

THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Bench:

Mr. Justice Athar Minallah

Ms. Justice Musarrat Hilali

Mr. Justice Irfan Saadat Khan

Criminal Petition No.786-L of 2016

(Against judgment dated 16.05.2016 of the Lahore High Court, Lahore passed in Criminal Appeal No.745 of 2012)

Subha Sadiq

... *Petitioner*

Versus

The State

... *Respondent*

For the petitioner:

Mr. Javed Iqbal Sheikh, ASC

For the State:

Mr. Irfan Zia, Addl.PG, Punjab
a/w Khalil ur Rehman (complainant)

Date of hearing:

22.04.2024

ORDER

Athar Minallah, J.- This petition has been filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") by Subha Sadiq, son of Muhammad Rafique ("**petitioner**"), who has sought leave against the judgment of the High Court, dated 16.05.2016, whereby the conviction and sentence handed down by the Anti-Terrorism Court-II, Multan, vide judgment dated 14.10.2011, were upheld.

2. The trial that had led to the conviction and sentencing of the petitioner was pursuant to crime report FIR No.75, dated 14.3.2011 (**Ex.PA**), registered at the Police Station Farid Nagar, District Pakpattan for the alleged commission of the offences described under sections 302, 324, 353, 186 and 34 of the Pakistan Penal Code, 1860 ("**PPC**") as well as sections 7 and 21-L of the Anti-Terrorism Act 1997 ("**the Act of 1997**"). The crime report was registered in relation to the murder of Falak Sher, Constable ("**deceased**"), on 14.3.2011 at about 9.40 pm. The

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complainant, Khalil ur Rehman (PW-10), had narrated that he and the deceased were posted at Police Station City, Pakpattan. While performing patrolling duties on a motorcycle, they had encountered three unidentified persons who were on foot. They were stopped for search on the basis of suspicion. The complainant remained sitting on the motorcycle while the deceased approached the three suspects for conducting their personal search. It was asserted that one of them who was standing behind the deceased fired at him with a firearm weapon and, resultantly, he fell on the ground because he was fatally injured. The commission of the crime was stated to have been witnessed by Khalil ur Rehman (PW-10) and the source of light mentioned in the crime report was the motorcycle's headlight. The latter informed the officials through a wireless message. Meanwhile, two police officials posted in Police Station Farid Nagar, District Pakpattan i.e. Asghar Ali, Head Constable (PW-11) and Muhammad Ikram Javed, Constable also arrived at the crime scene. The three unidentified persons then fled from the crime scene and they were chased by the complainant and the other two police officials but they could not be apprehended. The deceased was rushed to the DHQ Hospital, Pakpattan where he was pronounced dead. The autopsy was conducted by Dr. Munir Ahmed, Medical Officer (PW-6) and the nature of injuries was described in the autopsy report (Ex.PC). Iftikhar Ahmed, Sub-Inspector (PW-12) was entrusted with the investigation of the crime in this case. After completing the formalities at the Hospital he had visited the crime scene. He prepared the rough site plan and collected blood stained earth and two empties which were accordingly sealed. The investigation was transferred to Muhammad Ayub, Inspector (PW-16) on 02.6.2011. The record shows that on the same day the petitioner was arrested by him. Pursuant to the endorsement, dated 03.6.2011, issued by the District and Sessions

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Judge, Pakpattan, the test identification parade was supervised and completed by Kashif Ali Gujjar, Judicial Magistrate 1st Class (**PW-13**) on 04.6.2011. According to the report of the test identification parade three witnesses Khalil ur Rehman (**PW-10**), Asghar Ali, Head Constable (**PW-11**) and Ikram Javed, Constable, had identified the petitioner as one of the three unidentified accused. The record further shows that on 27.6.2011 the petitioner had led the investigating officer to the recovery of a firearm weapon i.e a pistol having 30 bore calibre with five live bullets. The crime empties and the recovered firearm weapon were sent to the Forensic Science Laboratory Punjab, Lahore and the latter vide letter dated 07.9.2011 sent its opinion to the investigating officer. The Chemical Examiner for Punjab, Lahore and the Serologist, Government of Punjab sent their reports vide reports dated 13.4.2011 and 28.8.2011, respectively. On completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1898 ("**Cr.P.C.**") was submitted and the trial proceedings were commenced after framing of the charge on 18.8.2011. The petitioner did not plead guilty. The prosecution had produced sixteen witnesses during the trial while the petitioner did not prefer to be examined on oath and, therefore, his statement was recorded under Section 342 Cr.P.C. The trial court, on conclusion of the trial proceedings, convicted and sentenced the petitioner vide judgment dated 14.10.2011. The petitioner preferred an appeal before the High Court which was dismissed vide the impugned judgment dated 16.5.2016. The other two co-accused were identified as Khurram Shahbaz and Ali Raza. The convictions and sentences of the co accused handed down by the trial court were set-aside and both were acquitted by the High Court vide judgments dated 19.3.2015 and 16.5.2016, respectively.

