Form No: HCJD/C-121

JUDGMENT SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Criminal Appeal No. 88-J of 2015
(Muhammad Umar vs. The State & 2 others)

J U D G M E N T

Date of Hearing: 17.08.2021
Appellant by: Mr. James Joseph Advocate
State by: Mr. Ansar Yasin Deputy Prosecutor General for the State

Sohail Nasir, J. Muhammad Umar ***(appellant)*** along with Muhammad Mushtaq and Abdul Razzaq were trialed in case FIR No.140 ***(PA)*** recorded on 02.05.2012 under Sections 302/34 PPC at Police Station Sahuka Tehsil Burewala District Vehari on the complaint of Tanvir Ahmad (***Pw-5***) for the allegations of commission of *Qatal-e-Amd* of Abdul Sattar (father of complainant). On conclusion of trial vide a judgment dated 31.03.2015 passed by the learned Additional Sessions Judge Burewala, appellant was convicted under Section 302-B PPC and sentenced to undergo life imprisonment as *Tazir*. He was ordered to pay Rs.200000/- *(two lacs)* as compensation to the legal heirs of deceased in terms of Section 544-A Cr.P.C and to undergo six months SI in case of non-payment thereof. Benefit of Section 382-B Cr.P.C was extended to him. By way of same judgment Muhammad Mushtaq and Abdul Razzaq were acquitted on the basis of compromise with legal heirs of deceased.

2. Being dissatisfied from his conviction, appellant has assailed the judgment of learned trial Court through the instant criminal appeal.

3. Facts of the case are that on 02.05.2012 upon receipt of information of the occurrence Javed Ahmad SI (***Pw-11***) arrived at place of occurrence in Chak No.309, where Tanvir Ahmad (***Pw-5***) made a statement (***PC***) where he maintained that his sister Nasreen Bibi was married with Muhammad Umar (***appellant***); for the last two months she was residing with them because of hostile relations with her husband; the appellant by giving threats used to force them to send Nasreen Bibi with him; he/complainant and his father got him realized many a times and asked that he should send his parents for this purpose, but appellant did not agree on it; on the day of occurrence (***02.05.2012***) at about 05:30 pm he/complainant, his father Abdul Sattar, uncle Ghulam Rasool (***Pw-6***) and his brother Imran while sitting in the house were busy in conversation; at that occasion Muhammad Umar, Abdul Razzaq and Mushtaq armed with Pistols came there on a motorbike No.VRO-8557; when Abdul Sattar asked from appellant for reason to come there, he made a fire that hit on the left side of chest of Abdul Sattar who being injured fell down and died at the spot, whereas all accused escaped from crime scene.

4. Appellant was arrested on 17.06.2012 and from his possession a Pistol 30-bore was also recovered.

5. On conclusion of investigation report under Section 173 Cr.P.C ***(Challan)*** was submitted in Court.

6. A charge under Sections 302/452/34 PPC was framed against appellant and his co-accused for which they pleaded not guilty and demanded their trial.

7. In support of its case prosecution had produced Ghulam Abbas HC/author of FIR (***Pw-1***), Muhammad Nawaz Constable/parcels depositor (***Pw-2***), Muhammad Arshad who identified the dead body (***Pw-3***), Zafar Iqbal HC/Moharrar (***Pw-4***), Tanvir Ahmad/complainant (***Pw-5***), Ghulam Rasool/eye witness (***Pw-6***), Dr. Muhammad Fayyaz (***Pw-7***), Naseem Ahmad Constable who escorted the dead body for postmortem examination (***Pw-8***), Atique-ur-Rehman Patwari who prepared scaled site plan (***Pw-9***), Muhammad Riaz Constable witness of arrest of appellant (***Pw-10***) and Javaid Ahmad SI/I.O (***Pw-11***).

