

THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 486 of 2018

[Muhammad Kashif & another versus State]

Appellants : Muhammad Kashif and Muhammad Hanif through Syed Lal Hussain Shah, Advocate.

The State : Mr. Siraj Ahmed Khan Chandio, Additional Prosecutor General Sindh.

Complainant : Haji Muhammad Ishtiaq through Mr. Muhammad Javed K.K. Advocate.

Dates of hearing : 20-11-2019 & 02-12-2019

Date of decision : 12-02-2020

JUDGMENT

Adnan Iqbal Chaudhry J. - This is an appeal from judgment dated 17-09-2018 passed by the learned Additional District Judge and Sessions Judge-IX, Karachi West, in Sessions Case No. 1714/2016 whereby the Appellants were convicted for the offence punishable under section 397 read with section 34 PPC (robbery with use of deadly weapon) and sentenced to rigorous imprisonment for seven years and fine of Rs.100,000/- each; the fine to be paid to the Complainant/victims as compensation under section 545 Cr.P.C., and on failure thereof to further simple imprisonment for six months.

2. FIR No. 18/2016 was lodged against persons unknown on 11-02-2016 at 07:30 hours at P.S. Baldia Town, Karachi, under sections 397, 392, 427 and 34 PPC. The Complainant, Haji Muhammad Ishtiaq, reported that around 4:30 a.m. when he and his family were asleep, four armed men broke into his house, held them at gunpoint; they searched the house and robbed them of 35 tola gold jewelry, Rs. 5,00,000/- cash, Saudi Riyals 15,000/- and five cellphones; that from their language and physical appearance the culprits appeared to be Muhajir and Punjabi, three of whom were wearing shalwar kameez

and one was wearing pant-shirt; and that the Complainant and his sons can recognize the robbers on seeing them again.

3. Per the investigation report, Muhammad Sajjad alias Sajid Genda and his gang were suspected of the crime as they were notorious for committing robberies in the area; that the other members of the gang were Usman Ghani, Muhammad Iqbal, Muhammad Kashif and Muhammad Hanif alias Hanif Kalia (the latter two, the Appellants); that as many as 16 FIRs were registered against Sajid Genda and Muhammad Kashif; and that the investigation proceeded by taking the CDR of the mobile SIMs registered against the CNICs of the suspects to discover that they were in contact with each other at the time and location of the incident, and by tracking the stolen cellphones through their IMEI numbers. The letter written by the I.O. to the CDR branch of the DIG Office for obtaining the CDR of the IMEI numbers of the robbed cellphones was produced by the I.O. at the trial as Exhibit 51. He also deposed that the accused were in contact with each other at the time and location of the incident, and that the accused Sajid Genda could not be arrested as he had absconded to Rawalpindi.

4. While the accused Sajid Genda and Usman Ghani remained absconders, the accused Kashif (Appellant No.1) was arrested on 30-4-2016. At a test identification parade conducted before the Magistrate on 03-05-2016, Kashif was identified by PW Sajjad Ahmed, PW Shahbaz Ahmed and PW Waqas Ahmed who were amongst the victims and were the sons of the Complainant.

The accused Hanif Kalia (Appellant No.2) and Muhammad Iqbal both of whom had been arrested in another FIR, were arrested in the instant FIR on 23-08-2016. At a test identification parade conducted before the Magistrate on 25-08-2016, Hanif Kalia was identified by PW Muhammad Ishtiaq (Complainant) and his sons, PW Sajjad Ahmed, PW Shahbaz Ahmed and PW Waqas Ahmed. Per the impugned judgment, the accused Muhammad Iqbal was not identified by any witness at the test identification parade or during the trial and therefore he was acquitted.

