IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH

APPEAL NO.35-Q OF 2007

ABDUL NABI SON OF HAJI ABDULLAH JAN, CASTE KAKAR, MACHERZAI RESIDENT OF KILLI SAMKHEL, MUSLIM BAGH.

APPELLANT

VERSUS

1. AMEENULLAH SON OF SAADULLAH.

2. SAADULLAH SON OF AWAL KHAN.
BOTH R/O KILLA SAIFULLAH.

3. ABDUL RAUF ALIAS MUHAMMAD RAFIQ SON OF MUHAMMAD RAMZAN, KILLI SARGARH, MUSLIM BAGH.

4. THE STATE.

RESPONDENTS

COUNSEL FOR THE APPELLANT	…	MR ABDUL NAFAY, ADVOCATE
COUNSEL FOR THE RESPONDENTS NO. 1 & 2	…	MR. FAIZULLAH KHAN KAKAR, ADVOCATE
COUNSEL FOR RESPONDENT NO.3	…	NO REPRESENTATION
COUNSEL FOR THE STATE	…	MR. SAEED AHMED ADVOCATE, ON BEHALF OF PROSECUTOR-GENERAL, BALUCHISTAN.
FIR NO. AND POLICE STATION	…	16 OF 2005 MUSLIM BAGH.
DATE OF JUDGMENT OF TRIAL COURT	…	25.07.2007
DATE OF PREFERENCE OF APPEAL	…	23.08.2007
DATE OF HEARING	…	28.03.2019
DATE OF DECISION	…	28.03.2019
DATE OF JUDGMENT	…	01.04.2019

JUDGMENT:

Mehmood Maqbool Bajwa, J: Judgment dated 25th July, 2007, handed down by a learned Additional Sessions Judge-IV, Quetta, recording acquittal in favour of respondents No.1 to 3 (Hereinafter called The Respondents) is under challenge by son of the complainant, citing him as appellant after the death of Abdullah Jan (P.W.1), complainant of case F.I.R. No.16 of 2005 registered under Section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) read with Sections 397, 398 and 457 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called Act XLV of 1860) at Police Station Muslim Bagh.

2. Naqeebullah, cited as respondent No.4, did not face trial before the learned Trial Court and as such his name was deleted through order dated 10th November, 2009.

3. Prosecution version in brief contained in the F.I.R., copy of which is (Ex.P.8-H) recorded on the strength of statement (Ex.P.1-A) of complainant (P.W.1) is that on the intervening night of 22nd and 23rd May, 2005, he alongwith his family members was sleeping in his house situated in Killi Samkhel, when four persons, armed with firearms entered in his house, made demand of key of vehicle and cash and on his refusal, overpowered him, resulting in raising of noise by him. Showing retaliation, the accused gave *Kalashnikov Butt* on his head and right side of face. The un-identified assailants entered in the adjacent room while breaking its door in which his son

Abdul Nabi (P.W.2) was sleeping, made similar demand and on resistance opened fire, causing injury on his abdomen and right leg. The family members sleeping in the house woke up. The accused confined all of them including children in the room. One son of complainant as per stance informed local police through mobile telephone, due to which, the accused managed to escape. Prior to leaving the place, they snatched Rado wrist watch from his another son, Molvi Abdul Manan (P.W.3) and mobile telephone from Abdul Nabi (P.W.2).

Perusal of the crime-report further reveals that inmates of the house intimated the complainant that five persons entered in the house and one remained at guard on the roof of the house.

4. The respondents alongwith others arrested due to their stated identification and availability of clue through tracking dog, faced trial alongwith one Aimal Khan and were acquitted. However, there is no grievance against the acquittal of later-mentioned person.

5. To prove the charge, prosecution produced eight witnesses including Abdullah Jan, complainant (P.W.1), Abdul Nabi (P.W.2), an injured eye-witness, Molvi Abdul Manan and Muhammad Ramzan (P.W.3 and P.W.4), sons of the complainant living under the same roof.

