

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.676-P/2011

1. Fayaz Khan son of Noor Islam; and
2. Naseeb Khan alias Shina s/o Muhammad Rasool,
both residents of Afghanistan, presently at Regi Lalma,
Peshawar.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellants :-	<u>M/S Javid Ali and Syed Duran Shah,</u> <u>Advocates</u>
For State :-	<u>Mr. Mujahid Ali Khan AAG.</u>
For complainant :-	<u>Mr. Hussain Ali, Advocate.</u>
Date of hearing:	<u>20.11.2019</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- At a trial held by learned trial Court/Additional Sessions Judge-II, Nowshera, accused Fayaz Khan, Naseeb Khan alias Shina and Aslam Khan alias Toray, having been found guilty of committing murder of a police Constable, namely, Iqbal Jadoon deceased and making an attempt at the life of Constable Hawaldar (PW.3), as well as causing him firearm injuries, have been convicted and sentenced as under:-

Under section 302(b) PPC:- To undergo imprisonment for life and to pay Rs.1,00,000/- each, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. and in default thereof to undergo 01 years S.I. each.

Under section 324 PPC:- To undergo seven years rigorous imprisonment (R.I) each and to pay Daman to the tune of Rs.70,000/- each to

injured Hawaldar within the meaning of section 337-F (vi) PPC.

2. Through the instant appeal, convicts Fayaz Khan and Naseeb Khan and through connected Cr.A. No.699-P/2011, convict Aslam Khan, have questioned their conviction and sentences, whereas, complainant-injured Halwadar Khan has filed **Cr.R. No.25-P/2017**, seeking enhancement of sentences of the convicts/respondents from life imprisonment to normal penalty of death as provided for the offence.

3. Since, all the three matters are emanating from one and the same judgment of the learned trial Court dated 13.10.2011; therefore, we propose to decide the same through this single judgment.

4. The prosecution case as unfolded in First Information Report (“FIR”) is that on 29.03.2009 at 2115 hours, complainant, namely, Hawaldar, a police Constable (PW.3) reported to Saleem Khan S.I. (PW.8) in District Headquarter (DHQ) hospital Noshera Kalan to the effect that on the fateful night he and Constable Iqbal Jadoon deceased, were on rider duty in ASC Colony, Nowshera. At 2020 hours, they came across three young persons of middle height duly clad/covered in shawls “*Chadar*” at double road ASC Colony. No sooner, they commanded them to stop, they (the three persons) opened fire at them with their respective pistols, as a result, Constable Iqbal

Jadoon got hit and died at the spot, whereas he (complainant) sustained firearm injuries. According to his report, he can identify the three culprits, if brought before him. Muhammad Saleem S.I (PW.8) recorded his report in the shape of Murasila Exhs.PA/1 and prepared his injury sheet Exh.PW.PM/2. He also prepared injury sheet and inquest report Exh.PW.8/1 and Exh.PW.8/2, respectively, of the deceased. He referred the injured to Medical officer for examination and shifted the dead body to the mortuary for postmortem examination. Dr. Abdul Jalil (PW.1) conducted autopsy on the dead body of Iqbal Jadoon deceased on 29.03.2009 at 8.55 p.m. He also examined the injured complainant on the same date and time.

5. The task of investigation was handed over to Swab Gul S.I. (PW.9), who proceeded to the spot and prepared site plan Exh.PB. During spot inspection, he recovered 06 empties of 30 bore Exh.P.1, a spent bullet Exh.P.2, a splinter of spent bullet Exh.P.3 and bloodstained pebbles from the places of the deceased and injured, in presence of witnesses vide recovery memo Exhs.PC. Vide recovery memo Exh.PC/1 he took into possession the last worn bloodstained uniform of deceased constable Iqbal Jadoon having cut and bullet marks and bloodstained police uniform of injured Hawaldar in presence of witnesses. Similarly, vide recovery memo Exh.PC/2 he took into possession 05 empties of 7.62 bore from the spot lying in

