JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.98 of 2019

(Tahseen Ullah Vs. The State and another)

and

Criminal Appeal No.121 of 2019

(Salman Khan Vs. The State and another)

and

Murder Reference No. 05 of 2018

(The State Vs. Tehseen Ullah)

JUDGMENT

Appellants by	:	Mr. Shuja Ullah Gondal, Advocate for appellant in Crl. Appeal No.98/2019.
		Mr. Muhammad Ilyas, Advocate for appellant in Crl. Appeal No.121/2019.
State by	:	Mr. Jameel Fayyaz Rajput, State counsel along with Muhammad Abrar, S.I.
Dates of Hearing	:	29.09.2022.

ARBAB MUHAMMAD TAHIR, J. Tahseen Ullah and Salman Khan (hereinafter collectively referred to as "the appellants") involved in case FIR No.85/2016 dated 31.03.2016 registered under Sections 302, 392, 324 and 34 of Pakistan Penal Code, 1860 ("hereinafter referred to as **"P.P.C."**) at Police Station Sabzi Mandi, Islamabad, were tried by the Court of the learned Sessions Judge (West), Islamabad. The learned trial Court vides judgment dated 08.04.2019 (hereinafter referred to as "the impugned judgment"), after finding the appellants guilty of the offences mentioned in the said F.I.R., proceeded to convict and sentence them in the following terms:-

i. *Under section 302/34 PPC, Tehseen Ullah is sentenced to death. He shall pay an amount of Rs.500,000/- (five lacs) to the legal heirs of deceased in terms of Section 544-A*

Cr.P.C. In default of payment of compensation, he shall further undergo six months SI.

ii. *Under section 302/34 PPC, Salman is sentenced to imprisonment for life. He shall pay an amount of Rs.500,000/- (five lacs) to the legal heirs of deceased in terms of Section 544-A Cr.P.C. In default of payment of compensation, he shall further undergo six months SI.*

iii. *Under section 324/34 PPC, both are sentenced to undergo 10 years RI each with a fine of Rs.100,000/- (one Lac) each. In default of payment of fine they shall further undergo one year SI each.*

iv. *Under section 392/34 PPC, both are sentenced to undergo seven years RI each with a fine of Rs.100,000/- (one Lac) each. In default of payment of fine they shall further undergo one year SI each.*

02. Challenging their convictions and sentences, Tahseen Ullah and Salman Khan have filed Criminal Appeals Nos.98 of 2019 and 121 of 2019, respectively. The learned trial Court has sent Reference in terms of Section 374 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "Cr.P.C."), which has been numbered as Murder Reference No.05 of 2019 for confirmation or otherwise of the death sentence awarded to Tahseen Ullah (appellant/convict). Since all these matters emanate from and relating to the impugned judgment, and since they are interconnected, hence they are being disposed of through this single judgment.

FACTUAL BACKGROUND:-

03. The facts necessary for the disposal of the abovementioned appeals are that on the basis of the complaint (Exh.PJ) submitted by the complainant, namely Shaukat Ali (PW-8), F.I.R. No.85/2016 was registered on 01.04.2016 under Sections 302 and 392 of P.P.C. at Police Station Sabzi Mandi Islamabad. PW-8, Shaukat Ali got recorded his statement on day of the incident to the effect that he was the driver of Mazda bearing Registration No.JY-3456-Sindh; his brother in law namely Dost Muhammad Khan (hereinafter referred to as "deceased") was performing his duty as Conductor; that on

31.03.2016 at about 10:45 p.m. (night), after loading spare parts in the said Mazda Truck from I-9 Dry Port, Islamabad, he parked the vehicle at IJP road near Dhoke Hassu in order to place cover ('Tarpal') on it; that he climbed over the Truck for the said purpose; that in the meanwhile, he saw a person who sat inside the vehicle and the other standing in front of the vehicle; that he came down and the deceased also joined him; that he (the complainant) asked the person sitting in the vehicle about his identity; that the said person took out his pistol and snatched Rs.100,000/- (one lac) from his front pocket; that when deceased saw the assailant(s), came forward and in this way, the assailant caught hold of the deceased from his collar, who made noise by saying *"chor chor"* "thief thief"; that the said assailant opened fire at Dost Muhammad Khan, which resulted into injury on his right shoulder and when, Dost Muhammad Khan tried to run in order to safe himself, same assailant made a second fire that hit Dost Muhammad Khan on his back, after receiving the second bullet Dost Muhammad Khan fell down on the road; that the same assailant fired at him, however, he remained safe and the fire hit the tank of the Truck/vehicle; that both the assailants/thieves were aged about 28/29 years and in appearance one was about 5/6 feet and the other about 5 feet and 8 inches; that physique of both of them were slim and they were wearing Shalwar Qameez of *Khaki* colour; that after the occurrence, he (the complainant) took the deceased to PIMS Hospital who during medical treatment, could not survive.

04. The criminal law was set into motion on the written application (Exh.PJ) presented by Shaukat Ali (PW.2) before Mehboob Ahmed, Inspector (PW-10) [first I.O.], upon which formal FIR (Exh.PDD) was chalked out by Muhammad Mubashir, Sub Inspector. PW-10 recorded the statement of the complainant and thereafter moved an application for postmortem (Exh.PR). He prepared the inquest report. The said

PW visited the place of occurrence on the pointation of the complainant/PW-8, wherefrom beside securing blood stained earth, he also took into possession three empties of .30 bore pistol and sealed them into parcel vide recovery memo (Exh.PL). He also drafted rough site plan (Ex.PU) and recorded the statements of the PWs. Thereafter, the investigation of the case was entrusted to Muhammad Bashir SI (PW-14) [Second I.O.].

