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Judgment Sheet

LAHORE HIGH COURT, MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Criminal Appeal No.1133 of 2017
Zahid Rasool, etc. versus The State, etc.
Criminal Revision No.194 of 2018
Abdul Jabbar. versus The State, etc.
P.S.L.A No.39 of 2018
Abdul Jabbar versus The State, etc.

JUDGMENT

Date of hearing:	*28.6.2021*
Appellants represented by:	*Mr. Badar Raza Gillani, Advocate*
The State by:	*Mr. Laeeq Ur Rehman Assistant Deputy Public Prosecutor*
Complainant/ Petitioner in Criminal Revision No.194-2018 and P.S.L.A No.39-2018	*Mr. Rehan Khalid Joiya, Advocate*

SARDAR AHMED NAEEM, J.- *Appellants, namely, Zahid Rasool and Gulfam Hussain along-with their co-accused Muhammad Afzal (since acquitted) faced trial in a private complaint under section 302,34 PPC filed by the complainant due to defective investigation of case FIR No.243-2016 dated 30.6.2016 under section 302,34 PPC registered at Police Station Shah Kot, Chichawatni. At the conclusion of trial, the learned trial Court vide judgment dated 30.11.2017, acquitted Muhammad Afzal co-accused, whereas, held guilty, convicted and sentenced the appellants as under:*

> ***Under section 302, 34 PPC and sentenced to imprisonment for life each as 'tazir' with the direction to pay a sum of Rs.5,00,000/- each as envisaged under section 544-A, Cr.P.C, in default thereof, to further undergo, six months SI.***
>
> ***Benefit of section 382-B, Cr.P.C. was also extended to them.***

2. Feeling aggrieved from the above said judgment, the appellants have filed instant appeal and the complainant /petitioner has also filed Criminal Revision No.194 of 2018 against respondents No.2 and 3 to award the major penalty of death and P.S.L.A No.39 of 2018 against acquittal of respondent No.2. I propose to decide all these matters through this single judgment.

3. The epitome of story as contained in private complaint was that on 30.6.2016 at about 6:30 a.m Imran Hussain went to his fields for ploughing and when he did not return after sufficient time, the complainant, Sabir Hussain and Mohsin Hayat (PWs) started his search and reached near the poultry farm of Nazeer Ahmad, where on raising lalkara by Muhammad Afzal (acquitted co-accused), Gulfam Hussain (appellant) armed with repeater 12 bore made three fire shots at Imran Hussain (deceased) which hit on his right shin, left leg and right foot. Zahid Rasool made four fire shots with his pistol 30 bore at Imran Hussain (deceased) hitting on his left arm, below his belly and went through and through from the back side of deceased and hit on left knee and back of his right leg. Imran Hussain (deceased) fell down and besmeared in blood. The witnesses could not come forward to rescue the deceased due to the threats extended by the appellants-accused and then they fled away from the crime scene while brandishing their respective firearm weapons towards Chak No.51/12-L.

The motive behind the occurrence was that cattles of the accused persons quite often entered in the complainant's field and destroyed their standing crops which often resulted into fight.

4. Initially, the FIR No.243-2016 was registered under section 302,34 PPC. Later on, due to defective investigation and on account of declaration of innocence of Muhammad Afzal (acquitted co-accused) and Gulfam Hussain(appellant), the complainant filed the private complaint.

5. After cursory statements of complainant and his witnesses, receiving the documentary evidence and hearing the complainant,

the appellants along-with Muhammad Afzal (acquitted co-accused) were summoned to face trial. ,

6. The charges were framed against the accused persons. They pleaded not guilty and claimed trial.

7. The complainant Abdul Jabbar himself appeared as (PW.1) and produced Mohsin Hayat (PW.2), gave up Sabir Hussain (PW) being unnecessary and on his application, PWs of state case were summoned as CWs including Syed Azhar Naqvi MO (THQ) Hospital (CW.1), Amjad Ali 1182-C (CW.2), Saeed Akhtar draftsman (CW.3), Nisar Ahmad 885-C (CW.4), Muhammad Imtiaz (CW.5) Muhammad Riaz 986-HC (CW.6), Ghulam Nabi (CW.7), Muhammad Asif Sarwar SHO (CW.8) and Abid Sagheer Inspector/investigating officer (CW.9).

Learned prosecutor gave up Muhammad Aslam 1299-C Haji Ghafar, Haji Munawar and Muhammad Akram Asif SI CWs.

8. Learned counsel for the complainant closed his evidence. Whereas, learned DDPP closed the prosecution case after tendering into the reports of PFSA Exh.PF & Exh.PG.

