

**IN THE FEDERAL SHARIAT COURT**  
**(Appellate Jurisdiction)**

**PRESENT:**

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

**CRIMINAL APPEAL NO 21/K OF 2018**

AMB SON OF WARYAM THAHEEM, RESIDENT OF VILLAGE TAYYAB  
THAHEEM, TALUKA TANDO ADAM, DISTRICT SANGHAR.  
(PRESENTLY CONFINED IN CENTRAL PRISON, HYDERABAD).

..... APPELLANT

VERSUS

THE STATE

..... RESPONDENT

COUNSEL FOR THE APPELLANT : MS. SALEHA NAEEM GHAZALA,  
ADVOCATE

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

FIR NO., DATE & PS : 141/2008, DATED 06.06.2008,  
P.S. TANDO ADAM, DISTRICT  
SANGHAR.

DATE OF IMPUGNED JUDGMENT OF THE TRIAL COURT : 14.03.2011

DATE OF INSTITUTION OF APPEAL IN FSC : 03.03.2018

DATE OF HEARING : 24.04.2019

DATE OF DECISION : 24.04.2019

DATE OF JUDGMENT : 29.04.2019

**JUDGMENT**

**SHAUKAT ALI RAKHSHANI, J:-** Appellant Amb has preferred Criminal Appeal bearing No. 21-K of 2018, assailing the judgment rendered on 14<sup>th</sup> of March, 2011 (“Impugned Judgment”) authored by learned

Additional Sessions Judge, Tando Adam Camp at Central Prison Hyderabad ("Trial Court"), in case of FIR No.141/2008 registered with Police Station Tando Adam, District Sanghar, whereby he was convicted under Section 396 of The Pakistan Penal Code [XLV OF 1860] ("Penal Code") as Tazir with fine of Rs.1,00,000/-, (Rupees one lac only) and in case of default of payment of fine to further suffer R.I for six months. It was also ordered that if fine is paid, half of the same shall be paid to the legal heirs of the deceased as compensation, contemplated under Section 544-A of The Code of Criminal Procedure [Act V of 1898] ("The Code") with the benefit of Section 382-B of The Code.

2. Crime No.141/2008 (Ex.29/E) was got registered by Niaz Muhammad (PW.2) on 06<sup>th</sup> of June, 2008 at about 10:00 p.m at night with the averments that yesterday on 05<sup>th</sup> of June, 2008 in the evening, he alongwith his nephew Muhammad Ismail alias Wakio, Ghulab and Ali Ahmed alias Laloo (PW.3), while returning from Bhit Shah in his carry (van) bearing No. CR.5472, when reached near Mahi Khan Thaheem bus stop at 04:00 a.m, suddenly five armed persons emerged from the road side, who signaled them with torch to stop the vehicle and instead when he accelerated, the culprits made straight firing upon them, whereby a bullet hit Muhammad Ismail at the back of his head making exit on the left side of his cheek, whereupon he informed the personnel of P.S Taulka Tando Adam.

According to him on arrival of the police staff, injured Muhammad Ismail was shifted to Civil Hospital Sanghar, whereas he alongwith other police officials following the foot prints chased the culprits, which disappeared in village Sattar Thaheem. He added that his nephew Muhammad Ismail succumbed in the hospital, where-after on burial of the deceased; he reported the matter against five unknown armed culprits.

He maintained that he as well as the said witnesses can identify the culprits.

3. On 6<sup>th</sup> of June, 2008 at about 07.30 a.m, ASI Behram Khan (PW.7) prepared inquest report (Ex.16/A) and memo of inspection of dead body (Ex.16-B), secured seat cover stained with blood through memo (Ex.16/C) as well as blood stained clothes of deceased Muhammad Ismail through recovery memo (Ex.16/D) in the presence of Ghulam Abbas (PW.4)

Dr. Shabbir Ahmed, CMO, (PW.8), Civil Hospital Sanghar on receipt of the dead body of deceased Muhammad Ismail conducted postmortem ("PM") and issued PM report as (Ex.30/ A). He observed the following injuries:-

- "1. Lacerated wound of entry about 2.c.m. x 2.c.m circular in shape inverted margin on the back of the head with fracture.*
- 2. Lacerated wound of exit about 4.c.m x 4.c.m on left side of the face everted margin circle in shape just beside the left ear 5 c.m below the left eye."*

