Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
(JUDICIAL DEPARTMENT)

CRIMINAL APPEAL No. 82543/2022.
Allah Ditta, etc. Vs. The State, etc.

CRIMINAL REVISION No.7417/2023.
Shah Jahan Vs. The State, etc.

JUDGMENT

DATE OF HEARING: 18.03.2024.

APPELLANTS BY: Mr. Asad Nisar, Advocate.

STATE BY: Miss Maida Sobia & Mr. Fakhar Abbas, Deputy Prosecutors General.

COMPLAINANT BY: Mr. Zafar Iqbal Chaudhry, Advocate.

……

MUHAMMAD AMJAD RAFIQ, J:- Allah Ditta and Basharat, (*hereinafter to be referred as "accused/appellants*") after going through a trial in the private complaint arising out of FIR No. 165 dated 13.04.2014 P/S Mureed Wala District Faisalabad vide judgment dated 30.11.2022 handed down by learned Additional Sessions Judge, Faisalabad have been convicted under section 302(b)/34 PPC and sentenced to imprisonment for life each, with further order to pay Rs.500,000/- each as compensation under section 544-A Cr.P.C., in default to undergo simple imprisonment for one year each, benefit of section 382-B Cr.P.C. was extended. Criminal Appeal No.82543/2022 has been filed by the accused/appellants to challenge their above conviction and sentence, whereas, through Criminal Revision No.7417/2023 the complainant seeks enhancement of sentence, both these matters are subject matter of this judgment.

2. According to the narration of private complaint filed by Shah Jahan (complainant), it was on 07.05.2014 at 10:30 p.m. when his brother Iftikhar Ahmad Nadeem (deceased) went to Square No.68, Killa No.4 for irrigating the fields, whereas, complainant as well as Muhammad Fahad

and Absar Ali were present nearby, suddenly, accused/appellants along with Zohaib Ehtisham alias Rashid (since PO), all armed with hatchets came out of the wheat crop and raised *lalkara* to teach Iftikhar Ahmad Nadeem a lesson for quarrel. Basharat Ali, accused/appellant inflicted hatchet blow on Iftikhar Ahmad Nadeem which hit on back of his right leg; Zohaib Ehtisham caused hatchet blow on right arm, whereas, hind side of hatchet blows by Allah Ditta landed on his back and left arm, thereafter, all the accused escaped from the place of occurrence along with their respective weapons. The witnesses claimed to have seen the occurrence and identified the accused in the light of torch and moonlit. Iftikhar Ahmad Nadeem was taken to RHC, Mureed Wala, but the doctor referred him to Civil Hospital, Faisalabad, who on 13.05.2014 at 06:10 p.m. succumbed to the injuries.

The motive behind the occurrence was said to be a few days' earlier quarrel between the accused persons and the deceased.

3. On filing of private complaint, cursory evidence was recorded and the accused persons were summoned. Initially, Zohaib Ehtisham alias Rashid attended the trial but Basharat Ali and Allah Ditta did not appear in response to process, therefore, they were declared proclaimed offenders. Trial was in progress and some evidence stood recorded when Zohaib Ehtisham alias Rashid absented him from the trial and is proclaimed offender till today. However, subsequently accused/appellants Basharat Ali and Allah Ditta were arrested and faced the trial. When charge sheeted, they pleaded not guilty and claimed trial, whereupon, the prosecution produced Shah Jahan complainant (PW-1), Muhammad Fahad (PW-2) as eye witnesses; Muhammad Ilyas (PW-3) identified the dead body at the time of autopsy, Khalid Hussain Sub-Inspector (CW-3), Ghulam Mustafa SI (CW-8) and Junaid Afzal SI (CW-9), respectively conducted investigation of the case, Muhammad Ijaz, Senior Clerk RHC Mureed Wala (CW-10) appeared as witness to give secondary evidence of Postmortem report on behalf of Dr. Muhammad Amjad (since dead) who had medically examined and later conducted postmortem examination of the deceased, whereas, rest of the witnesses are formal in nature. The

prosecution case was closed by tendering in evidence the PFSA report (Ex.PF). The accused/appellants were examined under section 342 Cr.P.C. who denied the prosecution evidence, however, neither they produced any evidence in defence nor appeared as their own witnesses in terms of section 340(2) Cr.P.C., and the trial ended in the terms as detailed above.

