

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akber

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No. 82 of 2020

[Syed Rizwan Ali v. The State]

Appellant : Syed Rizwan Ali through
Mr. Jamal S. Mufti, Advocate

State : Through Mr. Abrar Ali Kichi,
Deputy Prosecutor General, Sindh.

Date of Hearing : 22.12.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellant Syed Rizwan Ali son of Syed Aijaz Ali was tried by learned Judge, Anti-Terrorism Court-XVII, Karachi in Special Case No.B-462 of 2015 [Crime No.243/2014, under sections 302/324/114/34 PPC read with Section 7 ATA 1997], registered at P.S. Azizabad, Karachi. On conclusion of the trial, vide judgment dated 20.03.2020 the appellant was convicted under section 265-H (2) Cr. P.C. and sentenced as under:-

- a. For the offence under Section 302(b), PPC and sentenced to suffer life imprisonment as (Tazir) and to pay Rs.2,00,000/- (Two Lac) to the legal heirs of each deceased by way of compensation under section 544-A, Cr. P.C. and in default of payment thereof, further undergo S.I. for six months.
- b. For the offence under Section 7(1)(a) of Anti-Terrorism Act, 1997 to suffer life imprisonment and to pay fine of Rs.2,00,000/- (Two Lacs) and in default of payment thereof further undergo S.I. for six months.
- c. For the offence under Section 7(c) of Anti-Terrorism Act, 1997 read with Section 324 PPC to undergo R.I. for ten (10) years with fine of Rs.50,000/-. In case of default of payment thereof, further undergo S.I. for two months.

Trial Court further ordered for forfeiture of movable and immovable properties of accused to the extent of Rs.5,00,000/- (five lacs). All the sentences were ordered to run concurrently and benefit of Section 382-B, Cr. P.C. was also extended to appellant/accused.

2. Brief facts of the prosecution case as disclosed in the **FIR No. 243 of 2014 (Exh.9/P)** are that on **21.09.2014**, the duty officer SIP Saleem Siddiqui had received information that the incident of firing had been took place at main Hussain Abad road in Bismillah Lahori Hotel, Block-2, Federal B Area and he recorded such entry No.37 in the Roznamcha at about 07:56 hours and proceeded to the Abbasi Shaheed Hospital where after completing the legal formalities regarding the dead bodies and injured persons he recorded 154 Cr. P.C. statement of uncle of the deceased persons namely Faisal Usman as complainant at Abbasi Shaheed Hospital on **21.09.2014 at about 11:00 hours**. The complainant in his statement has stated that he is residing with his family in House No.559, Block-3, F.B. Area holding CNIC 42101-1546782-9 and doing business of general store at Karimabad Market. On 21.09.2014, he was available at his residence, he received phone call from his elder brother Shakeel Daud at about 08:00 a.m. and informed him that incident of firing took place at Hussainabad at Lahori Hotel, Block-2, F.B.Area, in which his nephew Imran s/o Abdul Karim along with two friends Muhammad Sajid s/o Muhammad Hanif and Naveed s/o Muhammad Hanif have also received fire arms injuries and shifted to Abbasi Shaheed Hospital through ambulance. On such information he immediately rushed to the hospital where he was informed that his nephew along with his friends succumbed to the injuries and died, their dead bodies were lying in mortuary. On enquiry he came to know that in the said hotel where they were having breakfast at about 07:55 a.m. four persons (their names and whereabouts are unknown) **came on two motorcycles** and made fire upon them for unknown reasons. The complainant claimed against **four unknown culprits**, who made firing with their respective weapons and committed murder of his nephew Imran @ Tao along with two other friends namely Sajid and Naveed and so also injured Nawaz Sharif s/o Ghulam Haider and Bilal s/o Muhammad Hanif. The above act of culprits created terror, fear, panic and insecurity in the area and relative of deceased and injured persons. The 154 Cr. P.C. statement had been incorporated by SIP Saleem Siddiqui in the FIR Book at about 1130 hours.

3. After usual investigation, challan was submitted against the above accused under the aforementioned sections and trial court framed charge against the accused at Exh.05, to which the accused pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined as many as fourteen (14) witnesses in order to prove its case. Thereafter, prosecution side was closed.

5. Statement of accused Syed Rizwan Ali under section 342 Cr. P.C. was recorded at Exh.26, wherein the accused denied all the incriminating pieces of prosecution evidence brought against him on record and claimed false implication in this case and stated that it is managed by I.O. nothing has been produced by him and police has managed the report to show their efficiency and the private PWs are managed by law enforcement agency, Rangers and by police, who have deposed at the instigation of police and Rangers. The PWs are of rival group of MQM and declined to give statement on oath. In a question what else you have to say, he replied that he was innocent and prayed for justice, he had no concern in this case and he had been acquitted in Case FIR No.107/2015 of P.S. Azizabad by this Court in Cr. Appeal No.425 of 2017 and said that he had no concern in this case and had been falsely implicated. The deceased persons were of criminal type of persons and record of their crimes was submitted by I.O. and they were of rival group of MQM.

6. Trial Court after hearing the learned counsel for the parties and assessment of the evidence, vide judgment dated 20.03.2020 convicted and sentenced the appellant as stated above. Hence this appeal.

7. Before dealing with the instant case and assessing the evidence before us it is relevant to mention that initially co-accused Aamir @ Sarphata son of Shoukat Ali was acquitted by extending him benefit of doubt under section 265-H(i) Cr. P.C.