05. The prosecution in order to bring home the guilt of the appellants produced as many as 14 witnesses including Shaukat Ali (PW-8), who is the eye witnesses of the occurrence, Mehboob Ahmed (PW-10) and Muhammad Bashir (PW-14) are the Investigating officers, who investigated the case and Dr. Farrukh Kamal (PW-12) is the Medico Legal Officer, who on 01.04.2016 conducted the autopsy of the deceased and issued post mortem report (Ex.PX) along with pictorial diagram (Exh.PX/2). Rest of the prosecution witnesses were, more or less, formal in nature. On 02.09.2016, a charge under Sections 302, 324, 392 and 34 P.P.C. was framed against the appellants to which they pleaded not guilty and claimed trial. During the course of the investigation, the Investigating Officer found the appellants to be connected with the crime. Consequently, report under Section 173 Cr.P.C. was prepared against the appellants on 17.11.2016. On conclusion of the prosecution evidence, the learned trial Court examined both the appellants under Section 342 Cr.P.C., wherein the entire prosecution evidence was put to them upon which they denied the charges leveled against them and professed their innocence. However, the appellants neither opted to appear under Section 340(2) Cr.P.C. in their own defence nor produced any witness to disprove the charges against them. In reply to a question “why this case against you and why the witnesses had deposed against you, the appellants, replied in the following manner:-

"I have been falsely involved in this case. Before alleged identification parade, I and complainant were brought face to face in police station. My photographs were also provided to the complainant before the identification parade. As it was untraceable case, so Investigating Officer having connivance with complainant managed my false involvement. Pistol was also planed on me while sitting in police station."

Salman Khan

"So called recovery was planted on me and all proceedings in this case are fictitious. There is no reason for me to commit the crime. Investigating Officer having connivance with complainant had managed my involvement in this case. I am innocent."

06. Muhammad Athar SI, Rasool Khan, Mazhar Iqbal, HC, Yaseen and Hameed Khan, Constables were given up being unnecessary. Placing on the record the reports (Ex.PGG) and and (Ex.PHH) of the Punjab Forensic Science Agency and National Forensic Science Agency, respectively, the Prosecutor closed the prosecution's evidence. On the conclusion of the trial, the appellants stood convicted and sentenced as detailed in paragraph-1 above of this judgment. Hence, these criminal appeals and Murder Reference.

07. Mr. Shuja Ullah Gondal, Advocate, learned counsel appearing on behalf of the appellant, namely Tahseen Ullah, has contended that the learned trial Court erred in convicting the appellant on the basis of the evidence, which was not sufficient to inspire confidence; that despite the failure of the prosecution to prove its case against the appellant, the learned trial Court proceeded to convict the appellant without applying its judicial mind; that the punishment awarded by the leaned trial Court to the appellant is harsh; that the impugned judgment was passed by the learned trial Court against the facts as well as the law; that the impugned judgment is not sustainable in the eye of law;

that prosecution's entire case is built on the Identification Parade, which was conducted in utter disregard of the law laid down by the superior Courts; that despite the fact that the complainant admitted that the dummies and the accused persons were of different heights, weight and physical features, the learned trial Court gave credence to the same; that there exists discrepancies between the ocular account and the medical evidence; that the learned trial Court did not take into consideration principle regarding the admissibility of the confession in police custody, concluded the learned counsel for the appellant. Learned counsel prayed for the impugned judgment to be set aside.

08. Mr. Ilyas Khan, advocate appearing on behalf of the appellant, Salman Khan, while adopting the arguments of the learned counsel for Tahseen Ullah, has contended that the appellant is innocent and has not committed the offence with which he has been charged with; that the learned trial Court has erroneously convicted the appellant; that the impugned judgment is against the material available on the record as well as the applicable law; that the impugned judgment is the result of mis-reading and non-reading of the available record; that the appellant had not been nominated in the FIR; that the appellant has falsely been roped in this case; that the appellant was arrested after six days of the lodging of the FIR; that no explanation has been offered for the said delay; that the identification parade has not been conducted in accordance with the High Court Rules; that the learned executive Magistrate did not comply with the procedure prescribed for conducting the identification parade; that the identification parade was conducted after a delay of almost 13 days; that during the identification proceedings, the officer conducting the said parade did not mention the specific ages, physique, dresses and caste of the dummy persons; that the accused persons were not marked

with any identification at the time of the identification parade; that prior to the identification parade, the accused were shown to the witness/complainant in police station; that no active role was attributed to the appellant; that the statement of the complainant regarding the presence of the appellant at the relevant time was highly doubtful; that the entire record of the prosecution is silent as to the role of the appellant; that it is the prosecution's version that the appellant was standing in front of the vehicle; that no recovery was affected from the possession of the appellant; that the impugned judgment is against the canons of safe administration of justice; that the prosecution has failed to bring home the guilt of the appellant; that the impugned judgment suffers from gross illegality warranting for interference by this Court, concluded the learned counsel for the appellant. Learned counsel prayed for the impugned judgment to be set aside.

09. On the other hand, learned State counsel while wholeheartedly supporting the impugned judgment has vehemently controverted the arguments advanced by the learned counsel for the appellants. Learned State counsel prayed for the appeals to be dismissed.

10. We have heard the arguments advanced at the bar and have perused the available record with the valuable assistance of the learned counsel for the parties.