4. Narratives and expressions in their respective case theories advanced by the proponents were heard at considerable length in the light of legal queries and provisions involved in the case while reading the evidence in the Court.

5. The occurrence of this case dated 07.05.2014 was reported to the police on 13.05.2014 with a delay of six days which though prosecution tried to explain that complainant remained busy in treatment of his brother and on his death, matter was reported to the police, yet such explanation did not find support from any other material available in evidence. Medico-legal examination of injured was got conducted through police showing availability of firsthand information of the occurrence. This fact gets further support from the statement of Khalid Hussain, SI (retired)/Investigating Officer (CW-3) who during cross-examination deposed that injured himself appeared before him and stated that due to an altercation he had received some injuries. It is also in the evidence of PWs that from the place of occurrence hospital is just at a few paces; so much so there is another astonishing fact that Faizan, another son of the deceased is also a police constable, therefore, the sole explanation of prosecution about delay in lodging the crime report falls to the ground and possibility of due deliberation and consultation by Shah Jahan complainant (PW-1) before reporting the occurrence to the police cannot be ruled out of consideration. Reliance is placed on the case reported as "*FARMAN AHMAD Versus MUHAMMAD INAYAT and others*" **(2007 SCMR 1825)**, wherein the Supreme Court of Pakistan has held as under;

> "The F.I.R. was lodged by the complainant after considerable delay of 17 hours without explaining the said delay in spite of the fact that complainant had stated in the written complaint that there was two eye-witnesses at the spot and none of them informed the police before filing a written complaint by the complainant. 17 hours delay in F.I.R. provides sufficient time for deliberation and consultation

> when complainant has given no explanation for delay in lodging the F.I.R."

This first loophole in the prosecution case in the form of delay in FIR is further attended in the light of remaining evidence.

6. It was claimed by the prosecution that occurrence took place on 07.05.2014 at 10:30 p.m., the deceased and the witnesses were present in Square No.67 allegedly busy in irrigating the land through approved schedule of '*Wara Bandi'* (turn of water); no source of light was shown available at the site except holding of a torch and moonlit as claimed by the prosecution; torch was not taken into possession by the Investigating Officer and it was also not proved that it was a night with moonlit when PW-1 conceded that it was 6th night of Islamic Month, therefore, non-availability of sufficient light at the place of occurrence provides doubts about the identity and precision on the part of PWs about roles of the accused persons. Thus, the very identity of the assailants remained fishy. Reliance is on the case reported as "*HAROON SHAFIQUE Versus THE STATE and others*" **(2018 SCMR 2118).** The Supreme Court of Pakistan in the case "*SARDAR BIBI and another Versus MUNIR AHMAD and others*" **(2017 SCMR 344)** has held as under;

> "….. The source of light i.e., bulbs etc. was not taken into possession during investigation to establish that the witnesses who were allegedly at the distance of more than 100 feet could identify the assailants. So, the identification of the assailants was also doubtful."

So much so it was admitted by the PWs during cross-examination that though clothes of the deceased were contaminated with soil but no mud was found which is not possible in the light of nature of work he was allegedly doing at the crime scene. Even otherwise, last worn clothes of the deceased when he received injuries were not produced during investigation nor before the trial Court. The fact of irrigating the land in Square No.67 was further under doubt when square number was later changed by the complainant through supplementary statements as 68. The final nail in coffin was the deposition of PW-1 who stated that Iftikhar deceased owned the land in Square No.47. No revenue documents were produced about ownership of Square Nos.67 or 68 nor any tenancy agreement was made available, so much so, schedule for turn of water

issued by the Irrigation Department was also not produced, therefore, the place of occurrence remained doubtful and effort of prosecution to show collection of blood-stained earth from the place of occurrence after 6 days was nothing but mere an eye wash, which was not useful for prosecution in any manner.

