

**KANWAR ANWAAR ALLI, SPECIAL JUDICIAL MAGISTRATE: IN THE
MATTER OF**

2019 PLD 488

Order Accordingly

Supreme Court of Pakistan

Asif Saeed Khan Khosa, C.J., and Syed Mansoor Ali Shah, J

Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018

Date of Decision: 21/02/2019

ORDER

ASIF SAEED KHAN KHOSA, C J.---While disposing of Criminal Appeal No. 259 of 2018 (Asfand Yar Khan v The State, etc.) this Court had passed the following judgment on 12.02.2019:

"Asfand Yar Khan appellant and some others had allegedly abducted one Adil Butt on 01.09.2009 for the purpose of extracting ransom and had later on done him to death and for commission of the said offences they were booked in case FIR No.370 registered at Police Station Model Town, Lahore on 02.09.2009 for an offence under section 365-A, P.P.C.. After a regular trial the appellant's co-accused were acquitted of the charge by the trial court whereas the appellant was convicted and sentenced for offences under section 302(b), P.P.C. read with section 34, P.P.C., section 347, P.P.C. read with section 34, P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997. The appellant was, however, acquitted of the charge as far as the offences under sections 365-A and 201, P.P.C. were concerned. For the offences of murder and terrorism the appellant was sentenced by the trial court to death on each such count. The appellant challenged his convictions and sentences before the High Court through an appeal which was partly allowed, the convictions and sentences of the appellant for the offences under section 347, P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997 were set aside, his conviction for the offence under section 302(b), P.P.C. was upheld and his sentence of death for the offence of murder was reduced by the High Court to imprisonment for life. Hence, the present appeal by leave of this Court

granted on 12.04.2018.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. The case in hand is a case of an alleged abduction for ransom and murder and admittedly the case hinges upon some pieces of circumstantial evidence. It is not denied that nobody had seen the appellant forcibly or deceitfully abducting Adil Butt deceased, no demand of ransom was attributed to the appellant or any connection of the appellant with such demand was established, no ransom was paid to the appellant or to anybody else for release of Adil Butt and the murder of Adil Butt had not been seen by anybody. The prosecution had produced Tabassum Saeed (PW6) and Mian Muhammad Yasin (PW7) so as to establish that they had seen the appellant and his co-accused in the company of Adil Butt deceased late in the evening on 01.09.2009 but we have found that the said piece of evidence produced by the above mentioned witnesses suffered from lack of proximity between death and last-seen. The said witnesses had claimed to have seen the deceased in the company of the appellant and his co-accused on 01.09.2009 but the medical evidence brought on the record showed that Adil Butt had died some time between 02.09.2009 and 05.09.2009 and, thus, the all-important consideration of proximity was not available in this case so as to make the last-seen evidence worth any serious consideration. Apart from that the above mentioned witnesses were chance witnesses and the stated reason for their availability at the relevant spot at the relevant time had not been established through any independent evidence. The next piece of circumstantial evidence relied upon by the prosecution was the statement of Sanaullah (PW 15) who had allegedly seen the appellant and another throwing a sack in a canal on 07.09.2009 but the medical evidence did not support that stance of PW 15 inasmuch as according to the medical evidence Adil Butt deceased lost his life latest by 05.09.2009 and, thus, throwing away of a sack by an appellant and another in a canal on 07.09.2009 could not positively establish that it were the appellant and another who had done the deceased to death themselves and all that it could show was that some effort was made by the appellant and another to make the deadbody disappear. Such action attributed to the appellant and another attracted an offence under section 201, P.P.C. but admittedly the appellant had been acquitted of the said charge framed against him. The prosecution had claimed that the deadbody of the deceased had been recovered from a canal and admittedly such recovery of the deadbody had not been brought about at the instance of the appellant. It was maintained by the prosecution that two days prior to recovery of the deadbody the appellant had pointed out the place where he had thrown the deadbody in a canal. Such pointing out of the place of throwing of the deadbody attributed to the appellant could not qualify as evidence or confession because during such pointing out no recovery of any incriminating article had taken place. The last-seen evidence provided by Tabassum Saeed (PW6) and Mian Muhammad Yasin (PW7) and the Waj-takkar evidence provided by Sana Ullah (PW 15) showed that at the relevant time the said witnesses had not identified the persons who were seen last in the company

