

Form No: HCJD/C-121.

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Jail Appeal No.56 of 2016

Abid Hussain.

Vs.

The State.

Criminal Revision No.27 of 2016

Zahid Hussain.

Vs.

Abid Hussain and another.

Criminal Appeal No.63 of 2016

Zahid Hussain.

Vs.

Nazabat Hussain and another.

**Appellant by : Mr. Naseer Anjum Awan, Advocate
(in Jail Appeal No.56 of 2016).**

**Mian Asad Hayat Awan, Advocate
for the Appellant/Petitioner (in
Criminal Appeal No.63 of 2016 and
Criminal Revision No.27 of 2016).**

**Respondent by : Mian Asad Hayat Awan, Advocate
(in Jail Appeal No.56 of 2016).**

**Mr. Naseer Anjum Awan, Advocate
(in Criminal Revision No.27 of 2016
and Criminal Appeal No.63 of
2016).**

**Mr. Muhammad Atif Khokhar,
learned State Counsel**

Date of hearing : 27.04.2020

AAMER FAROOQ, J. - This judgment shall decide the instant
appeal as well as Criminal Revision No.27 of 2016 and Criminal Appeal
No.63 of 2016 as common questions of law and facts are involved.

2. Abid Hussain (the appellant in Jail Appeal No.56 of 2016) and Nazabat Hussain were tried in case F.I.R. No.84, dated 07.08.2012 under Sections 324/34 P.P.C. (subsequently Section 302 P.P.C. was added as the injured Altaf Hussain succumbed to the injuries) registered with Police Station Nilore, Islamabad; Abid Hussain was convicted of the offences by the learned Trial Court, vide judgment dated 09.03.2016 and was awarded life imprisonment, however, Nazabat Hussain was acquitted of the charges. Abid Hussain has filed a Jail Appeal against his conviction, which is the subject matter of Jail Appeal No.56 of 2016; the complainant Zahid Hussain filed Criminal Revision for enhancement of the sentence awarded to Abid Hussain (Criminal Revision No.27 of 2016) and Zahid Hussain also filed an appeal against acquittal of Nazabat Hussain, which is the subject matter of Criminal Appeal No.63 of 2016.

3. Learned counsel for the appellant in Jail Appeal No.56 of 2016, *inter-alia*, contended that the prosecution suppressed material facts especially the fact that Nazabat Hussain also received injuries and was treated for the same at PIMS Hospital, Islamabad; he contended that Ex-PN and the Injury Sheet Ex-PO substantiate the said fact. It was also submitted that the above fact is also supported in the evidence of Ehsan-ul-Haq, ASI (PW-8), who was the first Investigating Officer. Learned counsel contended that the suppression of fact of injury inflicted on Nazabat Hussain shows that in fact the complainant and his family were the aggressors and injuries were inflicted on the accused; he placed reliance on the judgment reported as "*Amir Zaman Vs. Mehboob and others*" **(1985 SCMR 685)**. It was also pointed out that there is

contradiction between ocular account and medical evidence; that F.I.R. (Ex-PA/1), provides that Nazabat Hussain gave a *Churri* blow to Altaf Hussain the deceased and then Abid Hussain hit him with hatchet on the forehead above the left eye. It was submitted that in the cross-examination, the Investigating Officer (PW-12) categorically stated that the cause of death of Altaf Hussain is injury caused due to a blunt object and that he can distinguish between a blunt and a sharp edged weapon. The witness also stated that in the Inquest Report, he has stated that the injury has been caused due to a blunt weapon (Ex-PB); that Dr. Farrukh Kamal, PW-6 negated the ocular account as he stated categorically that the cause of death is injury on the left front side of the head, which fractured the skull and exposed the brain; the witness also stated that the injury was caused by a blunt object. Learned counsel further contended that no blood stain was found on the *Churri* recovered by the police and even the Forensic Report confirms that it cannot be said that the blood stain on the Axe is of human origin. It was also submitted that the referred facts show that the Axe/*Kulhari* was not used either from the sharp edge side or the blunt side and the assumption/supposition by the learned Trial Court is an error. Learned counsel placed reliance on cases reported as "*Hallu and Ors. Vs. State of Madhya Pradesh*" (**AIR 1974 SC 1936**) as well as "*M. Hassan Vs. Ghulam Rasool*" (**2009 P Cr. L J 940**). Learned counsel further contended that the prosecution failed to prove the motive. In this behalf, it was contended that though it was alleged in the F.I.R. that the motive for the murder is the matrimonial dispute between the daughter of the complainant and her mother-in-law, who is the sister of the accused but the same was not duly proved. It was

