

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Cr. A.T. Jail Appeal No. 40 of 2024

Present Before:

Justice Zafar Ahmed Rajput

Justice Tasneem Sultana

Appellant : Mumtaz Ali s/o Qadir Bux, through
Mr. Zulfiqar Ali Mashori, advocate.

Respondent : The State, through Mr. Muhammad Iqbal
Awan, Addl. Prosecutor General, Sindh.

Date of hearing : **12.02.2025**

Date of order : **12.02.2025**

J U D G M E N T

Ms. TASNEEM SULTANA, J. Through this appeal, appellant, namely, Mumtaz Ali son of Qadir Bux has assailed the judgment, dated 29.01.2024, passed by the learned Anti-Terrorism Court No. XIX, Karachi in Special Case No. 17 of 2023, arisen out of F.I.R. No. 649 of 2022, registered at P.S Quaidabad, Karachi-Malir, under sections 392, 397, 353, 324/34, P.P.C. r/w Section 7 of Anti-Terrorism Act, 1997 (“Act of 1997”), whereby he was convicted and sentenced, as under: -

- (i) *for offence under section 397/34, P.P.C., the appellant shall undergo R.I for seven years and pay a fine of Rs. 20,000/-, in default thereof, appellant to undergo S.I. for three months;*
- (ii) *for offence under section 7(h) A.T.A, 1997, r/w section 353, P.P.C., appellant shall undergo R.I. for two years and pay a fine of Rs. 20,000/-, in default thereof, appellant to undergo S.I. for three months;*
- (iii) *for the offence under section 7(i)(b) A.T.A, 1997, r/w section 324 PPC, appellant shall undergo R.I for five years and to pay a fine of Rs.20,000/-, in default thereof, appellant shall suffer S.I. for six months.*

All the sentences were ordered to run concurrently and the benefit of section 382/B, Cr. P.C. was extended to appellant.

2. Brief facts of the prosecution case are that complainant Muhammad Adeel s/o Ghulam Rasool lodged the aforesaid F.I.R., stating therein that, on 21.11.2022, he along with his brother Muhammad Nabeel was going to his job in M/s. Younus Textile Mills on his motor-cycle 125cc, Unique, bearing No. AFR 2022; at 7.50 a.m., they reached General Tyre Road, near Lati Fire Station, where four armed accused persons on two motor-cycles intercepted them and on the strength of weapons they snatched his motorcycle with his CNIC and other documents. Meantime, four police officials of 15-Madadgar arrived there on two motor-cycles, who signaled the accused to stop, but they opened fire on them with intention to kill them and deter them from discharging their duty, causing firearm injury to PC Gulsher. In retaliation one accused, namely, Suhno alias Laiq also received bullet injuries and he fell down, while rest three succeeded to make their escape good on snatched motor-cycle. ASI Neek Zada apprehended the injured accused and recovered from him one 30-bore pistol along with magazine, one magazine loaded with five live rounds, and secured three empties of SMG, one empty of 9mm and two empties of 30 bore pistols from the place of incident under memo of arrest and recovery; thereafter, injured accused and PC Gulsher were shifted to hospital for treatment. The complainant reported the incident vide aforesaid F.I.R. at police station. The injured accused later succumbed to injuries in Jinnah Hospital during his treatment.

3. Per investigation, on 19.12.2022, present appellant/accused was arrested in another Crime No. 715 of 2022, registered at P.S. Quaidabad under section 23(1)(a) of Sindh Arms Act, 2013, who during interrogation disclosed his involvement in the instant crime/case. He was identified by the complainant in identification test conducted on 26.12.2022 by the Judicial Magistrate-XII, Karachi-Malir (the "J.M"). After completing all necessary

formalities, police submitted the charge-sheet against the appellant. The necessary documents as required under section 265-C, Cr. P.C. were provided to him. The Trial Court framed formal charge against him, to which he pleaded not guilty and claimed to be tried.

