

**IN THE FEDERAL SHARI'AT COURT**  
**(Appellate Jurisdiction)**

**PRESENT**

**MR. JUSTICE DR.FIDA MUHAMMAD KHAN**  
**MR. JUSTICE RIZWAN ALI DODANI**

**JAIL CRIMINAL APPEAL NO. 23/K OF 2010**

1.Niaz Ali s/o Ali Nawaz Jamali ... Appellants  
2.Asif Ali s/o Abdul Rauf Rajput  
resident of Waritar Sukkur

Versus

The State ... Respondent

Counsel for the appellant s... Mr. Aftab Ahmad Khan,  
Advocate

Counsel for the State ... Mrs. Rehana Akhar Additional  
Prosecutor General Sindh for State

FIR No. Date and ... No.98/2004 dated 22.9.2004,  
Police Station P.S. A-Section Sukkur.

Date of Judgment of ... 07.10.2010  
trial Court

Date of Institution ... 18.10.2010  
of J.Cr.Appeal in FSC

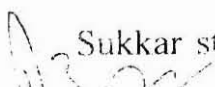
Date of hearing ... 29.05.2012

Date of decision ... 29.05.2012

**JUDGMENT**

**RIZWAN ALI DODANI, Judge:** This appeal has been filed by Niaz Ali and Asif Ali against the judgment dated 07.10.2010 passed by learned Additional Sessions Judge (Hudood), Sukkar whereby both of them were convicted under section 302(b) 34 PPC read with section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (herein-after referred to as the said Ordinance) and sentenced to life imprisonment each and under section 544-A Cr.P.C. to pay Rs.50,000/- each to the legal heirs of deceased, in default of payment thereof to suffer S.I. for four months. They have further been convicted under section 392/34 PPC read with section 20 of the said Ordinance and sentenced to seven years R.I. each plus to pay a fine of Rs.10,000/- each or in default to further undergo S.I. for two months more. Benefit of under section 382-B Cr.P.C. extended to both the appellants.

2. Brief facts of the case are that on 22.09.2004 at about 10.25.a.m. complainant Mohammad Hassan lodged report at Police Station A-Section

 Sukkar stating that on the fateful day he alongwith his friend Abdul Fateh

while boarding on motorcycle of Abdul Fateh from his village went to Sukkar. That near fish market where he alongwith Abdul Fateh met Abdul Sattar, at 10.00.a.m.when suddenly two persons emerged from Qasimabad market armed with T.T. pistols and they by show of pistol robbed motorcycle from them and one of the accused also robbed mobile phone and both the accused started running whereupon Abdul Fateh grappled with one of the accused. upon which that accused fired at Abdul Fateh which hit him on his abdomen and thereafter both the accused ran away on the motorcycle. Complainant then removed the injured Abdul Fateh to Police Station A-Section Sukkur where he lodged the report. The injured was then referred to Civil Hospital Sukkur where he succumbed to injuries on the same day at about 11.30.a.m.

3. Investigation of the case was conducted by Sajjad Ahmed, PW.6. He prepared injury statement and mashirnama of deceased on 22.09.2004 at Civil Hospital Sukkur in the presence of mashirs Khalil Ullah and Abdul Rahim. On the same day he visited the place of occurrence and secured two empties of 30 bore pistol and blood stained earth. He received the clothes of

deceased after postmortem. He recorded statements of PWs Abdul Shakoor and Abdul Sattar under section 161 Cr.P.C. On 28.09.2004 SIP Khalid Ghaffar Khuja handed over to him accused namely Niaz Ali and Asif Rajput alongwith mashirnama of their arrest. On production of both the accused in the Court of Sessions Judge and after recording their statements the court directed him to conduct investigation at Jail. On 04.10.2004 identification parade of accused was got conducted in jail in the presence of Civil Judge and Judicial Magistrate-II Sukkur. On 05.10.2004 he dispatched blood stained earth through Constable Ali Akbar to the office of Chemical Examiner, Rohri. On 10.10.2004 SIP Sarfraz Mangi was posted as SIP at Police Station A-Section Sukkur where he handed over the case file to him. On 21.11.2004 the investigation of the case was again entrusted to him for further investigation. On 22.11.2004 he recorded statements of both the accused under section 161 Cr.P.C. On 29.11.2004 he handed over the case file to SP (Investigation) for legal opinion and on 09.12.2004 he submitted challan to court requiring the accused to face trial. He produced report of



