

IN THE FEDERAL SHARIAT COURT
(APPELLATE/REVISIONAL JURISDICTION)

PRESENT

MR. JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH
MR. JUSTICE AMEER MUHAMMAD KHAN

JAIL CRIMINAL APPEAL NO. 06-K OF 2019

1. Parvaiz S/o Ayaz Chandio, R/o Ghari, Taluka and District Larkana (presently confined in Central Prison, Hyderabad).
2. Fateh Ali S/o Hidayatullah by caste Chandio, R/o Ghari Taluka, District Larkana (presently confined in Central Prison, Hyderabad).

APPELLANTS

VERSUS

The State

RESPONDENT

JAIL CRIMINAL APPEAL NO. 08-K OF 2019

1. Abdul Malik S/o Abdul Aziz, by caste Mallah, R/o Village Madeji, Taluka Garhi Yaseen, District Shikarpur (presently confined in Central Prison, Hyderabad).
2. Ghulam Sarwar S/o Hidayatullah, by caste Bhand, R/o Meenhon Khan Bhand, Taluka, District Dadu (presently confined in Central Prison Hyderabad).

APPELLANTS

VERSUS

The State

RESPONDENT

CRIMINAL MURDER REFERENCE No. 02-K OF 2019

The State

APPELLANT

VERSUS

1. Abdul Malik S/o Abdul Aziz, by caste Mallah, R/o Village Madeji, Taluka Garhi Yaseen, District Shikarpur (presently confined in Central Prison Hyderabad).
2. Ghulam Sarwar S/o Hidayatullah, by caste Bhand, R/o Meenhon Khan Bhand, Taluka, District Dadu (presently confined in Central Prison Hyderabad).

RESPONDENTS

COUNSEL FOR THE APPELLANTS	...	MR. WAZEER HUSSAIN KHOSO, ADVOCATE.
COUNSEL FOR THE STATE	...	MR. KHADIM HUSSAIN KHUHARO, ADDITIONAL PROSECUTOR GENERAL, SINDH
FIR NO. DATE AND POLICE STATION	...	72 OF 2010, 02.11.2010 BHAN, DISTRICT JAMSHORO
DATE OF JUDGMENT OF TRIAL COURT	...	27.03.2019
DATE OF INSTITUTION	...	04.05.2019
DATE OF HEARING	...	13.02.2025
DATE OF JUDGMENT	...	

JUDGMENT

AMEER MUHAMMAD KHAN, J: The Criminal Appeal No. 06-K of 2019 was filed by Parvaiz and Fateh Ali convicts through jail and was received in this Court by transfer vide the orders of Hon'ble High Court of Sindh, Circuit Court Hyderabad dated 22.4.2019, thereafter vide order of this Court dated 10.6.2019, the murder reference and the Criminal Appeal No.08-K of 2019 filed by Ghulam Sarwar and Abdul Malik through Jail Superintendent, pending in the High Court of Sindh were requisitioned and received for decision before this Court.

2. The appellants Parvaiz, Fateh Ali, Ghulam Sarwar and Abdul Malik were tried in the Court of Additional Sessions

Judge-I, Kotri, in case FIR No. 72/2010, Police Station Bhan, registered under Section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, (VI of 1979) read with Section 324 PPC wherein they were convicted and sentenced as under:-

“Ghulam Sarwar Bhand and Abdul Malik to death, Fateh Ali and Parvaiz to imprisonment for life, under Section 396/149 PPC, all four accused were burdened with the compensation of Rs. 5,00,000/- each, payable to the legal heirs of Shuja Muhammad alias Buxial, deceased under Section 544-A Cr.P.C and also under Section 324/149 PPC for 07-years, R.I cum a fine of Rs. 10,000/- each and in default the payment thereof to further undergo 03-Months S.I, sentence to be passed concurrently with benefit of Section 382-B Cr.P.C”.

Murder reference to the extent of Ghulam Sarwar Bhand and Abdul Malik was forwarded and received in this Court; hence these appeals and the murder reference are the subject of decision herein.

The Criminal Miscellaneous Application No. 5/K/2023 filed by Ghulam Sarwar Bhand, appellant/convict is pending adjudication; the same pertains to the merits of the case. The main appeal is being decided, therefore, the same is hereby dismissed.

3. The Brief facts as contained in FIR Exh.7/A, lodged by Abdul Malik, PW-1 regarding the occurrence taken place on 02.11.2010 at about 10:00 hours, reported on the same date at 11:00 hours, under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, (VI of 1979) read with Section 324 PPC, lodged at Police Station Bhan, District Jamshoro, stating therein that a shop located near Bhan Railway crossing for sale purchase of seeds/fertilizer was being run by him and his brothers including Shuja Muhammad alias Buxial, aged about 27/28 years and his other brothers also used to deal and sit there, a few days ago Ghulam Sarwar Bhand along with 4/5 persons started passing in front of their shop, on suspicion they investigated and inquired about the persons/outsideers being seen with said Ghulam Sarwar Bhand, they came to know that they were his friends and their names were Parvaiz s/o Ayaz Ali, Fateh Ali son of Hidayatullah, both Chandio by caste R/o village Ghari, District Larkana, Abdul Malik alias Matto s/o Abdul Aziz Mallah R/o Madehji, Tehsil Ghari Yaseen and one remained unknown. On the day of occurrence i.e. 02.11.2010, he along with his brothers Shuja Muhammad alias Buxial, Muhammad Hashim, his relative Muhammad Baqar s/o Muhammad Qasim, Usama s/o Muhammad Baqar Rahpoto and Muhammad Khan s/o Ahmed Khan Rahpoto, R/o Bilawalpur,