contended that Tanzeela Bibi, PW-7, who entered the witness box supported the motive but with malafide and dishonestly improved her statement, which could not have been done. Reliance was placed on "*Khalid Javed and another Vs. The State*" **(2003 SCMR 1419)** and "*Abdul Khaliq Vs. The State*" **(1996 SCMR 1553)**. It was further submitted that the recovery was not in accordance with law and is in violation of Article 40 of Qanun-e-Shahadat Order, 1984. Reliance was placed on "*Sardar Bibi and another Vs. Munir Ahmed and others*" **(2017 SCMR 344)**; that no statement of the recovery witness of hatchet/Axe was taken down, which has been duly admitted by the Investigating Officer in the cross-examination. It was contended that even otherwise the recovery of weapon is of no use inasmuch as it does not confirm that the weapon of offence was used to murder the deceased. Reliance was placed on "*Mst. Shazia Parveen Vs. The State*" **(2014 SCMR 1197)**.

4. Learned counsel contended that Nazabat Hussain recorded his first version immediately, which though was reduced in the Police Diary, but was never investigated by the police. It was submitted that it is the obligation of the police under Criminal Procedure Code, 1898 to investigate the matter and take into account entire inculpatory and exculpatory evidence. Learned counsel contended that Nazabat Hussain specifically stated that there were people standing on the roof of the shop of the complainant, which included Adnan, the nephew of the complainant and wife of the complainant, who threw stones and bricks, which hit the deceased Altaf Hussain. Reliance was placed on "*Liaqat Ali and another Vs. The State*" **(1998 P Cr. L J 216)** and "*Mst. Mumtaz*

Begum Vs. Ghulam Farid and another” (2003 SCMR 647). It was submitted that it is trite law that the interested witnesses in the case required corroboration and in the instant case, the complainant and other eye witness i.e. Umair Ali, both are interested and required independent corroboration. It was also submitted that under the facts and circumstances, the benefit of doubt was to be granted to the appellant namely Abid Hussain, which was not done and he ought to have been acquitted.

5. Learned counsel for the complainant, *inter-alia*, contended that the case in hand is one of awarding death sentence to the convicted accused namely Abid Hussain. It was submitted that the prosecution proved the case beyond reasonable doubt; that the deceased was put to death by Abid Hussain as he hit him with Axe. It was further submitted that the eye witnesses namely Zahid Hussain and Umair Ali (PW-1 and PW-2) categorically stated about the facts of the case and their testimonies remain untarnished in the cross-examination. It was further submitted that the weapon of offence (the Axe) was got recovered by Abid Hussain from his house and the blood stains have been confirmed on the same by the Forensic Report Ex-DB(2).

6. While arguing appeal against acquittal learned counsel for the complainant contended that Nazabat Hussain has wrongly been acquitted of the charges in as much as the ocular account regarding the incident is categorical that it was Nazabat Hussain and Abid Hussain, who inflicted injuries on Altaf Hussain because of which he died. It was also contended

that motive has also been duly proved against both the accused as they are brothers of the mother-in-law of Zahid Hussain's daughter.

7. Mr. Naseer Anjum Awan, Advocate while responding to the arguments addressed by the learned counsel for the complainant in criminal revision submitted that no case for enhancement of the sentence is made out rather the instant case is one for acquittal. It was submitted that even the learned Trial Court has mentioned that the motive alleged has not been duly proved and the ocular account is also not above the board.

8. Learned State Counsel supported the arguments addressed by learned counsel for the complainant.

9. Arguments advanced by learned counsel for the parties have been heard and the record of the case was duly examined with their able assistance.

10. The case of the prosecution against Abid Hussain and Nazabat Hussain as stated in the complaint, which culminated in F.I.R. No.84, dated 07.08.2012 (Ex-PA/1), is that on 07.08.2012, at about 03:00 P.M., Abid Hussain and Nazabat Hussain, armed with kulhari and churri respectively, came to the shop of complainant Zahid Hussain and verbally abused him; upon this Altaf Hussain came out of his shop which is situated by close by and tried to stop the accused upon which Nazabat Hussain inflicted a blow with *Churri*, with which he was armed, near the lower part of left eye. Abid Hussain inflicted a blow with Axe/Kulhari, which hit Altaf Hussain on the front left side of the scalp. It is stated in