11. The complainant, Shaukat Ali (PW-8) is the eye witness, who furnished the ocular account in this case. Certainly, it is an unfortunate incident in which a young man had lost his life. In order to have a glimpse of the events that prevailed with the learned trial Court to endorse the prosecution's version, it would be appropriate to contextualize the said events in a chronological order, as follows:-

ROLE AND DESCRIPTIONS OF THE ASSAILANTS ACCORDING TO THE FIR:-

12. A careful perusal of the FIR reflects that PW-8 had given the particulars *qua* the ages of the assailants, color, heights as well as their complexion in the following manner:-

> *"Both the accused were approximately of 28/29 years. Their complexion was of "sanwla" colour. One of the accused was of 5/6 feet and the other was of 5/8 feet and they were wearing Shalwar and Qameez of Khakhi (a pale yellow-brown) color; physique of both of them were slim"*

13. In his examination in chief, the complainant/PW-8 stood firmed by reiterating the same version as the one that had been taken by him before the Investigating Officer i.e. PW-10 and also attributed specific roles to the appellants. The relevant excerpt of his depositions read thus:-

> *"On 31.03.2016 at about 10.45 I loaded auto spare parts on my Mazda Truck bearing registration No.JY-3456. I parked my Mazda Truck near Dhok Hassu at IJP Road at about 11:30 a.m. I alongwith Dost Muhammad Khan were placing Tarpla (cover) on Truck. All of a sudden,* ***the accused Tehseen Ullah present in custody seated in the truck, whereas Salman Khan accused present in the Court came and stood before the Truck.*** *I stepped down of the truck, Dost Muhammad Khan also came out of the truck. I asked the person sitting in the truck that who are you?* ***He stepped down of the truck and he put out a pistol. He took forcibly Rs.100,000/- from my front pocket****. When Dost Muhammad Khan saw all this, he came towards me.* ***Tehseen ullah caught, Dost Muhammad Khan from his Greban. Dost Muhammad Khan shouted chor chor (thief, thief).*** *On this the accused* ***Tehseen Ullah target Dost Muhammad Khan and fired on his right shoulder. Dost Muhammad tried to safe himself and run from there, while the accused Tehseen Ullah made a second fire on his back. After receiving second bullet Dost Muhammad***

> ***Khan fell down on the road.*** *Accused Tehseen Ullah also made a fire on me but by the grace of Allah I was saved but the bullet hit the oil tank of the truck."*
> ***(Emphasis supplied)***

14. In the cross-examination he deposed that ***"IO had asked me about the appearance /description of the accused person and I had told to the IO about it. I had told the IO that the colour of both the accused persons were (Sanwla).*** *..... At the time of the identification parade,* ***I had told the role of the accused Salman to the Executive Magistrate that the accused Salman stood in front of my Mazda Truck at the time of occurrence.*** *The accused Salman was wearing khaki Shalwar Qameez at the time of the identification parade. The other dummy persons were wearing different colour of Shalwar Qameez.*

15. Learned counsel for the appellant, Salman Khan contended that no specific/active role was attributed to the said appellant by the complainant. The said argument of the learned counsel appears to be without any force since PW-8 in his cross-examination has assigned a specific role to both of the appellants by deposing in terms that:-

> *"...****Tehseen Ullah fired on the deceased Dost Muhammad. The role of the accused Salman was that he stood in front of my Mazda Truck on road.*** *I saw for the second time the accused Salman at Adyala Jail on 12.04.2016"..... whenever we park parked the truck, we always keep on the parking light of the truck.* ***Volunteered that at the time of the occurrence the street light was sufficient. IO had asked me about the appearance / description of the accused person and I had told the IO about it. I had told the IO that the colour of the both the accused persons were (Sanwla).***

16. Apart from the roles having been specifically attributed to the appellants, it is also clear that in presence of the street light, they were very much visible to the complainant/PW-8 and were

therefore, rightly identified during the course of the identification parade, and therefore, the possibility of their false involvement in this is satisfactorily ruled out. There was no chance of any mistaken identification because the occurrence had taken place alongside the road at night time when there was almost street light. The defense endeavored to extract something beneficial from the said PW, but his testimony could not be shaken as is evident from his following cross-examination:-

> *"**I identified the accused persons because they have committed the murder of the deceased in front of me. Volunteered that if the accused persons are keep (sic) standing in hundreds of people even then I would recognized that because they had committed murder of the deceased in front of me.**"*
> ***(Emphasis supplied)***

16. The said PW in his cross-examination further went on to say that:-

> *On 12.04.2016 I went to Adyala Jail for identification of the accused persons. The accused were sitting in two rows of 8 people in each row. In the first row on No.4 the accused Tehseen Ullah present in custody was sitting and I pointed him out of the row. Assistant Commissioner asked me that how did you recognize the accused and I **told him that in front of me he has committed murder and I would recognized him even after 100 years.** In the second row I pointed out the accused Salman Khan present before the Court"*
> ***(Emphasis supplied)***

18. The perusal of the statement of the sole eye witness of the incident i.e. PW-8 and of the cross examination conducted by the learned counsels for the appellants would reveal that material and detrimental admissions were made by the learned counsels for the appellants. PW-8, who is the complainant in the instant matter got, recorded his statement before the court on 14.11.2018, giving all the details as provided earlier in his report

(Ex. PJ) and also provided all the details with respect to the occurrence and the description of the appellants along with their specific role played by them during the commission of offence. The PW-8 was cross examined at length by the defence counsels but nothing material could be extracted from PW-8. Rather during the cross examination there were certain material admissions made by the defence counsel as while answering to a question regarding the role of the accused persons, PW-8 answered that ***"at the time of occurrence the accused Salman Khan, Tehsin ullah, I and deceased Dost Muhammad were present at the place of occurrence".***

RECOVERY OF THE VEHICLE:-

19. It is an undisputed fact that the vehicle (i.e. Mazda Truck) had remained present at the place of occurrence till 06.04.2016 since its fuel tank had been hit by a fire shot and had been leaking. PW-8 during the cross-examination deposed in the following words:-

