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

Criminal Appeal No.10549 of 2021.

**Rao Humayun Waqas Versus The State, etc.**

# JUDGMENT

DATE OF HEARING: 18.04.2024.

APPELLANT BY: Sardar Khurram Latif Khan Khosa, Advocate.

STATE BY: Mr. Ali Hassan, APG.

COMPLAINANT BY: Nemo for the complainant.

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**MUHAMMAD AMJAD RAFIQ, J:** Appellant, Rao Humayun Waqas along with Rao Amir Aqash (since acquitted) was tried by the learned Additional Sessions Judge/Judge MCTC, Lahore in case FIR No.433 dated 12.05.2013 registered under sections 302/109/34 PPC at Police Station Sabzazar, Lahore and on conclusion of trial, the learned trial Judge vide judgment dated 03.02.2021 while acquitting co-accused Rao Amir Aqash through the same judgment convicted the appellant under section 302 (b) PPC and sentenced him to imprisonment for life. The appellant was further directed to pay Rs.5,00,000/- as compensation under section 544-A Cr.PC to the legal heirs of Mustafa Ahmad (deceased), recoverable as arrears of land revenue. In case of default, the convict was to undergo further simple imprisonment for six months. Benefit of section 382-B of Cr.PC was extended to the convict/appellant. Being aggrieved with his above conviction and sentence, the appellant has filed this appeal.

2. According to the prosecution case set out in complaint Ex.PA made by Mushtaq Ahmad complainant, he was present at his shop

"*Rehman Medical Store*" along with his sons Mustafa and Nisar Ahmad, when at about 11.50 am, accused namely Rao Amir (since acquitted) and Rao Hamayoun (convict/appellant) came on Honda 125/CC Motorcycle, raised lalkara for teaching lesson for getting their father arrested by the police and both started straight firing with fire arm weapons. Mustafa got injured and fell down, whereas, Nisar Ahmad saved his life while laying on ground. Injured succumbed to injuries at the spot and the accused managed their escape.

It was alleged that on 11.05.2013 Rao Babar Ali had been arrested by the police along with firearm on whose abetment such occurrence was committed.

The complainant reported the matter to local police through a written application (Exh.PA), upon which FIR (Exh.PE) was registered. During the process, accused Rao Amir and Rao Humayun remained absconders; later were declared proclaimed offenders and to the extent of accused Rao Babar, report under section 173 Cr.PC was submitted before the learned trial court and during trial proceedings, on an application under section 265-K Cr.PC, he was acquitted of the charge vide order dated 08.01.2018.

3. It is pertinent to mention here that during interrogation, it came to light that Rao Amir and Rao Humayun had gone to Dubai, their arrest was effected through Interpol on 26.03.2018 and adopting all legal formalities, report under section 173 Cr.PC was submitted; charge was framed against them to which they pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined witnesses relating to ocular account, medical evidence, arrest & recovery of pistol, investigation

and abscondence. On close of prosecution evidence, statements of accused under Section 342 Cr.PC were recorded wherein they denied the prosecution version, however, did not opt to record statements under Section 340(2) Cr.PC Ultimately, accused/appellant was convicted and sentenced as detailed in the opening paragraph, whereas, co-accused Rao Amir was acquitted.

5. Arguments heard. Record perused.

6. In support of ocular account, Mushtaq Ahmad/ complainant and Nisar Ahmad entered appearance in the dock as PW-2 and PW-3. Mushtaq Ahmad, PW-2 in his examination in chief narrated the following story;

> "Stated that the occurrence took place at Shah Noor when the sun was about to set. My son was present in his shop. The polling was on as it was election day. My son received injury and he fell down. The persons scattered from the place of occurrence. The dispute was about the maid. The injured was shifted to hospital and he succumbed to the injuries. He received number of fire arms shots. The postmortem examination was conducted upon the deceased and we received the dead body of deceased and buried him."

Such statement clearly shows that neither he mentioned the date and time of occurrence nor nominated any accused. Name of deceased was also not spoken, nor any role was assigned to any one for committing murder. The deviancy from requirement of stating particulars of charge against the appellant was also not attempted to be justified. Such edition of statement in no case helps the prosecution to substantiate the charges against the appellant.

7. Learned Additional Prosecutor General stated that complainant was in advance age as being of 95 years, could not recollect the facts after such a long time, therefore, not mentioning the name of accused and other particulars is not fatal to the prosecution story.