3. We had heard the learned counsel for the petitioner as well as the learned Additional Prosecution General Punjab at great length.

4. It is evident from the prosecution story narrated in the crime report that the three persons who were stopped for personal search on the basis of suspicion were not known either to the deceased or the complainant. According to the deposition of the complainant, Khalil ur Rehman (**PW-10**), he had witnessed one of the unidentified accused firing from a firearm weapon which had fatally injured the deceased. The other two witnesses Asghar Ali, Head Constable (**PW-11**) and Ikram Javed, Constable had arrived later at the crime scene. Ikram Javed, Constable was given up as a prosecution witness while Asghar Ali, Head Constable (**PW-11**) entered the witness box and had testified that he had reached the crime scene along with the other police official because they had heard shots fired from a firearm weapon, besides receiving a message from the police station. It is obvious from his testimony that the two police officials had arrived at the crime scene after the deceased had been fired upon and wounded. He had further deposed that he did not describe or attribute any role to the petitioner when his statement was recorded by the investigating officer on 17.6.2011. There is no explanation why the three unidentified accused did not flee from the crime scene immediately after they had fatally wounded the deceased. Their presence at the crime scene till two other police officials from Police Station Farid Nagar had arrived there is unexplained. There is also no explanation about the fact that neither did they attempt to harm the complainant who, according to his own testimony, remained seated on the motorcycle nor the latter, being a police official, offered any resistance. Khalil ur Rehman (**PW-10**), during his cross examination, had contradicted his own statement recorded in the examination in chief. He had deposed that the incident had taken place at 10 pm and upon hearing shots being fired a 'chowkidar' (**watchman**) had reached the crime scene. No such watchman had entered the witness box as a prosecution witness nor was

his presence mentioned by Asghar Ali, (PW-11) in his testimony. Moreover, this crucial assertion was not mentioned in the statement recorded in the examination in chief. It is not disputed that Asghar Ali (PW-11) and another police official, Ikram Javed, were not present when the incident had taken place. They had obviously not witnessed the crime and, therefore, could not have identified the petitioner. As already noted, it does not appeal to a prudent mind that the three unidentified accused would have opted to remain at the crime scene even after fatally wounding one of the police officials. There is also no explanation as to how the witness, Asghar Ali (PW-11), knew that the petitioner was the accused who had fired at and wounded the deceased. This raises a serious doubt regarding the veracity of the prosecution's story. According to the deposition of Khalil ur Rehman (PW-10) the petitioner was standing behind the deceased when he had fired upon him. He has further deposed that he then informed the concerned police officials through wireless. It is unlikely that a person would remain seated on the motorcycle with its headlights on and use the wireless in the presence of the accused when his colleague had been fatally wounded. This raises further questions regarding the reliability of the witness's testimony. The testimony is not confidence inspiring nor could it have been relied upon to convict and sentence the petitioner.

5. The next question that needs consideration is the arrest of the petitioner, which is shrouded in mystery. The evidence brought on record by the prosecution shows that he was arrested on the same day when the investigation was transferred to Muhammad Ayub, Inspector (PW-16). The recovery of the firearm weapon and the report of the Forensic Science Laboratory Punjab was disbelieved by the High Court and this factum has not been challenged by the prosecution. The prosecution had come up with the story that two witnesses, Haq Nawaz (PW-8) and Muhammad

Amin (**PW-9**), had overheard a conversation between three persons who were seated in a public place i.e an eating outlet. According to their depositions the three persons were calling each other by their names and that they were owning the killing of the deceased. They had stated in their testimonies that, instead of reporting this matter to the police, they had informed the deceased's brother belatedly. A careful examination of the depositions of Muhamad Amin (**PW-9**) and Haq Hawaz (**PW-8**) shows that they had contradicted each other regarding the timing of providing the information. The former had stated that his statement was recorded by the investigation officer on 18.6.2011 while the latter had deposed that the brother of the deceased, namely, Sarfraz Ahmed (**PW-7**), had taken them to the police station a day after the information was given to him. The brother of the deceased, Sarfraz Ahmed (**PW-7**), in his deposition, did not mention that the two witnesses had informed him regarding the conversation nor that he had taken the said witnesses to the police station. The investigating officer, Muhammad Ayub, Inspector (**PW-16**) did not say anything regarding how the petitioner was arrested. He, however, had stated that the latter was an accused in another criminal case for allegedly committing the offence under sections 11 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979. The testimonies regarding the circumstances which had led to the arrest of the petitioner and his identification by the two witnesses have not been found to be confidence inspiring nor reliable. The conviction and sentences appear to have been handed down by the trial court and upheld by the High Court mainly by placing reliance on the test identification parade. Before discussing the test identification parade and its evidentiary value in the case in hand it would be appropriate to highlight the principles and law regarding the test identification parade as a piece of evidence.