> ***"Said vehicle remained at the place of occurrence till 06.04.2016, thereafter, I got repaired it from mechanic. On 06.04.2016 I took the said vehicle at afternoon"……."I parked Mazda Truck before I-11 Police Station on 06.04.2016. I handed over the custody o the truck to the IO of the police station."***
> ***(Emphasis supplied)***

20. The said stance of PW-8 stood strengthened by the deposition made by the I.O/PW-13 in his examination in chief in the following words:-

> ***"On the pointation of accused Suleman the accused Tehseen Ullah was arrested in the instant case on the same date i.e. 06.04.2016……the complainant on the same date handed over to me Mazda truck No.JY-3456 outside the police station in the parking.***
> ***(Emphasis supplied)***

21. During the cross-examination he deposed that ***"from the date of occurrence till 06.04.2016, the truck remained available on place of occurrence. Witness has volunteered that as because of fire, its patrol tank was leaked so that was the reason for its parking till that time"***

(Emphasis supplied)

ARREST OF THE APPELLANTS.

22. It is an admitted position that initially the appellants were not nominated in the crime report. They were subsequently implicated in this case on the basis of statement made by Muhammad Bashir, Inspector/I.O. (PW-14), who deposed that on 06.04.2016, he was was on patrolling duty along with other police officials. During the patrolling, he found a suspected person (Salman Khan, appellant in Crl. Appeal No.121/2019) who after looking the police party had tried to escape from there. He further deposed that the police party followed him and apprehended him and upon his personal search, an iron fist was recovered from him; that on this recovery, a separate FIR bearing No.88/2016 under Sections 13, 20 and 65 of the Arms Ordinance was registered against him and the iron fist so recovered was taken into police custody through recovery memo Ex.PD; that during the interrogation in the said FIR, the appellant Salman Khan made an admission to the effect that he had also committed the offence in this case along with co-accused Tahseen Ullah (i.e. the appellant in the captioned appeal); that on the pointation of Salman Khan, Tahseen Ullah was also arrested on the same day i.e. 06.04.2016. The relevant portions of his deposition read as follows:-

> *"On 06.04.2016, I alongwith Hameed 4740/HC, Yaseen Ali 1793/C, Arshad 5774/C were on patrolling duty.* ***We found a suspicious person who after looking at the police party had tried to escape from there. On that we followed and apprehended him.*** *On his personal search an iron fist was recovered from him. ……****Accused Salman Khan had made admission that he has also committed offence in the instant case with his co-***

> ***accused Tehseen Ullah. On the pointation of accused Suleman the accused Tehseen ullah was arrested in the instant case on the same date i.e. 06.04.2016....*** *On 07.04.2016, both accused were sent to judicial custody for indemnification parade.*
> ***(Emphasis supplied)***

RECOVERY OF PISTOL USED IN THE COMMISSION OF THE OFFENCE:-

24. During the examination in chief, PW-14 has deposed about the recovery of the weapon in the following terms:-

> *"On 21.04.2016 both the appellants were produced before Learned Area Magistrate and took five days physical remand.* ***On 25.04.2016 accuse Tehseen Ullah during course of investigation made disclosure that he can get recovery (sic) the weapon of offence 30 bore pistol which he used during Wardat, accused led the police party and took at IJP Tool Plaza Green Area and recovered 30 bore pistol which I took into possession vide recovery memo Ex.PA. Recovered pistol is Ex.P1 available in the court."***
> ***(Emphasis supplied)***

25. The pistol which had been used in the commission of the offence was forensically found to be wedded with the three empties that were secured for the place of the occurrence. The said casings were sent for chemical examination on 04.04.2016 whereas the pistol was sent for forensic test on 25.04.2016. Therefore, there remains no doubt that the prosecution has remained unsuccessful in proving its case against the appellants.

26. Apparently, the defense did not take any exception to this aspect of the matter. In the case titled **Muhammad Hayat & another v. The State (2021 SCMR 92),** it was held as follows:-

> *"As the investigation progressed, the appellants were arrested on 28.12.2010; they were later put to a test identification parade wherein Abdul Razzaq (PW-3) and Ahad Khan (PW-4) correctly identified them as the culprits.* ***Pursuant to disclosures, the appellants led to the recovery of Kalashnikovs respectively used by them***

during the occurrence; these were forensically found wedded with the casings secured from the spot."
(Emphasis supplied)

SUBMISSION OF THE EMPTIES AND PISTOL TO THE NATIONAL FORENSIC SCIENCE AGENCY (NFSA):-

27. On 01.04.2016, during the spot inspection, three empties of 30 bore pistol were taken into possession by the I.O. and were sealed into a parcel through memo (Ex.PK). The said recovery was witnessed by Mehboob Ahmed Inspector (PW-10) and the complainant (PW-8). It appears that to this aspect of the matter, the defense did not take any exception in the cross-examination. These empties were handed over to Qaiser Bashir, Moharrar of Malkhana, who kept the same in safe custody. On 04.04.2016, the said empties were transmitted to the forensic for expert's opinion. As discussed above, the weapon i.e. 30 bore pistol was recovered on 25.04.2016 and was handed over to the Moharrar on the same day for safe custody into Malkhana. On 09.05.2016 the same was deposited in the office of the NFSA. The report (Exh.PHH) of the NFSA is in the affirmative as such it was proved that all the three empties had in fact been fired from the pistol so recovered at the instance of the appellant, Tahseen Ullah.

