

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, **JUDICIAL DEPARTMENT**

Criminal Appeal No.146/2019

Amjad Zaman
versus
The State & another

Appellant by: Mr. Ch. Zaheer Ahmad, Advocate.
Respondents by: Barrister Ayesha Siddique Khan, State Counsel.
Hafiz Farman Ullah, Advocate for Respondent No.2
Sultan Mehmood, S.I., P.S. Koral, Islamabad.
Date of Hearing: 28.02.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellant has called in question judgment of the learned Additional Sessions Judge (East), Islamabad, dated 27.03.2019, whereby the appellant has been convicted in case FIR No.176, dated 08.06.2014, under Section 302/34 PPC, P.S. Koral, Islamabad and sentenced to imprisonment for life as Ta'zir along with payment of fine of Rs.200,000/- to the legal heirs of deceased, in failure whereof, the appellant shall further undergo simple imprisonment for 04 months.

2. Brief facts referred in the instant criminal appeal are that on 08.06.2014, at about 6 p.m., when Shabbir Alam/complainant along with his brother namely Saeed Alam (deceased) and PW-17 Asad Ali were on their way back to home, the said deceased person had an inclination to attend call of nature and in order to find cover he went in a vacant plot in a street where four persons already sitting there inquired him of his stopover, whereby Saeed Alam/deceased told them of his said purpose to attend the call of nature, whereupon the said four persons started quarrel with him and ultimately one of the accused person shot the deceased on his chest with pistol. The said episode attracted Shabbir Alam/complainant and PW-17 Asad Ali to the spot and on their hue and cry the four accused persons fled away from the spot, however Saeed Alam (deceased) succumbed to injuries. Subsequently, Shabbir Alam/complainant reported the

incident by filing complainant (Exh.PQ), whereupon case FIR No.176/2014 (Exh.PA) was got lodged against four unknown accused persons. Later on, Shabbir Alam/complainant through supplementary statement nominated Jabbar Hussain, Amjad Zaman (appellant), Faraqat Hussain alias Rafaqat (since dead) and Sami Satti (proclaimed offender) as the said accused persons who committed murder of the deceased. During investigation, the said accused persons were arrested, however Sami Satti/co-accused on getting pre-arrest bail absconded from the Court, while rest of the three (03) accused persons were charged on 22.09.2015, to which they pleaded not guilty and claimed trial. During the trial, Faraqat Hussain/co-accused died, therefore, proceedings to his extent were abated on 07.01.2017. In order to prove the charges against remaining accused persons i.e. Amjad Zaman/appellant and Jabbar Hussain/co-accused, the prosecution has produced 19 prosecution witnesses and the learned trial Court pursuant to recording of evidence of said 19 PWs, recorded the statement of accused persons under Section 342 Cr.P.C. and ultimately passed the impugned judgment, whereby Jabbar Hussain/co-accused has been acquitted of charge while Amjad Zaman/appellant has been awarded life imprisonment as Ta'zir along with payment of fine of Rs.200,000/- to the legal heirs of deceased, in failure whereof, the appellant shall further undergo simple imprisonment for 04 months. Hence, the instant criminal appeal.

3. Learned counsel for appellant contended that the learned trial Court while passing the impugned judgment has not taken into account the material contradictions and dishonest improvements found in the statements recorded by the PWs; that the learned trial Court has failed to consider that the prosecution case is false and concocted one as the alleged occurrence was an unseen occurrence, even otherwise, the prosecution has not produced any independent witness to prove the charges against the appellant; that conducting of identification parade pursuant to nomination of accused persons through

supplementary statement without disclosing any source is not warranted under the law; that the learned trial Court has also ignored to appreciate that the alleged recovery is planted one as the prosecution has failed to prove it from any independent source, therefore, passing of the impugned judgment is absolutely illegal, arbitrary and against the settled principles of law.