8. Learned counsel for the appellant contended that the impugned judgment is patently erroneous, factually incorrect and has resulted in miscarriage of justice and is unwarranted by law, same is liable to be set aside. He further contended that the impugned order is based upon contradictory evidence, which is not trustworthy, suffers from infirmity, the reasons given by the learned trial Court are patently illegal, baseless, illogical, artificial, speculative and based on misreading and misappreciation of the entire evidence available on record which has resulted in the miscarriage of justice, therefore the impugned judgment and conviction awarded to the appellant is liable to be set aside. He further contended that the impugned judgment is not sustainable in law and on facts in as much as the learned trial Court has failed to appreciate that the prosecution has miserably failed to prove its case beyond any shadow of doubt against the appellant while passing the impugned

judgment. He further contended that the FIR was registered against unknown persons and the appellant was arrested in another case and falsely implicated in this case and there are several contradictions in prosecution case. He further contended that the complainant is not an eye witness of the occurrence but he came to know about the incident from his elder brother Shakeel. He contended that the appellant was challaned in the present crime, which was already disposed of in "A" class by I.O., which shows the interest of the police. He also contended that learned trial Court has erred in holding that the prosecution has proved the case against the appellant while there was contradictory evidence which is not trustworthy due to material contradictions and conviction handed down to the appellant is illegal and the same is result of mis-reading of facts and evidence on record.

9. Conversely, learned Deputy Prosecutor General has argued that the prosecution has examined fourteen (14) PWs and they have fully implicated the accused in the commission of offence. He further argued that police officials had no enmity to falsely implicate the accused in this case and the trial Court has rightly convicted the accused after proper appreciation of evidence. Learned Deputy Prosecutor General prayed for dismissal of the present appeal.

10. We have carefully heard learned Counsel for both the parties and scanned the entire evidence available on record.

11. At the trial, prosecution examined PW-01 SIP Saleem Siddiqui [Exh.09] deposed that on 21.09.2014, he was posted as duty officer at PS Azizabad. On that day, at about 07:56 hour morning time police mobile officer namely SIP Syed-ur-Rehman telephoned on the police station that the incident of the firing took place at Lahori Hotel Hussainabad, Block-2, F.B.Area. He made roznamcha entry No.37, which he produced as Exh.9/A and then proceeded towards the place of incident where he came to know from the public that the injured persons shifted to the Abbasi Shaheed Hospital, then he reached to Abbasi Shaheed Hospital where he came to know that three persons have expired and two persons were injured in the incident of firing. During his cross-examination he admitted that he cannot say who had shifted to the injured to Abbasi Shaheed Hospital and he had not inquired about the name of the persons of public, and FIR was registered against unknown accused persons without any feature and description. He had not inspected the place of incident

therefore question of recovery did not arise, further admitted that Entry No. 37 Ex. p/A was not showing his duty timing and in the inquest report he had mentioned in the column that the culprits were unknown, and in Ex.9/A it was not mentioned that in which vehicle he went to place of incident to Abbasi Shaheed Hospital, he had not counted how many police personnel came at the spot at that time, and he had not produced entry regarding his duty timing during his evidence.

12. PW-02, Faisal Usman [Exh.10] deposed that **four years back this incident took place but at present he did not remember the exact date.** In the morning time at about 8:30 hours he was sleeping in his house when his brother Shakeel had informed him on mobile phone that incident of firing had taken place at Lahori Hotel situated at Hussainabad and his nephew Imran and other have injured and were shifted to Abbasi Shaheed Hospital. They immediately rushed to the hospital where he came to know that his nephew Imran s/o Abdul Karim along with two other persons namely Muhammad Sajid s/o Hanif and Naveed s/o Hanif who were also injured and died at the hospital. Later on he came to know that Hotel Wala namely Nawaz Sharif and one Bilal were also injured in the firing. In the hospital police was also present. Police had also recorded his 154 Cr. P.C. statement. During his cross-examination he stated that **after registration of the FIR he was called at the police station for obtaining his signature and he did not remember whether he put his signature on Ex.9/L (Statement under section 154 Cr. P.C.).**

13. PW-03 Shakeel Dawood [Exh.11] deposed that on 21.09.2014 he was sleeping in his house. One his friend Shoaib @ Shobi called him on his mobile and told him that incident of firing took place at Lahori Hotel where his nephew Imran was injured / killed along his friends namely Sajid @ Mastana and Naveed. He then immediately on telephone informed his step brother Faisal Usman, who was living in the same gali. They immediately came out and rushed to the Abbasi Shaheed Hospital where they saw the dead bodies of deceased in the Mortuary. Police after completing all the proceedings handed over dead bodies to them. His statement u/s 161 Cr.P.C. was recorded by the police. He was not cross examined though chance given.

4. PW-04, Senior MLO Abbasi Shaheed Hospital, Dr. Muhammad Pervaiz Anwar Khan, [Exh.12] deposed that on 21.09.2014, he was posted at Abbasi Shaheed Hospital.

On the same day, he received two dead bodies from jurisdiction of PS Azizabaad brought by SIP Saleem Siddiqui at about 09:30 A.M., as per letter dated 21.09.2014, which bears his signature. He started postmortem of one of the deceased Muhammad Imran s/o Abdul Karim at about 09:35 A.M. and completed at about 10.25 A.M. During his cross-examination he admitted that the inquest report are same which were seen and observed by him during postmortem and the duration between the death and postmortem can be determined from the rigor-mortis postmortem lividity, colour of injuries and body departure and he had not mentioned about the body temperature of the dead body, further admitted that he had not observed any corresponding marks of injuries on the cloths of the deceased.