MEDICAL EVIDENCE

28. The record further supports the version of the complainant/PW-8 in the shape of medical evidence furnished by Doctor Farrukh Kamal PW-12, who had conducted the postmortem of the deceased and it was opined in the following terms:-

"Following injuries were noted on the body of deceased:-
Injury No. 1: Entry wound 1x1.5 centimeter, circular, inverted margins, blood stained 13 cm from right shoulder, burning present on right arm later expect.

Injury No. 2: Exit wound 1x1 cm, irregular averted margins, blood stained 30 cm from above 4 cm from mid-line right back of chest.

Rigor mortis and post-mortem levedity present. Corresponding holes present on clothes.

OPINION

"In my opinion deceased died due to fire arm injury which caused rupture and damage of right lung which caused haemo-thorax, shock and death. All injuries were ante-mortem in nature and sufficient to cause death in ordinary course of nature."

(Emphasis supplied)

29. The doctor was subjected to cross examination, but nothing beneficial to the defense could be extracted. Apart from other circumstantial evidence, medical evidence produced by the said PW is also in line with the occur account furnished by the complainant/PW-8.

TEST IDENTIFICATION PARADE AND ITS DELAY:-

30. The prosecution's case, so to speak, revolves around the identification parade and the recoveries effected subsequent thereto. The defense laid much stress on the belated conduct of the identification parade. We may reiterate that the occurrence took place on 31.06.2016 and the appellants were arrested on 06.04.2016. On 07.04.2016, they were in the judicial custody and the identification parade took place on 11.04.2016 meaning thereby within six days their identification parade was conducted and such a delay, in our view, is not fatal to the prosecution's case. The record reflects that the appellants were arrested in this case on 06.04.2016 by Muhammad Bashir, Inspector (PW-14), who sent them to judicial lock-up for the purpose of test identification parade, which took place on 12.04.2016 under the supervision the executive magistrate namely Syed Ali Asghar, (PW-13) (AC/DC (Hunza) within the precincts of Adiyala Jail, Rawalpindi. The purpose of the identification parade is only to find out as to whether the person, who has been alleged to have committed an offence is the actual

perpetrator of the crime in dispute or otherwise. It is thus pivotal in the circumstances where the name of the offender/perpetrator is not known to the person, who claims to have witness the commission of the crime by an unknown named accused, and that such an offender was earlier not known to him. However, the person/eye witness who claims to have seen the offender committing the crime, could recall the complexion, facial features, physique and age in sufficient details and also would be in a best position to identify him if and when such an accused is brought before him for identification. The sole purpose of the identification is to gauge the veracity of the version of the eye witness. It goes without saying that identification parade helps the Investigating Officer to determine as to whether the eye witness had in fact witnessed the offence having been committed by the accused. Identification parade also enables the Investigating Officer as to the exoneration or implication of the accused person on the basis of the evidence collected in the form of such parade. It is well settled that an identification parade is a substantive piece of evidence.

31. Essentially, the method of identification is enumerated in Article 22 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as "QSO"), which is reads as under:-

> *"**Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted**, are relevant in so far as they are necessary for that purpose."*
> ***(Emphasis supplied)***

32. As discussed above, the identification parade is always conducted for two purposes (i) to establish the identity of the

perpetrator and, (ii) to pin-point the active role that has been played by him in the commission of the offence. In the case titled **Tassar Mehmood & another v. The State and others (2020 SCMR** 1013), it was held as follows:-

> *"The underlying purpose behind High Court Rules and Orders, Volume III, Part-C, based upon a circular issued by the Punjab Government way back on 19th of December, 1936 is primarily to ensure that the accused confronting the witnesses in a test identification exercise is least embarrassed or handicapped. Similarly, Rule 26.32 of the Police Rules, 1934, inter alia, provides as under:-*
>
> > *"The proceedings shall be conducted in the presence of a magistrate or gazetted police officer, or, if the case is of great urgency and no such officer is available, in the presence of two or more respectable witnesses not interested in the case, who should be asked to satisfy themselves that the identification has been conducted under conditions precluding collusion."*
>
> *The survey of above provision of law renders it abundantly clear* ***that the process of test identification parade has to be essentially carried out, having regard to the exigencies of each case, in a fair and non-collusive manner, free from the taints of prejudice; a contra claim must rest upon evidential basis; the exercise is not an immutable ritual, inconsequential non-performance whereof, may cause failure of prosecution case, otherwise structured upon clean and probable evidence****. In the present case, the assailants surprised the witnesses and soon thereafter started snatching the valuables; upon resistance."*
> ***(Emphasis supplied)***

33. The identification parade in a case like the one in hand is only a test regarding a corroboratory factor, otherwise the substantive evidence is the testimonies of the eye-witnesses and the identification done during the deposition at the trial. We may observe here that the prosecution has collected evidence in this case which is enough for conviction without there being the availability of the other equally valuable evidence. In this

regard, we are guided by the wisdom laid down by the Hon'ble Supreme Court in the case titled **"Bacha Zeb Vs. the State (2010 SCMR 1189),** wherein it was held as follows:-

> *5. Delay in holding identification test was further examined by this Court in the case of Muhammad Zaman v. State 2007 SCMR 813. After relying upon the decisions of Asif Masih v. the State PLD 2001 Supreme Court 398; Lal Singh v. State 2003 INSC 506; and Vikram Singh v. Raj Singh (1973) 3 SCC (Crl.) 578),* ***it was observed that "Mere long delay in holding identification test of the accused would not by itself be sufficient to discard testimony.***
> ***(Emphasis supplied)***

34. In the case titled **Ali Muhammad v. State (1985 SCMR 1834)**, the Hon'ble Supreme Court, after having deliberated upon all material points involved in the said case identification test, has graciously observed as follows:-