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6. The identification parade is one of the methods of proof contemplated under section 22 of the Qanun-e- Shahadat Order, 1984¹. It must be carefully conducted in order to achieve its main object i.e 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 and impression.² The process has to be carried out having regard to the exigencies of each case in a manner that is fair and does not indicate any collusiveness. It is merely a corroborative piece of evidence and holding of test identification parade is not mandatory. If the testimony of the witness qua the identity of the accused inspires confidence and the witnesses are consistent in all material particulars and there is nothing in the evidence to suggest that the latter had deposed falsely then in such an eventuality not conducting a test identification parade is not fatal to the prosecution's case.³ The omission of salient features in a crime report is not necessarily a ground to discard a test identification parade.⁴ The test identification parade is, therefore, not required when the victim had identified the accused and his statement has been found reliable.⁵ In the case of Kanwar Anwar Ali⁶, this Court has highlighted the necessary guidelines set out in the form of executive instructions and judicial pronouncements and they are as follows;

- (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

¹ Muhammad Siddique and others v. The State (2020 SCMR 342)

² Javed Khan Bacha v. the State (2017 SCMR 524)

³ M.AkramRahi v. State (2011 SCMR 877)

⁴ Muhammad Hayat v. The State (2021 SCMR 92)

⁵ Ghulam Abbas v. The State (2022 SCMR 1102)

⁶ Kanwar Anwar Ali (PLD 2019 Supreme Court 488)

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 stations;
- (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 along with 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 CH.II.C. of Vol. III of Lahore High Court Rules and Orders.

7. This Court has observed that the above measures are not exhaustive and, though these requirements are undoubtedly mandatory, at same time they are only illustrative of the precautions which a court of law must demand before the evidence offered through the test identification proceedings can be relied upon. Moreover, in the case of Mian Sohail Ahmed⁷, this Court has highlighted the importance of assessing the ability and capacity of the eye witnesses, separately, to identify the accused in the circumstances of each case. It has been observed that this assessment also forms part of the identification

⁷ Mian Sohail Ahmed v. The State (2019 SCMR 956)

evidence along with the test identification parade. It has been stressed that for the safe administration of justice, after the test identification parade the court must verify the credibility of the eye witness by assessing the evidence on the basis of the factors or 'estimator variables' eloquently described and highlighted by this Court in the aforementioned judgment. This Court has drawn a distinction between the 'system variables' and 'estimator variables'. The former includes the test identification parade while the latter refers to factors attributed to the witness e.g. the distance from which the crime was witnessed, the level of stress likely to have suffered, the nature of weapon used, duration of the incident and characteristics of the witness etc. The process of identification of an accused has been held to involve two steps i.e the test identification parade and assessing the creditability of the eyewitness on the basis of the 'estimator variables'.

8. In the case before us the test identification proceedings were fraught with serious infirmities and, therefore, could not be relied upon for handing down the conviction. The proceedings were conducted and supervised by a Judicial Magistrate, 1st Class (**PW-13**). The latter had admitted in his testimony that the features of the petitioner and the eight dummies were not recorded in the report. The petitioner was identified by three witnesses. As already noted, it was unlikely that the two police officials who had arrived at the crime scene after the incident had taken place could have identified the accused who had fired at the deceased. None of the witnesses had attributed a specific role to the petitioner. In the facts and circumstances of the case it cannot be ruled out that the witnesses of the test identification proceedings may have seen the petitioner after his arrest. It also appears from the deposition of the Judicial Magistrate, who had supervised and conducted the test identification proceedings that he was not familiar with the guidelines

and principles enunciated by this Court regarding the test identification proceedings. The probity and evidentiary value of the test identification proceedings were definitely questionable and, thus, could not have been relied upon for the purposes of handing down the conviction.

9. The above are the reasons for our short order dated 22.4.2024, and the same is as follows:

“For reasons to be recorded later, this petition is converted into an appeal and allowed. The impugned judgment of the High Court, dated 16.05.2016, is set aside. The appellant is extended the benefit of doubt. Consequently, his conviction and sentence are set aside. He shall be released forthwith if not required to be incarcerated in any other case.”

Judge

Judge

Judge

Islamabad the,
22nd April 2024
'APPROVED FOR REPORTING'
(Amir Sh./Rameen Moin, LC)