15. PW-05, Sr. MLO Civil Hospital, Dr. Shahid Nizam [Exh.13], who in his Deposition has stated that on 21.09.2014, he was posted as MLO at Abbasi Shaheed Hospital at night shift at about 08:30 a.m. Two injured and three dead bodies brought by KKF with history of firearm injuries in the jurisdiction of PS Azizabad. He examined three dead bodies of (1) Muhammad Sajid s/o Muhammad Hanif aged 30 years with no pulse no BP. Pupils dilated and fixed. He issued ML Certificate 7028/2014, which he produced the same as Exh 13/C (2) Imran Abdul Karim s/o Abdul Karim aged 26 years. On examination, no pulse, no BP, no respiration, pupils dilated and fixed. He issued ML Certificate 7029/2014. He produced the same as Exh.13/D and (3) Naveed S/o unknown with no pulse, no BP, no respiration. He issued such ML No.7030/2014. He produced the same as Exh.13/E. He has also conducted postmortem of deceased Muhammad Sajid s/o Muhammad Hanif and issued postmortem report No.959/2014 and death certificate which he produced the same as Exh.13/F and 13/G. He opined the cause of death was cardio respiratory failure. Secondary to neurogenic and hemorrhagic shock due to fire arm injury. During his cross-examination he admitted that he had not mentioned in his postmortem report regarding bullet corresponding marks, and he received inquest report before conducting postmortem of deceased Sajid.

16. PW-06, Sr. Civil Judge, Syed Zaheer Ahmed [Exh.15] deposed that he was posted as 7th Judicial Magistrate Karachi-Central. He allowed the application for identification parade and directed the PI Hameedullah Khan Niazi to produce the witnesses for conducting identification parade. He produced application and the order

thereon as Exh.15/A and 15/B. During his cross-examination he admitted that he had not mentioned the CNICs, ages and address of the dummies in the mashirnama and in the identification memo address of the witness Nasir son of Abdul Razaq was not mentioned, and he had not directed witnesses to sit in his chamber but he ordered them to sit in the office room and he had not directed affixed the certificate with the identification memo.

17. PW-07 HC Traffic Nazimabad, namely Nadeem Ahmed [Exh.16] deposed that on 21.09.2014, he was posted as PC at PS Azizabad in Investigation Branch. On that day, SIP Mansoor Ahmed Warsi called him and asked him to accompany him to the place of incident i.e. Lahori Murgh Choley hotel situated at main road Hussainabad at about 1145 hours. He along with SIP Mansoor Ahmed Warsi set on motorcycle and another person whose name he did not remember at that time set on other motorcycle. They reached at the place of incident within 3/4 minutes. They saw that the blood was lying on the earth. Where he came to know that the incident of firing had took place and about 03 persons had died due to firing and 02 persons got injured in the firing. SIP Mansoor Warsi collected blood stained earth from the spot and also got recovered 14 empties of 9MM pistol and one led/sikka of 9MM pistol from the spot. The SIP then also took the photographs of the place of incident and prepared such Mushirnama of place of incident, seizer of empties and of blood stained earth and so also prepared Naksha-e-Nazri. His signature was obtained by the said SIP as a witness and so also took the signature of another person whose name he did not remember at present. He produced mashir nama as Exh. 16/A. His statement u/s 161 Cr. P.C., was also recorded at PS by the said SIP. During his cross-examination he admitted that in his statement under section 161 Cr. P.C. it is not mentioned that blood stained earth and empties were recovered from the place of incident but voluntarily said in his statement he had mentioned preparation of statement at the place of incident was the commercial and populated area and in his statement under section 161 Cr. P.C. it was not mentioned that empties were recovered from the spot, further admitted that in the mashirnama the numbers of the empty bullets are not mentioned and on the sealed parcel of the empties date was not mentioned.

18. PW-08, PC Muhammad Amir [Exh.17], who in his deposition has stated that on 08.04.2015, he was posted at PS Nazimabad as PC, PI Hameedullah Khan Niazi took him and HC Irfan in government mobile and proceeded to PS Sharifabad. The already

arrested accused namely Rizwan Ali s/o Shoukat was in the lockup arrested in some other case. The PI Hameedullah Khan Niazi interrogated the accused in case Crime No.243/2015 u/s 302/324/353/34 PPC of PS Azizabad. During interrogation accused in front of them got ready to produce voluntarily crime weapon and also disclosed that he had hidden the crime weapon at the wall of K.D.A. Office, Gulistan-e-Jauhar. On such disclosure PI took the accused in the mobile in their presence and they proceeded to some distance the accused disclosed that the crime weapon was not lying at the KDA office wall but the same was lying hidden in the Yaseenabad Graveyard. On such disclosure, they proceeded towards the Yaseenabad Graveyard, main gate, where PI Hameedullah Khan Niazi had called ASI Mansoor Warsi and PC Arshad from Azizabad PS. They took the accused and proceeded in the graveyard, the accused led them towards one of the grave on which the name was mentioned as Hajan Nanhi Begum and the accused pointed out near the tree at the grave that he had buried crime weapon under the earth he kept aside to cement blocks and he dug to some extent and took out one blue colour shopper bag and opened the same bag and got produced one 9 MM pistol along with three live bullets before the PI Hameedullah Niazi. PI Hameedullah Khan Niazi then prepared such mashirnama in his presence and in presence of PC Arshad. He put his signature on the mashirnama and co-mashir also put the signature. He produced the mashirnama of seizure and arrest as Exh 17/A. They then brought the accused and recovered weapon at PS Sharifabad. Where the accuse was locked up and the crime weapon was handed over to ASI Younus Aziz of PS Azizabad and FIR was lodged as Crime No.107/2015 under section 23(i)(a) of Sindh Arms Act, 2013. During his cross-examination he admitted that in Exh.17/A (memo of arrest and seizure dated 08.04.2015) and so also in his statement under section 161 Cr. P.C. he had not mentioned the entry number through which they left the PS Nazimabad and reached at PS Taimuria. It was not in his knowledge that the accused Amir was in the custody of the Rangers since 11.03.2015. I.O had not disclosed about the detention of accused Amir with Rangers for 90 days. He further admitted that the place of incident Bismillah Murgh Chooley Hotel was thickly populated area and number of the 9 mm Pistol was not mentioned in his statement under section 161 Cr. P.C but it in his mashirnama Exh. 17/A it was mentioned, further admitted that in his statement under section 161 Cr. P.C. it was not stated that the crime weapons was recovered by digging the land but in the mashirnama [Exh. 17/A] it