9. Statements of the appellants under section 342, Cr.P.C. were recorded. They repudiated the allegations levelled against them and professed innocence. To a question "Why this case against him and why the PWs have deposed against him" Zahid Rasool (appellant) deposed as under:

> ***"It is false case, basically proceedings regarding this occurrence basically proceedings regarding this occurrence were carried out on the basis of Exh.CW.08/A wherein different story and different roles were attributed but later on, in order to fill the lacunae of the complainant has filed this private criminal complaint with considerable and unexplained delay of 09 months with due deliberation and consultation. All the PWs are close relatives inter se and inimical towards me and my co-accused. In fact, Imran deceased was a womanizer having so many enemies in the area. It was un seen and un witnessed occurrence which took place in the dark hours of the night. FIR was lodged against me and my co-accused after the autopsy with due deliberation and consultation. The dead body was recovered in the area of Chak No.51/12-L. I am involved in this case due to enmity, party faction, political rivalry and for the purpose of blackmailing."***

Responding to same question, Gulfam Hussain (appellant) also took the same plea in his statement under section 342, Cr.P.C.

Neither the appellants appeared as their own witnesses under section 340(2) Cr.P.C. nor produced evidence in defence.

10. Learned counsel for the appellants, inter-alia, contended that the prosecution miserably failed to prove its case against the appellants beyond reasonable shadow of doubt; that the occurrence took place on a thorough fare but no independent witness was cited by the prosecution; that the witnesses failed to account for their presence at the time and place of occurrence; that the ocular account is contradicted by the medical evidence; that the eye witnesses made deliberate improvements to bring the case of prosecution in line with the medical evidence; that the motive in this case was not proved; that the place of occurrence was not established; that the Investigating Officer concluded that one Waqas was responsible for this occurrence and challaned him as an accused; that certain material facts were suppressed by the prosecution; that one of the appellant, namely, Gulfam Hussain along-with his acquitted co-accused Muhammad Afzal was found innocent by the Investigating agency; that the prosecution story does not fit in the probabilities; that the case of prosecution was replete with doubts and every doubt even slightest is always resolved in favour of the accused, thus, the appellants are entitled to acquittal.

11. Learned Assistant District Public Prosecutor assisted by the counsel for the complainant opposed this appeal with vehemence and submitted that it was a daylight occurrence and there was no question of mistaken identity; that the eye witnesses have furnished the ocular account in a straightforward manner; that both the appellants have been ascribed specific roles of causing repeated firearm injuries to the deceased, supported by medical evidence available on record; that the motive was proved; that the discrepancies referred to by the learned counsel for the appellants were negligible; that the learned trial Court acquitted co-accused of

the appellants contrary to law; that as the case against the appellants was proved by the prosecution beyond reasonable shadow of doubt, thus, the sentence awarded to them may suitably be enhanced.

12. I have considered the points raised at the bar and have perused the record with able assistance of the learned counsel for the parties.

13. During this occurrence, Imran Hussain (the deceased) lost his life on 30.6.2016 at 6:30 a.m within Square No.5 of Chak No.52/12-L Chichawatni, Sahiwal. He had gone to his fields early in the morning for ploughing. He did not come back and being worried, the complainant, namely, Abdul Jabbar along-with Sabir Hussain and Mohsin Hayat (PWs) went after him and when they reached near poultry farm of Nazir Jat, they saw that Muhammad Afzal co-accused of the appellants while standing in square No.6 raised a lalkara to eliminate the deceased and then the appellants with their respective weapons fired at the deceased.

14. The motive behind the occurrence was that the cattles of the accused party used to destroy the standing crops of the complainant party and earlier the deceased was beaten/injured by the accused party. On 02.11.2015, he was medically examined through MLR No.113-AN/15 Tehsil Head Quarter Hospital, Chachiwatni and rapat No.14 was also recorded at Police Station on 02.11.2015. The accused after enacting the episode fled away from the crime scene. The matter was reported to police and FIR No.243 under section 302,34 PPC was registered at Police Station Shah Kot Chachiwatni. During the investigation, a co-accused, namely, Muhammad Afzal and the appellant, namely, Gulfam Hussain were found innocent, thus, being dissatisfied with the investigation, the complainant filed the private complaint, wherein the accused were summoned to face trial, held guilty, convicted and sentenced as detailed above.