Chemical Examiner Ex.15-F. He also identified the accused in the court as the same culprits whom he investigated.

4. The learned trial court after receipt of challan framed charge on 27.12.2005 against both the accused namely Niaz Ali and Asif Ali under sections 302, 392/34 PPC and under section 17(4) Offence Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case at the trial produced 12 PWs. The gist of their deposition is as under:-

- \* PW.1 is Muhammad Hassan, complainant who reiterated the same facts as he got recorded in the FIR (Ex.9/A).
- \* PW.2 is Abdul Sattar who stated on 22.09.2004 he alongwith Molvi Abdul Shakoor was present near Subhan Mosque at about 10.00.a.m. he saw that both the accused snatched one mobile and motorcycle from complainant Muhammad Hassan. When Abdul Fatch resisted to give motorcycle, one of the accused fired at Abdul Fatch and the accused ran away. He alongwith complainant Muhammad Hassan and Molvi Abdul Shakoor identified the accused persons before the Magistrate. He is an eye witness of the occurrence;
- \* Molvi Abdul Shakoor appeared as PW.3 and made statement in line with the statement made by Abdul Sattar PW.2. He is also eye witness of the occurrence; He also deposed that two ematies and blood stained mud were recovered from the vardat.

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- \* PW.4 is Khalil Ullah who signed the mashirnama (Ex.12-A) of place of wardat prepared by the I.O. at the place of occurrence;
- \* Ali Hassan, ASI appeared as PW.5 and deposed that complainant Muhammad Hassan appeared before him at police station A-Section and disclosed the facts of the occurrence whereupon the PW. recorded formal FIR (Ex.P.9-A) and got signatures of the complainant on it and also read over to him the contents of FIR;
- \* Sajjad Ahmad, SIP was examined as PW-6 who conducted investigation of the case and supported all the documents prepared by him and involved the present accused during this investigation. He also produced, mashirnama of inspection of dead body, inquest report, mashirnama of vardat and recovery of empties and blood stained mud from the place of vardat and securing blood stained clothes of the deceased as well as chemical examiner and supported all the documents prepared by him. The detail of his investigation is mentioned at para-3 of this judgment.
- \* PW-7 Khalid Ghaffar, Inspector deposed that he arrested the accused and produced mashirnama Ex.16-A of arrest and supported the contents of the same.
- \* Dr.Muhammad Yasin, Medical Officer appeared as PW-8 and corroborated the version of the complainant and eye witnesses by deposing that on 22.9.2004 he examined the dead body of Abdul Fateh who had sustained fire arm injuries. He also produced postmortem report as Ex.17-A and supported the same.

#### Opinion

From the external as well as internal examination of the dead body of Abdul Fateh son of Muhammad Sabir he is of the

discharge from fire arm weapon. The injury No.1 & 2 were sufficient to cause death in ordinary course of nature. The time between injuries and death was about 1 to 1 ½ hours while the time between the death and postmortem was about 30 minutes.