was mentioned and I.O. had not taken any private person as mashir. The cemented blocks were not taken by the I.O. as case property. The graveyard Yaseenabad was/is a big one and the surrounding area of the graveyard boundary was consisting of populated area. He further admitted that that in the mashirnama there was no mention of any cloth piece in which the case property was sealed and the sealing cloth was not bearing the date of incident and the bullet numbers were not mentioned at Exh.17/A as well as FIR and in his 161 Cr. P.C. statement. PI Hameedullah Niazi had not taken photograph of the graveyard. The fingerprint expert was not called at the time of recovery.

19. PW-09, ASI Younus Aziz [Exh.19] deposed that on 08.04.2015, he was posted as ASI at PS Azizabad. He received investigation in Crime No.107/2015 u/s 23(i)(a) Sindh Arms Act, 2013. He was entrusted copy of statement of complainant 154 Cr. P.C., copy of FIR, Memo of arrest and recovery, case property. He made such entry to the station diary. He produced it as Exh.19/A. He visited the place of incident i.e. Yaseenabad Graveyard and prepared the mashirnama of place of incident in presence of mashirs. He recorded 161 Cr. P.C. statement of the witnesses on the spot. He sent the recovered case property to FSL and such report was received on 17.04.2015. After completing the entire investigation he challaned the accused before the competent authority. During his cross-examination he admitted that he had no concern in this particular case but since he was I.O of crime No.107/2015 u/s 23(i)(a) Sindh Arms Act, 2013, in which accused Rizwan was challaned and as per Exh.19/A, the custody of the accused remained with the Inspector Hameedullah Khan Niazi and was not handed over to him and no date was mentioned on the Naksh-e-Nazri.

20. PW-10, Muhammad Sajjid [Exh.20] deposed that on 20.09.2014 at about 2330 hours his friend Imran alias Tau met with him in their mohalla which is usually known as Soonar Mohallah and in the meantime his other friends namely Nasir alias Dar and Sajjid alias Mastana also came here and they all together went to Hussainabad Food Centre for taking dinner and they spent about one and half hour in taking dinner and then went to the house of another friend namely Feroz alias Ghandi at about 0130 hours for playing gambling tash/cards and thereafter in the morning at about 0630 hours they all friends went for getting breakfast at Bismillah Lasani Murgh Choley Hotel situated at Hussainabad and after taking the breakfast were busy in chit chat

when they saw that on two motorcycles four unknown persons came there and started indiscriminate firing by targeting his friends namely Sajid Mastana, Imran Tau and Naveed alias Beemari, who received fire shot injuries and died at the spot whereas Bilal alias Ali and one employee of the hotel become injured in the firing whereas the culprits ran away on the same motorcycles from the spot. He and his friend Nasir Dar remained safe. He then immediately took his injured friend Bilal alias Ali in the rickshaw and shifted to Ziauddin Hospital from where he was shifted to Abbasi Shaheed Hospital. He then returned back to his house and on the same day in the evening time he was called by the SIP Mansoor Warsi at PS who recorded his statement under section 161 Cr. P.C. On 29.03.2015, Inspector Hameedullah Khan Niazi asked him to come at City Courts Karachi on 30.03.2015 as such he went to City Courts Karachi in the morning time. I went in the Court where Judicial Magistrate was present and about 10 persons were standing in the row in the Court. The Magistrate asked him to look at the row and identify the culprits if any in the row. He had carefully seen at the row and identified one of the culprits who had made firing upon his friends on the day of incident. Magistrate prepared some documents and obtained his thumb impression and obtained his signatures. He saw Exh. 15/D and said that it bears his signatures, thumb impression and so also his photographs. He saw the accused present in the Court who was the same to whom he identified before the Magistrate. [This witness has pointed towards the accused Rizwan correctly]. This accused had made firing on the day of incident on the deceased and injured persons. During his cross-examination he admitted that in his 161 Cr. P.C. statement number of his house was not mentioned but only Bhangoria Goth was mentioned and his mobile phone number and CNIC number were not mentioned in 161 Cr. P.C. Statement, and he had given address in his evidence as house No.483/2, Azizabad Karachi, and further admitted that in his 161 Cr. P.C. statement there was no mention that deceased Imran Tao and others were his friends and it was a fact that he had not mentioned the address of deceased Imran Tao in his 161 Cr. P.C. statement and in evidence, further admitted that he had not disclosed the address of Feroz @ Gandhi and he had not disclosed the names of 3/4 persons playing gambling in the house of Feroz @ Ghandi in his statement under section 161 Cr. P.C. He resided in the flat in the Bhangoria Goth for about 20 years. There was about 02 KM distance between Bhangoria Goth and Kareemabad and Baloch Hotel situated within the area of Bhangoria. He further admitted that he had not