7. Shah Jahan complainant (PW-1) and Muhammad Fahad (PW-2) appeared for ocular account. PW-1 was not resident of the place of occurrence and during cross-examination admitted as under;

> "It is true that we have our residential dharies and houses at Tehsil Chishtian, District Bahawal Nagar. I cannot rebut the suggestion of the defence that Tehsil Chishtian is at the distance of more than 500 KM from the place of occurrence."

Further deposed that "*I have the photocopy of my identity card which is Ex.DA bearing No.31102-6448333-7 and on it my permanent as well as present residential address has been mentioned as of Chak No.207 Murad, Tehsil Chishtian, District Bahawalnagar and said ID card was issued in the year 2012 prior to the present occurrence*". His residence near the place of occurrence was also doubtful when he remained unable to tell names of persons cultivating the land in Square No.67 and presence also becomes doubtful from his reply that he does not remember as to whether his clothes were smeared in blood while attending the deceased or not. These facts show that he was not present at the place of occurrence at the relevant time. Fahad PW-2 though was son of the deceased, expected to be residing in the same area but he also could not prove his presence at the place of occurrence when he deposed during cross examination that "*I am unable to tell the name of any other owner of the surrounding lands of the place of occurrence*". It has also been observed that accused/assailants were not armed with any firearm weapons rather with hatchets, and witnesses admitted that PW-1 maintains height of six feet, other witness Absar was also of good height and in 18/19 years of his age, similarly, PW-2 Fahad was also of 22/23 years of age with good height and physique but against the natural human conduct they did not try to capture the accused or to intervene in order to save the life of deceased because they did not sustain any injury or scratch during the

occurrence as admitted by the PWs during cross examination. Even injuries on the person of deceased remained on non-vital part of body i.e., knee, arm and back, and the injuries on his back were simple in nature, therefore, it was not a big fight between the parties so as to desist the complainant party not to intervene into the matter. From all such observation it is clear that both the PWs were not present at the relevant time at the place of occurrence, therefore, their testimony cannot be stretched in favour of the prosecution to be used against the present accused/appellants. Reliance is placed on judgment reported as *"PATHAN Versus The STATE"* **(2015 SCMR 315).**

8. In order to get support for ocular account, medical evidence was essential but it has been observed that doctor who conducted the medico-legal examination followed by postmortem examination was later died and Muhammad Ijaz, Senior Clerk of hospital appeared as CW-10 who straight away tendered the medicolegal and postmortem reports without narrating the contents of such reports, therefore, description of injuries, nature of injuries, kind of weapon and cause of death could not be brought on the record. Without appearance of doctor such MLR and PMR were of no use for the prosecution because doctor has not been tested through cross-examination with respect to his observation/findings made in such reports. Learned counsel for the complainant stated that support of medical evidence is available in the terms that during the stage when only Zohaib Ehtisham alias Rashid co-accused was facing the trial, Dr. Amjad appeared as witness and his statement was also recorded as CW-8. It has been noted that even such statement has not been tendered in evidence by the prosecution against the accused/appellants which cannot be used against them by mere referring it from the record because it was recorded in their absence, therefore, by all means prosecution hardly have support of medical evidence in this case.

9. The above anomaly about the admissibility of postmortem report without calling the doctor as a witness needs to be settled. It was attended in the light of arguments of learned counsel (s) as well as learned DPGs and thorough examination of relevant case laws efficiently collected by

Mr. Muhammad Afzil, Civil Judge/Research Officer. Legally, Postmortem report is viewed as a documented expert opinion, therefore, its production in the evidence through primary evidence though is admissible yet contents of it cannot be read unless doctor appears as a witness to authenticate and verify that it was the report he had prepared. If doctor is not available then such report available in the Court record can be produced as secondary evidence through any person who had seen preparation of such document, knows handwriting or signature of the doctor on the report while showing a comparison with any proved document in the handwriting of such doctor, and this can also be done by production of another doctor or record keeper of the concerned hospital. This being so in the context of Article 78 of Qanun-a-Shahadat Order, 1984 which requires that execution of a document must be proved through the mode and manner as suggested in law. A case reported as *"SIRAJ DIN versus Mst. JAMILAN and another"* **(P L D 1997 Lahore 633)** throws light on the subject as under;

