

Form No: HCJD/C-121

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Jail Appeal No. 174 of 2019

Ramdad Khan

Versus

The State, etc.

Criminal Appeal No.201 of 2019

Amir Sohail alias Billa

Versus

The State

Jail Appeal No. 175 of 2019

Amir Sohail alias Billa

Versus

The State, etc.

Murder Reference No. 11 of 2019

The State

Versus

Ramdad Khan

Appellants by : Raja Aamir Shehzad and Ch. Zaheer Ahmed, Advocates.

Respondents By : Mr. Muhammad Atif Khokhar, State Counsel.
Complainant in person.
Tariq, S.I.

Date of Hearing : 04.06.2020.

AAMER FAROOQ, J. -This judgment shall decide the instant appeal, Jail Appeal No. 175/2019, Criminal Appeal No. 201/2019 as well as Murder Reference No. 11/2019, as they arise out of the judgment dated 17.05.2019, in case FIR No. 219/2015, dated 12.07.2015, registered with Police Station Shahzad Town, Islamabad.

2. The appellants were tried in FIR No. 219/2015, dated 12.07.2015, under sections 396/412 PPC, Police Station Shahzad Town, Islamabad and were

convicted by the learned Trial Court vide judgment dated 17.05.2019. In this behalf, the accused Ramdad Khan was awarded death sentence alongwith compensation of Rs.200,000/- to be paid to the legal heirs of the deceased; for offence under section 412 PPC, he was awarded rigorous imprisonment of 05 years and fine of Rs.10,000/- and in default to undergo imprisonment. The accused Aamir Sohail was also convicted under section 396 PPC and was awarded imprisonment for life and compensation of Rs.200,000/- to be paid to the legal heirs of the deceased; with respect to offence under section 412 PPC, he was awarded rigorous imprisonment of 05 years and fine of Rs.10,000/-.

3. Case of the prosecution is that on the complaint of one Ghulam Abbas, abovementioned FIR was registered, wherein it was alleged that the complainant alongwith his son Adnan Hussain Shah runs a general store under the name Al-Syed Super Mart. It was alleged that on the date in question i.e. 12.07.2015, at about 10:00 pm, 04 unknown persons, aged about 22 to 28 years of medium height, entered the store, who can be recognized by the complainant. It was alleged that they stole money from the counter and also during the incident killed security guard as he resisted by not letting go of his rifle. It was contended that the entire incident was witnessed by the complainant and his son alongwith Malik Tahir, who had come there to collect his bill as well as his driver Syed Mudassir Hussain Shah.

4. Learned counsel for the appellants, *inter alia*, contended that under the facts and circumstances, identification parade was not carried out in accordance with the settled principles. In this behalf, it was contended that the appellants were arrested on 10.09.2015, whereas identification parade was conducted on 02.10.2015, after a period of almost a month. It was further contended that no separate identification parades were conducted rather identification parade with respect to both the appellants was conducted at the same time; that in the FIR as well as statements under section 161 Cr.P.C, of the

eye witnesses, the age description and other specific features for recognizing the assailants were not mentioned and likewise in the identification report, the roles of both the appellants have not been specified. Learned counsel contended that due to absence of the referred elements, which have been held to be mandatory by the Hon'ble Supreme Court of Pakistan, the identification report should not have been relied upon, and is of little or no probative value. Reliance was placed on **"Azhar Mehmood and others versus The State" (2017 SCMR 135)** as well as **"Imran Ashraf and 07 others versus The State (2001 SCMR 424)** and **"Hakeem and others versus The State (2017 SCMR 1546).**

5. Learned counsel further contended that though the alleged recovery of pistols was made on 10.09.2015 and the bullet/empty from the scene of crime on 30.08.2015, yet the referred items were sent for forensic analysis with unexplained delay of almost 2/3 months. In this behalf, it was contended that the empty was handed over to the police authorities by Adnan Hussain Shah on 30.08.2015, which was sent to forensic on 29.10.2015, whereas the pistols were initially sent on 27.11.2015 and again on 23.12.2015. It was further submitted that though the forensic report does point out that the pistol recovered from Ramdad Khan matches with the crime empty, however, since the manner in which the empty as well as pistols were sent, the same is in violation of the law and should not have been relied upon by the learned Trial Court. It was also argued that there are material discrepancies in the statements of the prosecution witnesses. In this behalf, it was contended that Sargul Khan, ASI, (PW-12), categorically stated that on the motorcycle, there were three boys, who were apprehended at Naka held in Tarlai, whereas the Investigating Officer, namely Tariq Rauf, S.I (PW-16), stated that there were only two persons on the motorcycle at the time when they were apprehended. It was also contended that the complainant as well as his son did state that the entire incident has been recorded on CCTV camera, however, according to the complainant, footage was

