

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

JAIL CRIMINAL APPEAL NO.44/K OF 2018

ASAD ALIAS DILOO SON OF MUHAMMAD UMER TURK,
RESIDENT OF NANGO LANE KOTRI TALUKA KOTRI,
DISTRICT JAMSHORO

APPELLANT

VERSUS

THE STATE ... RESPONDENT

FOR THE APPELLANT ... MRS.AMBREEN SIYAL, ADVOCATE

FOR THE STATE ... MR.ZAFAR AHMAD KHAN, ADDITIONAL
PROSECUTOR GENERAL SINDH.

NO.& DATE OF FIR ... NO.377/2010,DATED 26.11.2010
POLICE STATION ... P.S KOTRI, DISTRICT JAMSHORO

DATE OF THE JUDGMENT ... 15.01.2013
OF THE TRIAL COURT ...

DATE OF INSTITUTION ... 28.07.2018
OF APPEAL IN THIS COURT ...

DATE OF HEARING ... 24.04.2019

DATE OF DECISION ... 24.04.2019

DATE OF JUDGMENT ... 25.04.2019

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- By means of Jail Criminal Appeal No.44/K of 2018, appellant Asad alias Diloo has assailed the judgment rendered on 15th of January, 2013 ("Impugned Judgment") authored by learned Sessions Judge, Jamshoro at Kotri ("Trial Court") in case FIR bearing No.377/2010 (Ex.4/A) under section 17(4) of Offences Against Property(Enforcement of Hudood) Ordinance, 1979 (VI of 1979

("Hudood Ordinance"), read with sections 302,324/34 of the Pakistan Penal Code [Act XLV of 1860] ("Penal Code") whereby the appellant has been convicted under section 302(b) of the Penal Code and sentenced to suffer imprisonment for life with compensation of Rs.100,000/(Rupees one lac only) payable to the legal heirs of the deceased as provided under section 544-A of The Code of Criminal Procedure [Act V of 1898] ("The Code"), inclusive of benefit of section 382-B of The Code.

The instant jail criminal appeal has been received from Hon'ble High Court of Sindh, Circuit Court Hyderabad vide order dated 26th of April, 2018 for want of jurisdiction, which was time barred but the delay in filing of the appeal was condoned on 7th of February, 2019 for the reasons mentioned in the application for condonation of delay.

2. Upshot of the unfortunate occurrence gleaned from the FIR (Ex.4/A) appears to be that complainant Zulfiqar Ali (P.W.1) got registered an FIR bearing No.377/2010 with Police Station Kotri on 26th of November, 2010, contending therein that on 25th of November,2010 he along with his brother Muhammad Nawaz (P.W.2) and Abdul Aziz Gadahi (not produced) went to meet his brother Qaim Ali Gadahi at his shop and when they reached near his shop at 07:25 p.m, they saw three persons with open faces fighting with their brother whereupon they ran towards them but one of the culprits in the meanwhile pushed his brother whereby his brother fell down on the ground. He added that the said culprit fired with his pistol at the back side of his brother whereas another assailant made firing upon owner of the shop Sajidullah (P.W.6) who received bullet injury on his left thigh whereafter they took the dead body of their brother and injured Sajid Ali (P.W.6) to Taluka Hospital Kotri, where police arrived and after due formalities such as preparation of inquest report (Ex.5/C) and injury sheet (Ex.5/A) and got conducted the postmortem of the deceased.

Dr.Zaffar Seenharo (P.W.3) Medici Officer, Taluka Hospital Kotri conducted postmortem of deceased Qaim Ali Gadahi and injured Sajidullah (P.W.6) and issued post mortemreport (Ex.6/B) and medical report (Ex.6/D and Ex.6/E) endorsing the inquest

report (Ex.5/C) and injury sheet (Ex.5/A). The doctor made the following observations in respect of dead body as under:

“Features identifiable:

No sign of decomposition. PML not present, Tongue inside the mouth, both pupils dilated. Both eyes half open, mouth half open, No ENT oozing.

Surface wound & injuries.

1. Lacerated punctured around circular in shape with inverted margins measuring 0.8 cm x 0.8 cm x deep into pleural cavity situated on the middle part of back of chest on right side close to vertebral column(wound of entry).
2. Lacerated wound punctured circular in shape with inverted margins measuring 1.5 cm x 1.5 cm situated on middle part of front of right side of chest about 3 cm below right nipple.”

A lacerated punctured wound 0.5 x 0.5 cm x deep on upper part of left thigh lateral aspect (wound of entry) was observed on the body of injured Sajidullah (P.W.6).

