

JUDGMENT:

MUHAMMAD NOOR MESKANZAI, CJ --- Appellants

Munawar and Zafar Khan through Jail Criminal Appeal No. 3/K of 2020 have called in question the legality, validity and propriety of the conviction and sentence recorded vide judgment dated 12.02.2020 handed down by the learned Judge Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad, whereby the appellants were found guilty and awarded the following sentence:-

Munawar S/o Abdul Hameed and Zafar Khan S/o Sarwar Khan were convicted under Section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and awarded death sentence as "Hadd" with directions to hang them by their neck till death for the offence of murder of deceased Sher Muhammad during robbery.

They were also directed to pay fine of Rs.500,000/- (Five Lacs) each to legal heirs of deceased under Section 544-A Cr.P.C. or in default thereof to further suffer six months S.I each. Benefit of Section 382-B Cr.P.C was extended to the appellants.

The learned trial Court sent a reference for confirmation of death sentence awarded to the accused/appellants, which was registered in this Court as Cr. Murder Reference No.1/K of 2020.

Through this consolidated judgment, we propose to dispose of the above-mentioned two matters, as both arise out of the common judgment dated 12.02.2020 passed by the learned Judge Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad in case FIR No.9/2014 dated 03.03.2014 registered at Police Station Fort, District

Hyderabad in respect of an occurrence of robbery which took place on 24.02.2014 and one person namely Sher Muhammad was murdered.

2. The brief facts of the case are that on 03.03.2014, complainant Noman Haseeb son of Sher Muhammad got registered FIR No.9/2014 at police station Fort, District Hyderabad wherein he stated that on 24.02.2014 he was present on his duty when received telephone call of his mother namely Mst. Parveen, who informed him that on 24.02.2014 in the morning she and his father proceeded to Railway Station in a rickshaw of neighbor namely Sajid son of Mukhtar. At 0900 hours, when they reached at Sakhi Wahab Shah Fly-over, two muffled persons, riding on motorbike, stopped the rickshaw by parking the motorcycle in front of the rickshaw. As soon as the rickshaw stopped, both the accused, armed with pistols, got alighted them from rickshaw on pistol point. One accused snatched purse from his mother (Mst. Parveen) containing Rs.35,500/- and the other accused picked out ATM Card of Bank Al-Habib and a mobile phone Nokia from the pocket of his father (Sher Muhammad). On his resistance, the accused fired at him upon which he fell down in injured condition. The accused succeeded in fleeing away on their motorcycle leaving one magazine of pistol on the spot which fell down from the pistol of the accused while escaping. He further stated that during resistance, veil of one accused was dropped and his mother and rickshaw driver Sajid saw the face of the accused and they can identify the accused if brought before them. The injured was taken to hospital but on the way he succumbed to his injuries. After postmortem the police handed over the dead body which was brought to

home. On receiving this information, the complainant came home from Karachi and got registered the FIR.

3. Investigation conducted by the Investigating Officer culminated in submission of challan against the accused. The learned trial Court framed charge against the accused under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused refuted the charge and claimed trial.

4. The prosecution, in order to prove its case, produced fourteen witnesses. The accused got recorded their statements under Section 342 Cr.P.C. They neither opted to record statements on Oath as contemplated under Section 340(2) Cr.P.C nor proposed to produce defense evidence.

5. The learned trial Court, while appreciating the evidence, found the appellants guilty of the offence and awarded the sentence as mentioned in opening paragraph of this judgment.

6. The learned Counsel for the appellants, inter-alia, contended that according to the prosecution, the incident took place on 24.02.2014 whereas FIR was lodged on 03.03.2014 without any plausible explanation. It can safely be concluded that the FIR has been lodged after due deliberation and consultation, which loses significance in the eye of law. It was further contended that according to PW.1 he lodged the FIR after funeral of his father, if this may be the case admittedly the deceased was buried on the same day, so in any case, there is no justification, whatsoever, for lodging of FIR after clear seven

days. Secondly, investigation prior to lodging of FIR carries no legal weight, therefore, Ex. 5/A, Ex.5/B and Ex.5/C have no legal efficacy. It was next contended that the PWs produced by the prosecution do not inspire confidence because according to the prosecution version, the accused were muffled and after commission of offence while leaving the place of incident, mask of one accused got removed but no description of the accused was given in the FIR nor the statement of PW recorded under section 161 Cr.P.C contained description of the accused. Similarly, in the statements before the Court the PWs did not mention the description of the accused. Therefore, in such circumstances without mentioning description of the accused the alleged identification parade carries no legal weight. The learned Counsel submitted that according to PW.3, he visited the Court of Magistrate at 08:30 a.m. to 9:30 a.m, and remained in the Magistrate's Court for about 10/20 minutes whereas according to memo of identification parade, the identification parade was conducted after 11 a.m. So in such state of affairs, the PWs do not support each other much less on the point of time for the purpose of identification parade. It was maintained that the police claims to have arrested the accused on 11.03.2014 whereas so called identification parade was conducted on 19.03.2014. There is no explanation by the prosecution for this belated identification parade, which again is fatal for prosecution. Learned Counsel strenuously urged that according to statement of PW.1 and the contents of FIR, his father resisted the accused who fired upon his father whereas there was no resistance by the mother of the informer, how mask of the other accused got removed is

something that is shrouded in mystery. The learned Counsel maintained that both the eye-witnesses contradicted each other on material points and their statements loose legal significance as their statements under Section 161 Cr.P.C. have been recorded after eight days of the incident. So far as confessional statement of convict Munawar is concerned, the statement is apparently belated, involuntary, untrue and exculpatory. Furthermore, as per statement of the I.O, the accused was ready to make a confessional statement, on 18.03.2014, what was the justification for retaining the accused for two more days in the police custody, meaning thereby each and every pressure was put to the accused to make an involuntary and untrue statement. Furthermore, PW.2 and PW.3 identified both the accused in the Court whereas identification parade of one accused was conducted, this is a dishonest improvement by the PWs to strengthen the prosecution case. PW.3, in his examination in chief, stated that two empties shells were collected from the venue but in cross-examination admitted that *“It is correct to suggest that police officer did not recover empty bullets from place of incident in my presence.”* Similarly, Ex.5/C also does not contain recovery of two empty shells. In such state of affairs, the prosecution has not been able to prove its case against the accused beyond any reasonable doubt and the appellants are entitled for acquittal.

7. The learned State Counsel submitted that the prosecution has succeeded to prove the guilt to the hilt by producing confidence inspiring evidence, though apparently there is delay in lodging the FIR but this delay does not have any adverse impact on the prosecution case

as the accused have not been nominated in the FIR. The accused are habitual offenders and have been nominated in a couple of cases, the detail whereof was produced by the prosecution before the trial Court. Legally, no exception can be taken to the impugned judgment.

8. The learned Counsel for the complainant, while adopting the arguments of the learned Additional Prosecutor General Sindh, submitted that the prosecution has proved its case to the hilt. The trial Court, after proper appraisal of material available on record, has rightly convicted the appellants. The appellants have got criminal history and detail of criminal cases lodged against accused showing the criminal history of the convicts was produced before the trial Court. The delay in the FIR does not affect the prosecution case as there is no mala fide on the part of the prosecution and the accused have not been nominated in the FIR. The prosecution witnesses have supported each other on material points and if some minor discrepancies have occurred in the case that may be due to human nature as the statements were recorded after four years.

9. We have heard the learned Counsel for the parties and have gone through the available record with their valuable assistance.

10. Prosecution case hinges upon (a) ocular account furnished by PW.2 and PW.3; (b) identification parade; and (c) Confessional statement of accused Munawar. We would like to examine the ocular account first, it would be beneficial to reproduce the gist of the statements of PW.1 to PW.3:-

PW.1 Noman Haseeb, Complainant:

“On 24.02.2014 I was posted at Malir Cantt: as Lieutenant and my mother called me at about 0830 hours and she told me that we were going towards Railway station Hyderabad and my father was accompanied with her and once they were going at the mid of fly over in auto rickshaw, two persons riding on a bike and their faces were masked and they asked the rickshaw driver to stop and they stopped their bike in front of the auto rickshaw and both of them surrounded the rickshaw and pointed the weapons towards my parents. They asked them to handover their belongings and my mother gave them a purse containing cash amount Rs. 35,500/- and also took a ATM card of Bank Al-Habib and a Nokia mobile model 101 from my father. Afterwards my mother went behind the auto as she was shouting for help and in the meanwhile my father resisted and one culprit shot my father and he fell down and at the same time they ran away on their bike, while they were going one out of them was unmasked and my mother saw him and she told me that she can recognize him. After that I returned from Karachi and I became busy in funeral ceremony of my father. I produce FIR as Ex.3/A, which is same, correct and bears my signature. My mother had identified the accused in court before the magistrate only the one who was unmasked on the day of incident”

PW.2 Mst. Parveen

“On 24.02.2014 I alongwith my husband left the house for going towards railway station for boarding Shalimar train for visiting our son. We left our house at about 08.45 a.m and we proceeded in auto rickshaw, the owner of which is residing in our locality and his name is Sajid son of Mukhtiar Ahmed. We boarded in the rickshaw and proceeded towards railway station. As soon as our rickshaw climbed on the ramp of Sakhi Wahab Shah fly over, two masked persons arrived there from my side on their motor bike. They stopped their bike in front of our rickshaw and at once they demanded money from me. I was forced to come out from rickshaw by one culprit and other one forced my husband to alight from rickshaw. I was having a purse in my hand which was snatched by the culprit and my purse contained cash amount Rs. 35,500/-. I was resisting with the culprit due to which the face of the culprit was unmasked. I was maltreated by the accused and he also pointed pistol on my temple. I ran towards my husband and the other culprit had put his hand in the front pocket of Kameez of my husband. Due to winter season my

husband was also wearing a sweater. My husband was shouting to leave me. Both the accused were armed with pistols. I ran behind the rickshaw and meanwhile one of the culprit pulled me from my hairs and the culprit who was sitting behind on the motor bike opened fire upon my husband and the magazine was also ejected from the pistol. I mistakenly picked up magazine as mobile phone. I shifted my husband to civil hospital in same rickshaw and my husband succumbed to his injuries on the way to hospital. I had also seen the culprit who was unmasked on the day of incident and secondly I saw the accused during identification parade before the court of Magistrate. One of the accused was attired in jeans and shirt and both the accused had covered their faces with checked handkerchiefs. After the incident the culprits run away downwards of the incline. Accused Munawar and Zafar produced before today in court are same. The case property viz one magazine loaded with bullets is same and one mobile phone is also produced in sealed condition”

PW.3 Sajid Ali:

“On 24.2.2014 at about 8.15 am I alongwith my Rickshaw was standing near Piza hut where on muhallah person Sher Muhammad Malak alongwith his wife Mst. Parveen came to me and asked to go to Railway station. Thereafter I took the said person and his wife in my Rickshaw and proceeded towards Railway station and when we reached at the bridge (Naya bridge) where two young boys with muffled faces arrived on a Motorcycle in front of my Rickshaw and got stopped us. They both armed with pistols, they encircled my rickshaw from both sides, and got down Sher Muhammd Malak and his wife Mst. Parveen from the Rickshaw and snatched the purse from the hand of Mst. Parveen whereas other accused put his hand in the pocket of Sher Muhammad Malak and took out one ATM card of Bank Al-Habib one Nokia 101 Mobile phone. Sher Muhammad asked the accused persons to leave him and during resistance accused made fire shot upon Sher Muhammad who become injured and fell down on the ground whereas accused escaped away on their motorcycle whereas one magazine of the pistol of accused fell down which was taken up by Mst. Parveen and during resistance the muffle of one accused was removed to whom I seen properly. Mst. Parveen disclosed that an amount of Rs. 35,500/- were lying in her purse. Thereafter we shifted injured Sher Muhammad to civil hospital Hyderabad but he succumbed his injuries in the way to hospital. Mst. Parveen disclosed such facts to her relatives who reached at hospital and in the meanwhile police also arrived at hospital and after

postmortem the dead body was handed over to them. Police prepared Danistnama, mashirnama of dead body so also sealed the clothes of deceased viz. white Shalwar-Qameez, white colour Baniyan and brown coloured Sweater which were blood stained, at hospital in my presence. I produce Danistnama and mashirnama of dead body at Ex.5/A & 5/B and say these are same, correct and bear my signature. Thereafter I alongwith police reached at place of incident at about 10.30 am where police collected the blood stained earth, two empty bullets so also bullet marks were available at the wall of the bridge and such mashirnama of surzamine was prepared at spot with my signatures which I produce as Ex.5/C and say it is same, correct and bears my signature. Police also recorded my statement U/s 161 Cr.P.C on 04.3.2014. Accused present in court are same. The identification parade of accused was also conducted through me before Judicial Magistrate-X Hyderabad where I identified the one of the present accused in court. (On inquiry by the court the said accused disclosed his name as Munawar)”

11. Although PW.1 is not an eye-witness but he narrated the story, as gathered and collected from his mother i.e. PW.2. According to PW.1, after stopping the rickshaw both the accused surrounded the rickshaw, pointed the weapons towards the parents of the complainant by asking them to hand over their belongings. The statement of PW.1 reveals that only his father resisted and was shot dead by one of the accused and while running away on their bike one accused became unmasked. PW.1 does not state that his mother resisted and on her resistance the mask of accused got removed, whereas the PW.2 states that she resisted the accused due to which face of culprit was unmasked. Pw.1 states that his mother told him that she can identify and recognize the accused but PW.2 in her statement before the Court does not state that she can identify the accused. Besides, there are substantial and inherent variances within the statement of PW.2 which are

irreconcilable, for instance she says that she resisted the accused due to which the face of culprit was un-masked meaning thereby on resistance the mask got removed. Later on, states that I had also seen the culprit who was unmasked on the day of incident, meaning thereby the accused was without mask and with open face, again states that “*I saw the accused during identification parade before the Court of Magistrate*” but does not claim that she can identify or she has identified the accused. Furthermore, the PW.2 states that “*Accused Munawar and Zafar produced before today in court are same.*” meaning thereby that she had identified both the accused whereas the identification parade was conducted in respect of one of the accused only.

12. PW.3 states that “*during resistance the muffle of one accused was removed to whom I seen properly*”. PW.3 neither mentioned the description of accused nor claimed to identify and recognize the accused if produced before him nor states that Mst. Parveen disclosed that she can identify and recognize the accused if produced before her. Furthermore, states that “*during resistance the muffle of one accused was removed to whom I seen properly*” but does not state that **they** had seen the accused. Moreover, none of the PWs mentioned the description of the accused before the Court nor in statements recorded under section 161 Cr.P.C. In this matter, the prosecution case, as build up in FIR is that “*while going back on bike mask of one accused got removed*”, so whether was there sufficient time available to PWs to see, observe, watch and remain capable to recognize and identify the accused is something that creates genuine doubt in a prudent mind regarding recognition and identification of accused.

13. Besides, the role attributed to the accused by the PWs during identification parade is contradictory and conflicting. For the sake of convenience the role attributed by each PW before the Judicial Magistrate during the course of identification parade is reproduced respectively:-

“She saw the dummies and rightly pointed out towards accused. She stated that accused had snatched purse from her and took pistol on her head. He and co-accused came with covered faces but during snatching the cloth from his face was removed and she has seen his face. She also stated that accused dragged her from hair from rickshaw and they were on motorcycle.”

“Then PW Sajid was called from outside Court room. The PW appeared and produced his original NIC. He saw the whole row and correctly identified the accused. He stated that the accused dragged the lady from rickshaw, hit her from butt of pistol and extended threats to him to remain silent and sat in rickshaw.”

Both the PWs not only do not support each other on material particulars rather are at variance and these statements are contradictory to statements of the said PWs recorded by the Court. So the apparent contradictions qua the role attributed to the accused during the course of identification parade and improvements in the statements is sufficient to reduce the worth of the identification parade and render the evidence of PWs inadmissible as if PW.2 is believed that belies PW.3 and vice versa. Reliance is placed on a judgment of apex Court reported in 2008 SCMR 6 ‘Akhtar Ali and others Vs. The State’, relevant at page 12 is reproduced:-

“It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness.”

14. The whole process of identification parade becomes suspicious and doubtful for another reason as well because PW.3 states that he had gone to the Court of Magistrate for identification parade at about 8:30 to 09:00 AM and remained in the Court for about 10/20 minutes whereas according to PW.7 Magistrate, Identification Parade proceedings started at 11:00 a.m. So looking the identification parade from whatever angle and perspective it does not meet the required conditions of admissibility.

