49/24

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Syed Hasan Azhar Rizvi
Ms. Justice Musarrat Hilali

DJ-AFR
Criminal Appeal No. 577/2019 & Crl. P. 596/2016
(Against the judgment dated 17.03.2016 of the Lahore High Court, Rawalpindi Bench *passed in Crl. Appeal No.198/2012)*

Zafar Ali Abbasi
(in Crl. A. No. 577/2019) ***Appellant/ Petitioner***

Shakeel Ahmed Abbasi
(in Crl. P. No. 596/2016)

Versus

Zafar Ali Abbasi, and others ***Respondents***

For the Appellant/Petitioner: Mr. Basharat Ullah Khan, ASC
Syed Rifaqat Hussain Shah, AOR
in Crl. A. No. 577/2019)

Raja Muhammad Farooq, ASC
Syed Rifaqat Hussain Shah, AOR
in Crl. P. No. 596/2016)

For the State: Mirza Abid Majeed, DPG Punjab

Date of Hearing: 13.05.2024

ORDER

Jamal Khan Mandokhail, J.- Facts in brief are that one Shakeel Ahmed Abbasi (complainant) registered an FIR No. 500/2010 dated 13.08.2010 against the appellant for offences under sections 302, 324, 109, Pakistan Penal Code, 1860 ('**PPC**') registered at Police Station Murree, Rawalpindi. The complainant alleged that he along with Raja Azhar Azeem while travelling in a Jeep, when reached the place of occurrence, he saw the appellant having a dagger in his hand, was quarreling with his brother, namely, Muhammad Sabeel, (deceased). After inflicting three dagger blows on the deceased, the appellant made good his escape, however, subsequently he was arrested. The appellant was tried by the Additional Sessions Judge, Rawalpindi ('**Trial Court**'), and was convicted and sentenced to death under section 302(b), PPC. The appellant feeling aggrieved, filed an appeal before the High Court, which was dismissed by means of the impugned judgment dated

17.03.2016. The appellant filed a petition before this Court, wherein leave to appeal was granted on 20.11.2019, in the following terms:

> ***'CRL. M.A. NO. 954 OF 2016***
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> *For the reasons mentioned in the application for condonation of delay, same is allowed and the delay is condoned.*
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> ***JAIL PETITION NO.243 OF 2016***
>
> *2. Learned counsel for the petitioner, inter-alia, contends that according to FIR the complainant and the eye witnesses took the deceased in injured condition to THQ Hospital in their own jeep whereas the MLC negates the stance of both the eye witnesses as according to the same it was Rescue 1122 who brought the deceased in injured condition to the hospital and there is no mention of name of any of the alleged eye witnesses in the MLC; that in order to suppress this material fact, the prosecution did not produce the said MLC on record through the said medical officer and the same was brought by the defence while cross- examining the said medical officer; that during investigation, the bus driver and the conductor claimed before the 1.0. that the occurrence took place in the bus and subsequently the said driver was produced as D.W. and that there are material contradictions in the statement of both the eye witnesses.*
>
> *3. In view of the above, leave to appeal is granted to re-appraise the entire evidence.'*

Criminal Appeal No. 577 of 2019

2. Arguments heard and have perused the record. The prosecution's case rests upon the statements of the complainant and Raja Azhar Azeem, who appeared as PW-1 & PW-2 respectively before the Trial Court. According to them, they were about 20 paces away from the deceased and the appellant, when they saw both of them were altercating. In reply to a question, the complainant stated that after 10 seconds, the appellant inflicted first blow upon the deceased. Admittedly, the appellant was alone, whereas, the complainant, PW-2 and the deceased were three in numbers. Taking the words of the complainant that he and the eyewitness were 20 paces away from the appellant, they could have easily reached the appellant and overpowered him within few seconds, but no attempt was made by them to avert the attack. It

is hard to believe that life of the brother and uncle of PW-1 and PW-2 respectively, was in danger, why they did not react immediately? Had the complainant and his nephew been present at the time and place of the occurrence, the appellant could have been apprehended before causing any injury to the deceased. Despite the fact that the complainant and his companion were 20 paces away from the appellant, they did not make any attempt to catch hold of him, even after causing injuries to the deceased.