the F.I.R. that on the hue and cry of the complainant and other eye witnesses namely Umair Ali and Muhammad Ismail and others, the accused fled; the injured Altaf Hussain was taken to the hospital by Ismail and the complainant, where he succumbed to the injuries. It has been alleged in the complaint and in the F.I.R. that the motive for murder was a family feud due to acrimonious relations between the daughter of the complainant and her mother-in-law, who is sister of accused persons. In order to prove its case, the prosecution led thirteen (13) witnesses. In this behalf, the eye witnesses, Zahid Hussain and Umair Ali appeared as PW-1 and PW-2, Zabih Ullah Abbasi, the initial Investigating Officer appeared as PW-13 and Muhammad Annar, S.I, the Investigating Officer of the case appeared as PW-12. Dr. Farrukh Kamal, appeared as PW-6 and PW-11. The Forensic Report was tendered in evidence as Ex-DB, whereas the F.I.R. was exhibited as Ex-PA/1, Inquest Report as Ex-PB, Memo of possession of parcel regarding blood stain clothes as Ex-PF, Memo of possession of parcel regarding weapon of offence (hatchet) as Ex-PJ, Memo of possession of parcel regarding *Churri* as Ex-PK; Injuries Map as Ex-PL, Postmortem Report as Ex-PH and the Site Plan as Ex-PG. Both the eye witnesses namely Zahid Hussain and Umair Ali categorically stated that Nazabat Hussain and Abid Hussain came to shop of Zahid Hussain armed with *Churri* and Axe respectively. It was also stated that due to the fight, the victim received initial injury with *Churri* below left eye. It is pertinent to observe that in the F.I.R. (Ex-PA/1) and in the testimonies of PW-1 and PW-2, it is only one infliction of blow with *Churri* by Nazabat Hussain, whereas in the Postmortem Report (Ex-PH) three injuries have been indicated and in this

behalf, Injuries No.2 and 3 have been classified as incised wounds below left eye. Dr. Farrukh Kamal, who conducted the postmortem, has affirmed the position while appearing as witness by stating that Injuries No.2 and 3 on the pictorial diagram (Ex-PH) are incised wounds one below left eyelid and the other below left eye lateral to Injury No.2. There is no mentioning of infliction of two blows of *Churri* by Nazabat Hussain in the statements of Zahid Hussain and Umair Ali, the third eye witness Ismail was never produced by the prosecution. Moreover, both the eye witnesses have stated that Abid Hussain struck a blow with the *Axe/Kulhari*, which hit him on the front left side of the scalp and exposed the brain (Injury No.1 on the pictorial diagram, EX-PH). Dr. Farrukh Kamal in his cross-examination has opined that the cause of death is Injury No.1, which most probably has been caused by a blunt object. Similar statement was made by the Investigating Officer (PW-12) in the cross-examination, when he stated that he can distinguish between the injury caused by a sharp edged weapon and the one by a blunt object. He also stated that he has mentioned in Column No.12 of the Inquest Report that the injury caused to the deceased is one of blunt object (Ex-PB). Learned Trial Court while deciding the matter has assumed that the back end of the Axe has been used, however, there is nothing to the effect on record. Generally, when it is deposed by someone that an attack was made through Axe/hatchet, it is assumed that the sharp end side is used; despite the Postmortem Report and the Inquest Report indicating that the fatal injury was caused by a blunt object the prosecution made no attempt to clarify the matter that the Injury No.1 was inflicted through a blunt object. The prosecution made no effort to

clarify the contradiction or rather specify that back end/blunt side of the axe/hatchet has been use, which they ought to have in light of the decisions reported as "*M. Hassan versus Ghulam Rasool*" (**2009 P. Cr. LJ 940**) and "*Hallu and others versus State*" (**AIR 1974 Supreme Court 1938**). The said anamoly about the use of the Axe/hatchet and the fatal injury being caused by a blunt object creates contradiction between the ocular account and the medical evidence.

11. The above factor when taken into consideration alongwith the first version of the accused cast doubt on the story of the prosecution. Nazabat Hussain, who was injured was taken to PIMS Hospital on the same date Ex-PN and Ex-PO; he stated categorically that wife of the complainant and his nephew namely Adnan upon hearing the scuffle and exchange of verbal abuse came to the rooftop of the shop of the complainant and threw stones and bricks one of which hit the deceased. It is relevant to state that Dr. Farrukh Kamal appearing as PW-6 categorically stated that in his opinion the injuries inflicted on Nazabat Hussain were not self-inflicted. Moreover, the Investigating Officer (PW-12) admitted in cross-examination that Nazabat Hussain recorded first version regarding people being present at the rooftop, however, did not further probe the matter by interrogating wife of the complainant and his nephew namely Adnan. He also conceded that no effort was made to examine the site of occurrence to see whether any blood stained stones or bricks were present. It is relevant to observe that the Investigating Officer (PW-12) was bound to investigate the matter in totality. When the first version came to his knowledge through statement of Nazabat