6. The respondents in their respective statements under Section 342 of The Code of Criminal Procedure, 1898 (Act V of 1898)

(Hereinafter called The Code), controverted the evidence suggesting their involvement.

Ameenullah and Abdul Rauf (respondents No.1 and 3) in order to disprove accusation also appeared as their own witnesses, raising plea of *"Alibi"*.

Abdul Rauf (respondent No.3) produced Noor Hussain (D.W.1) to substantiate his plea.

7. It is worth-mentioning that according to prosecution, Abdul Rauf (respondent No.3) is commonly known as Muhammad Rafique in the locality (Muslim Bagh), where at present, he is residing, controverted by the said respondent.

8. Learned Trial Court while appraising evidence formulated opinion about the inability of prosecution to prove its case against the respondents, recording acquittal through judgment assailed.

9. Learned Counsel for the appellant contended that the evidence led by prosecution comprising the complainant, Abdullah Jan (P.W.1), Abdul Nabi, appellant-injured eye-witness (P.W.2), Molvi Abdul Manan (P.W.3) and Muhammad Ramzan (P.W.4) (eye-witnesses) was not properly appreciated. Submitted that Abdul Nabi, injured eye-witness (P.W.2) implicated the respondents, attributing specific role but his evidence was disregarded without any justified cause, clearly suggesting the perversity of conclusion. Referring to the evidence of Sakhawat Hussain, A.S.I. (P.W.5) and memo of pointation of place of occurrence (Ex.P.5-M), it was submitted that

Ameenullah (respondent No.1) pointed out the place of occurrence, which aspect was also not taken into consideration.

Drawing our attention to the pointation of place of occurrence through tracking dog vide memo (Ex.P.5-L) and evidence of Sakhawat Hussain, A.S.I. (P.W.5), it was further submitted that the dog identified the house of Muhammad Rafique (Abdul Rauf), a strong factor against the said respondent but that too was not properly appraised.

Continuing the arguments, it was maintained that four empties and two live cartridges of Kalashnikov, pieces of wood of door were taken into custody vide memos (Ex.P.5-C, Ex.P.5-E and Ex.P.5-D), attested by Sakhawat Hussain, A.S.I. (P.W.5) but said piece of evidence was brushed aside on surmises and conjectures. Reference was also made to the recovery memo (Ex.P.5-F) through which one live cartridge of 30 bore pistol was taken into custody duly attested by Sakhawat Hussain, A.S.I. (P.W.5) , which according to the learned Counsel for the appellant was also a corroborative piece of evidence but the same was also not acted upon.

Placing reliance upon the evidence of Dr. Mubeen-ur-Rehman (P.W.6) and Dr. Muhammad Anwar (P.W.7) examining the complainant (P.W.1) and Abdul Nabi (P.W.2), it was contended that the evidence of both the witnesses and Medico-Legal Certificates (Ex.P.6-4 and Ex.P.7-A) provides corroboration to the ocular account, which too was ignored.

Highlighting the cumulative effect, it was maintained that the ocular account led by the prosecution, particularly the statement of Abdul Nabi, injured eye-witness (P.W.2) coupled with the medical evidence, pointation of place of occurrence and recovery of different articles was sufficient to prove the case of prosecution against the respondents beyond shadow of doubt and as such the judgment assailed is legally not sustainable.

10. On the other hand, learned Counsel for respondents No.1 and 2, who in the absence of learned Counsel for respondent No.3, also argued on his behalf, maintained that none of the respondent was named in the F.I.R. and case was registered against un-known accused. Submitted that evidence of Abdul Nabi (P.W.2) and Molvi Abdul Manan (P.W.3) deposing about the identification of respondents No.1 and 2 cannot be taken into consideration as the said witness (Abdul Nabi) while highlighting the mode of identification, maintained that he identified Ameenullah, respondent No.1 from his nose and hair. While (Muhammad Rafique) was recognized from his voice, nose and eyes.