> (i) that execution of each and every instrument is to be proved unless it is admitted under Article 113, presumed under Article 102 of the Act or some other provisions of law. Ordinarily a document does not prove itself. It may be proved by following methods:
>
> (a) By calling and examining writer himself;
>
> (b) by evidence of person who saw the document being written
>
> (c) by evidence of person acquainted with the handwriting of the writer; or
>
> (d) by comparison of disputed writing/signatures/impressions with the admitted ones by an Expert's evidence.
>
> These methods are not exhaustive and any other recognised by law can be pressed into service. The proof of execution means the proof of writing/signatures/impressions of the author. The proof of execution, however, is not synonymous with the proof of the contents of documents. The burden to prove the contents of documents, in addition to proof of execution, is on the beneficiary of that document, who is to lead primary/secondary circumstantial internal evidence to prove the truth of that document.
>
> (emphasis supplied)

Thus, despite proof of execution of a document by above means, truth of contents of document is to be proved. Neither the medicolegal or postmortem reports are the categories of documents as mentioned in

Article 102 so as to dispense with a formal proof of its execution nor in this case it was claimed to have been admitted by the parties so as to rule out necessity of formal proof. In a case reported as "*Ch. MUNEER HUSSAIN Versus Mst. WAZEERAN MAI alias Mst. WAZIR MAI*" **(PLD 2005 Supreme Court 658),** the observation of Supreme Court was to the following effect;

> "9. Therefore, with reference to Article 78 of Qanoon-e-Shahadat, 1984, it was held that if a document is alleged to be signed or to have been written by any person, the signature or writing must be proved in that person's handwriting, the said Article places emphasis on the proof of identity of author of questioned documents and this Article does not say that mere proof of handwriting/signatures/thumb-impressions of executant will prove truth of the said document."

(emphasis supplied)

10. Thus, mere production of postmortem report is not sufficient to be read in the evidence as a support to the prosecution case. A like situation was attended in a case reported as *"MUHAMMAD NAZIM and others Versus The STATE and others"* **(2022 P Cr. L J Note 82)** [Lahore] when medical evidence was not furnished by the concerned doctor who had conducted the postmortem examination rather one Imran Shahid, record keeper appeared as CW-5, who stated that Dr. Afzal has died and produced the original record of postmortem report, it was observed that oral statement with respect to contents of document was not given by any expert witness, therefore, question of description of injury, its angle or trajectory and presence of burning around the wounds remained an unanswered story. Opinion of doctor could only be deposed by the said doctor as per Article 71 of Qanun-e-Shahadat Order, 1984 which says that oral evidence must, in all cases whatever be direct, that is to say, if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Thus, it was held as under;

> "Secondary evidence for doctor should have been given by another doctor/expert in order to assist the Court to understand the nature of injuries. Even postmortem was conducted on the next morning at 9.35 a.m. with a delay of around 8 hours without any plausible explanation. No time of receiving the dead body in the mortuary is mentioned in the postmortem report. Question of targeted or accidental fire could also not been explained which was the job of expert only, prosecution has not produced any expert

> for explanation. Therefore, medical evidence has no support for prosecution."

With almost in similar situation Jharkhand High Court in a case reported as "*Dayanand Khatik vs The State of Jharkhand"* decided on 6 February, 2020 by a Division Bench, while discussing relevant provisions of law held as under;

> "18., ……. A document in original if produced during the trial is a primary evidence, however, contents of a document unless the maker is examined cannot be read in evidence. In terms of section 293 of the Code of Criminal Procedure a post-mortem report needs to be proved by the doctor who has conducted the examination or a person who is conversant with the facts of the case and can satisfactorily depose in the court on behalf of the doctor. In "Munna Kumar Vs. State of Bihar" reported in (2005) 12 SCC 209 case, finding that the post-mortem report was not proved in terms of section 293 of the Code of Criminal Procedure, the Supreme Court has observed that the appellant was entitled for the benefit of doubt. It has been held that the prosecution should have produced the best evidence by proving the post-mortem report by examining the doctor or any other person acquainted with the hand-writing of the doctor who had prepared post-mortem report.
>
> 19. The maker of the post-mortem report has not been examined during the trial and the person who has proved his writing and signature has admitted that he is not a medical expert and, therefore, the cause of death of Binay Kumar Khatik has not been proved by the prosecution.

