the impugned judgement. When best and independent evidence is not produced, presumption would be against prosecution, as there is no independent corroboration of the statement of complainant PW-9.

16. From the contents of Ex-PM (Identification Report) it appears, that witness No.2 may have been someone, from these three persons but question arises that how his utterance purportedly made before learned Magistrate, PW-12 during course of identification parade, could have been considered at all, when prosecution failed to produce him during trial to face the test of cross-examination, in order to find the truth. It was more essential as evidence of PW-9 appears not to be of confidence inspiring. Reference is made to, the following case law; 2014 P.Cr.LJ 1559, PLD 2014 Pesh.29, 2012 YLR 633, 2007 YLR 954, 1972 SCMR 286, PLD 1999 Lah. 56, NLR 1998 Crl 577, 2004 and P.Cr.LJ 1030.

Since learned trial court gave no value to the recoveries, therefore, I need not to discuss the same.

17. For what has been discussed above, instant appeal is allowed by holding that prosecution failed to prove case against appellant beyond shadow of doubt, resultantly, impugned judgment dated 29.09.2015 is hereby set aside.

18. These are the reasons of my short order dated 09.12.2016.

(SHAIKHA AZIZ SIDDIQUI)
JUDGE

Approved for Reporting.
Blue Slip added.

"Waqar Ahmad"

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