

C J D A 38.  
JUDGMENT SHEET  
**IN THE LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

**Criminal Appeal No. 5537 of 2022.**

(Muhammad Rafique & another. Vs. The State & another)  
&

**Murder Reference No. 14 of 2022.**

(The State. Vs. Arshad Ali & another)

**J U D G M E N T**

Date of hearing.	27.03.2023.
Appellants by:	Mr. Muhammad Shahzad Saleem Warraich, Advocate.
State by	Mr. Munir Ahmad Sial, Deputy Prosecutor General.
Complainant by	Malik Azhar Abbas Waseer, Advocate.

**Malik Shahzad Ahmad Khan, J:-** By this single judgment we shall dispose of **Criminal Appeal No.5537 of 2022** titled as “Muhammad Rafique and another vs. The State and another”, filed by Muhammad Rafique and Arshad (appellants), as well as, **Murder Reference No.14 of 2022**, sent by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Muhammad Rafique and Arshad (appellants) in private complaint in respect of offences under Sections 302/364/147 and 149 PPC. We propose to dispose of both these matters by this single judgment as both these have arisen out of the same judgment dated 20.01.2022 passed by the learned Addl. Sessions Judge, Nankana Sahib.

2. Initially on the complaint of Abdul Ghafoor, complainant (PW-1) case F.I.R. No.51, dated 29.01.2013, was registered at police station Mangtanwala, District Nankana Sahib, in respect of offences under sections 302/147 and 149 PPC but later on being dissatisfied with the police investigation, Abdul Ghafoor complainant (PW-1) filed private complaint (Exh.PB) against the appellants and four (04) others. The learned trial Court, after observing all the pre-trial codal

formalities, framed charge under sections 302, 364, 148, 149 PPC against the appellants and their co-accused, namely Shahbaz (since acquitted), Mubarik Ali (since acquitted), Qurban Riasat Ali (since acquitted) and Iftikhar alias Ghaffar (since acquitted) on 12.08.2013, to which they pleaded not guilty and claimed trial. After conclusion of the trial, the learned trial Court (Additional Sessions Judge, Nankana Sahib) *vide* its judgment dated 20.01.2022, has convicted and sentenced the appellants as under:-

*Under Section 302(b) PPC to 'Death' as tazir on two counts each for committing Qatl-i-Amd of Jamal Hussain and Mst. Rabia Bibi (deceased). Both the convicts were also ordered to pay Rs.5,00,000/- (rupees five hundred thousand only) each to the legal heirs of Jamal Husain (deceased) and in default thereof to further undergo six months simple imprisonment each.*

However, the learned trial Court *vide* the same impugned judgment acquitted all the accused persons from the charges under Sections 364/149 of PPC. Shehbaz, Mubarik Ali, Qurban Riasat Ali and Iftikhar alias Ghaffar co-accused were acquitted by the learned trial Court from all the charges *vide* the same impugned judgment while giving them the benefit of doubt.

3. Brief facts of the case as given by the complainant in his private compliant (Exh.PB) are that he (complainant) was resident of Kot Bheeni Das. On 29.01.2013 at about 04:45 *a.m.*, he (complainant) along with his wife Mst. Maqsoodan Bibi, his sons, namely, Jamal Hussain aged 24/25 years (deceased), Bilal (PW-2), Ali Shah, Sunny Abbas, Hammad Ali (given up PWs) was present in his house when Muhammad Rafique (appellant) knocked the door of his house and called Jamal (deceased) to open the door as he had some piece of work with him. Jamal (deceased) opened the door. The complainant and his wife Maqsoodan Bibi and his sons Bilal (PW-2), Ali Shan, Sunny Abbas, Hammad Ali (given up PWs) also came out of their house to inquire about Jamal Hussain (deceased). They saw that Muhammad Rafique (appellant) was armed with iron '*kappa*', Shahbaz (acquitted co-accused) was armed with iron '*kappa*', Mubarik Ali (acquitted co-accused) was armed with *Sota* Ghaffar (acquitted co-accused) was armed with *sota*, Arshad Ali (appellant) was armed with *iron 'kappa'* and they were taking away Jamal Hussain (deceased) while abducting him and were inflicting blows on his body with *sotas*.