Tehsil Sehwan were present at their said shop, when at about 10:00 a.m, Ghulam Sarwar Bhand, Parvaiz Chandio, Abdul Malik alias Matto Mallah came and stood on the shop adjacent thereto and in the meanwhile his other friends namely Fateh Ali Chandio and one un-known reached on motorcycle, all said five took out their pistols, raised "hakled" and directed them to keep sitting silently and commanded to handover to them whatever was with them. Parvaiz Ali Chandio robbed Rs. 25,200/- from the first informer, Fateh Ali robbed one Rado watch, a golden chain weighing about 1 and ½ tola and cash amount Rs. 5,000/- from his brother Muhammad Hashim, accused Abdul Malik alias Matto robbed cash amount of Rs. 40,000/- from his brother Shuja Muhammad alias Buxial, and Rs. 25,000/- from Muhammad Baqar and a Nokia phone, the un-known accused person robbed Rs. 4,000/- and one Nokia Mobile from Muhammad Aslam, accused Ghulam Sarwar and Abdul Malik alias Mattoo took out counted cash amount of Rs. 64,800/- from the drawer (Daraz). His brother Shuja Muhammad alias Buxial resisted on which Abdul Malik Mallah made straight fire with his pistol on Shuja Muhammad alias Buxial hitting him on the left side above the breast, in the meanwhile Ghulam Sarwar Bhand also resorted to firing with his pistol hitting on his said brother in front of chest, he fell down while crying, the other

accused persons also made straight firing upon them with intent to murder them, they fell on the ground and the fire shot missed. The culprits took the motorcycle 125 of the complainant party and went away to Bhan city. Shuja Muhammad alias Buxial had succumbed to the injuries. In the meanwhile SHO Bhan, Ghulam Akbar Chandio along with his staff hearing the firing shots reached at the spot. The first informer remained with the dead body of his brother whereas his brother Muhammad Hashim, his relative Muhammad Baqar, Muhammad Aslam and Muhammad Khan Rahpoto boarded with the SHO in the mobile and went to pursue the accused. The dead body was shifted to Government Hospital, Bhan where Ali Nawaz Ghadi, ASI, P.S Bhan reached, he completed the formalities. The detail of the stolen property is as under:-

- i. One motorcycle bearing no. Nil of black color, Engine No. 3662592 and Chassis No. 49033, Model-2009.
- ii. Two Nokia mobile phones.
- iii. Total Cash amount Rs. 1,64,000/-
- iv. One Gold Chain weight about 1 and ½ Tola.
- v. One Rado wrist watch.

4. The learned trial Court on receipt of report under Section 173 Cr.P.C and completing the formalities, charge sheeted the present four appellants/convicts, whereas one

Azmat was a “proclaimed offender”, under the two heads, for murder of Shuja Muhammad alias Buxial while committing Haraabah co-jointly and for attempt to commit murder with their common object, the appellants pleaded not guilty and claimed trial.

5. The prosecution evidence was summoned and recorded. The gist of which is as under:-

PW-1 Abdul Malik, the first informer, eye witness and the victim reiterated the same story as mentioned supra while claiming that the contents of FIR Exh.7/A, were read over to him and he had signed the same beside identification of the recovered case property vide exhibited articles **A to I** respectively comprising one Rado wrist watch, one golden chain, cash amount of Rs. 1,60,000/-, two mobile phones, four pistol of 30-bore with magazines beside two motorcycles.

PW-2 Muhammad Baqar, an eye witness, victim and the marginal witness of the memos.

Muhammad Aslam PW-3, is the eye witness, victim of the occurrence and also the marginal witness of memos.

PW-4 Ghulam Akbar, DSP, on 02.11.2010 he was SHO at P.S Bhan Saeeda Abad, on hearing the firing shots vide the

departure entries No. 13 at 10:10 hours in the roznamcha, he along with his staff Muhammad Yaqoob, Muhammad Saleem and Mumtaz Ali, Head constables, P.C Nazeer Ahmed and DPC Abdul Hameed proceeded to the place of occurrence where people were gathered at a shop located in between Police Station and Railway Phatak, there he came across Abdul Malik Rahpoto who disclosed him about escape of five persons after commission of occurrence while disclosing their names as Ghulam Sarwar, Parvaiz, Fateh Ali Chandio, Abdul Malik Chandio alias Matto along with one un-known by riding on two motorcycles comprising one of the culprits and the second taken away by them belonging to the complainant party, stopped outside their shop, four persons Aslam, Hashim, Baqar and one other joined them on the vehicle. He came to know that one out of five culprits, riders of the two motorcycles got down at the chowk in the town while remaining four were moving towards the by-pass, he went and when reached at Johi link road close to the said riders, he informed to SHO Khuda-abad and the investigation Incharge Saeed Ahmed Channa who also reached there along with their staff. Motorcycle riders were commanded alighting from the motorcycle; they went in the nearby fields of standing crops resorted firing upon them. The police party retaliated and in defence made firing upon the accused

consuming 15/20 minutes, in exchange of the firing, then they apprehended the culprits by encircling them off, arrested them who disclosed their names as Parvaiz Chandio, Fateh Ali Chandio, Abdul Malik and Ghulam Sarwar Bhand. The accused were searched out resulting into pistol with empty magazine, one cloth pocket (Gathri) containing cash Rs.1,00,000/- (one lac) from Parvaiz Chandio, an un-licensed pistol with empty magazine from Fateh Ali resulting into recovery of one Gold chain, one Rado wrist watch, two Nokia Mobile phones with cash amount of Rs. 60,000/-, then one un-licensed pistol with empty magazine from Ghulam Sarwar Bhand accused, un-licensed pistol with empty magazine from Abdul Malik Mallah. This PW also took into possession two motorcycles from the place of occurrence. He prepared memos of recoveries attested by Aslam Rahpoto and Baqar PWs vide memo Exh.8/A, the accused were taken to police station Bhan, he produced departure roznamcha entry No. 13, Exh.10/A, he also produced the FIRs No. 73/2010, 74/2010, 75/2010, 76/2010 and 77/2010 of P.S Bhan, Exh.10/B to Exh.10/F, respectively and he also gives the detail of recovered articles and proves the memos.