4. Conversely, learned State Counsel as well as learned counsel for Respondent No.2/complainant opposed the instant criminal appeal and contended that the prosecution has produced direct evidence, which has not been shattered by the defence in any manner; that the prosecution's version has further been corroborated by the recoveries effected from the place of occurrence and on the pointation of accused person; that the medical evidence is in line with the ocular account, which further strengthens the prosecution evidence with regard to involvement of accused persons in the commission of murder of deceased; that the contradictions in the prosecution evidence brought on surface by the defence are minor in nature and could not be relied upon to acquit the accused person of the capital charge and as such, the learned trial Court has rightly appreciated the evidence brought on record and sentenced the appellant in accordance with law.

5. Arguments heard, record perused.

6. Perusal of record reveals that on 08.06.2014, PW-16 Shabir Alam/complainant along with his brother namely Saeed Alam and PW-17 Asad Ali went to see Saeed Alam's daughter in Irfanabad Tramari, Islamabad and when they were going back after visiting at about 6 p.m. in the evening, the complainant's brother Saeed Alam in order to attend the call of nature had gone into a nearby plot where four unknown persons were sitting, with whom Saeed Alam had an exchange of hot words, which resulted into physical grappling. Meanwhile, one of the said four persons pulled out his pistol and fired upon Saeed Alam's chest, whereupon PW-16 complainant and PW-17 Asad Ali made

hue and cry, but all the four accused persons fled away from the scene and Saeed Alam succumbed to injuries. Consequently, complaint Exh.PQ was filed, which was converted into FIR No.176, dated 08.06.2014, under Section 302/34 PPC, P.S. Koral, Islamabad (Exh.PA). Consequently, PW-18 Naseer Ullah/S.I. on receiving information of occurrence reached at Polyclinic Hospital and prepared inquest report Exh.PG, received last worn clothes of deceased vide Exh.P13 to P15 comprising of grey color *Shalwar Qameez* and vest (white), which were taken into possession vide recovery memo Exh.PM. The dead body was identified by PW-16 Shabbir Alam/complainant and PW-17 Asad Ali/eyewitness through Exh.PR, whereafter the Investigating Officer visited the place of occurrence and recovered one firearm empty of .30 bore pistol through Exh.P16 and prepared recovery memo Exh.PT. He has also collected bloodstained earth through recovery memo Exh.PU and also prepared unscaled site plan of place of occurrence vide Exh.PX. The Investigating Officer transmitted the .30 bore pistol empty parcel to the Forensic Science Laboratory, Islamabad along with bloodstained earth on 27.06.2014 through Muhammad Arif/Constable. The postmortem report Exh.PH has been received by the Investigating Officer which has been placed on record, whereas PW-4 Malik Amir Shahzad/Draftsman prepared the site plan vide Exh.PB.

7. The prosecution has produced PW-9 Dr. Tanveer Afsar Malik, CMO, Polyclinic Hospital, who after conducting postmortem of the deceased has reached to the following observations.

"External Appearance:-

Dead body of middle age person, wearing light gray color Shalwar, Qameez & white banyan, soaked with blood with corresponding holes in Qameez. Eyes and mouth were closed. Body was in lax position. There was no post-mortem lividity. I observed the following injuries:-

Injuries:-

1. *Fire arm entry wound on the right side of front of chest just 3cm lateral to right side of sternum in the 4th intercostals space measuring 2cm x 1cm with no blackening and charring.*

2. *Fire-arm exit wound on the left mid axillary line in the 11th intercostals space, measuring 1x1cm with edges of the wound everted. It is 10cm inferio-lateral to the left nipple.*

Cranium and Spinal Cord.

Scalp/skull, membranes, brain were found healthy.

Thorax

Walls, ribs, cartilages were ruptured and fourth rib was fractured. Both sides of pleurae ruptured. Larynx and trachea were healthy. Right and left lung ruptured. Paricardium and heart was ruptured and clotted and un-clotted blood was present in the cavity.

Abdomen.

All organs were found healthy. Stomach & small intestine were healthy and semi digested food particles were present. Bladder was empty.