> ***"14. As to the second test of corroboration in this case, the strongest item is the eye-witness account coupled with the identification parade. It needs to be clarified that it was not such a case that without approver's testimony the prosecution had no legs to stand upon****. The eye-witnesses are highly responsible (two of them are educated men dealing with accounts of the Mills) and the third a watchman. A lot importance is to be given to them.* ***They being independent, is beyond doubt and their presence at the spot is beyond challenge*** *and so is of Siraj Din P.W. The only question is of opportunity to identify at the spot and the capability to identify at the parade after a year. There is no hard and fast rule that a delayed parade due to late arrest/discovery of the culprits is always to be rejected. It depends upon a host of circumstances including the type, witnesses and other factors. In this case they had seen the killing. The killers features were fixed in their memory due to many reasons some of them have been recorded in the High Court Judgment with which we agree on this point. Regarding the formalities at the identifying parade suffice it to observe that all necessary persecutions were taken. So much so that the suspects did not raise any objection before the Magistrate prior to the parade. They thought that they had, in the arrangements made for the*

*parade by the Magistrate, a chance of not being identified. It was only after the parade that protests were made. Similarly there is no hard and fast rule that even where sufficient number of under-trials in the jail is not available, the parade cannot be conducted or that it should not be conducted at all or that if conducted it would be valueless**. This also depends upon all the relevant features involved in the case. The delay per se, particularly where the accused are apprehended after a long time, would not prejudice the capability, if otherwise enough, of the eye-witnesses to identify the culprits**. **It is not uncommon that even fleeting glimpse of a person, specially placed in a position of immense importance, would be revived in memory after long time, provided the bond of event and embedding in memory were of permanent character. In this case they were so. The point regarding failure of the eye-witnesses to utter same words at the time of pointing out a culprit at a parade, though of some importance is not of any inviolable right or rule.** That also depends upon the facts of each parade and the type of witnesses. In this case they were, as already indicated, highly responsible persons. They already stood committed in their statement recorded in the lawful proceedings that they were there in the parade so as to identify the culprits of this case. **The description of the culprits in the previous statements of the witnesses in the case is the one which might be expected in normal daylight dacoity. The discrepancies pointed out at the bar do not furnish enough reason for rejecting the identification. The parade in a case like the present one is only a test regarding a corroboratory factor. Otherwise the substantive evidence is the statement of the eye-witnesses and the identification done during the deposition at the trial. This evidence in the present case is enough for conviction independent of the availability of other equally valuable evidence."***

(Emphasis supplied)

35. In the case **titled Muhammad Siddique and others Vs. The State (2020 SCMR 342)**, it was held as follows:-

"Castigating severely the evidence of test identification parade, the learned counsel relied upon the guidelines laid down in the case of

Kanwar Anwaar Ali (PLD 2019 Supreme Court 488) to urge exclusion thereof. The supra case, indeed a fine piece of juridical literature, nonetheless, does not extend much help to the convicts; it mainly addressed laconic approach adopted by a Magistrate in holding the test identification parade in the said case while highlighting general principles of law on the subject.
(Emphasis supplied)

DIFFERENT FEATURES OF EACH CASE.

36. This Court is mindful of the fact that the identification parade is to be conducted in accordance with the procedure contained in the High Court Rules and Orders, Vol.III, Part-C, under Rule 26.32 of Police Rules, 1934 and judicial prescriptions pronounced in the judgments of the Hon'ble Supreme Court of Pakistan in a plethora of judgments as well as the settled norms of justice. It is well settled proposition of law that each and every case has to be decided keeping in view its own peculiar facts and circumstances and no hard or fast rules can be applied so as to necessarily bring a case in conformity with the other case having district features. In the case **titled Muhammad Siddique (supra), it was observed as follows:-**

"Test identification parade is a method of proof contemplated by Article 22 of the Qanun-e-Shahadat Order, 1984, *reproduced below for the convenience of reference:-*

> *"Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."*

The above framework provides enough space to admit evidence in prosecution of offenders previously unacquainted with the victims or the

witnesses; appraisal of such evidence is subject to same principles as are universally applicable to any piece of evidence, under consideration in a criminal trial*; there are no additional barricades as is evident from the plain reading of the Article ibid; without prejudice to the safeguards available to an accused at each stage of trial, essentially fair as guaranteed under the Constitution,* ***nonetheless, it does not cast an artificially heavier onus on the prosecution to meet standards of proof beyond human capacity. Each criminal case is to be decided having regard to its own peculiar facts and circumstances."***

(Emphasis supplied)

NONE ASSIGNMENT OF ROLE TO THE APPELLANTS:-

37. PW-8 had categorically deposed during the cross-examination that ***"at the time of the identification parade I had told the role of the accused Tehseen to the Executive Magistrate".*** Again said ***"I had told the Magistrate about the role of the accused persons at the place of occurrence"***. The record evinces that the defense did not confront PW-13, who was conducting the identification parade as to whether the complainant/PW-8 had ascribed any role to the accused persons and if he had attributed roles to the accused persons during the identification parade, then why it was not so mentioned by him (PW-13). It was the defense's responsibility to have confronted with his material aspect of the matter, but the defense failed in discharging its obligation. It is well settled that the deposition which goes unchallenged shall be presumed to have been admitted.