Hussain, he was supposed to include in the investigation the people mentioned in order to discern the true state of affairs. It is the obligation of the Investigating Officer not only to take into account inculpatory evidence but also exculpatory evidence. Any piece of evidence which benefits the accused, if is not probed or withheld violates the fundamental right of any person of fair trial as enshrined in Article 10-A of the Constitution of Islamic Republic of Pakistan; reliance is placed on case reported as "*Liaquat Ali versus The State*" **(1998 PCr. LJ 216)**. The alleged weapon of offences i.e. Axe and *Churri* were recovered by the police, no blood stain was found on *Churri* as per Forensic Report, Ex-DB. However, the Axe according to the prosecution was got recovered by Abid Hussain from his house. It is relevant to mention that the Investigating Officer PW-12 in cross-examination admitted that in the house of Abid Hussain, his family was also residing and when he entered the house for recovery, it was open and the Axe was lying in corner of one room. The referred fact makes the recovery doubtful and ineffective inasmuch as the alleged offence was committed on 07.08.2012 and the arrest was made on 10.08.2012. Appellant had ample time to dispose of the weapon of offence or wash of the blood. Moreover, in a house, which is easily accessible, recovery of weapon from an open place is regarded as ineffective. Reliance is placed on "*Sardar Bibi and another Vs. Munir Ahmed and others*" **(2017 SCMR 344)** and "*Noor Shah Gul Vs. Asim Ullah and another*" **(PLD 2015 Peshawar 01)**. The Forensic Report from Punjab Forensic Science Agency states that though Axe was blood stained but it cannot be confirmed that the same was of human origin, whereas *Churri* did not have any blood stain. If it cannot be confirmed

that the blood stains were of human origin and matched with one of the deceased, the weapon of offence otherwise is of no avail to support the case of the prosecution.

12. As noted above, it was the obligation of the Investigating Officer to further investigate the first version given by Nazabat Hussain, which he acknowledges that was duly recorded in cross-examination. The said act of the Investigating Officer is in violation of law in light of the judgments reported as "*Liaqat Ali and another Vs. The State*" (**1998 P Cr. L J 216**) and "*Mst. Mumtaz Begum Vs. Ghulam Farid and another*" (**2003 SCMR 647**). The above facts and circumstances give rise to doubt in the case of the prosecution. In this behalf, the following circumstances cast shadow on the case of the prosecution:-

- a) The first version of the accused wherein he stated that wife of the complainant and his nephew hurled stones and bricks from the rooftop from the shop of the complainant was not investigated at all by the Investigating Officer, which he duly admitted in his cross-examination.
- b) The ocular and medical account evidence contradict each other inasmuch as both the eye witnesses have stated that one blow with the *Churri* was made, whereas in the postmortem there are two incised wounds; moreover, Abid Hussain has been attributed to have inflicted a blow with Axe on the victim, whereas the Inquest Report as well as the Postmortem Report and the opinion of Dr. Farrukh Kamal indicate that the fatal

injury was caused by a blunt object. In this behalf, the prosecution failed to establish that the injury was inflicted with a blunt side of the Axe as none of the eye witness clarified the position despite the Inquest Report as well as the Postmortem Report, which they were required to do so.

- c) The Forensic Report is negative inasmuch as it states that the blood on the axe is of human origin cannot be confirmed.

13. In view of the above facts and circumstances, the learned Trial Court rightly concluded that the case against the Nazabat Hussain is not made out, hence he is to be acquitted. Due to the above reasons, even case against Abid Hussain is also not made out. More so as in light of the judgment of the Hon'ble Supreme Court of Pakistan "*Notice to Police Constable Khizar Hayat Son of Hadait Ullah on account of his false statement*" (**PLD 2019 SC 527**) and "*Sardar Bi Bi versus Munir Ahmed*" (**2017 SCMR 344**), where testimony of one witness is disbelieved, it is to be disbelieved in totality, hence when the version of the eye witnesses is disbelieved to the extent of Nazabat Hussain, it is also disbelieved to the extent of Abid Hussain. Moreover, no case for enhancement of the sentence is made out as the prosecution's case is not beyond reasonable doubt and has shortcomings.

14. For what has been stated above, Jail Appeal No.56 of 2016 is **allowed** and the conviction of Abid Hussain is **set-aside**; consequently, he is acquitted of the charges leveled against him in the above mentioned case, hence he is to be released from the jail forthwith, if not

required in any other case. Criminal Appeal No.63 of 2016 and Criminal Revision No.27 of 2016 are accordingly **dismissed**.

(CHIEF JUSTICE)

**(AAMER FAROOQ)
JUDGE**

Announced in Open Court this day of June, 2020.

CHIEF JUSTICE

JUDGE

M. Zaheer Janjua

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