

[Supreme Court of Pakistan]

Present: Asif Saeed Khan Khosa, C.J., Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**Mian SOHAIL AHMED and others---Appellants****Versus****The STATE and others---Respondents**

Criminal Appeals Nos. 306-L, 307-L and 308-L of 2012, decided on 24th April, 2019.

(Against the judgment dated 25.01.2012 passed by the Lahore High Court, Lahore in Criminal Appeal No. 383 of 2007 and Murder Reference No. 44 of 2007)

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Belated post-mortem examination---Deceased and complainant were in their car, when the accused and the co-accused allegedly tried to rob them---During the incident the deceased was shot and murdered---Accused persons were sentenced to death, however on appeal the sentence of one of the accused was reduced to imprisonment for life---Held, that case of the prosecution rested on the ocular account of two eye-witnesses---Testimony of one of the said witnesses and his presence at the scene of the crime had been rightly disbelieved by the High Court---According to the doctor at the hospital the post-mortem examination took place 15 hours after the body of the deceased was brought to the hospital---Such delay in the post-mortem examination, when the occurrence was promptly reported and formal FIR was registered within 15 minutes gave rise to an inference that the incident was not reported as stated by the prosecution---Complainant, who claimed to be on the passenger seat, must have single-handedly moved the deceased, who was on the driving seat, to another seat in the car, and in the process soiled other seats and his clothes with blood; however, there was no evidence on the record to support such fact---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Medical evidence---Nature of bullet wound---Site-plan showed one of the accused to be standing next to the driving seat of the car at a distance of 4 feet---Fire-shot from such short distance was likely to cause blackening but the medical evidence did not support this, raising suspicion that the events may have unfolded differently than as reported---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Presence of deceased at the site of occurrence doubtful---Deceased and complainant were in a car outside a godown, where the accused persons allegedly tried to rob them and in the process shot and murdered the deceased---In the absence of any supporting evidence, the presence of the deceased at the site of occurrence was highly improbable considering that the deceased was a doctor, employed with the social security department of the Government, having no evident interest in the business of the complainant or any convincing evidence to show that the godown, where the incident took place, fell in the way to his residence---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt---Appeals were allowed accordingly.

(d) Penal Code (XLV of 1860)---

---Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Recovery of weapon doubtful---Investigation Officer deposed that the recovery of pistol was effected from a house whose ownership he failed to ascertain---According to the investigating officer it was a double storied house and recovery was effected from the ground floor where other family members also resided--- Memorandum of recovery showed that the pistol was recovered from an open room lying under rough clothes, therefore, it would be unsafe to rely on such recovery for a conviction on a capital charge---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

(e) Penal Code (XLV of 1860)---

---Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade, infirmities in---Description of suspects given in the FIR by complainant or witnesses---Test identification parade conducted by the Special Judicial Magistrate was fraught with several infirmities diminishing its probative and evidentiary value---Brief description of the two unknown persons (later on identified as the accused persons) in the First Information Report (FIR) mentioned their height, bodily size and colour of the skin---Test identification proceedings were silent regarding the description of the unknown accused given by the complainant in the report---Test identification could only commence, once suspects matching the description in the crime report or in the statements of the witnesses under S. 161, Cr.P.C. had been arrested---Matching the description in the FIR was the starting point towards identification of the unknown accused, therefore, it was uncertain as to how the accused persons in the present case were hurled and lined-up for the identification parade without the Magistrate first matching the description given by the complainant---Selection of the suspects, without any correlation with description of the accused in the FIR, raised doubts and made the identification proceedings unsafe and doubtful rendering the identification evidence inconsequential---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

State/Government of Sindh v. Sobharo 1993 SCMR 585; Muhammad Afzal alias Abdullah v. State 2009 SCMR 436; Sabir Ali alias Foji v. State 2011 SCMR 563 and Muhammad Abdul Hafeez v. State of A.P AIR 1983 SC 367 ref.

