

Murder Reference No.223 of 2019

Criminal Appeal No.44377 of 2019

P.S.L.A.No.55094 of 2019

Criminal Rev.No.55096 of 2019

SADAQAT ALI KHAN, J. Umer Draz, Abdul Ghafar, Abdul Hafeez and Muhammad Shoukat (**appellants**) along with Muhammad Khan, Ghulam Muhammad, Abdul Hameed, Muhammad Sharif, Tariq Aziz and Abdul Rasheed (**co-accused since acquitted**) have been tried by trial Court in private complaint under sections 302/324/148/149 PPC arising out of case FIR No.97 Dated 16.05.2015 P.S. Wan Bhachran, District Mianwali, and were convicted and sentenced vide judgement dated 26.06.2019 as under:-

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**Umer Draz, Abdul Ghafar, Abdul Hafeez and
Muhammad Shoukat (appellants)**

u/s 302 (b) PPC	Sentenced to Death as 'Ta'zir' each on four counts for the murders of Muhammad Ashraf, Muhammad Asghar, Muhammad Zaman and Sher Abbas along with compensation of Rs.200,000/- (recoverable as arrears of land revenue) each u/s 544-A Cr.P.C. to the legal heirs of each deceased and in default thereof to further undergo 6-months S.I. on each count.
u/s 148 PPC	Sentenced to 3-years R.I. each for commission of offence of rioting

Sentences of the appellants were ordered to be run concurrently with benefit of section 382-B Cr.P.

2. Appellants have filed this Criminal Appeal against their convictions, complainant filed CrI.P.S.L.A against acquittal of respondents/co-accused (**discussed above**) and CrI.Rev. for enhancement of compensation whereas trial Court has sent Murder Reference for confirmation of death sentence of Umer Draz, Abdul Ghafar, Abdul Hafeez and Muhammad Shoukat (**appellants**) or otherwise, which are being decided through this single judgment.

3. Brief facts of the case have been stated by the complainant Rahtas Khan^{PW13} in his statement before the learned trial Court, which is hereby reproduced as under for narration of the facts:-

“Stated that I am resident of Muzaffarpur Janoobi, Tehsil & District Mianwali. On 16-05-2015 I alongwith Ameer Ahmad, Farhat Ullah were present at my dera, where I received mobile phone call at about 01:45 pm called by Muhammad Ashraf and Mohammad Zaman that our dala loaded by wood stuck near the dera Kalluanwala and asked for our help. On that account I alongwith Ameer Ahmad, Farhatullah on one motorcycle while Muhammad Asghar and Sher Abbas on other motorcycle reached there at about 02:15 pm where accused Umar Daraz, Abdul Ghafar armed with repeaters, Muhammad Khan, Ghulam Muhammad both armed with Kalashnikov, Waheed, Hafeez both armed with Kalashnikovs, Hameed, Abdul Rasheed both armed with Gun 12-bore, Abdul Lateef (since dead) armed with rifle 44-bore, Shareef armed with pistol 30bore, Shoukat armed with pistol 30bore and Tariq armed with pistol 30-bore, came there and Abdul Ghafar and others raised Lalkara that they are here to teach lesson for striping off the cloths of Abdul Lateef. Then Abdul Ghafar made fire with his repeater hitting Muhammad Ashraf on his chin, Umar Daraz fired at

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Muhammad Asghar hitting his chin. In retaliation Muhammad Zaman made a burst fire towards Abdul Lateef, Umar Daraz, Shoukat, Abdul Waheed and Muhammad Hafeez. All the other accused persons made indiscriminate firing hitting Muhammad Ashraf, Asghar, Muhammad Zaman and Sher Abbas on different parts of their bodies. The above stated accused persons also made firing upon us but while laying on ground we saved our lives. All the above stated accused persons managed their escape good towards their houses while saying that they had taken revenge for striping off the cloths of Abdul Lateef. We managed Muhammad Ashraf, Asghar, Zaman and Sher Abbas in injured condition but Ashraf, Asghar and Zaman succumbed to the injuries at the spot while Sher Abbas was shifted to the DHQ Hospital Mianwali in injured condition. I alongwith Farhatullah, Ameer Ahmad P.Ws witnessed the occurrence. I was proceeding to Police Station Wan Bhachran while in the way at Chor-wala I met Abdul Ghafoor S.I who recorded my statement Ex.P-X by my signatures which was read over to me. My signatures are Ex.PX/1.

The motive behind the occurrence is that the clothes of Abdul Lateef (deceased) were stripped off by Muhammad Asghar (deceased) and Muhammad Ashraf (deceased) due to that revenge accused persons above stated have committed this occurrence.”

4. Heard. Record. Perused.

5. It is the case of two versions. The duty of a Court in such like cases is to review entire evidence and circumstances at the close, before arriving at a conclusion regarding the truth or falsity of the defence plea. All factors favouring belief in accusation must be placed in juxta position to the corresponding factors favouring the plea in defence. It is worth mentioning that prosecution case and defence plea are considered in juxta position with each other to determine that which story is plausible and near to truth. However, it is not ignored that basic duty of the prosecution to prove its own case beyond shadow of doubt against an accused. If prosecution is failed to prove its case beyond shadow of doubt against an accused then there is no need to consider prosecution case and defence plea in juxta position with each other rather an accused is to be acquitted even if he had taken a plea and had

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thereby admitted killing the deceased. It is also settled by now that if an accused declines to be examined on oath as his own defence witness, this does not leave it open to presume that he is guilty because it is the duty of only and only the prosecution to prove its case against the accused beyond shadow of doubt and that burden is not reduced by not appearing an accused as his own witness under section 340(2) Cr.P.C. to prove his defence plea. In these circumstances firstly, we take up the case of prosecution to consider as to whether it has proved its case beyond any shadow of doubt against the appellants or not.

6. In present case, from one side Muhammad Ashraf, Muhammad Asghar, Muhammad Zaman were done to death and Sher Abbas sustained firearm injuries but later on he also succumbed to the injuries. During life time of Sher Abbas (**deceased**), the then injured, his dying declaration was not recorded. Muhammad Zaman and Sher Abbas (**deceased**) had no relation inter-se as well as with Muhammad Ashraf and Muhammad Asghar (**deceased**) who were real brothers inter-se. Rahtas Khan/complainant^{PW13} being paternal uncle of Muhammad Ashraf and Muhammad Asghar (**deceased**) got lodged FIR No.97 on 16.05.2015 at 3.50 p.m. against the appellants and other co-accused (**since acquitted mentioned above**) regarding the occurrence took place on the same day (**16.05.2015**) at 02.15 p.m., who (**Rahtas Khan/complainant^{PW13}**) and Farhat Ullah Khan^{PW14} claim themselves to be the eye-witnesses of the occurrence.

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7. On the other side, Abdul Latif was done to death, whereas Abdul Waheed (**died before recording of his statement before the trial Court**), Muhammad Shaukat, Abdul Hafeez and Umar Daraz (**appellants**) also sustained firearm injuries during the same occurrence for which cross-version/separate FIR No.98 Dated 16.05.2015 u/ss 302/324/148/149 PPC P.S Wan Bhachran, District Mianwali was got lodged on the statement of Abdul Sattar (**father of Umer Draz and Abdul Ghaffar, appellants**) against Muhammad Rahtas (**complainant of instant FIR i.e.97/2015**), Arshad Khan, Akram Khan, Muhammad Aslam Khan, Khalas Khan, Muhammad Farooq and Ghulam Abbas @ Gaman (**Ghulam Muhammad**), who have been acquitted by the trial Court through separate judgment dated 26.06.2019. Appellants were the injured eye-witnesses in support of their cross-version who have been disbelieved by the trial Court against Rahatas Khan/complainant^{PW13} and Farhat Ullah ^{PW14} (**who have not received any injury during the occurrence**) and have been disbelieved to the extent of co-accused having effective role of firing on the persons of all four deceased.

8. Time, date, month, and year of occurrence are not disputed. Place of occurrence is Kacha path near the Dera of the appellants which is also not denied, where the complainant party of the present case had apparently no business as Muhammad Ashraf and Muhammad Zaman (**deceased**) could go through the different route leading to their houses and selecting a “Kacha” path in question near the Dera of appellants and summoning of the other

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deceased (**Muhammad Asghar and Sher Abbas**) alongwith Rahtas Khan/complainant^{PW13} and Farhat Ullah Khan^{PW14} with the plea that they need their help as their “Dala” loaded with wood had stuck off near Dera of the appellants is neither plausible nor believable. Abdul Ghafoor SI/CW-6 stated in his cross examination that he had not mentioned in site plan of the place of occurrence that Dala was stuck off at point No.14 because complainant and witnesses of case F.I.R. No.97/2015 had not pointed out the same. He had not found helping machinery such as tractor etc. at the place of occurrence to remove Dala from there. He admitted in his cross-examination that complainant, witnesses and deceased of case F.I.R.No.97/2015 were having no landed property around or in the close vicinity of the place of occurrence. He had found heavy arms and ammunition including drum-magazines from near the dead bodies of deceased persons of case F.I.R.No.97. He had collected numerous crime empties from the place of occurrence of deceased of case F.I.R. No. 97. All these facts suggest that occurrence had not taken place in the manner alleged by the prosecution.

9. Fazal Karim SI/CW-4 admitted in his cross examination that previous I.Os. had deferred the arrest of the accused and he did the same in view of their versions. It is not denied that appellants along with Abdul Waheed (since dead) and Lateef deceased sustained fire arm injuries during the occurrence rather it is mentioned in the FIR of the present complainant with one difference that

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Muhammad Zaman one of the deceased of this case caused firearm injuries with Kalashnikov on their persons which version is not believable.

10. The trial Court itself has specifically observed in para-10 of the impugned judgment that “The Court has no hesitation to conclude that both the parties have not come up with whole truth and they have distorted some facts about the unfortunate occurrence and the actual incident which resulted in the occurrence”. It is further observed that “it can also be concluded that neither the complainant party came there with specific motive after preparing itself to launch the attack nor the complainant party would have made any such efforts but in view of the already existing tense relations between them, the occurrence took place and the presence of weapons with both the parties is natural”. It is also observed in para-15 of the judgment “There appears to be a strong probability that both the parties have exaggerated about the numbers of the actual participants from both sides in the occurrence. The evidence of the prosecution from both sides reveal that parties were inimical and in that perspective the probability that parties have thrown wider net to involve the maximum number of persons from both sides cannot be ruled out. It is observed that all Investigation Officers i.e. CW-1 to CW-6 have found no incriminating material against accused persons Muhammad Khan, Ghulam Muhammad, Abdul Hameed, Muhammad Sharif, Abdul Ghafar, Tariq Aziz and Abdul Rasheed and they have also verified their pleas of alibi”. In last learned trial Court in

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para 20 of the impugned judgment has also observed that “In view of above discussion, it is held that prosecution has failed to prove the charge against accused persons Muhammad Khan, Ghulam Muhammad, Abdul Hameed, Muhammad Sharif, Tariq Aziz and Abdul Rasheed beyond the shadow of reasonable doubt and they are hereby acquitted from the charge by extending the benefit of doubt”. In presence of above discussed observations of the trial Court, the appellants could not have been convicted while acquitting their co-accused with similar role by disbelieving complainant Rahtas Khan^{PW-13} and Farhat Ullah Khan^{PW-14}.

11. Dr. Anayt Ullah,^{PW-5} during post mortem examination on the dead body of Muhammad Ashraf alias Achhu observed firearm entry wound on left side of his chin (**Injury 1**), on his left ear (**Injury 3**), a firearm re-entry wound on front of his right shoulder (**Injury 5**) and stated in his cross examination that injury 5 mentioned above was the re-entry wound of injury 1. The Medical Officer during post mortem examination on the dead body of Muhammad Zaman deceased observed single firearm entry wound on back of his scalp (**jointly attributed to appellants and their co-accused, seven in number since acquitted**). Likewise, Medical Officer during post mortem examination on the dead body of Muhammad Asghar observed single firearm entry wound on his chin. Medical Officer also observed single firearm entry wound on the skull of Sher Abbas deceased (**jointly attributed to appellants and their co-accused since acquitted**) mentioned above. Above discussed injuries on the persons of all the deceased

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also negate the story of prosecution that ten accused made joint effective firing on their persons.

12. Abdul Ghafar (**appellant**), Tariq Aziz, Abdul Hameed, Abdul Rasheed, Muhammad Sharif, Muhammad Khan and Ghulam Muhammad (**co-accused**) have also been attributed role of firing on the persons of all the four deceased i.e. Muhammad Ashraf, Muhammad Asghar, Muhammad Zaman and Sher Abbas (**well mentioned in the FIR**) but these accused have been found not involved in the occurrence during investigation as stated by Fazal Karim/S.I.^{CW4} in his cross-examination and except Abdul Ghafar (**appellant**), the others accused mentioned above have been acquitted by the trial Court through the impugned judgment. (**2019 SCMR 1978** “Safdar Mehmood and others Vs. Tanvir Hussain and others”).

13. Statedly, Rahtas Khan/complainant^{PW13} and Farhat Ullah Khan^{PW14} (**alleged eye-witnesses of the occurrence**) reached the place of occurrence and saw the occurrence after receiving telephonic call made by Muhammad Ashraf and Muhammad Zaman (**deceased**) at 1.45 p.m. on 16.05.2015 when they were sitting at the Dera of Rahtas Khan/complainant ^{PW13} but call data in this respect has not been produced to establish this fact. They are residents of Muzafar Pur Janobi and village Gulmeeri respectively and are not residents of Kalluwanwala where the occurrence took place. They also did not receive any injury during the occurrence despite cross firing claimed by them in their story/statements which is neither plausible nor believable and have already been

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disbelieved by the trial Court to the extent of co-accused (**since acquitted**).

14. Nothing was recovered on pointing out of Abdul Ghafar (**appellant**). Recovery of 30-bore pistol, Kalashnikov and 12-bore gun on pointing out of Muhammad Shoukat, Abdul Hafeez and Umar Draz (**appellants**), respectively in absence of positive report of PFSA regarding matching of crime empties with weapons of offence is inconsequential. It is important to note here that on the other hand report of Punjab Forensic Science Agency placed at page 108 of the paper book of M.R.No.223 of 2019 Part-I shows that pistol (P1) recovered from near dead body of Muhammad Ashraf deceased has matched with crime empties i.e. C3, C5, and C6 collected from place of occurrence, pistol 30-bore (P2) recovered from near dead body of Muhammad Asghar deceased has matched with crime empties C1, C2 and C3 collected from the place of occurrence and rifle (R1) recovered from near dead body of Muhammad Zaman deceased has matched with crime empties C8, C10, C11, C13, C16 and C23 to C33 collected from place of occurrence and disbelieves the version of present complainant.

15. We are mindful that murder of four persons is a crime of heinous nature but it is also in our mind that in the same occurrence appellants along with Abdul Latif (**deceased**) and Abdul Waheed (**since dead**) also sustained firearm injuries statedly at the hands of complainant party. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions.

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Gruesome, heinous and brutal nature of the offence may be relevant at the stage of awarding suitable punishment for conviction but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused persons as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against an accused beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence which is missing in the present case. **(PLD 2021 SC 600 “Naveed Asghar and 2 others Vs. The State”).**

16. Considering above, we are of the view that prosecution has failed to prove the case with its version, so there is no need to discuss the version of the appellants. As law is settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. **(2013 SCMR 383 “Azhar Iqbal vs. The State”).**

17. In view of the above discussion, we entertain serious doubt in our mind regarding participation of Umer Draz, Abdul Ghafar, Abdul Hafeez and Muhammad Shoukat (**appellants**) as well as co-accused since acquitted. It is settled principle of law that for giving benefit of doubt, it is not necessary

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that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in the prudent mind about the guilt of the accused, then he would be entitled to its benefit not as a matter of grace or concession, but as of right.

18. For the foregoing reasons, this appeal is allowed, convictions and sentences of Umer Draz, Abdul Ghafar, Abdul Hafeez and Muhammad Shoukat (**appellants**) awarded by trial Court through impugned judgment are hereby set-aside. They are acquitted of the charges and directed to be released forthwith, if not required in any other case. Murder Reference is answered in **NEGATIVE** and death sentences of Umer Draz, Abdul Ghafar, Abdul Hafeez and Muhammad Shoukat (**appellants**) on all counts are **NOT CONFIRMED.**

19. In view of above decision, PSLA filed by the complainant against acquittal of respondents/ accused having no merits is dismissed whereas Criminal Revision filed by him for enhancement of compensation having become infructuous is disposed of.

(Mirza Viqas Rauf)
Judge

(SADAQAT ALI KHAN)
Judge

Approved for Reporting

Judge

Judge