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JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No. 83 of 2016

Matloob Hussain
Vs
The State

DATE OF HEARING: 28-04-2020.

APPELLANT BY: Mr. Basharat Ullah Khan, Advocate
for appellant in Criminal Appeal No.
83/2016 and PSLA No. 04/2016 and
for respondent in Criminal Revision
No. 44/2016.

RESPONDENT BY: Mr. Talat Mehmood Zaidi, Advocate
for the complainant/respondent in
Criminal Appeal No. 83/2016 and
PSLA No. 04/2016 and for petitioner
in Criminal Revision No. 44/2016.
Mr. M. Atif Khokhar, State Counsel.
Mr. M. Ishaq Khan, S.I.

ATHAR MINALLAH, CJ.- Through this

consolidated judgment we shall decide Criminal Appeal no.
83/2016 titled "Matloob Hussain Vs. The State" as well as
PSLA no. 04/2016 titled "Matloob Hussain Vs. Muhammad
Pervaiz, etc." and Criminal Revision no. 44/2016 titled
"Muhammad Pervez Vs. Matloob Hussain, etc."

2. On conclusion of the trial, Matloob Hussain, son of Zardad Khan (hereinafter referred to as the "**Appellant**"), was convicted and sentenced by the learned trial court vide consolidated judgment, dated 29.03.2016, in the following terms:

"The accused Matoolb Hussain is thus held guilty of committing Qatal-e-Amd of Mst. Shamim Akhtar and, therefore, is convicted and sentenced as under:

1. Under Section 302-B of PPC:

Convicted and sentenced to undergo imprisonment for life.

2. Under section 544-A of Cr.P.C.

The accused is directed to pay compensation of Rs.200,000/- u/s 544-A, Cr.P.C; to the legal heirs of deceased and in case of default of payment, he shall further undergo simple imprisonment for six months.

Benefit of section 383(b) Cr.P.C extended in favour of the accused.

Lesser punishment is given keeping in view the fact that the motive has not been fully established by the prosecution and that the accused is first offender. Moreover, no prior preparations were made by the accused to commit the murder as evidence from the record."

3. In the complaint case, the alleged accused were acquitted and consequently the complaint was dismissed.

4. Pursuant to the complaint (Exh.PA) of Muhammad Pervaiz, son of Muhammad Ashraf (hereinafter referred to as the "**Complainant**"), criminal case i.e. FIR No. 10, dated 29.01.2012 (Exh.PW1/1) was registered at the Police Station Nilore, Islamabad under section 302 of the Pakistan Penal Code, 1860 (hereinafter referred to as the "**PPC**"). The Complainant had stated that on 29.01.2012, at 4.30 pm, he and his wife, namely Shamim Akhtar, daughter of Zardad Khan (hereinafter referred to as the "**Deceased**"), were plucking grass in their land/field situated in Harno Thanda Pani, Islamabad (hereinafter referred to as the "**crime scene**"). The house of the Appellant was across the street from the crime scene and the latter and the Deceased were siblings. While they were in the field, the Appellant appeared on the roof of his house and raised the proverbial "lalkara" by warning the Appellant and the Deceased to save their lives because he intended to take revenge. He was armed with a firearm weapon described as a 12 bore gun. The Complainant rushed and shielded himself against a wall while the Deceased was fatally injured because she was hit by the gun shot fired by the Appellant. It was asserted in the complaint that Gul Nawaz, son of Muhammad Maqsood (PW-3), and one Rashid, son of Aurangzeb, had witnessed the commission of the offence. Both were stated to be the Appellant's nephews and the former lived in his house. The Deceased, who was injured at the time, was rushed to the Polyclinic Hospital but she

succumbed to her injuries while being transported. It was further asserted by the Complainant that the motive for the gruesome crime was the transfer of property by the father of the Deceased in the names of his male children and that the Appellant was annoyed because the Deceased was agitating her rights.