8. After the prosecution's evidence was closed, appellant and his co-accused were called for their examination under Section 342 Cr.P.C. To the question that why this case was against him and why witnesses deposed against him, version of appellant was as under: -

> *"I being the son-in-law of Abdul Sattar deceased and brother-in-law of complainant has been implicated in this case falsely after consultation and deliberation. I cannot think even to kill my father in law. The lame excuse of my strained relations with Nasreen Bibi my wife has been pretended just to implicate me in this case by the complainant and the PW. Both the PWs (**Pw-5 & Pw-6**) are interested witnesses being closely related inter-se. They have also made an excuse of awarding threats to them on telephone by me but it is without substance and merits and neither my cell number nor their cell numbers have been narrated in the ExP-C/ExP-A or the same has been mentioned in the depositions in ocular account (**Pw-5 & Pw-6**). I have been made an escape goat because the murderer of my father-in-law was not traceable who was killed by some unknown assailants and the PWs were not eye witnesses who were imported to be as such by Javed SI after mediation and consolation. The statements*

> *of both the PWs in ocular account are rife with contradictions and improvements regarding their sitting on the costs viz-a-viz sitting of Abdul Sattar deceased. The investigation was also conducted by the I.O in a dishonest manner just to implicate me in the case at the instance of the complainant party"*

9. Appellant did not opt to produce defence evidence, however he made the statement on oath in terms of Section 340(2) Cr.P.C where he maintained that he was present in his house when he came to know that his father-in-law had died; he was falsely involved in this case; pistol was also planted on him and that he was ready to take special oath regarding his innocence on Holy Book.

10. Learned counsel for appellant contended that this is the duty of prosecution to prove its case beyond reasonable doubt and for that it cannot take any benefit from weakness of defence; the benefit of doubt in all circumstances has to be extended in favour of accused who is the favorite child of law; both eye witnesses are close relatives of deceased, therefore, their credibility is under uncertainty; the recovery of pistol and story of motive has already been disbelieved by the learned trial Court, whereas the ocular account is not supported from other medical evidence; statements of two eye witnesses do not inspire confidence, therefore, cannot be relied upon; after the occurrence none from complainant's side informed the police which indicates that none of them was present there and they came forward later on with a false story; there was no justification or reason for appellant to commit the *Qatal-e-Amd* of Abdul Sattar who was the father of his wife. He finally maintained that as prosecution has badly failed

to prove its case beyond reasonable doubt, therefore, appellant deserves for acquittal.

11. On the other hand, learned DPG for the State maintained that this is a case of absence of enmity, therefore, question of false involvement does not arise; occurrence took place in the day light inside the house of complainant so question of misidentification does not arise; mere this fact that the eye witnesses are inter se related shall not discredit their testimony who with quite consistency narrated the manners of occurrence and defence was not able to shatter their confidence in cross examination; it is a case of promptly lodged FIR, hence question of manipulation or consultation does not arise. He finally argued that the learned trial Court on the basis of qualitative evidence has rightly convicted the appellant.

12. This Appeal was admitted to regular hearing on 17.07.2021. On 17.01.2018 when it was fixed first time for hearing, Tanveer Ahmad/Complainant appeared and on his request that he wanted to engage an Advocate, it was adjourned. On 27.03.2018, 08.04.2019 and 23.09.2019 the Appeal was repeatedly fixed for hearing but no one from complainant side came forward. On the next dates those were 08.10.2019, 12.11.2019 and 10.02.2020 follow up notices *(Pervi)* was issued to complainant, but of no consequence. Thereafter, on many dates this appeal came for hearing and every time complainant was absent. Many of the follow up notices issued show that complainant was served in person or through his brother. However reports reveal that he has gone to Saudi Arabia. It means that complainant has no interest in this appeal.

13. HEARD

14. The learned Trial Court has disbelieved the story of motive and recovery of pistol from the possession of appellant, but convicted him while relying on ocular account and medical evidence.

15. Much stress has been made by the learned DPG on the argument that as it is a case of promptly lodged FIR, therefore, possibility of false involvement of appellant is out of question. I cannot hold so for the reasons that promptitude in FIR is not enough, if on the basis of judicial scrutiny of the evidence on record it is found that prosecution is failed to prove its case beyond reasonable doubt. It is also not a guarantee that in timely recorded FIR, involvement of an innocent person is not possible.