He further observed as follows:-

*"There was fracture in scalp and skull, and membranes was damaged.*

**Throat.**

*Walls, Ribs, and Cartilages, Pleurae, Larynx & Trachea, Right Lung, Left Lung, Pericardium & heart, Blood vesels, were found healthy.*

**Abdomen.**

*Walls, Peritoneum, Mouth, Pharynx and Oesophagus, Diaphragm, Stomach and its contents, Prancreas, small intestine and their contents, large intestine and their contents, liver Gallbladder and common bile duct, spleen, Right kidney, left kidney, Urinary bladder, and Organs of generation external and internal were also found healthy.*

**Opinion.**

*From the external & internal examination of deceased Muhammad Ismail son of Rano Khan. I am of the opinion that death due to hemorrhage & shock due the injury No.1 & 2, which caused by firearm. Which is sufficient to ordinary course of life the cause of death. All injuries antimortem in nature."*

On the next day, on the pointation of Niaz Muhammad (PW.2) crime scene was inspected and a bullet case of Kalashnikov was recovered, whereof memo (Ex.16/E) was prepared.

On 08<sup>th</sup> of June, 2008 Behram Khan ASI (PW.7) recorded the statements of Ali Ahmed alias Laloo (PW.3) and Ghulab (not produced).

On 15<sup>th</sup> of June, 2008, Behram Khan ASI (PW.7) accompanied a police party headed by SHO Ali Sher Khaskheli and got conducted a raid at village Tayab Thaheem, wherefrom appellant Amb and acquitted accused Khair Muhammad and Ali Hassan were apprehended and a Kalashnikov from appellant Amb alongwith 30 live bullets from the magazine and 10 live rounds were recovered, which were secured through recovery memo (Ex.13/A), whereof a separate case FIR No. 150/2008 under Section 13 (e) of the West Pakistan Arms Ordinance, 1965 was registered.

On 24<sup>th</sup> of June, 2008, the statement of Ali Ahmed alias Laloo (PW.3) and Ghulab (not produced) were got recorded under Section 164 of The Code by learned Judicial Magistrate-II Tando Adam in the presence of appellant and said acquitted co-accused persons.

4. On receipt of Positive Chemical and Ballistic Reports (Ex.29/F & Ex.29/G) respectively, the appellant alongwith acquitted accused persons namely Khair Muhammad, Ali Hassan, Adam were booked whereas after arrest of co-accused Nasir through supplementary challan was sent to face the trial before the Trial Court.

5. On 19<sup>th</sup> of October, 2009, and later on 29<sup>th</sup> of November, 2010 by means of amended charge appellant alongwith Khair Muhammad, Ali Hassan, Adam and Nasir were indicted by framing a formal charge under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Ordinance VI of 1979) ("Hudood Ordinance"), to which they pleaded not guilty.

6. The Prosecution in order to prove the charge produced as many as eight (8) witnesses, which ended in examination of the appellant and acquitted accused persons under Section 342 of The Code, which allegations were refuted by them, professing their innocence. None opted to record their statement on oath nor did they desire to adduce any defence witness.

At the end of the trial, appellant Amb was convicted and sentenced in the terms mentioned in para supra, whereas co-accused persons namely Adam, Nasir, Ali Hassan and Khair Muhammad were acquitted of the charge.

7. We have heard Ms. Saleha Naeem Ghazala Advocate learned counsel for the appellant and Mr. Zafar Ahmad Khan Additional Prosecutor General, Sindh for the State as well as perused the record cover to cover with their valuable assistance.

8. Ms. Saleha Naeem Ghazala Advocate, learned counsel for the appellant inter-alia contended that the appellant has been made scapegoat. Neither Niaz Muhammad (PW.2) and Ali Ahmed alias Laloo (PW.3) provided any description of the perpetrators nor subsequently any identification parade was conducted to rule out any suspicion or ambiguity with regard to identity of the culprits but the Trial Court has ignored such legal requirement, making the impugned judgment erroneous, illegal and unsustainable in the eyes of law. She maintained that nominating the appellant on 24<sup>th</sup> of June, 2009 under Section 164 of The Code, amounts to a supplementary statement which has been disapproved by the Hon'ble Supreme Court of Pakistan for being an afterthought story.

