

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

Murder Reference No.319 of 2019

The State v. Ghulam Abbas alias Agha

Cr. Appeal No.78701 of 2019

Ghulam Abbas alias Agha v. The State, etc.

Cr. Revision No.63816 of 2019

Ghulam Raza v. The State, etc.

Date of hearing **30.01.2024**

Appellant by: Mr. Muhammad Kashif Saeed, Advocate.

Complainant by: Ch. Abdul Ghaffar, Advocates (also in Cr. Revision No.63816 of 2019).

State by: Mr. Sultan Asghar Chatha, Deputy Prosecutor General.

MUHAMMAD WAHEED KHAN, J. This judgment shall

decide Criminal Appeal No.78701 of 2019 filed by appellant, Ghulam Abbas alias Agha (*against his conviction and sentence*), Criminal Revision No.63816 of 2019 filed by the complainant (*for enhancement of sentence awarded by the learned trial Court to the appellant/respondent No.2*) and Murder Reference No.319 of 2019 forwarded by the learned trial Court for confirmation of death sentence awarded to appellant or otherwise. As all the matters have arisen out of the same judgment dated 12.10.2019 passed by the learned Addl. Sessions Judge, Lahore in case FIR No.655 dated 01.12.2012 registered u/s 302/324/109 PPC at Police Station Manawan, Lahore, whereby appellant was convicted and sentenced as under;:-

Under section 302(b) PPC awarded **death** sentence as Ta'zir for committing qatl-e-amd of Rafia Rani, Mst. Zohara Bibi and Muhammad Asif on three counts. He was

also directed to pay compensation of Rs.3,00,000/- each to the legal heirs of the each deceased under section 544-A Cr.P.C, in default thereof, to further undergo six months simple imprisonment on three counts.

2. Brief facts as narrated by complainant Ghulam Raza in the above mentioned FIR are as under:-

"The complainant married her sister Rafia Rani with Ghulam Abbas about 02-years prior to the said occurrence, after one year from the marriage complainant's sister Rafia Rani (deceased) alongwith her husband Ghulam Abbas (accused) living in Madrassa Bint-e-Zainab, situated at Ada Chabbeal, Hando Road, Lahore in connection to earn lively hood; about 15/20 days prior to said occurrence Ghulam Zohra (deceased) mother of the complainant came at Lahore in the house of her daughter Rafia Rani. On 01.12.2012 at about 08:00/09:00 a.m Mst. Rafia Rani telephonically informed complainant's brother Muhammad Asif that she had a petty quarrel with her husband Ghulam Abbas, so she asked her brother Muhammad Asif to come and bring her and her mother back from the house of Ghulam Abbas. Upon which Muhammad Asif (deceased) telephonically informed the complainant that he is going to Lahore and you should also reach there, so complainant alongwith Muhammad Ramzan son of Ahmad Yar and Mazhar Hussain son of Muhammad Nawaz reached to Lahore. They reached at Lahore on 01.12.2012 at about 05:00 pm and saw that complainant's mother Ghulam Zohra his sister Rafia Rani and his brother Muhammad Asif standing in front of the house of Ghulam Abbas accused, who made straight firing upon Rafia Rani, Zohra Bibi and Muhammad Asif, one fire hit Rafia Rani on left side of her thigh, two fires hit on her belly and two fires hit on her belly button and she fell down, two fires hit Zohra Bibi on her left side of her rib and she fell down, accused made straight firing upon Muhammad Asif and he fell down in injured condition. Ambulance of 1122 came there and picked up the injured persons and shifted them to Ganga Ram Hospital, Lahore. Complainant's mother Zohra Bibi succumbed to the injures on the way, Mst. Rafia Rani succumbed to the injuries in the hospital. Later on injured Muhammad Asif also died in Jinnah Hospital, Lahore."

3. Dr. Atfa Naheed, Senior Demonstrator Forensic Department KEMU, Lahore, who conducted postmortems upon the dead bodies of Zohra Bibi and Mst. Rafia Rani, appeared as (PW-8), Dr. Ahmad Raza Khan DML, Forensic Medicine Department KEMU, Lahore, who conducted autopsy upon the dead body of Muhammad Asif, appeared as (PW-11) and Dr. Nosheen Iram PGR/Woman Medical Officer, who initially examined Rafia Rani and Muhammad Asif, in injured condition, appeared as (PW-16).

