

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

**Criminal Appeal No. 56707 of 2019.**

(Muhammad Sarwar. Vs. The State & another)

**Criminal Appeal No. 50403 of 2019.**

(Asad Aslam. Vs. The State & 02 others)

&

**Murder Reference No. 275 of 2019.**

(The State. Vs. Muhammad Sarwar)

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

Date of hearing.	<b>02.11.2023.</b>
Appellant by:	Barrister Aiyan Ali Bhutta.
State by	M/s Munir Ahmad Sial & Nuzhat Bashir, Deputy Prosecutor General.
Complainant by	Syed Farhad Ali Shah, Advocate.

**Malik Shahzad Ahmad Khan, J:-** By this single judgment, we proceed to decide **Criminal Appeal No. 56707 of 2019** filed by Muhammad Sarwar (appellant) against his conviction & sentence, **Criminal Appeal No. 50403 of 2019** filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar *alias* Shana and Muhammad Arslan Sarwar *alias* Fana (respondent Nos. 2 & 3) and **Murder Reference No. 275 of 2019** sent by the learned trial Court for confirmation or otherwise of the sentence of Death awarded to Muhammad Sarwar (appellant) by the learned trial Court. We propose to decide all these matters by this single judgment as these have arisen out of the same judgment dated 11.07.2019 passed by the learned Addl. Sessions Judge, Lahore.

2. The appellant, namely, Muhammad Sarwar along with Muhammad Zeshan Sarwar *alias* Shana (co-accused since acquitted) and Muhammad Arslan Sarwar *alias* Fana (co-accused since acquitted) was tried in case FIR. No. 177 dated 12.02.2017 registered at Police Station Ghalib Market District Lahore in respect of offences under Sections 302/34 of PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 11.07.2019 has convicted and sentenced Muhammad Sarwar appellant as under: -

**Under Section 302(b) PPC** to 'Death as tazir' for committing Qatl-i-Amd of Ahsan Aslam (deceased). He was also ordered to pay Rs.300,000/- (Rupees three hundred thousand only) to the legal heirs of Ahsan Aslam deceased as compensation under Section 544-A of Cr.P.C, recoverable as arrears of land revenue, and in default thereof to undergo simple imprisonment for six months.

The learned trial Court however, vide the aforementioned judgment has acquitted Muhammad Zeshan Sarwar *alias* Shana (co-accused) and Muhammad Arslan Sarwar *alias* Fana (co-accused) by extending them the benefit of doubt.

3. Brief facts of the case as given by the complainant Asad Aslam (PW-8) in the complainant (Exh.PA) on the basis of which formal FIR (Exh.PA/2), was chalked out, are that he (complainant) was resident of House No. 50, Nasir Colony, Lahore. On 12.02.2017 at 12:30 p.m., (noon), he (complainant) along with his elder brother, namely, Ahsan Aslam (deceased) was playing cricket in Saint Marry Dongi Ground, where, Muhammad Sarwar (appellant) armed with pistol, his (complainant's) two sons, namely, Arslan *alias* Mana (co-accused since acquitted) armed with 'danda', Zeshan *alias* Shana (co-accused since acquitted) armed with 'danda' along with an unknown accused person entered. Zeshan (co-accused *since* acquitted) raised 'lalkara' that Ahsan (deceased) be killed and be not let alive upon which all the accused persons attacked & started beating the brother of the complainant. Ahsan (deceased) called him (complainant) to save him, whereupon, he (complainant) rushed towards his brother. In the meanwhile, Muhammad Sarwar (appellant) made fire shot with his pistol which landed on the right side of abdomen of Ahsan (deceased) who fell down while smeared in the blood. Thereafter, Muhammad Sarwar (appellant) made two consecutive fire

shots which did not hit Ahsan (deceased) due to his fallen condition. The occurrence was witnessed by Hakeem Khan (given up PW), Haji Tahir (given up PW) and Sheraz Butt (PW-9). Ahsan (deceased) was shifted to the Services Hospital, Lahore, in injured condition.

Motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between Ahsan (deceased) and Sarwar (appellant) along with his two sons, namely, Arslan (co-accused since acquitted) and Zeshan (co-accused since acquitted) on account of a fight of the children of the locality and due to this grudge, the accused persons made firing at the brother of the complainant.

Initially FIR was lodged for offences under Sections 324/34 of PPC however, after the death of Ahsan (deceased) on 15.02.2017, offence under Section 302 of PPC was added in this case *vide zimni* No. 03.