Large intestine. *Small quantity of fecal matter was present.*

Opinion:

In my opinion, deceased sustained fire-arm injury over the right side of front of chest which traversed to the left side of the chest, rupturing heart and both lungs leading to loss of their function causing death of deceased. All the injuries were ante-mortem in nature and were sufficient to cause death, in ordinary course of nature.

8. The case of the prosecution is mainly based upon the testimony of PW-16 Shabbir Alam/complainant, who narrated the entire story as referred above, but introduced the second part on 11.10.2014 i.e. after four months of incident that he had received a call from his cousin namely Asif informing him that some people had approached him in connection with murder of his deceased brother for the purpose of compromise, whereupon PW-16 Shabbir Alam/complainant had visited his cousin where Jabbar Hussain/co-accused was in company of those people who had quarreled with the deceased. The complainant stated that Jabbar Hussain/co-accused admitted his sin, pleaded for forgiveness and shown his readiness to pay compensation for the murder, but the complainant refused to enter into a compromise and on 12.10.2014 i.e. the next day, he along with PW-17 Asad Ali informed the police authorities regarding the said incident.

9. PW-16 Shabbir Alam/complainant recorded his supplementary statement to the Investigating Officer on 16.03.2015 i.e. after 09 months of the incident, whereby he nominated Amjad Zaman/appellant along with Jabbar Hussain, Faraqat Hussain and Somi Satti as accused persons, who have been identified through his personal search and inquiries from residents of street as well as through the police. Subsequently, the appellant was arrested in this case and he along with Faraqat Hussain/co-accused were identified as accused persons during the identification parade conducted in presence of PW-13 Yasir Mehmood/Magistrate in Adiala Jail on 20.03.2015, vide identification parade proceedings Exh.PM.

10. On 16.03.2015, the investigation was transferred to PW-19 Sultan Mehmood/S.I., who recorded the supplementary statement of the complainant and has arrested the appellant, who was also a proclaimed offender in case FIR No.480, dated 26.09.2012 under Section 302/34 PPC, P.S. Shahzad Town, Islamabad as well as in case FIR No.338, dated 20.08.2011, under Section 13/20/65 AO, P.S. Koral, Islamabad. During the course of investigation, the appellant made disclosure on 03.04.2015 and got recovered.30 bore pistol vide Exh.PE, regarding which a separate criminal case i.e. FIR No.129, dated 03.04.2015, under Section 13/20/65 AO, was got lodged after preparation of unscaled site plan Exh.PZ. PW-19 Sultan Mehmood/I.O. has also brought on record the identification parade, the recovery memo, and FSL report Exh.PAA and submitted the challan.

11. The entire case of the prosecution rests upon the following key points.

- a. extrajudicial confession
- b. identification parade
- c. recovery of weapon of offence
- d. Forensic Science Laboratory report of the weapon
- e. Statement of Eyewitness

12. PW-16 Shabbir Alam/complainant narrated the story in his examination in chief that after the murder of his brother Saeed Alam on 08.06.2014, he was called by his cousin regarding meeting with some persons, who wanted to discuss the issue of murder and during the said meeting, he identified one of the accused person i.e. Jabbar Hussain/co-accused, who made an extra judicial confession and asked for forgiveness. The said meeting took place on 11.10.2014 and complainant had informed the police regarding the said meeting, but surprisingly the supplementary statement of the complainant was recorded on 16.03.2015, whereby he nominated all four accused persons, including the appellant and as such, there is no logical explanation as to;

- a. Why PW-16 Shabbir Alam/complainant has not recorded his supplementary statement on the same day i.e. 11.10.2014?
- b. What are the sources through which PW-16 Shabbir Alam came to know about the names of accused persons i.e. Amjad Zaman, Rafaqat Hussain, Jabbar Hussain and Sorni Satti?
- c. Why PW-16 Shabbir Alam/complainant has not called his cousin Asif and others in whose presence Jabbar Hussain/co-accused had made an extra judicial confession?