It was also argued the recovery of pistol from appellant in the manner as narrated does not inspire confidence and seems absolutely unbelievable. According to her, the recovery itself has no substantive value whereas the positive Forensic Science Laboratory Report ("FSL Report") procured by

sending the empty together with the said Kalashnikov offends the dictum as laid down by the apex Court. She added that the co-accused persons having similar role have been acquitted of the charge, whereof no appeal against their acquittal has been filed, entitling the appellant for the benefit of doctrine of consistency.

On the other hand, Mr. Zafar Ahmad Khan, Additional Prosecutor General, Sindh for the State controverted the arguments so advanced by the learned counsel for the appellant and forcefully argued that while lodging the FIR, complainant (PW.2) has stated that he and the eye witnesses had identified the culprits, which was enough to identify the appellant in the Court. He maintained that recovery of crime weapon, positive FSL Report coupled with the medical evidence are sufficient enough to hold the appellant guilty of the charge, thus requested for dismissal of the appeal.

9. The case of the prosecution rests upon the ocular testimony of Niaz Muhammad (PW.2), Ali Ahmed alias Laloo (PW.3), recovery of Kalashnikov alongwith 40 rounds, positive FSL Report of the said Kalashnikov and medical evidence. Niaz Muhammad complainant (PW.2) has lodged the FIR almost 18 hours after the occurrence, whereof explanation has been offered by him that he was engaged in tracing the culprits and then time was spent in burial of the deceased. Albeit, the explanation offered is an omnibus reason but since no one has been nominated as a culprit, therefore, the delay occurred in lodging of the FIR against unknown perpetrators has not caused any prejudice to the appellant or else, as such delay being not a result of any manipulation is ignored subject to its veracity and truthfulness with regard to identity of the appellant and other aspects of the events.

Niaz Muhammad complainant (PW.2) testified in line with his averments so incorporated in the FIR and identified the appellant and acquitted accused persons for the first time in Court. Adam with pistol was attributed the

role, who fired on the tyre of the vehicle, Khair Muhammad and Ali Hassan stated to be present on the crime scene with hatchets and the appellant was identified as the assailant, who made fire upon the deceased.

The record reflects that after two days of the occurrence, on 08<sup>th</sup> of June, 2008 the statements under Section 161 of The Code of Ali Ahmed alias Laloo (PW.3) and Ghulab were recorded, wherein the appellant and co-accused were nominated, following the statements of aforesaid witnesses recorded on 24<sup>th</sup> of June, 2008 under Section 164 of The Code in the presence of appellant and acquitted co-accused persons implicating them in the crime.

10. Niaz Muhammad complainant (PW.2) stated to have identified the culprits. As such, in the attending circumstances, it was incumbent upon the prosecution to have had conducted identification parade so as to identify them with specific roles, to rule out any suspicion and doubt in their identification for the safe administration of justice, more particularly when Niaz Muhammad complainant (PW.2) had not provided description of the culprits, such as their features, built, height and other requisites to identify them subsequently. In this regard we are fortified with dictum expounded by the apex Court in the case of JAVED KHAN ALIAS BACHA AND ANOTHER VS. THE STATE AND ANOTHER (2017 SCMR 524), wherein at para 8, it was observed in the words reproduced herein below:-

*"8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect."*

11. Another eye witness, Ali Ahmed alias Laloo (PW.3) maintained that on the fateful day, while returning from Bhit Shah at about 04.00 a.m at night he

alongwith deceased, Niaz Muhammad (PW.2) and Ghulab (not produced) got confronted with five culprits, who were identified by them in the head lights of the vehicle. He added that one of them armed with Kalashnikov, two with pistols and other two with hatchets signaled them to stop the vehicle and when they did not stop, the perpetrators armed with Kalashnikov made fire upon them passing through the front wind screen, which hit Muhammad Ismail deceased on his neck, making exit through and through from the right side of window glass. He also testified that as they crossed, the accused made 2/3, fires whereof a bullet hit on the back side of the tyre but they moved ahead covering 1 or 1.25 kilometer and thereafter stop the vehicle and that the complainant informed the police, who arrived about half an hour later. According to him, he and Ghulab (not produced) took away injured Muhammad Ismail to Civil Hospital Sanghar, whereas Naiz Muhammad complainant (PW.2) went alongwith police party. He stated to have identified accused Amb, who was armed with Kalashnikov, Ali Hassan and Khair Muhammad armed with hatchets whereas accused Adam with pistol. He also deposed that on 08<sup>th</sup> of June, 2008, he disclosed the names of the accused to complainant (PW.2), further affirming that his statement under Section 164 of The Code was recorded by Judicial Magistrate-II Tando Adam, which he produced as (Ex.15/A). He admitted in his cross-examination that complainant (PW.2) is neighboring zamindar and a friend. He further admitted that both of them exchange labourers as well. According to him, he was present at the bus stop, wherefrom he was picked up by complainant (PW.2) in his carry (van) wherein Ghulab and Ismail were already aboard.