**4.** Muhammad Sarwar appellant was arrested on 08.03.2017 by Razaqat Ali, Sub Inspector/I.O (PW-13) who on 19.03.2017 made disclosure and led to the recovery of pistol (P-7) along with four live bullets P-8/1-4 *vide* recovery memo (Exh.PH). After completion of investigation, the *challan* was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against Muhammad Sarwar appellant along with Muhammad Zeshan Sarwar *alias* Shana (co-accused since acquitted) & Muhammad Arslan Sarwar *alias* Fana (co-accused since acquitted) on 04.07.2017, to which they pleaded not guilty and claimed trial.

**5.** In order to prove its case, the prosecution produced thirteen witnesses during the trial and also produced documentary evidence in the shape of (Exh.PA to Exh.PW).

The statements of the appellant and Muhammad Zeshan Sarwar *alias* Shana (co-accused since acquitted) & Muhammad Arslan Sarwar *alias* Fana (co-accused since acquitted) were recorded under Section 342 of Cr.P.C. The appellant refuted the allegations levelled against him and professed his innocence. The appellant neither opted to make his statement on oath as envisaged under Section 340 (2) Cr.P.C., nor produced any evidence in his defence.

The learned trial Court *vide* its judgment dated 11.07.2019 found the appellant guilty, convicted and sentenced him as mentioned and detailed above however, acquitted Muhammad Zeshan Sarwar *alias* Shana (co-accused) and Muhammad Arslan Sarwar *alias* Fana (co-accused) while extending them the benefit of doubt.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the police; that in fact, the occurrence was unseen; that the prosecution eye witnesses are chance witnesses and they could not establish any reason of their presence at the spot at the relevant time; that Razaqat Ali, Sub Inspector (PW-13), has admitted that two gardeners were present at the spot at the relevant time who had stated that they had witnessed the occurrence but the said gardeners were not produced in the witness box and as such, the prosecution has withheld the best evidence therefore, an adverse inference can be drawn under Article 129(g) of the Qanun-e-Shahadat Order, 1984 against the prosecution; that there is glaring conflict between the ocular account and the medical evidence of the prosecution because according to the ocular account, Ahsan (deceased) was firstly beaten by the accused party and thereafter, one fire shot was made by Muhammad Sarwar (appellant) which landed on the right side of the abdomen of Ahsan (deceased) but according to the medical evidence, there was no blunt injury on the body of the deceased, whereas, there were two firearm entry wounds on his body and as such, the ocular account is contradicted by the medical evidence; that it is evident from the evidence of the prosecution witnesses that investigation in this case was conducted after two (02) days of the occurrence *i.e.*, on 14.02.2017 which further created dent in the prosecution case; that safe custody of parcel of pistol, allegedly recovered on pointing out of the appellant, could not be established by the prosecution in this case as Anwar-ul-Haq H.C/Moharrar (PW-4) has not uttered a single word regarding handing over of the abovementioned parcel to him or its delivery to any prosecution witness for its onward transmission to the office of PFSA; that motive was also not proved in this case through any reliable evidence; that the prosecution has miserably failed to prove its

case against the appellant beyond the shadow of doubt. It is therefore, prayed that the appeal filed by Muhammad Sarwar (appellant) may be allowed and the appellant may be acquitted of the charge by extending him the benefit of doubt.

7. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of doubt; that the occurrence took place in the broad day light and as such, there was no chance of any mis-identification of the appellant during the occurrence; that the prosecution witnesses were cross-examined at length but their evidence could not be shaken and their evidence has substantially been supported by the medical evidence; that prosecution case against the appellant is further corroborated by the recovery of pistol (P-7) on pointing out of the appellant and positive report of PFSA (Exh.PW); that motive of the prosecution was also proved in this case through reliable evidence of the prosecution witnesses; that there is no substance in the appeal filed by the appellant therefore, his appeal may be dismissed, Murder Reference be answered in the positive and the sentence of death awarded to the appellant by the learned trial Court may be upheld & maintained.

Insofar as **Crl. Appeal No. 50403 of 2019** filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar *alias* Shana (co-accused) and Muhammad Arslan Sarwar *alias* Fana (co-accused) is concerned, learned counsel for the complainant submits that both the aforementioned co-accused were not only present at the spot but they also shared common intention with the principal accused; that they along with other accused gave beating to Ahsan (deceased) at the time of occurrence and as such, both the aforementioned acquitted accused actively participated during the occurrence and they have wrongly been acquitted from the charges. It is therefore, prayed that while allowing the appeal of the complainant, both the accused (respondent Nos. 2 & 3) may also be convicted & sentenced, in accordance with the law.