16. With regard to ocular account prosecution's story is revolving around the statements of Tanveer Ahmad/complainant ***(Pw-5)*** who is the son of deceased and Ghulam Rasool ***(Pw-6)*** the real uncle *(Mamoo)* of complainant.

17. Dr. Muhammad Fayyaz ***(Pw-7)*** had conducted the post-mortem examination of Abdul Sattar ***(deceased)*** and found two injuries on his body those were as under: -

1. *An abraded collar of firearm wound measuring 1x1 cm present at left side of front of chest, just below the nipple with inverted margins,* ***blackening and burning*** *was present. Relevant hole was present in Qameez and Bunyan (Entry wound).*
2. *A lacerated collar of firm arm wound present at right side of low back (right renal area position) measuring 3cm x 2½cm with everted margins. Relevant holes were present in Qameez and Bunyan (exit wound).*

(Emphasized)

18. In cross-examination Dr. Muhammad Fayyaz admitted that blackening is caused as a result of fire shot when the victim is at a three feet distance from the assailant.

19. Tanveer Ahmad ***(Pw-5)*** facing the challenge of cross-questioning categorically replied that *"the distance between my father and assailant was 2½ Karams when my father received the fire shot"*. Admittedly 2½ Karams mean fourteen feet. In scaled site plan ***(PJ)*** the distance between deceased and appellant has been mentioned as 3 Karams at the time of firing, which is not disputed as 16.5 feet. In this view of the matter there is a serious contrast in medical and ocular account of this case.

20. On the question of conflict in medical evidence and statements of eye witness, the apex Court in ***Barkat Ali's case***[1] was pleased to hold as under: -

> *"It is an admitted fact that eye witnesses had stated that the deceased was hit by the respondents at about 30-35 feet whereas according to the medical report, there was burning and blackening and is evident from the statement of PW.2, therefore, ocular account furnished by the two eye witnesses in not in consonance with the medical evidence which clearly contradicts the statements of the eye witnesses. It is a settled law that blackening appears on the dead body in case the deceased has received injuries at a distance of 4 feet according to medical jurisprudence by Modi. It is a settled law that oral evidence cannot be accepted to the extent of its inconsistency with the medical evidence. See Mardan Ali's case 1980 SCMR 889, Bagh Ali's case 1983 SCMR 1292, Sain Dad's case 1972 SCMR 74 and Zardshad case 1969 SCMR 644"*

[1] Barkat Ali VS Muhammad Asif & Others 2007 SCMR 1812

21. The Honorable Supreme Court of Pakistan again in ***Amin Ali's case***[2] while observing similar inconsistency, was pleased to rule as follows: -

> *"The medical officer found one entry wound on her back with blackening, whereas PWs 13, 14 and 15 deposed that the fire shot was fired from the roof of the shop. Entry wound with blackening marks cannot be caused from such a long distance. From the above position, it is manifest that ocular testimony is in conflict with the medical evidence. Thus, the deceased and injured did not receive the injuries in the manner as alleged by the prosecution"*

22. In an identical proposition the Honourable Supreme Court of Pakistan in ***Muhammad Zaman's case***[3] was pleased to declare that: -

> *"Let us assume that FIR, whose maker passed away before his examination in the Court cannot be looked into for any purpose yet the prosecution versions neither rings true nor inspire confidence when a fire arm entry wound found on the person of PW No. 5 caused by a shot fired from a distance of 13 feet was accompanied by blackening which is not possible beyond 3 feet. Especially when it has never been the case of the PW that any of the assailants fired at him from a close or contact range. In Modi's Medical Jurisprudence and Toxicology (21st Edition), at page 354, it has been held that "Blackening is found, if a firearm like shotgun is discharged from a distance of not more than 3 feet"*

23. The same proposition was taken into account in its recent judgment by the Honourable Supreme Court of Pakistan in ***Muhammad Mehboob's case***[4] and it was observed that: -

> *"Two .12 caliber shot guns, one produced by the complainant and the second recovered pursuant to a disclosure, spell out*