(f) Penal Code (XLV of 1860)---

---Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Joint identification parade---Suspects jointly seated in the line-up---Idea of identification parade or lineup was to stand or seat the suspect in a group of persons (dummies or fillers) that closely resembled the characteristics of the suspect, in order to test the recognition, memory, perception and observation of the witness and thus verify the testimony of the witness---Placing two or more suspects jointly in an identification parade (or joint parade), tarnished the homogeneity, sameness and identicalness of the members of the parade and defeated the very purpose of having a test identification parade---Joint parade passed for suggestive and indicative identification, compromising the reliability of the witness and opening doors to misidentification, rendering test identification unsafe and untrustworthy---Both the accused persons in the present case were jointly seated in the lineup during test identification parade---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

In the matter of Kanwar Anwaar Ali PLD 2019 SC 488 ref.

(g) Penal Code (XLV of 1860)---

---Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade---Absence of role assigned to suspects by the witness or complainant in an identification parade---In the present case, no role was assigned to the suspects by the witnesses, especially when the First Information Report (FIR) clearly described two different roles to the accused persons; one that of an assailant, while the other of a driver of a motorcycle who drove the assailant away---Where a witness failed to give the description of the part played by the suspect in the crime, the credibility of the witness stood questioned as he failed to complete the picture of the crime scene, thus inviting caution and circumspection in assessing the evidentiary value of the identification evidence---Little reliance was placed on such identification evidence by the (Supreme) Court---Even in the subsequent identification by the complainant in court, which had little evidentiary value, the complainant failed to point an accusing finger at the accused persons to say who did what, therefore the parts played by the accused persons in the crime remained a mystery---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

In the matter of Kanwar Anwaar Ali PLD 2019 SC 488 ref.

(h) Penal Code (XLV of 1860)---

---Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade---"Impermissible suggestiveness" by the police---Duty of police to guard identity of suspect till test identification proceedings---According to the complainant the accused persons were his employees at a godown, where the murder took place, and the Investigation Officer admitted in his cross-examination that he took the accused persons to the godown after they were arrested and the employees at the godown confirmed that both of them worked as employees at the godown of the complainant---Police was to guard the identity of the suspects from the witness till test identification parade took place---Visiting the godown of the complainant with the suspects unravelled the identity of the suspects, tarnishing the secrecy required, which was referred to as "impermissible suggestiveness" at the hands of the police---Probability of the witnesses knowing the identity of the accused persons prior to the identification parade could not be ruled out in such circumstances---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

(i) Qanun-e-Shahadat (10 of 1984)---

---Art. 22---Test identification parade---Capacity and ability of the eye-witness to identify the accused---"Estimator variables" negatively affecting the memory of a witness---Capacity and ability of the eye-witness should be assessed independently as a sequel or step two to the test identification proceedings---Such assessment also formed part of the identification evidence along with the test identification proceedings---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"---"Estimator variables" were factors related to the witness, like distance, lighting, or stress, over which the legal system had no control---Identification of an accused, therefore, became a two-step process; first, the suspects underwent a test identification parade and second, the credibility of the eye-witness was assessed by weighing the evidence in the light of the "estimator variables"---Non-exhaustive list of "estimator variables" provided.

Following is the non-exhaustive list of "estimator variables" that negatively affected the memory process of a witness:

- i. Stress: Even under the best viewing conditions, high levels of stress could diminish an eye-witness' ability to recall and make an accurate identification. While moderate levels of stress

- improved cognitive processing and might improve accuracy, an eyewitness under high stress was less likely to make a reliable identification of the perpetrator.
- ii. **Weapon focus:** When a visible weapon was used during a crime, it could distract a witness and draw his or her attention away from the culprit. Weapon focus could thus impair a witness' ability to make a reliable identification and describe what the culprit looked like if the crime was of short duration.
 - iii. **Duration:** The amount of time an eyewitness had to observe an event may affect the reliability of an identification. There was no minimum time required to make an accurate identification, however, a brief or fleeting contact was less likely to produce an accurate identification than a more prolonged exposure.
 - iv. **Distance and lighting:** A person was easier to recognize when close by, and that clarity decreased with distance. Poor lighting made it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions could diminish the reliability of an identification.
 - v. **Witness characteristics:** Characteristics like a witness' age and level of intoxication could affect the reliability of an identification. Children between the ages of nine and thirteen who viewed target-absent lineups were more likely to make incorrect identifications than adults.
 - vi. **Characteristics of perpetrator:** Disguises and changes in facial features altered between the time of the event and the identification procedure affected the accuracy of an identification.
 - vii. **Memory decay:** Memories faded with time and memory decay was irreversible; memories never improved. As a result, delays between the commission of a crime and the time an identification was made could affect reliability.