11. Corresponding to section 293 of Indian Code of Criminal Procedure, 1973, in ours section 510 exists but with slight difference, which is not applicable for medical reports. Mode of recording evidence of a doctor is mentioned in Section 509 of Cr.P.C. This Section falls in Chapter XLI which contains heading as "Special Rules of Evidence", of course an overriding effect on all other provisions, consists of four Sections 509, 510, 511 and 512 of Cr.P.C. which with some connotation to cut short the process provides an expeditious mode of recording of evidence as well as securing the evidence for trial. Section 509 of Cr.P.C., is reproduced as under;

> **509. Deposition of medical witness:** (1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.
>
> (2) **Power to summon medical witness**: The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

According to Section 509 of Cr.P.C., deposition of a medical witness taken and attested by a Magistrate in the presence of accused or taken on Commission may be given in evidence in an inquiry, trial or other proceedings under this Code without calling the medical witness, however, Court does have a power to summon the medical witness as and when thinks fit. This section has like connotation as that of Section 164 of Cr.P.C., which also ensures securing of evidence of a witness but unfortunately Section 509 Cr.P.C., has lost sight of legal practitioners and by the learned Courts, therefore, on the eve of death of a medical witness or his migration to other country, medical evidence falls short of probative value which cannot be brought on record properly or if it is brought on record its probative value decreases due to non-availability of medical witness to depose about the nature, locale, size of injuries and other observation made at the time of examination and test/protocols performed to arrive at an opinion with respect to cause of death or other matters which are also relevant as per Article 65 of Qanun-e-Shahadat Order, 1984. Thus, this Section is must to be adhered by all the concerned in future and Criminal Prosecution Service (CPS) should attend to the provision for securing statement of medical witness at the earliest opportunity while producing him before the concerned Magistrate so that on the eve of non-availability of doctor such statement could be used during the trial before the Court concerned. Necessity and utility of Section 509 Cr.P.C., has also been highlighted in Rule 6, Chapter-18, High Court Rules & Orders, Volume III.

12. Before producing secondary evidence of medical reports, it is essential to prove the non-availability of doctor. In a case reported as *"SOOBA and 3 others Versus THE STATE"* **(1994 P Cr. L J 1323),** this Court while referring cases reported as *Allah Ditta v. The State* **(P L D 1958 SC (Pak.) 290)**, *Fazal Muhammad and another v. The state* **(1970 SCMR 405)**, *Hussain Bakhsh v. The State* **(1971 P Cr. L J 1331) (Lahore)** and *Muhammad Siddique and another v. The State* **(1974 P Cr. L J 180) (Lahore)**, held that absence of doctor must be proved before bringing on record the postmortem report as secondary evidence. Above judgment speaks as under;

> "The law laid down in the said precedents is to the effect that secondary evidence in such cases could only be allowed when the prosecution proves to the satisfaction of the Court that the doctor who conducted post-mortem examination was not available or had become incapable of giving evidence or his attendance could not be procured without an amount of delay or expense which in the circumstances of the case was unreasonable. It has been laid down that where any such evidence is allowed without complying with the provisions of section 32(2) of the Evidence Act (now Article 46 of the Qanun-e-Shahadat, 1984), such evidence shall be excluded from consideration."

In a case reported as ***"****MUHAMMAD SHAM AND 3 OTHERS versus THE STATE"* **(P L D 1972 Lahore 661),** while referring the cases *Allah Ditta v. The State* **(P L D 1958 S C 290)** & *Nityananda Roy v. Rash Behari Ray* **(A I R 1953 Cal. 456)**, matter was remanded to the trial court to examine the foot constable for proof of absence of doctor and, then by calling original postmortem report, record the statement of dispenser who reportedly worked with the doctor well conversant with his writing and signature, and thereafter by comparing the carbon copy of postmortem report with the original allow its tendering through secondary evidence to prove the postmortem report.