15. The complainant was real brother of the deceased. Whereas, Mohsin Hayat (PW.2) was nephew and Sabir Hussain (given up PW) was their Chachazad. It was in the evidence that people were attracted to the spot at the time of occurrence but no independent witness was cited by the prosecution. The incident was reported by the complainant to police at Chak No.86/12-L at 8:00 a.m on 30.6.2016 through a written application. Thereafter, the investigating officer inspected the spot, took into possession two crime empties, blood stained earth and dispatched the dead body for postmortem examination, conducted by Dr. Syed Azhar Naqvi (CW.1) on 30.6.2016 at 2:47 p.m. He observed twelve injuries on the person of the deceased. The injuries Nos.1,3,5,7,9 and 10 were entry wounds, however, the dimensions and width of all entry wounds were different. The time between the injuries and death was instantaneous and between the death and postmortem was 7 to 8 hours. He has admitted during the cross-examination that he observed no corresponding hole on 'Qamiz' and 'Shalwar' of the deceased and that the postmortem was conducted immediately after the receipt of death body i.e. at 2:47 p.m. He further admitted that probable time between death and postmortem was calculated from the available police papers and possibility could not be ruled out that probable period between death and postmortem was about 12 to 16 hours as in this case rigor mortis was fully developed and the postmortem staining was present. Though the witnesses claimed to have seen the occurrence and ascribed specific role of causing repeated firearm injuries to the appellants but this fact is not supported by the available evidence.

16. The occurrence took place on 30.6.2016 at 6:30 a.m and the autopsy was held on the same day at 2:47 p.m. As mentioned above, rigor mortis in this case was fully developed. The rigor mortis is a postmortem change which leads to stiffening of the body, muscles because of chemical changes in the myofibrils. It helps in estimating the time since death as well as to recognize if the body

was moved after death. The position of the body plays a major role in case of rigor mortis as it is indicative of the position of the body at the time of death, unless the position is disturbed by external forces or putrefaction. The primary reason for the development of rigor mortis is the loss of adenosine or triphosphate from the anoxic tissue. It starts to develop 2 to 4 hours after death and gradually dissipates until approximately 72 hours after death. Classically, rigor mortis is said to develop sequentially beginning from eyelids, jaw and neck followed by the limbs. The joints of the body become fixed when the rigor is fully developed, and the state of flexion of these joints depends upon the position of the trunk and limbs at the time of death. It is due to chemical changes affecting the proteins of muscles fibers. This is sign of the end of cellular life of the muscles. Rigor mortis is one of the important factors in determining time since death. It passes away in the same order as it comes on. Time of onset varies greatly in different cases. But on an average it may be said to commence 2-4 hours after death. It's only a temporary condition depended upon the body temperature and other conditions. The phenomenon is caused by the skeletal muscles partially contracting as was unable to relax, so the joints become fixed place. Maximum stiffness is reached around 12-24 hours. As mentioned above in this case rigor mortis was fully developed and the medical officer had not ruled out the possibility regarding time of death in between 12 to 24 hours which is not inconsonance with the time of occurrence as described by the eye-witnesses. Algor mortis, Rigor mortis and Livor mortis has been the basis for ascertaining the time since death collectively.. Till date, it is still the important and most fascinating criteria to ascertain the time since death. This assessment covers the importance of the time since death from rigor mortis in forensic science.

17. Next comes postmortem staining which is called livor mortis but it is finally changed in classical triad. The postmortem staining is an intravascular phenomenon and there is no extravasation of

blood in the area. As the postmortem staining occurs externally on the dependent parts of the body, it also occurs at the dependent parts of all the internal organs, the blood of these organs settle at their dependent parts. It is said that man is the most cunning of all animals. Chameleon changes its color during lifetime but the man changes his color even after his death. It is self evident that longer the interval of time between death and the examination of the body, the wider will be the limits of probability. Various methods have been tried to find out the time of death. These include study of physical, chemical, biochemical, histological and enzymatic changes which occur progressively in a dead body. Postmortem lividity is one of the physical changes useful for estimating time of death to a certain degree of accuracy. Postmortem lividity is one of the important signs of death. It is also called the "darkening of death" because shortly after death, in from 20 minutes to 2 hours usually purple red blotches begin to appear in the skin. Within first 3-4 hours after death these livid blotches may be blanched out by pressure of the finger against the skin only to return when the finger is removed. The forensic significance of this change in the stability of the lividity is that if the position of the dead body has been changed after death but before lividity is fixed the findings of two different areas of distribution of lividity, such as in front and behind may serve as mute evidence that the body has been moved since death.

18. Postmortem lividity is a bluish or reddish purple discoloration due to capillo-venous distension with blood, at the undersurface of the skin of the dependent parts of the body, due to settling of blood in those areas due to pull of the gravity, when circulation to keep the blood in motion ceases.