not handed over to the police authorities but they did see the same, whereas Adnan Hussain shah (PW-14), submitted that CCTV footage was handed over to the police authorities, however, in either case, the same was never produced in evidence. Learned counsel further submitted that the fact that the empty recovered was fired from one of the pistols recovered from the appellants yet the said piece of evidence was not confronted to the appellants, which is in violation of the law.

6. Learned State counsel, *inter alia*, contended that the prosecution proved its case beyond reasonable doubt. In this behalf, it was submitted that ocular account as stated by Ghulam Abbas (PW-13), Adnan Shah (PW-14) and Malik Tahir (PW-15) remained un-rebutted. It was also contended that the referred eye witnesses categorically identified the appellants and even one of the weapons recovered from the said accused persons was matched with the empties recovered from the scene of crime. It was further contended that possession of the weapons as well as empties was duly acknowledged through recovery memo and the appellants also pointed out the place of occurrence in the presence of witnesses.

7. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

8. The case of the prosecution against the appellants has already been mentioned hereinabove, therefore, need not be recapitulated. In support of its case, the prosecution produced twenty two witnesses, including the eye witnesses namely Ghulam Abbas, Adnan Hussain Shah and Malik Tahir (PWs-13 to 15). Malik Farrukh Nadeem, Ex-Magistrate Shalimar, Islamabad (PW-20), entered the witness box to give evidence regarding identification parade conducted in his presence. The recovery witnesses also give evidence to the recovery. The prosecution tendered in evidence various recovery memos, FIR

and other documents, including the identification parade report. The appellants tendered their statements under section 342 Cr.P.C.

9. In the instant case, there are four witnesses, who witnessed the incident in question; out of the four, three entered the witness box as PW-13, PW-14 and PW-15. Ghulam Abbas being the complainant narrated the contents of the FIR and Adnan Hussain Shah and Malik Tahir (PW-14 & PW-15) expanded the same. The statements of the eye witnesses are more or less the same, however, in the cross-examination, PW-13 categorically admitted that at the time of the crime, there were ladies/customers present in the store, however, nothing has been mentioned in the FIR to the effect. It is an admitted position that the assailants were not apparently known to the complainant and other eye witnesses; hence the appellants were put to test the identification parade. The said parade is conducted under Article 22 of the Qanun-e-Shahdat Order, 1984, which provides a mechanism in order to help the witness to establish identity of unacquainted accused over a period of time. The Hon'ble Supreme Court of Pakistan has laid down a criteria and the law for conducting test identification parade. In this behalf, in **"Azhar Mehmood and others versus The State" (2017 SCMR 135)**, it was observed that it has consistently been held by this Court that the test identification parade is legally laconic and is of no evidentiary value where in the process, no role played by each assailant in the incident is spelt out. It was further observed that even the identification of the accused, during the course of trial, is unsafe. In **"Javed Khan alias Bacha and another versus The State and another" (2017 SCMR 524)**, it was observed that there is a long line of precedents stating that identification parade must be carefully conducted. The august Apex Court after discussing the case law observed that in the said case, the complainant 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 had been identified, were the actual culprits. The august Court also observed that the Magistrate has to certify that in the identification proceedings, the other persons, amongst whom the appellants are placed, are of similar age, height, built and colouring. It was observed that 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 that a witness simply confirming a faint recollection or impression that is of an old, young, tall, short, fat, thin and dark or fair suspect. In **"Hakeem and others versus The State" (2017 SCMR 1546)**, while relying upon **2017 SCMR 135**, the august Apex Court held that if the accused were identified without reference to any role played by them in the incident, the same is of no evidentiary value. In **"Lal Pasand versus The State" (PLD 1981 SC 142)**, the august Apex Court held that where the identification parade was held with delay, which is not satisfactorily explained and not conducted in accordance with the rule of mixing nine or ten strangers with one accused, it has dangers of errors. It was further observed that where no description of assailant was given by the witness to the police, the vague description does not specify the purpose. In **"Kamal Din alias Kamala versus The State" (2018 SCMR 577)**, the august Apex Court held that identification of many accused in one go was not proper besides being unsafe. The law pertaining to test identification parade was re-examined by the Hon'ble Supreme Court of Pakistan in **"Mian Sohail Ahmed and others versus The State and others" (2019 SCMR 956)**. It was observed as follows:-