13. In the light of above references, prosecution has failed to bring on the record the secondary evidence of medicolegal and postmortem reports in accordance with law and contents of such reports if deposed by the doctor in the absence of accused/appellant cannot be used against them. Even acclaimed contents of both reports allegedly deposed by late Dr. Amjad as CW-8 were not put to the accused/appellants in their statement under section 342 of Cr.P.C., therefore, medical evidence has no support to prosecution case.

14. This Court is conscious of the fact that an occurrence can be motiveless, but here in this case in the FIR the prosecution gave a clue of some days' earlier trivial quarrel between the deceased and the accused persons, which according to the prosecution formed basis behind this occurrence. Even in the private complaint, on motive part it was incorporated that (اور جملہ ملزمان نے للکارا کہ آج افتخار ندیم کو جھگڑا کرنیکا مزہ چکھا دو). Except such simple words, no reference was given by either of the PWs

that anyone from them had seen such earlier quarrel and what was the reason behind said quarrel. Thus, it can safely be held that though motive was set up yet the same could not be established by the prosecution and it is trite that though the prosecution is not required to prove motive in every case, yet the same, if set up, should be proved through independent source of evidence other than the words of mouth and in case of failure to do so, the prosecution should have faced the consequences and not the defence. Reliance is placed on judgment reported as *"HAKIM ALI AND 4 OTHERS Versus THE STATE AND ANOTHER"* **(1971 SCMR 432)**, which has further been adopted in case titled *"RIASAB KHAN Versus NOOR MUHAMMAD and another"* **(2010 SCMR 97).**

15. Admittedly, no recovery of crime weapon could be effected from or on the lead of accused/appellants, thus, this element is yet another factor going against the prosecution and even otherwise, when the ocular account has failed, recovery even if had been effected, it being just of corroborative nature, could not have been considered and made basis for recording conviction.

16. It is on the record that accused/appellants remained absconders, however, when question was put to them about the abscondence, they categorically denied the same and both unanimously stated that fake reports were prepared by the police and in fact they were never informed by the police regarding the above said proceedings. There is also plethora of authorities of superior Courts on this point that mere abscondence of accused is not a conclusive proof of the guilt of the accused. The value of abscondence depends upon the fact of each case and abscondence alone cannot take the place of guilt unless and until the case is otherwise proved on the basis of cogent and reliable evidence. The accused persons generally disappear due to fear of police or because of the feelings of the guilt, and in this case during cross examination accused/appellants put the apprehension of their fake police encounter because son of the deceased was a police man; therefore, in view of the dictum handed down in "*RAHIMULLAH JAN Versus KASHIF and another*" **(PLD 2008 SC 298)** mere abscondence would not be taken as a conclusive proof of guilt of

accused. If any other authority in respect of abscondence is needed, reliance can also be placed upon "*ZALEY MIR versus THE STATE*" **(NLR 1999 AC 564)**, wherein abscondence of four years of the accused was not taken as a ground for conviction of the accused and accordingly the conviction was set-aside.

17. For what has been discussed above, I am of the firm opinion that prosecution has not been able to establish the charge against the accused/appellants beyond any shadow of doubt. In the case "*NAJAF ALI SHAH versus The STATE*" **(2021 SCMR 736)**, the Supreme Court of Pakistan has held that for giving benefit of doubt to an accused a single circumstance creating reasonable doubt in a prudent mind about guilt of accused is sufficient to make him entitled to such benefit. Here in this case as discussed above the prosecution has squarely failed to bring home the guilt against the accused persons. Consequently, the instant appeal is allowed, the impugned judgment of conviction and sentence is set-aside and the accused/appellants are acquitted of the charges levelled against them. They shall be released forthwith if not required in any other case or proceedings. Case property shall be retained for trial of absconding co-accused Zohaib Ehtisham alias Rashid, whereas record of the learned trial court be sent back immediately.

14. For the above reasons, Criminal Revision No.7417/2023 fails and is dismissed.

(MUHAMMADAMJAD RAFIQ)
JUDGE

APPROVED FOR REPORTING

JUDGE

This judgment was pronounced on 18.03.2024 and after dictation and preparation it was signed on 08.04.2024

Jamshaid*