8. It is observed that examination in chief of a witness is to be

conducted by the Public Prosecutor who is required to follow the pattern suggested as per international best practices so as to facilitate and assist the witness to recollect the facts. The 17th edition of a book titled ***"ADVOCACY" edited by Robert McPeake printed by Oxford University Press*** explains that *"examination in chief is the process of eliciting evidence from your own witness and is the first opportunity when the court has to assess the witness. A strong impression made at that stage will give the witness credibility and may withstand any attack in cross examination"*. The aims of conducting examination in chief is usually three-fold;

(a) to establish your case or part of it through the evidence elicited from the witness;

(b) to present the evidence so that it is clear, memorable and persuasive;

(c) to insulate the evidence, insofar as possible, from anticipated attack in cross examination.

To achieve such aim next step is the preparation which involves;

(i) selecting the order of witnesses;

(ii) selecting the order of evidence to be elicited from each witness.

It is preferable to start and finish your case with a witness who makes a strong impression. Avoid calling your first witness whose evidence is particularly vulnerable to cross examination and select which part of his evidence is to be elicited first.

9. Though prosecutor is not authorized to ask the leading question in examination in chief which is explained in Article 136 of the Qanun-e-Shahadat Order, 1984 as *"any question suggesting the answer which the person putting in wishes or expects to receive is*

*called a leading question"*; however, it is subject to some conditionalities as mentioned in Article-137 as under;

> (1) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a reexamination, except with the permission of the Court.
>
> (2) The Court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved.

First condition is objection of opposite party, if no objection is raised, leading questions can well be asked, whereas on the objection of opposite party, still there is a space to ask leading questions if the Court permits. Court has been guided through the same provision to grant permission if the question relates to matters which are introductory or undisputed or which in the opinion of Court have already been sufficiently proved.

10. Usually to avoid leading questions, prosecutors while conducting examination in chief can use technique of five Ws, which means formulating of interrogatories with **"<u>when, where, what, who, why</u>"** and for seeking wide expression can ask the witness 'to describe/explain' the fact he stated. The words may not be put into the mouth of witness rather question must be framed in a sequence as to extract the story of witness in his own words. Prosecutor is not bound to conduct the examination in chief of witness in a sequence of facts as mentioned in statements of witnesses recorded under section 161 Cr.PC rather it should be rearranged to create an impact by abandoning the unnecessary details. KEITH EVANS in his book "ADVOCACY IN COURT" (A Beginner's guide) summarized the task as follows;

> It is done by bearing in the mind the 'one line of transcript' rule, breaking the thing down into the shortest questions eliciting the shortest answers, and by analyzing out as you go along what building bricks you in fact require in order to erect the structure of evidence that you want from this witness. Broken down into the smallest pieces, every story, just about, can be drawn out of a witness without leading questions being used. But you often do have to break the narrative down very finely.

11. Preparation of witnesses is an essential task for the prosecution and it usually depends upon the status of witness as ordinary or expert, and with further segregation as child, vulnerable, infirm, incapacitated like deaf or dumb or old aged. Every sort is to be attend accordingly and prosecutor, before presenting the witness in the court, must have a meeting in order to apprise him about the Court science, like appearance style, court decorum, manners and attitude in response to questions asked by the prosecutor, defence counsel and the Court. There are many techniques to follow for conducting examination in chief of a witness. The main two techniques were discussed by this Court in a case reported as *"MUHAMMAD RAMZAN Versus The STATE and others"* **(2023 P Cr. L J 1156)** as under;

> "During examination-in-chief, two out of many techniques are most popular to be allowed to follow by the prosecution i.e. (i) signposting, and (ii) piggybacking. Signposting in fact is an indicator to alert the witness to a particular part of his testimony e.g., telling the witness that now some questions would be asked about his status/work or questions about his relation with other witnesses and so on; this bit-by-bit examination helps the witness to recollect the facts clearly and it is permissible as per international best practices. Piggybacking is a form of question arranged with the part of answer given by the witness while using it as prefix to next question, e.g., if a witness replied that accused made a fire shot which hit the deceased; then by using technique of piggybacking, next question can be framed like; "when the fire hit the deceased, how did he react or what happened to him". This technique also helps to produce a conjunction in or symmetry to evidence. It is the domain of the court to control question which a party wants to ask as per Article 143 of QSO, 1984; therefore, court should remain vigilant while attending such questions and decide its relevancy or admissibility then and there; if a question is asked without reasonable ground, then court can take proper action as required under Articles 144, 145 and 146 of QSO, 1984."