PLD 1981 SC 142; Kenneth A. Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004). Charles A. Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265 (2004); Nancy M. Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992). Anne Maass & Gunther Koehnken, Eyewitness Identification: Simulating the "Weapon Effect", 13 Law & Hum. Behav. 397, 401-02 (1989). The Handbook of Eyewitness Psychology: Memory for People, supra, at 339, 353-54; Colin G. Tredoux et al., Eyewitness Identification, in 1 Encyclopedia of Applied Psychology 875, 877 (Charles Spielberger ed., 2004). Elizabeth F. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Applied Cognitive Psychol. 3, 10 (1987); R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008); Jennifer E. Dysart et al., The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. Applied Psychol. 170, 174 (2002). Joanna D. Pozzulo & R.C.L. Lindsay, Identification Accuracy of Children v. Adults: A Meta-Analysis, 22 Law & Hum. Behav. 549, 563, 565 (1998). Jennifer E. Dysart & R.C.L. Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method? Vol.II, The Handbook of Eyewitness Psychology: Memory for People 137, 147 (2007). James C. Bartlett & Amina Memon, Eye-witness Memory in Young and Older Adults Vol.II The Handbook of Eye-witness Psychology: Memory for People, supra, at 309, 317-19; Brian L. Cutler et al., Improving the Reliability of Eyewitness Identification: Putting Context into Context, 72 J. Applied Psychol. 629, 635 (1987). K.E. Patterson & A.D. Baddeley, When Face Recognition Fails, 3 J. Experimental Psychol.: Hum. Learning & Memory 406, 410, 414 (1977); Kenneth A. Deffenbacher et al., Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol: Applied 139, 142 (2008) and State v. Henderson, 208 N.J. 208 (2011), State v. Lawson, 291 P.3d 673, 695 (Or. 2012) ref.

(j) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22--- Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade---"Estimator variables" negatively affecting the memory process of the identifying witness---Site-plan showed that the accused persons were at a distance of 15 to 30 feet from the complainant in the empty space of the godowns abutting a road with no light---Source of light in the empty area behind the godowns (place of occurrence) had not been secured as evidence during the investigation---Witness was fired at first and then the deceased was shot dead---Duration of the event had not been specified in the crime report---In such background, it could not be said with certainty that the visual recognition of the accused persons by the complainant on the fateful night was unhindered and unhampered especially when he was fired at first and allegedly saw the occurrence under stress of a threat---Based on such "estimator variables," possibility of misidentification could not be ruled out, thereby making it unsafe to place reliance on the identification evidence---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

Raja Tariq Nadeem, Advocate High Court with permission of the Court for Appellants (in Cr. A. 306-L of 2012).

Malik Abdul Haq, Advocate Supreme Court for Appellants (in Cr. As. 307-L and 308-L of 2012).

Raja Tariq Nadeem, Advocate High Court with permission of the Court for the Complainant (in Cr. As. 307-L and 308-L of 2012).

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab for the State (in all cases).

