

HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

Criminal Appeal No. 1240-J of 2017
(Muhammad Ijaz & another versus. The State)

J U D G M E N T

<u>Date of Hearing:</u>	24.11.2021
<u>Appellants by:</u>	Mr. Abdul Khaliq Dogar Advocate
<u>State by:</u>	Mr. Muhammad Laeeq-ur-Rehman Assistant District Public Prosecutor

This Criminal Appeal filed by Muhammad Ijaz and Muhammad Fayyaz (*appellants*) is directed against judgment dated 25.04.2017 passed by the learned Additional Sessions Judge, Lodhran on the basis of which appellants were convicted and sentenced as under: -

- i. Under Sections 302(b)/34 PPC¹ for committing the Qatl-i-Amad² of Muhammad Zawwar, imprisonment for life each. They were also directed to pay an amount of Rs.200000/- (two lacs) each as compensation to the legal heirs of deceased in terms of Section 544-A Cr.P.C³ and in default thereof to further undergo six months S.I⁴ each.
- ii. Under Sections 302(b)/34 PPC for committing the Qatl-i-Amad of Muhammad Siddique, imprisonment for life each. They were also directed to pay an amount of Rs.200000/- (two lacs) each as compensation to the legal heirs of deceased in terms of Section 544-A Cr.P.C and in default thereof to further undergo six months S.I each.

¹ Pakistan Penal Code, 1860

² Murder

³ Code of Criminal Procedure, 1898

⁴ Simple Imprisonment

- iii. *Under Sections 324/34 PPC to undergo 5 years R.I⁵ each and fine of Rs.30000/- (thirty thousand) each. In default of payment of fine they were ordered to further undergo 3 months S.I each.*
- iv. *Under Sections 337-F(i)/34 PPC to pay Rs.20000/- (twenty thousand) Daman⁶ each to Muhammad Zahid (Pw-15) and to undergo one year R.I each as Tazir⁷*

2. The convictions are outcome of case FIR⁸ No. 288 (PL/1) recorded on 31.05.2016 at Police Station City Lodhran under Sections 324/34 on the complaint of Nazar Muhammad (Pw-8). During the investigation Sections 302/397 PPC were also added. It is important to mention here that one Muhammad Javed was also tried with the appellants and acquitted by way of same judgment.

3. Facts of the case are that on 31.05.2016 Safdar Naseer SI⁹ (Pw-10) upon receipt of information of the occurrence arrived at Pull Khandan Wali Moza Kot Lal Shah where he recorded the statement of Nazar Muhammad (PL) who maintained that in between the night of 30/31.05.2016 an information was received that three unknown assailants had committed the crime in a shop and injured one Muhammad Aslam; on this information he/complainant along with Nazar Hussain (*deceased*), Muhammad Siddique (*deceased*), Muhammad Wazeer (Pw-9) went to Pull Khandan; after a short while from western side a motorbike came with head light off; three unknown persons on that motorbike when reached close to them, the head light was made on; all accused started indiscriminate firing with their weapons resulting into the

⁵ Rigorous Imprisonment

⁶ Compensation determined by the Court to be paid by the offender to the victim for causing hurt

⁷ Punishment other than Qisas, Diyat, Arsh or Daman

⁸ First Information Report (S.154 Cr.P.C)

⁹ Sub Inspector

injuries on the person of Zawwar Hussain, Muhammad Siddique and Muhammad Zahid (Pw-15). It was finally stated that all the assailants then escaped from crime scene.

4. Safdar Naseer SI after observing the necessary formalities made an endorsement and send the complaint to Police Station through Adnan Aslam Constable on the basis of which FIR was recorded by Muhammad Imran ASI¹⁰ (Pw-13). Appellants and their co-accused Muhammad Javed were arrested on 22.06.2016 by Hubdar Hussain SI (Pw-11) and were sent to jail where identification parade was supervised by Mr. Muhammad Javed Khan Magistrate (Pw-14). The witnesses had identified all the assailants. During these proceedings the witnesses disclosed that Javed was driving the motorbike whereas appellants made firing.