scattered condition. Through recovery memo Exh.PC/3 he took into possession official motorcycle 125 Exh.P.17 on which at the time of occurrence injured and the deceased were riding/performing their duties. Remaining investigation was conducted by Shakeel DSP (PW.10), who on 04.04.2009, recorded statements of one Gul Malook Khan a watchman (chowkidar) in the vicinity of the place of occurrence and Gul Said under section 161 Cr.P.C. On 10.04.2009, the appellants were arrested by Manzoor Khan SHO Police Station Nowshera Cantt and were handed over to (PW.10), who obtained their two days physical remand. During interrogation, appellant Fayaz led the police to the place where he had kept his cloths and chappal Exh.P.20, P.21 and P.22, worn by him at the time of occurrence, which PW.10 took into possession vide pointation/recovery memo Exh.PW.10/7. On joint pointation of all the appellants, the shawls (chadar) worn by them at the time of occurrence were also recovered and taken into possession vide recovery memo Exh.PC/3. The 30 bore pistol Exh.P.15 used by appellant Fayaz in the instant case was recovered from him by the Seizing Officer in case FIR No.291 PS Noshara Cantt, and the same was handed over to PW.10 which he took into possession vide recovery memo Exh.PC/6. Similarly, vide recovery memo Exh.PC/6 he also took into possession 30 bore pistols recovered from appellant Aslam and Naseeb in the

aforesaid FIR. He recorded statements of the PWs, placed on file the FSL report Exh.PZ and application Exh.PW.10/8 for identification parade of the appellants.

6. On 12.04.2009, injured complainant Hawaldar recorded his statement under section 164 Cr.P.C. wherein he charged the appellants for commission of the offence.

7. On completion of investigation, challan was submitted against the appellant before the learned Anti-Terrorism Court, where on the application of defence, the case was transferred to the Court of learned Sessions Judge, Nowshera vide order dated 09.02.2010 for trial of the appellants. The above said order was assailed by the complainant before this Court in Writ Petition No.858/2010, which was allowed, consequently, the case was remanded to the learned Anti-Terrorism Court, with the direction that the question of jurisdiction be decided after recording evidence of the prosecution. On conclusion of trial, the learned Anti-Terrorism Court once again transferred the case to the Sessions Judge, Nowshera, vide order dated 28.06.2011, where fresh charge was framed against the appellants and fresh trial commenced, but learned counsel for the parties agreed to rely on the evidence already recorded before the learned Anti-Terrorism Court, hence, learned counsel for the parties were heard and vide impugned judgment, the appellants

were convicted and sentenced, as mentioned in Para No.1 of the judgment, hence, these appeals and revision.

8. We have heard the exhaustive arguments of learned counsel for the parties except counsel for appellant Aslam who did not turn up despite service and date by court. We have also perused the record, available evidence and the impugned judgment of the learned trial Court.

9. Ocular account of the occurrence has been furnished by injured complainant Hawaldar Khan (PW.3). In his initial report he charged three unknown culprits, without disclosing their features, however, described them covered with shawl (Chadar). He while appearing as PW.3, to some extent reiterated the same story set forth by him in his initial report Exh.PA/1, however, he introduced certain new events which do not find mention in his initial report such as **“that at the time of occurrence they were riding on a motorbike which was being driven by Iqbal Jadoon deceased and he was sitting behind him. Iqbal Jadoon deceased told him that they would spend some time in the ASC Colony because there were complaints of theft and dacoity by gangs. I also made fire in myself defence with my official Kalashnikov. Two accused decamped/escaped towards southern side while one fled away towards street”**. In his initial report he has not disclosed the aforesaid circumstances and this factum has been admitted by him in his cross examination. He

deposed that the above mentioned circumstances/events were disclosed by him in his supplementary statement recorded under section 161 Cr.P.C. on 12.04.2009 i.e. after a delay of more than 12/13 days of the occurrence as well as after arrest of the appellants on 10.04.2009. It appears from daily diary No.39 dated 10.04.2019 that Manzoor Hussain SHO on 10.04.2009 at 1800 hours, on receipt of spy information about presence of the appellants in a ravine (khwar/Algadda) of Madina Colony, Nowshera, along with other police officials rushed to the spot and arrested the appellants. He allegedly recovered a 30 bore pistol from folding of each of the appellants. The daily diary (ibid) was sent to Police Station Nowshera Kalan for registration of case under section 13 West Pakistan Arms Ordinance against the appellants, however, record is silent about registration of FIR on 10.04.2019 against the appellants on the said daily diary. Neither in initial report Exh.PA nor in supplementary statement, the injured complainant has stated a single word as to how and by whom he and the dead body of the deceased were shifted to the hospital. In the supplementary statement he has also not disclosed the source of information on the basis of which he got satisfied about complicity of the appellants in the commission of offence. No doubt, identification parade of the appellants has been conducted through him but on one hand, it has been conducted on 20.04.2009 i.e. on the

10th day of arrest of the appellants and on the other hand, by then the appellants were already nominated by the complainant in his supplementary statement recorded on 12.04.2019 by Investigating Officer Shakeel Khan (PW.10). Besides, the factum of joint identification parade of the appellants has been admitted by the complainant in his cross-examination by deposing that all the three appellant were standing in one row along with other dummies 15/20 in number at the time of identification parade. Similarly, the fact of joint identification parade of the appellants has also been admitted by Muhammad Inam Ullah Judicial Magistrate (PW.2), who had conducted identification parade in sub-jail Nowshera.

