JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No. 187 of 2017

Dr. Saif-Ud-Din and another.

Versus

The State, etc.

Appellant's by : **Raja Rizwan Abbasi, Sohail Akhtar and Anwar Ul Haq, Advocates.**

Respondent's by : **Mr. Kashif Mustafa Satti, Advocate.**

Mr. Awais Haider Malik, State Counsel.

Date of Hearing : **11.10.2018**

****

AAMER FAROOQ, J. - This appeal calls in question judgment, dated 14.12.2017, whereby the appellants were convicted in case FIR No.275/2013, dated 14.09.2013, under Sections 302/324/148/149/337-L PPC at Police Station Koral, Islamabad and sentenced to imprisonment for life and were held liable to pay fine of Rs.1,00,000/- as compensation to the legal heirs of the deceased and in default thereof to undergo six months simple imprisonment each.

2. The case of prosecution against, *inter-alia,* the appellants was that complaint was lodged by one Ch. Altaf Hussain that on the night of 13.09.2013 at about 11:30 P.M. a car got parked in front of his house playing loud music upon which he and his son looked outside and saw a black BMW bearing registration No.530/ICT/KE in which there were five persons who looked *Pathan*; one of them was

identified as Siraj Din Badshah, whereas the others can be identified subsequently; they were dressed in *Shilwar Kameez* and one of them had Kalashnikov while the three had 30 bore pistols and one had 12 bore gun. It was further alleged that the accused were asked to turn off the music, which they declined and started firing; the complainant and his son came down upon which the accused fired again, which injured the son of the complainant. Due to the noise and hue and cry nephews of the complainant as well as others also reached the site whereupon the accused fled but were intercepted by the nephew of the complainant namely, Masood Ahmad who was fired at and was killed by the accused. In the referred complaint only Siraj Din Badshah was nominated, however, subsequently the appellants were also nominated. They were arrested and tried for the offences and were convicted and punished as mentioned above.

3. Learned counsel for the appellants, *inter-alia,* contended that the conviction of the appellants is not sustainable in the facts and circumstances of the case. In this regards in so far as Muhammad Khaliq is concerned, it was contended that he has not been identified in accordance with law; that in the report of the Magistrate the details of the other dummies has not been mentioned as required in light of the judgments of the superior Courts; that while identifying Muhammad Khaliq as one of the accused his role in commission of the offence was not specified, which again is in violation of the law laid down by the august Apex Court. Reliance was placed on cases reported as ***"Hakim and others Vs. State" (2017 SCMR 1546), "Javed Khan Vs. State" (2017 SCMR 524), "Ghulfam Vs. State" (2017 SCMR 1189), "Azhar Mehmood Vs. State" (2017 SCMR 135) and "Kamal Din Vs.***

State" (2018 SCMR 577). It was further contended that the recovery attributed to Muhammad Khaliq is also doubtful and has been implanted inasmuch as the same was effected after about a month and the witnesses of the recovery are also not genuine. It was further submitted that the forensic report confirms that the bullets shot are not from the weapon recovered.

4. Learned counsel further submitted that a substantial reliance has been placed on the site plan by the learned Trial Court to reach to the conclusion that there was ample light and the accused/ assailants could be identified. In this behalf it was contended that it is trite law that the site plan is not a substantive piece of evidence and is made just to facilitate in reaching the conclusion. Reliance was placed on cases reported as ***"Mst. Shamim Akhtar Vs. Fayyaz Akhtar" (PLD 1992 SC 211), "Muhammad Saddique Vs. State" (2013 P. Cr. L J 539),*** and ***"Muhammad Khalid Vs. State" (2007 YLR 1423).*** It was further submitted that story of the prosecution is dubious as the prosecution witnesses and even the statements of eyewitness are discrepant. Learned counsel further contended that implication of the appellants is result of afterthought as they were not originally nominated in the FIR nor their description was given in the same.

5. Learned counsel contended that in the case of Saif-ud-Din he was not present at the scene of the occurrence and is a doctor by profession and at the relevant time was in Lahore performing his duties and ample proof of the same was provided to the Investigating Officer, which the prosecution failed to rebut. It was further contended that no identification parade in so far as Saif-

ud-din is concerned was carried out; that no role has been attributed to him and his implication is only on the basis that the car in question is owned by him. It was further submitted that ample justification was given by the defence regarding the use of the car, which was parked at his residence in Islamabad under the supervision of the caretaker Gul G.

6. Learned counsel for the complainant, *inter-alia,* contended that the defence failed to discharge onus regarding alibi in accordance with law laid down in the case reported as ***"2008 MLD 1663"***. It was further contended that Gul G was not produced; that the car in question is owned by Saif-ud-din; that the articles recovered from the car implicate the appellants; that there was ample light in the street at the time of occurrence and the appellants could be seen and identified; that the impugned judgment does not suffer from any error of law or fact. Learned State counsel supported and adopted the arguments of learned counsel for the complainant.

7. Arguments advanced by the learned counsels for the parties have been heard and the evidence and exhibits placed on record examined with their able assistance.