It was further argued that no recovery was ever effected from any of the respondent. Continuing the arguments, went on saying, that no evidence was led to prove that Abdul Rauf (respondent No.3) is commonly known as Muhammad Rafique. Argued that Ameenullah (respondent No.1) and Abdul Rauf (respondent No.3) also appeared as their own witnesses, pleading *alibi*, which could not

be shattered in cross-examination. Further argued that Noor Hussain (D.W.1) appeared on behalf of respondent No.3 to substantiate his defence plea.

Learned law officer supported the stance of appellant while criticizing the judgment assailed but without pointing out any illegality or infirmity in the said judgment.

11. Yardstick for interference in the conclusion of acquittal stands on different footing. In order to set at naught the findings of acquittal, suggesting double presumption of innocence, one has to establish that reasons are artificial, shocking, made in utter disregard of evidence on record. Possibility of formation of opinion different from that of the court acquitting the accused subject to reasonable possibility of both the views hardly provides any justification for interference.[1]

12. First of all, we will re-appraise the evidence led by prosecution against Ameenullah and Saadullah (respondents Nos.1 and 2).

13. F.I.R. (Ex.P.8-H) was lodged by Haji Abdullah Jan (P.W.1). Perusal of the contents of the crime-report clearly reveals that case was registered against un-known accused. None of the respondents before us are named in the F.I.R. One also cannot find features and description of any of the assailant. The complainant (P.W.1) while

[1] "GHULAM SIKANDAR ANOTHER v. MAMARAZ KHAN AND OTHERS" (PLD 1985 SC 11)
"RAHIMULLAH JAN v. KASHIF and another" (PLD 2008 SC 298)
"MUHAMMAD TASAWEER v. HAFIZ ZULKARNAIN and 2 others" (PLD 2009 SC 53)
"MUHAMMAD ZAMAN v. The STATE and others" (2014 SCMR 749)

appearing as a witness also did not name any of the respondent as culprit and as such how his evidence can be acted upon in order to prove their culpability?

It is further to be noted that the complainant in his direct statement maintained that he saw the four accused in the light of bulb, which fact was not mentioned in *farad biayan* (Ex.P.1-A) upon the strength of which F.I.R. was lodged, clearly demonstrating element of improvement, putting the court at guard. Even if this aspect is ignored, it would not improve the case of prosecution in view of his failure to name any of respondent as an accused.

14. Abdul Nabi (P.W.2) is the injured eye-witness. Sustaining of injuries by him was heavily relied upon persuading us to act upon his evidence. Suffice it to say that injuries sustained by a witness is only indication of his presence at the spot but is not proof of his veracity. His credence has to be tested like any other witness.[1]

Presence of Abdul Nabi (P.W.2) at the spot cannot be questioned, which even otherwise is not fact-in-issue, being inmate of the house, supposed to be present at his residence and that too at the time of stated occurrence unless proved contrary.

The witness narrated the detail of occurrence, which is not required to be dealt with. He identified Naqeebullah son of Haji

[1] "SAID AHMAD v. ZAMMURED HUSSAIN AND 4 OTHERS (1981 SCMR 795)
"MUHAMMAD PERVEZ and others v. THE STATE and others" (2007 SCMR 670)
"NAZIR AHMAD v. MUHAMMAD IQBAL and another" (2011 SCMR 527)

Sarfraz, a proclaimed offender. His evidence to this extent is not required to be examined.