PW-5, Ali Nawaz, ASI , this PW on 02-11-2010 inspected the dead body of deceased Shuja Muhammad alias Buxial, when

he reached at health centre Bhan, prepared the injury statement, inquest report by inspecting the dead body, took last worn clothes after the post-mortem examination.

PW-6 Dr. Abdul Sattar, this PW as MLO at health centre Bhan, on 02.11.2010 at about 10:30 a.m vide letter Exh.13/A and Exh.13/B, conducted the post-mortem examination on the dead-body of Shuja Muhammad alias Buxial and observed as under:-

“The dead body wearing blood stained clothes of black militia color Shalwar Kameez with white color Azarband (Nara). The body of deceased was warm and rigor mortis absent all over the body. He found following injuries on the person of above named deceased:-

INJURY NO. 1. Fire arm injury on left side of chest 3 cm above the nipple with blackish, burnt and inverted margin measuring 1.5 c.m x 1.5 cm x cavity deep. (wound of entrance).

INJURY NO. 2. A fire arm injury at mid-epigastric region with burnt margin and inverted margin. (wound of entrance).

INJURY NO. 3. Gutter-Shaped lacerated fire arm injury on left side of back of chest measuring 2 cm x 1.5 cm x cavity deep (wound of Exit).

INJURY NO. 4. Lacerated wound on 5th 6th lumber spinal (Cord) vertebra measuring 2.5 cm x 2 cm x cavity deep (wound of Exit).”

He opined that from the external and internal examination the above mentioned injuries are ante-mortal and death has been occurred due to rupture of heart and main aorta caused by Fire arm and instant death had been occurred. He issued post-mortem report of deceased as Exh.13/C in original which bears his signatures.

PW-7, Illahi Bux Tapedar, this PW prepared the site plan of occurrence, the sketch is Exh.14/A.

PW-8 Saeed Ahmed, SI is the I.O of this case. On 02.11.2010, while he was posted as SIO, Saeeda-abad and was present out of the police station for investigation of a case, he on receipt of the mobile phone call of his SHO Ghulam Akbar, Inspector, PW-4 joined him in pursuit of the accused persons, on the same day at about 10:40 to 11:20 A.M this PW along with other PWs succeeded to apprehend the accused at the spot, affected recoveries as already mentioned. He investigated this case, register FIRs and investigated the cases subject matter of FIR Nos. 72/2010 to 77/2010, inspected the place of occurrence in case FIR No. 72/2010, collected blood from place of

occurrence, beside four empties of pistol 30-bore and one live bullet from the place of occurrence, took the same into custody and sealed vide mashirnamas, he also inspected the place of occurrence subjected mater of FIR No. 73/2010, under Section 324/353 PPC, P.S Bhan, inspected the place of occurrence, collected 10-empties shell of 30-bore pistol, five of G-3 rifle and 50 empties of the SMG from the said place of occurrence, sealed the same into parcels and then secured the case property and got the same towards ballistic expert, he also tendered the Ballistic expert report Exh.17/C, recorded statement of PWs under Section 161 Cr.P.C, took the physical remand of said accused persons, interrogated them, they disclosed the name of the absconding companion namely Azmat Mirani, R/o Zubaida Colony, Larkana as the fifth culprit, he conduct raids for arrest of the said accused; he got prepared the sketch of place of occurrence on 03.11.2010, he forwarded the samples to the Chemical Examiner comprising of blood stained earth; report of Chemical examiner as Exh.17/F.

PW-9 Mehar Ali, Firearm Expert, this PW was summoned through the Court, he proved in Court the Ballistic expert Report Exh.17/C.

6. The learned Assistant District Public Prosecutor give up PWs Mumtaz Ali Lund HC, Nazeer Ahmed PC, Muhammad Saleem, HC and PC Muhammad Yaqoob and vide his statement dated 06.11.2018, closed the prosecution case.

7. Statements of the accused under Section 342 Cr.P.C were recorded. Except the accused Ghulam Sarwar Bhand none else opted for producing defence evidence, all the accused did not opt to state on oath in their defence as required under Section 340(2) Cr.P.C.

Ghulam Sarwar Bhand produced defence evidence, DW-1 Jaam Khan, this DW claimed that on 03.11.2010 at About 09:00 a.m on asking of Subedar Akbar Chandio, he handed over Sarwar Bhand to him, DW-2, Naik Muhammad deposed that he witnessed and claimed presence when police asked Rais Jaam Khan DW for handing over of Ghulam Sarwar Bhand, accused. DW-3, Muharam, he is the witness of the handing over of the accused Ghulam Sarwar Bhand to the police. After that on 02.2.2019, the defence evidence was closed.

8. Thereafter vide impugned judgment the conviction and sentence mentioned supra was awarded to the accused, hence these appeals.

