

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Dost Muhammad Khan

Mr. Justice Qazi Faez Isa

Mr. Justice Faisal Arab

Criminal Appeals No. 126 & 127/2010.

(On appeal against the judgment dated 16.04.2009 passed by the Lahore High Court, Rawalpindi Bench in CrI. A. No. 268/2003 & M. R. No. 425/2003 and CrI. Rev. No. 140/2003)

Javed Khan alias Bacha. (in CrI. A. 126/2010)

Raees Khan. (in CrI. A. 127/2010) Appellant(s)

Versus

The State and another. (in both cases) Respondent(s)

For the Appellant(s): Mr. Altaf Elahi Sheikh, Sr. ASC.
Syed Rifaqat Hussain Shah, AOR.

For the State: Rana Abdul Majeed, Addl. PG.

For the Complainant: Mr. Ansar Nawaz Mirza, ASC.
Mr. Ahmed Nawaz Ch., AOR (Absent)

Date of Hearing: 19.01.2017.

JUDGMENT

Qazi Faez Isa, J.- These two appeals arise out of a common judgment of the Rawalpindi Bench of the Lahore High Court whereby the conviction awarded by the Additional Sessions Judge, Rawalpindi to the appellants for the murder of Haji Muhammad Hazir was upheld and Raees Khan was sentenced to death and Javed Khan to imprisonment for life. However, their conviction under section 392 of the Pakistan Penal Code ("**PPC**") was set aside and substituted with section 394 PPC read with section 34 PPC and sentenced them to 10 years rigorous imprisonment each and with a fine of fifty thousand rupees each.

2. Nasir Mehmood, the son of the deceased, had reported the crime to the Police whereby a First Information Report (FIR No.513/2000) was lodged on 24.9.2000 at 2:05 pm in respect of

the murder of his father which, as per the FIR, took place earlier the same day at 11:45 am. The case of the prosecution against the appellants was that the appellants came to the general store run by Haji Muhammad Hazir with the intention to rob him however as he resisted the appellants fired on him from close range and decamped on a motorcycle. The Complainant was a prosecution witness (PW-5) and stated that when he heard the gunshot he rushed from his bakery, situated adjacent to the general store of his father, and saw a person inserting a pistol into his *dub* underneath his shirt/*kameez*. In the FIR it was stated that, in addition to the Complainant, Muhammad Idrees (PW-7), Muhammad Sheraz and Muhammad Yasir can also recognize the assailants. However, the FIR did not describe the assailants other than stating that they were between 25-30 years old and were wearing *shalwar kameez*. The two stated eyewitnesses, Muhammad Sheraz and Muhammad Yasir, were not produced by the Prosecution during the trial.

3. No progress was made in tracing out the culprits of the crime till Sub-Inspector Razaqat Hussain (PW-21) took over the investigation on 14.9.2001, and when on this very day he learnt through "spy information" that Raees Khan, who was in custody in another case (FIR No. 237 dated June 29, 2001), was one of the perpetrators. Therefore, Raees Khan's identification parade was conducted on 29.9.2001 (Exhibits P.O/1) within the jail premises by Magistrate Farooq Alvi, however, the Magistrate was not produced as a prosecution witness because he had gone abroad for training. Raees Khan was identified by Nasir Mehmood (PW-5, Exhibit PP/1-2) and by Subedar Mehmood Ahmad Khan (PW-6, Exhibit P.O/1) to be one of the culprits. Raees Khan was then arrested in the present case on 7.10.2001 and on 14.10.2001 he is stated to have disclosed that his brother Javed Khan was his accomplice in the crime. Javed Khan was then arrested and his identification parade was conducted by Special Judicial Magistrate, Amjad Saeed (PW-15) on 15.11.2001 in jail where Nasir Mehmood (PW-5) and Subedar Mehmood Ahmed Khan also identified him (Exhibit PL) as the other culprit.

4. The learned counsel for the appellants stated that the entire case of the prosecution rests on the identification parades, however, reliance cannot be placed thereon, because: (1) the identification proceedings' reports specifically record the objection of the appellants that their identity had been earlier revealed to the witnesses and the Magistrates did not attend to this crucial aspect; (2) the Complainant (PW-5) had not provided particulars of either of the appellants in the FIR or in his statement recorded under section 161 of the Criminal Procedure Code ("**Cr.P.C.**"); (3) neither the FIR nor the section 161 Cr.P.C. statement of the Complainant mentioned that Subedar Mehmood Ahmed Khan was present at the place of occurrence, therefore, he was not an eyewitness who could be called upon to identify the appellants; Muhammad Idrees (PW-7), who was mentioned in the FIR as a purported eyewitness, was not called to participate in the identification proceedings; the identification parades took place on 29.09.2001 and 15.11.2001, which was more than a year after the date of the murder, therefore, it was unbelievable that witnesses who had a fleeting look at the assailants would still be able to identify them.