10. During investigation one Malook and Gul Said were introduced as Chowkidar in the vicinity of the place of occurrence. The former had seen two persons wearing black and grey clothes decamping from the spot. The latter has been abandoned while the former has been examined as (PW.4). Statement under section 161 Cr.P.C. of the said Malook Khan had been recorded by the I.O. on 04.04.2009 i.e. after six days of the occurrence. He while appearing as PW.4 deposed that:-

“I am working as Chokidar in plot situated at ASC colony.

I used to reside there in a room even at night time. I used to be armed. On the night of occurrence at 8.00/8.30 p.m.

I heard report of fire shot. I woke up and sat in my

Charpai. I noticed that one/two persons were running and they came across me, one was having grey clothes and the other was having black colour clothes. The person who was wearing grey clothes was having small beard and was holding a **rifle in his hand**. I flashed the torch and **saw the person wearing black clothes** was not moving smooth. He was being obstructed by bushes, in fact he was dwindling whereas the person in grey clothes was running smoothly. **I also made a few fire with my Kalashnikov** to scare the accused. I suspected them to be thieves. Later on, I came to know that two police officials were shot. My statement under section 161 Cr.P.C. was recorded in which I have stated that whenever accused came before me I can identify them. I was summoned to jail where I identified two of the accused before the Magistrate and superintendent of Jail, Peshawar". (**Bold and underlines are for emphasis**).

11. As per FIR, the occurrence has taken place on 29.03.2009, whereas statement of Malook Khan (PW.4) under section 161 Cr.P.C. has been recorded by the I.O. on 04.04.2009. Record suggests that on the night of occurrence Swab Gul SI (PW.9) proceeded to the spot, prepared site plan and effected recoveries from the spot, but he did not found PW Malook Khan there, however, after six days, PW Malook emerged and recorded his statement without giving any explanation as to why he remained mum till 04.04.2009. Similarly, the I.Os of the case has also not bothered to furnish any explanation as to

why PW Malook was not examined on the very first day of the occurrence. Statedly, PW Malook Khan was Chowkidar in Plot situated at ASC Colony, but hesitantly he did not disclose the name of owner of the Plot nor furnished any information about his master. No other person from the vicinity of the crime spot has been produced to substantiate that PW Malook was serving as Chokidar near the spot during the days of occurrence. No empty of the fire shots allegedly made by PW Malook Khan has been taken into possession by the I.O. nor have ever been produced by PW Malook Khan to the I.Os. In cross-examination PW Malook Khan deposed that the distance between him and the accused was about 2/3 paces when he noticed them. He further deposed that when he made fire on the culprits they were at a distance of 150 paces from him. This part of statement of PW Malook Khan is also unbelievable, because if the three culprits were so desperate and dangerous that they could not be searched by police officer, rather they opened fire at the police, then how an ordinary man would be so courageous to dare putting flash light on their faces, in such a foolhardy occasion. The culprits, whose hands were coloured with the blood of police officials, would not have spared PW Malook Khan. Surely PW Malook is neither an eyewitness of the occurrence nor was in the know of firing by the culprits on police officials, rather, as per his

statement at the crucial time he was sleeping and on report of fire shot woke up and sat in his Charpai. He is also not sure as to whether he saw one or two persons running and came across him. According to his assertion, he noticed one/or two persons from a distance of 2/3 paces and in flesh light of his torch saw that person wearing black clothes was not moving smoothly, while the other one wearing grey clothes having small beard was carrying rifle in his hand. In the initial report, the injured complainant has categorically mentioned pistols in the hands of the culprits on which they committed the crime. Not a single word has been mentioned by the complainant about any rifle in possession of the culprits. Since, 5 empties of 7.62 bore have also been shown recovered from the spot, therefore, PW Malook in order to bring his testimony in line with the spot position, stated about rifle in hand of one of the culprits. The entire story fetched up by PW Malook is neither believable nor appealable to a prudent mind. Sparing of Chowkidar by the desperate vagabonds, who purportedly have committed murder of a police official, particularly, in a situation when the Chowkidar flashed his torch on their faces from a distance of two/three paces, is unbelievable and improbable. Neither the alleged torch was produced by PW Malook to the I.O nor has the prosecution bothered to make demand for its production, which led one to draw inference that neither PW Malook