9. The learned counsel Mr. Wazeer Hussain Khoso, appearing on behalf of appellants contended that the appellants/convicts are innocent; not involved in the occurrence and that the prosecution failed to prove the charge against them contending that the disclosures of the names of culprits to first informer and the other PWs is a mystery and without source. There are contradictions inter-se the statements of the PWs regarding the arrival of the culprits and attribution to the appellant's names at the place of occurrence; that the appellants were not apprehended by the police, Ghulam Sarwar Bhand, the appellant was produced by DW-1 Jaam Khan; the arrival of the police within 15/20 minutes at the spot and the revelation that one out of five culprits escaped, never apprehended and the arrest of the accused is highly doubtful. Muhammad Aslam and Muhammad Baqar PWs have been claiming their presence with the police all the time and their presence at two places simultaneously that is place of encounter and arrest of the culprits and at the hospital give rise to the impossibilities and the doubts, further contended that the owner of the 125 motorcycle remained in mystery, none claimed the said motorcycle so far, the prosecution evidence is comprise of contradiction and confrontations. The presence of the PWs was doubtful. No independent witness has been produced in

evidence, and that the testimonies of the PWs are highly doubtful. The impugned judgment was against law and comprise of mis-reading and non-reading of evidence. The learned counsel for the appellant emphasized that the statements of PWs were based upon dishonest improvements and discrepancies inter-se. At the end, he asserted that there are dents in prosecution story and averred for acquittal of appellants.

10. On the other hand, Mr. Khadim Hussain Khuharo, learned Additional Prosecutor General, Sindh vehemently opposed the contentions raised by the learned counsel for the appellants and contended that prosecution has proved the charge beyond shadow of doubt qua the time, date and the manner of occurrence; the nomination of the culprits was well in time and explained by the PWs; the defence failed to bring on record any discrepancy or confrontation with any of the previous statements of the PWs, nor opted any such mode for putting the PWs to confrontation, as to their previous statements as provided under Article 140 of the Qanun-e-Shahadat Order, 1984. The culprits/appellants were arrested within a short possible time, when the police apprehended them is result of the hot pursuit; there is no reason of false implication of the

appellants in this case and that the defence failed to substantiate the plea of *Alibi* and that of the substitution as claimed during the evidence by them; further contended that all the appellants along with their fifth culprit since “proclaimed offender” committed this occurrence and were rightly challaned, tried and convicted; finally argued that the prosecution has proved the charge.

11. Arguments heard. Record perused.

12. PW-1 Abdul Malik, his brothers Shuja Muhammad alias Buxial, the deceased and Muhammad Hashim had a shop pertaining to sale purchase of wheat, cotton and fertilizers located at link road leading toward Talti near Railway Phatak Bhan Town. Two/four days prior to the occurrence of dacoity when they were sitting at their said shop Ghulam Sarwar Bhand along with three/four strangers were seen by them passing in front of their shop. PW-1, Abdul Malik asked from other persons of the town about the said three/four strangers, they came to know that their names were Parvaiz Chandio, Fateh Ali Chandio, Abdul Malik alias Matto and one unknown, friends of Ghulam Sarwar Bhand. This part of the statement of PW-1, Abdul Malik is relevant, he has claimed the knowledge of the names/identity of said three/four unknown persons, who later

on have been nominated by him in this FIR Exh.7/A, as accused for commission of Haraabah with murder in this case. Therefore, the claim of this PW about discovery of the identity of the said persons by name is a relevant fact to be proved by the prosecution as part of the subsequent occurrence taking place on 02.11.2010 at about 10:00 a.m.

Abdul Malik, PW-1 stated that he along with his brothers Shuja Muhammad alias Buxial, the deceased, Muhammad Hashim, his relatives Muhammad Baqar, Muhammad Aslam and Muhammad Khan PWs were present at their above said shop, the accused Parvaiz Chandio, Abdul Malik alias Matto and Ghulam Sarwar Bhand came on foot in front of the shop, then two more accused namely Fateh Ali and one unknown reached there while riding on a motorcycle, soon thereafter the arrival, all the said five accused took out their Pistols from the folds of their Shalwars and announced not to move otherwise they will be killed. The accused Parvaiz Chandio took out cash of Rs. 25,000/- from the front pocket of Abdul Malik PW, whereas the other accused persons mentioned supra started robbing cash, gold chain and mobile phones from the other persons sitting in the shop. Abdul Malik alias Matto, accused headed towards the Almirah of the shop wherein counted cash amount of

Rs. 64,800/- was placed. Shuja Muhammad alias Buxial deceased herein resisted, upon which Abdul Malik accused fired upon him with his pistol hitting on his left side of chest over the nipple. Then Ghulam Sarwar Bhand, accused resorted to firing with his pistol hitting on Shuja Muhammad alias Buxial on his chest, receiving two fire shots; he fell down while raising cries. Thereafter the remaining accused persons made straight fire shots upon them which could not hit and they remained safe as they lay down. Thereafter all the culprits fled away while riding on motorcycles and proceeded towards Western side towards Bhan Town, taking along the booty and a 125 motorcycle already parked in front of the shop of occurrence. This was the crux of the story of occurrence.

13. The attribution of snatching of the stolen property to the accused persons is reproduced as under:-

“Abdul Malik alias Matto accused took Rs. 25,000/- and one mobile from PW-2, Muhammad Baqar and Rs.40,000/- from Shuja Muhammad alias Buxial deceased. Parvaiz Chandio accused took out Rs.25,000/- from Abdul Malik PW-1; Fateh Ali, accused snatched one Rado wrist watch, one gold chain and cash amount of Rs.5,000/- from Muhammad Hashim, PW and the unknown accused snatched Rs.5,000/- and one Nokia mobile from Muhammad Aslam, whereas the amount of

Rs. 64,800/- available in the Almirah was taken out by Ghulam Sarwar Bhand and Abdul Malik."