38. In the case titled **Yaqoob Khan v. State (PLD 1996 SC 97),** It was observed as under:-

"We are, therefore, unable to find anything in the two cases relied by the learned counsel for the petitioner, which supported his conclusion that if a witness at the time of identifying a person in the identification parade did not state about the role played by that person in the crime he is precluded from giving evidence in the Court with regard to this specific role in the crime and that if such evidence is

adduced at the trial, the same is to be excluded from the consideration. ***In the case before us, the witnesses who identified the accused in the identification parade, in their evidence before the Court stated in detail the role of each of the petitioners in the crime and as such their evidence was rightly relied by the Courts below."***

(Emphasis supplied)

39. In the case titled **Bacha Zeb Vs. the State ()2010 SCMR 1189)**, it was held as follows:-

"16. In a judgment reported as Ghulam Rasool and 3 others v. The State 1988 SCMR 557, it was ruled that "Role of the accused at the time of commission of offence not described by the witnesses-Inherent defect-Evidence of witness identifying parade accused in such identification parade lost its efficacy and not relied." This principle was relied upon with reference to case of Khadim Hussain v. The State 1985 SCMR 721. In the case of Alim v. The State PLD 1967 SC 307, the Honourable author Judge Mr. Justice A.R. Cornelius, the then C.J. held that "Murder-Identification of accused--Witnesses, in particular circumstances of case, at best had only fleeting look at assailant-Unsafe to put reliance of such statements." In the case of Mehmood Ahmed and 3 others v. The State 1995 SCMR 127 it was held that "Evidentiary value-identification of accused in the identification parade without attributing to them their role in the crime is of no evidentiary value."

17. We would conclude our reference to the case-law by citing this last judgment reported as in the case of Khadim Hussain (supra) authored by renowned, respectable and honourable Judge of this Court Mr. Justice Shafiur Rehman, Judge (as he was) has recorded as under:---

> ***"The mere fact that witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in a Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the***

crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, *but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as the simple fact that a witness was in a position to show that he knew a certain accused person by sight."*
(Emphasis supplied)

40. Furthermore, in the said judgment, it was held as follows:-

"4. This Court confronted with the similar point in the case of Solat Ali Khan v. State 2002 SCMR 820. In that case also the witnesses did not assign any role to the accused at the time of identification parade, except stating, "this is the man". But during the course of evidence in Court, they specified the role of each accused and the Court relied upon the said piece of evidence. ***Even the question of delay in holding the identification test was addressed to by the Court, the identification test was held after 530 days of the occurrence. The Court examining the evidence at page 826 observed as under:-***

"The figure and features of the appellant must have been imprinted on the minds of Mrs. Shahnaz Hamid (P.W.) and Umer Shahid (P. W.12) widow and son respectively of deceased Shahid Hameed. How they can forget the person who had committed this gruesome act of killing Shahid Hamid along with his driver and gunman? It is expecting too much from the complainant to point out the detailed description and features of the accused in the F.I.R. as at that moment she must be undergoing a very traumatic condition."
(Emphasis supplied)

41. In the case titled **Ashfaq Ahmed Vs. State (2007 SCMR 641), it was held as follows:-**

"We have also observed certain minor lapses on the part of investigation but it cannot be equated to

that of dishonest investigation and such procedural lapse can be ignored in view of the eye account furnished by Muhammad Irfan (P.W.2) and Muhammad Rafi (P.W.3) which have been rightly considered and relied upon by the learned trial Court determination whereof has been upheld by the learned Division Bench of High Court after having gone through the entire evidence with diligent application of mind which is not only in accordance with the settled norms of justice but precedent law as mentioned above."
(Emphasis supplied)

42. In the case titled **Ali Muhammad and another v. The State (1985 SCMR 1834),** it was dilated upon the question of failure on the part of witnesses to describe the overt acts of accused persons in the commission of the offence while picking them in the identification parade by his lordship Mr. Justice Muhammad Afzal Zullah, J. (as his Lordship then was) *inter alia* as follows:--

"The point regarding failure of the eye-witnesses to utter same words at the time of pointing out a culprit at a parade, though of some importance is not of any inviolable right or rule. That also depends upon the facts of each parade and the type of witnesses. In this case they were, as already indicated, highly responsible persons. They already stood committed in their statements so as to identify the culprits of this case. ***The description of the culprits in the previous statements of the witnesses in this case is the one which might be expected in a normal daylight dacoity. The discrepancies pointed out at the bar do not furnish enough reason for rejecting the identification. The parade in a case like the present one is only a test regarding a corroboratory factor. Otherwise the substantive evidence is the statements of the eye-witnesses and the identification done during the deposition at the trial. This evidence in the present case is enough for conviction independent of the availability of other equally valuable evidence."***
(Emphasis supplied)

43. Even otherwise, minor discrepancies can be avoided provided the ocular account furnished by the complainant is found to be confidence inspiring. In holding so, were guided by the law laid down in the case titled **Ashfaq Ahmed Vs. State (2007 SCMR 641)**, wherein it was held as follows:-

> ***"We have also observed certain minor lapses on the part of investigation but it cannot be equated to that of dishonest investigation and such procedural lapse can be ignored in view of the eye account furnished by Muhammad Irfan (P.W.2) and Muhammad Rafi (P.W.3) which have been rightly considered and relied upon by the learned trial Court determination whereof has been upheld by the learned Division Bench of High Court after having gone through the entire evidence with diligent application of mind which is not only in accordance with the settled norms of justice but precedent law as mentioned above."***
> ***(Emphasis supplied)***

44. In the case titled Bacha Zeb (supra) it was held as follows:-

> *"7. As regards the joint identification of both the appellants together, it is pointed out that in the case of Fazal Hussain (supra), two accused were arrested on 29-1-1994 and were put to identification test on 26-2-1994 where the two P.Ws. in presence of the Magistrate identified the accused and such identification test was relied upon.* ***Even otherwise, there is no harm in conducting joint identification of few accused together. Further in the case of Yaqoob Khan (supra) three accused, mixed up with 18 dummies, were put under identification test by the Magistrate in a single identification parade, where the witnesses identified them. Such facts were mentioned in the order of the High Court, which was appealed in the above case. I have examined the original file of said appeal, which was sought to be reviewed under the above authority. This Court did not find any fault in joint identification parade of three accused in a single identification parade but after relying upon the said identification test maintained the conviction and sentences of the accused.***