Date of hearing: 20th February, 2019.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---Dr. Tofeeq Ahmed was robbed and shot dead in the driving seat of his car at 8:30 p.m. on the fateful night of 31st August, 2006. According to the story of the prosecution, the complainant (PW-8) along with his brother (the deceased) came out of their office-cum-godown, carrying cash in a shopping bag. As the deceased sat in the driving seat of his car while the complainant was still on his way to the car, they were taken by surprise by two unknown persons (later on identified as the appellants). One of them threatened the deceased to hand over the cash to him, as the complainant tried to resist, one of the appellants fired at him but missed and then ended up killing Dr. Tofeeq Ahmed, in the driving seat of his car. The assailant was driven away by his partner, who all this while remained watchfully seated on his motorcycle. In this background case FIR No. 935 was registered against two unknown persons, at Police Station North Cantonment, Lahore under sections 392 and 203, P.P.C. on 30.8.2006. In the investigation that ensued, the appellants were arrested and after verifying their identity in an identification parade, were sent up for trial. They were convicted and sentenced by the trial Court for multiple offences under sections 302(b), 392, 324 and 411 read with section 34, P.P.C. including death under section 302(b), P.P.C. along with compensation and imprisonment for various terms under sections 392, 324 and 411, P.P.C. while extending them the benefit of section 382-B, Cr.P.C. Upon appeal the convictions and sentences of the appellants were maintained to the extent that the sentence of death in the case of Abdur Rashid (appellant) was converted into imprisonment for life. Hence, these appeals with the leave of the Court granted on 6.12.2012.

2. Examining the record with the assistance of the learned counsel for the parties we observe that the case of the prosecution rests on the ocular account of two eye-witnesses namely Mian Suhail Ahmed (Complainant/PW-8) and Sheikh Khalid Saeed (PW-11). Testimony of PW-11 has been disbelieved and his presence at the scene of the crime held doubtful by the High Court, which has been found by us, on our own independent evaluation of the evidence to be convincing and correct. In this background, we observe that the complainant drove the deceased to the hospital in the same car in which he was shot and filed the complaint with the police at Combined Military Hospital ("CMH") at 8:45 p.m., the

same night, within 15 minutes of the occurrence. The name of the complainant does not find mention in the Inquest Report prepared at the hospital. There is no evidence on the record to support that the deceased was brought to CMH or death certificate was issued by the hospital as narrated in the ocular account of PWs 8 and 11. According to the Doctor (PW-10), who did the post-mortem examination, the dead-body of the deceased was brought to the mortuary at 11:15 a.m. on 01.9.2006 and the post-mortem examination took place at 12 noon after a delay of 15 hours. This delay in the post-mortem examination, when the occurrence was promptly reported at 8:45 p.m. and formal FIR was registered at 9.00 p.m. on 31.8.2006 gives rise to an inference that the incident was not reported as stated by the prosecution. The complainant must have single-handedly moved the injured deceased (see Ex-PA - memo of blood stained clothes of the deceased) to another seat in the car, having soiled other seats and his clothes with blood. However, there is no evidence on the record to support this. The story as narrated by the prosecution casts a ring of suspicion around its probability and credence.

3. Site-plan (Ex-PL) shows one of the appellants to be standing next to the driving seat of the car at a distance of 4 feet. A fire-shot from this distance is likely to cause blackening but the medical evidence (Post-mortem examination reports Ex-PM and Ex-PM/1 and the statement of PW-10) does not support this, once again raising a suspicion that the events may have unfolded differently than as reported. In the absence of any supporting evidence, the presence of the deceased at the site of occurrence is highly improbable considering that the deceased was a doctor, employed with the social security department of the Government having no evident interest in the business of the complainant or any convincing evidence to show that the godown fell in the way to his residence.

4. The Investigation Officer (PW-15) deposed that the recovery of pistol was effected from a house whose ownership he failed to ascertain. According to him it was a double storied house and recovery was effected from the ground floor where other family members also resided. The memorandum of recovery (Ex-PG) shows that the pistol was recovered from an open room lying under rough clothes. It would be unsafe to rely on this recovery for a conviction on a capital charge. The ocular account of the sole eye-witness (PW-8) does not inspire confidence in the absence of any corroboration from the identification evidence or the recovery.