14. PW-1 Abdul Malik, claimed that about two/four days prior thereto the main occurrence, he and his brothers Muhammad Hashim, Shuja Muhammad alias Buxial had the opportunity to see Ghulam Sarwar Bhand accused along with four unknowns, herein nominated as accused Abdul Malik alias Matto, Parvaiz Chandio and Fateh Ali Chandio. The Shuja Muhammad alias Buxial is the deceased, Muhammad Hashim has not been produced as PW to state in Court about this fact, therefore, PW-1 Abdul Malik becomes the sole person of this first episode to describe and prove as to the reconnaissance by the said accused and the exposure of their names and identity to him.

Admittedly, all the four unknowns were strangers to him but he nominated them in this occurrence relying upon his quarries from other persons of the Town and claimed having the knowledge about their identity by name. This PW-1, Abdul Malik was cross-examined on these points, he answered as under:-

"It is correct to suggest that names of those persons are not mentioned in the FIR who disclosed the names of unknown accused persons roaming in front of his shop

to him. It is correct to suggest that no specific time and date is mentioned in FIR about the disclosure of this fact. It is correct to suggest that names of those persons are not mentioned in the case as witness who disclosed the names of unknown accused to them. I do not want to disclose the names of those witnesses in presence of whom the name of present accused Parvaiz Chandio, Abdul Malik alias Matto and Fateh Ali were disclosed by some persons”.

PW-1, Abdul Malik was bound to prove source of his knowledge of revealing the names and identity of said friends of Ghulam Sarwar Bhand, the unknown accused herein but he did not opt to disclose even when asked in cross-examination, therefore, withholding his such knowledge give rise to the mystery, making his statement regarding their nominations in the FIR Exh.7/A as inadmissible in evidence to be culminated as hearsay. Therefore, whether an act of reconnaissance took place about two/four days prior to the main occurrence by Ghulam Sarwar Bhand and others and the revelations of their names and identity to this PW goes to mystery. The role of Investigating Officer is to collect the evidence, he has not uttered single word about the first episode nor collected any evidence as to how the names of the unknowns were exposed to the first informer, hence nomination of the said unknown in the FIR, Exh.7/A to PW-4, SHO Ghulam Akbar while proceeding for hot pursuit

remains in mystery and inadmissible in evidence. It is in evidence that FIR Exh.7/A, had been registered prior to the claimed arrest of the accused persons.

15. It is pertinent to mention here that PW-2 Muhammad Baqar and PW-3 Muhammad Aslam are not the witnesses of first episode mentioned supra. PW-1, Abdul Malik had acquaintance only with Ghulam Sarwar Bhand, accused and the remaining three namely Parvaiz, Abdul Malik alias Matto and Fateh Ali were strangers. As discussed above, the very question that how he came to know their names and identity is a mystery. He did not utter a word about the time, date of his interaction with the said unknowns on the day when they passed in front of his shop with Ghulam Sarwar Bhand nor disclosed any source through which he gained such knowledge. Therefore, in absence thereof the nomination of the said strangers in the FIR and in the testimony becomes hearsay, not admissible in evidence. A revelation without source could not be made admissible in evidence. Therefore, the situation is created that such inadmissible nomination shall affect not only the ocular account part but also the snatching part of the episode as adduced in evidence, mentioned particularly in the Para above. Therefore, the distinctive attribution qua the making of firing and the

snatching of articles shall stand effected when no identification parade has been held.

16. The prosecution evidence that soon after the occurrence of dacoity cum murder at the shop of occurrence, the SHO, P.S Bhan, PW-4 Ghulam Akbar along with his subordinates reached at the place of occurrence, hearing the fire shots while in a police mobile by incorporating departure entry in the Roznamcha of the police station bearing No. 13 at 10:10 hours, consuming more two/three Minutes. PW-1, Abdul Malik stated the occurrence to him that five persons escaped away after looting and making firing on his brother Shuja Muhammad alias Buxial disclosing their names as Ghulam Sarwar Bhand, Parvaiz Chandio, Fateh Ali Chandio, Abdul Malik Chandio alias Matto and one unknown by riding on two motorcycles. This PW-4, Ghulam Akbar SHO then took along four persons namely PW-2 Muhammad Baqar, PW-3 Muhammad Aslam and Muhammad Hashim brother of the deceased beside another leaving Abdul Malik PW with the dead body at the spot, went in hot pursuit of the said culprits, took over them after an encounter lasting for 15/20 minutes of the exchange of firing with the help of SHO P.S Khuda Abad and others and arrested

all the four accused whereas one unknown went skipped. The accused disclosed their names as mentioned above.

17. As per the evidence of Investigating Officer, PW-8 Saeed Ahmed, SI, who stated that PW-5 Ali Nawaz, ASI of P.S Bhan reached at the place of encounter of the accused persons and informed him that PW-1 Abdul Malik had lodged the FIR against the same accused persons under Section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, (VI of 1979) read with Section 324 PPC, bearing No. 72/2010, Exh. 7/A at 11:00 a.m. PW-5, Ali Nawaz, ASI is the scribe of the FIR and informed the SHO, PW-4 Ghulam Akbar and to PW-8 Saeed Ahmed, the Investigating Officer. The disclosure of the names of the unknown by Abdul Malik PW-1 to the SHO Ghulam Akbar PW-4, clearly becomes a mystery throughout the trial.