was present in the vicinity of the spot nor was he having torch in his possession, rather his own statement is sufficient to falsify and distort his fictional presence near the spot. Moreso, in view of the above observations question as to whether Malook was present near the place of occurrence as Chowkidar, made fire from his Kalashnikovs at the culprits and noticed two persons in torch light, has remained shrouded in mystery, hence, his evidence is not credible or worthy of credence. This PW also has also admitted in his statement that he identified the appellants in a joint identification parade conducted inside the jail by the Judicial Magistrate.

12. Supplementary statement of complainant Hawaldar and statement under S.161, Cr.P.C. of PW Malook Khan being recorded after sufficient delay without any tangible and plausible explanation, must vanish its sanctity, and would not be held confidence inspiring.

13. Similarly, joint identification parade of the appellants through the PWs (complainant and Malook Khan) that two without attributed specific role by them to each appellant, has no value in the eye of law, as per ratio of judgment of the Hon'ble Supreme Court in case titled, **“Mian Sohail Ahmad and others Vs the State” (2019 SCMR 956).** Identification parade is always held for two purposes; one to establish identity of the culprits and secondly to pinpoint the role played by each culprit in the

commission of offence. In case titled, “**Hakeem and others vs the State**” (2017 SCMR 1546). it has been held by the Hon’ble supreme Court that:-

“We have gone through the statements made by the supervising Magistrates i.e. PW.5 and PW.10 as well as the proceedings of the test identification parades and have straightaway noticed that in the said parades the present appellants had not been identified with reference to any role played by them in the incident in issue. It has consistently been held by this Court that such a test identification parade is legally laconic and is of no evidentiary value and a reference in this respect may be made to the case of **Khadim Hussain v the State(1985 SCMR 721), Gulam Rasul and 3 others vs the State (1988 SCMR 557), Asghar Ali alias Sabah and others v the State and others (1992 SCMR 2088), Mehmood Ahmad and 03 others v the State and another (1995 SCMR 127), Siraj ul Haq and another v the State (2008 SCMR 302), Ghulam Qadir and 02 others v the State (2008 SCMR 1221), Shafqat Mehmood and others v the State (2011 SCMR 537), Sabir Ali alias Fauji v the State (2011 SCMR 563) and Muhammad Fayyaz v the State (2012 SCMR 522).**”

The august Supreme Court in the judgment (supra) while dilating upon the evidentiary value of the joint identification parade of accused has held that :-

“This Court in case of Bacha Zeb v the State (2010 SCMR) after relying upon earlier decision of this Court in case of Lal Pasand v the State (PLD 1981 SC 142), held that it would be unreasonable to mix five accused person with several other persons for the purposes of identification as such a large number of persons would only confuse the identifying witnesses

and *the proper course is to have separate identification parade for each accused. Keeping in view the manner in which the identification parade was held, such identification parade cannot be relied upon...*. (emphasis supplied).

Similar view has been adopted by the Hon'ble Supreme Court in a recent judgment, rendered in case titled, **"Mian Sohail Ahmad and others Vs the State and others"** (2019 SCMR 956) that:-

“Placing two or more suspects jointly in an identification parade (or joint parade), tarnished the homogeneity, sameness and identicalness of the members of the parade and defeat the very purpose of having a test identification parade”.

14. Adverting to the positive FSL report Exh.PZ/2 about the 30 bore pistols allegedly recovered from the appellants at the time of their arrest and the 06 crime empties of 30 bore from the spot, record depicts that on 10.04.2009, all the three appellants have been shown arrested by Manzoor Hussain SHO (now dead) at 1800 hours in the ravine (khwar/Algadda) of Madina Colony in the limits of ASC Nowshera and 30 bore pistol without number, has been shown recovered from folding of each of the appellant vide daily diary No.39 dated 10.04.2009. The said daily diary has been forwarded to the Police Station Nowshera Cantt but amazingly no FIR has been registered against the appellants in the said Police Station on 10.04.2009, rather FIR No.292 dated 12.04.2009 under

