

JUDGMENT SHEET

PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A. No.174-B/2016.

Saleem Khan alias Gul
Vs.
The State, etc.

JUDGMENT

For Appellant: **Muhammad Sadiq Khan, Advocate.**

For Respondents: **Mr. Shahid Hameed Qureshi, Addl:**
A.G., M/S Pir Liaqat Ali Shah and
Farooq Khan Sokarri, Advocates.

Date of hearing: **03.3.2020.**

SAHIBZADA ASADULLAH, J.- This judgment shall dispose of the criminal appeals, bearing *Cr.A. No.174-B/2016 (Saleem Khan alias Gul Vs. The State, Cr.A. No.180-B/2016 (Afshan Vs. The State), Cr.A. No.215-B/2016 (Sir Syed Ali Shah Vs. The State & Cr.A. No.299-B/2016 (The State Vs. Sir Syed Ali Shah etc), as arising of the same judgment dated 24.3.2016, rendered by learned Judge Anti-Terrorism Court, Bannu, in case FIR No.436 dated 17.8.2015, registered under Sections 324, 334, 394, 34, 411, 412 PPC read with Section 15 Arms Act and S.7 of Anti-Terrorism Act, at police station Saddar, Bannu, whereby the appellants were convicted and sentenced as under:*

- (1) Under Section 394/34 PPC, ten years R.I. with fine of Rs.5,00,000/- each, or in default thereof to undergo three years S.I;

- (2) Under Section 324 PPC, ten years R.I. with fine of Rs.2,00,000/- each or in default thereof to undergo one year S.I.
- (3) Under Section 334 PPC, they were held liable to *Arsh*, equivalent to the half value of *Diyat* in terms of Section 338(R) PPC to Rs.9,50,000/- to be paid by all the three accused in equal share, with imprisonment of five years R.I. as *Ta'zir*;
- (4) Under Section 411 PPC, to two years R.I. with fine of Rs.1,00,000/- each or in default thereof to undergo further six months S.I.;
- (5) Under Section 7(c) of Anti-Terrorism Act, to 14 years R.I. with fine of Rs.5,00,000/- or in default thereof to undergo three years S.I.
- (6) The appellant Sir Syed Ali Shah was also convicted under Section 15 Arms Act and sentenced to pay fine of Rs.10,000/- or in default thereof to undergo one month S.I.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was not extended to the convicts.

2. Facts of the case, as reflected from the FIR Ex. PA, registered on the basis of murasila Ex. PA/1, are that on 17.8.2015 at 1050 hours, complainant Muhammad Naeem Khan (PW-5), in injured condition, made report in Civil Hospital, Bannu, to the effect that on the day of occurrence he alongwith Farid Khan (PW-6) was riding on a motorbike from New Sabzi Mandi for depositing cash amount of Rs.26,00,000/- in Unite Bank Limited, Bannu; the motorbike was driven by him, whereas Farid Khan PW-6 was occupying the pillion with cash amount wrapped in a Chadar; when they reached at Kotka Imam Shah Mulagan situated on Bannu-D.I.Khan Road opposite to Bannu Woolen Mills at about 1020 hours, meanwhile, three

unknown persons with muffled faces riding on a motorcycle Honda 125, black colour struck their motorbike from behind and started firing with their pistols which resulted into injuries on their person. One of the accused snatched cash amount from PW-6. The accused decamped from the spot after commission of the offence. Besides the complainant, the occurrence is stated to be witnessed by Farid Khan PW-6. Subsequently, the complainant and PW-6 recorded their supplementary statements, wherein they mentioned full descriptions and features of all the three accused and stated that the amount was arranged by PW Muhammad Ilyas and after counting was handed over to the complainant in his motorcar, whereafter, while on their way to United Bank Limited three unknown accused riding a motorcycle struck their motorbike from behind, started firing with their pistols which resulted into injuries on their person and one of the accused came ahead to snatch the amount and the complainant grappled with the accused and in that eventuality, his face was exposed who was duly seen by the complainant and the injured PW Farid Khan. Subsequently, Sir Syed Ali Shah was arrested and from his possession a Honda motorcycle 125, 30 bore pistol and cash amount of Rs.9,21,500/- were recovered. The appellant Afshan was arrested on 22.9.2015, whereas Salim Gul on 05.10.2015 and on their pointation, their shares in the snatched amount were recovered by the local