This creates reasonable doubt in the mind of the Court that how before the arrest of the accused persons, their names with the overt acts were mentioned in the FIR and the prosecution has failed to explain anywhere through an admissible evidence as discussed supra.

18. The burden to prove the charge remains purely on the prosecution. In this case, the claim of prosecution regarding

arrest of four accused persons after a police encounter is important and has to be proved before the Court.

The Investigating Officer has not prepared any sketch of the said place of encounter. Although cross firing has been claimed by him, an act of firing upon the police party could not be considered as a minor offence, which otherwise is punishable under Section 353 PPC and even under Section 7 of the Anti-Terrorism Act, 1997, if it is covered under Section 6 (m) (n) of the Act *ibid*, and as per Rule 25.13 of the Police Rules 1934, yet operative, plan of the scene was required to be prepared for explanation of the scene but the same has not been prepared for highlighting the said venue. The Investigating Officer, PW-8 Saeed Ahmed and PW-4 Ghulam Akbar, SHO claimed the arrest of the accused from said place after taking over them near to Johi Link Road along with the contingent of the police and claimed exposure of the accused Parvaiz Chandio, Fateh Ali Chandio, Ghulam Sarwar Bhand and Abdul Malik, recovered unlicensed Pistols with empty magazine from Parvaiz Chandio besides cash amount Rs.1,00,000/-, unlicensed Pistol from Fateh Ali, one gold chain, one Rado wrist watch, two Nokia mobile phones and cash amount of Rs.60,000/- from their personal search. He also claimed recovery of unlicensed pistol from Ghulam Sarwar

Bhand, pistol with an empty magazine from Abdul Malik alias Matto accused and also claimed for sealing the same in presence of Muhammad Aslam and Muhammad Baqar, PWs, prepared the recovery memos attested by them and then shifted the accused persons to the Police Station and registered the FIRs and handed over the said arrested accused to PW-8 Saeed Ahmed, SI, for the investigation along with the total case property.

The defence has vehemently argued that the story of hot pursuit, arrest of the accused persons, recoveries in presence of Muhammad Aslam and Muhammad Baqar are false and manipulated. Both the said PWs can not be supposed to be present at two places concurrently at the same time that is at the place of arrest/encounter and in the hospital where Post-mortem examination of Shuja Muhammad alias Buxial was conducted by PW-6, Dr. Abdul Sattar and the inquest proceedings were carried out by PW-5 Ali Nawaz, ASI. Both the said venues are admittedly about three Kilometers apart.

19. PW-2 Muhammad Baqar and PW-3 Muhammad Aslam are the marginal witnesses of all the memos either prepared at the stated place of arrest of the accused for recovery or prepared in the hospital at the time of Post-mortem

examination, inquest proceedings or the recoveries of empties and blood at the scene of occurrence.

PW-2 Muhammad Baqar is the marginal witness of the inquest report and the injury statement and the identification of the dead body of Shuja Muhammad alias Buxial before the doctor at 10:30 a.m, as mentioned in the Post-mortem examination Report Exh.13/C, duly proved by the doctor Abdul Sattar PW-6. The time of police encounter as stated by PW-8 Saeed Ahmed is 10:40 a.m to 11:20 a.m and stated the presence of PW-2 Muhammad Baqar there, who signed the recovery memos at the said place.

PW-2 Muhammad Baqar has been cross-examined on this point who stated that the police encounter continued from 11:00 a.m to 11:15 a.m, about half an hour spent after the encounter and that the hospital was located at a distance of about three Kilometers from the said place. The inquest report Exh.13/B was referred to him that it was prepared at 10:30 a.m, he volunteered that he did not remember when he reached the hospital. The PW-4 Ghulam Akbar, SHO also claimed taking this PW along at about 10:10 a.m from the shop of occurrence. The time certainly consumed in the hot pursuit, the encounter and while preparation of the memos at the spot.

The dead body arrived in the hospital at 10:30 a.m , post-mortem examination started at 10:45 a.m and finished at 11:45 a.m on 02.11.2010. The identification of dead-body is made before the doctor at the commencement of the post-mortem examination. The time as 10:30 a.m is documented and proved by the doctor PW-6. The time of identification of the dead-body and that joining PW-4 Ghulam Akbar, SHO from the place of occurrence for proceeding to the pursuit is concurrent and the PW is bound to explain his presence concurrently at two places otherwise manipulations on part of the police would be the result, Muhammad Baqar PW-2 has not explained his position in this regard.

So far as PW-3 Muhammad Aslam is concerned, he is also the marginal witness of Mashirnama of dead body and the memo of possession of last worn clothes of the deceased Exh.8/B and Exh.8/E respectively. PW-5 Ali Nawaz, ASI stated that on 02.11.2010, he on receiving information from Abdul Malik, PW reached at the Health center Bhan, where the dead body of Shuja Muhammad alias Buxial was lying. He prepared the Mashirnama of dead body Exh.8/B, danshtnama as Exh.8/C and last worn clothes of the deceased as Exh.8/E. The dead body was received with the doctor for post-mortem examination at 10:30

a.m on 02.11.2010. The PW-5 Ali Nawaz further stated that he prepared the "*Naash Chakas Form*" Exh.13/B, along with the letter for examination of the dead body. He also prepared the memo of last worn clothes of the deceased in presence of Muhammad Aslam and Muhammad Baqar PWs, last worn clothes are handed over by the doctor after the completion of Post-mortem examination having signed the corresponding wholes on the clothes or presence of blood and is signed by him. Therefore, this PW-3 Muhammad Aslam signed the said recovery Exh.8/E, suffers with the same situation as that of PW-2 Muhammad Baqar. Simultaneously he claims a member of the police raiding party and signing the recovery memos at the place of arrest of the culprits. One can not be deemed present simultaneously at two places apart and if one claims so and is proved in evidence to be present at two places, the onus shift to such claimant in this case both the said PWs failed to explain. Therefore, it becomes clear that there existed manipulations and fabrications especially on part of the police. Hence, his claim of being present at any of the said venues becomes a mystery and it can be inferred that either there was no police encounter or this PW was not present there. Hence, the credit of the testimony of the said PWs becomes doubtful and not believable.