19. Lividity will not develop in that region which is in actual contact with the surface on which the body is lying due to occlusion of the toneless capillaries by the pressure of the body. These areas are known as contact pallor. Similarly it is not seen on those parts,

which have been compressed by tight clothing or tight rapping of a sheet, but occurs as a strip of bands called vibices.

20. Fixation of postmortem lividity occurs mainly due to certain physical factors. Firstly, after the formation of the postmortem lividity blood cannot easily pass through the capillaries. Secondly, by the time there has been total settling of the blood, rigor mortis is well established all around the body. This change in the muscle obliterates the big vessels passing through them. Hence after this period, the blood cannot pass through these vessels to settle in the small venules and capillaries in the new areas.. Thirdly, after full establishment of rigor mortis, the venules lie almost empty and compressed in the rigid muscles at that time and cannot be easily distended by the resettling blood.

21. Reverting to the facts, the place of occurrence was square No.5 at Chak No.52/12-L, Chachiwatni. The deceased had gone by a tractor for ploughing the fields. No tractor was taken into possession or shown in the un-scaled or scaled site plan. After sustaining the firearm injuries, the deceased fell down and was lifted by both the eye witnesses, who claimed that their clothes got blood stains but neither those clothes were taken into possession during the investigation nor produced by the PWs. The complainant being dissatisfied with the investigation filed the private complaint with his own story but has not appended any scaled site plan with the private complaint nor cited any other draftsman in the calendar of witnesses appended with Exh.PC

22. The scaled site plan in this case was prepared by Saeed Akhtar CW.3. He was not cross-examined by the complainant despite the fact that he was afforded an opportunity. However, during the cross-examination by the defence, CW.3 admitted that he took rough notes at the pointing out of the eye witnesses and on instructions of police. He further admitted that he has not mentioned any square number in the scaled site plan. He gone on to add that the occurrence took place within the boundaries of Chak No.51/12-

L. The Investigating Officer appeared as CW.8 and also admitted during the cross-examination that the occurrence took place in Chak No.51/12-L, thus, despite the fact that being dissatisfied with the investigation, the complainant filed private complaint but even then has mentioned the place of occurrence as square No.5 in Chak No.52-L, Chichawatni, therefore, the prosecution failed to prove the place of occurrence.

23. So far as, the presence of the eye witnesses at the place and time of occurrence is concerned, that is also doubtful as their names did not find mention in the inquest report either in column No.4 or column No.24 and despite their acclaimed presence, the dead body was escorted to mortuary by CW.4. The statement of the medical officer further suggested that the dead body was shifted to mortuary from Police Station, which belied the stand of the eye witnesses that the dead body was shifted to mortuary from the place of occurrence.

24. Another aspect of the matter cannot be lost sight of as the Investigating Officer disclosed in the cross-examination that Abdul Ghaffar a motorcycle rickshaw driver was the first person who made a phone call to 1122, which is also evident from Exh.DA and the statement of the Investigating Officer further revealed that he had no friendship with anyone from the parties as the parties were 'Jat' by caste and Abdul Ghaffar was 'Rajpoot' by caste. He also admitted during the cross-examination that as per his investigation, the complainant and PWs Mohsin Hayat and Haji Sabir Hussain (given up PWs) were not present at the place and time of occurrence. He further admitted that he did not confirm the participation of Muhammad Afzal (acquitted co-accused) and Gulfam Hussain (appellant) in this occurrence and as such declared them innocent.

25. Regarding motive, suffice it to observe that the motive is not a component of murder as certain crimes are motive-less and it lies deep in the mind of the perpetrator of the crime. It is also settled

that the prosecution is not bound to introduce the motive but once a motive is set up and then not proved, it adversely effects the case of prosecution. Though the witnesses claimed the destruction of their crops by the cattle of the accused party and allegedly, Imran Hussain (the deceased) was beaten by the accused party three days prior to the occurrence but no such documentary proof was produced during the investigation as admitted by the Investigating Officer during the cross-examination, thus, the motive in this case was not proved.

26. As mentioned above, the appellant Gulfam Hussain was declared innocent by the investigating agency and no recovery was effected from him. Whereas, Zahid Rasool (appellant) was arrested in this case on 14.8.2016 and got recovered pistol (CW.2/1), from his house not in his exclusive possession. Even otherwise, the weapon allegedly recovered from the appellant was found in working condition, thus, recovery was also inconsequential.