The answer to above questions is not available and such conduct of complainant is beyond any reasonable approach, whereas the concept of extra judicial confession has to be seen in the light of principles laid down in case reported as 2019 SCMR 1994 (Wajeeh-ul-Hassan vs. The State), wherein it has been held that evidence of extra judicial confession is inherently weak and does not present a brighter picture either.

13. The second important element which has been observed from the conduct of complainant, which has been recorded in the cross examination in the following manner:

"Jabbar Hussain accused had came to my door seeking for forgiveness for his act of committing murder of my brother. Jabbar Hussain accused told

me the names of other accused persons. No one from the family of the accused persons had approached me for the compromise other than Jabbar."

14. The above referred statement further creates anomaly in the testimony of the complainant, who received the information regarding other accused person, which is based upon the statement of co-accused i.e. Jabbar Hussain, whereas such statement could not be believed as the same has been considered as maneuvered confessional statement on the part of the complainant, who could not justified such extra judicial confession on the touchstone of case reported as held 2017 SCMR 1672 (Tariq vs. The State).

15. The extra judicial confession statement is valuable for the prosecution case, but it requires corroboration from independent sources through which unrebutted strong presumption comes on record and conclusion that the statement leads to such result where no other opinion could be formulated, except the involvement of accused. However, in this case, the complainant has failed to establish that such extra judicial confession was made before him as he has not produced his cousin and other persons as witnesses in this case, therefore, the conviction could not be based upon such statement as also held in case reported as 2000 SCMR 1634 (Nasreen Akhtar vs. The State).

16. PW-16 Shabbir Alam/complainant has also acknowledged during the course of cross-examination that he identified Jabbar Hussain/co-accused on 11.10.2014 while the other two accused persons namely Amjad Zaman/appellant and Faraqat Hussain on 20.03.2015 in Adiala Jail, however he nominated the accused persons on 16.03.2015. Such conduct on the part of complainant has to be seen in the light of complainant's earlier statement whereby he acknowledged that Jabbar Hussain/co-accused has been identified by him on 11.10.2014 when his cousin Asif called him that some people came to see him in connection with murder of deceased, where Jabbar Hussain/co-accused had allegedly made an extra judicial confession and asked for forgiveness. Such aspect apparently

maligns the identification parade conducted in Adiala Jail in presence of PW-13 Yasir Mehmood/Magistrate as all the four accused persons were already known to the complainant, who himself acknowledged that he drafted the application on 16.03.2015 and attributed the roles to the accused persons, although his statement was objected to by the learned counsel for the accused persons/defence and even there is no logical explanation as to how the complainant has referred the names of accused persons which were not known to him earlier, especially when he had mentioned in his application that, *"accused Amjad made firing at my deceased brother. I do not know Amjad accused before the occurrence. We had inquired on ourselves about the names of accused persons as well as from the police and people of locality we got to know the names of accused persons."*

17. The second star witness in this case i.e. PW-17 Asad Ali, nephew of deceased, who has also narrated the entire story referred in the complaint and acknowledged that he came to know about the names of accused persons when they were arrested and he identified accused persons in the identification parade conducted on 20.03.2015. He further stated that he came to know about accused persons for the first time at the time of identification parade. PW-17 Asad Ali also stated that, *"the fire shot was made at a distance of 2/3 feet from the deceased."* However, his demeanor was recorded by the learned Trial Court during the course of evidence in the following manner:

"The demeanor of PW – hesitation to answer to each question put to him, prolonged thinking and thereafter he answered the question."