5. In subsequent investigation recoveries were also affected at the instances of both the appellants.

6. On conclusion of investigation a report under Section 173 Cr.P.C (*Challan*) was submitted in court.

7. A charge under Sections 302/324/397/34 PPC, on 29.11.2016, was framed against appellants and Muhammad Javed for which they pleaded not guilty and demanded their trial, where after prosecution had produced the following witnesses: -

Pw-1 Dr. Safdar Ali issued the operation notes with regard to injuries on Muhammad Siddique (deceased).

Pw-2 Dr. Iftikhar Ahmad conducted the post mortem examination of Muhammad Siddique and issued the report (PA).

Pw-3 Dr. Shahbaz Akhtar conducted the post mortem examination of Zawwar Hussain and the post mortem report he issued is Ex-PD.

Pw-4 Dr. Jawwad Rasool medically examined Muhammad Zawwar (deceased)

¹⁰ Assistant Sub Inspector

and Muhammad Siddique (deceased) when both were in injured condition.

Pw-5 Ghulam Hussain Constable escorted both the deceased (the then injured) to the hospital for their medical examination.

Pw-6 Muhammad Arif Constable got conducted the post mortem examination of Zawwar Hussain.

Pw-7 Khuda Bakhsh Patwari¹¹ prepared scaled site plan (PK).

Pw-8 Nazar Muhammad is complainant and an eye witness.

Pw-9 Muhammad Wazeer is also one of the eye witnesses.

Pw-10 Safdar Naseer SI conducted the initial investigation.

Pw-11 Hubdar Hussain SI made subsequent and final investigation.

Pw-12 Muhammad Tahir Constable is a witness to recovery of motorbike (P-18) at the instance of Muhammad Javed (since acquitted).

Pw-13 Muhammad Imran ASI is the author of FIR.

Pw-14 Muhammad Javed Khan Magistrate supervised the identification parade and issued the proceedings (PX).

Pw-15 Muhammad Zahid is an injured eye witness.

8. After producing the reports of Serologist (PY), firearm (PZ) and copies of FIRs (PAA) prosecution's evidence was closed by the learned Deputy District Public Prosecutor.

9. In their examinations made under Section 342 Cr.P.C appellants pleaded their false involvement.

10. Learned counsel for appellants maintained that the basic evidence in this case is identification parade and if it is established that there was no possibility for the witnesses to see the faces of the appellants, how they could identify them during these proceedings?; identification parade

¹¹ An official of revenue of department

proceedings are suffering from serious illegalities so cannot be relied upon; identification parade is a weak type of evidence and cannot be relied unless there is strong corroboration from independent sources. He finally contended that as it is a case of no evidence therefore convictions of appellants cannot sustain.

11. On the other hand learned Assistant District Public Prosecutor contended that witnesses were having no enmity whatsoever for the false involvement of appellants who were rightly picked up during the identification parade where the role was also assigned to them and their co-accused; identification proceedings, if suffering from certain irregularities, for that complainant cannot be held responsible as it was the duty of the Magistrate to observe what he was supposed to do?; pointing the crime scene and recoveries of weapons with positive report of firearm expert are independent corroboration in this case. He finally argued that there is no reason to interfere in a well reasoned judgment recorded by the learned trial court.

12. HEARD

13. According to prosecution's story the appellants along with their co-accused on 09.07.2016 led the police party to the crime scene and disclosed that it was the venue where they committed the crime. Under Article 40 of the Qanoon-e-Shahadat, Order 1984, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates **distinctly** to the fact thereby discovered, may be proved (**Emphasized**).

14. The word '**distinctly**' used in the provision means a fact that was not in the knowledge of anyone prior to its

disclosure by accused. The place of occurrence pointed out by the appellants was not secret or a breaking news before it was disclosed by them, so it has no legal value and cannot be used as an incriminating piece of evidence against appellants.

15. Muhammad Javed alias Kalay Shah was stated to be present with appellants at the time of occurrence. Before the identification proceedings were conducted neither in FIR nor in their statements recorded under Section 161 Cr.P.C the witnesses ever claimed that Muhammad Javed was driving the motorbike and only appellants made firing. The case was quite specific that three unknown persons came there and made indiscriminate firing. Muhammad Javed, as mentioned earlier, has been acquitted by the learned trial court. Neither complainant nor the state has taken any exception to that acquittal, therefore when similarly placed person has been cleared by the learned trial court while disbelieving the statements of private witnesses, how prosecution can force to sustain the convictions of appellants?