5. The Test Identification Parade ("TIP") (Ex/PN) which was conducted by the Special Judicial Magistrate (PW-13) on 13.6.2006 is fraught with several infirmities diminishing its probative and evidentiary value. Brief description of the two unknown persons (later on identified as the appellants) in the first information report mentions their height, bodily size and colour of the skin. TIP proceedings are silent regarding the description of the unknown accused given by the complainant in the report. TIP can only commence, once suspects matching the description in the crime report or in the statements of the witnesses under section 161, Cr.P.C. have been arrested. Matching the description in the first information report is the starting point towards identification of the unknown accused. It is, therefore, uncertain how the appellants were hurled and lined-up for the identification parade without the Magistrate first matching the description given by the complainant. Selection of the suspects, without any correlation with description of the accused in the first information report, raises doubts and makes the identification proceedings unsafe and doubtful rendering the identification evidence inconsequential. This is just a shade apart from cases where there is no description of the accused in the FIR, the effect being the same, casting doubts on the credibility of the test identification parade. See *State/Government of Sindh v. Sobharo* (1993 SCMR 585), *Muhammad Afzal alias Abdullah v. State* (2009 SCMR 436), *Sabir Ali alias Foji v. State* (2011 SCMR 563) and *Muhammad Abdul Hafeez v. State of A.P.* (AIR 1983 SC 367).

6. Both the appellants were jointly seated in the lineup. The idea of identification parade or lineup is to stand or seat the suspect in a group of persons (dummies or fillers) that closely resemble the characteristics of the suspect, in order to test the recognition, memory, perception and observation of the witness and thus verify the testimony of the witness. Placing two or more suspects jointly in an

identification parade (or joint parade), tarnishes the homogeneity, sameness and identicalness of the members of the parade and defeats the very purpose of having a test identification parade. Joint parade passes for suggestive and indicative identification, compromising the reliability of the witness and opening doors to misidentification, rendering TIP unsafe and untrustworthy. See: In the matter of Kanwar Anwaar Ali (PLD 2019 SC 488) on joint identification parade.

7. No role was assigned to the suspects by the witnesses, especially when the first information report clearly describes two different roles to the appellants; one that of an assailant, while the other of a driver of a motorcycle who drove the assailant away. If a witness fails to give the description of the part played by the suspect in the crime, the credibility of the witness stands questioned as he fails to complete the picture of the crime scene, thus inviting caution and circumspection in assessing the evidentiary value of the identification evidence. This Court over the years has placed little reliance on such identification evidence. Even in the subsequent identification by the complainant in court, which has little evidentiary value, he failed to point an accusing finger at the appellants to say who did what, therefore the parts played by the appellants in the crime remain a mystery. See: In the matter of Kanwar Anwaar Ali (PLD 2019 SC 488) on the absence of a role assigned by the witness in an identification parade.

8. According to the complainant one of the appellants was his employee at the godown and the Investigation Officer (PW-15) admits in the cross-examination that he took the appellants to the godown after they were arrested and the employees at the godown confirmed that both of them worked as employees at the godown of the complainant. This is also indicated from the statements of the appellants under section 342, Cr.P.C. Police is to guard the identity of the suspects from the witness till TIP takes place. Visiting the godown of the complainant with the suspects unravels the identity of the suspects, tarnishing the secrecy required. This once again is suggestive and is also referred to as "impermissible suggestiveness¹" at the hands of the police, therefore the probability of the witnesses knowing the identity of the appellants prior to the identification parade cannot be ruled out. Additionally, the identification of the appellants by PW-11, whose testimony and presence at the scene of the crime has been disbelieved further weakens the credibility of TIP and supports the view that the witnesses knew the identity of the suspects before TIP was held.

9. Identification evidence has so far been examined on the basis of the guidelines of test identification parade based on executive instructions and judicial pronouncements, which have been eloquently and elaborately discussed in Muhammed Yaqoob² and recently echoed In the matter of Kanwar Anwaar Ali.³ These guidelines deal with the test identification parade and have also come to be known as "system variables," discussed later.