18. This aspect noted by the learned Trial Court is relevant in this case as prolonged thinking and hesitation refer certain disagreement of facts in the mind of prosecution witness, although such aspect has not been highlighted in the evidence nor comes on record, but the important element giving rise to a situation is that both the eyewitnesses have identified the accused persons in Adiala Jail despite the fact that the accused persons were already nominated, known and their whereabouts were verified by the complainant, even the

complainant had seen Jabbar Hussain/co-accused prior to the identification parade, who disclosed the names of other co-accused persons in this case. Such discrepancy could not be justified in any manner, especially when both the eyewitnesses i.e. the brother and nephew are interested and close relatives of deceased. The statement of such kind of interested witnesses could only be considered with care and caution, who otherwise became the eyewitness in this case, but they failed to establish the link of their information from any independent source, nor even they brought such source on record, which creates a doubt regarding authenticity of their information, especially the extra judicial confession made by one of the co-accused namely Jabbar Hussain, who has already been acquitted by the learned Trial Court vide the impugned judgment, regarding which no appeal has been filed by the complainant or by the State.

19. I have attended to the factum of recovery of fire-arm empty and .30 bore pistol, which were recovered on 03.04.2015 on the disclosure of the appellant from village Kadhrepar and observed that the said pistol was recovered from an open land/place kept in a shopping bag of white color said to have contained three live bullets, as referred in Exh.PE. The recovery of weapon of offence from open land/place has been considered by the apex Court in judgment reported as 2016 SCMR 1605 (Muhammad Saleem vs. Shabbir Ahmad, etc.), wherein it has been held that *"weapon used in commission of crime had allegedly been recovered from a place, which was open and accessible to all and, thus, it was unsafe to place reliance upon such recovery."* Even otherwise, the alleged incident took place on 08.06.2014 while the appellant was arrested on 18.03.2015 and was identified as accused persons during the course of identification parade conducted in Adiala Jail on 20.03.2015, whereas the recovery of weapon of offence i.e. .30 bore pistol (Exh.P11) was made on 03.04.2015, which clearly spells out that the recovery is belated and could not be believed due to the delay in this case. Reliance in this regard is placed upon 2017 SCMR 1976 (Amanat Ali vs. The State) and 2014 SCMR 1349 (Malik

Muhammad Aslam vs. The State). Whereas, such belated recovery of weapon of offence has been disbelieved by the superior Courts.

20. I have also gone through the testimony of PW-9 Dr. Tanvir Afsar Malik, who conducted autopsy of deceased Saeed Alam, whereby it has been observed that the deceased received one firearm injury having *"fire arm entry wound on the right side of front of chest just 3cm lateral to right side of sternum in the 4th intercostals space measuring 2cm x 1cm with no blackening and charring"*. Whereas, the fire-arm exit wound was said to be found *"on the left mid axillary line in the 11th intercostals space, measuring 1x1cm with edges of the wound everted. It is 10cm inferio-lateral to the left nipple."* Such opinion of PW-9 Dr. Tanvir Afsar Malik establishes two aspects i.e. *firstly*, the firearm injury has not been caused from a closed range, while PW-17 Asad Ali/eyewitness acknowledged during the course of cross-examination that *"the fire shot was made at a distance of 2/3 feet from the deceased."* This aspect clearly establishes that there is a difference of ocular and medical evidence on record and such glaring difference was not taken into account by the learned Trial Court while passing the impugned judgment. *Secondly*, the other important aspect which remained unnoticed is the line of sight of the injury as referred by the doctor in his testimony, which clearly establishes that the firearm entry wound is on the upper side of the chest, whereas the exit wound is on the lower side, which is not possible when a straight fire was made by the accused person and it contradicts the stance of eyewitness.

21. The identification parade conducted by PW-13 Yasir Mehmood/Magistrate has been brought on record through Exh.PN, however during the course of cross-examination, following discrepancies have been noticed on the part of said PW.