of the deceased and even the persons throwing a sack in a canal had not been identified by the Waj-takkar witness. These pieces of evidence could have some relevance to this case against the appellant if the appellant had been lawfully or properly identified during a test identification parade. In the case in hand the test identification parade conducted for identification of the appellant and his co-accused by the relevant prosecution witnesses suffered from a serious legal defect inasmuch as in one and the same parade three accused persons including the appellant had statedly been identified by three separate prosecution witnesses. Such identification of three accused persons in one go amounted to a joint identification and an identification parade which is joint has consistently been disapproved by this Court through many a judgment and a reference in this respect may be made to the cases of Kamal Din alias Kamala v. The State (2018 SCMR 577), Gulfam and another v. The State (2017 SCMR 1189), Hakeem and others v. The State (2017 SCMR 1546), Shafqat Mehmood and others v. The State (2011 SCMR 537), Bacha Zeb v The State (2010 SCMR 1189), Ziaullah alias Jajj v. The State (2008 SCMR 1210), Imran Ashraf and 7 others v. The State (2001 SCMR 424) and Lal Pasand v. The State (PLD 1981 SC 142). It is unfortunate that the Magistrate conducting the test identification parade in this case was completely oblivious of such judgments holding the field. The only piece of evidence remaining in the field was in the shape of some recoveries affected in this case which included a Danda, a rope, a wallet, a copy of the Computerized National Identity Card, some cheques, visiting card, receipts and a copy of the Matriculation Result Card of the deceased which had statedly been recovered from the house of the appellant during the investigation. Some reservations have already been expressed by the High Court in the impugned judgment passed by it regarding veracity of the alleged recoveries and upon our own independent evaluation we have found such recoveries to be nothing but fabricated. It was unthinkable that the culprits who had taken every precaution to conceal their crimes would keep such articles at their home so as to furnish evidence of their crimes later on.

4. For what has been discussed above a conclusion is inescapable and irresistible that the prosecution had failed to prove its case against the appellant beyond reasonable doubt. This appeal is, therefore, allowed, the conviction and sentence of the appellant are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required to be detained in connection with any other case.

5. Before parting with this judgment we may observe that competence and capability of Mr. Kanwar Anwaar Ali, Special Judicial Magistrate appearing before the trial court as PW8 have been found by us to be quite doubtful and deficient inasmuch as while conducting a test identification parade on 19.09.2009 in connection with this criminal case in Central Jail, Kot Lakhpat, Lahore he had paid no heed or regard whatsoever to the law declared by this Court in the precedent cases holding the field wherein it had clearly been laid down that a test identification parade qua many accused persons cannot be conducted in one go. Through his disregard of the law declared by this Court he had made a very important piece of evidence reduced in worth or eliminated as an admissible

piece of evidence and the prosecution had to suffer on that score irretrievably. Let Mr. Kanwar Anwaar Ali appear before this Court on 22.02.2019 in person so as to show as to why appropriate proceedings may not be initiated against him on account of dereliction of duty and lack of sufficient legal knowledge and also to show as to why some adverse recommendations may not be made to the concerned authorities regarding his suitability to hold a judicial or executive office. The Registrar of the Lahore High Court, Lahore is directed to trace the said Mr. Kanwar Anwaar Ali and to make sure that he appears before the Court in person on the appointed date."

2. In compliance with the direction issued by this Court on 12.02.2019 Mr. Kanwar Anwaar Ali, the then Special Judicial Magistrate appearing before the trial court as PW8 has appeared before this Court in person along with his written statement which reads as follows:

"I most humbly submit that I was inducted as a Provincial Management Service (PMS) Officer (BS-17) on 15.05.2006 and my academic qualification at the time of induction was simple graduation (B.A). I received training at Management and Professional Development Department (MPDD), Government of the Punjab in a 32 weeks course on Administration and Development from 15.05.2006 to 23.12.2006. Except for few orientation lectures on C.P.C., P.P.C., Cr.P.C. and Constitutional Law, no extensive legal education or training was being imparted by the MPDD after abolition of Executive Magistracy and main focus was and still is on planning and Development, Public Administration, Public Policy, Management and Revenue.

2. It is further submitted that after 03-years of government service while I was working as Tehsil Municipal Officer, Okara, I was transferred by S&GAD on 18.08.2009, after concurrence of Hon'ble Lahore High Court, Lahore and posted as Special Judicial Magistrate, at Model Town Courts, Lahore against one of the vacant posts where erstwhile Executive Magistrates of PCS cadre would serve and decide petty offences pertaining to local and special laws. I was not a law graduate yet I served there as Special Judicial Magistrate in District Judiciary w.e.f. 01.09.2009 to 11.10.2012. in absence of any institutional setup and formal legal training arrangement or practical demonstrations pertaining to assignments like test identification parades, raids, inquests and exhumations, the only opportunity available to me was day to day on job learning or study of case laws of Superior Courts and commentaries. For a non-law-graduate like me, there was no institutional arrangement for capacity building and throughout I had to be self taught.