4. To prove its case, prosecution examined ten witnesses; **PW-1** PC Gul Sher examined at Ex.04; **PW-02** Muhammad Adeel, complainant, examined at Ex.05, who produced memo of arrest and recovery at Ex. 5/A, F.I.R. at Ex. 05-B, Qaimi entry No.9 at Ex. 05/C, memo of site inspection at Ex. 05/D, memo of identification test at Ex. 5/E; **PW-03**, ASI Naik Zada examined at Ex.08, who produced station diary No.59 at Ex.08/A, station diary No.20 at Ex. 08-B and memo of Crime Scene Unit CSI Form-11, at Ex.08/C; **PW-04**, PC Samad Khan examined at Ex.9, who produced duty list/report at Ex.09/A, station diary No.15 at Ex.9/B and memo of arrest and recovery at Ex. 09/C; **PW-05** ASI Iftikhar Ali Shah examined at Ex. 10, who produced station diary No.13, at Ex.10/A, memo of inspection of dead body at Ex.10/B, Inquest Report u/s 174 Cr.P.C. at Ex.10-C, Letter of dead body handing over to Chhipa Mortuary at Ex. 10/D, arrival entry No. 15 at Ex. 10/E; **PW-06**, MLO, Dr. Ghulam Mustafa examined at Ex.12, who produced letter of police of P.S Quaidabad at Ex.12/A, certificate of cause of death at Ex.12/B and postmortem report at Ex.12/C; **PW-07** HC Muhammad Hanif examined at Ex.13, who produced station diary No.59 at Ex.13/A and police letter to MLO for treatment of injured PC Gulsher at Ex.13/B; **PW-08**, MLO, Dr. Abdul Basit examined at Ex. 14, who produced two MLCs at Ex.14/A and Ex.14/B respectively; **PW-09** Furqan Karim, the J.M, examined at Ex.15, who produced application of I.O. duly ordered at Ex.15/A, C.N.I.C. at Ex. 15/B, photograph of witness Muhammad Adeel at Ex.15/C and Identification test at Ex. 15/C-; **PW-10**, Inspector Muhammad Nawaz Kehar, I.O., examined at

Ex.16, who produced station diaries Nos.24, 4, letter to in-charge Chhipa Mortuary Centre, photographs of deceased accused, station diaries Nos. 21, 25, 36, 25, CRO of deceased accused Laiq Khan and accused Mumtaz Ali Khan, FSL reports along with photo of weapons and ammunition and application to J.M-XII, for issuance of certified copies of identification test, at Ex.16/A to Ex.16/M, respectively.

5. The statement of appellant under section 342, Cr. P.C. was recorded at Ex. 17, wherein he has denied the allegations against him and claimed to be innocent. He has deposed that he was booked in this case falsely with mala fide intention. He, however, neither examined himself on oath to disprove prosecution's allegations nor even led any evidence in his defence. The Trial Court after hearing the learning counsel for the appellant as well as A.P.G. for the State convicted the appellant and sentenced him as mentioned above, vide impugned judgment.

6. We have heard the learned counsel for the appellant as well as Addl. P.G. for the State and perused the material available on record with their assistance.

7. Learned counsel for the appellant, *inter-alia*, has contended that Trial Court failed to appreciate law and facts involved in this case and to consider material contradictions in the depositions of the P.Ws., which have created serious doubt in the prosecution case. He has added that impugned judgment is based on presumptions and assumptions. He has further contended that after lapse of considerable time, the identification test was held before J.M in which quantum of dummies were not fulfilled, while witnesses had already seen the appellant at police station, and merely on the basis of identification test, the appellant could not be convicted. He has also

contended that, on 17.12.2022, the appellant was arrested from Malir Court; such complaint was made by his brother, thereafter, he was booked in this false case, although he had no role in the commission of alleged offence.

8. Conversely, learned Addl. P.G. for the State while supporting the impugned judgment, has maintained that the prosecution has proved its case through ocular, medical and circumstantial evidence. He has further maintained that the appellant along with his three accomplices snatched the motorcycle and other valuable articles from the complainant and PW/PC Gulsher sustained firearm injury in assault made by accused persons. He has further maintained that complainant in identification test identified the appellant before J.M, who being private person has no reason to falsely implicate the appellant. He has also maintained that the complainant, injured PC Gulsher, other PWs and I.O have corroborated each other and the Trial Court rightly convicted and sentenced the appellant, hence, impugned judgment is liable to be maintained by dismissing instant appeal.

9. Right at the outset, it is observed that the appellant was not apprehended on the spot. As per prosecution case, he succeeded to make his escape good from the crime scene, however, later on he was arrested in some other criminal case and, thereafter, the complainant identified the appellant in the identification test. It would be appropriate to discuss the legal position of identification test. In this regard, Article 22 of the Qanoon-e-Shahadat Order, 1984 may be referred to, which is reproduced, as under: -

22. Facts necessary to explain or introduce relevant facts:

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.”

10. It is settled law that though the identification of an accused made at the identification test may not be substantive evidence, yet it can be used to corroborate the statement of witnesses made in Court at the trial. The whole idea of an identification test is that witnesses, who claims to have seen the accused at the time of occurrence, are to identify them from the midst of other persons without any aid or any other source. So, the main object of holding identification test, during the investigation stage, is to test the memory of the witnesses based upon the first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witness of the crime.