20. Therefore, the statements of PW-2 Muhammad Baqar and PW-3 Muhammad Aslam can not be accepted as truth and the witnesses becomes of least worth. The impression of manipulation comes out as discussed above; the manipulations could not be an alternate of the truth. Therefore, the said PWs were part of the manipulations carried out by the police and their story regarding their presence concurrently at two places, that is the place of encounter and the hospital before the doctor, loses their worth of being truthful witnesses to be believed in for their participation at the claimed place of encounter, at the time of arrest of the accused persons and as member of the hot pursuit team. Therefore, the conduct of said PWs is not appealable to the ordinary prudence and gives rise to disturb their veracity.

The manipulations by the police could not be taken as minor discrepancy or of no effect nor the police has got a license to manipulate or fabricate the facts and investigation proceedings nor the Investigating Officer is supposed to introduce fabricated facts before the Court of law. The role of Investigating Officer in collecting the pieces of evidence is crucial for the ultimate result of the case.

21. Now coming to the arrest of the accused persons, affecting of recoveries comprising of the stolen property, the weapons of offence, crime empties from the place of occurrence of the encounter, claim of sealing into parcels and taking into possession by PW-4 Ghulam Akbar, SHO and handing over the same to the Investigating Officer, PW-8 Saeed Ahmed is concerned. He also collected four crime empties from the place of main occurrence beside the blood on the same date. He was cross-examined by the defence, during the cross-examination he accepted it correct that he did not make marking over the weapons in order to identify that which one was recovered from which accused and accepted it correct that at present he was not able to segregate the weapon recovered from Ghulam Sarwar Bhand. He further deposed that he was unable to identify those empties recovered by him.

PW-8 Saeed Ahmed, the Investigating Officer admitted that presently he could not identify the Pistol recovered from Ghulam Sarwar Bhand accused and stated that at present it was not identifiable. This PW stated that he did not remember at present that from the date of recovery till receipt of the weapons by the Ballistic Expert, where the case property was kept or retained. He did not remember the name of the officials through

whom the case property was transmitted to the Ballistic Expert. He stated it correct that he could not say that which weapon was recovered from whom, whereas he accepted it correct that report of the Forensic Division, Sindh Exh.17/C, contained the date of receipt of the weapons as 09.12.2010. Later on PW-9 Mehar Ali, a fire arm expert was summoned by the Court, he also clarified that the correct date of receipt of case property with the Ballistic Expert as 09.12.2010, meaning thereby that from the date of recovery that is 02.11.2010, the empties and the recovered Pistols remained at some unknown place. The prosecution failed to explain in this regard. The statement of Investigating Officer, PW-8 Saeed Ahmed SI, reveals that the official who transmitted the case property remained unknown and is not a PW in this case. The police official who kept the case property in the police station is also not a PW, therefore, the prosecution failed to prove on record the safe custody of all the case property vis-a-vis the transmission of the concerned articles to the Ballistic expert.. The place of arrest of the accused persons become doubtful and the claim of recoveries from the accused persons stood not proved and became inconsequential. The stolen property comprise of the cash amount, the golden chain, mobile phones and wrist watch suffered with the same situation. The prosecution is silent as to where the said case property was kept

and from where it was produced before the Court at the time of recording of evidence of the witnesses/victims in this case for the purpose of identification of the stolen property.

The stolen articles comprising of the case property was present in de-sealed condition when PW-1 Abdul Malik recorded his evidence in the Court, the date of recording of his evidence is 25.10.2016, there is no where in the evidence that the said case property was de-sealed in open Court, even this fact is not mentioned in the interim order of the Court for the date *ibid*. Therefore, the prosecution failed to bring on evidence any corroborative piece of evidence in the form of recovery of the weapons, matching of the recovered crime empties and connecting to any particular accused. Similarly the stolen articles so produced remained inconsequential for the purpose of corroboration.

22. Now coming to the ocular account advanced by PW-1 Abdul Malik, PW-2 Muhammad Baqar and PW-3 Muhammad Aslam, who deposed the story of main occurrence. The worth of testimony of PW-2 Muhammad Baqar and PW-3 Muhammad Aslam has already been discussed above. They were not the witnesses of the previous occurrence of reconnaissance and also they were not the witnesses of

exposures of names of the unknown accused persons to PW-1 Abdul Malik. PW-1 Abdul Malik himself failed to prove this fact of the exposure of names, identity of the said unknown culprits, therefore, the specific attribution of snatching of the articles during the occurrence of dacoity without holding of any identification parade, similarly the specific attribution of fire shots can not be believed for the same reason. Therefore, their statements in this regard before the Court could not be considered of any worth. Beside that they were part of the manipulations carried out by the police as discussed supra.