mentioned in his 161 Cr.P.C. statement his mobile number and mobile number of SIP Mansoor Ahmed while he was called at PS, and they were sitting on the chairs available outside the hotel on the road, and traffic was plying at that time but it was light traffic due to morning time and many persons were sitting on chairs besides them and just opposite to Bismillah Hotel, big hospital of Memon Community is situated, further admitted that hospital administration had deployed private guards for maintaining parking and he had not mentioned from which side of the road the four unknown persons came on two motorcycles, and he had not mentioned in his 161 Cr. P.C. statement and in his evidence that he was sitting outside the hotel on road facing chair, and he had not mentioned about the colour, model, and registration number of motorcycles of unknown culprits and he had not mentioned about ambulance in his statement and police had not come at the place of incident in his presence and he had not stated about the brother of injured Bilal in his evidence about shifting to Abbasi Shaheed Hospital, and when I.O. called him at P.S. he remained there for about 1-1/2 hours and his statement was recorded in the computer whatever stated by him which was dictated by SIP Mansoor Ahmed Warsi and contents of his 161 Cr. P.C. statement were not read over to him by I.O. He did not know whether accused were political and social worker of MQM Pakistan Party and he had not received any written notice for appearing before the Court of Magistrate but I.O. asked him to appear in the Court of Magistrate on mobile phone and he had not given his mobile number to Inspector Hameedullah Khan Niazi. He had not gone to City Courts Karachi except for this case, and he further stated that he reached in the City Courts where I.O. Hameedullah Khan Niaz was present and he accompanied him to the concerned Court of JM. He further admitted that he had not given photographs to J.M., his photograph was taken by I.O. Hameedullah Khan Niazi then provided to the Court and saw Exh.15/D (identification test parade memo), contents whereof were not read over to him and Inspector Hameedullah Khan Niazi did not record his 161 Cr. P.C. statement.

21. PW-11 Muhammad Nasir while reiterating the whole prosecution story admitted that in his 161 Cr. P.C. statement his mobile phone number was not mentioned nor he mentioned his mobile phone number and he had not given his mobile number to the police, and he had not received any written letter for coming to PS from police

and he was taken to PS by police with Muhammad Sajid and remained there for about an hour, and he had not mentioned the address of Feroze Gandhi in whose house they were sitting and he had not mentioned the house number of deceased persons he had not mentioned in his 161 Cr. P.C. statement and in his evidence that he had attend the funeral and burial proceedings of the deceased, further admitted that he had not shifted any deceased and injured to the hospital after the incident nor he touched the body of injured and deceased, he had not gone to PS at any time before 21.09.2014 and he was not called at PS after 21.09.2014 in connection with this case and he had not received any written letter from Inspector Hameedullah Khan Niazi for coming at City Court but on mobile phone he called him to come at City Court. I.O. had not disclosed the block number of the building where they reached and were standing and when he recorded 161 Cr. P.C. statement he did not know that Faisal had lodged the FIR and in 161 Cr. P.C. statement it was not mentioned that Imran, Sajid, Sharjeel and Feroze were his friends.

22. PW-12 Muhammad Bilal admitted that his CNIC number, mobile number and house number were not mentioned in his 161 Cr. P.C. statement and he had not disclosed his proper and full address and in his 161 Cr. P.C. statement it was not mentioned that he was called at PS for recording 161 Cr. P.C. statement, he did not know the other persons who were present at the house of Feroze Ghandhi when they were playing cards and the name of complainant was not mentioned in his 161 Cr. P.C. statement and the time of incident he was sitting on the road side on the chair facing towards southern side and there remains rush round the clock at Memon hospital, he had not mentioned the addresses of his friends Imran and others in his 161 Cr. P.C. statement, further admitted that he had not produced in his evidence any documents to show that he got medical treatment from Ziauddin and then Abbasi Shaheed Hospital and he had not handed over blood stained cloths to the police, and he did not know whether complainant had named him as eyewitness in the FIR and the light traffic was running when he received fire shot injury and fell down on the side of the hotel and not on the road and at that time public was available on the road, and he had not received any written notice from SIP Mansoor to reach at the place of incident but he called him on cell phone number and the name of accused Rizwan was disclosed by SIP Mansoor Warsi and

he was not called through any written notice for City Court for identification parade. He went to City Court with witness Sajid and Nasir and one other person was with him except these persons and police had not informed him about the hulia of the accused but informed him about his name.

23. PW-13 SIP Mansoor Ahmed Warsi also reiterated the whole version of the prosecution and admitted that he had not produced any entry dated 21.09.2014 for coming on duty and place of incident was situated at the distance of half a kilo meter away from PS Azizabad and there was delay of three hours in lodging of the FIR and Hussainabad Road where incident took place remains busy road and he had not mentioned in the memo as Ex.16/A (memo of inspection of place of occurrence) as to at what distance the empties were lying at the place of incident. He further admitted that he had prepared Ex.16/A on the narration and pointation of complainant and witnesses Faisal Usman and PC Nadeem were not the eye witnesses, and empties were not in damage condition and he had not noted the number of empties in the memo Ex.16/A, also affirmed that date and time was not mentioned on Article-A/cloth parcel and he had not obtained the signatures of Faisal Usman on Article-A/cloth parcel and he had not mentioned in the memo 16/A that he had taken photographs of the place of incident and he had not got the sketch of the place of incident prepared through Tehsildar/Tapedar and Entry No.23/E was not the carbon copy of the original roznamcha entry and in entry Ex.23/E he had not mentioned about the sikka/lead and he had not handed over the empties to Koth Moharar, further confessed that he had not produced the road certificate of sending the empties to FSL but he had already produced the letter and in the CDRs there was no location of the place of the incident, and he had not inquired from any of the complainant mentioned in CRO of the deceased person and he had not received entry No. 40 from duty officer of their PS and entry No. 41 was also not the carbon copy of the original entry , further admitted that in entry No. 32 Ex.23/Q he had not mentioned that he called the complainant on mobile phone and in the memo Ex.22/A he had not mentioned that the accused was brought at the place of incident with muffled fact for pointation and in Ex.22/A and 23/Q he had not mentioned the police mobile registration and the names of police personnel who accompanied him at the place of incident, further admitted that he had not taken owner of the hotel or any other public person to