27. Learned counsel for the complainant argued that the occurrence in this case took place on 30.6.2016 and the appellant Gulfam Hussain was arrested on 09.11.2016 after about five months of the occurrence and remained absconder for considerable period but this fact was not asked from the appellant in his statement recorded under section 342, Cr.P.C., thus, no benefit of the absconsion of the appellant can be availed by the prosecution.

28. Taking from whatever angle, the story described by the eye witnesses does not fit in the probabilities as they offered no resistance to any of the assailant when their near and dear was fired at by the accused-appellants in their presence. They claimed to have lifted and dispatched the deceased to hospital but did not produce their blood stained clothes during the investigation. The inquest report was silent about their names and the dead body was escorted by a police constable to mortuary. The rigor mortis was fully developed and the postmortem staining was present and that medical officer had not ruled out the possibility regarding time

between the death and postmortem between 12 to 24 hours. Assuming for the sake of arguments that the eye witnesses were present at the crime scene and had witnessed the occurrence but their presence is belied by host of circumstances. A similar question came up for consideration before apex Court in "Muhammad Saleem V. The State" ***(2010 SCMR 374)*** *at page 377, the apex Court was pleased to observe as under:*

> ***".....General rule is that statement of a witness must be in-consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent mind. If these elements are present, then the statement of a worst enemy of the accused, can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without second thought. Reference is invited to Haroon alias Harooni V. The State and another 1995 SCMR 1627. The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle, that a disinterested witness is always to be relied upon even his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequences. Reference is invited to Muhammad Rafique V. State 1977 SCMR 454 and Haroon V. The State 1995 SCMR 1627"***

29. It is an axiomatic principle of law that in case of doubt, the benefit thereof must resolve in favour of the accused. It was observed by the Hon'ble apex Court in Tariq Pervaiz v. The State: ***(1995 SCMR 1345)*** *that for giving benefit of doubt it was not necessary that there may be many circumstances creating doubts and if there is circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then accused would be entitled to the benefit of doubt. In this context case of Muhammad Akram v. the State* ***(2009 SCMR 230)*** *can also be referred to.*

30. It is settled principle of law that benefit of doubt even slightest must be resolved in favour of the accused and without any reservations. Reliance is placed upon case reported in ARIF HUSSAIN and others V. THE STATE through Advocate-General and another ***(2005 YLR 2279)****. It is well settled principle of law that to*

give benefit of doubt to an accused is much more than a mere rule of law. It is the rule of prudence which no man ought to and no judge acting in accordance with provisions of Qanoon-e-Shahdat, can ignore and this rule was vigorously enforced by Islam.

31. At this stage, it may be mentioned that the role ascribed to the appellants in the crime report was different than that of private complaint as in the FIR, two fires were attributed to Gulfam Hussain (appellant) hitting right shin and left thigh of the deceased and two fires were also attributed to Zahid Rasool (appellant) hitting left wrist and abdomen of the deceased but in the private complaint, attribution was somewhat different as three fires were attributed to Gulfam Hussain (appellant), whereas, four fire shots were assigned to Zahid Rasool (appellant) may be for the reason that the complainant/prosecution improved his version to bring that in line with the medical evidence keeping in view the number of injuries observed by the medical officer during the postmortem examination, thus, the prosecution neither established the place of occurrence nor presence of the eye witnesses is suggested from the available material. The motive was also not proved. The recovery was inconsequential. The independent witness, namely, Abdul Ghaffar was not adduced during trial. The information received by 1122 was also concealed/suppressed. The medical officer observed twelve injuries on the body of the deceased but heinousness of crime is not ground for conviction if the prosecution case is not proved to the hilt. The occurrence might have taken place wherein the deceased lost his life but not in the mode and manner as described by the eye witnesses. It appeared that they have not described the complete and accurate tale by withholding the material facts and, thus, prosecution failed to prove its case against the appellants beyond reasonable shadow of doubt.

32. In a recent case, titled Najaf Ali Shah Versus The State ***(2021 SCMR 736)****, the apex Court observed as under:*

> ***"9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the Court to do complete***

> ***justice. 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 then 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 go 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 Stat (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129), when this Court observed that once a single loophole is observed in a case presented by the prosecution, such 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."***

33. Seeking guidance from the observations of their lordships and respectfully following the same, I accept this appeal and set aside the impugned judgment. The appellants are acquitted of the charge. They are in jail and be released forthwith if not required in any other criminal case.

For the reasons mentioned above, Criminal Revision No.194-2018 and P.S.L.A No.39-2018 are hereby dismissed.

The office shall ensure immediate remittance of the record of the learned trial Court.

(SARDAR AHMED NAEEM)
JUDGE

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APPROVED FOR REPORTING

Judge