3. I beg to state that it was the 10th day of my duty as Special Judicial Magistrate when I conducted my maiden test identification parade in the subject case. I had given bare reading of instructions on the subject contained in volume-III of High Court Rules and Orders and Police Rules 1934. During the conduct of my ever first identification Parade, I used commonsensical learning that I had gathered from reading of bare instructions, pattern and guidance of my

colleagues in judiciary. In my humble understanding, a joint identification parade meant a parade in which more than one accused had been made to stand in a single row with many other dummies for identification by a witness, therefore I took care not to mix more than one accused person with 09 almost identical dummies in a separate row. Each row was separately presented before a witness for identification. The witness was told that he would be presented three rows; one after the other and in each row of 10 inmates, one person could be a suspect. A row would appear on site, the witness could identify or otherwise, the identified person would be separated and then the left over row of the dummies would depart. The second important learning was identification of accused with description of role in front of the identified suspects.

4. It is my most humble submission that I have conducted said identification proceedings in good faith as a judicial officer to the best of my ability and knowledge without any mala fide intention. It is my humble understanding that the crux of the statements made by witnesses while describing respective roles of accused person in the occurrence could hardly substantiate the offence under sections 365-A or 302, P.P.C. It was responsibility of the prosecution to collect corroborating circumstantial evidence for proving charges against the accused person. I most humbly submit that my role as a judicial officer was restricted only to the extent of recording witnesses and their description of respective roles of the accused persons in the occurrence.

Prayer:

It is most humbly prayed that I am a career civil servant and father of three school going kids and a sole bread-winner of a large family consisting of elderly parents and un-married sisters. In good faith, I tried to perform my duty wherever I was posted by the Government. I place myself at the mercy of the Hon'ble Court and invoke its compassion of taking a lenient view and humbly request that I may not be punished in any manner which may jeopardize my career as a civil servant and future lives of my innocent kids and dependents."

The explanation put forward by Mr. Kanwar Anwaar Ali who is presently posted as Deputy Secretary (P&D Department) Government of the Punjab, Lahore and the peculiar circumstances mentioned therein have been found by us to be plausible and, thus, no occasion has been found by us for proceeding against him in any manner or for passing any adverse remark against his conduct. The notice issued to him is, therefore, discharged.

3. Before parting with this order we would like to point out that the matter of taking of different steps in holding of a proper test identification parade in connection with a criminal case has developed over many decades and the requirements of such a parade as well as the safeguards to be ensured during such a parade so as to make it a meaningful exercise and providing material in a criminal case to be considered in a trial have elaborately been detailed in the landmark judgment passed by a learned Division Bench of the Lahore High Court, Lahore in the case of Muhammad Yaqoob and another v. The State (1989 PCr.LJ 2227) and in the said judgment Mr. Justice Khalil-ur-Rehman Ramday (as his lordship then was a Judge of the Lahore High Court, Lahore) had observed as follows:

"16. But before we undertake a deeper analysis of the evidentiary value of the test identification proceedings held in the present case, it would be of advantage to first appreciate the object and the value of such an evidence as also to recapitulate the standards required to be met before such like identification parades could be credited with reliance.

17. The evidence offered through identification proceedings is not a substantive piece of evidence but is only corroborative of the evidence given by the witnesses at the trial Muhammad Bashir v. The State PLD 1958 SC (Pak.) 1. It has no independent value of its own Muhammad Afzal and another v. The State 1982 SCMR 129 and cannot as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record Sudhindranath v. The State AIR 1952 Cal. 423.

18. The identification parades (as they are normally called) are necessary only where the offender was a complete stranger to the witnesses Ismail and another v. The State 1974 SCMR 175. And the whole object of the identification proceedings is to find out whether the suspect was or was not the real offender Satya Narain v. The State AIR 1953 All. 385 and Kind v. Christle 1914 AC 545.

19. Such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. These gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could also wrap the vision of a man. When mistakes are possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers is definitely greater. And more so when the witnesses have seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorised state of mind.