4. After registration of the case, investigation was carried out by the police and on culmination of the same, the Investigating Agency submitted report u/s 173 Cr.P.C. before the learned trial Court by placing the name of appellant in column No.3, whereas names of co-accused, Sikandar Hayat

and Ghulam Raza were placed in column No.2, however, both the co-accused were also summoned alongwith the appellant to face the trial, wherein charge was framed, which was denied by them, hence, trial commenced. It is pertinent to mention here that during the pendency of the trial, above said co-accused Sikandar Hayat and Ghulam Raza filed application u/s 265-K Cr.P.C., which was allowed and both of them were acquitted of the charge by the learned trial Court vide order dated 16.09.2013.

5. In order to prove its case against the appellant, the prosecution produced as many as nineteen witnesses. Ocular account was furnished by complainant Ghulam Raza (PW-3) and eye witness Rana Mazhar Hussain (PW-4). Investigation of the case was conducted by Muhammad Nawas SI (PW-18), whereas remaining PWs were of formal in nature. Thereafter, the prosecution closed its evidence by producing certain documentary evidence. After recording the prosecution evidence, appellant was examined u/s 342 Cr.P.C., wherein he denied all the allegations leveled against him. He did not opt to record his statement u/s 340(2) Cr.P.C., however, produced Muhammad Ramzan as (DW-1) and Muhammad Ameer (DW-2) in his defence. Learned trial Court after appraising the prosecution evidence convicted and sentenced the appellant in the above mentioned terms.

6. In support of the instant appeal, learned counsel for the appellant submits that the impugned judgment is result of non-comprehension of facts and mis-reading of material evidence available on record; that availability of the eye witnesses at the crime scene is seriously questionable as they hail from far flung area and keeping in view the other facts and circumstances of the case, they can easily be categorized as ‘chance witnesses’ because they have never plausibly explained their presence at the crime scene; that the dying declaration of one of the deceased, Muhammad Asif was of no legal sanctity as mandatory legal requirements were not fulfilled while recording the same; that there is glaring contradiction between ocular account and medical evidence; that the prosecution has not asserted any motive for killing three persons at the

hands of the appellant; that the stated recovery of weapon of offence and its positive report of Punjab Forensic Science Agency (PFSA) is rendered to be inconsequential as the crime empties were sent after arrest of the appellant, hence, other pieces of evidence do not provide any corroboration to the ocular account and lastly submits that since the prosecution has failed to prove its case ‘beyond shadow of doubt’ hence, by accepting the instant appeal, the appellant be acquitted of the charge.

7. By taking exceptions to the arguments of learned counsel for the appellant, learned Deputy Prosecutor General assisted by the learned counsel for the complainant, has faithfully defended the impugned judgment and submits that the prosecution has ably proved its case by providing trustworthy, reliable and coherent evidence as both the eye witnesses remained firm qua their stance that they had witnessed the occurrence, right from the registration of case till recording their testimonies before the learned trial Court; that the appellant in connivance with his acquitted co-accused, namely, Sikandar Hayat and Ghulam Raza had done to death three persons including his wife on account of a trivial family dispute with the deceased wife; that dying declaration of Muhammad Asif has provided ample support to the prosecution story; that weapon of offence i.e. rifle .7 mm got recovered at the instance of the appellant during course of investigation and positive report furnished by the Punjab Forensic Science Agency (PFSA) in this regard have also provided full corroboration to the ocular account; that since the prosecution has proved its case up to the hilt qua the guilt of the appellant, so, there is no force in the arguments of learned counsel for the appellant, hence, the appeal filed by the appellant is liable to be dismissed and by allowing revision petition filed by the complainant, fine imposed by the learned trial Court upon the appellant may also be sufficiently enhanced as per law.

8. We have heard arguments of learned counsel for the appellant, learned Law Officer, learned counsel for the complainant, have gone through the record with their assistance and noticed that the prosecution in order to bring home the guilt of the appellant, has relied upon the ocular account provided by the complainant, Ghulam Raza (PW-3) and Rana