5. Ashiq Muhammad, Inspector/SHO, Police Station Khanna, Islamabad (PW-7), who at the relevant time was posted at Police Station Nilore, Islamabad (hereinafter referred to as the **"Investigating Officer"**) reached the Polyclinic Hospital along with other officials, pursuant to receiving information. He took the complaint (Exh.PA) from the Complainant and sent it to the Police Station for registration of a criminal case. He prepared an inquest report (Exh.PG) after examining the body of the Deceased in the emergency ward of the Polyclinic Hospital. The inquest report was stated to have been witnessed by Gul Nawaz (PW-3) and one Rashid. The body of the Deceased was later shifted to the Pakistan Institute of Medical Sciences for conducting an autopsy. The Investigation Officer submitted an application for conducting the autopsy, Exh.PN. The autopsy was conducted by Dr. Nasreen Butt, MLO, PW-4 and in the postmortem report, (Exh.PF), the injuries were described as follows:

"Injury No. 1 to 3: There were three entry wounds, measuring 1x1 cm each on right

upper thigh with inverted margins. There were three exit wounds measuring 2x2 cm each in the right inguinal area with everted margins.

Injury No.4: *Entry wound right mid-thigh laterally with inverted margins. Exit wound right thigh medially.*

Injury No.5: *Entry right pubic area 1x1 cm. Exit wound supra pubic area 2x2 cm size.*

Injury No. 6. *Entry wound right side of Umbilicus 1x1. Exit wound 2x2 cm left side of umbilicus.*

Injury No. 7: *Entry wound on right side of inguinal area. Exit wound left side 4 cm above umbilicus."*

6. The dead body was handed over to the Complainant after the completion of the postmortem. The Investigating Officer visited the crime scene in the evening and prepared the un-scaled site plan, Exh.PK. He collected bloodstained earth and took the same in possession vide recovery memo Exh.PE, while no empty was found at the crime scene. On 01.02.2012, Aamir Shahzad, Draftsman (PW-6), visited the crime scene and the latter prepared and submitted the scaled site plan Exh.PJ. The Investigating Officer visited the office of the Appellant on 07.02.2012, who was subsequently arrested after his anticipatory bail was not confirmed. According to the prosecution's story, on 18.03.2012 the Appellant led police to

the recovery of the firearm weapon i.e. a 12 bore rifle from his bedroom in his house. Muhammad Hassan, Constable (PW-5), was one of the witnesses of the said recovery. When the firearm weapon was recovered, a fired cartridge was found in its chamber. The Investigating Officer took the two items in his possession vide recovery memo Exh.PL. The Investigating Officer prepared the rough site plan (Exh.PM) of the place of recovery of the firearm weapon. The firearm weapon and the cartridge were sent to the Punjab Forensic Science Agency (hereinafter referred to as the "**Laboratory**") on 18.04.2012 through Muhammad Hassan, Head Constable (PW-5). The latter had deposed that by the time he reached the Laboratory it had closed and thus the parcel could not be deposited. He visited the Laboratory the next day i.e on 19.04.2012 but the officials refused to receive the parcel by raising an objection to the effect that the 'sample of the seal' was missing. The items were, therefore, brought back to the Police Station and subsequently taken to the Laboratory again on 22.04.2012 by Muhammad Hassan, Head Constable. The Laboratory, vide its report dated 29.08.2012, (Exh.PN), confirmed that the cartridge and the firearm weapon had matched. The Chemical Examiner for Punjab, Lahore, vide report dated 23.05.2012, (Exh.PP), confirmed the blood to be that of a human. After completion of the investigations, a report under section 173 of Criminal Procedure Code, 1898 (hereinafter referred to as "**Cr.P.C**") was submitted and a charge was framed by the learned trial court on 09.06.2012.

The prosecution produced seven witnesses, while the Appellant preferred not to be examined under oath and, therefore, his statement under section 342 of the Cr.P.C. was duly recorded. After providing an opportunity of hearing to the parties, the learned trial court convicted and sentenced the Appellant in the terms which have been reproduced above. The Appellant and his relatives had attempted to record their cross version and had also invoked the jurisdiction of the learned Justice of the Peace under section 22-A of the Cr.P.C. for registration of a criminal case/recording of cross version and, when they failed to do so, then a private complaint was filed. The private complaint was dismissed vide the impugned judgment.