After burial on the next day at 05:45 p.m, the FIR was lodged against unknown persons for committing robbery and murder of deceased Qaim Ali Gadahi as well as inflicting fire arm injury to Sajidullah (P.W.6).

3. Investigating Officer Ghulam Farooque, ASI (P.W.8) was entrusted with the investigation, who on 26th of November, 2010, inspected the crime scene, secured blood stained earth, three bullet empties of .30 bore pistol and two leads through recovery memo (Ex.5/E). On 8th of December, 2010, statement of Sajidullah (P.W.6) was recorded. On 15th of December, 2010 appellant Asad alias Dillo was arrested and confined in some other case; bearing FIR No.391/2010 who was subjected to identification by a formal identification parade, got conducted under the supervision of Judicial Magistrate Jamshoro at Kotri through complainant Zulfiquar Ali (P.W.1), Muhammad Nawaz (P.W.2) and Abdul Aziz (not produced) whereof identification memo (Ex.9/B) was prepared On 15th of December, 2010 Investigating Officer Ghulam Farooque,ASI (P.W.8) got recovered a pistol from appellant hid in the bushes near shrine of Dargah Natho Shah Bukhari , beside the Railway track which was secured through recovery memo (Ex.5/G).

At the end of the investigation, the appellant was put on trial. On 13th of April, 2011 charge under section 17(4) of the Hudood Ordinance read with sections 302,324,34 of Penal Code was framed to which the appellant pleaded not guilty and refuted the allegations, claiming innocence.

4. In order to establish the accusation, the prosecution adduced as many as 8 (eight) witnesses. The appellant was examined under section 342 of The Code, who denied the allegations brought forward by the prosecution, however, he did not opt to record his statement on oath as envisaged under section 340(2) of The Code nor did he produce any evidence in his defence.

5. We have heard Mrs. Ambreen Siyal Advocate for the appellant and Mr.Zafar Ahmad Khan Additional Prosecutor General Sindh for the State and perused the record minutely cover to cover with their valuable assistance.

6. Learned counsel for the appellant inter-alia contended that the prosecution witnesses complainant Zulfiquar Ali (P.W.1) and Muhammad Nawaz (P.W.2) are chance witnesses and their presence on the crime scene is unjustifiable and highly doubtful, evident from the post mortem report (Ex.6/B) showing rigor mortis developed and the eyes and mouth open which could not happen, had the said witnesses present at the time of the occurrence. She added that it was a night time occurrence and the source of light has been mentioned to be a 'bulb' which has not been taken into possession and that before the arrest of the appellant none of the so called eye witnesses and injured had provided description of the culprits, thus subsequent identification of the appellant in an identification parade is immaterial. Learned counsel for the appellant further maintained that the joint identification parade has further diminished the evidentiary value of entire identification parade, making the same inadmissible, which cannot be read in evidence. Regarding the recovery of pistol in absence of Forensic Science Laboratory (FSL) report, if admissible, which cannot be used as a corroborative piece of evidence. Reliance is placed

upon the cases reported in 2017 SCMR 135, 2017 SCMR 524, 2017 SCMR 622, 2017 SCMR 2002 and 2006 SCMR 1846.

On the contrary, Mr. Zafar Ahmad Khan, learned Additional Prosecutor General Sindh vehemently opposed the contentions so put forth by complainant learned counsel for the appellant and contended that the prosecution has successfully proved the charges against the appellant through the ocular account furnished by complainant Zulfiqar Ali (P.W.1) , Muhammad Nawaz (P.W.2) and injured Sajidullah (P.W.6). According to him the ocular deposition has been corroborated through identification parade and recovery of crime weapon, which has rightly been appreciated by the Trial Court while convicting and awarding sentence to the appellant. He added that the appellant has failed to make out his case for acquittal, therefore, the appeal being meritless deserves dismissal.

7. Considering and going through the evidence, we have observed that the case of the prosecution rests upon the testimony of eye witnesses Zulfiqar Ali complainant (P.W.1), his brother Muhammad Nawaz (P.W.2), Sajidullah (P.W.6) and identification parade (Ex.9/B) held under the supervision of Mr.Karamuddin, Judicial Magistrate (P.W.4) wherein the appellant was identified as one of the culprits, who fired upon the deceased, the recovery of pistol, empties and medical evidence.

8. Admittedly, there is a delay of about 24 hours in lodging the FIR, which albeit is not appreciated but as none has been nominated in the FIR, therefore, the delay is not of a kind, giving rise to any manipulation and substitution, hence the delay in the attending circumstance is held not to be fatal and prejudicial to the appellant.