16. Coming to the identification parade, the basic question before this Court is that whether there was any occasion for Nazar Muhammad (*Pw-8*), Muhammad Wazeer (*Pw-9*) and Muhammad Zahid (*Pw-15*) to see the faces of appellants and their co-accused, because the occurrence had taken place in the dark hours of the night where admittedly no source of light was available. This was their own case of the eye witnesses that when motorbike of assailants came close to them, till that time its head light was off so there was no question for them to see the faces of any of the assailants? It was then stated by them that the culprits switched on the head light. Even from this angle there was

no possibility for the witnesses to see the features of the appellants and their co-accused because the head light of the motorbike was towards their faces and not the appellants.

17. The source of light was a serious challenge for prosecution and finding in difficulty, first time in court Nazar Muhammad (*Pw-8*) added that Abdul Ghaffar one of the witnesses was having a torch in his hand. On confrontation, in cross-examination by defence, he was found under improvement. Similarly Muhammad Wazeer and Muhammad Zahid stated so. This principle is relevant to refer here that a witness who makes material improvements in his statement during trial so as to cover inherent defects, his credibility remains of no worth¹².

18. Hubdar Hussain SI in his statement admitted that no source of torch was mentioned in the complaint however this fact was introduced during the investigation. For the sake of arguments if it is considered that torch was there, why it was not taken into possession? Prosecution stands with lips tight here.

19. The outcome of above discussion is that when there was no chance and possibility for the eye witnesses to see the faces of the appellants and their co-accused, the process of identification was a futile exercise.

20. Reverting to the identification parade, that is also called 'Police Lineup' (in American English) and 'Identity Parade' (in British English) means that a line of people who stand next to each other while someone tries to identify one of them as the person who has committed the crime. It is a relevant fact under Article 22 of the Qanoon-e-Shahadat,

¹² Sardar Bibi & another vs. Munir Ahmad & others 2017 SCMR 344, Syed Saeed Muhammad Shah & another vs. The State 1993 SCMR 550, Amir Zaman v. Mehboob and others 1985 SCMR 685 and Muhammad Arif vs. The State 2019 SCMR 631

Order 1984. It is not a requirement of law but only one of the methods to test the veracity of the evidence of an eye witness who had an occasion to see the accused and claims to identify him. 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 trial¹³. It has no independent value of its own and cannot as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record¹⁴. It is also not a rule of law but a rule of prudence. Identification parade is governed by Volume III, Chapter 11-G, Part-C of the Rules and Orders of the Lahore High Court, Lahore and paragraph No. 26.32, Chapter XXVI of the Police Rules, 1934 and various instructions issued by the Government¹⁵. The important features for a valid identification parade are as under: -

- i. *The proceedings shall be conducted under the supervision of a Magistrate.*
- ii. *Proceedings shall be held inside the jail.*
- iii. *Identification shall be carried as soon as possible after the arrest of suspect.*
- iv. *Once the arrangements for proceedings have been undertaken, the Officer investigating the case and any Police Officer assisting him in that investigation should have no access whatever either to the suspect or to the witnesses.*
- v. *List of all persons included in identification should be prepared, which should contain their names, parentage, address and occupation.*
- vi. *The suspects shall be placed among other persons similarly dressed up, of the same religion and of same social status.*
- vii. *There shall be proportion of 8 or 9 such person to one suspect.*
- viii. *The identifying witnesses shall be kept separate from each other and at such a*

¹³ Muhammad Bashir vs. The State PLD 1958 SC 1

¹⁴ Muhammad Afzal & another vs. The State 1982 SCMR 129

¹⁵ Punjab Government Circular Letter No.6091-J-36/ 39829 (H-Judl.) dated 19-12-1936; Punjab Government Circular Letter No. 6546-J-43/83844 (H-Judl.), dated 17.12.1943; Punjab Government Circular Letter No.Judl.I-(13)/61, dated 26-7-1961

distance from the place of identification as shall render it impossible for them to see the suspects or any of the persons concerned in the proceedings, until they are called upon to make identification.