They (accused persons) threatened the complainant party that if anyone would come near, then he shall be done to death but the complainant party kept on chasing accused persons and the abductee. Accused persons took Jamal (deceased) in a room of their house while beating him. Rafique (appellant) and his co-accused pushed Jamal towards ground. Rafique (appellant) caught hold the deceased from his right leg, whereas, Shahbaz (acquitted co-accused) caught hold the deceased from his left leg. Qurban (acquitted co-accused) caught hold the deceased from his right arm, whereas, Mubarik (acquitted co-accused) caught hold the deceased from his left arm. Ghaffar (acquitted co-accused) sat on the abdomen of the deceased and Arshad (appellant) cut the throat of Jamal deceased with iron '*kappa*' due to which he died at the spot. Then Muhammad Rafique appellant cut the throat of his niece and sister of Arshad Ali (appellant), namely, Mst. Rabia Bibi with iron '*kappa*' and she also succumbed to the injury at the spot.

Initially the FIR (FIR No. 51 dated 29.01.2013 offences under Sections 302/147/149 of PPC P.S: Mangtanwala District Nankana Sahib) was lodged on the complaint of Abdul Ghafoor complainant (PW-1) however, during the course of investigation, police declared all the accused persons except Arshad Ali (appellant) as innocent therefore, being dis-satisfied with the police investigation, Abdul Ghafoor complainant (PW-1) filed the private complaint under Sections 302/364/147/149 of PPC in which the aforementioned accused persons were tried.

**4.** The appellants were arrested in this case and after completion of investigation, the *challan* was prepared and submitted before the learned trial Court. In the private complaint, summary evidence was recorded and the accused were summoned to face the trial. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 12.08.2013 to which they pleaded not guilty and claimed trial.

**5.** In order to prove its case, the prosecution produced three witnesses during the trial, whereas, statements of ten Court witnesses were also recorded. The prosecution also produced documentary evidence in the shape of Exh.PA to Exh.PE, Exh.CW-1/1 to Exh.CW9/3 and Mark-A to Mark-I.

**6.** The statements of the appellants and their co-accused under Section 342 of Cr.P.C. were recorded. Muhammad Rafique appellant refuted the allegations

leveled against him and professed his innocence, whereas, while answering to a question that ‘Why this case and why the PWs deposed against you’ Arshad Ali appellant replied as under:-

**Arshad Ali**

*“PWs are related inter-se, interested and are inimical towards me and my co-accused persons. In-fact Mst. Rabia Bibi and Jamal Hussain deceased persons developed illicit relations. On the fateful night, Jamal deceased came into our house and Mst. Rabia Bibi and he went to her room. I saw both of them in the said room in an objectionable position; due to sudden provocation and Gairat, I picked up an iron KAPA lying in the room and cut the throats of both the deceased persons in the heat of passion. The occurrence was committed by myself alone and not by any other accused persons. The complainant, PWs and the remaining accused persons were not present at the time and place of occurrence as alleged by Abdul Ghafoor complainant. After the occurrence, I myself went to the police station, narrated the incident to the SHO concerned and also produced the iron KAPA used by me in the occurrence. My arrest was not shown immediately by the police and they kept it awaiting and later on, according to the timings suitable to them they showed my arrest. Later on, the complainant, with false facts and after concocting a false story, got lodged FIR against me and others which was not substantiated during investigation. During investigation, I also offered to get record my statement under section 164 Cr.P.C. but the police, as it was league with the complainant, did not produce before me before the learned Judicial Magistrate for recording of my such statement. The occurrence had happened due to the reason that Jamal and Rabia Bibi deceased persons had developed illicit relations with each other. All the facts narrated by the PWs are false.”*