10. Other than the test identification parade, our courts have, now and then, independently examined the conditions under which the eye-witness saw the accused at the time of the crime, to assess whether the eye-witness had a good look at the accused so as to rely on his testimony. This assessment has been based on general principles of judiciousness and caution and is not necessarily based on scientific research. See Alim v. State (PLD 1967 SC 307) and Majeed alias Majeedi v. State (2019 SCMR 301). The evaluation of the witness on the basis of his ability to remember or recall the accused has not been mainstreamed in our criminal jurisprudence as an essential element while appreciating the identification evidence, i.e. identification proceedings and the rest of the evidence on the record especially the statement and location of the witness during the occurrence. Thus, the veracity of the testimony of the eye-witness is largely determined through the identification parade and not independent of the identification parade by examining the capacity and ability of the eye-witness to identify the accused.

11. In 1989, Lahore High Court in Muhammed Yaqoob⁴ observed that "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 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 been the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorized state of mind." Lahore High Court raised an important point regarding power of observation, perception, recognition and memory of an eye-witness identifying an accused. However, this approach remained restricted to the role played by the accused in the crime as per the requirement of the guidelines of the test identification parade discussed above. The capacity and ability of the eye-witness was not assessed independently as a sequel or step two to the test identification proceedings. In 1981 Doral Patel, J. in Lal Pasand's case⁵ 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 that mistakes in identifications were " by far the greatest cause of actual or possible wrong convictions ." This underlines the importance of assessing the ability and capacity of the eye-witness, separately, to identify the accused in the circumstances of the case. This assessment also forms part of the identification evidence along with the test identification proceedings.

12. As time passed, international scientific surveys revealed that eye-witness testimony has been the most popular topic in psychological research. By 1995 alone there were over 2000 publications in psychology concerned with eye-witness reliability.⁶ The single most important observation from the research on eye-witness identification is that it is substantially less accurate than generally believed. Overall, data from real-life cases show that just under 45 percent of witnesses pick the suspect, about 35 percent decline to make a choice, and about 20 percent pick innocent fillers.⁷ The over reliance on visual identification evidence has led to numerous mistaken identifications of innocent suspects and consequently wrongful convictions.⁸ In approximately 75 % of DNA exonerations in the United States, mistaken identification was the principal cause of wrongful conviction.⁹ Furthermore, in 80 to 90 per cent of all DNA exonerations at least one eye-witness made a mistaken identification.¹⁰ A wrongful conviction results in two injustices. The first tragedy is to the innocent person. The second is to the victim of the offence and to society, because the real offender is not brought to justice.¹¹ Wrongful convictions undermine the credibility of the legal system. Whenever witnesses are mistaken, it is rarely because they lie or misrepresent facts, but mostly because they misidentify people.

13. In the late 1960s, the courts around the world¹², began to set the standard for reviewing eyewitness identification evidence.¹³ Reliability and credibility of the witness was termed as the linchpin in determining the admissibility of identification testimony.¹⁴ US Supreme Court in the case of *Manson v Brathwaite*¹⁵, UK Court of Appeal (Criminal Division) in *Regina v. Turnbull and Another*,¹⁶ New Jersey Supreme Court in *State v Madison*¹⁷ and Oregon Supreme Court in *State v. Classen*¹⁸ settled the following factors for assessing the reliability of the witness:

- (1) the opportunity of the witness to view the suspect at the time of the crime;
- (2) the witness's degree of attention;
- (3) the accuracy of the witness's prior description of the suspect;
- (4) the level of certainty demonstrated at the confrontation (seeing the accused in court); and
- (5) the time between the crime and the confrontation (seeing the accused in court).

It is interesting to note that these factors were drawn from earlier judicial rulings and not from scientific research.¹⁹ The scientific research refutes the notion that memory is like a video recording, and that a witness needs only to replay the tape to remember what happened. Human memory is far more complex. The memory is a constructive, dynamic, and selective process. The process of remembering consists of three stages: acquisition-"the perception of the original event"; retention-"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and

retrieval-the "stage during which a person recalls stored information".²⁰ The process of memory retention and retrieval may be affected by a number of factors. The scientific literature divides those variables into two categories: system and estimator variables.²¹ System variables are factors like lineup procedures which are within the control of the criminal justice system and in our jurisprudence are referred to as the Test Identification Parade. Whereas Estimator variables are factors related to the witness - like distance, lighting, or stress - over which the legal system has no control.²² Our courts have marginally attended to this aspect of witness reliability before placing reliance on the identification evidence (see above). The scientific research²³ establishes that the following non-exhaustive list of "estimator variables" negatively affect the memory process:-