11. The purpose of conducting an identification test is twofold; first is to enable the witnesses to satisfy themselves that accused whom they suspect is really the one, who was seen by them in connection with the commission of the crime; second is to satisfy the investigation authorities that the suspect is the real person, whom the witnesses had seen in connection with the said occurrence. The Hon'ble Supreme Court has discussed the scope and legal implications of identification test in chain of reported cases. For quick reference, reliance is placed on case of Kanwar Anwar Ali (PLD 2019 SC 488) wherein after discussing leading cases on identification test, the Supreme Court observed that *“the vital factor determinative of the worth and value of the identification proceeding is the effectiveness of the precautions taken before and during the course of such proceedings which are designed to eliminate the possibility of unjustified convictions.”* The Apex Court then summarized a list of precautions and guidelines for holding

the identification test and held that while weighing the evidence offered through an identification test, a Court of law should consider whether the stated precautions had been taken.

12. In present case, PW-2, complainant, Mohammad Adeel (Ex.05) while reiterating the contents of his F.I.R., has stated that, on 26.12.2022, Investigating Officer called him for identification test in Sessions Court Malir, Karachi and he identified the appellant during identification test and assigned him clear role for commission of the offence. The complainant has identified the appellant, present in Court at the time of recording his evidence, as the same accused. Even in cross-examination, the defence counsel has failed to shatter the evidence of complainant on the main incident, mode and manner of identification test in which he identified the appellant. The defence counsel has not given any suggestion to complainant regarding lodging of false F.I.R. and pursuing the case malafidely up to identification test held before the J.M.

13. Before evaluating the evidence of remaining eye-witnesses, it would be appropriate to analyze and scrutinize the proforma of identification test produced by the P.W-9, Furqan Karim, J.M., at Ex.15/C, who has apprised the Trial Court about the identification test, which he conducted in his Court premises on 26.12.2022. He has noted down that the complainant assigned clear and specific role to the appellant. He has specifically mentioned that the appellant was brought before him in muffled face with handcuff in Court premises, and after removing the handcuffs and cover from the face, he was called to stand on his own choice in the queue of dummies. There was total nine dummies beside the appellant at the time of identification test. The said P.W. has noted down the names of said dummies, their parentage and even

their C.N.I.C. numbers and has duly appended certificate to Ex.15/C. The said P.W. also faced ordeal of cross-examination at the hands of defence counsel, however, his evidence remained unshaken. No suggestion was given to him that the complainant had not identified the appellant in the identification test. It does not appeal to the prudent mind that the complainant, who is a private person and employed in a Mill, would lodge false F.I.R. against the appellant and follow him till the identification test. Nothing has been brought on record by the appellant during the trial or even before this forum that complainant already knew him before the incident or he had any enmity with him.

14. Injured PW-1, PC Gulsher (Ex.04) has corroborated the complainant by deposing that, on 21.11.2022, during patrolling at about 07.50 hours, they saw four culprits committing robbery from two persons and on seeing police party they started firing, thereby encounter took place between police party and culprits and he (PW) received firearm injury on his left leg. He has further deposed that the encounter continued for about 5-7 minutes and one culprit also sustained gunshot injuries, whereas three culprits made their escape good. He identified the appellant before the Trial Court. During cross examination, his evidence remained unshaken, however, he admitted that he is unaware as to which accused made firing upon him. Learned defence counsel neither confronted the said PW on police encounter nor offered any explanation by way of suggestion that his injury was either self-inflicted or the same was received at some other place but was malafidely attributed to the accused persons of present case.

15. PW ASI Naik Zada (Ex.08) has also supported the prosecution case. He has deposed that after receiving information about the incident, he along

with two other police officials arrived at place of incident at 8.00 a.m. and shifted the injured police constable and co-accused to Jinnah Hospital, Karachi for their treatment and recovered arms and ammunition from the possession of the deceased co-accused and secured empties from place of incident. The counsel for the appellant cross-examined him but failed to extract any advantageous words.

16. PW Samad Khan (Ex.09) also supported the complainant and PW Gulsher on the chain of events as he was part of the same police party. At trial, he also identified the appellant.