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[2] Amin Ali & Another VS The State 2011 SCMR
[3] Muhammad Zaman VS The State & Others 2014 SCMR 749
[4] Muhammad Mehboob VS The State 2021 SCMR 366

> *a confrontation in close blank proximity; on the contrary, in scaled site plan (Ex. PE/2), inter se distance between the appellant and the deceased is shown as 9-1/2 Karams, a scenario that does not accommodate autopsy findings of burning surrounding each wound"*

24. Dr. Muhammad Fayyaz ***(Pw-7)***, in cross-examination, further replied that *"it is correct that the bullet passed through the body from upward to down"*. This obviously indicates that the assailant was on a higher level than the deceased. Tanveer Ahmad ***(Pw-5)*** when questioned in the process of cross-examination, he responded that: -

> *"The accused when entered in the house accused Umer was leading them the gate from which the accused entered in the house was towards south from my father. My father got up from the cot and went towards the accused. The distance between my father and assailant was 2½ Karams when my father received the fire shot"*

25. So the transparent position is that it is a case of straight fire by appellant to Abdul Sattar ***(deceased)***) therefore, the declaration by doctor that it was from upward to downward has also made the prosecution's case doubtful.

26. The conduct of witnesses at the time of occurrence or thereafter is quite relevant, when examined on the touch stone of Judicial scrutiny. The police station from crime scene was at a distance of about 7 KMs. Real father of Tanveer Ahmad and brother in law of Ghulam Rasool was shot dead by appellant at about 05:30 pm but before arrival of Javed Ahmad SI ***(Pw-11)*** none of them or any other person present at crime scene bothered to inform the Police. This fact was admitted by Tanveer Ahmad

without any reservation in cross-examination while replying that neither he nor Ghulam Rasool or his brother Muhammad Imran reported the matter to the police. He had shown his ignorance that who informed the police about the occurrence. This fact that none of the witnesses informed the police is also supported on perusal of the statement of Javed Ahmad SI ***(Pw-11)*** who maintained that: -

> *"The occurrence as is incorporated in the relevant column of FIR is 05:30 pm. Someone informed me that occurrence has taken place within the limits of Chak No. 309/EB. It is correct that I have recorded in my police proceedings on over leaf Ex. PC that I was informed by police 15. The information by 15 was apprised through wireless set"*

27. There is also a serious discrepancy about recording of complaint ***(PC)*** by Javed Ahmad SI ***(Pw-11),*** whether it was reduced into writing at crime scene Chak No. 309/EB or the story was otherwise? The opening sentences of Javed Ahmad SI are very important and as under: -

> *"On 02.05.2021, I was present to check crime and patrolling duty at Bridge Khaddar Canal 40/KB, complainant came there and made a statement before me which was reduced into black and white and the same was Ex. PC. Then I reached the spot"*

28. In cross-examination when Javed Ahmad SI was confronted with the instance he took in his examination-in-chief, he volunteered that *"I have committed mistake while stating that the statement of Tanveer Ahmad was recorded by me at bridge khaddar canal 40/KB but the same was recorded by me at the place of occurrence"*.

29. Infirmity in prosecution's case still continues. Narrations made by Tanveer Ahmad ***(Pw-5)*** and Ghulam Rasool ***(Pw-6)*** are that appellant along with his two acquitted co-accused came on a motorbike but escaped by leaving it there. This absolutely appears to be an abnormality in prosecution's story, because appellant was residing in a village that was at a distance of 15/16 KMs. Appellant and his co-accused were armed with pistols and they had no fear of anyone therefore, leaving the motorbike at venue of crime makes no sense at all. Thus, the version of appellant he made in his statement under Section 340 (2) Cr.P.C that his motorbike was removed by the police from his house and planted on him cannot be ruled out.

30. Last but not least, Tanveer Ahmad claimed that while escaping from crime scene, appellant and his co-accused also made firing in the air but except one, no empty whatsoever was found on spot inspection.

31. This is the settled principle of law that prosecution cannot escape from its duty to prove the case beyond reasonable doubt. ***Mr. James Q. Whitman***[5] in his book "***The Origins of Reasonable Doubt***"[6] while digging in deep into its past, has written about origins that it was not primarily intended to protect the accused, instead, strange as it may sound, the reasonable doubt formula was originally concerned with protecting the souls of the jurors against damnation. According to him convicting an innocent defendant was regarded, as a

[5] Mr. Whitman is Ford Foundation Professor at Yale Law School, where he teaches criminal law and legal history. He holds both a law degree and a doctorate in history.
[6] https://historynewsnetwork.org/article/47018

potential mortal sin[7]. Referring to medieval doctrine[8], judging was a spiritually dangerous business. Any sinful misstep committed by a judge in the course of judging "built him a mansion in Hell." To be a judge in a capital case was to participate in a killing, and that meant judging was full of spiritual peril. He kept on saying that doubt was the voice of an uncertain conscience, and it had to be obeyed. "In cases of doubt," as the standard theological formula ran, "the safer way is not to act at all." A judge who sentenced an accused person to a blood punishment while experiencing "doubt" about guilt committed a mortal sin, and thus put his own salvation at grave risk. There is plenty of evidence that English jurors took these ominous threats quite seriously, especially at the end of the eighteenth century. Jurors experienced "a general dread lest the charge of innocent blood should lie at their doors." It was in response to such juror "dread" that the reasonable doubt standard introduced itself into the common law, especially during the 1780s. It is still with us today, a living fossil from an older moral world. "Beyond a reasonable doubt" standard was not originally designed to make it more difficult for jurors to convict but it was originally designed to make conviction easier, by assuring jurors that their souls were safe if they voted to condemn the accused. He finally wrote that: -

> *"The law cannot give any convincing answer to the question, what is the meaning of "beyond a reasonable doubt?". That is a question only history can answer*"

[7] A mortal sin, in Catholic theology, is a gravely sinful act, which can lead to damnation if a person does not repent of the sin before death.

[8] Medieval philosophy is the philosophy that existed through the Middle Ages, the period roughly extending from the fall of the Western Roman Empire in the 5th century to the Renaissance in the 15th century

32. The presumption of innocence is a legal principle that every person accused of any crime is considered innocent until proven guilty. Under the presumption of innocence, the legal burden of proof is thus on the prosecution, which must present compelling evidence before the Court. These are the golden principles of law that: -

a. *Finding of guilt against an accused cannot be based merely on the high probabilities that may be inferred from evidence in a given case.*
b. *Finding of the guilt should rest surely and firmly on the evidence produced by the prosecution.*
c. *Mere conjectures and probabilities cannot take the place of proof otherwise the golden rule of benefit of doubt will be reduced to naught.*
d. *It is the duty of prosecution to prove its case beyond reasonable doubt.*
e. *Accused is only to create dents in prosecution's case.*
f. *Benefit of doubt however slight may be must go to accused not as a matter of concession or grace but as a matter of right.*
g. *Even a single infirmity in prosecution's case would entitle accused to benefit of doubt.*

33. In ***Muhammad Akram' case***[9] the Honorable Supreme Court of Pakistan was pleased to hold that: -

> *"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right"*

[9] Muhammad Akram vs. The State 2009 SCMR 230

34. On the question of single circumstance creating doubt it was ruled by the apex Court in ***Muhammad Imran's case***[10] that: -

> *"It is by now well settled that benefit of a single circumstance deducible from the record, intriguing upon the integrity of prosecution case, is to be extended to the accused without reservation"*

35. In a latest verdict rendered in ***Najaf Ali Shah's case***[11] it was declared that: -

> *"This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State*

[10] Muhammad Imran vs. The State 2020 SCMR 857
[11] Najaf Ali Shah vs. The State the 2021 SCMR 736

> *(2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused"*

36. Concluding the discussion made above, this appeal is ***allowed***. Impugned judgment dated 31.03.2015 passed by the learned Additional Sessions Judge Burewala district Vehari is ***set aside***. Appellant is ***acquitted*** from the case. He is in custody and shall be ***released*** forthwith if not required in any other case.

(Sohail Nasir)
Judge

Approved for Reporting

(Judge)