- ix. Each witness shall be brought up separately to attempt his identification. Care shall be taken that the remaining witnesses are still kept out of sight and hearing and that no opportunity is permitted for communication to pass between witnesses who have been called up and those who have not.*

21 In *Kanwar Anwaar Ali case*¹⁶ the apex court was pleased to further add that 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 and that he is required to record in his report all the precautions taken by him for a fair conduct of the proceedings.

22. Mr. Muhammad Javed Khan a learned Magistrate (Pw-14) on 28.06.2016 had supervised the identification parade. He did not perform his duty with a reasonable level of responsibility. He deviated from the instructions (ibid) for a proper identification parade. The illegalities committed by him are as under: -

- i. He conducted the proceedings in an open ground inside the jail so on this reason alone no sanctity can be attached to this exercise.*
- ii. List of all persons included in the identification parade although contains the names and parentage but the addresses and occupations are not recorded.*
- iii. It does not indicate that the suspects were placed among other persons similarly dressed up, of the same religion and of same social status.*

¹⁶ PLD 2019 SC 488

- iv. *It is silent that the identifying witnesses were kept separate from each other and at such a distance from the place of identification as rendered it impossible for them to see the suspects until they were called upon to make identification.*
- v. *Firstly Nazar Muhammad, then Abdul Ghaffar and finally Muhammad Wazeer were called but surprisingly every witness after he completed his job was simply sent back that means that he had the contact with the identifying witness who still had to join the proceedings.*
- vi. *The proceedings are completely unvoiced that where the witnesses were made to sit and where they had to go after they did the assignment?*

23. The identification parade is of no worth for the prosecution for another important reason. Nazar Muhammad (Pw-8) after identifying the appellants maintained that **only Fayyaz made firing** resulting into death of Muhammad Zawwar and Muhammad Siddique. When Abdul Ghaffar came to identify, he stated that **Fayyaz and Ijaz had made firing** whereas Muhammad Javed was driving the motorbike and same role was assigned by Muhammad Wazeer (Pw-9).

24. It is settled principle of law that identification parade is the weakest type of evidence and can be believed only if it is supported from other independent sources. Unfortunately prosecution even cannot claim that the identification parade has been corroborated from other independent material. Recovery of Kalashnikovs (P4) on 12.07.2016 at the instances of Ijaz (PN) and a Kalashnikov (P5) at the instance of Fayyaz on 13.07.2016 is of no help to the prosecution for the sole reason that both recoveries were affected from open places those were within the approach

of public at large hence exclusive possession of appellants is not established.

25. It is surprising that recovery at the instance of Fayyaz was made from the jurisdiction of Police Station Kehror Pakka but the Investigation Officer did not bother to make any entry in the *Roznamcha* of that Police Station or to join any of the officials from there.

26. Coming to the recovery of motorbike at the instance of Javed, it is also of no worth on a simple ground that Javed has been acquitted which has not been taken to any exception by the prosecution.

27. The positive report of firearm expert shall also play no role in this case once the recoveries have been disbelieved. 12 empties were collected from crime scene on 31.05.2016 and surprisingly sent to expert on 21.06.2016 just one day earlier to the arrest of appellants and Javed. No explanation is there that why the empties were kept in Police Station and were sent just 24 hours earlier to the arrest of appellants and their co-accused? Even from this dimension the report of PFSA has lost its value and cannot be used against appellants.

28. There is no need to discuss the medical evidence because it has not been denied that Zawwar Hussain, Muhammad Siddique and Muhammad Zahid sustained the injuries and later on Zawwar Hussain and Muhammad Siddique had died.

29. The reasonable doubt standard is a fundamental part of jurisprudence which once arisen, cannot be refused and denied. This means that the prosecution must present propositions which preclude "reasonable doubt" in the mind of a reasonable person as to the guilt of accused. Therefore, beneficiary of this failure by the prosecution under all the

circumstances shall be the one who is called favorite child of law.

30. I therefore finally conclude that prosecution has not been able to prove its case beyond reasonable doubt against both the appellants hence this Appeal is **allowed**. Impugned judgment dated 25.04.2017 is **set aside**. Appellants are **acquitted** from the case. They are in custody and shall be released forthwith if not required in any other case. The case property shall be dealt in the same manners as directed by the learned trial court.

(Sohail Nasir)
Judge

Approved for Reporting

(Judge)

Adeel