Usually Ali Ahmed alias Laloo (PW.3) does not travel with him, which makes his presence in the said vehicle on the fateful day to be by chance. Although, we are mindful of the legal proposition that the testimony of a chance witness cannot be brushed aside merely for such reason, if otherwise his



statement rings true and confidence inspiring. In this regard, we would like to refer to the case of HASHIM QASIM AND ANOTHER VS. THE STATE (2017 SCMR 986).

But in this case, his statement was recorded by police after two days of the occurrence without any justifiably explanation and further recording of his statement under Section 164 by the Judicial Magistrate-II Tando Adam on 24<sup>th</sup> of June, 2008 at such a belated stage reduces the efficacy of his testimony, more particularly when no explanation finds mention on record as to how he came to know about the appellant and acquitted co-accused persons. Here we would like to make a reference to the case of MUHAMMAD ASIF VS. THE STATE (2017 SCMR 486), wherein it was held that one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses was unsafe to be relied upon.

Admittedly, it was a dark night incident as such it was impossible for the complainant (PW.2) and Ali Ahmed alias Laloo (PW.3) to identify the culprits with such details as narrated by them with specific attribution of the roles and weapons in their hands. It was also impossible and improbable for the said prosecution witnesses to identify the culprits from a running vehicle during firing as they had merely a glance in the headlights of the culprits. Further nomination of the appellant and acquitted co-accused persons while recording statement under Section 164 of The Code is also inconsequential as it amounts to supplementary statement, having no appreciation by the apex Court rather such statement has been held to be afterthought and inadmissible in evidence, holding the same to be a dishonest improved statement to strengthen the case of the prosecution. In this regard reliance can be placed upon the cases of AKHTAR ALI AND OTHERS VS. THE STATE (2008 SCMR 6) and KASHIF ALI VS. THE JUDGE, ANTI-TERRORISM, COURT NO.II, LAHORE AND OTHERS (PLD 2016 SUPREME COURT 951).

12. The Hon'ble Supreme Court has always depreciated and held the identification by a witness in the Court *per-se* unreliable and unsafe to make an accused culpable of the crime as the members of the complainant party, including the eye witnesses before recording the statement in Court as ample opportunity to see the accused in the Court premises on several occasions. In this regard reliance can be placed upon the case of MAJEED ALIAS MAJEEDI AND OTHERS VS. THE STATE AND OTHERS (2019 SCMR 301).

Learned Additional Prosecutor General, Sindh for State, besides relying upon the ocular account banked upon the recovery of crime weapon and positive FSL Report. The prosecution in order to establish the factum of recovery of crime weapon produced Ali Sher Khaskheli SIP (PW.1) and Ghulam Abbas (PW.4).

Ali Sher Khashkehli SIP (PW.1) testified that on 15<sup>th</sup> of June, 2008 while patrolling, he received a spy information at 05:30 p.m that appellant Amb, Khair Muhammad and Ali Hassan wanted in the instant case are present in the house of appellant, where-after he arranged two private witnesses namely Ghulam Abbas (PW.4) and one Muhammad Hassan and raided at the house of Amb where he saw them sitting, whereupon, he alongwith other police staff encircled and apprehended them. He further stated that a person namely Amb (appellant) was found in possession of a Kalashnikov loaded with 30 live bullets and 10 live rounds whereas nothing was recovered from acquitted co-accused Khair Muhammad and Ali Hassan, as such, recovery memo (Ex.13/A) was prepared and a separate case bearing No.150/2008 was registered under the West Pakistan Arms Ordinance, 1965 against the appellant Amb for having illegal and unlicensed weapon in his possession.

Ghulam Abbas (PW.4) in cross-examination admitted to be the uncle of deceased Muhammad Ismail, who accompanied the police during the investigation on many occasions.