"11. In 1989, Lahore High Court in Muhammed Yaqoob observed that "such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. These gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could 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 been

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." Lahore High Court raised an important point regarding power of observation, perception, recognition and memory of an eye-witness identifying an accused. However, this approach remained restricted to the role played by the accused in the crime as per the requirement of the guidelines of the test identification parade discussed above. The capacity and ability of the eye-witness was not assessed independently as a sequel or step two to the test identification proceedings. In 1981 Doral Patel, J. in Lal Pasand's case 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 that mistakes in identifications were " by far the greatest cause of actual or possible wrong convictions." This underlines the importance of assessing the ability and capacity of the eye-witness, separately, to identify the accused in the circumstances of the case. This assessment also forms part of the identification evidence along with the test identification proceedings.

12. *As time passed, international scientific surveys revealed that eye-witness testimony has been the most popular topic in psychological research. By 1995 alone there were over 2000 publications in psychology concerned with eye-witness reliability. The single most important observation from the research on eye-witness identification is that it is substantially less accurate than generally believed. Overall, data from real-life cases show that just under 45 percent of witnesses pick the suspect, about 35 percent decline to make a choice, and about 20 percent pick innocent fillers. The over reliance on visual identification evidence has led to numerous mistaken identifications of innocent suspects and consequently wrongful convictions. In approximately 75 % of DNA exonerations in the United States, mistaken identification was the principal cause of wrongful conviction. Furthermore, in 80 to 90 per cent of all DNA exonerations at least one eye-witness made a mistaken identification. A wrongful conviction results in two injustices. The first tragedy is to the innocent person. The second is to the victim of the offence and to society, because the real offender is not brought to justice. Wrongful convictions undermine the credibility of the legal system. Whenever witnesses are mistaken, it is rarely because they lie or misrepresent facts, but mostly because they misidentify people.*

13. *In the late 1960s, the courts around the world, began to set the standard for reviewing eye witness identification evidence. Reliability and credibility of the witness was termed as the linchpin in determining the admissibility of identification testimony. US Supreme Court in the case of Manson v Brathwaite, UK Court of Appeal (Criminal Division) in Regina v. Turnbull and Another, New Jersey Supreme Court in State v Madison and Oregon Supreme Court in State v. Classen settled the following factors for assessing the reliability of the witness:*

- (1) the opportunity of the witness to view the suspect at the time of the crime;*
- (2) the witness's degree of attention;*
- (3) the accuracy of the witness's prior description of the suspect;*
- (4) the level of certainty demonstrated at the confrontation (seeing the accused in court); and*

- (5) *the time between the crime and the confrontation (seeing the accused in court).*

It is interesting to note that these factors were drawn from earlier judicial rulings and not from scientific research. The scientific research refutes the notion that memory is like a video recording, and that a witness needs only to replay the tape to remember what happened. Human memory is far more complex. The memory is a constructive, dynamic, and selective process. The process of remembering consists of three stages: acquisition-"the perception of the original event"; retention-"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval-the "stage during which a person recalls stored information". The process of memory retention and retrieval may be affected by a number of factors. The scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system and in our jurisprudence are referred to as the Test Identification Parade. Whereas Estimator variables are factors related to the witness - like distance, lighting, or stress - over which the legal system has no control. Our courts have marginally attended to this aspect of witness reliability before placing reliance on the identification evidence (see above). The scientific research establishes that the following non-exhaustive list of "estimator variables" negatively affect the memory process:-

- i. Stress: Even under the best viewing conditions, high levels of stress can diminish an eye-witness' ability to recall and make an accurate identification. It may be noted "while moderate levels of stress improve cognitive processing and might improve accuracy, an eye-witness under high stress is less likely to make a reliable identification of the perpetrator."*
- ii. Weapon Focus: When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.*
- iii. Duration: The amount of time an eye-witness has to observe an event may affect the reliability of an identification. There is no minimum time required to make an accurate identification, however, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."*
- iv. Distance and Lighting: A person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.*
- v. Witness Characteristics: Characteristics like a witness' age and level of intoxication can affect the reliability of an identification. Children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults.*

- vi. Characteristics of Perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affects the accuracy of an identification.
- vii. Memory Decay: Memories fade with time and memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.