- \* Ghulam Sarwar, Head constable appeared as PW-9 and stated that he is mashir of arrest and fully supported the contents of mashirnama of arrest Ex.16-A. He further stated that both the accused were arrested on 28.9.2004 by SIP Khalid Ghaffar in his presence.
- \* Manzoor Ahmed, Tapedar appeared as PW-10 and stated that he produced sketch of vardat at Ex.19-A and fully supported the same.
- \* Gulshan Iqbal, appeared as PW-11 and stated that he in his evidence fully supported the identification parade, which was held in his presence before the Magistrate, deposed that accused were correctly identified by the complainant and witnesses and supported the contents of mashirnama at Ex.20-A of identification being an independent witness by caste Shaikh and not related to deceased or complainant.
- \* Abdul Sattar Soomro, Magistrate appeared as PW-12 and stated that he fully supported the prosecution case by deposing that during identification parade at Ex.20-A accused Niaz Ali and Asif Ali were identified by the complainant and PWs Abdul Sattar and Abdul Shakoor correctly in presence of mashirs. Moreover incident has taken place in broad day time and defence has not challenged the identification of accused, even not pointed out any infirmity or illegality in the identification test.

6. The statements of the accused under section 342 Cr.P.C. were recorded on 3-5-2010 in which they totally denied the case of prosecution

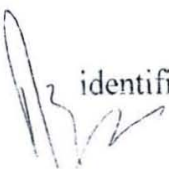
and claimed to be innocent.

7. The learned counsel for the appellants submitted that in the FIR descriptions of the culprits were not given by the complainant. That the name of Abdul Shakoor PW-3 was also not mentioned in the FIR and it was only introduced by the complainant in his statement before the Court. That all the PWs are interested being relating to each other. He further submitted that the identification parade has not been carried out as per prescribed rules and that the Magistrate in his report also did not mention the descriptions of dummies such as names and addresses. He also contended that during the statement of accused persons under section 342 Cr.P.C, the question regarding identification parade was not put to them and according to him this cannot be considered as piece of evidence and could not be based for conviction, and placed his reliance on 2012 P.Cr.L.J.page-500. He further contended that the instant case was foisted on the appellants inasmuch as the I.O. Sajjad Ahmad PW-6 has stated in his statement before the Court that "on 29.9.2004 the accused were produced before the District and Sessions Judge, Sukkur due to raid of Judicial Magistrate". This fact depicts that the appellants were arrested earlier than that of the alleged date of arrest i.e.



28.9.2004 and only after filing of application of Habeas corpus an order of raid was passed by the District and Sessions Judge, Sukkur. That allegedly robbed articles were also not effected at all from the accused persons nor the pistol of 30 bore allegedly use in the crime was recovered. The identification parade was also doubtful as it was conducted after the several days of arrest of the accused persons without assigning reason. The evidence of PWs are not trust worthy being interested witnesses and tutored by the police and no one of them given the description of the accused persons in their respective statements recorded under section 161 Cr.P.C. He lastly argued that there are bundle of doubts in the prosecution story and the instant case is devoid of any substantial evidence.

8. On the other hand the learned Additional Prosecutor General appearing for the State submitted that the prosecution witnesses are trust-worthy and their evidence is based on probable facts. She further submitted that although descriptions were not given by the complainant and the PWs as to the culprits but they have identified the accused persons through identification parade and before the trial Court during the trial and as such it



cannot be doubted. She candidly submitted that though the incriminating/robbed articles could not be recovered from the accused persons yet they were identified by the natural witnesses who had seen them closely at the time of occurrence. That in rebuttal to the argument raised by the learned counsel for the appellants that the question with regard to the identification parade was not put to the accused persons under the proceedings under section 342 Cr.P.C, she submitted that under Qanoon-e-Shahadat Order, 1984 prosecution is not obliged to conduct the identification parade as such non-asking of question in this regard would not damage the prosecution case in any manner. She lastly argued that the evidence against the appellants is so sufficient that the conviction and sentences rightly awarded by the trial Court as such, which do not warrant interference of this appellate Court.