Mazhar Hussain (PW-4), eye witnesses, dying declaration in shape of statement of one of the deceased Muhammad Asif got recorded in injured condition in hospital, evidence of motive provided by the same witnesses, medical evidence and the evidence of recovery of weapon of offence i.e. .7 mm rifle from the appellant. We have straightway observed that in fact the complainant, Ghulam Raza (PW-3), while lodging the instant crime report had nominated, apart from the appellant, two other co-accused Sikandar Hayat and Ghulam Raza with the allegation of abetment but they were exonerated from the charge by the Investigating Agency and the complainant or the State for that matter neither challenged the findings of the Investigating Agency qua the innocence of above said co-accused before any forum of police hierarchy nor filed any private complaint. Meaning thereby that they were quite satisfied from the outcome of the investigation. The incident in this case statedly took place on 01.12.2012 at 05:00 p.m., whereas the same was reported to the police by the complainant Ghulam Raza, while making statement (Ex-PC) to the police at 07:30 p.m. in Ganga Ram Hospital, Lahore and the same was converted into formal FIR (Ex-PDD) at 08:15 p.m. on the same day. Learned counsel for the appellant has argued that the FIR (Ex-PDD) was lodged with an inordinate delay of about three hours but on going through the contents of the same, we have noticed that in fact none of the deceased expired at the crime scene, rather all of them were shifted to hospital in injured condition and Mst. Zohra Bibi succumbed to the wound on the way to hospital, whereas Mst. Rafia Rani breathed her last after reaching hospital and Muhammad Asif was got admitted in Ganga Ram Hospital in injured condition. So in that eventuality, apparently, machinery of law was set into motion by the complainant Ghulam Raza with a reasonable promptitude. However, to ascertain truthfulness and sanctity of eye witnesses qua their claim that they were present at the crime scene and they had witnessed the incident, we have straightway observed that both the eye witnesses adduced by the prosecution i.e. Ghulam Raza (PW-3) and Rana Mazhar Hussain (PW-4), hailed from District Sargodha and it was claimed that complainant Ghulam Raza (PW-3), on receiving

information qua the quarrel between appellant and Mst. Rafia Rani, his sister on telephone call allegedly made by Muhammad Asif deceased, they alongwith one Ramzan (not produced) reached at the house of appellant, Ghulam Abbas alias Agha situated at Adda Chabbeal, District Lahore, the place situated within the precincts of Police Station Manawan and when they reached at the house of the appellant, at that point of time, all the three deceased alongwith appellant were standing outside of house of the appellant and in their view, the appellant made fatal firing on all the three persons, who later on succumbed to the wounds. So, apparently, stance of the eye witnesses that they reached at the crime scene exactly at the same time when the appellant made firing at the persons of the deceased from a far flung place i.e. District Sargodha about 170 kilometers away from Lahore, is hard to believe. However, we have further scanned the record to verify this stance of the PWs and observed that the complainant claimed that after receiving the injuries, all the three injured were shifted to hospital through Rescue 1122 and the complainant and other PWs also accompanied them but unfortunately, no official from the office of Rescue 1122 was produced before the learned trial Court to verify the stance of the eye witnesses.

9. We have also gone through the medical evidence i.e. Medico Legal Certificates (MLCs) of Mst. Rafia Rani and Muhammad Asif (Ex-PL & Ex-PM) and noticed that in the relevant columns of ‘accompanied by’ was kept blank. So, these two documents belied stance of the eye witnesses that in fact they had accompanied the deceased to hospital in injured condition and this fact also raises our eyebrows qua the truthfulness of their stance qua their availability and witnessing the occurrence. On going through the medical evidence, we feel that there is force in the arguments of learned counsel for the appellant that there is contradiction between ocular account and medical evidence. In the FIR complainant claims that fire shots made by the appellant hit Mst. Rafia Rani at the thigh, abdomen and at her armpit but on going through her postmortem report (Ex-PH) and testimony of Dr. Atfa Naheed (PW-8), who noted two lacerated wounds on back of right chest and nothing was observed at her armpit, whereas the

complainant has not mentioned that Mst. Rafia Rani had received any injury at the back of chest, so, the medical evidence is not in line with the prosecution story, rather it contradicts the same.

10. We have also gone through the scaled and un-scaled site plans (Ex-PX & Ex-PA respectively) and noticed that place of occurrence is situated in a thickly populated area and there are houses all around and a Madrassa Zainab Bint-e-Ali on one side, whereas Al-Hadi Educational Academy on the other side and there is also a chowk ‘چوک’ nearby and the time of incident was before the evening i.e. 05:00 p.m. but none from the locality, has come forward in support of the prosecution case. We are mindful of the fact that in these days common people hardly show readiness to appear before the police or to depose before the learned trial Court in order to avoid rigours and hardships of investigation and protracted trial but at the same time, we feel that since there was a Madrassa Zainab bint-e-Ali and an Educational Academy around the place of occurrence, so, someone should come to depose in support of the prosecution case, especially in the circumstances that the appellant was living in upper story of the said Madrassa.

11. We have also observed that stance of the eye witnesses regarding the involvement of co-accused Khizar Hayat and Ghulam Raza s/o Muzammal Hussain had been disbelieved by the Investigating Agency, so, we hold that status of both these eye witnesses is not more than mere chance witnesses and there is hardly any doubt in the legal proposition that the conviction and sentence can be based upon the testimony of chance witnesses if that is sufficiently corroborated by the other pieces of evidence coming forth from independent sources.