5. Of the stolen items, one cellphone Nokia 1800 was recovered vide memo of seizure dated 05-05-2016 (Exhibit 19) by tracking its IMEI number. That cellphone was found in the possession of PW Anees who then deposited the same at the P.S. Per the deposition of PW Anees, he had purchased that cellphone from one Sheikh Kamran in April, 2016; and that Sheikh Kamran had informed him that he had purchased the cellphone from Hanif Kalia (Appellant No.2). But then the prosecution did not examine Sheikh Kamran as witness. It appears that after the deposition of the Complainant and his sons who had identified the Appellants at the test identification parade and in Court at the trial as two of the robbers, the prosecution dropped a number of witnesses including Sheikh Kamran. Thus, the case of the prosecution was pitched on the ocular evidence of the victims i.e. the Complainant and his three sons. It is that evidence that is to be appraised in this appeal, and the point for determination is whether that ocular evidence is reliable to hold the Appellants guilty beyond doubt.

6. Learned counsel for the Appellants submitted that the FIR was against unknown persons; that the features/appearance of the suspects was not mentioned in the FIR; that it was a night-time incident and PW Waqas Ahmed had stated that the faces of the robbers were muffled; and therefore the Complainant and his sons could not have identified the Appellants at the test identification parade; that the I.O. had revealed the faces of the Appellants to the witnesses prior to the test identification parade; that though a separate identification parade was held for each accused but the same set of dummies was used in both sets of parades; that the test identification parade was held after a considerable period from the date of the incident; and thus, the identification evidence was not reliable. In support of his submissions, learned counsel for the Appellants cited *Mian Sohail Ahmed v. The State* (2019 SCMR 956); *The matter of Kanwar Anwaar Ali* (PLD 2019 SC 488); and *Lal Pasand v. The State* (PLD 1981 SC 142).

7. On the other hand, learned counsel for the Complainant and the learned APG supported the impugned judgment. They submitted that there was no major inconsistency in the statements of the prosecution witnesses; that there is no reason to doubt the ocular evidence of the victims as there was no enmity between them and the Appellants; that there was no question of mistaken identity as the victims had ample time to observe the Appellants; that it is incorrect that the dummies at the identification parade of both the Appellants were the same; that the investigation and the CDRs collected by the I.O. had revealed that the Appellants were present at the time and place of the incident; and that the Appellants were habitual offenders and a number of criminal cases were registered against them. Learned counsel for the Complainant relied on the case of *Zakir Khan v. State* (1995 SCMR 1793) to submit that that when the victims/witnesses had ample time to observe the faces of the Appellants, then the test identification parade was not even mandatory and the identification of the Appellants by the witnesses at the trial was sufficient evidence.

8. Heard the learned counsel and appraised the evidence.

It is settled law that though the identification made at the test identification parade may not be substantive evidence, it can be used to corroborate the statement of the witness made in Court at the trial. In the instant case, the witnesses were the victims of the robbery who had identified the Appellants as two of the robbers first at the test identification parade before the Magistrate, and then in Court at the trial.

9. *In the matter of Kanwar Anwaar Ali* (PLD 2019 SC 488), after discussing the leading cases on test identification parade, the Supreme Court held 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”. The Supreme Court then summarized a list, *albeit* a non-exhaustive one, of precautions and guidelines for holding a test

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

10. The test for weighing the evidence of identification proceedings again came under discussion in *Mian Sohail Ahmed v. The State* (2019 SCMR 956), and there the Supreme Court of Pakistan has taken a leap to keep abreast with scientific developments on the subject matter. In *Sohail Ahmed*, the precautions and guidelines for a test identification parade earlier adverted to *In the matter of Kanwar Anwaar Ali* were classified by the Supreme Court as “system variables” and as only the first step to test identification proceedings before proceeding to discuss the next step, a second test of the identification proceedings, viz. the capacity and ability of the eye-witness to identify the accused in the circumstance of the case, classified by scientific literature as “estimator variables”, and it was held that such assessment forms part of the identification evidence along with the test identification proceedings. It was observed that factors in the first test of ‘system variables’ were those that were within the control of the criminal justice system (i.e. the test identification parade); whereas the ‘estimator variables’ consisted of factors related to the witness, such as stress, weapon focus, duration, distance, lighting, witness characteristic, characteristic of perpetrator, memory decay etc., over which the legal system has no control. It was observed that these ‘estimator variables’ have an impact on the memory of the witness and thus such variables have also to be attended while assessing witness reliability. It was therefore held in *Sohail Ahmed* that:

“15. After the test identification parade, the Court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or estimator variables discussed above. Identification of an accused, therefore, becomes a two-step process. First, the suspects undergo a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables.”