20. It was primarily for these reasons that Dorab Patel, J. (as his Lordship then was) cautioned the Courts to beware of the dangers inherent in the identification of strangers and quoting from the Criminal Law Revision Committee Report (1972), observed in Lal Pasand's case PLD 1981 SC 142 that mistaken identifications were:-

".....by far the greatest cause of actual or possible wrong convictions...."

A similar note of caution was given by Monir in his Evidence Act Pak. Edition, Vol. 1 where the advice is that:-

" the evidence as to identification ought in each case, to be subjected to a close and careful scrutiny."

21. What then are the standards required to be satisfied by such an evidence before the same could be accepted by a Court of law?

22. The answer is that the vital factor determinative of the worth and value of identification proceedings 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.

23. Although there is no law, which prescribes any such precautions yet the necessary guidelines are available in the form of executive instructions and judicial pronouncements. Some of them are summarised as under:-

(a) Memories fade and visions get blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence;

(b) a test identification, where the possibility of the witness having seen the accused persons after their arrest cannot be ruled out, is worth nothing at all. It is, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects are put to identification tests as early as possible. Such suspects should preferably, not be remanded to police custody in the first instance and should be kept in judicial custody till the identification proceedings are held. This is to avoid the possibility of overzealous I.Os. showing the suspects to the witnesses while they are in police custody. Even when these accused persons are, of necessity, to be taken to Courts for remand etc. they must be warned to cover their faces if they so choose so that no witness could see them;

(c) identification parades should never be held at police stations;

(d) the Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings;

(e) in order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused persons should be as much as possible. But then there is also the need to ensure that the number of such persons is not increased to an extent which could have the effect of confusing the identifying witness. The superior Courts have, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. This ratio must be followed unless there are some special justifiable circumstances warranting a deviation from it;

(f) if there are more accused persons than one who have to be subjected to test identification, then the rule of prudence laid down by the superior Courts is that separate identification parades should ordinarily be held in respect of each accused person;

(g) it must be ensured that before a witness has participated in the identification proceedings, he is stationed at a place from where he cannot observe the proceedings and that after his participation he is lodged at a place from where it is not possible for him to communicate with those who have yet to take their turn. It also has to be ensured that no one who is witnessing the proceedings, such as

the members of the jail staff etc., is able to communicate with the identifying witnesses;

(h) the Magistrate conducting the proceedings must take an intelligent interest in the proceedings and not be just a silent spectator of the same bearing in mind at all times that the life and liberty of some one depends only upon his vigilance and caution;

(i) the Magistrate is obliged to prepare a list of all the persons (dummies) who form part of the line-up at the parade along with their parentage, occupation and addresses;

(j) the Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons or by the identifying witnesses before, during or after the proceedings;

(k) where a witness correctly identifies an accused person, the Magistrate must ask the witness about the connection in which the witness has identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate this statement in his report;

(l) and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;

(m) the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings and

(n) the Magistrate has to give a certificate at the end of his report in the form prescribed by CH.II.C. of Vol. III of Lahore High Court Rules and Orders.

24. The measures above listed should, however, not be taken as exhaustive of the steps which are required to be taken before, during and after the identification proceedings. All these requirements are no doubt mandatory but at the same time they are only illustrative of the precautions which the Courts of law demand before some respect can be shown to the evidence offered through the test identification proceedings.

25. In enunciating the above principles governing the proceedings in question and in enumerating the above measures and requirements, we have sought guidance from the following:-

(i) Rules and Orders of the Lahore High Court, Chapter 11-C of Vol.III; (ii) Punjab Government Circular Letter No.6091-J-36/ 39829 (H-Judl.) dated 19-12-1936; (iii) Punjab Government Circular Letter No. 6546-J-43/83844 (H-Judl.), dated 17.12.1943; (iv) Punjab Government Circular Letter No.Judl.I-(13)/61, dated 26-7-1961, (v) Monir's Evidence Act (Pak. Edition) Vol. I, (vi) Lal Pasand v. The State PLD 1981 SC 142, (vii) Muhammad Afzal v. The State 1982 SCMR 129, (viii) Ismail v. The State 1974 SCMR 175, (ix) Khadim Hussain v. The State 1985 SCMR 721, (x) Muhammad Bashir Alam v. The State PLD 1958 SC (Pak.) 1, (xi) Gul Baig v. The State PLD 1964 Kar. 275, (xii) Musharrif Hussain v. The State PLD 1970 Dacca 686, (xiii) Sadu v. The State 1972 PCr.LJ 10, (xiv) Qabil Shah v. The State