In the middle of his statement, he maintained that Ameenullah and Saadullah (respondents No.1 and 2) made fire, causing injury on his abdomen. He further stated that he identified Ameenullah (respondent No.1) from his nose and hair. Narrating the factum of identification of Saadullah (respondent No.2), he maintained that the said respondent though had muffled face but it was dropped when he was opening the cupboard. The said witness was taken to hospital and his statement was recorded on 30th May, 2005 by the official of Crimes-Branch. There is nothing on record to suggest when the said witness was found fit to make statement. However, leaving aside this aspect, the mode and manner of identification of both the respondents by the said witness does not appeal to the reason. Identification of respondent No.1 by the witness through nose and hair by no stretch of imagination can be said to be proper identification, particularly in the absence of specific stance regarding the provision of electricity in the room. Element of mistake cannot be ruled out even if there was provision of light. It is to be noted that the complainant (P.W.1) in his deposition maintained that he saw four persons in the light of bulb but as referred earlier, it was an improvement on his part as nothing was suggested in this regard in his statement (Ex.P.1-A), upon the strength of which F.I.R. was lodged. Similarly, the way he identified respondent No.2 also does

not appeal to the mind in view of non-availability of evidence regarding the provision of light. If the respondent No.2 had muffled his face, then it is beyond comprehension that his associates will enter in the house having naked faces.

Mode and manner of recognition shall also be dealt with while dealing with case of respondent No.3 having similarity with the case of respondent No.1.

15. Matter can be examined from another angle as well. The injured witness attributed role of causing firing to both the respondents on his abdomen. Attribution of role of firing jointly to both the respondents, clearly suggests that there should be more than one injury on the abdomen but the said fact stands negated in view of evidence of Dr. Muhammad Anwar (P.W.7), according to whom, he noted Injuries No.I and II on the right side of abdomen. Injury No.I is entry wound, while the Injury No.II is exit wound. Conflict of medical and ocular account is sufficient to put a dent in the case of prosecution with reference to role assigned to both the respondents. One also find injury on the right side of hip joint (Injury No.III) and Injury No.IV, is on right thigh medial side which is exit wound, not attributed to respondents No.1 and 2. The conflict puts a question-mark about the veracity and credibility of injured witness.

16. Molvi Abdul Manan (P.W.3), son of the complainant and real brother of appellant-injured, narrated the mode and manner of occurrence, also stating that he identified respondent No.1,

Ameenullah. However, he did not disclose how he identified the said respondent? We are conscious that the witness in cross-examination maintained that the respondent remained in their village for two-three months but this fact is not sufficient to act upon his evidence in view of non-availability of evidence regarding provision of light, the aspect already dealt with.

Muhammad Ramzan (P.W.4) is also son of the complainant. Being inmate of the house, his presence at the spot, cannot be questioned. He, however, did not implicate respondents No.1 and 2. According to the witness, the accused four in number, took all the family members in kitchen while two remained at guard there.

17. Re-appraisal of the evidence of the eye-witnesses (P.W.1 to P.W.4), clearly reveals that their statements implicating the respondents No.1 and 2 by no stretch of imagination can connect them in the commission of crime. They not only made conscious and dishonest improvements in their respective statements but mode and manner of identification of said respondents also put a question-mark to their evidence.

18. Another piece of evidence against Ameenullah (respondent No.1) is stated disclosure and then pointation of place of occurrence through pointation memo (Ex.P.5-M) as stated by Sakhawat Hussain, A.S.I. (P.W.5).

Detail of disclosure was not highlighted by the witness as it was objected to. Pointation of place of occurrence through memo

(Ex.P.5-M) by respondent No.1 is inadmissible in evidence as nothing was recovered from the said place in pursuance of the disclosure.[1]

Even otherwise, the place of occurrence was an open secret, frankly admitted by the witness (P.W.5) who replying a question stated that prior to pointation of place of occurrence by the said respondent, he and S.H.O. visited the place of occurrence.