9. Heard the learned counsel for the appellants as well as for the State. Perused the relevant record and the impugned judgment with able assistance of the learned counsel for the parties. It has been observed that the contents of FIR do not depict as to the descriptions of the accused persons as well as

the name of prosecution witness namely Abdul Shakoor PW-3 was also not mentioned in the same. It is also on the record that according to the police, the appellants were arrested on 28.9.2004 and that in the same breath it was stated that the appellants were produced before the District and Sessions Judge, Sukkur on 29.9.2004 after raid was conducted by the judicial Magistrate on order of the District and Sessions Judge in a case of Habeas corpus filed by the accused persons. So it could safely be ascertained that the application from the accused side was obviously filed earlier than the date of alleged arrest of the accused i.e. 28.9.2004, therefore, an order had been passed for raid as to the illegal confinement of the appellants on or before 29.9.2004 and as such it goes to show that they were under custody much before than the said alleged date of arrest, therefore, the arrest of the accused as narrated by the prosecution has become doubtful. As regards to the identification parade, the contentions of the learned counsel for the appellants with reference to the statement recorded under section 342 Cr.P.C. find weight particularly when he is fortified by the case law namely

2012 P.Cr.L.J.pages-500 wherein it was held that non-asking of a question

regarding identification parade which is an incriminating piece of evidence causes prejudice to the accused and as such could not be used as evidence against the accused and made basis for conviction. We are also convinced with this proposition of law that anything incriminating in nature when was not put to the accused persons in the proceedings under section 342 Cr.P.C. may cause prejudice to the accused, as such, following the principles of safe administration of justice and Audi alteram partem as well, it would not be safe to convict the accused on the basis of such evidence. Therefore, we are of the view that such evidence cannot be taken into service. That the robbed article and the pistol allegedly used in the crime have also not been recovered from the accused persons. That in the absence of any description regarding the accused persons being unknown by the complainant and PWs, makes the prosecution case highly doubtful as to the identification of the accused persons by the complainant and prosecution witnesses. That the alleged incident took place in the rush hours of the day in a fish market yet no witness from the locality was cited that also put heavy dent on the veracity

of the prosecution case inasmuch as the prosecution witnesses are relatives

to each other and moreso one of them Abdul Shakoor PW-3 is under shadow of doubt as was not mentioned at the first available opportunity i.e. in the FIR.

10. That the summary of above discussion shows that the identification parade lost its admissibility, the other available piece of evidence which could be helpful to the prosecution i.e. the recovery of incriminating articles is also absent. The evidence of PWs including complainant is also not devoid of doubts on two counts such as their statements do not mention any description of the accused persons and that they are relative inter-se. As regard the medical account is concerned in the absence of these material evidence the same is of no use.

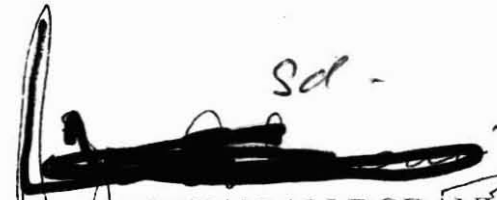
11. That in this view of the matter we are of the considered view that the prosecution case is not free of doubts and that the conviction on the basis of such evidence shall go against the norms of safe administration of justice, therefore, we are constrained to interfere in the impugned judgment by

setting aside the same.



12. Consequently, the conviction and sentences awarded to the appellants namely Niaz Ali son of Ali Nawaz Jamali and Asif Ali son of Abdul Rauf Rajput by learned Additional Sessions Judge (Hudood) Sukkur vide judgment dated 7-10-2010 are set aside and they are acquitted of the charges. They shall be released forthwith if not required to be detained in any other case.


These are the reasons of our short order dated 29-05-2012.

 Sd -  
JUSTICE RIZWAN ALI DODANI

 Sd -  
JUSTICE DR. FIDA MUHAMMAD KHAN

Islamabad the  
29<sup>th</sup> May, 2012  
Abdul Majeed/-

Approved for reporting.

 Sd -  
JUSTICE RIZWAN ALI DODANI