While answering to a question that ‘Why this case and why the PWs deposed against you’ Muhammad Rafique appellant replied as under:-

**Muhammad Rafique**

*“PWs are related inter-se, interested and inimical towards me and my co-accused persons. In-fact, Mst. Rabia Bibi and Jamal Hussain*

*deceased persons developed illicit relations and on the fateful night, Jamal deceased came into the house of Arshad my co-accused, where-after Jamal Hussain and Rabia Bibi went to her room where Arshad my co-accused saw them in an objectionable position and committed their murder due to sudden provocation and Gairat. All the story narrated by the complainant and the PWs is false.”*

In answer to another question that “Have you anything else to say?” Muhammad Rafique appellant replied as under:

*“I am innocent.”*

The appellants and their acquitted co-accused neither opted to make their statements on oath as envisaged under Section 340(2) of the Code of Criminal Procedure, 1898 in disproof of the allegations leveled against them nor they produced any evidence in their defence.

The learned trial Court *vide* its judgment dated 20.01.2022, found the appellants guilty, convicted and sentenced them as mentioned and detailed above. However, *vide* the same impugned judgment Shehbaz, Mubarik Ali, Qurban Riasat Ali and Iftikhar alias Ghaffar co-accused were acquitted by the learned trial Court while giving them the benefit of doubt.

7. It is contended by learned counsel for the appellants that the appellants are innocent and they have falsely been implicated in this case by the complainant being in league with the local police; that the occurrence was unseen; that there is gross delay in conducting the postmortem examinations on the dead bodies of Jamal & Mst. Rabia deceased and the said delay is suggestive of the fact that the eye witnesses were not present at the spot at the relevant time therefore, the abovementioned delay was consumed in procuring the attendance of fake eye witnesses; that there are material contradictions in the statements of prosecution witnesses; that there is conflict between the ocular account and the medical evidence of the prosecution; that the motive has also not been proved in this case; that the alleged recovery of ‘kappa’ has been planted against Arshad Ali appellant; that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt. It is therefore, prayed that the instant appeal may be allowed and the appellants may be acquitted of the charges by extending them the benefit of doubt.

**8.** On the other hand, it is contended by the learned Deputy Prosecutor General assisted by learned counsel for the complainant that the occurrence in this case took place on 29.01.2013 at 04:45 *a.m.*, and the matter was promptly reported to the police on the same day and the FIR was also lodged on the same day *i.e.* on 29.01.2013 at 10:15 *a.m.*, hence, promptness of the FIR rules out the possibility of any deliberation or concoction on the part of the prosecution; that both the eye witnesses of the occurrence *i.e.*, Abdul Ghaffor (PW-1) and Bilal (PW-2) were residents of the same house from where Jamal deceased was abducted by the accused persons therefore, their presence at the spot at the time of occurrence was quite natural and probable; that the prosecution's case against the appellants is supported by the medical evidence furnished by the prosecution through Dr. Uzma (CW-2), Dr. Muhammad Azhar Ameen (CW-3) and postmortem examination reports, as well as, pictorial diagrams of Jamal & Mst. Rabia Bibi deceased (Exh.CW-3/1) & (Exh.CW-2/1) respectively; that the prosecution case is further corroborated by the recovery of '*kappa*' from the possession of Arshad Ali appellant and positive report of PFSA, Lahore (Exh.PE); that motive has also been proved in this case against the appellants through reliable and confidence inspiring evidence of the prosecution's witnesses; that the prosecution has proved its case against the appellants beyond the shadow of any doubt therefore, their appeal may be dismissed, Murder Reference be answered in the affirmative and the sentences of death awarded to Arshad Ali and Muhammad Rafique appellants by the learned trial Court may be upheld & maintained.