17. Evidence of P.W-8, MLO, Dr. Abdul Basit is evaluated in the same sequence at Ex.14. He examined the injuries of PC Gulsher at Jinnah Hospital and produced Medico Legal Certificate (*Ex.14/A and Ex. 14/B*). As per Medical Certificate, no blacking was noticed near or around the wound and same was caused by a firearm. His oral and documentary evidence corroborates the version of complainant and injured PW. It is relevant to mention here that one of the co-accused, namely, Suhno alias Laiq was killed in the alleged encounter and PW-5, MLO, Dr. Ghulam Mustafa (Ex.12) conducted his postmortem, who produced post mortem report and cause of death certificate at Ex.12/A and Ex.12/B. PW-10, I.O, Inspector Muhammad Nawaz (Ex. 16) summed up the entire prosecution case pointing out that on 19.12.2022, he arrested the appellant, as he was already in custody in another criminal case, and on 26.12.2022 he got the identification test conducted through complainant before J.M concerned. He has also deposed that the appellant was also involved in 4/5 other cases as per his CRO. In cross-examination, his evidence remained unshaken on main points and false implication or enmity with the present appellant.

18. In his statement, recorded under section, 342 Cr. P.C., the appellant has denied the allegations and contended that he was falsely implicated in the present case. However, he offered no explanation that what was so special, which had prompted complainant and police officials to stage a fake robbery and subsequent police encounter in which a police constable received firearm injury. His counsel has taken plea in cross-examination as well as during arguments regarding his arrest from Malir Court on 17.12.2022 and his subsequent false implication, for which brother of the appellant moved application, however, the appellant has himself not taken any such stand in his 342, Cr. P.C. Statement. He has even not produced in evidence the copy of alleged complaint/application moved by his brother.

19. In his arguments, the main thrust of the counsel for appellant was on identity of the appellant and he claimed that that it is a case of mistaken identity. However, this line of arguments is totally devoid of merit and contrary to the facts, circumstances of the case and evidence on record. It may be observed that the complainant had enough time to see the face and feature of all the culprits including the present appellant at the time of incident, who deprived him of his valuables. So the complainant had not merely seen a quick or passing glimpse of present appellant. Admittedly, the present appellant was arrested in another criminal case within a month after the present incident and, thereafter, the complainant identified him in identification test before the J.M. At the cost of repetition, it is pointed out that complainant had rightly picked the present appellant among the nine dummies and also assigned clear role to him. The mode and manner of the identification test; details on the proforma of identification test (Ex.15/C) and evidence of complainant and concerned Judicial Magistrate have already been discussed at length in above paras. Therefore, it can safely be said that

the guideline and precautions set out by the Apex Court in *Kanwar Anwar* case have been complied with in this case.

20. The complainant and other PWs were subjected to cross-examination, but their evidence is consistent, coherent, and confidence inspiring, while minor contradictions do appear in the evidence with the passage of time, because a person cannot remember each and every detail. So, merely raising plea of false implication is not sufficient in such circumstances, when nothing is available on record to show that complainant, PWs and Investigating Officer had acted with malice or had any enmity with present appellant. Even on repeated queries, the appellant's counsel has not pointed out any major contradiction in evidence and record. Minor contradictions and slight variations are inconsequential and same cannot be considered from believing a straight forward and confidence inspiring evidence. Some variations occur naturally in the evidence, which would not take away or reduce the intrinsic value of the evidence. In case of *Zakir Khan v. The State (1995 SCMR 1793)*, it has been observed *"that the rule is now well establishing that only material contradiction are now to be taken into consideration by the Court while minor discrepancies found in the evidence of PWs, however, in our view none of these discrepancies are of a material nature, so as to effect the outcome of the case and as such can be overlooked."*

21. It is worth noting that is exchange of fire/shots, like present incident, it is not possible to exactly point out that fire shot from which of the accused hit PC Gulsher. Section 34, P.P.C. provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons are liable for that act in the same manner as if it was done by

him alone. On the point of quality and not quantity of evidence, reliance is placed on the case of *Qasim Shahzad and others v. The State* (2023 SCMR 117), where Hon'ble Supreme Court has held "as a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of evidence. It is not that who is giving and it is not the person the statement. What is relevant is what statement has been given and it is not the person but the statement of that person, which is to be seen and adjudged... The same was the view of this Court in *Asim v. The State* (2005 SCMR 417); *Lal Khan v. The State* (2006 SCMR 1846) and *Muhammad Sadiq v. The State* (2022 SCMR 690). (Emphasis is provided)

22. The contentions raised by the learned counsel for the appellant in view of above facts and circumstances are not tenable. For the forgoing facts and reasons, there is no substance in this appeal, which stands dismissed and the impugned judgment is maintained. These are the detailed reasons of our short order, dated 12.02.2025, whereby the present appeal was dismissed.

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