Keeping in mind the test of 'system variables' and 'estimator variables' laid down by the Supreme Court *In the matter of Kanwar Anwaar Ali and Sohail Ahmed* for evaluating identification evidence, the evidence in the instant case is discussed as follows.

11. At the trial, the deposition of the victims, i.e., the Complainant and his sons is essentially that, at about 04:30 hours when they and their family were asleep, four persons armed with pistols broke into their house; the robbers went to the second floor where PW Sajjad Ahmed was asleep; woke him up and his family who were in the next room; they took hostage PW Sajjad Ahmed and his family and came down to the first floor where the Complainant, PW Shahbaz Ahmed and PW Waqas Ahmed were asleep; they made PW Sajjad Ahmed knock at the door of the first floor, which was opened by the Complainant; the robbers rounded-up the entire family and held them at gun-point in the Complainant's room; and that the robbers searched out and robbed certain items/cash from rooms on the first and the second floor.

12. The Complainant Muhammad Ishtiaq (Exhibit 5) had further deposed that the faces of the robbers were open/exposed; and that two of the robbers who came to the first floor holding PW Sajjad Ahmed and his family at gun-point, were the Appellants who were present in Court. On cross-examination, he acknowledged that it was dark outside, but stated that the robbers had switched on the lights themselves. He stated that at an identification parade before the Magistrate on 02-08-2016, he had identified Hanif Kalia as one of the robbers. On cross-examination he admitted that the family of Kashif (Appellant No.1) had paid him Rs. 70,000/-. He explained that he met with Kashif's family at the P.S. at the insistence of the I.O., which was many days after the identification parade; that Kashif's family said that Kashif's share of the robbery was Rs. 1,00,000/- ; they gave the Complainant Rs.70,000/-, promised to pay him the balance, and asked him to forgive Kashif, but that the Complainant refused to do so.

13. PW Sajjad Ahmed (Exhibit 8) had further deposed that the robbers threatened to kill them if they raised a cry; and that he had identified two of the robbers at the identification parade who were the Appellants present in Court. On cross-examination he stated that though it was dark outside but the lights of the staircase and courtyard were on; that the light of his room remains open while he sleeps and that it was open on the day of the incident; and that the robbers consumed 20 to 30 minutes to commit the robbery.

14. PW Shahbaz Ahmed (Exhibit 12) had further deposed that one robber stood over them with a pistol, one in the courtyard, while two searched the house and robbed them of the stated items. He stated that at the identification parade he had identified two of the robbers who were the Appellants present in Court. On cross-examination he stated that though the lights in the house were off, the robbers themselves had turned them on at the time of the incident.

15. PW Waqas Ahmed (Exhibit 15) further deposed that when the door of the first floor was opened, he saw the robbers holding a pistol to the head of his brother, PW Sajjad Ahmed and his wife; and that at the identification parade he had identified two of the robbers who were the Appellants present in Court. On cross-examination he stated that at the time of the incident it was dark; the faces of the robbers were muffled; and that the robbers had themselves turned on the lights.

16. The robbery took place on 11-02-2016. Kashif (Appellant No.1) was arrested on 30-4-2016 (Exhibit 22). Per the deposition of the I.O. (Exhibit 31), since the following day (01-05-2016) was a holiday, the application (Exhibit 52) for conducting Kashif's identification parade was granted by the Magistrate on the next day, and thus the same was held on 03-05-2016, i.e. after three days of his arrest. Hanif Kalia (Appellant No.2) was arrested on 23-08-2016 (Exhibit 27). He was produced at an identification parade on 25-08-2016, i.e., on the second day of his arrest. Therefore, it cannot be said that there was

delay in conducting the test identification parade. Regards the effect of the time that lapsed between the date of the incident and the test identification parade, that aspect of the matter is examined *infra*.