**9.** Arguments heard. Record perused.

**10.** Prosecution story as set forth in the private complaint (Exh.PB) has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

**11.** We have noted that the occurrence in this case took place on 29.01.2013 at 04:45 *a.m.*, but the FIR was lodged on 29.01.2013 at 10:15 *a.m.*, *i.e.*, with the delay of 05 hours and 30 minutes from the occurrence. Although the distance between the place of occurrence and the police station was 12 kilometers and mere delay in reporting the matter to the police may not be fatal to the prosecution case but we have also noted that postmortem examination on the dead bodies of both the deceased persons of this case, namely, Jamal and Mst. Rabia Bibi were conducted

on 29.01.2013 at 07:30 *p.m.*, and 07:45 *p.m.*, respectively which means that there was delay in conducting the postmortem examination on the dead body of Jamal deceased of 14 hours and 45 minutes, whereas, there was delay of 15 hours in conducting the postmortem examination on the dead body of Mst. Rabia Bibi deceased. The abovementioned delay in conducting the postmortem examinations on the dead bodies of both the deceased persons is suggestive of the fact that the occurrence was unseen and the said delay was consumed in procuring the attendance of fake eye witnesses. In the case of *‘Muhammad Ilyas Vs Muhammad Abid alias Billa and others’* (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye witnesses. Relevant part of the said judgment at **page No. 55** reads as under:-

“2. ....Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ...”

Similarly, in the case of *“Khalid alias Khalidi and two others vs. The State”* (2012 SCM 327), the Hon’ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as *“Sufyan Nawaz and another vs. The State and others”* (2020 SCMR 192), *“Zafar vs. The State and others”* (2018 SCMR 326) and *“Muhammad Ashraf vs. The State”* (2012 SCMR 419).

It is further noteworthy that the occurrence in this case took place in the month of January *i.e.*, on 29.01.2013 at 04:45 *a.m.*, meaning thereby that the occurrence in this case took place during the darkness of night. Bilal (PW-2) has stated during his cross-examination that Fajar Namaz used to be offered during the

month of January at 06:20 a.m. Relevant part of his statement in this respect reads as under:-

*“It is correct that during January namaz of Fajar is performed at 06:20 a.m.”*

We have next noted that no source of light has been mentioned in the site plan (Exh.CW-7/1) or in the statements of the abovementioned prosecution eye witnesses rather Abdul Ghafoor complainant (PW-1) during his cross-examination has conceded that no light was installed in the street between his house and that of the accused. Relevant part of his statement in this respect is reproduced hereunder for ready reference:-

*“No light has been installed in the street between my house and that of accused.”*

None of the prosecution eye witnesses stated that there was moon light at the relevant time. Under the circumstances, the identification of the appellants during the darkness of night is not free from doubt.

**12.** It is further noteworthy that conduct of the prosecution eye witnesses is highly unnatural. According to the prosecution case, as set forth in the FIR, on the night of occurrence, Jamal appellant was present in his house, where Abdul Ghafoor complainant and his sons, namely, Bilal (PW-2), Ali Shan, Sanni Abbas & Hammad Ali (given up PWs) were also present along with his wife, namely, Mst. Maqsoodan Bibi and son Jamal (deceased) and as such, the complainant party was comprising of total seven members. We have further noted that Bilal (PW-2) who is son of the complainant, has further conceded during his cross-examination that the house of his uncle Manzoor was situated in front of the house of the complainant party and said Manzoor had six sons. He further conceded during his cross-examination that he had not got recorded in his statement before the police that any of his family members raised hue and cry when his brother was being beaten and abducted by the accused persons nor he informed any neighbour in this respect though house of his uncle Manzoor who had six sons was situated in front of his house. Relevant parts of his statement in this respect read as under:-

*“House of my uncle Manzoor is in front of our house.....My uncle Manzoor have six sons named Imran, Arfan, Amir Shehzad, Gulfram, Qaisar, Faisal Mahmood. I cannot tell their exact ages however Amir Shehzad and Imran are married. Presently ages of Qaisar, Gulfram and*