The scientific research referred to above has not only appeared in the peer reviewed journals but also has been considered "credible" by various courts in different jurisdictions. New Jersey Supreme Court in *State v. Henderson* observed that "virtually all of the scientific evidence" that had emerged in recent decades "reveals that an array of variables can affect and dilute memory and lead to misidentifications." Also see *State v. Lawson*.

14. The laws of evidence maintain that in order for the court to take judicial notice of scientific facts they must be part of the general knowledge of men or must be agreed upon by reputable men in a particular field of science beyond reasonable dispute. For judges to determine the degree of consensus on a particular scientific fact they may refer to any reputable and recognized reference sources. The House of Lords in *Regina (Quintavalle) v. Secretary of State for Health* held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. This Court can take judicial notice of the credible scientific development under Article 112, Qanun-e-Shahadat, 1984. The question is can we shut our eyes to credible scientific research and development, which has already been recognized and acknowledged by the courts in various other jurisdictions. If scientific research can help and assist the court in understanding and appreciating evidence more fully and more meaningfully, the risk of miscarriage of justice stands minimized. Therefore, the courts don't shy away from scientific developments but instead reach out and embrace them. Reliance on scientific research and the factors evolved by science to assess the reliability and credibility of the eye-witness can improve the quality of identification evidence and as a consequence the quality of justice. Our jurisprudence had already travelled in this direction and now credible scientific research by providing us additional factors or "estimator variables" (which are not exhaustive) has provided additional factors to certify the credibility and reliability of the eye-witness and as a result the veracity and probative value of the identification evidence.

15. After the test identification parade, the court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or estimator variables discussed above. Identification of an accused, therefore, becomes a two-step process. First, the suspects undergo a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables."

In recent judgment titled "***Tasar Mehmood and another versus The State and others***" (2020 SCMR 1013), the august Apex Court observed that the

process of test identification parade has to be essentially carried out, having regard to the exigencies of each case, in a fair and non-collusive manner, free from taints of prejudice; a contra claim must rest upon evidential basis; the exercise is not an immutable ritual, inconsequential non-performance whereof may cause failure of prosecution case.

10. In light of the above case law and benchmarks set-up by the august Apex Court regarding test identification parade, in the instant case, the processes/procedures were not carried out in accordance with the same. The appellants were allegedly arrested on 10.09.2015. According to PW-16, they admitted the commission of crime on the same day, however, test identification parade was conducted on 02.10.2015. There is unexplained delay of almost a month from the date of arrest of the appellants and the test identification parade, which creates doubts regarding the process as the possibility of seeing of accused by the prosecution witnesses cannot be ruled out. Moreover, both the appellants were put to test identification parade at the same time. The prosecution witnesses, who also are eye witnesses, did not spell out the roles of both the appellants during the commission of offence. Moreover, in the FIR as well statements under section 161 Cr.P.C, the eye witnesses have not described the assailants in details; there is a bald statement in the FIR that the assailants were aged about 22 to 28 years and were of medium height; the referred description is neither here nor there. The Magistrate, who conducted the identification parade, namely Malik Farrukh Nadeem, Ex-Magistrate, Shalimar (PW-20), while compiling the report of identification proceedings, which was tendered in evidence as Ex-PS, did not certify that other persons included in the parade were of the same height, colour, age and bearing similarities to the assailants. The abovementioned discrepancies and omissions in conducting identification parade makes the same as not only defective but of no evidentiary value in light of **2017 SCMR 135** as well as **2017 SCMR 1546** *supra*.