act as mashir at the time of pointation, and he had recorded 161 Cr. P.C. statement of owners of the hotel namely Muhammad Iqbal and Rashid and both had stated that they had not seen the culprits nor could identify any culprit and mashir PC Nadeem Ahmed had not stated about securing of 14 empties from place of incident in his 161 Cr. P.C. statement and he had not produced any entry of PS Azizabad about the putting the accused in the lockup of PS Azizabad on 26.03.2015, further admitted that during investigation before filing A-class report he had not got recorded any statement of the eye witnesses and the accused under section 164 Cr. P.C. before any Magistrate and he had not taken the cloth piece/muffler as case property in this case through which he had muffled the face of accused and when he proceeded to the place of incident and inspected the place the names of PWs Nasir son of Abdul Razzaq and Muhammad Sajid son of Muhammad Ismail were not appeared before him and their names were not appearing in the FIR as eye witness and SIP Saleem Siddiqui did not record any statement of injured person at the hospital and he had cited Nasir and Sajid as witnesses after inspection of the place of incident.

24. PW-14 Retired Inspector Hameedullah Khan Niazi deposed that previously case was disposed of in A-Class. On 28.03.2015 he moved the application to concerned Magistrate for permission and after getting such permission he moved an application to concerned Magistrate for conducting identification parade and 30.03.2015 was fixed for identification parade and in the meantime on 29.03.2015 he issued notices to the accused and witnesses under section 160 Cr. P.C. Identification parade was held by learned Magistrate on 30.03.2015. On 08.04.2015 he left PS Nazimabad as per entry No.36 and came at PS Sharifabad and started interrogating the accused and during interrogation the accused got ready to produce the crime weapon and while reiterating the prosecution story admitted that he had not produced any entry of receiving of police file and he had not produced the case property and FIR was registered against unknown culprits and there was no name of any witness mentioned in the FIR and hulia and description of the culprits were not mentioned in the FIR, and SIP Mansoor Warsee disposed of FIR in A-class for want of evidence, and he had brought the accused on 30.03.2015 before the Judicial Magistrate but he had not produced any such entry of roznamcha of PS Sharifabad, and he had not produced the accused Rizwan for recording confession statement under section

164 Cr. P.C. before any Judicial Magistrate and Ex.24/D, 24/E and 24/F receiving signatures were there but date and time of receiving notices was not mentioned and Ex.24/E and 24/F and 24/B the address of witnesses was same and on the notices under section 160 Cr. P.C. there was no signature of SIP Mansoor Warsi, further admitted that he had not got prepared any Naqsha-e-Nazri of the place of incident through Tapedar, and he had not produced any entry of roznamcha of PS Sharifabad that he put the accused in the lockup of PS Sharifabad on 30.03.2015 after identification parade and he had not produced any of entry of PS Azizabad for 08.04.2015, and he had not mentioned about two blocks and tree as mentioned in entry No.39 at Ex.24/I during his evidence and it was also not mentioned in the entry that the earth was dugged. He further admitted that he had received empties from SI Mansoor Warsi on 19.05.2015 and sent the same to FSL for matching with the weapon got produced by the accused a per Crime No.107/2015 and he had received the empties after about 41 days of receiving of investigation and he received FSL report on 04.06.2015.

25. Record reflects that earlier despite hectic efforts, I.O. Mansoor Ahmed Warsi could not find out actual culprits of the FIR No.243/2014 (present crime), which was disposed of under A-Class on 27.10.2014 by the trial Court. Furthermore, PW-13 SIP Mansoor Ahmed Warsi had himself has admitted that he had not got recorded any statement of the eye witness and the accused under section 164 Cr. P.C. before any Magistrate and on 26.03.2015 SHO of P.S. Sharifabad has informed him that the present accused arrested in Crime No. 74/2014 has disclosed about his involvement in the instant crime and during interrogation accused admitted his guilt and got ready to point out the place of incident and deposed that during interrogation the present accused got ready to produce the crime weapon and went to the place where the crime weapons was allegedly digged by the accused and found one 9 mm pistol loaded with three live bullets recovered from the shopper. The said I.O. admitted that one injured Nawaz Shareef was eye witness of the incident and in his 161 Cr. P.C. statement the said eye witness had admitted that he had not seen the culprits due to firing and he rushed towards inside the hotel and received fire shot injuries. If at all, the said Nawaz Shareef was the eye witness, as such, the best evidence was withheld by the prosecution in the case, which itself makes the case of prosecution highly doubtful and it would be presumed that

person i.e. Nawaz Shareef (injured) of this case is not supporting the case of the prosecution. I.O. has also failed to bring the owner of Bismillah Lahori Murgh Choly Hotel for recording evidence, where the alleged incident took place. Therefore, above evidence of the prosecution clearly shows glaring contradictions/infirmities, which creates serious doubt in the prosecution story.