*Faisal are of about 24/25 years. Occurrence took place during winter on 29.01.2013 and in those days it was very cold.....I have not got recorded in my statement before police that I, my mother or any other witness raised hue and cry that accused are taking away my brother Jamal deceased. I have not got recorded in my statement before police that I went to any neighbour to inform that accused have forcibly taken away my brother Jamal deceased.”*

It is also noteworthy that the accused persons were not armed with any lethal firearm weapon like pistol, gun etc and according to the prosecution case, they were armed with ‘kappas’ & ‘dandas’ but the complainant party, who was comprising of at least seven members did not try to rescue Jamal deceased from the hands of the accused persons. We are therefore of the view that conduct of the prosecution eye witnesses, who were closely related to Jamal deceased is highly unnatural therefore, their presence at the spot is highly doubtful, hence their evidence is not worthy of reliance. We may refer here the case of “Liaquat Ali Vs. The State” (2008 SMCR 95), wherein at Para No.5-A of the judgment, the Hon’ble Supreme Court of Pakistan was pleased to observe as under:-

*“Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful.”*

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of “Pathan Vs. The State” (2015 SCMR 315) & “Zafar Vs. The State and others” (2018 SCMR 326). Under the circumstances, it cannot be safely held that the abovementioned eye witnesses were present at the spot at the relevant time and they had witnessed the occurrence because their conduct is highly unnatural.

**13.** It is further noteworthy that ocular account of the prosecution in this case is in conflict with the medical evidence. It was the case of the prosecution, as set forth in the FIR, that on the night of occurrence, accused persons while armed with different weapons came to the house of the complainant and forcibly dragged Jamal deceased while giving him ‘*sota*’ blows and took him into the house of the accused party where they (accused persons) committed the murder of both the deceased persons but according to the postmortem report of Jamal deceased, there was no injury on his body except one injury on his neck which was attributed to Arshad Ali appellant. It is further noteworthy that according to the postmortem report of Mst. Rabia Bibi deceased, there were two injuries on her body. Injury No.1 was on her right cheek, whereas, injury No.2 was on the right side of her neck. None of the prosecution eye witnesses explained injury No.1 on the body of Mst. Rabia Bibi deceased. Even the learned trial Court in paragraph No. 8 of the impugned judgment has partly disbelieved the evidence of the prosecution eye witnesses regarding the forcible abduction of Jamal deceased and infliction of ‘*danda*’ blows on his body by the accused party. Co-accused of the appellants, namely, Mubarak Ali, Qurban Riasat Ali & Iftikhar *alias* Ghaffar who were statedly armed with *sotas*, have already been acquitted by the learned trial Court and petition for leave to appeal filed against their acquittal has also been dismissed today by this Court through a separate order of even date, being barred by time. The abovementioned conflict between ocular account and medical evidence of the prosecution created further dent in the prosecution case.

**14.** Insofar as the recovery of blood stained ‘*kappa*’ (Exh.CW-9/2) on the pointation of Arshad Ali appellant is concerned, it is noteworthy that the occurrence in this case took place on 29.01.2013, whereas, ‘*kappa*’ (Exh.CW-9/2) was recovered on the pointation of the said appellant on 03.03.2013 *i.e.*, after 01 month & 03 days from the occurrence and during the abovementioned period, Arshad Ali appellant had ample opportunity to wash away the blood on the ‘*kappa*’. In the light of above, recovery of blood stained ‘*kappa*’ (Exh.CW-9/2) on the pointation of Arshad Ali appellant is not free from doubt. The Hon’ble Supreme Court of Pakistan in the case of ‘*Basharat and another Vs The State*’ (1995 SCMR 1735) disbelieved the evidence of blood-stained dagger which was allegedly

recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:-

*“11. The occurrence took place on 20.04.1988. Basharat appellant was arrested on 28.04.1988. The blood-stained Chhuri was allegedly recovered from his house on 30.04.1988. It is not believable that he would have kept blood stained chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it”*

Moreover, blood disintegrates during the abovementioned period of 01 month and 03 days. Reliance in this respect may be placed on the case of ‘Muhammad Jamil Vs Muhammad Akram and others’ (2009 SCMR 120). In the light of above, recovery of ‘kappa’ (Exh.CW-9/2) and positive report of PFSA (Exh.PE) are inconsequential for the prosecution.