11. The deceased was fired from 30 bore pistol, which fact has been confirmed by the post-mortem and medical reports. No crime empties were recovered from the scene of the crime when police visited the place after the offence was reported, however, empty was handed over to the police on 30.08.2015 by Adnan Hussain Shah (PW-14) allegedly the same was found while cleaning the shop. The recovery memo for the said bullet was duly prepared vide Ex-PR. The pistols were recovered from the appellants namely Ramdad Khan and Amir Sohail on 10.09.2015, and according to prosecution witnesses, both the appellants admitted the commission of crime. The pistols were recovered under memo of recovery Ex-PH. According to the prosecution, all these items were put in Malkhana and subsequently, were sent to forensic for examination. According to Sikandar Ali (PW-11), he delivered the empty to the forensic on 29.10.2015 and the docket for the pistols on 10.11.2015, but the same were returned under objection on 27.11.2015, but were sent again on 23.12.2015. The said statement is contradicted by the statement of Naeem ul Hasnain, ASI (PW-19). According to statement of said witness, the road certificate was issued on 29.10.2015 for all the items i.e. empty as well as pistols. According to him, on 10.11.2015, parcel regarding pistols were sent again, but were returned and were sent again on 23.12.2015. Both the witnesses i.e. PW-11 and PW-19 were unable to point out the objection raised by the forensic department due to which the parcels for pistols were returned on 29.10.2015 and 27.11.2015. Moreover, PW-19 stated that he handed over the parcel containing the pistols to Sikandar Ali (PW-11), which was handed over to him on 10.09.2015, however, PW-11 only states about parcel containing 30 bore empty and does not state that the parcel for the pistols was also handed over to him on 29.10.2015. He only stated about the parcel for pistols given to him on 10.11.2015, hence there is material contradiction with respect to prosecution witnesses. Moreover, National Forensic Science Agency report, EX-PKK, states that parcel for 30 bore pistol was received

on 29.10.2015, but does not states the date on which parcel for pistols was received by it. According to the said report, the empty/cartridge matched with the pistol was allegedly recovered from Ramdad Khan. As noted above, there is no explanation for delay in sending the empties as well as pistols. Moreover, the certificate does not show the date on which the pistols were received and the objection which it had raised on 29.10.2015 and 27.11.2015. Where such is the case, forensic report has no evidentiary value in light of the case law reported as **"Ali Sher and others versus The State" (2008 SCMR 707)** and **"Muhammad Farooq and another versus The State" (2006 SCMR 1707)**.

12. Sargul Khan, ASI (PW-12) was present at Naka on 10.09.2015. According to his statement, alongwith Tariq Rauf, SI, he categorically stated that at Naka, 03 persons riding on the motorcycle approached the same, however, contrary to the same, Tariq Rauf, S.I (PW-16) stated that only two boys, who were riding the motorcycle came near the Naka. He affirmed the position in cross-examination as well, hence material discrepancy exist between PW-12 and PW-16. Both the prosecution witnesses namely Ghulam Abbas and Adnan Hussain Shah (PW-13 and PW-14) stated that footage of the incident was recorded on CCTV. PW-13 stated that the police authorities saw the footage, however, Adnan Hussain Shah (PW-14) stated that the footage was handed over to the police as well but the prosecution did not produce the CCTV footage in evidence. Moreover, Ghulam Abbas in his cross-examination stated that there were customers including ladies in the shop at the time of the occurrence, whereas nothing to the effect was stated in the FIR. The recovery of cash from the appellants is inconsequential as it cannot be determined with certainty that it is the same cash which were stolen from the shop owned by the complainant. The factum of matching of empty and pistol recovered from Ramdad Khan, as mentioned in forensic report, was not confronted to him as required under the law. Reliance is placed on **"Haji Nawaz Vs. The State" (2020 SCMR 687)**,

"Dr. Waqas Hameed Vs. The State" (2020 SCMR 321) and "Anwar Begum Vs. Akhtar Hussain" (2017 SCMR 1710).

13. In light of the above position of law, though there is ocular account as stated by the PW-13, PW-14 and PW-15, however, due to the legal flaws in the test identification parade and forensic report regarding matching of the empty from the pistol recovered from Ramdad Khan and other lacunaes mentioned above, the case of the prosecution cannot be regarded as beyond reasonable doubt warranting conviction of the appellants.

14. For the aforementioned reasons, the instant appeal as well as Criminal Appeal No.201/2019 are **allowed** and impugned judgment dated 17.05.2019 is **set-aside**; consequently, the appellants are acquitted of the charges in case in question and shall be released forthwith, if not required in any other case. Since the appeal filed by Amir Sohail stand decided, the Jail Appeal filed by him has become infructuous and is **disposed of** accordingly. Murder Reference No.11/2019 is answered in **Negative**. In Appeal under objection containing diary No.10545/2019, the objections are sustained.

(CHIEF JUSTICE)

**(AAMER FAROOQ)
JUDGE**

Announced in open Court this 20th day of August, 2020.

JUDGE

JUDGE

M.Shah/.