26. It is also very important to note here that after the admission of the accused before the police officials, the I.O. did not produce him before the concerned Judicial Magistrate for recording his statement under section 164 Cr. P.C. in respect of the offence in hand nor the statements of eye witnesses have been recorded before the Magistrate, which fact has been admitted by the I.O. during his evidence. It is also an admitted position that admission of the accused before police official has got no evidentiary value under Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984. Even otherwise, such admission was also not supported from the other independent source of circumstantial evidence. It seems that the case in hand is of no evidence against the accused. In the case of **SAJID MUMTAZ and others V. BASHARAT and others** reported as **2006 SCMR 231**, wherein it was observed as follows:-

“22. As observed by the Federal Court, we could reiterate especially referring to this part of the country, that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confessions. Such confessions by now, have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship of the witness with the maker of confession and what, above all is the position or authority held by the witness.”

27. The most important thing is that there is no Huliya/description and features are mentioned in the statements of PWs 10 and 11 (so-called eye witnesses), and according to their evidence, they went to restaurant (place of incident) along with their friend **Muhammad Bilal** to had breakfast. Another crucial point is PW-13 himself admitted that he had not got recorded any statement of the eye witnesses and the accused under section 164 Cr. P.C. which itself indicates that prosecution has no tangible evidence and the present PWs were introduced by police in order to dispose of the case in hand on flimsy ground. In the case of **IMRAN ASHRAF and 7 others v.**

THE STATE (2001 SCMR 424), the Hon'ble Supreme Court of Pakistan has held as follows:-

“We are conscious of the fact that as far as site plan is concerned it has no evidentiary value but its importance can also not be denied to determine the location of the incident as well as the position of the witnesses particularly in those matters where presence or otherwise of the witnesses has been challenged. Reference may be made to 1997 SCMR 89. On the question of non-preparation of a site plan at the pointation of a witness this Court has held in the case of Gul Mir v. The State (PLD 1980 SC 185) that if it was not prepared on the pointation of a witness it will loose its evidentiary value.”

It has further been held in para. 30 of the afore-cited judgment that “This Court has already held in 1993 SCMR 550 and 1995 SCMR 127 that if no plausible explanation is offered by prosecution to record the statement of eye-witness immediately after the registration of the case then the evidence of such witness becomes incredible.”

28. Admittedly, identification parade was conducted by PW-06/Judicial Magistrate on 30.03.2015 (Exh. 15/C to 15/E), in which, an alleged eye-witnesses of the prosecution, namely, PW-10 Muhammad Sajid, PW-11 Muhammad Aamir and Muhammad Bilal have allegedly identified the present accused but I.O. failed to produce them before the concerned Magistrate for recording their statements under section 164 Cr. P.C. No plausible explanation has been furnished by the prosecution for their non-appearance before the trial court for recording of their statements under section 164 Cr. P.C. PW-06/Judicial Magistrate has also confessed that he had not mentioned the CNICs, ages and address of the dummies in the mashirnama and in the identification memo address of the witness Nasir son of Abdul Razaq was not mentioned, and he had not allowed the witnesses to sit in his chamber instead made them sit in the office room and he had not affixed the certificate with the identification memo and at the time of recording confessional of any accused or statement of the witness under section 164 Cr. P. C. certificate is to be affixed in accordance with section 364 Cr. P.C. Therefore, the prosecution case is highly doubtful. In view of above, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner. Accordingly, the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same, in all fairness.

29. In our considered view, identification of the accused in the present case was highly doubtful for the reason that accused was arrested on 25.03.2015 in FIR No.74/2015 and there is nothing on record that the said P.Ws had seen accused clearly for sufficient time at the place of incident. We have no hesitation to hold that identification parade through PW-10 Muhammad Sajid, PW-11 Muhammad Nasir and Muhammd Amir was legally laconic and unsafe for maintaining conviction. Moreover, identification parade was not held in accordance with the guidelines contained in the Police Rules, 1934. Reliance can be placed upon the case reported as **Hakeem and others vs. The State (2017 SCMR 1546)**, wherein the Honourable Supreme Court has held as under:

"The Rule 26.32(1)(d) inter alia require "the suspects shall be placed among other persons similarly dressed and of the same religion and social status, in the proportion of 8 or 9 such persons to one suspect. Each witness shall then be brought up separately to attempt his identification. Care shall be taken that the remaining witnesses are " still kept out of sight and hearing and that no opportunity is permitted for communications to pass between witnesses who have been called up and those who have not." PW-5, Imdad Ali, Assistant Mukhtiarkar, Mirpursakro, in whose presence the identification parade was conducted, has stated in his deposition that he arranged 22 dummies. He deposed "the accused persons namely Ghulam Mustafa, Bodo, Noor Mohammad, Khuda Bux, Usman, Hakim and Imdad were mixed up in the row with damies (sic) according to their choice and thereafter the complainant Wali Muhammad and PWs Jan Mohammad and Abdullah picked them up from the row." So in-fact seven accused were lined up with dummies for identification. Furthermore, during the identification parade, no specific role played in the incident was assigned to any particular accused. This Court in the case of Azhar Mehmood v. State (2017 SCMR 135) has held that in an identification parade, if the accused were identified without reference to any role played by them in the incident, the same is of no evidentiary value. A quote from the judgment of Azhar Mehmood's case is as follows:-