7. The learned counsel for the Appellant has contended that; the investigations were not conducted honestly and in a fair manner; the cross version was crucial but was deliberately ignored by the Investigating Officer malafidely; the motive could not be proved; Gul Nawaz (PW-3) had explicitly stated in his testimony that he had not met the Investigating Officer at the Polyclinic Hospital while he was shown as one of the witnesses of the inquest report prepared in the said hospital; the firearm weapon was taken to the Laboratory without the seal being intact; the prosecution was not able to prove its case beyond a reasonable doubt by placing on record unimpeachable evidence.

8. The learned counsel for the Complainant, on the other hand, has argued that; the Appellant admitted his presence at the crime scene; he has referred to the positive suggestion and reply in response thereto in the cross examination of the Complainant; the criminal case was registered promptly; substitution is a rare phenomena; the statement recorded under section 342 of the Cr.P.C. acknowledges the presence at the crime scene and thus is an admission of commission of the offence.

9. The learned State Counsel has adopted the arguments advanced by the learned counsel for the Complainant.

10. The learned counsels and the learned State Counsel have been heard and the record perused with their able assistance.

11. The Appellant and the Deceased were siblings while the Complainant was the latter's husband. According to the prosecution's case, the motive for commission of the offence was the transfer of land by the father of the Deceased to the latter's male siblings. The prosecution had definitely failed in bringing on record any cogent and reliable evidence in order to prove the stated motive. According to the prosecution the commission of the offence was witnessed by Gul Nawaz (PW-3) and one Rashid, son of Aurangzeb. The latter was given up

on the evasive ground of not being relevant. Both were nephews of the Complainant. The latter, in his deposition, had also stated that Gul Nawaz (PW-3) was living with him in his house. Gul Nawaz (PW-3) was shown as having witnessed the inquest report prepared by the Investigation Officer at the Polyclinic Hospital before shifting the body of the Deceased to the Pakistan Institute of Medical Sciences for conducting the autopsy. Gul Nawaz (PW-3), in his testimony, had unambiguously stated that he had met the Investigating Officer for the first time in the Pakistan Institute of Medical Sciences and not at the Polyclinic Hospital. The other eye witness of the ocular account, namely Rashid, was indeed most relevant because, according to the evidence, his house was situated near the crime scene but no plausible explanation was given for discarding him as a prosecution witness. The Investigating Officer had candidly conceded in his testimony that except for the Complainant, Gul Nawaz (PW-3) and one Rashid, no one had supported their story when he had visited the crime scene during the course of investigations. There is also no satisfactory explanation for refusal on the part of the Investigating Officer to consider and investigate the cross version, despite the fact that several persons had given their affidavits in support thereof. The firearm weapon and the cartridge were sent together to the Laboratory. Initially the Laboratory had not accepted the parcel because, according to the testimony of Muhammad Hassan, (PW-5), the sample of the seal was missing.

Moreover, doubts were raised regarding the recovery of the firearm weapon from the bedroom located inside the house of the Appellant because the prosecution failed to bring on record reliable and unimpeachable evidence to prove this crucial factum. The recovery was stated to have been witnessed by two witnesses but only one of them i.e. Muhammad Hassan, (PW-5) entered the witness box. In his cross-examination he stated that he had not entered the house and, therefore, he admitted that the recovery from inside the house was not witnessed by him. Gul Nawaz, (PW-3), had deposed that he was self employed and was engaged in the business of providing taxi services and that he owned a vehicle for this purpose. He was not a resident of the area surrounding the crime scene and lived at some distance. According to his testimony he was present 'by chance' when he had witnessed the commission of the offence on the fateful day. However, he did not give any justifiable explanation for his presence. The Investigating Officer, for reasons best known to him, did not obtain the information/data regarding cellular phones which may have been in the use of the eye witnesses in order to ascertain their location at the time of the commission of the offence. The Complainant had deposed that when he saw the Appellant for the first time on the roof of his house, the latter was not carrying a firearm weapon. This contradicts the assertions recorded in his written complaint, (Exh.PA), as well as the testimony of the other crucial witness i.e. Gul Nawaz, (PW 3). Moreover, it raises