12. For this purpose, we have analyzed other pieces of evidence relied upon by the prosecution and observed that the prosecution has heavily relied upon the statement of Muhammad Asif recorded by the Investigating Officer Muhammad Nawaz SI (PW-18) in injured condition when he was admitted in Ganga Ram Hospital, Lahore, after having procured requisite permission from the concerned Medical Officer by filing application (Ex-

PN), who declared that patient Muhammad Asif was fit for statement, on which his statement (Ex-PN/1) was recorded by Muhammad Nawaz Investigating Officer (PW-18). We have observed that statement of Muhammad Asif was recorded in terms of section 161 Cr.P.C. and there is no dispute qua the legal proposition that the statement in shape of dying declaration of a deceased is relevant and admissible under Article 46(1) of Qanoon-e-Shahadat Order, 1984 (**Order**) and Rule 25.21 of Chapter XXV of Police Rules, 1934 (**Rules**). The mechanism of the same has been provided in Article 46(1) of the Order, which reads as under;—

“46.”

(1) When it relates to cause of death: *When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which cause of his death comes into question.”*

However, on going through the above referred provisions of law, it is obvious that statement of the deceased in the shape of dying declaration has been made relevant but the mechanism of recording the same has not been followed as provided in the above referred Rule 25.21 of the Rules, which reads as under;—

“25-21. Dying declaration—

- (1) *A dying declaration shall, whenever possible, be recorded by a magistrate.*
- (2) *The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.*
- (3) *If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.*
- (4) *If no such witnesses can be obtained, without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.*
- (5) *A dying declaration made to a police officer should, under section 162, Code Criminal Procedure, be signed by the person making it.”*

So, there is no denial of the fact that the Investigating Officer (PW-18), while recording statement of Muhammad Asif (deceased) in injured condition had not adhered to the mandatory provisions of law as the word ‘shall’ is used in each of the above referred Rule 25.21 (i to v) of Rules.

There is no cavil with the legal proposition that conviction can be based on the dying declaration alone. Reliance in this regard is placed upon the judgment passed by the august Supreme Court of Azad Jammu & Kashmir in case of "*MISRI v. STATE through Advocate General*" (**1999 P.Cr.L.J 116**). However, for making reliance on this piece of evidence, the superior judiciary of the country had enumerated certain conditions to be fulfilled to make it trustworthy and reliable. The August Supreme Court of Pakistan in case of "*Mst. ZAHIDA BIBI v. THE STATE*" (**PLD 2006 SC 255**) had authoritatively held, if such statement was recorded in hospital, it should be written in presence of a Doctor or any other staff of hospital should be associated. The august Supreme Court of Pakistan in above referred case observed as under:-

"This is an admitted fact that the statement of the deceased was not recorded by the Sub-Inspector of police in presence of the doctor and further neither any member of hospital staff was associated at the time of recording the statement nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Be that as it may, status of such statement would be hardly a statement u/s 161 Cr.P.C. and not a dying declaration of the deceased."

The purpose of statement u/s 161 Cr.P.C. recorded by the Investigating Officer during the course of investigation is only one, in our Criminal Administration of Justice, which has been provided u/s 162 Cr.P.C. and it read as under;

"162. Statements to police not to be signed, use of such statements in evidence: (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof whether in a police-diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross examination."

(Underline has been provided for emphasis)

Meaning thereby that the purpose of statement u/s 161 Cr.P.C. is to contradict and confront the witnesses in the manner as provided u/s 140 of

Qanoon-e-Shahadat Order, 1984. So, in these circumstances, statement of Muhammad Asif deceased recorded by the Investigating Officer in injured condition in hospital u/s 161 Cr.P.C., carries no legal sanctity, rather it should not have been exhibited on record as (Ex-PN/1), however, this is the prerogative of accused only to bring it on record for the purpose of to contradict and confront the maker as observed above.

13. The next piece of evidence is the medical evidence and as observed earlier, there is clear contradiction between ocular account and the medical evidence qua the injuries at the person of one of the deceased Mst. Rafia Rani, so, it hardly provides any support to the ocular account. Even otherwise, now it has been firmly settled by the august Supreme Court of Pakistan that the medical evidence does not provide any corroboration to the ocular account, rather it just confirms the nature and seat of injuries, the weapon used therein and the time elapsed between injuries & death and death & postmortem. Reliance in this regard may be placed on the judgment passed by the august Supreme Court of Pakistan in case of “MHAMMAD SALEEM v. SHABBIR AHMED and others” (**2016 SCMR 1605**).