- i. Stress: Even under the best viewing conditions, high levels of stress can diminish an eye-witness' ability to recall and make an accurate identification. It may be noted "while moderate levels of stress improve cognitive processing and might improve accuracy, an eye-witness under high stress is less likely to make a reliable identification of the perpetrator."²⁴
- ii. Weapon Focus: When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.²⁵
- iii. Duration: The amount of time an eye-witness has to observe an event may affect the reliability of an identification. There is no minimum time required to make an accurate identification, however, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."²⁶
- iv. Distance and Lighting: A person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.²⁷
- v. Witness Characteristics: Characteristics like a witness' age and level of intoxication can affect the reliability of an identification. Children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults.²⁸
- vi. Characteristics of Perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affects the accuracy of an identification.²⁹
- vii. Memory Decay: Memories fade with time and memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.³⁰

The scientific research referred to above has not only appeared in the peer reviewed journals but also has been considered "credible" by various courts in different jurisdictions.³¹ New Jersey Supreme Court in *State v. Henderson*³² observed that "virtually all of the scientific evidence" that had emerged in recent decades "reveals that an array of variables can affect and dilute memory and lead to misidentifications." Also see *State v. Lawson*³³.

14. The laws of evidence maintain that in order for the court to take judicial notice of scientific facts they must be part of the general knowledge of men or must be agreed upon by reputable men in a particular field of science beyond reasonable dispute.³⁴ For judges to determine the degree of consensus on a particular scientific fact they may refer to any reputable and recognized reference sources.³⁵ The House of Lords in *Regina (Quintavalle) v. Secretary of State for Health*³⁶ held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. This Court can take judicial notice of the credible scientific development under Article 112, Qanun-e-Shahadat, 1984. The question is can we shut our eyes to credible scientific research and development, which has already been recognized and acknowledged by the courts in

various other jurisdictions. If scientific research can help and assist the court in understanding and appreciating evidence more fully and more meaningfully, the risk of miscarriage of justice stands minimized. Therefore, the courts don't shy away from scientific developments but instead reach out and embrace them. Reliance on scientific research and the factors evolved by science to assess the reliability and credibility of the eye-witness can improve the quality of identification evidence and as a consequence the quality of justice. Our jurisprudence had already travelled in this direction and now credible scientific research by providing us additional factors or "estimator variables" (which are not exhaustive) has provided additional factors to certify the credibility and reliability of the eye-witness and as a result the veracity and probative value of the identification evidence.

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.

16. Applying the "estimator variables" to the instant case we see that the site-plan shows that the appellants were at a distance of 15 to 30 feet from the complainant in the empty space of the godowns abutting a road with no light. The source of light in the empty area behind the godowns has not been secured as evidence during the investigation. The witness was fired at first and then the deceased was shot dead, we notice that factors like weapon focus and distance and lighting are visible in this case. The duration of the event has not been specified in the crime report. In this background, it cannot be said with certainty that the visual recognition of the appellants by the complainant on the fateful night was unhindered and unhampered especially when he was fired at first and allegedly saw the occurrence under stress of a threat. Based on the above "estimator variables," possibility of misidentification cannot be ruled out, thereby making it unsafe to place reliance on the identification evidence.

17. For the above reasons, appellants stand acquitted of the charge by extending them benefit of the doubt. These are the reasons for our short order dated 20.2.2019 which is reproduced hereunder for convenience and completion of record:

"For reasons to be recorded later Criminal Appeals Nos. 307-L of 2012 and 308-L of 2012 are allowed, the convictions and sentences of Abdul Rashid and Rashid Aziz Rana appellants are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case. Criminal Appeal No. 306-L of 2012 seeking enhancement of the sentence of Abdul Rashid respondent is dismissed."

MWA/S-15/SC Appeals allowed.