3. Moreover, the witnesses alleged that after the occurrence, they boarded the injured in their jeep to take him to a hospital for treatment and when they reached at Bansra Gali, the injured was shifted to Rescue Van of 1122 for taking him to THQ Hospital Murree. The natural reaction of the brother ought to have reached the hospital immediately in order to save the life of the injured, but the needful was not done. There was no justification in shifting the injured from the jeep to the Rescue Van. To substantiate the contention of the complainant, the statements of the Driver of the Rescue Van was of utmost importance, but the IO did not record a statement of any of the members of the van. By not recording the statements of the driver or the other officials of the Van of Rescue 1122, the presumption would be that they might not be supporting the contention of the complainant. Besides, for the sake of arguments, if it is believed that the complainant and PW-2 boarded the injured in the jeep, then the jeep and clothes of the complainant and the witness must have been stained with blood. Admittedly, no blood was collected from the jeep nor the blood stained clothes of the witnesses were taken into possession by the Investigation Officer ('IO') and no explanation in this behalf has been advanced by the prosecution. The stance of the complainant and the eye witness is not only improbable, but also got no support from the record. The prosecution has failed to prove the presence of the complainant and his nephew at the time and place of the occurrence.

4. Another important aspect of the case is that Dr. Shahzad Rasool conducted the postmortem of the deceased, who while appearing as PW-10 before the Trial Court, submitted that rigor mortis was developed and eyes of the deceased were semi opened.

Considering the contention of the complainant that the injured was immediately taken to the hospital for treatment in his jeep, then a question arises as to how rigor mortis was developed and why eyes of the deceased were not closed. The postmortem report, the statement of the doctor and his opinion do not support the contention of the complainant regarding immediate shifting of the injured to the hospital. It is a settled principle of law that a documentary evidence carries with it a presumption of truth, therefore, there is no reason to disbelieve the postmortem report and the statement of the doctor, which proves the fact that the injured remained at the place of the occurrence for a considerable long period of time. Had the complainant and PW-2 been present at the place and time of the occurrence, the injured could have been taken to the hospital, without loss of time and thereby, rigor mortis could not have been developed. It is also worth noting that in his cross examination, the doctor explained that the injuries were lunar shaped, which means that probably, the injuries was caused through lunar shaped weapon. On the contrary, the complainant and the eye-witnesses alleged that the appellant inflicted dagger blows on the deceased. Their statements regarding nature of the injures sustained by the deceased and the weapon used contradict the postmortem report and the statement of the doctor. We are conscious of the fact that just because the witnesses are related to the deceased, their testimonies cannot be disregarded, however, it is also important that testimonies of such witnesses have to be scrutinized with greater care and circumspection. The facts discussed herein makes it clear that the conduct of the witnesses was unnatural. It leads us to a conclusion that presence of the witnesses at the time of the crime was doubtful, as such the occurrence seems to be unseen.

Disclosure leading to recovery of crime weapon

5. In order to bring the case within the ambit of Article 40 of the Qanun-e-Shahadat Order, 1984, the prosecution must prove that a person accused of any offence, in custody of police officer, has conveyed an information or made a statement to the police, leading to discover of new fact concerning the offence, which is not in the prior knowledge of the poiice. Such information or statement