police from their houses. The complainant and PW Farid Khan identified the convicts/appellants on different dates before Amir Ali Afridi Judicial Magistrate (PW-14). The snatched money was also identified by PW Ilyas Khan in presence of Judicial Magistrate in police station Saddar.

3. On completion of investigation, complete challan was submitted against the accused before the learned Trial Court. Charge was framed where the accused did not plead guilty and claimed trial. In order to bring home guilt of the accused, the prosecution produced and examined as many as sixteen witnesses, whereafter, accused were examined under section 342, Cr.P.C., wherein they denied the allegations, professed innocence and stated to have falsely been implicated in the present case, however, neither they opted to be examined under section 340(2), Cr.P.C., nor wished to produce evidence in their defence. The learned trial Court, on conclusion of the trial, convicted the appellants vide impugned judgment dated 24.3.2016, and sentenced them as mentioned above, which has been assailed through the instant appeals.

4. Arguments heard and record perused.

5. The complainant reported that on 17.8.2015, he alongwith injured Farid Khan visited New Sabzi Mandi, Bannu and collected an amount of Rs.26 Lacs, while on their way to United Bank Limited, their motorcycle was struck from behind, they saw three persons riding a

motorcycle with muffled faces who pulled out their pistols and started firing at them which resulted into injuries, one of the accused snatched the amount from PW Farid, which was wrapped in a *Chadder*, whereafter, the injured were shifted to the hospital where the complainant Muhammad Naeem reported the matter. The record further transpires that after the injured were examined by the doctor, the SHO of the concerned police station, namely Iftexhar Ali alongwith the Investigating Officer Inayatullah Khan reached to the hospital, where after some time the injured got recorded their supplementary statements. The complainant while recording his supplementary statement, stated that the accused when reached near them, started firing and one of the accused came forward, snatched the amount. The parties started grappling with each other as a result face of the accused got exposed and was identified. The supplementary statements tell that the amount was provided by one Ilyas to the complainant and after counting the same in his motorcar, it was wrapped in a *Chadder*. As the supplementary statement has created a haze so prudence demands great care to unearth the hidden truth and to assess the veracity of the prosecution witnesses. The report is silent that wherefrom the amount was collected and that what for the collected amount was to be deposited in the Bank. There is nothing on record to suggest that the complainant was having his business in the vegetable

market and that it was from there that the amount was collected. The complainant stated in his supplementary statement that the amount was handed over by PW Muhammad Ilyas after counting in his motorcar, who was examined as PW-9, who stated that it was in the morning that the complainant asked the amount, he arranged the same and handed over. The prosecution failed that why in the initial report, such important facts were ignored and what need was felt for recording a supplementary statement despite the fact that at the time of report both the witnesses were conscious and oriented in time and space. The prosecution could not explain that how Muhammad Ilyas, on such a short notice arranged the amount and handed over to the complainant. If the relations between the two i.e. the complainant and PW Ilyas were so cordial, then why PW Ilyas soon after the occurrence on getting information, did not visit the hospital and that why he did not record his statement in this respect. This is astonishing that when Ilyas was examined as PW-9, he stated that after handing over amount to the complainant he went to Sarai Naurang for personal errand and that he asked his brother to go to the hospital and inquire about the health of the complainant. This witness further stated that he visited the hospital after 2/3 days of the incident. We are surprised that what prevented the complainant to visit the hospital despite the fact that the hospital is located in the same city. If the