8. The case of prosecution against the appellants has been mentioned hereinabove, therefore, need not be re-produced. During the course of trial in order to prove its case the prosecution produced 21 witnesses. In this regard PW-1 received the dead body of Masood Ahmad and signed the memo. PW-2 and PW-3 are witnesses to the recovery of the Kalashnikov and deposed about the same; PW-3 is the father of the deceased Masood Ahmad. PW-4 and

PW-5 are the eyewitnesses, who testified regarding the occurrence. In this behalf, PW-4 also during the identification proceedings identified Muhammad Khaliq and testified to the effect; PW-6 recorded the FIR; PW-7 Malik Amir Shahzad is the draftsman, who prepared scaled site plan, which is Ex-PH and his hand written notes are Exhibited as Ex-PH/1. PW-8 is *Malkhana Moharar*, who kept three parcels, consisting of blood stain cotton, wearing apparels of the deceased, and empties and deposed to the effect. He also stated that he handed over the parcels to Muhammad Asif for sending the same for FSL; PW-9 is Dr. Farrukh Kamal, who performed the postmortem of Masood Ahmad and testified to the effect. PW-10 is Muhammad Amin, *Moharar* of Police Station Koral; PW-11 is Inspector Muhammad Zameer, whereas PW-12 is Bashir Hussain. The Magistrate who conducted the identification was produced as PW-13 (Malik Farrukh Nadeem) and exhibited the hand written report as Ex-PN. PW-14 is Malik Umar Farooq, the car dealer; PW-15 is Zulfiqar Ali, ASI; PW-16 is the complainant Ch. Altaf Hussain; PW-17 is the injured Ch. Sohail Altaf son of the complainant. PW-18 is Ayaz Akram. PW-19 is Muzaffar Hussain, who was the Investigating Officer and PW-20 is Sultan Mehmood; PW-21 is Dr. Afsar Malik, who treated Sohail Altaf.

9. Both the appellants were not originally nominated in the FIR and were subsequently involved. In this behalf the complainant and the other eyewitnesses in their statements under Section 161 Cr.P.C did not provide any features and physical attributes of the accused persons. Muhammad Khaliq was nominated almost about one month after the commission of the offence and with respect to him the identification proceedings were carried out in the presence

of the Magistrate Malik Farrukh Nadeem (PW-13). The referred witness also prepared the report regarding the identification proceedings, which was exhibited as Ex-PN. Law with respect to the identification proceedings and its significance has recently been dilated upon in a number of judgments by the Hon'ble Supreme Court of Pakistan. In this regard in case reported as ***"Azhar Mehmood Vs. State" (2017 SCMR 135)*** the august Apex Court observed that where while identifying the accused no role has been attributed to him such test identification parade was of no evidentiary value. It was further observed that even the identification of the accused before the Trial Court is unsafe. In case reported as ***"Javed Vs. State" (2017 SCMR 524)*** the Hon'ble Supreme Court observed that the identification proceedings must be carefully conducted. While holding so reliance was placed on earlier decisions reported as ***"Lalpasand Vs. State" (PLD 1981 SC 142) and "Imran Ashraf Vs. State" (2001 SCMR 424)***. It was also observed that where the complainant has not mentioned features of his slate either in the FIR or in his statement under Section 161 Cr.P.C. there was no benchmark against which to examine whether the person identified was the actual accused. In case reported as ***"Gulfam Vs. State" (2017 SCMR 1189)***, the Hon'ble Supreme Court of Pakistan deprecated joint test identification parade and also observed that identification of accused before the Trial Court during the trial was unsafe and could not be approved. In case reported as ***"Hakeem Vs. State" (2017 SCMR 1546)***, it was reiterated that while identifying the accused reference is to be made as to the role played by him in the incident otherwise the proceedings have no evidentiary value. Similar view was affirmed by the Hon'ble Supreme

Court of Pakistan in a recent judgment of ***"Kamal Din Vs. State" (2018 SCMR 577)***.

10. The bare perusal of the FIR shows that the physical features of the accused persons were not mentioned by the complainant nor were mentioned in statement under Section 161 Cr.P.C. hence, as held by the Hon'ble Supreme Court of Pakistan, there was no benchmark against which the veracity of positive identification of the accused could be judged. Moreover, it has been mentioned in the FIR that one of the assailants armed with Kalashnikov fired at Sohail Altaf. The features of this referred assailant were not mentioned in the statement under Section 161 Cr.P.C. or even in the FIR. During the course of identification proceedings as prepared and noted by PW-13 all the witnesses identified Muhammad Khaliq and attributed him the role of firing with Kalashnikov. As observed above Muhammad Khaliq was not nominated in the FIR but was implicated subsequently; the source of knowledge by the complainant and the reason for implicating Muhammad Khaliq was not elaborated during the evidence. Even during the cross examination the complainant confirmed that he did not mention his source of information in his statement dated 16.10.2013 regarding the nomination of Muhammad Khaliq, Irfanullah and Barkatullah. He also confirmed that he did not mention in his statement the reason for delay in nominating Muhammad Khaliq. Appellant Muhammad Khaliq was involved after a month or so and was arrested accordingly. Recovery of Kalashnikov has been attributed to him and witnesses to the recovery are PW-2 and PW-3. They claim to be chance witnesses. However, PW-2, Ch. Asif admitted that alongwith Investigating