Muhammad Nawaz (P.W.2) has also given the ocular account in almost similar words as furnished by his brother complainant (P.W.1). His brother Abdul Aziz has been given up by the prosecution on 18th of January, 2012 for his statement being identical. Sajidullah (P.W.6) also reiterated the ocular account of murder of his 'munshi' Qaim Ali and causing injury to him by the assailants, but after scanning the testimony of

the aforesaid witnesses, we have found certain contradictions in their statements, making the identity of culprits and involvement of the appellant in the crime alleged herein highly doubtful. We are mindful of the legal proposition that the prosecution is not under compulsion to produce number of witnesses, as quality and not the quantity of evidence is the rule but it may also be observed that non-production of most natural and material witness, such as Abdul Aziz, who has been given up, would lead us to infer that had he appeared in the witness box, he would have not testified in favour of the prosecution. In this regard reference can be made to the case of LAL KHAN VERSUS THE STATE (2006 SCMR 1846).

9. Reaffirming the assertion made in the FIR, Zulfiqar Ali complainant (P.W.1) while furnishing the ocular account, deposed to have arrived to meet his brother Qaim Ali Gadhai(deceased) alongwith his brothers Muhammad Nawaz (P.W.2) and Abdul Aziz (not produced), at the shop of Sajidullah (P.W.6) where his deceased brother was working as 'munshi'. According to him, at 7:25 p.m when he reached near the shop at a distance of 20/25 feet, he saw his deceased brother grappled with three unknown persons and then one of them pushed his brother aback and made fire, hitting his back whereas the other assailant made firing upon Sajidullah (P.W.6), inflicting fire-arm injury on his thigh, whereafter the culprits flee away making aerial firing. He also stated that some persons from the mosque also came there who saw them. He maintained that his brother succumbed whereas Sajidullah (P.W.6) was shifted in Suzuki car by his father to hospital whereas they shifted the deceased at their own to the hospital whereafter five minutes police arrived, examined the dead body. He maintained that injured Sajidullah (P.W.6) was referred to Civil Hospital Hyderabad and that on the following day after burial of the deceased and offering 'juma' prayer he lodged the FIR (Ex.4/A). He further stated that on 15th December, 2010, police officials called him to the Family Court to identify the culprits whereupon he alongwith his brother Abdul Aziz (not produced) and Muhammad Nawaz

(P.W.2) went there before noon and identified the appellant as culprit, who made firing upon his brother.

10. Strict scrutiny of the deposition made by Zulfiqar Ali complainant,(P.W.1) , Muhammad Nawaz (P.W.2) and testimony of Sajidullah (P.W.6) have been found by us to be contrary to each other on the material points, making the case of the prosecution doubtful. Zulfiqar Ali (P.W.1) and Muhammad Nawaz(P.W.2) stated to have seen three persons grappled with his brother Qaim Ali (deceased) whereas Sajidullah (P.W.6) stated that amongst three one remained with the motorcycle whereas two entered in his shop, who got grappled with his 'munshi'. Sajidullah(P.W.6) stated and identified the appellant in the court to be the culprit who made firing upon him and the deceased whereas on the contrary Zulfiqar Ali (P.W.1) and Muhammad Nawaz (P.W.2) categorically stated that amongst the assailant one fired upon the deceased whereas the other culprits made fire upon the injured, which contradictions have demolished the entire prosecution version, casting doubt with regard to the presence of Zulfiqar Ali Gadahi(P.W.1) and his brother Muhammad Nawaz (P.W.2). The eye witnesses stated that soon after the occurrence a lot of people came at the crime scene from the nearby mosque but none from them have been made witnesses to independently affirm the presence of the eye witnesses on the crime scene.

Furthermore, the presence of the eye witnesses become doubtful on perusal of the postmortem report as well. The post mortem report (Ex.6/B) transpires that the mouth and eyes of the deceased were found half open, which cannot happen in the presence of eye witnesses. Had the eye witnesses present at the crime scene, they would have shut the mouth and the eyes of the deceased, while taking them to the hospital and thereafter. The Hon'ble Supreme Court of Pakistan while being confronted in a similar situation in the case of ZAHIR YOUSAF AND ANOTHER VERSUS THE STATE AND ANOTHER (2017 SCMR 2002) while recording acquittal made observation at para No.4, which for ease of reference is reproduced herein below:

"We have also noted that as per the inquest report (Ex.PG) eyes of Ghulam Sarwar (deceased) were open which makes the presence of the witnesses of ocular account at the time of occurrence doubtful because had they been present there they would have closed eyes of deceased who was their close relative."