12. Apart from technique of signposting and piggybacking for conducting examination in chief of a witness, there are in place certain other suitable and practiced rules in every nook and corner of the world in the Courts. In terms of 'Form of questions', guidelines are as under;

> (i) Do not lead (ii) Avoid wide question and ask focused/specific/targeted questions (iii) Avoid long question and ask short, simple questions (iv) Avoid compound questions and ask one question at a time (v) one point at a time (vi) Have a dialogue and ensure the questions follow on (vii) establish facts not conclusions (viii) Avoid comment, build to a point.

For sequence or structure of questions, following rules are followed;

> (i) Help the witness to tell the story (ii) paint a picture (iii) Help the Court to follow (iv) use the exhibits and photos (v) use of plans (vi) avoid irrelevancies (vii) listen to the answers (viii) avoid quick fire questions (ix) avoid interrupting (x) use piggybacking as cited above.

To have a control on the witness, techniques are as follows;

> (i) Ask precise question (ii) know your material (iii) demonstrate clear direction (iv) know where you are going (v) plan transition or alternate questions

13. In the present case, prosecution has not attempted to elicit the necessary facts from the mouth of complainant by using any of above techniques, therefore, prosecution case is bereft of material necessary to substantiate the charge. Learned Additional Prosecutor General however, states that Nisar (PW-3) has deposed in support of prosecution version and statement of single witness is sufficient to substantiate the charge. There is no cavil to the proposition that conviction can be recorded on the testimony of a single witness but it is only in a situation when there is only one witness available at the place of occurrence but when prosecution claims more witnesses at the crime scene, then disbelieving the testimony of one or two in

contrast to others, squarely helps the prosecution to stay and build their abode on the testimony of single witness because in that eventuality absence of corroboration stems so strong to fail the prosecution case easily in terms of nonavailability of proof beyond reasonable doubt while casting a serious doubt on that single testimony. However, it has been observed that Nisar Ahmad (PW-3) when entered appearance has entirely changed the complexion of prosecution case by stating that though Rao Humayun and Rao Amir came at the place of occurrence yet Rao Humayun was holding two pistols in his hand but he did not state anything about firing made separately by Rao Humayun or Rao Amir rather in a slipshod manner stated that accused persons came to the shop on motorcycle and after firing made their escape good from the place of occurrence, though a little touch was given in terms that they fired upon his real brother who was sitting on the chair. Such narration is so complex and based on compound impression as not to accept it a clear story with safe and sound effect that the accused/appellant is responsible for qatl-a-amd of Mustafa Ahmad deceased, particularly when co-accused with similar role stood acquitted on the same set of evidence. Thus, there is no credible evidence available to substantiate the charge against the appellant in terms of ocular account.

14. The above narration of PWs indicates that they were not present at the place of occurrence and this fact further gets strengthen from delayed postmortem examination which was conducted on next day i.e., 13.05.2013 with a delay of 22 hours. Though PW-12, Dr. Riasat Ali, Demonstrator Forensic Medicine & Toxicology, King Edward Medical University, Lahore has observed that deceased

sustained seven entry wounds with some exits on different parts of his body but it is trite that medical evidence being confirmatory in nature does not indicate the man responsible for causing such injures.

15. The recovery of pistol 9-mm is not helpful to the prosecution in the sense that it did not match with the spent shells collected from the spot. Thus, recovery is totally inconsequential losing its corroborative effect in this case.

16. So far as the question that accused/appellant remained absconder, there is plethora of authorities of superior Courts on this point that mere abscondence of accused is not a conclusive proof of the guilt of the accused. The value of abscondence depends upon the fact of each case and abscondence alone cannot take the place of guilt unless and until the case is otherwise proved on the basis of cogent and reliable evidence, therefore, in view of the dictum handed down in "*RAHIMULLAH JAN Versus KASHIF and another*" (**PLD 2008 SC 298**) mere abscondence would not be taken as a conclusive proof of guilt of accused. If any other authority in respect of abscondence is needed, reliance can also be placed upon "*ZALEY MIR versus THE STATE*" (**1999 AC 564**) printed by NLR publication, wherein abscondence of four years of the accused was not taken as a ground for conviction of the accused and accordingly the conviction was set-aside.

17. It is trite that when substantive evidence fails, investigation or other material hardly supply want of evidence and it cannot be looked into for the purpose of stretching anything favourable to the

prosecution except one in the form of digital or forensic evidence, which is not available in this case.

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

**(MUHAMMAD AMJAD RAFIQ)**
**JUDGE**

**Approved for reporting**

**Judge**

**Signed on 26.04.2024.**

*Gulzar**