Officer there was no one from the locality/Abadi to join proceedings and stated that he has not mentioned in his statement where were they going when they met Sultan, ASI. The other recovery witness PW-3 is Muhammad Ashraf who is father of the deceased Masood Ahmad. During the cross-examination, he was unable to substantiate the reason of his presence at Remo Chowk, he stated that place of recovery is accessible and within the reach of every person. He also stated that the Kalashnikov was lying in open and not concealed under the earth. In the forensic report which is Ex-EV, National Forensic Agency has opined that the crime cartridge had not been fired from the Kalashnikov recovered. Hence, the recovery attributed to the appellant Muhammad Khaliq is not in accordance with law and even otherwise is of no consequence as cartridges recovered do not match with the weapon allegedly got recovered by the referred appellant.

11. Deceased Masood Ahmad died during the incident due to alleged firing of the accused persons. The postmortem report was prepared by PW-9 i.e. Dr. Farrukh Kamal and was exhibited as Ex-PI/1/6. The referred report reveals that the deceased received multiple injuries; he deposed that in his opinion the deceased died due to firearm injuries. During the cross-examination he stated that except injury No.3, which is on the left side of the face and there is blackening present all fires were made from the long distance. He also stated that some of the injuries are from higher pedestal especially injury No.5, which could be caused by someone standing at roof. He affirmed that if victims and assailants are at same pedestal i.e. same height injuries No. 1, 3 and 5 could not be caused. He also deposed that on 17.10.2015 at about 2:20 pm one

Muhammad Khaliq/appellant was brought to him with history of firearm injury and he conducted the examination and opined that the wounds are two years old. The above medical evidence does not support the ocular account and the version as narrated in the FIR. Moreover, none of the eyewitnesses have attributed specific role to any of the accused while firing at deceased Masood Ahmad. In the complaint, general firing has been attributed to all the accused persons. Moreover, as stated by PW-9 some of the injuries especially injuries No. 1&5 are of such nature that they are long distance and seems to have been fired from a height more than that of the deceased. Moreover, in the FIR, it has been alleged and have stated by the eyewitnesses that while the accused persons including the appellants were fleeing from the site deceased Masood Ahmad tried to intercept them and they fired at him, which is not borne out from the evidence on record inasmuch as PW-9 has stated that the injuries are long distance, with only one injury is close range i.e. injury No.3, which bears blackening. Furthermore other than the Kalashnikov no other weapon was recovered and sent to forensic for analysis. No recovery has been effected from Dr. Saif-ud-Din nor any identification with respect to him was conducted even in evidence no specific role has been attributed to him.

12. There is yet another aspect of the incident, which has been highlighted by learned counsel for the appellants during the course of arguments but has not been elaborated in the prosecution evidence or even in the impugned judgment. Admittedly, a black BMW was parked outside the house of the complainant with its face towards North leading to Lahtrar road. At the left back of the vehicle there are bullet marks, which are unjustifiable and remain

inexplicable. It seems that there was an exchange of fire between the complainant and the assailants and the bullets fired from the rooftop of the house hit the vehicle. The possibility of the bullets hitting the deceased Masood Ahmad from the roof of the house also cannot be ruled out in light of the evidence of PW-9.

13. Significant reliance has been placed on the site plan while convicting the appellants. It is trite law that site plan is not a substantive piece of evidence. Reliance is placed on cases reported as ***"Mst. Shamim Akhtar Vs. Fayyaz Akhtar" (PLD 1992 SC 211), "Muhammad Khalid Vs. State" (2007 YLR 1423) and "Muhammad Saddique Vs. State" (2013 P. Cr. L J 539)***. None of the witnesses appearing for the prosecution has stated anything regarding the streetlights and the clarity with which the features of the accused/assailants could be seen. The perusal of the plan Ex-PH shows that place at Sr. No.1 is the place where the car of the appellants was parked and firing is attributed to them. Point at Sr. 14 on the site plan is an electric poll with light, which is very close to the alleged place of occurrence i.e. initial firing. However, since the site plan is not substantive piece of evidence not much reliance can placed on it and not much elaboration of the lighting in the street was made by eyewitnesses or other prosecution witnesses.

14. In view of the above position of law and fact, the findings of the learned Trial Court convicting the appellants are not sustainable as there is ample doubt regarding the involvement of the appellants in the commission of the offence. Prosecution has failed to proof its case beyond reasonable doubt against the appellants and there are

discrepancies and shortcomings in the case of the prosecution as noted hereinabove.

15. For the foregoing reasons, the instant appeal is allowed and impugned judgment, dated 14.12.2017 to the extent of conviction and awarding of sentence to the appellants is set aside. Consequently, the appellants are directed to be released forthwith, if not required in any other case.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 08.01.2019

JUDGE

Shakeel Afzal/.

Uploaded By: *Engr. Umer Rasheed Dar*