"We have gone through the statements made by the supervising Magistrates, i.e. PW5 and PW10 as well as the proceedings of the test identification parades and have straightaway noticed that in the said parades the present appellants had not been identified with reference to any role played by them in the incident in issue. It has consistently been held by this Court that such a test identification parade is legally laconic and is of no evidentiary value and a reference in this respect may be made to the cases of Khadim Hussain v. The State (1985 SCMR 721), Ghulam Rasul and 3 others v. The State (1988 SCMR 557), Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), Mehmood Ahmad and 3 others v. The State and another (1995 SCMR 127), Siraj-ul-Haq and another v. The State (2008 SCMR 302), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Shafqat Mehmood and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563) and Muhammad Fayyaz v. The State (2012 SCMR 522)"

5. This Court in the case of *Bacha Zeb v. The State (2010 SCMR 1189)* after relying upon earlier decision of this Court in the case of *Lal Pasand v. The State (PLD 1981 SC 142)* held that it would be unreasonable to mix five accused persons with several other persons for the purposes of identification as such a larger number of persons would only confuse the identifying witnesses and the proper course is to have separate identification parades for each accused. Keeping in

view the manner in which the identification parade was held, such identification parade cannot be relied upon to award the accused punishment of life imprisonment, who on account of old blood feud may also be already known to the complainant.”

30. It is settled law that identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence, since memories fade and visions get blurred with the passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between occurrence and identification proceedings, should be viewed with suspicion. Moreover, it is imperative to ensure that, after their arrest, the suspects are put to identification tests as early as possible and 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 will avoid the possibility of overzealous investigation officers 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 so that no witness could see them. Identification parades should never be held at police stations and the Magistrate, supervising the identification proceedings, must verify the period, 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. In order to guard against the possibility of a witness identifying an accused person by chance, the number of dummies to be intermingled with the accused persons should be as much as possible but 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. Ratio between the accused persons and the dummies should be 1 to 9 or 10. It also 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 should also 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. 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 someone depends only upon his vigilance and caution. 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. 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 and 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 and if a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked up by the witness. **The Magistrate is also required to record in his report all the precautions taken by him for a fair conduct of the proceedings and should also issue certificate at the end of his report.** Such guidelines have elaborately been mentioned in the order of the Honourable Supreme Court dated 22.02.2019, passed in Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018 (PLD 2019 SC 488).

31. Now we come to the point of recovery of incriminating pistol i.e. 9 mm pistol on the pointation of accused, it may be observed that PW-13 (I.O. of the case) stated that on **08.04.2015** during interrogation the accused got ready to produce the crime weapon, then he took the accused to the Yasinabad graveyard and dug the earth of one grave and produced one blue color shopper and handed over to him in which he found **one 9 mm pistol loaded with three live bullets recovered from the shopper**, whereas, incident took place on **21.09.2014** and three persons were killed. It is further important to note that 9 mm bore pistol No. HAM775 with magazine and three 9 mm bore live cartridges and other crime empties (damage condition) were received by Ballistic Expert on **19.05.2015** for examination. There is about 41 days' delay in sending of the crime weapon and empties to the Ballistic Expert, which has not been explained by the prosecution, which creates serious doubt in the prosecution story. It is also crucial to note that the present accused had already been acquitted in case Crime No.107/2015, registered under section 23(i)(a) of Sindh Arms Act, 2013 by this Court vide judgment dated 11.10.2018. Head Mohrarr of P.S. has also not been examined, who was Incharge of *Malkhana*.

32. Prosecution failed to prove that appellant assaulted or used criminal force to police officials to deter from discharge of their duty. Appellant had been convicted under section 324, PPC was without any evidence. From the prosecution

evidence available on record, offence had no nexus with the object of Anti-Terrorism Act, 1997 as contemplated under sections 6 and 7 of the Anti-Terrorism Act, 1997.

33. Admittedly, arrival and departure entries have not been produced by the prosecution. We are unable to rely upon the evidence of the prosecution witnesses without independent corroboration which is lacking in this case. Investigation officer had also failed to conduct the fair investigation in this case as no independent person of locality was examined in order to ascertain truth. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case.

34. In criminal cases the burden of proving its case lies on the prosecution and the prosecution is duty bound to prove the case against the accused through reliable evidence, direct or circumstantial and that too beyond reasonable doubt. Besides this, it is a settled principle of law, that if there is an element of doubt as to guilt of an accused, the benefit of that doubt must be extended to him. The doubt of-course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. In presence of such lacunas in the prosecution case we are of the considered view that the conclusion drawn and reasons advanced by learned trial Court do not show fair evaluation of evidence, which is not in accordance with the settled principles in criminal cases, therefore, impugned judgment is a result of erroneous and unreasonable lines of reasoning and merits interference by this Court to erase the effect of miscarriage of justice.

35. After careful reappraisal of the evidence discussed above, we are left with no doubt that the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same.

36. In view of the above stated reasons, we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about the guilt of accused. The concept of benefit of doubt to an accused person is deep-rooted in our Country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as

a matter of grace and concession but as a matter of right. In the case of **Muhammad Mansha vs. The State (2018 SCMR 772)**, the Hon'ble Supreme Court has observed as follows:-

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

The above principle was also recently reiterated by the Hon'ble Supreme Court in the case of **Abdul Jabbar v. State (2019 SCMR 129)**.

37. From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the appellant's implication in this case is not free from doubts. He thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story.

38. For the above stated reasons, we had reached to an irresistible conclusion that prosecution had utterly failed to prove its case against the appellant and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellant could not be ruled out. Resultantly, this appeal was allowed and conviction and sentence recorded by the trial Court vide our short order dated 22.12.2020 when impugned judgment dated 20.03.2020 was set aside and appellant was acquitted of the charges. Appellant was ordered to be released forthwith if not required in some other custody case.

41. These are the reasons for our short order dated 22.12.2020.

JUDGE

JUDGE