statement of PW Ilyas is taken to be correct then what for the amount was to be deposited in the Bank as it was urgently needed, even the complainant failed to explain the urgency. The complainant did not come with the whole truth, rather he concealed the material facts with the sole purpose to bring his story in line to what the police demanded. The complainant never remained consistent and went on changing his stance at one point of time and he stated that in the vegetable market, one Tawab handed over an amount of Rs:3,16,600/-, which was lying in his pocket at the time of incident, but while recording his supplementary statement he did not mention that before the incident he entered into the vegetable market. If we concede to what he stated, then why the said Tawab was not examined who could have been the best witness, but this suggests that the complainant did not come with the whole truth. The supplementary statement was an attempt to create a breakthrough so that the subsequent involvement and arrest could be justified, it was this attempt that jolted the very foundation of the case.

6. The report tells that the accused while firing were muffled faces. The complainant never claimed that he could identify if the accused were brought before him and even in the FIR, no descriptions/features of the accused were mentioned. The supplementary statement has given a

new twist to the story where dishonest improvements were made which has shaken the very structure.

In case titled Muhammad Mansha Vs. The State (2018 SCMR 772), it was held that:-

"Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses".

7. Iftekhhar Ali (SHO) was examined as PW-7, who stated that after recording supplementary statements of the witnesses, he received information that one of the accused was Sir Syed, who had gone to the house of one Ayub Ali Shah of Kotka Imam Shah and so they chased in haste and reached there, Ayub Ali Shah was brought out from his house who stated that the accused with two others have left on motorcycle to Koti Sadat and when they reached Koti Sadat, they came across 3/4 villagers, who told that the accused went to the house of one Amanullah in village Adami. We are surprised that how the SHO was informed regarding the involvement of accused Sir Syed in

the episode and that how the informer could know his such involvement. It is yet an element of surprise that even the complainant did not disclose the name of accused Sir Syed, either to the Investigating Officer or to the SHO (PW-7). If the stance taken by PW-7 to be correct, then why they did not record the statement of Ayub Ali Shah to whose house the accused after the occurrence had gone and that why this fact was not brought on record that it was Ayub Ali Shah who told that the accused Sir Syed with two others went towards Koti Sadat. The conduct of this witness is not above board as it was soon after the occurrence that he followed the accused on information, then wherefrom two others came to the house of Ayub Ali Shah, when the informer had seen only accused/appellant Sir Syed while entering into the house. PW-7 further stated that when he reached to Koti Sadat, the passer-bys told that all the three i.e. Sir Syed and his companions went to Adami to the house of one Amanullah. This is surprising that how the villagers came to know that the persons leaving for Adami, were Sir Syed and his friends and that how they came to know that the accused had gone to the house of one Amanullah. If we accede to what PW-7 stated, then why the statements of the villagers, who tendered the information, were not recorded. The Investigating Officer stated that he went in the company of the SHO and others to the house of Amanullah and when entered into the Baithak, accused Sir

Syed and two others were sitting there, where the accused Sir Syed introduced himself, who was holding an envelope in his hand and so the accused was arrested and an amount of Rs.9,21,500/- alongwith a 30 bore pistol were recovered and taken into possession. If we say yes to what the witnesses stated, then the prosecution will have to satisfy that why rest of the two who were present at the time of arrest of accused/appellant Sir Syed, were let off without asking their names and without confirming their status from convict/appellant Sir Syed. The prosecution is yet to explain that how it decided that the other two persons with the convict/appellant were not the nominated accused. The arrest was allegedly made from the Baithak of one Amanullah, but the prosecution did not feel the need to record his statement in this respect. The convict Sir Syed was arrested, thoroughly investigated and thereafter was deposited in the judicial lockup. It was after sometime that the prosecution inserted Section 7 of the Anti-Terrorism Act to the file which led to the constitution of a Joint Investigation Team headed by one Latif Ullah Khan Inspector. Latif Ullah Khan Inspector was examined as PW-13, who stated that after insertion of Section 7 ATA, an application for further custody of the accused was submitted pursuant thereto five days custody was granted and on expiry two more days were granted, but noting to favour the prosecution could be extracted. The record is