PLD 1960 Kar. 697, (xv) Wahid Bakhsh v. The State 1969 PCr.LJ 137, (xvi) Karim v. The State PLD 1961 Kar. 728, (xvii) Kameshwar Singh v. The State AIR 1972 SC 102 (xviii) Parbhu v. Emp. AIR 1943 Lah. 946, (xix) Emp. v. Debi Charan AIR 1942 All. 339, (xx) Sataya Naryan v. The State AIR 1953 All. 385, (xxi) Gajadher v. Emp. AIR 1932 Oudh. 99 and (xxii) Ramzan v. Emp. AIR 1929 Sindh 149."

We have failed to find a more elaborate illustration of the requirements and the safeguards necessary for holding a test identification parade than found in the above mentioned portion of the judgment passed in the said precedent case. We wholeheartedly approve the said requirements and safeguards which are to be meticulously followed and observed in all the test identification parades held in connection with criminal cases.

4. It may also be observed that during a test identification parade the requirement regarding specifying by a witness the role of an individual accused person in commission of an offence had also been identified and emphasized by this Court in the cases of Ismail and another v. The State (1974 SCMR 175), 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), State/Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo (1993 SCMR 585), 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), Muhammad Afzal alias Abdullah and another v. State and others (2009 SCMR 436), Shafqat Mehmood and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563), Muhammad Fayyaz v. The State (2012 SCMR 522), Azhar Mehmood and others v. The State (2017 SCMR 135), Hakeem and others v. The State (2017 SCMR 1546) and Kamal Din alias Kamala v. The State (2018 SCMR 577).

5. Identification of many accused persons in one line in one go during a test identification parade has also repeatedly been held by this Court to be improper and it has been clarified by this Court on a number of occasions that every accused person is to be put to a separate test identification parade and a reference in this respect may be made to the cases of Lal Pasand v. The State (PLD 1981 SC 142), Imran Ashraf and 7 others v. The State (2001 SCMR 424), Ziaullah alias Jajj v. The State (2008 SCMR 1210), Bacha Zeb v. The State (2010 SCMR 1189), Shafqat Mehmood and others v. The State (2011 SCMR 537), Gulfam and another v. The State (2017 SCMR 1189), Hakeem and others v. The State (2017 SCMR 1546) and Kamal Din alias Kamala v. The State (2018 SCMR 577).

6. Identification of an accused person by eye-witnesses before the trial court during a trial is generally considered to be quite unsafe because before such identification before the trial court during the trial the eye-witnesses get many opportunities to see the accused persons appearing before the court in connection with their remand, distribution of copies of statement of prosecution witnesses recorded under section 161, Cr.P.C., framing of the charge and recording of statements of other prosecution witnesses. Even in such identification before the trial court during the trial it is imperative that a witness must point towards a particular accused person present before the trial court and must also specify the role allegedly played by him in the incident in issue. The unsafe nature of identification of an accused person before the trial court during the trial has already been commented upon by this Court in the cases of Asghar Ali alias Sabah and others v. The State and others (1992

SCMR 2088), Muhammad Afzal alias Abdullah and another v. The State and others (2009 SCMR 436), Nazir Ahmad v. Muhammad Iqbal (2011 SCMR 527), Shafqat Mehmood and others v. The State (2011 SCMR 537), Ghulam Shabbir Ahmed and another v. The State (2011 SCMR 683) and Azhar Mehmood and others v. The State (2017 SCMR 135).

7. It may also be mentioned here that a test identification parade and correct pointing out of an accused person by an eye-witness therein is not a substantive piece of evidence and failure to hold a test identification parade is not always fatal to the prosecution's case and a reference in this respect may be made to the cases of Muhammad Akram Rahi and others v. The State and others (2011 SCMR 877) and Ghazanfar Ali alias Pappu and another v. The State (2012 SCMR 215).

8. The above mentioned precedent cases and the best practices mentioned therein have been consolidated by us in the present order so that any confusion regarding the legal position in respect of a test identification parade may be removed and all concerned may stand instructed and guided in that regard in future. A serious exception may henceforth be taken to any non-compliance or disregard of the requirements and safeguards mentioned above.

9. The office of this Court is directed to send a copy of this order to the Registrars of all the High Courts in the country with a direction to send a copy of the same to every Judge and Magistrate within the jurisdiction of each High Court handling criminal cases at all levels for their information and guidance.