PW-2 Muhammad Baqar and PW-3 Muhammad Asam both were residents of village *Wadi Manhan* located at six/seven Kilometers from the place of occurrence, may be estimated as chance witnesses unless their presence at the scene of occurrence could be substantiated through any corroborative piece of evidence. The reasons for their presence as advanced by them was receiving of sale cash which otherwise remained an oral assertion as they did not provide any receipt of sale/purchase nor the Investigating Officer opted to collect any such evidence. They have been contradicted qua their presence at the place of stated encounter and arrest with their presence at the hospital at the relevant times inter-se.

PW-1 Abdul Malik is real brother of the deceased Shuja Muhammad alias Buxial. He has attributed Ghulam Sarwar Bhand accused with single fire shot on the deceased, whereas the first fire shot has been attributed to unknown accused namely Abdul Malik alias Matto. The Pistols assigned to both the said accused persons have not been marked by the police. The report of Ballistic Expert Exh.17/C became inconsequential, the post-mortem report by itself is not sufficient to segregate the distinctive receipt of fire arm injuries. He further stated that he knew the accused Ghulam Sarwar Bhand for the last 15/20 years and there was no previous enmity with him. This PW-1, Abdul Malik has assigned specific role to each of the five accused with names for snatching of cash, mobile phones, wrist watch and gold chain. The size of the shop of occurrence has been described as 9/10 feet width and 15/16 feet length. For the purpose of probabilities of specific attribution, the total persons including the culprits may be counted as eleven inside the shop of occurrence, in the manner that five accused who have been assigned role for entering into the shop and six from the complainant side claim present inside besides some furniture, table etc, and the place becomes congested. This PW admitted it correct that he and the PWs did not become injured and even did not receive any scratch nor any sign of bullet highlighted inside

the shop on any place or object. Only four crime empties were recovered, resultantly become inconsequential. The defence denied the presence of all the PWs at the place of occurrence. This PW categorically stated that after fall of Shuja Muhammad alias Buxial, then other above named accused persons who were also armed with pistols also made straight fire shots towards them with intention to kill but they fell down and their fire shots missed, the statement does not fit in the scenario so depicted if there was any indiscriminate firing.

In this case injuries on the person of Shuja Muhammad alias Buxial deceased as per statement of PW-6 Dr. Abdul Sattar and the post-mortem examination report Exh.13/C, that the same were caused from a close distance having the signs of blackening and burning which by itself contradict the scenario stated by PW-1 Abdul Malik had there been the distinctive firing on the deceased the track of injuries would be different and the other PWs could not escape receiving injuries. Therefore, the statement of PW-1 Abdul Malik requires strong corroboration as per the principle laid down in "Ata Muhammad and other Versus The state" cited at "1995 SCMR 599" it was held that "the ocular evidence may be classified into three categories firstly wholly reliable, secondly wholly un-reliable and thirdly partly

reliable and partly un-reliable. In the first category conviction may safely be sustained on un-corroborated testimony, in the second category even strongest corroborative evidence may not rehabilitate such evidence in the third category conviction can not recorded unless such evidence is corroborated by oral or circumstantial evidence coming from distinct source”.

Ghulam Sarwar Bhand accused who has taken specific stance that he himself appeared at the police station through “Naik Mard” Jaam Khan Bhand, DW-1 also produced his defence evidence. DW-1 Jaam Khan claimed that at 03.11.2010 at 09:00 a.m, he handed over Ghulam Sarwar Bhand to Subedar Ghulam Akbar Chandio, who is PW-4. The cross-examination disclosed that even this PW tendered an affidavit at the stage of bail of the accused and he denied the suggestion of the prosecutor that accused Ghulam Sarwar Bhand was arrested on 02.11..2010 after a police encounter resulting into recovery of one un-licensed Pistol. In this case the occurrence of encounter, recovery of pistol and arrest has already been discussed above and the prosecution failed to prove the same.

PW-1 Abdul Malik is real brother of the deceased whether he deposed independently before the Court is a question mark, when he suppressed the source of his knowledge about the

nomination and identity of the unknown co-accused. The inference can be drawn that the story was a result of some deliberations and manipulations on part of the police.

The conduct of a witness is relevant, whatever he deposed has to be appreciated accumulatively with the other pieces of evidence as truth or otherwise. The statement of a witness is recorded on oath and becomes admissible only on administering the oath, which describes an undertaking in the name of Allah Almighty for deposing "the whole truth" and not for "a half truth".

PW-1 Abdul Malik required a strong corroboration of facts which is not available. In this case, the principle of sifting grain from the chaff shall not be applicable being contrary to the words of oath stated by a witness for deposing the "**whole truth**". The prosecution has failed to prove the charge against any of the accused through cogent and admissible evidence. The story advanced by the prosecution witnesses as discussed above, suffered with serious imbalances, lacunas and legal infirmities giving rise to the doubts.

23. Therefore, benefit of doubt is right of the accused, same is extended to all the appellants. Both the appeals stands allowed. The appellants namely Parvaiz, Fateh Ali, Abdul Malik

alias Matto and Ghulam Sarwar Bhand stands acquitted. The conviction and sentence awarded to them vide impugned judgment is hereby set-aside. They are acquitted from the charge on benefit of doubt. They be released, if not required in any other case.

24. The murder reference is **answered in negative**. Files be consigned to record room and the original record be sent back to the learned trial Court.

JUSTICE AMEER MUHAMMAD KHAN
JUDGE

JUSTICE IQBAL HAMEEDUR RAHMAN
CHIEF JUSTICE

JUSTICE KHADIM HUSSAIN M. SHAIKH
JUDGE

Dated, Islamabad the