19. Recovery of empties and live cartridges of Kalashnikov and one live cartridge of 30 bore pistol vide memos (Ex.P.5-C, Ex.P.5-E, Ex.P.5-F) in the absence of recovery of weapons of offence and positive report of Chemical Examiner cannot be used as a corroborative piece of evidence.[2]

20. In the opinion of learned Counsel for the appellant as well as learned law officer endorsing the stance of appellant, medical evidence also provides support to the case of prosecution. We regret to share and endorse the opinion for two-fold reasons. Statement of Abdul Nabi (P.W.2), though injured eye-witness as discussed earlier cannot be reconciled with his Medico-Legal Report keeping in view the number of injuries mentioned in the Medico-Legal Report (Ex.P.7-A) and statement of Abdul Nabi, attributing act of firing not only to respondent No.1 but also to respondent No.2.

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[1] "MUHAMMAD RAMZAN v. THE STATE" (PLD 1957 (W.P.) Lahore 956)
"NAEEM AKHTAR and others v. THE STATE" (1993 Pakistan Supreme Cases (Crl.) 845)
"ZIAUL REHMAN v. THE STATE" (2000 SCMR 528)
[2] "MUHAMMAD MANSHA v. The STATE" (2018 SCMR 772)

Even otherwise, medical evidence cannot point out the identity of the culprit, only helpful to know the locale and duration of injury and weapon of offence used.[1]

No other evidence was led by the prosecution to connect the said respondents in the commission of crime.

21. Respondent No.1 took the plea of *alibi* in his statement under Section 342 of The Code. To substantiate the same, he opted to appear as a witness on oath.

22. Since there is a failure of prosecution to prove its case against the respondent No.1 beyond shadow of doubt, therefore, there is no legal compulsion to deal with the stance taken by him in his respective statements in the form of questions answers as well as on oath.

23. Prosecution as such failed to prove charge against the said respondents, rightly concluded by learned Trial Court.

24. Now, we will examine the evidence led against Abdul Rauf, respondent No.3.

25. The adversaries are not in agreement about the actual name of said respondent. As per prosecution case, respondent No.3 is commonly known as Muhammad Rafique and as such he was pointed out by said name, the fact controverted by respondent.

Abdul Rauf is cited as respondent No.3. In the memorandum of appeal, his particulars are mentioned in the following manner:

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[1] "HASHIM QASIM and another v. The STATE" (2017 SCMR 986)
"MUHAMMAD MANSHA v. The STATE" (2018 SCMR 772)

"Abdul Rauf alias Muhammad Rafique".

26. The prosecution in order to prove its version that Abdul Rauf is known as Muhammad Rafique did not produce any worthy of credit evidence.

The complainant (P.W.1) did not utter even a single word on this aspect.

Abdul Nabi (P.W.2) attributed role of firing to Muhammad Rafique adding that he knows him by this name, controverted by putting suggestion in cross-examination.

Abdul Manan (P.W.3) in his direct statement just stated that he identified Muhammad Rafique who made firing upon his brother.

Muhammad Ramzan (P.W.4) identified respondent No.3 by making pointation towards him. His statement is totally silent about the fact-in-issue.

Evidence led by prosecution, reference of which has been made is not sufficient to prove its version about the name of respondent.

27. In rebuttal, the respondent (Abdul Rauf) in his statement under Section 340(2) of The Code reiterated his stance about his name. To substantiate the same, he produced copies of identity card (Ex.D.1-A), passport (Ex.D.1-B), Academic Progress Report (Ex.D.1-C), Certificates of Merit (Ex.D.1-F, Ex.D.1-G), Result Card of Baluchistan Board of Intermediate and Secondary Education, Quetta (Ex.D.1-H), certificate of Baluchistan Board of Intermediate and Secondary Education (Ex.P.1-J), Result Card of High Secondary School (Ex.D.1-

K), provisional certificate of Baluchistan Residential College, Loralai (Ex.P.1-L), Character Certificate (Ex.D.1-M).

Statement of respondent on oath and copies of documents are sufficient to controvert the version of prosecution which even otherwise could not be established.

If the respondent No.3 was also known as Muhammad Rafique, the prosecution could have established the same by producing the inhabitants of vicinity but no attempt was made in this regard. Documentary evidence, if any, could have been also adduced but there is omission on both counts.