section 13 A.O. has been shown registered against the appellants by said Manzoor Hussain SHO on the basis of separate Murasila, wherein two Kalashnikovs have been shown recovered on the pointation of appellants, namely, Naseeb Khan and Aslam Khan. No private person has been associated with the proceedings of arrest of the appellants and alleged recovery of pistols from their possession. Besides, arrest of the appellants from a ravine in the limits of ASC, Nowshera also pinch a prudent mind because it is not believable that culprits committing murder of police would still prefer to remain in the surroundings of the crime spot. Besides, recovery of 30 bore pistols without number from folding of each of the appellants also seems just filling in the blanks as such like pistols can easily be managed/purchased from the Arms dealers available in each and every market. Thus, recovery of the 30 bore pistols from possession of the appellants and positive FSL report Exh.PZ/2 in respect thereof is nothing but planted and procured evidence on the part of police to strengthen the prosecution case where one police constable has been done to death and another was injured.

15. As regards recovery of two Kalashnikovs on the pointation/discovery of appellants Naseeb Khan and Aslam Khan, the same had been shown recovered from the fields, which were allegedly thrown by them after commission of the offence. On one hand, the alleged recovery has been

shown on joint pointation of the two appellants; while on the other hand, no role of firing by Kalashnikovs has been attributed to any of the accused by the complainant-injured. According to report of injured Hawaldar the culprits fired at them with their pistols. He has not stated a single word about Kalashnikovs in the hands of any of the culprits or using the same in the occurrence. As stated earlier, since 05 empties of 7.62 bore have also been shown recovered from the spot, therefore, the I.O. in order to bring in line the case with spot position, has shown this planted and fake recovery of Kalashnikovs on the pointation of the appellants. For the sake of discussion, if the appellants after commission of the offence were still having in their possessions the crime pistols then it does not appeal to a prudent mind that they would have thrown the Kalashnikovs in the fields because Kalashnikovs being automatic weapons were necessity needed for their protection as compared to 30 bore pistols. In this view of the matter, we are of the considered view that recovery of Kalashnikovs on the pointation of the two appellants is concocted and planted evidence on the part of Manzoor Hussain SHO.

16. Recovery of blood stained pebbles, the last worn bloodstained police uniform of the deceased and injured constable, positive serologist report in respect thereof coupled with autopsy report of the deceased and medico

legal report of the injured establish the crime spot to be the same as alleged by the injured complainant and that they have sustained firearm injuries, but it does not disclose the names of culprits. An iota of evidence either direct or circumstantial is not available on file to prove beyond shadow of reasonable doubt, that appellants were the perpetrators of the occurrence. Such pieces of supporting and corroborative evidence are always taken into consideration along with direct evidence and not in isolation. In support, reliance can be placed in on the judgments rendered by the Hon'ble apex court in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541)**. Besides, in case titled, **"Saifullah vs the State" (1985 SCMR 410)**, it has been ruled by the Hon'ble Supreme Court that:-

“When there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery”.

For the reasons discussed above, we are firm in our view to hold that prosecution has miserably failed to prove the guilt of the appellants through cogent and confidence inspiring direct evidence or circumstantial evidence making an unbroken chain, one end of which touch the dead body of the deceased and another end the neck of the appellants. The prosecution evidence is pregnant with confusions and compounding statements of witnesses

belied by circumstances create serious doubts in the case, benefit of which should have been extended to the appellants but the learned trial Court by not appreciating the evidence in its true perspective landed into the field of error by holding the appellants guilty of the offence. As per golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused.

17. Accordingly, this appeal is allowed, conviction and sentences of the appellants/convicts recorded vide impugned judgment dated 13.10.2011, are hereby set-aside and they are acquitted from the charges leveled against them. They be set at liberty forthwith, if not confined in any other case.

18. On acquittal of the convicts, the connected **Cr.R. 25-P/2017, titled, "Hawaldar Khan vs Fayaz Khan etc"**, has become infructuous, which is hereby dismissed.

18. These are the reasons of our short order of even date, which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentences of the appellants, namely, Fayaz Khan son of Noor Islam and Naseeb Khan salias Shina son of Muhammad Rasool, recorded by the learned trial Court/ASJ-II, Nowshera under sections 302 (b), 324 and 337-F(vi) PPC, vide judgment dated 13.10.2011, in case FIR No.261 dated 29.03.2009, registered under sections

302/324/353/34 PPC, at Police Station Nowshera Cantt and they are acquitted of the charges leveled against him in the cited case. They be set at liberty forthwith, if not confined in any other case.

Announced:

20.11.2019

M.Siraj Afridi PS

JUDGE

JUDGE

**DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Muhammad Nasir Mehfooz.**