17. The memos of the identification parade of Kashif (Appellant No.1) recorded as follows. PW Sajjad Ahmed had stated (Exhibit 10) that one of the robbers had a black mole on his face, a slim body and was wearing a pant-shirt; that the robbers put a cloth over his face and took him and his family at gun-point to the first floor; and he identified Kashif as one of the robbers armed with a pistol. PW Shahbaz Ahmed identified Kashif as the one who was holding a pistol to the head of PW Sajjad Ahmed (Exhibit 13). PW Waqas Ahmed identified Kashif as the one who stood over them with a pistol while the others searched the house (Exhibit 16). The said memos also record that Kashif had raised an objection that prior to the identification parade the I.O. had taken his photograph.

The memos of the identification parade of Hanif Kalia (Appellant No.2) as identified by the Complainant (Exhibit 7), PW Sajjad Ahmed (Exhibit 11), PW Shahbaz Ahmed (Exhibit 14), and PW Waqas Ahmed (Exhibit 17), record that each witnesses identified Hanif Kalia as one of the robbers armed with a pistol.

Thus, while identifying the Appellants at the test identification parade, each witness had also described the role of each Appellant at the robbery.

18. As regards the other precautions taken by the Magistrate at the test identification parade, the identification memos record that each Appellant was lined-up with 10 dummies; that each had been produced in Court by the Police with his face covered; that the cover was removed before asking him to mix with the dummies and stand in the row at a place of his choice; that the Police was sent out of the Court-room; and that the witness was made to sit in the Judge's Chamber until called into the Court-room for identification. The Magistrate who had certified the test identification parade was also examined (Exhibit 53), and he affirmed the contents of the identification memos. He also deposed that the dummies were of a

similar description as the suspect, and that the dummies were shuffled for each identification parade. Learned counsel for the Appellants had argued that the dummies used in the identification parade of both the Appellants were the same. However, that is not so as the list of dummies annexed to the identification memos show that a different set of dummies was used for the identification parade of each Appellant.

19. Learned counsel for the Appellants had argued that the faces of the Appellants had been revealed to the witnesses prior to the identification parade and thus the identification made thereat was of no value. To support his submission learned counsel first pointed to the identification memos with regards to Kashif (Appellant No.1) which record that he raised an objection that prior to the identification parade the I.O. had taken his photograph; and secondly, learned counsel pointed to the investigation report dated 15-03-2016 which stated that a photograph of Sajid Genda and Kashif had been shown to the Complainant who had recognized both as amongst the robbers. However, when Kashif was confronted under section 342 Cr.P.C. with his identification parade, he had stated differently, viz., that the witnesses had been called earlier to the P.S. but could not identify him over there. That statement by Kashif appears to be an attempt to improve his case inasmuch as, at the identification parade he had never stated that he had already been exposed to the witnesses at the P.S. On cross-examination, the I.O. and the victims had denied such suggestion. As regards the I.O. showing Kashif's photograph to the Complainant for the purposes of investigation, suffice to observe that the Complainant was never a witness at the identification parade of Kashif. The witnesses who had appeared and identified Kashif at the test identification parade were PW Sajjad Ahmed, PW Shahbaz Ahmed and PW Waqas Ahmed, who too were the victims of the robbery. The deposition of the Complainant shows that he was at Abbotabad when the identification parade of Kashif was held but he identified Kashif at the trial. Even if that identification of Kashif by the Complainant at

the trial is to be ignored, the identification evidence given by the other three victims still stands.

As regards Hanif Kalia (Appellant No.2), though his statement under section 342 Cr.P.C. was that the witnesses had seen him outside the Court-room prior to the identification parade, that too appears to be an after-thought. There is no evidence to substantiate that allegation. No such objection had ever been raised by him before the Magistrate at the time of the identification parade. On the other hand, on cross-examination the I.O. and the witnesses were consistent in denying the revealing/seeing of the faces of Appellants outside the Court-room prior to the test identification parade.