should be in writing and in presence of witnesses. In absence of information or statement from a person, accused of an offence in custody of police officer, discovery of fact alone, would not bring the case of the prosecution under the said Article. According to the prosecution, a dagger used in the commission of the offence was recovered on the disclosure and pointation of the appellant. Surprisingly, the IO did not record the information received from the appellant in writing, in presence of a witness, while he was in police custody. The prosecution has failed to establish any disclosure from the appellant, therefore, recovery of the dagger, in the circumstances was immaterial. Even otherwise, the IO stated that the recovery of the dagger was effected on the pointation of the appellant, in presence of PW-5, who is also a nephew of the deceased. According to the said witness, the dagger was wrapped in a black colour shopper, but when it was presented before the Trial Court, it was unsealed and was wrapped in a white colour plastic. None of the recovery witness put any identification mark upon it in order to exclude any possibility of foisting false recovery or substituting the recovered one. The manner in which the dagger was taken into possession and produced in the Court, creates doubt regarding its recovery, therefore, the High Court has rightly disbelieved it.

6. Without prejudice to the above, the appellant took a plea that actually the occurrence had taken place in a bus. The driver and conductor of the said bus appeared before the IO and recorded their statements under section 161 Cr.PC. This fact was admitted by the IO in his cross-examination, but surprisingly, their statements were not found in the case file nor the witnesses were produced before the court. The IO was supposed to gather and collect every material evidence with regard to the occurrence and to bring the real culprit before the Court. The record shows that the I.O. did not collect the evidence properly. Some relevant evidence was withheld without any reason. It seems that either the investigation was conducted in a colourful and biased manner to save the real accused or it was a result of incompetence of the IO. The manner in which the investigation was conducted makes the prosecution's case highly doubtful, benefits whereof should have

been extended to the appellant, but the needful was not done by the fora below.

7. There is another important aspect of the case that the injured was shifted to the hospital at about 10:30 am and by that time he was alive. He was under a treatment till 01:35 pm and thereafter, succumbed to injuries. This fact was admitted by the IO in his cross-examination. According to the prosecution, the FIR was registered at 11:25 am, but surprisingly, section 302, PPC was inserted in it and by that time, the injured was alive. This shows that the FIR was actually registered after the death of the deceased, but with *malafide* intention, time of its registration was mentioned as 11:25 am in order to cover the delay in lodging the FIR. The delay in lodging the FIR was a result of deliberation and consultation, therefore, false involvement of the appellant cannot be ruled out.

8. Motive for the crime as alleged by the complainant in the FIR was dispute over some water issues between the appellant and the deceased. At the same time, PW-5 in his statement before the Court stated that a day before the incident, the appellant felt insult by the hands of the deceased, which, according to him, was a motive behind the occurrence. Though both the witnesses have alleged different motives, but there is no evidence on the record to prove either of the two, that is why the High Court has rightly disbelieved it.

9. After disbelieving the recovery of the crime weapon and the motive by the High Court, only the statements of PW-1 and PW-2 are left for consideration. As discussed above, their statements do not get support from the available circumstantial evidence, rather were contradicted by the other evidences. The conduct of the witnesses throughout was unnatural, therefore, they were not trustworthy. The prosecution has failed to establish its case against the appellant Zafar Ali Abbasi beyond a reasonable doubt. The fora below did not appreciate the evidence and the material available on the record properly, hence came to a wrong conclusion. Under such circumstances, the conviction and sentence awarded to the appellant are not sustainable.

10. Thus, these are the reasons of our short order dated 13.05.2024 which is reproduced herein below:

> "For the reasons to be recorded separately, Crl. A. 577/2019 is allowed and Crl. P. 596/2016 is dismissed on merit as well as being barred by time. The impugned judgment dated 17.03.2016 passed by the Lahore High Court and that of the learned Trial Court dated 27.04.2012 are set aside. The appellant-Zafar Ali Abbasi is acquitted of the charges leveled against him and be released from the jail forthwith, if not required to be detained in any other case."

Criminal Petition No. 596/2016

11. After accepting the appeal of the respondent convict and setting aside the impugned judgment, this petition for enhancement of sentence is dismissed.

Judge

Judge

Judge

Islamabad,
13th May 2024
Rizwan/Waqas Ahmad, LC

Approved for Reporting