silent that wherefrom the co-accused i.e. Salimullah and Afshan crept in when it has nowhere been mentioned by the Investigating Officer and Incharge Joint Investigation Team that it was the convict/appellant Sir Syed, who disclosed the identity of the co-accused. Though the Investigating Officer arrested the co-accused on different dates where on pointation of accused Afshan, Rs.8,30,000/- from a ditch inside the house was recovered and on pointation of accused Salim, an amount of Rs.8,27,000/- has been shown recovered. The Investigating Officer, after recovery of the amount requested for identification of the currency through PW Ilyas, in which respect an application was submitted before the Court which was allowed and one Aamir Ali Afridi, Judicial Magistrate was deputed for the purpose and identification parade of the currency was conducted. We are anxious to know that when the FIR was silent regarding the numbers and denominations of the snatched amount and when the amount was arranged within a short span of time by PW Ilyas for the complainant, then how the amount could validly be identified. The prosecution failed to establish the factum of identification of the amount and even the statement of PW Ilyas cannot be taken against the convicts/appellants as his name nowhere figures in the report. This is on record that at the time of recovery the amount was not sealed into parcels and when so, it cannot be determined that in fact the amount recovered was the

amount snatched. This is alarming that the recovered amount was put to identification after a sufficient long time despite the fact that PW Ilyas was very much present in the village and this conduct of the witnesses tells otherwise, so we feel no hesitation to hold that the amount was planted to strengthen the case of the prosecution.

8. The Investigating Officer went to the spot, recovered three empties of 30 bore and prepared the site plan on his personal observation as the witnesses were in the hospital. PW Farid Khan was taken to the spot on 28.8.2015 and on his pointation addition was made to the site plan in respect of the place occupied by the unknown accused at the time of incident. This was on 20.10.2015 that on pointation of the complainant Muhammad Naeem, the unknown accused were named and the points added on pointation of PW Farid Khan were confirmed. The prosecution could not explain that wherefrom the complainant gathered the names of the accused when the appellant/convict Sir Syed had not disclosed the same and when the record was silent in that respect.

9. It was stressed by the learned counsel for the complainant that the convict/appellant was arrested and a 30 bore pistol was recovered from his possession which was dispatched to the laboratory for comparison wherefrom a positive report was received and to him, this alone is sufficient to hold the convict/appellant responsible. We

cannot accede to the submission so made, as the pistol and empties were recovered on 17.8.2015, whereas these were received to the laboratory on 25.8.2015, after a considerable delay. The prosecution did not bring anything on record that in whose custody the incriminating articles were lying and that who took it to the Forensic Sciences Laboratory for comparison. Neither the Moharrir of the concerned police station was examined nor the official who took it to the laboratory. We are afraid, that the laboratory report in this respect cannot advance the case of the prosecution and this piece of evidence cannot be relied upon.

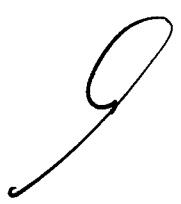
In case titled Hayat Ullah Vs. The State (2018 SCMR 2092), it was held that:-

Much reliance was placed on the recovery of pistol from the appellant and empty from the place of occurrence, we observe that the empty was recovered on 11.02.2006 and pistol was recovered on 22.02.2006 and till the recovery of the pistol the empty was not sent to the firearm expert and the empty and the pistol both remained together in the Malkhana and thereafter transmitted to the office of the Forensic Science Laboratory. So the recovery is inconsequential. Even otherwise recovery alone is not sufficient for conviction and it is always termed as a corroborative piece of evidence. It is settled law that one tainted piece of evidence can't corroborate another tainted piece of evidence.