20. Learned counsel for the Appellants had argued that it was a night-time incident; that as per the statement of PW Sajjad Ahmed in the identification memo, the robbers had covered his (Sajjad's) face with a cloth; that PW Waqas Ahmed had stated on cross-examination that the faces of the robbers were muffled; and therefore the witnesses could not have identified the Appellants. Accepted that it was dark outside, but PW Sajjad Ahmed had stated that the light in his room on the second floor, and the light in the staircase and courtyard leading to the first floor were already on. The other PWs had stated that the lights on the first floor were switched on by the robbers themselves. The fact that a robbery did take place after a search of the house, was not in question. Therefore, the oral evidence of the PWs that the robbers had switched on the lights to enable them to search the rooms is plausible. Though the FIR did not detail the features of the robbers, the FIR did give a description of the robbers coupled with a statement that the Complainant can recognize them if he sees them again. The Complainant had deposed that the faces of the robbers were open/exposed. Though the robbers had put a cloth over the face of PW Sajjad Ahmed, but that was after he was woken up by them and taken to the room where his wife and children were asleep. The statement of PW Sajjad Ahmed in the identification memos that one of the robbers had a black mole on his face, a slim body and was

wearing a pant-shirt, shows not only that the face of that robber was exposed but also that PW Sajjad Ahmed had the opportunity to examine his face. The rule of appreciation of evidence is that evidence should be considered as a whole; corroborative evidence and ocular testimony should be read together; and a minor inconsistency in one piece of evidence is not sufficient to reject the whole evidence (see *Muhammad Hanif v. The State*, PLD 1993 SC 895). Per the identification memos, PW Shahbaz Ahmed had categorically stated that Kashif (Appellant No.1) was the one who was holding a pistol to the head of PW Sajjad Ahmed; PW Waqas Ahmed had categorically stated that Kashif was the one who stood over them with a pistol; and all the PWs had categorically stated that Hanif Kalia (Appellant No.2) was also one of the robbers armed with a pistol. Therefore, the singular statement of PW Waqas Ahmed extracted on cross-examination that the faces of the robbers were muffled, is not sufficient to dislodge the entire evidence which is otherwise.

21. Learned counsel for the Appellants had pointed to the cross examination of PW Shahbaz Ahmed and PW Waqas Ahmed where they acknowledge that *"It is correct to say that my father and brother Sajjad told me to identify the accused before this Court today"*. Learned counsel submitted that such admission showed that both of the said witnesses were acting on instructions. But that is a reading of the cross-examination out of context. That statement only goes to show that the said witnesses had been advised that unless they identify the Appellants also in Court during the trial, their identification at the test identification parade would not be of value.

22. The ocular testimony of all four eye-witnesses, i.e., the Complainant and his sons as regards the manner in which the robbery panned-out does not contain any material inconsistency. That evidence is that the robbers first came to the second floor; rounded-up PW Sajjad Ahmed, his wife and children and took them at gun-point to the first floor; there they rounded-up the Complainant, PW Shahabaz Ahmed, PW Waqas Ahmed, their sister

and children; and detained all of them at gun-point in one room to commit the robbery. PW Sajjad Ahmed had deposed that the stay of the robbers was between 20 to 30 minutes. Thus, this was not a case of a fleeting glimpse of the accused at a distance, but a case where the accused were in close eye-range of the witnesses for a considerable period of time. Given that fact, and the fact that none of the eye-witnesses had erred at the test identification parade, the duration of 2 ½ months and 6 months between the incident and identification parade of the Appellant No.1 and Appellant No.2 respectively, does not diminish the reliability of that evidence. Further, the Appellants were unknown to the eye-witnesses. There is nothing to indicate that any of the witnesses had any motive to implicate the Appellants falsely. The Appellants had also not pleaded enmity with the witnesses. Thus, there is also no reason otherwise to doubt the ocular evidence of the eye-witnesses.

23. Having assessed the identification evidence as above, I am satisfied that the same is in compliance of the system variables and is not negated by the estimator variables. Therefore, the prosecution had succeeded in establishing the guilt of the Appellants. Consequently, this appeal is dismissed and the judgment of the trial court is sustained but with the modification that the Appellants shall be entitled to the benefit of section 382-B Cr.P.C.

JUDGE

Karachi
Dated: 12-02-2020