**15.** We have disbelieved the prosecution evidence qua ocular account and recovery of ‘kappa’ but it is noteworthy that Arshad Ali appellant while making his statement under Section 342 of Cr.P.C., has candidly admitted the occurrence with the stance that on the night of occurrence, he committed the murder of both the deceased on account of grave and sudden provocation and ‘ghairat’. The occurrence in this case took place on 29.01.2013 which means that the same took place prior to the amendment brought in Section 311 of PPC whereby it was provided that if the offence has been committed in the name or on the pretext of honour, punishment shall be imprisonment for life. As the abovementioned amendment cannot be applied retrospectively and as the occurrence of this case took place prior to the introduction of abovementioned amendment therefore, the said amendment in the relevant law is not applicable in this case. We have further noted from the statement of Arshad Ali appellant recorded under Section 342 of Cr.P.C., that on the night of occurrence, he saw his sister, namely, Mst. Rabia Bibi (deceased) with Jamal Hussain (deceased) in objectionable condition in a room of his house, in the odd hours of night, therefore, due to grave and sudden provocation, he committed the murder of both the deceased. It is by now well settled that if the prosecution evidence is disbelieved then statement of an accused is to be accepted or rejected in toto. If statement of Arshad Ali appellant is accepted in toto, then to his extent, it is a case punishable under Section 302 (c) of PPC and not a case punishable under Section 302 (b) of PPC. Consequently,

convictions & sentences of Arshad Ali appellant for the charge under Section 302 (b) of PPC are hereby set-aside and his convictions & sentences are converted to the offence under Section 302 (c) of PPC. He is therefore, convicted under Section 302 (c) of PPC and is sentenced to fourteen (14) years rigorous imprisonment on two counts. Compensation under Section 544-A of Cr.P.C., awarded by the learned trial Court against Arshad Ali appellant is however, upheld & maintained. Sentences awarded to Arshad Ali appellant shall run concurrently. Benefit of Section 382-B of Cr.P.C., is also extended to Arshad Ali appellant. Insofar as the case of Muhammad Rafique appellant is concerned, we have disbelieved the prosecution evidence due to the reasons mentioned in paragraph Nos. 11 to 14 of this judgment and as the said appellant has neither made any confession before the learned trial Court nor he has admitted the murder of both the deceased in his statement recorded under Section 342 of Cr.P.C., therefore, he is acquitted of the charges by extending him the benefit of doubt. He is in jail. He be released forthwith if not required to be detained in any other case.

**16.** Consequently, with the above said modification in the conviction & sentence of Arshad Ali appellant, **Criminal Appeal No. 5537 of 2022** filed by Muhammad Rafique and Arshad appellants is hereby **partly dismissed** to the extent of Arshad Ali appellant and **partly allowed** to the extent of Muhammad Rafique appellant. Murder Reference (**M.R. No. 14 of 2022**) is answered in the **negative** and death sentences of Muhammad Rafique and Arshad Ali appellants are **not confirmed**.

(MUHAMMAD AMJAD RAFIQ)  
JUDGE.

(MALIK SHAHZAD AHMAD KHAN)  
JUDGE.

*\*Ajmal Rana.*

**APPROVED FOR REPORTING.**

(MUHAMMAD AMJAD RAFIQ)  
JUDGE.

(MALIK SHAHZAD AHMAD KHAN)  
JUDGE.