10. The prosecution mainly relied upon the identification of the accused and so did the trial Court, but it is yet to be tested as to whether the convicts/appellants

were seen at the time of occurrence and as to whether any description was given in the FIR. The question as to whether the witnesses could identify the convicts/appellants at the time of occurrence can better be answered if both the FIR and supplementary statement of witnesses are placed together and on doing so, this Court reaches to the conclusion that the convicts/appellants were not identified by the witnesses at the time of the occurrence and the supplementary statement was in fact a dishonest improvement to create a link between the occurrence and the appellants. The glaring contradictions between the two documents exposed the honesty of the witnesses and the conscious attempt by the police to persuade the complainant to change his earlier stance. The convict/appellant Sir Syed was arrested on 17.8.2015, whereas his identification parade was conducted on 04.9.2015. the convict Sir Syed was repeatedly taken to custody and was in the police lockup for long time so there is every possibility of his having been shown to the witnesses and that was the reason that at the time of identification, he raised objection that while in lockup he was shown to the witnesses and even the Judicial Magistrate in whose supervision the identification parade was conducted admitted the same.

In case titled Muhammad Afzal alias
Abdullah and others Vs. The State and another (2009
SCMR 436), it was held that:-



"It is also explicit on record that prior to holding of the identification test accused persons had complained to P.W.7, the Magistrate, who had supervised the identification test that they were shown to the identifying witnesses and the Magistrate in the course of his statement, at the trial, has in unequivocal terms admitted that he had received such complaint. Another fact which impairs evidentiary value to the identification test is that accused persons were produced before P.W.7 initially on 3-11-2000 but the test was put off and was conducted on 7-11-2000 as a result of freshly made application dated 6-11-2000 and no reason whatsoever for the delay was shown. In the circumstances the possibility that the test was delayed purposely in order to show the accused persons to the identifying witnesses, could not have been ruled out. The evidence of identification, in the circumstances, was of no help to the prosecution".

Convict Salim Gul and Afshan were arrested on different dates and after a long time their identification was conducted but the record is still silent as to how, who and when they were introduced by names in the case and yet again no statement in this respect was recorded. Though the identification parade was conducted through the witnesses, but none of the witness gave specific role to any of the appellant at the time of occurrence and even they did not specify that who out of the accused snatched the amount and that what was the accused whose face got

exposed at the time of grappling. The witnesses frankly conceded in their Court statements that they did not remember the kind of clothes the convicts/appellants were wearing at the time of identification. They further stated that the dummies arranged for the purpose were of different heights and body structure and they even admitted that some of the dummies were having beards and some not, when this was the situation then how this Court will rely upon the identification parade where no rule and procedure was followed.

In the case titled Ghulam Rasul and others



Vs. The State (1988 SCMR 557), it was held that:-


"Role of accused at the time of commission of the offence was not described by the witnesses, it has held that evidence of witnesses identifying accused in such identification parade had lost its efficacy and therefore could not have been relied upon. In a number of cases it has been laid down by this Court that identification test in the absence of description of the accused in the F.I.R. is of no value. Reference in this regard may usefully be made to the cases report as (i) Ghulam Qadir v. The State 2008 SCMR 1221, (ii) State/Government of Sindh v. Sobharo 1993 SCMR 585 and (iii) Ismail and another v. The State 1974 SCMR 175".

11. The prosecution witnesses remained inconsistent throughout and nothing was brought on record which could connect the convicts/appellants with commission of the offence. Judged from all angles and considered from all aspects after fair appraisal of evidence,

we are of the firm and considered view that the prosecution has miserably failed to establish its case against the appellants. Resultantly, these appeals are allowed and the convicts/appellants are acquitted of the charges and they are to be released forthwith if not required to be detained in connection with any other criminal case. The connected criminal appeal, bearing Cr.A. No.299-B/2016, filed by the State, stands dismissed as the appeals of the convicts/appellants have been allowed.

Announced.
Dt: 03.03.2020.
Kifayat/*


JUDGE

JUDGE


20-04-2020

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah