

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

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

JAIL CRIMINAL APPEAL NO.20/I OF 2018

SIKANDAR ALIAS SIKOO SON OF NOOR MUHAMMAD,
(PRESENTLY CONFINED IN CENTRAL PRISON GADDANI)APPELLANT

VERSUS

THE STATERESPONDENT

FOR THE APPELLANT	...	MALIK ABDUL HAQ ADVOCATE
FOR THE STATE	...	SYED ABDUL BAQAR, ADDITIONAL PROSECUTOR GENERAL, BALOCHISTAN
FOR THE COMPLAINANT	...	MIAN TAHIR IQBAL KHATTAK, ADVOCATE.
NO.& DATE OF FIR POLICE STATION	...	NO.85/2015,DATED 10.03.2015 P.S HUB CITY,DISTRICT LASBELA.
DATE OF THE JUDGMENT OF THE TRIAL COURT	...	17.04.2018
DATE OF INSTITUTION OF APPEAL IN THIS COURT	...	29.11.2018
DATE OF HEARING	...	08.05.2019
DATE OF DECISION	...	08.05.2019
DATE OF JUDGMENT	...	10.05.2019

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- Through this judgment we intend to dispose of Jail Criminal Appeal No.20-I of 2018 filed by appellant Sikandar alias Sikoo, preferred against the judgment dated 17th of April, 2018 (“Impugned Judgment”) authored by learned Additional Sessions Judge Lesbela at Hub (“Trial Court”) in case F.I.R No.85/2015 (Ex.P/14-A) registered with Police Station Hub City, District Lesbela for the offences punishable under section 17(4) of Offences Against Property(Enforcement of Hudood) Ordinance, 1979 (VI of 1979) (“Hudood Ordinance”) whereby the appellant was convicted under section 398 of the Pakistan Penal Code [Act XLV of 1860] (“Penal Code”) and sentenced to suffer seven years R.I with fine of Rs.30,000/- and in case of default of fine to further suffer eight months S.I as well as under section 302(b) of the Penal Code and sentenced him to life imprisonment with further order to pay compensation of Rs.200,000/- (Rupees two lacs only) as provided under section 544-A of the Code of Criminal Procedure [Act V of 1898] (“The Code”) to the legal heirs of the deceased Ludha Ram inclusive of the benefit of section 382-B of The Code.

The co-accused persons namely Baboo and Hubdar were found guilty for the attempt to commit robbery at the shop of the deceased, therefore, they were convicted under section 393 read with section 109/34 of Penal Code and sentenced to suffer three years R.I each with fine of Rs.20,000/- each and in default of payment of fine to further suffer six months S.I with benefit of section 382-B of The Code, whereas the case file was kept in dormant till the arrest of the proclaimed offender Dildar son of Abdul Hameed. Co-convicts Baboo and Hubdar have not filed any appeal in this Court.

2. The instant jail criminal appeal has been received from Hon'ble High Court of Balochistan, Quetta vide order dated 19th of November, 2018 for want of jurisdiction, which was time barred, which was condoned on 20th of December, 2018.

3. Aneel Kumar complainant (P.W.1) is the son of the deceased and was at his home at the time of the occurrence, who was informed by his younger brother Raja (PW.2) through telephone at 7.45 p.m that three unknown culprits came into their shop for decoity and made fire upon their father. According to the complainant (P.W.1), he rushed to the shop where his father had received fire-arm injuries on his neck, who had been taken to Zahid Medical Centre, wherefrom his father was further shifted to Ghulam Qadir Hospital Hub by them but his father succumbed. He added that his brother told him that three culprits had come on a motorcycle, amongst whom one remained seated on the motorcycle whereas two of them came at the shop pretending to be customers and asked for the prices and then aimed pistol at his father and asked to hand over the cash. In the meanwhile on the hue and cry of his father Ludha Ram one of them fired at his father which hit him on his neck whereafter both the said culprits ran away on foot.

Complainant(P.W.1) maintained that both the culprits can be identified by his brother Raja (P.W.2). As such on the written application (Ex.P/1-A) of the complainant (P.W.1) F.I.R No.85/2015 (Ex.P/14-A) under section 17(4) of the Hudood Ordinance was registered with Police Station Hub City District Lesbela.

4. Inspector Police, Mahiwal Khan(P.W.14) was entrusted with the investigation. He went to the Civil Hospital where he prepared Inquest report (Ex.P/14-B), secured blood stained clothes of the deceased through recovery memo (Ex.P/7-A), proceeded to the place of occurrence and prepared site plan (Ex.P/14-C) in the presence of prosecution witnesses as well as took into possession an empty shell through recovery memo (Ex.P/7-B). He also took into possession one slipper of culprit, who while running away left it at the crime scene through recovery memo (Ex.P/7-D)

On spy information, on 13th of March, 2015 appellant Sikandar alias Sikoo was arrested, who revealed the names of his companions involved in the crime

as Baboo and Dildar. The appellant allegedly led the Investigating Officer to the crime scene, whereof memo of place of occurrence (Ex.P/5-B) was prepared. On 14th of March, 2015 a co-convicted accused persons Dildar and Hubdar both sons of Abdul Hameed were arrested. On the same day one of the accused Dildar flee from the police custody. On 16th of March, 2015 the identification parade of appellant Sikandar alias Sikoo was got conducted through eye witness Raja (P.W.2) under the supervision of Abdul Muqet (P.W.13) Judicial Magistrate. On 22nd of March, 2015 co-convict Hubdar got recovered crime pistol and motorcycle having been used in the crime which were provided by him to co-convicts to commit robbery, whereof memo (Ex.P/14-E) was prepared and a separate case under section 13 (e) of the West Pakistan Arm Ordinance, 1965 was got registered against co-accused Hubdar, whereas the pistol (crime weapon) alongwith an empty shell recovered from the crime scene were sent together to Forensic Science Laboratory ("FSL") for ballistic opinion. He produced the positive FSL report (Ex.P/14-I).

Dr. Farukh Nek Akhtari(P.W.8) Senior Medical Officer, Jam Ghulam Qadir Hospital Hub medically examined the deceased Ludha Ram. He issued medical certificate (Ex.P/8-A). He observed the following injuries on the person of the deceased and opined as under:-

- "i) Entry wound on left side of chin lower portion.*
- ii) Exit wound on back side of survival region.*
- iii) Bleeding signs seen from right ear and mouth.*

Probable Cause of death huge bleeding and pain. Weapon was used fire arm, while duration of injuries was fresh at about 45 minutes".

Sub Inspector Riaz Hussain (P.W.15), on 29th of September, 2015 arrested co-convict Baboo in the instant case, who was already detained at Police Station Aziz Billu Shaheed Dera Murad Jamali in some other case. On 16th of March, 2015 accused Sikandar alias Saikoo and on 3rd of October, 2015 co-convict Baboo were got identified by eye witness Raja (PW.2) during the identification parade

(Ex.P/13-A & Ex.P/13-B) as well as (Ex.P/13-C & Ex.P/13-D) during the identification parade conducted under the supervision of Abdul Muqet Judicial Magistrate (P.W.13). On 10th of October, 2015 co-convict Baboo made disclosure (Ex.P/6-A) and pointation of the crime scene. On conclusion of the investigation, the appellant alongwith co-convict Baboo and Hubdar were sent to the Trial Court to face the deeds of their crime.

5. After due compliance of the requisite formalities the appellant alongwith co-convicts were formally charged under section 17(4) of the Hudood Ordinance read with section 109 of the Penal Code, to which they pleaded not guilty and professed their innocence.

In order to establish the charges, the prosecution produced as many as 15(fifteen) prosecution witnesses, whereafter on closure of the prosecution side, the appellant and co-convicts were examined under section 342 of The Code. The allegations and evidence brought forwarded by the prosecution were rebutted by them. They opted to record their statements on oath, however, the appellant subsequently refused to record his statement on oath, so reflected from the order dated 16th of April, 2018 but produced D.W.3 Ahmed Ali whereas the co-convict Baboo and Hubdar got record their statement on oath as well as produced D.W.1 Muhammad Salah, D.W.2 Ahmed Khan and D.W.4 Nisar Ahmed in their defence.

At the end of the trial, the appellant and co-convicts were held guilty of the charges, thus convicted and sentenced in the terms mentioned herein before in para (supra).

6. We have heard Malik Abdul Haq learned counsel for the appellant, Syed Abdul Baqar learned Additional Prosecutor General Balochistan on behalf of the State and Mian Tahir Iqbal Khattak learned counsel for the complainant and perused the record cover to cover carefully and minutely with their able assistance.

7. Malik Abdul Haq learned counsel for the appellant inter-alia contended that Aneel Kumar(P.W.1), Parkash Kumar (P.W.3) and Nadeem Kumar (P.W.4) are not eye witnesses nor have they identified the appellant at the time of the occurrence whereas the sole eye witness of the occurrence Raja (P.W.2) has failed to provide detailed description of the culprits thus picking up the appellant and co-convict Baboo during the identification parade is immaterial and not in accordance with the dictum as enumerated by the apex court. He maintained that the recovery of pistol has been made from the co-convict Hubdar, which cannot be related and attributed to the appellant. He further emphasized that the FSL reports procured cannot be used as a corroborative piece of evidence as the empty and crime weapon have been sent together, which practice and procedure has been disapproved by the apex court time and again through its judgments. It was further argued that the prosecution has miserably failed to prove the case beyond any shadow of doubt, which entitles the appellant for acquittal in consequence of acceptance of the appeal and setting aside the Impugned Judgment.

On the other hand Syed Abdul Baqar learned Additional Prosecutor General Balochistan rebutted the arguments of the learned counsel for the appellant and submitted that the prosecution has successfully proved the charges through ocular evidence of Raja (P.W.2), identification parade, recovery of pistol, whereof positive FSL reports have been received, which connect the appellant with the murder of the deceased Ludha Ram and attempted robbery. He maintained that the appeal being meritless requires to be dismissed.

Conversely, Mian Tahir Iqbal Khattak learned counsel for the complainant, while relying upon the arguments so advanced by the learned Additional Prosecutor General Balochistan added that the testimony of sole eye witness Raja (P.W.2) is confidence inspiring, which has not been shaken by the defence. Continuing his arguments, he urged that the ocular account has been

corroborated by the recovery of crime weapon allegedly made on the pointation of Hubdar which has further been substantiated by positive FSL reports. He maintained that the medical evidence has also corroborated the ocular account; leaving no room of doubt in the involvement of the appellant for committing murder of deceased Ludha Ram during the course of the attempted robbery as such requested for dismissal of the appeal.

8. Undeniably, the complainant Aneel Kumar (P.W.1) is not the eye witness of the occurrence. He was apprised of the occurrence by his younger brother Raja(P.W.2), who witnessed the occurrence of attempted robbery and death of his father Ludha Ram. The prosecution also produced Parkash Kumar (P.W.3) as circumstantial witness. He testified that on the fateful night at 7:45 p.m, while he was present at home alongwith his brother Aneel Kumar(P.W.1), he received phone call from his younger brother Raja (P.W.2) that two persons had fired upon his father who has received fire-arm injuries. He reiterated the version narrated by Aneel Kumar (P.W.1) regarding shifting of his father to Civil Hospital from Zahid Medical Centre and receipt of the dead body. He produced an application (Ex.P/3-A), wherein request was made for not conducting the postmortem (Autopsy) of his father and handing over the dead body of the deceased Ludha Ram. The case of the prosecution hinges upon the following pieces of evidence:

- i) Ocular testimony of Raja (P.W.2).
- ii) Identification parades, wherein Raja (P.W.2) identified the appellant and co-convict Baboo.
- iii) Disclosure and pointation of crime scene.
- iv) Recovery of crime pistol (crime weapon) from the house of co-convict Hubdar.
- v) F.S.L. reports and
- vi) Medical evidence.

9. None has been nominated in the instant case as the culprits, who made the attempt of robbery and murdered Ludha Ram, as perpetrators were not known to the prosecution witnesses. Raja (P.W.2) is the sole eye witness of the occurrence. Despite the fact that several shops were situated nearby, none of the shop-keepers got attracted and witnessed the occurrence, which in itself requires explanation. Raja (P.W.2) testified that on 10th of March, 2015 while he was present alongwith his deceased father at his shop at about 07:35 p.m (night) three persons came there on a motorcycle, amongst whom one remained seated on the motorcycle whereas two culprits came and asked for the prices of various items in the shop. He maintained that a person with tawny complexion and having long hair on the hue and cry of his father made fire upon the deceased, which inflicted on his neck, where-after both of them flee away. He added that the person who had a pistol in his hand fell on the ground at a distance while running towards Gaddani Stop whereas the other had already made his escape good. He stated that he informed his brother on phone and the people from the neighbourhood took his deceased father to Zahid Medical Centre and then his brother and his other relatives shifted his father to Civil Hospital. He categorically stated that he could not identify the person seated on the motorcycle for being far. He deposed that on 16th of March, 2015 he alongwith his brother went to the court where the Judge made Sikandar alias Sikoo(appellant) to stand in the row of eight persons, having similar height. He stated that he picked up appellant Sikandar alias Sikoo amongst them thrice and told the Judge that he is the person who fired upon his father and ran away. He identified the appellant and co-convict Baboo present in the court.

Abdul Muqet, Judicial Magistrate (P.W.13) testified that on 16th of March, 2015, he supervised the identification parade of Sikandar alias Sikoo and on 3rd of October, 2015, supervised the identification parade of Baboo wherein Raja (P.W.2) identified both the appellant and Baboo present in the court. Imperative to

note that surprisingly Raja (P.W.2) neither gave any description of co-convict Baboo in his statement before the police nor he in his statement before the court testified that he participated in the test of identification parade conducted by Judicial Magistrate (P.W.13) in respect of co-convict Baboo Khan or he had identified him during the occurrence, which negates the deposition of Judicial Magistrate (P.W.13), putting the entire proceedings of test of identification parade of co-convict Baboo at naught. Be that, if the testimony of Judicial Magistrate (P.W.13) is believed to be correct assumingly, then the testimony of eye witness Raja (P.W.2) deserves scrutiny that as to how he had picked up co-convict Baboo Khan during the course of identification parade with a specific role, when he had neither stated in police statement nor before the court that he identified him, more particularly, when he had not given a slightest description of him.

Prior to discuss the sufficiency of the description provided by eye witness Raja (P.W.2) of the appellant Sikandar alias Sikoo and picking him up during the test of identification parade with attribution of role to him, we would like to make reference to the dictum expounded by the apex court while determining the worth and value of the test of identification parade in respect of its effectiveness to eliminate the possibility of mis-identification of an accused.

We are conscious of the legal proposition that picking up of an accused in an identification parade is not substantive piece of evidence but is merely corroborative evidence in its nature, as held in the case of SHAFQAT MEHMOOD AND OTHERS VERSUS THE STATE (2011 SCMR 537). We are also well aware of the dicta settled by the apex court that a test of identification parade and correct pointing out of an accused person is not a legal requirement and its failure has not been always held to be fatal to the case of the prosecution. In this regard reference can be made to the cases of MUHAMMAD AKRAM RAHI AND OTHERS VERSUS THE STATE AND OTHERS(2011 SCMR 877), GHAZANFAR ALI ALIAS PAPPU

AND ANOTHER VERSUS THE STATE (2012 SCMR 215) as well as to the matter of KANWAR ANWAAR ALI reported in (PLJ 2019 SC(Cr.C.) 153.

In the Kanwar Anwaar Ali's case (supra) while referring to the dictum settled in the cases of AZHAR MEHMOOD AND OTHERS VERSUS THE STATE (2017 SCMR 135), GHULAM SHABBIR AHMED AND ANOTHER VERSUS THE STATE (2011 SCMR 683) and SHAFQAT MEHMOOD AND OTHERS VERSUS THE STATE (2011 SCMR 537), it was also held that identification parade of an accused person by eye witnesses before the court during a trial is generally considered to be quite unsafe because before such identification before the trial court the eye witnesses get many opportunities to see accused persons appearing before the Court in connection with their remand, distribution of copies of statement of other prosecution witnesses, framing of a charge and recording of statement of witnesses, therefore, identification parade in the peculiar circumstances was necessary; as in this case too, but the identification parade was subjected to compliance of certain requisites as contemplated in the form of executive and judicial pronouncements.

Guidance can be sought from the case of MUHAMMAD YAQOOB AND ANOTHER VERSUS THE STATE (1989 P Cr.L.J 2227), which contains the guidelines and necessary pre-cautions for evaluating and conducting an identification parade, which was later endorsed by the Hon'ble Supreme Court in the Kanwar Anwaar Ali's matter (supra). For ease of reference para 23 is reproduced:-

"23. Although there is no law, which prescribes any such precautions yet the necessary guidelines are available in the form of executive instructions and judicial pronouncements. Some of them are summarized as under:

- (a) Memories fade and visions get blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence;*

- (b) *a test identification, where the possibility of the witness having seen the accused persons after their arrest cannot be ruled out, is worth nothing at all. It is, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects are put to identification tests as early as possible. Such suspects should preferably, not be remanded to police custody in the first instance and should be kept in judicial custody till the identification proceedings are held. This is to avoid the possibility of overzealous I.Os showing the suspects to the witnesses while they are in police custody. Even when these accused persons are, of necessity, to be taken to Courts for remand etc, they must be warned to cover their faces if they so choose so that no witness could see them;*
- (c) *identification parades should never be held at police station;*
- (d) *the Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings;*
- (e) *in order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused persons should be as much as possible. But then there is also the need to ensure that the number of such persons is not increased to an extent which could have the effect of confusing the identifying witness. The superior Courts have, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. This ratio must be followed unless there are some special justifiable circumstances warranting a deviation from it;*
- (f) *if there are more accused persons than one who have to be subjected to test identification, then the rule of prudence laid down by the superior Courts is that separate identification parades should ordinarily be held in respect of each accused person;*
- (g) *it must be ensured that before a witness has participated in the identification proceedings, he is stationed at a place from where he cannot observe the proceedings and that after his participation he is lodged at a place from where it is not possible for him to communicate with those who have yet to take their turn. It also has to be ensured that no one who is witnessing the proceedings, such as the members of the jail staff etc., is able to communicate with the identifying witnesses;*
- (h) *the Magistrate conducting the proceedings must take an intelligent interest in the proceedings and not be just a silent spectator of the same bearing in mind at all times that the life and liberty of some one depends only upon his vigilance and caution;*
- (i) *the Magistrate is obliged to prepare a list of all the persons (dummies) who form part of the line-up at the parade alongwith their parentage, occupation and addresses;*
- (j) *the Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons or by the identifying witnesses before, during or after the proceedings;*
- (k) *where a witness correctly identifies an accused person, the Magistrate must ask the witness about the connection in which the witness has identified that person i.e as a friend, as a foe or as a culprit of an offence etc and then incorporate this statement in his report;*

- (l) *and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;*
- (m) *the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings and*
- (n) *the Magistrate has to give a certificate at the end of his report in the form prescribed by C.H.II.C of Vol.III of Lahore High Court Rules and Orders."*

10. Evaluating the testimony of eye-witness Raja (P.W.2), we have observed that the description which he had given to police was that the culprit who made firing upon his father had tawny complexion with long hair. But the memo of identification parade does not reflect that whether the appellant and the dummies were of the same complexion and had short or long hair. The details of the dummies with their names and parentage have also not been mentioned, which was necessary. According to eye-witness (P.W.2), he had told his brother about the culprits that he had long hair and tawny complexion but the complainant (P.W.1) has not mentioned about such description and details of the culprits in his report. Eye-witness (P.W.2) during cross-examination admitted that the dummies were of distinct features and he does not know their ages. Judicial magistrate (P.W.13) admitted in cross-examination that majority of the dummies were court staff. He also admitted that the lock-up is visible to a person who passes from the veranda but explained that one or two detainees can be seen only. He claimed that when the witness was called, he saw him in the veranda. He admitted that during remand the faces of the accused persons were open and that the accused persons can be seen by the litigants, advocates and every one present in court premises. It may be observed that the delay in conducting the identification parade after 3 days of the arrest of the appellant also reduces the evidentiary value of test of identification.

After careful and anxious consideration of the test of identification parade, we have found several infirmities diminishing its evidentiary value as the

identification parades conducted in the instant case are in utter violation of touchstone enunciated by the apex court referred herein above.

The Hon'ble Supreme Court of Pakistan, while deciding the case bearing Criminal Appeals No.306-L,307-L and 308/L of 2012 of Mian Sohail Ahmed, Abdul Rashid and Rashid Aziz Rana Versus the State, etc., albeit not published yet but approved for reporting; pronounced on 20th of February, 2019, following its reasons on 24th of April, 2019 observed that the single most important observation from the research on the eye-witness is that it is substantially less accurate than generally believed and that overall data from real-life cases show that just under 45 percent of witnesses pick the suspect, about 35 percent decline to make a choice, and about 20 percent pick innocent fillers. It has further been observed that overreliance on visual identification evidence has led to numerous mistakes in identification of innocent suspects, culminating into wrongful convictions, which results in two sort of injustices. The firstly tragedy is to the innocent person, second to the victim and the society because the real offender is not brought to justice and last but not the least, the wrongful convictions undermines the credibility of the legal system. Referring to the scientific research the author of the judgment Hon'ble Mr.Justice Mansoor Ali Shah in the case of Mian Sohail Ahmed's case (supra) observed regarding human nature and conduct with regard to identification that the process of memory retention and retrieval may be affected by a number of factors, such as "system variables" and "estimator variables". Test of identification parade was held to be system variable whereas estimator variable have been held to be the factors effecting upon the mind of a witness during an occurrence, which needs to be judged and analyzed, while evaluating the testimony of such witness. For convenience the relevant portion of the judgment rendered in the case of Mian Sohail Ahmed (supra) is reproduced herein below:

“The scientific research establishes that the following non-exhaustive list of “estimator variables” negatively affect the memory process:-

- i. *Stress: Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification. It may be noted “while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator.*
- ii. *Weapon Focus: When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. “Weapon focus” can thus impair a witness’ ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.*
- iii. *Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. There is no minimum time required to make an accurate identification, however, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.*
- iv. *Distance and Lighting: A person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.*
- v. *Witness Characteristics: Characteristics like a witness ‘age and level of intoxication can affect the reliability of an identification. Children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults.*
- vi. *Characteristics of Perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affects the accuracy of an identification.*
- vii. *Memory Decay: Memories fade with time and memory decay “is irreversible”; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.”*

11. On the above touchstone and application of aforementioned estimator variables, we have found that the testimony of eye-witness Raja (P.W.2) was under the influence of *high stress* because not only the occurrence took place at gun point abruptly within a spell of few movements but also he was under the threat of *weapon focus*, obviously aiming at him as well as his father under the threat of life. Therefore he did not give detailed features of the culprits who aimed at them and made firing upon his father except describing only one culprit firing at his father with a cloudy description that the said culprit was of tawny complexion and long hairs.

In view of the above estimator variables enumerated, we are of the considered opinion that the description furnished by eye witness Raja(P.W.2) was insufficient, thus in the peculiar circumstances of the instant case it is unsafe to believe the said eye witness as he did not identify the culprits on the crime scene in definite terms. The conduct of the said eye witness (P.W.2) also demonstrates to be un-worthy of credence as he seems to be over ambitious in implicating the co-convict Baboo in the Court as well in the identification parade despite the fact that earlier before he had not furnished his description. Moreover, the infirmities committed during the course of aforesaid identification test and probable exposure of the appellant to the eye witness Raja (P.W.2) makes the entire identification parade being violative of the dictum enunciated by the apex court as referred herein before. Thus with no doubt in mind the testimony of eye witness Raja (P.W.2) alone and the identification parade, wherein he identified the appellant are unsafe to be relied upon for holding the appellant culpable.

12. The alleged disclosure of appellant Sikandar alias Sikoo was prepared on 13th of March, 2015 but no recovery was effected thereof, as such it amounting to a confession before the police which is inadmissible under Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984 ("Order of 1984"). The pointation of the crime scene made by appellant Sikandar alias Sikoo in consequence of the said disclosure (Ex.P/5-A) is worthless as it has no legal recognition. The place of occurrence was well within the knowledge of the prosecution witnesses including the Investigating Officers and marginal witnesses in whose presence the crime scene was secured and site plan was prepared; as such disclosure and pointation of the crime scene does not fall within the purview of Article 40 of Order of 1984.

[SEE; ZIA UR REHMAN VERSUS THE STATE (2000 SCMR 528) and HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986)]

13. No doubt, the crime weapon has not been recovered from the possession of the appellant Sikandar alias Sikoo. The recovery of pistol and motor cycle bearing registration KGL-No.2445, Engine No.AA28102, Chassis No.5A28102, model 2013 red in colour, have been made from co-convict Hubdar, who allegedly disclosed that the pistol was used by Sikandar alias Sikoo (appellant).

Admittedly neither colour nor the registration, chassis and engine number of the motorcycle were provided earlier before the recovery of the said motorcycle, therefore, subsequently recovery of the motorcycle having been used in the crime absolutely in no way connect the appellant or even the co-convict with the crime.

As far as the recovery of pistol is concerned, since it has been made by co-convict Hubdar, therefore, the same cannot be used against the appellant by mere words that the same was used by appellant; that too without any strong corroborative and independent evidence, which unfortunately is not available on record against the appellant. The portion of the disclosure, wherein co-convict Hubdar has attributed the role of firing to the appellant by means of said pistol when considered, we have found the same to be nothing but a confession before the police, which is hit under Articles 38 and 39 of Order, 1984, making the same inadmissible. After holding the recovery of pistol irrelevant the positive FSL report (Ex.P/14-I) becomes worthless. Even otherwise since the pistol and empties have been sent together to FSL for ballistic opinion, therefore, the said FSL report has lost its evidentiary value. The apex court in the case of ALI SHER AND OTHERS VERSUS THE STATE (2008 SCMR 707), MUSHTAQ AND 3 OTHERS VERSUS THE STATE (2008 PLD SC 1) and MUHAMMAD FAROOQ AND ANOTHER VERSUS THE STATE (2006 SCMR 1707) held that if the empty is retained and subsequently after recovery of the crime weapon when both are sent together to FSL for analysis, such FSL report is ruled out of consideration for being maneuvered.

14. Now it is settled principle of Criminal Jurisprudence that the medical is not a corroborative piece of evidence rather confirmatory in nature, which can be used by the defence to confirm or contradict the medical evidence with the ocular evidence. In this case, un-natural death of the deceased caused by fire arm has been proved and not disputed by the defence, thus in such context, the medical evidence need not to be further discussed. Even otherwise, the medical evidence cannot identify an accused rather merely confirms the locale, duration, kind of weapon used and timing of the injuries inflicted and so on so-forth but in no way can be considered as a corroborative piece of evidence connecting an accused with the crime. In this regard reliance can be placed upon the cases of MUHAMMAD MANSHA VERSUS THE STATE (2018 SCMR 772) AND HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986).

15. As the co-convicts Hubdar and Baboo have not filed any appeal and are not before us, therefore, we need not to dilate upon their defence evidence in the attending circumstances of the case. Although, the appellant did not record his statement on oath, however, produced Ahmed Ali (D.W.3) as his witness. Ahmed Ali (D.W.3) stated that on 3rd of October, 2015 while he was present in Court premises, he was called by the police and made to sit in front of the Court of Judicial Magistrate (PW.13) in veranda with Court staff members, complainant and accused, where-after in five minutes Judicial Magistrate (P.W.13) came and got conducted the identification parade.

The prosecution has to stand on its own legs to prove the case beyond any shadow of doubt. Failure of the prosecution to prove the case beyond any reasonable doubt has made the defence evidence redundant. However, it may be added that the testimony of Ahmed Ali (D.W.3) strengthens the plea of the appellant that he was exposed to the complainant party before conducting identification parade.

16. The crux of the above discussion is that the findings of the learned Trial Court are result of mis-reading and non-reading of evidence, whereas the ocular evidence of Raja (P.W.2) is untrue and non-confidence inspiring, the identification parade suffers from various infirmities, the recovery of the crime weapon made from co-convict Hubdar and positive FSL report of the said pistol are irrelevant, enabling the appellant for the benefit of doubt.

17. For the foregoing reasons, the appeal was accepted, impugned judgment of the learned Trial Court was set aside to the extent of appellant Sikandar alias Sikoo and in consequence thereof acquittal of the appellant Sikandar alias Sikoo was recorded and pronounced on 8th of May, 2019 through short order.

Above are the reasons for our short order dated 8th of May, 2019.

SYED MUHAMMAD FAROOQ SHAH
JUDGE

SHAUKAT ALI RAKHSHANI
JUDGE

Islamabad 10th of May, 2019/
M.Akram/