5. That as regards the forensic report, which mentions that the bullet casing matched with the pistol the learned counsel for the appellants stated, that a deformed bullet and casing is stated to have been received by the Forensic Science Laboratory on 6.10.2000 however there is no document on record to show when and how the same was delivered. He referred to the statement of Constable Sher Muhammad (PW-3) who stated that on 3.10.2000 he had received three parcels of which one was to be delivered to the Chemical Examiner, Lahore which he delivered on 4.10.2000 whereas the two parcels to the Forensic Science Laboratory, Lahore, which contained a bullet and casing respectively, were delivered on 6.10.2000 and there is no explanation for this delay. Therefore, the contents of the sealed parcels delivered to the Forensic Science Laboratory could have been tampered with, particularly when it was not stated what kind of seal (with any distinguishing mark) was affixed on the sealed parcels as neither the policeman Muhammad Khaliq (PW-4) who had collected the bullet and the casing, *Moharrir* Tanvir Ahmed (PW-10) who gave

them to Constable Sher Muhammad (PW-3) for onward delivery to the Forensic Science Laboratory's report (Exhibit PX) mentioned this nor was the type of seal affixed on the sealed parcels mentioned in the report of the Forensic Science Laboratory.

6. The learned Additional Prosecutor General of Punjab and Mr. Ansar Nawaz Mirza, the learned counsel for the Complainant, stated that both the trial Court and the High Court had found the appellants guilty; that there was no enmity of the Complainant with the appellants to falsely implicate them; that the Complainant and Subedar Mehmood Ahmed Khan (PW-6) were eyewitnesses of the crime and had identified both the appellants in the identification parade and before the trial court; Muhammad Idrees (PW-7) had identified the appellants in Court; and the pistol that was recovered in the other case had connected the appellants with the crime, therefore, when all these facts are taken together they are sufficient to maintain the conviction of the appellants.

7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sind 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In Alim v State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him

before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In Lal Pasand v State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Imran Ashraf v State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P).

8. The Complainant (PW-5) 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 he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. 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 of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect. There is yet another aspect to the matter of identification of the culprits of this case. The Complainant had named three other persons who could recognize the assailants, but he did not mention Subedar Mehmood Ahmad Khan (PW-6) as one of them. Nonetheless Subedar Mehmood Ahmad Khan came forward to identify the appellants. Significantly, none of the three persons mentioned by the Complainant participated in the identification proceedings and two were not even produced as witnesses by the Prosecution. During the identification proceedings both the appellants had informed the Magistrates who were

conducting the identification proceedings, and before the identification proceedings commenced, that they had earlier been shown to the witnesses. The Magistrates recorded this objection of the appellants in their reports but surprisingly did not attend to it, which can only be categorized as a serious lapse on their part. Therefore, for all these reasons reliance can not be placed upon the report of the identification proceedings in which the appellants were identified.

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) and Idrees Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eyewitnesses who had seen the culprits fleetingly once would be inconsequential.

10. As regards the matter of matching the bullet casing with the pistol, it is not free from doubt. The Police allegedly recovered the pistol stated to have been used in the crime in another case (FIR No.237 dated 29.6.2001) however the pistol was sent to the Forensic Science Laboratory on 7.1.2002, whereas the investigation officer stated that Raees Khan disclosed using the same weapon in this crime on 14.10.2001; the delay in sending the

pistol was not explained. Neither the Forensic Science Laboratory nor any of the policemen, who had retrieved the bullet and its casing and had kept them in custody and then delivered them to the Laboratory, mention the marks affixed on the seals affixed on the parcels in which the said items were delivered to and received by the Laboratory. Under such circumstances it would not be safe to uphold the conviction of the appellants merely on the basis of the firearm expert's report because of the legitimate concerns about when and how the bullet casing and pistol were delivered to the Forensic Science Laboratory.

11. There are certain other aspects of the case that also require to be considered. Subedar Mehmood Ahmad Khan (PW-6) testified that he had gone to buy a bag of flour from the general store of the deceased despite there being several shops along the 4 kilometers route to the said general store from his residence which also sold flour. He also stated that he was not a regular customer of the deceased. Under such circumstances he would be categorized as a chance witness and one who had not explained his presence at the place of occurrence. Then there is the matter of Sub-Inspector Rafaqat Hussain (PW-21) who on the very day he had been assigned the investigation of the case had managed to connect Raees Khan with the crime, stating that he did so on the basis of "spy information", but without disclosing the nature of this spy information which had most conveniently and immediately become available to him.

12. In view of the aforesaid examination of the material and the applicable precedents it would not be at all safe to uphold the convictions of the appellants. We had allowed these appeals and had acquitted the appellants of all charges, vide our short order dated 19.1.2017, reproduced herein below:

"For the reasons to be recorded later on, these appeals (Criminal Appeal No. 126/2010 and Criminal Appeal No. 127/2010) (Javed Khan alias Bacha and Raees Khan) are allowed. Their conviction and sentences upheld by the learned Lahore High Court, Rawalpindi Bench, Rawalpindi, vide impugned judgment dated 16.4.2009 are set aside.

2. Accordingly, both the appellants are acquitted of all the charges leveled against them. Thus, they be set free forthwith, if not required in any other case."

The reasons given in this judgment are the reasons for the short order reproduced above.

Judge

Judge

Judge

ISLAMABAD.
20.01.2017.
(Farrukh)

Approved for Reporting.