28. First question for consideration is how the name of said respondent came in picture? Statement of Sakhawat Hussain, A.S.I. (P.W.5) is relevant in this regard. Highlighting the background, he deposed that on 23rd May, 2005, tracking dog was engaged who pointed out house of Muhammad Rafique and "Fard"(Ex.P.5-L) was prepared, also attested by him.

Evidence of the witness clearly reveals that respondent No.3 was implicated due to clue through tracking dog and then he was named as culprit.

Such type of evidence cannot be used as incriminating evidence in the absence of evidence to suggest qualification of handler by proper training from recognized institution, having sufficient

experience to handle the dog and interpret his action, sufficient training to dog to track human scent, etc.[1]

Admittedly, prosecution failed to produce evidence on such lines.

29. Even otherwise, evidence led by prosecution is insufficient to prove guilt of said respondent.

The complainant (P.W.1) did not implicate him in his statement.

Abdul Nabi (P.W.2) though named the respondent, also attributed role of causing injury on his leg but mode and manner of identification is very strange and interesting, adding that he identified him from his voice, nose and eyes. Recognition of a culprit in such a manner by injured person and that too in a state of panic and havoc does not appeal to the prudence.

It was dark night as admitted by Muhammad Ramzan (P.W.4) who also identified Abdul Rauf (respondent No.3) by pointing out towards him.

The witness in cross-examination admitted that he did not see the respondent prior to occurrence. If the witness saw the said respondent first time, how he was in a position to identify. Part of deposition regarding disclosure of features of the said respondent is result of improvement as nothing was suggested in this regard in his statement under Section 161 of The Code, with which he was confronted.

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[1] "HASHIM QASIM and another v. The STATE" (2017 SCMR 986 (996)
"SHAKEEL NAWAZ and another v. THE STATE and others" (PLD 2013 Peshawar 78 (D.B.)

Deposition of Abdul Manan (P.W.3) about identification of Muhammad Rafique, attributing role of causing injury also cannot be acted upon in view of omission on the part of the witness to disclose source of recognition, particularly when admittedly it was dark night.

30. Recognition by voice is very difficult and that too in such situation, always considered to be doubtful.[1]

Frequent and liberal occasions and opportunities of meeting in past are required to be familiar with the voice of a particular person. A person un-deniably cannot have such opportunities with the stranger. Close relationship, either by blood or affinity, subject to good relations can provide such occasions and that too while living in the same city or village. Friendship and neighbourhood are other factors which also can be suggested in this regard.

Similarly, to identify a person from any part of his body (nose, eyes and hair as suggested) close liaison is also required and that too on frequent occasions.

Despite availability of such occasions, it would not be safe to bank upon such evidence.

Evidence of identification of a person by nose, hair and eyes without disclosing its particulars (such as colour, shape, etc.) appears to be an afterthought, conscious attempt to fabricate evidence but un-successful.

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[1] "AYYUB v. THE STATE" (1994 P.Cr.L.J. 1057 (D.B.)

31. Identification of all the respondents in the court and that too after a period of more than one year is un-safe, having no legal sanctity.[1]

32. Scanning of the evidence clearly demonstrates that the learned Trial Court while reaching to the conclusion did not commit any illegality, considering the evidence insufficient to record conviction against the respondents.

33. Keeping in mind the yardstick to make interference in the judgment of acquittal referred in the earlier part of the judgment, we do not feel any hesitation to endorse the conclusion, resulting in dismissal of appeal.

34. After hearing the arguments, we through short order dismissed the appeal. Hereinbefore are the reasons for our said conclusion.

SYED MUHAMMAD FAROOQ SHAH
JUDGE

MEHMOOD MAQBOOL BAJWA
JUDGE

Dated, Islamabad the
1st April, 2019.
Mubashir

[1] "GHULAM and another v. The STATE" (2017 SCMR 1189)