14. So far as the motive part of the incident is concerned, the prosecution’s own case was that there was some family dispute between the appellant and his wife Mst. Rafia Rani, so, except oral assertion of the complainant, no other material/evidence is available on record to prove this aspect of the case. Even otherwise, it is hard to believe that on this trivial dispute, one can murder three innocent persons.

15. Adverting to the evidence of recovery of weapon of offence i.e. .7mm rifle, from the possession of the appellant is concerned, according to record, Investigating Officer Muhammad Nawaz (PW-18) secured five crime empties of .7 mm from the crime scene and after arrest of the appellant, he allegedly got recovered rifle .7mm from his possession, both i.e. crime empties and rifle .7mm were sent for forensic analyses and vide report furnished by the Punjab Forensic Science Agency (Ex-PGG), the same were fond matched with each other. On going through memo of

possession of rifle .7mm (Ex-PD), it is observed that the appellant got recovered it from a room of his residential house, which was kept open in a corner of the room and in the said memo, it was never claimed that the said room was locked or the weapon was lying in a secret place. Meaning thereby that the weapon of offence was recovered from an open place, which according to the scaled site plan (Ex-PA), is the upper story of a Madrassa Zainab Bint-e-Ali and that place was accessible to the other people too. It means that the weapon of offence was not got recovered from the exclusive possession of the appellant. Even otherwise, there is no denial of the fact that the empties were recovered on the very first day of the occurrence i.e. 01.12.2012, whereas the appellant was arrested on 02.12.2012 and the recovery of weapon of offence was got effected from his possession on 12.12.2012, whereas the same (empties) were sent to the Punjab Forensic Science Agency (PFSA) on 13.12.2012, which date is obviously after the arrest of the appellant, so, there is force in the assertions of learned counsel for the appellant that in these circumstances, this piece of evidence i.e. recovery of weapon of offence) rendered inconsequential and does not provide any corroboration to the ocular account.

16. We have also adverted to the stance taken by the appellant during the course of investigation and before the learned trial Court while recording statement u/s 342 Cr.P.C., wherein he stated that in fact he had contracted marriage with Mst. Rafia Rani sister of the complainant against the wishes of her family, so, her brothers i.e. the complainant Ghulam Raza and Muhammad Asif deceased turned inimical towards him and in fact Muhammad Asif deceased was the actual culprit in this case, who murdered his mother Mst. Zohra Bibi and sister Mst. Rafia Rani (wife of the appellant) and when he (appellant) reached at the spot after hearing the voice of firing from Madrassa Zainab Bint-e-Ali and tried to snatch the gun from Muhammad Asif, at this moment he received fire arm injury by his own hands. The appellant further stated that he was empty handed and has no concern with the alleged offence. In his defence, the appellant produced two witnesses, namely, Muhammad Ramzan (DW-1) and Muhammad

Ameer (DW-2), we have gone through their testimonies and noticed that basically, both of them have tried to depose that in fact Rana Mazhar Hussain (PW-4), one of the eye witnesses, was not available at the crime, rather they alongwith the said Rana Mazhar Hussain got information about the incident in village Lakhial and thereafter, they proceeded towards the crime scene. However, we feel that there is no need to discuss the evidence adduced by the appellant, in his defence in detail, as we have already disbelieved the prosecution evidence as discussed in preceding paragraphs.

17. In view of the above discussion, we reach to the conclusion that the presence of the eye witnesses at the crime scene is highly doubtful, the medical evidence is in conflict with ocular account and no other piece of evidence is available to rectify the inherent defects in the ocular account, hence, we hold that the prosecution remains failed to prove its case on the touchstone of principal of ‘beyond reasonable doubt’ hence, by giving benefit of doubt, we, **allow** the instant appeal and set aside the conviction and sentence awarded by the learned trial Court through impugned judgment to the appellant, Ghulam Abbas alias Agha and **acquit** him of the charge. He is in jail, so, he be released forthwith if not required to be detained in any other case. Resultantly, **Murder Reference No.319 of 2019 is answered in NEGATIVE and death sentence of the appellant is NOT CONFIRMED.**

18. So far as **Criminal Revision No.63816 of 2019** filed by the complainant for enhancement of compensation amount awarded to the appellant is concerned, since we have already disbelieved the evidence of the prosecution and acquitted the appellant from the case, therefore, the revision petition filed by the complainant is **dismissed** being lost its relevance and becomes infructuous.

**(SHEHRAM SARWAR CH.)
JUDGE**

**(MUHAMMAD WAHEED KHAN)
JUDGE**

APPROVED FOR REPORTING

JUDGE