15. Now it is settled law of the land that in cases where previously the accused is not known to witnesses, without description given by the witnesses, identification of the accused before Court or during identification parade loses legal weight and significance. The view stand supported by the dictum of Apex Court reported in 2011 SCMR 563 ‘Sabir Ali alias Fauji Vs. The State’, relevant portion at page 570 is reproduced as under:-

“It is also settled principle that identification test is of no value when description/feature of accused is not given in the contents of the F.I.R. It appears from the record that accused persons are complete strangers to the prosecution witnesses, therefore, in the absence of description in the contents of

F.I.R., the benefit of doubt be given to the accused persons coupled with the fact that according to the prosecution witnesses they had opportunity to see them on the day of incident in moonlight.”

16. The second important piece of evidence relied by the prosecution and believed by the trial Court is the confessional statement of convict Munawar. But the statement loses its worth, significance and evidentiary value for various reasons; firstly, because it is delayed, as the accused was arrested on 11.03.2014 and statement was recorded on 20.03.2014. Secondly, the statement is not true according to prosecution case, this accused snatched the purse, extended threat, took the pistol on the head of PW.2 but his statement is absolutely silent regarding these facts so the element of truthfulness of statement is missing. There is no independent corroboration of the statement. Above all, the statement is exculpatory, except mere presence no role he assigns to himself rather exonerating himself. Last but not least, after recording statement he was handed over to same police who had produced him before the Court. In the given circumstances, without independent corroboration, legally this confessional statement cannot be used against co-convict. This is the sole piece of evidence against Zafar accused, which is not legally sufficient to saddle convict Zafar with the commission of alleged crime. If this statement is discarded and taken out of consideration then the entire prosecution case is bound to collapse.

17. The perusal of record reveals that admittedly the incident happened on 24.02.2014 whereas the FIR of the incident was lodged on 03.03.2014 at 5:00 p.m, the only explanation available in the FIR is that

after funeral of the deceased, with consultation of the family members the FIR has been lodged. This excuse for lodging the FIR, even if accepted may have culminated in lodging of FIR just after funeral of the deceased but the delay so occurred cannot be justified. There is no cavil with the legal proposition that the delay in lodging of the FIR without plausible explanation carries an adverse impact on the prosecution case and militates against the bona-fide of the prosecution. For holding this view, we are fortified with the dictum laid down by the Hon'ble Apex Court in 2008 SCMR 6 'Akhtar Ali and others Vs. The State', relevant at page 13 is reproduced:-

“It is also a settled law that delay of 10/11 hours in making F.I.R. not explained leads to inference that the occurrence was unwitnessed. In the case in hand this fact is also established in view of supplementary statement and conduct of the eye-witnesses.”

Similarly, the PWs stated before the Court that their statements under Section 161 Cr.P.C were recorded on 04.03.2014 which again is fatal for prosecution.

18. Danistnama and mashirnama of dead body and mashirnama of surzamine Ex.5/A to Ex.5/C respectively, which were prepared prior to lodging the F.I.R. have lost their significance. Reliance in this respect is placed on a case reported in 2008 P.Cr.L.J 1237 'Abdul Batin & others Vs. The State', the relevant at page 1249-1250 is reproduced as under:-

“The basis of criminal prosecution is the F.I.R. No investigation can be initiated without first recording the First Information Report and once an F.I.R. has been recorded the investigation is undertaken on its basis. Facts and crimes not

incorporated in an F.I.R. and not emanating from the facts given in it are not made the basis of investigation under that F.I.R. However, here is a case in which some crimes are said to have been committed prior to the lodging of the F.I.R. which does not refer to any event prior to November, 2000 but the police made investigations in respect of crimes which find no place in the F.I.R. and the prosecution adduced evidence in respect of those alleged crimes and the learned trial Court has not only taken such evidence into consideration but has also convicted and sentenced the accused in respect of such crimes and therefore we shall examine this evidence and the findings given by learned trial Court thereon.”

19. In the light of above discussion and at the strength of citations relied upon as referred herein above, we are inclined to accept Jail Cr. Appeal No.3/K of 2020 filed by appellants Munawar and Zafar Khan, set aside the conviction recorded vide judgment dated 12.02.2020 by learned Judge Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad and acquit both the accused of the charge by extending benefit of doubt to them. If they are not required in any other case or offence, they shall be released forthwith.

Since the appeal has been accepted and conviction has been set aside, therefore, Cr. Murder Reference No.1/K of 2020 is **answered in negative.**

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

MR. JUSTICE DR. SYED MUHAMMAD ANWER

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

Dated, Islamabad the

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