11. Undeniably, the occurrence took place in darkness. Zulfiqar Ali (P.W.1) though in his statement before the court did not mention the source of light but assailants having been identified in the light of bulb, finds mention in the FIR. Considering the statement of P.Ws to have identified the culprits in the light of bulb has made an obligation upon the prosecution to have had collected the bulb statedly being the source in which the assailants were identified. In a similar eventuality when the source of light was stated to be a bulb for identifying the culprits it was observed in the case of AZHAR MEHMOOD AND OTHERS VERSUS THE STATE (2017 SCMR 135) at para-3 of the judgment *ibid* with following words:

"It has straightaway been noticed by us that the occurrence in this case had taken place after dark and in the FIR no source of light at the spot had been mentioned by the complainant. Although in the site-plan of the place of occurrence availability of an electric bulb near the spot had been shown yet no such bulb had been secured by the investigating officer during the investigation of this case."

12. Above all, none of the aforementioned prosecution eye witnesses of the occurrence including injured has given description of the assailants, which was incumbent upon them to have had mentioned about their features, height and body structure as the assailants were not known to them. The occurrence lasted for 2/3 minutes as stated by Zulfiqar Ali (P.W.1) during cross-examination and as such it can be gathered that the eye witnesses and injured had a glimpse of the culprits. The apex court in the case of JAVED KHAN ALIAS BACHA AND ANOTHER VERSUS THE STATE AND ANOTHER (2017 SCMR 524) remarked in similar situation that the complainant had not mentioned any features of the assailants either in the FIR or in his police statement recorded under section 161 of the Code, therefore, there was no benchmark against which to test as the eye witness had fleetingly seen the culprits. The main object of identification

proceedings is to enable a witness to properly identify a person involved in the crime and to exclude the possibility of a witness, simply confirming a faint recollection or impression that was, of an old, young, tall, short, fat, thin, dark or fair suspect. It was also observed in Javed Khan alias Bacha's case (supra) that the Magistrate also did not certify that the dummies were similar age, height, built and colour. In this case as well the certificate does not contain the said details of dummies, which offends the dictum *ibid*.

13. The most fascinating aspect of the case is the arrest of the appellant, which is a mystery. The prosecution has failed to bring anything on record as to how; it was known that the appellant was involved in the instant case. We are conscious of the fact brought on record that the appellant was arrested in some other case bearing FIR No.391/2010 registered under sections 457 and 380 of Penal Code on suspicion. But the reasons for suspicion has not been brought on record in the instant case, which infers us to believe that since the culprits were not known and were untraceable, therefore, to wrap up the case, the appellant who was confined in some other case was made scapegoat and was involved by the police through the manipulated identification parade, wherein the appellant was got identified by the so called eye witnesses.

The most flagrant flaw in the identification parade is that three witnesses in one go picked up the appellant once by each accused. It was necessary to have had identified the appellant thrice by each witness but by not doing so the entire identification parade has become immaterial and unworthy of credence, whereupon no reliance can be placed.

14. Be that as it may, since the description of the assailants were not given by the eye witnesses prior to the arrest of the appellant, therefore, the identification parade otherwise become inconsequential, having no evidentiary value. Sajidullah (P.W.6) has also neither given any description of the assailants nor had taken part in any identification parade and as such identification by him for the first time in the court is unworthy and absolutely unsafe to be relied upon because identification of an accused *per se* in the court

has never been appreciated and considered to be incriminating for holding an accused culpable of the crime.

15. Coming to the recovery of pistol made from the possession of the appellant on his pointation from Dargah Natho Shah Bukhari beside the Railway track, it may be worthy to note that neither the crime empty at the earliest nor the crime weapon recovered subsequently were sent for analysis to the Ballistic Expert, therefore, the recovery of pistol becomes irrelevant and cannot be considered as a a corroborative piece of evidence. The recovery of pistol by itself may constitute an offence punishable under section 13(e) of Pakistan Arms Ordinance, 1965, but cannot be read as supportive evidence in the instant case. In this regard we would like to refer to the case of USMAN ALIAS KALOO VERSUS THE STATE (2017 SCMR 622) wherein in absence of FSL report the recovery of crime weapon was held to be inconsequential and irrelevant.

16. Aftermath of the above discussion is that the prosecution has failed to discharge their obligation by establishing the charge against the appellant beyond any shadow of doubt and as such the findings of the Trial Court have been found by us to be contrary to the evidence on record, resulting into misreading and non-reading material evidence, which cannot sustain, therefore, by means of our short order dated 24th of April, 2019, the appeal was allowed and the appellant was acquitted of the charges, following the reasons thereof.

SYED MUHAMMAD FAROOQ SHAH
JUDGE

SHAUKAT ALI RAKHSHANI
JUDGE

Karachi, 25th of April, 2019/
M.Akram/