- a) *I cannot tell the number of persons who were present in the community hall at the time of identification parade as period of two years has elapsed.*
- b) *I do not remember the name of witness who came to identify Amjad zaman at the first.*

- c) *The accused had raised objection with regard to identification parade which were noted down by me in the proceedings.*

22. While considering the above, I have gone through the objection recorded by the appellant as well as Faraqat Hussain/co-accused in the identification parade proceedings (Exh.PN), which is as under:

"اے بعد ملزمان سے شناخت پریڈ کے بارے میں اعتراض پوچھا گیا۔ تو دونوں ملزمان نے کہا کہ ہمیں اعتراض ہے کہ گواہان نے ہمیں تھانے میں پولیس کے ہمراہ دودھ دیکھا ہے۔"

The abovementioned fact creates a suspicion upon the entire proceedings of identification parade, especially when no role has been explained by the eyewitnesses, who have identified the appellant in the identification parade, nor they have specifically stated the role of each accused person as to whether the appellant had caused the firearm injury to the deceased or otherwise, therefore, the identification parade, which is silent qua the role or where the role has not been ascribed, has no evidentiary value. Reliance is placed upon 2017 P.Cr.LJ 622 Islamabad (Jehan Ali alias Jee Khan vs. The State).

23. While considering the entire background and evidence discussed above, the entire story of the prosecution suffers from serious discrepancies as the same have been started with eyewitness account, but subsequently PW-16 Shabbir Alam/complainant i.e. the brother of deceased has introduced extra judicial confession of Jabbar Hussain/co-accused (acquitted accused) in presence of cousin Asif, however no such witness has been produced to prove the factum of recording of extra judicial confession, even the complainant has identified Jabbar Hussain/co-accused in this case at the initial stage, but he has not been nominated for quite some time and later on all four accused persons have been nominated by the complainant through supplementary statement after 08 months of alleged incident without disclosing of any source, material or information through which he came to know about involvement of all the accused persons. Similarly, the record establishes that identification parade had been conducted after having knowledge of all accused persons by their names,

even then the role of each accused person or the appellant Amjad Zaman has not been explained in the identification parade report Exh.PN. Even otherwise, both the eyewitnesses are interested and related witnesses of the deceased, whose testimonies could only be considered through care and caution. The conduct of eyewitness i.e. PW-17 Asad Ali is doubtful as he acknowledged that fire shot attributed to the appellant was made at a distance of 2/3 feet, but the testimony of PW-9 Dr. Tanvir Afsar Malik is contrary to the ocular account as fire shot made at a distance of 2/3 feet causes blackening and charring, hence the eyewitness account is not up to the mark. Moreover, the recovery of weapon of offence from the appellant is from an open space and that too has been recovered after delay of 09 months of the occurrence, such belated recovery from open space could not be relied upon for the purpose of conviction. Furthermore, the prosecution has also not set up any motive in this case, nor the eyewitnesses are able to establish any such thing on record.

24. I have also gone through the judgment of the learned Trial Court with able assistance of learned counsel for parties and observed that the learned Trial Court has ignored the basic principles of appreciation of evidence as the instant case is suffering from existence of any motive, even otherwise, on the strength of same evidence one of the co-accused namely Jabbar Hussain has been acquitted of the charge despite the fact that he was the first person introduced in this case by the complainant as source of information. All these lacunas create doubt in the instant case as nomination of accused persons has not been proved from any independent source, the identification parade is doubtful and could not be made basis of conviction, the weapon of offence recovered from an open place has no evidentiary value and its recovery is inconsequential, although the FSL report confirms the use of weapon, but the said single piece of evidence could not be made basis of conviction. Even otherwise, the extra judicial confession of Jabbar Hussain/co-accused is not believed by the learned Trial Court, therefore, the

superstructure established on his statement could not be made basis of further link of the appellant with the commission of offence, hence, at this stage doubt emerges on record and it is not safe to convict the appellant in such circumstances.

25. In view of above, the instant criminal appeal is hereby ALLOWED. The impugned judgment dated 27.03.2019, passed by learned Additional Sessions Judge (East), Islamabad, Islamabad is SET-ASIDE and Amjad Zaman/appellant is ACQUITTED of the charge in case FIR No.176, dated 08.06.2014, under Section 302/34 PPC, P.S. Koral, Islamabad. The appellant be released forthwith, if not required in any other case.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 14th April, 2020.

JUDGE

Khalid Z.