doubts regarding the prosecution's story. If the Appellant was not carrying a firearm weapon and the Complainant had sufficient time to save himself by taking shelter against the wall situated across the street, then why did the Deceased not make a similar attempt. There is also no satisfactory explanation as to why the Complainant had not tried to protect the Deceased. The Investigating Officer, in his testimony, had conceded that when he had visited the Polyclinic Hospital. Other relatives of the Deceased were also present there but he preferred not to record their statements or to make inquiries. The medical evidence also does not support the ocular account nor the narration of events put forth in the prosecution's story. We are afraid that the reliance of the learned counsel for the Complainant on only a portion of the statement of the Appellant, recorded under section 342 of the Cr.P.C., is misplaced because it is settled law that such a statement is either to be discarded as a whole or accepted in its entirety. Reliance is placed on the cases titled "Wajahat Ahmed and others vs. The State and others" [2016 SCMR 2073], "Abdur Rehman alias Boota and another vs. The State and another" [2011 SCMR 34], " Muhammad Asghar vs. The State" [PLD 2008 SC 513], "Waqar Ahmed vs. Shaukat Ali and others" [2006 SCMR 1139], "Ali Ahmad and another vs. The State and others" [PLD 2020 SC 201].

12. As enunciated by the august Supreme Court in the case titled "Mst. Sugra Begum and another v. Qaiser Pervez

and others"[2015 SCMR 1142], a chance witness in legal parlance was a witness who claimed that he was present at the crime spot at the fateful time and that his presence there was a sheer chance because, in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present at the spot. The august Supreme Court has held that the testimony of a chance witness is ordinarily not accepted unless justifiable reasons can be shown to establish his presence at the crime scene at the relevant time. It has been observed that, in rare cases, the testimony of a chance witness could be relied upon, provided some convincing facts appealing to a prudent mind regarding his presence at the crime spot when the occurrence took place was put forth, otherwise the testimony would fall in the category of suspect evidence and thus not worthy of reliance. The august Supreme Court, in the case titled "Mst. Rukhsana Begum and others v. Sajjad and others" [2017 SCMR 596], has observed and held that a single reasonable doubt regarding the presence of a witness at the crime spot would be sufficient to discard the latter's testimony as a whole. Reliance is also placed on the case titled "Mst. Anar Begum v. Akhtar Hussain alias Kaka and 2 others" [2017 SCMR 1719]. The witness could not show justifiable reasons to establish his presence. The testimony of Gul Nawaz, (PW-3), cannot be relied upon because no justifiable reasons could be shown by the prosecution for his presence at the time of the commission of the offence. His deposition has already

been discussed and we have no hesitation in observing that we did not find it trustworthy for upholding the conviction of the Appellant.

13. For the stated reasons, the prosecution had definitely failed to prove its case beyond a reasonable doubt. The complainant, in the private complaint, was also not able to establish his case and thus the complaint was rightly dismissed by the learned trial court. We, therefore, allow Criminal Appeal No. 83/2016 [assailing the conviction and sentence of the Appellant] and thus the impugned judgment, dated 29.03.2016 to the extent of the conviction and sentence is set aside. Consequently Criminal Revision No. 44/2016 [seeking enhancement of conviction and sentence of the Appellant] stands dismissed. PSLA No. 04/2016 [assailing the acquittal of the acquitted accused in the private complaint] has been found to be devoid of merit and thus dismissed. The Appellant is directed to be released forthwith if not required to be incarcerated in some other case

(CHIEF JUSTICE)

(AAMER FAROOQ)
JUDGE

Announced in open Court, on 12.05.2020.

JUDGE

CHIEF JUSTICE