8. In para 14 of the judgment, it has been observed that in Exh.P.Q., memo of identification test, the Magistrate did not give the number of dummies of each accused at the time of identification nor gave the description of dummies as to whether they were of same stature or age.
9. I have examined Exh, P. Q. and find that the learned Magistrate has shown two rows of the persons in which the accused were mixed up. Not only the number of dummies but their names and fathers' names were mentioned who were standing in each row and the number of persons in each row was eight, including the accused.
10. As regards the description of the accused, such fact is not mentioned in Exh.P.Q., but the same has been mentioned in the evidence. Therefore, I will refer to the evidence of Magistrate (P. W.13), who stated as under;---

> *"The descriptions of the other under trial were almost the same as the accused persons. Volunteers that they were of the same age group."*

Non-mentioning of such facts in the identification memo would not by itself diminish the value of the identification test, as it can be termed an irregularity, which has apparently been cured by the Magistrate by mentioning such facts in the statement before the Court. Further it has not caused any prejudice to the appellants in their defence, particularly, when they have not raised any objection about the conduct or manner of identification test. Even otherwise, in the case of confession, if anything is missing in the confessional statement or non-compliance of provisions of section 164 or 364, Cr.P.C. but the Magistrate states such fact in the evidence then that defect is curable under section 533, Cr.P.C. On the same analogy, similar view can be taken in the present case.
(Emphasis supplied)

SCOPE OF THE ADMISSION MADE BY THE APPELLANT, SALMAN KHAN:-

45. The learned trial Court in the impugned judgment has very exhaustively dealt with this aspect of the matter. The relevant portions whereof read as under:-

> *"16. The story starts when on 06.04.2016, Muhammad Bashir Inspector (PW-14) along with Hameed*

Khan HC (PW-6) and other employees was on patrolling. They found a suspect who tried to escape but after being chased he was apprehended and he disclosed his name as Salman Khan. At that occasion from his passion, an iron fist was recovered and that was taken into possession. That was the time when according to prosecution, Salman Khan disclosed about the occurrence by him and his co-accused. Whether this fact is proved or not primarily it has to be seen that if this was an admissible or inadmissible piece of evidence? ***I must mention here that before Salman Khan had unveiled their involvement, he was not arrested but he was under interrogation as he was having an iron fist. Presuming that he was under custody still the question remains that his disclosure was a relevant fact and admissible under the law. Article 38 of the "Order" clearly says that no confession shall be relevant that is made in the custody of police. Article 40 of the "Order" however clarifies the position that if during investigation such confession or disclosure leads to a distinct fact that it is relevant and admissible. Prior to the arrest of Salman, nobody knew that who had committed this crime so when Salman Khan disclosed about him and his co-accused Tehseen Ullah, definitely it was a distinct disclosure. I am conscious of the fact that said disclosure alone shall not be relevant unless there has to be corroboration from other pieces of evidence which shall be seen later on."***
(Emphasis supplied)

NON PRESENCE OF MOTIVE:-

46. As is evident from the record that there exists no enmity of personal grudge which can be termed that PW-8/complainant was motivated by venom or vengeance. The said PW was not an interested witness to falsely implicate the appellants. Moreso, during the course of the arguments, learned counsel for the appellants were asked as to any motive on the part of the complainant/PW-8 but none so. In the case titled **Ashfaq Ahmed (Supra)**, it was held as follow:-

"We may mention here that interested witness is one who has a motive for falsely implicating the

accused, is a partisan and having some rancor or enmity against the accused. No evidence has come on record inferring any such enmity between the witnesses and that of petitioner. In the absence of any mitigating circumstances which have been explained time and again in various authorities such as Muhammad Sharif v. State 1991 SCMR 1622; Muhammad Yaqoob v. State 1992 SCMR 1983 and Combind Enterprises v. Water and Power Development Authority PLD 1988 SC 39, no leniency can be shown as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner. It is well-settled by now that no lenient view should be taken merely on the ground that motive has not been proved by the prosecution. In this regard reference can be made to case titled Sajjad Hussain v. State 1997 SCMR 174."
(Emphasis supplied)

47. After evaluating the evidence of identification test, we are of the considered view that the identification test has been properly proved by PW-8, who is a natural and independent witness, whose presence at the place of the incident cannot be doubted as he had no enmity or personal vengeance which could have been satisfied by him, to say the least. He has fully supported the prosecution case and have successfully undergone the lengthy cross-examination. There are no discrepancies or material contradictions in the prosecution's evidence. The prosecution witness showed unanimity on all material aspects of the matter. Admittedly, there is no reason for the prosecution witnesses or the police to falsely rope the appellants in this case. Their evidence finds corroboration with identification test. As such, there remains no reason to disbelieve their evidence.

48. In sequel to what has been discussed above, we are of the view that the prosecution has proved the case against the appellants beyond any reasonable doubt. We, therefore, find no material irregularity or illegality in the impugned judgment calling for interference by this Court, therefore, the same is **MAINTAINED**. Consequently, Crl. Appeal No.98 of 2019 and Crl. Appeals Nos. 121 of 2019 are **DISMISSED** and Murder Reference No. 05 of 2019 is answered in the **AFFIRMATIVE.**

(CHIEF JUSTICE) **(ARBAB MUHAMMAD TAHIR)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____10.2022

JUDGE **JUDGE**

ISLAMABAD | ____.10.2022
APPROVED FOR REPORTING

//*Kamran*//