He is marginal witness of inquest report (Ex.16/A), memo of inspection of dead body (Ex.16/B), marginal witness of recovery of blood stained articles (Ex.16/C), blood stained clothes of deceased (Ex.16/D), mashir of empty shell (Ex.16/E) as well as recovery of the Kalashnikov secured through (Ex.13/A). He is not the resident of the village of Tayyab Thaheem wherefrom the recovery of weapon was statedly affected from the appellant. He is resident of village Haji Dani, Tehsil Sinjhorro far away from the village of the appellant. Making him marginal witness of the recovery of crime weapon, offends the provision of section 103 of The Code by not associating witness of the recovery from the locality, raising questions with regard to proving the recovery independently. Moreover, there are many contradictions with regard to the mode and manner of the apprehension of the appellant and recovery of crime weapon from his possession. Ali Sher Khaskheli SIP (PW.1) in his cross-examination admitted that at the relevant time several persons were present; but he did not make any effort to make them witnesses, reducing the evidentiary value of the said recovery. Ali Sher Khaskheli SIP (PW.1) further stated that when they reached at the house of appellant, he saw three persons were sitting there and on seeing the police party, the appellant alongwith two persons came out from the house and tried to run away but police apprehended them. It is surprising that if they were inside the house then how come police saw them sitting, when admittedly they did not enter into the house. Furthermore, it is also not understandable that if they were encircled, then instead of leaving behind the Kalashnikov or hiding it somewhere in the house, why would the appellant take it with him and then try to run away, particularly, when he did not even try to use the same. In such situation, the testimony of the aforesaid witnesses of recovery of crime weapon does not inspire confidence and true too.

13. Looking at the recovery of weapon from another angle, it may be observed that the recovery of an unlicensed weapon by itself may constitute an

offence for violation of the provisions of the West Pakistan Arms ordinance, 1965, but it cannot be read in evidence unless the crime weapon is matched with the empty case of a bullet recovered from the crime scene.

Undeniably, the prosecution has procured and placed on record the positive FSL Report (Ex.29/G), in order to convince the Court that the crime weapon recovered from the appellant was used in the murder of the deceased as it matched with the empty recovered from the crime scene but regrettably after scanning the positive FSL Report (Ex.29/G), it has been noted that after the recovery of empty made from the crime scene on 06<sup>th</sup> of June, 2008, the same should have been sent to FSL but instead it was retained and after recovery of Kalashnikov (crime weapon) made on 15<sup>th</sup> of June, 2008, both the empty and Kalashnikov were sent together for analyses to procure positive FSL Report, which practice has not only been discouraged time and again by the apex Court but such practice has been held to be inappropriate, raising suspicion, manipulation and tampering with such piece of evidence. The Hon'ble Supreme Court of Pakistan while enunciating such principle has disbelieved and discredited such recovery of weapon and report of FSL thereof.

[SEE ALI KHAN VS. THE STATE (1999 SCJ 502), MUHAMMAD FAROOQ AND ANOTHER VS. THE STATE (2006 SCMR 1707), MUSHTAQ AND 3 OTHERS VS. THE STATE (PLD 2008 SUPREME COURT 1), ALI SHER AND OTHERS VS. THE STATE (2008 SCMR 707) and HASHIM QASIM AND ANOTHER VS. THE STATE (2017 SCMR 986)].

14. Now, it is a 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. The medical evidence cannot identify an accused but the same does confirm 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 case of HASHIM QASIM AND ANOTHER VS. THE STATE (2017 SCMR 986).

In the instant case, medical evidence does not coincide with the ocular testimony of Niaz Muhammad (PW.2) and Ali Ahmed alias Laloo (PW.3) rather the medical evidence reacts to their depositions making the case doubtful. The ocular testimony furnished by the eye witnesses is that the assailants made a fire which hit the front wind screen; but the injuries sustained to the deceased show entry wound 2.c.m. x 2.c.m circular in shape inverted margin on the back of the head with fracture making an exit wound 4.c.m x 4.c.m on left side of the face.

15. Sequel of the above discussion is that the prosecution has failed to prove its case beyond any shadow of doubt and the findings arrived at by the Trial Court are contrary to the evidence on record, which cannot hold field, culminating into setting aside the impugned judgment to the extent of conviction and sentence awarded to the appellant as well as his acquittal.

16. These are the reasons for our short order dated 24<sup>th</sup> of April, 2019.

**SYED MUHAMMAD FAROOQ SHAH**  
JUDGE

**SHAUKAT ALI RAKHSHANI**  
JUDGE

Islamabad, 29<sup>th</sup> of April, 2019  
Khurram/