8. Arguments heard. Record perused.

**9.** Prosecution story as set forth in the complainant (Exh.PA) on the basis of which formal FIR (Exh.PA/2) was chalked out, has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

**10.** The occurrence in this case took place on 12.02.2017 at 12:30 *p.m.*, (*noon*). The matter was reported to the police and the FIR (Exh.PA/2) was also lodged on the same day *i.e.* on 12.02.2017 at 01:30 *p.m.*, *i.e.*, within a period of 01 hour from the occurrence. The distance between the police station and the place of occurrence was 1-kilometer. Even Ahsan Aslam (deceased) who initially sustained injuries during the occurrence and later on, died, was also medically examined on the same day *i.e.*, on 12.02.2017 at 12:47 *p.m.*, *i.e.*, within a period of 17 minutes from the occurrence. Keeping in view the time of occurrence, the place of occurrence, its distance from the police station and the time of medical examination of the injured (later on deceased), we are of the view that there was no deliberate or conscious delay in reporting the matter to the police and the FIR was promptly lodged.

**11.** The ocular account of the prosecution was furnished by Asad Aslam complainant (PW-8) and Sheraz Butt (PW-9). The occurrence in this case took place in the cricket ground of Saint Marry Dongi Ground, Gulberg Lahore. Asad Aslam complainant (PW-8) is real brother of Ahsan Aslam (deceased). He is also resident of Gulberg, Lahore. Likewise, Sheraz Butt (PW-9) is also resident of Lahore though he is resident of Umar Park Baghbanpura, Lahore but both the abovementioned eye witnesses have plausibly explained the reason of their presence at the spot at the relevant time by stating that they were playing cricket along with Ahsan Aslam (deceased) in the abovementioned cricket ground at the time of occurrence. The occurrence in this case took place in the broad day light *i.e.*, at 12:30 *noon.*, and as such, there was no chance of any mis-identification of the appellant during the occurrence. Both the abovementioned eye witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Their evidence is confidence inspiring & trustworthy. Although it is argued by learned counsel

for the appellant that according to the statement of Razaqat Ali, Sub Inspector (PW-13) gardeners of the ground, were present at the spot at the relevant time and they were the most natural witnesses of the occurrence but the prosecution has withheld their evidence and as such, an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984, may be drawn against the prosecution but it is noteworthy that it is the quality and not the quantity of evidence which weighs with the Courts regarding the decision of a criminal case therefore, non-production of the aforementioned gardeners of the ground in the witness box is not fatal to the prosecution case. Even otherwise, it is by now well settled that the people/witnesses not related to the deceased/complainant party do not appear in the witness box to avoid enmity with the accused party and their non-appearance in the witness box is not fatal to the prosecution case, as observed by the Hon'ble Supreme Court of Pakistan in the cases reported as 'Zakir Hussain Vs The State' (2008 SCMR 222) & 'Abdul Haq and another Vs The State' (2015 SCMR 1326) therefore, abovementioned argument of learned counsel for the appellant carries no weight.

**12.** Recovery memo of the blood stained earth dated 12.02.2017 (Exh.PD), recovery memo of the empties, recovered from the spot dated 12.02.2017 (Exh.PE), recovery memo of last worn/blood stained clothes of the deceased dated 12.02.2017 (Exh.PF), all these documents show that investigation of this case started on 12.02.2017 and as such, there is no force in the argument of learned counsel for the appellant that investigation in this case started on 14.02.2017.

**13.** Medical evidence of the prosecution was furnished by Dr. Ayad Akhtar (PW-5), Dr. Muhammad Owais Qureshi (PW-10) & Dr. Zulqarnain Haider (PW-11). Dr. Ayad Akhtar (PW-5) initially medically examined Ahsan (deceased), in injured condition, on 12.02.2017 at 12:47 p.m., i.e., within a period of 17 minutes from the occurrence. He noted two firearm injuries on the body of Ahsan (deceased). He further noted that the abovementioned injuries were caused by firearm weapon. Although it is argued by learned counsel for the appellant that according to the prosecution

case, accused party firstly gave beating to Ahsan (deceased) and thereafter, Muhammad Sarwar (appellant) made fire shots out of which only one fire shot landed on the right side of the abdomen of Ahsan (deceased), whereas, the Medical Officer did not note any blunt weapon injury on the body of the deceased and two firearm injuries were noted on his body which contradicts the prosecution case but it is noteworthy that the allegation of giving beating to the deceased with the help of clubs was levelled against Muhammad Zeshan Sarwar *alias* Shana & Muhammad Arslan Sarwar *alias* Fana (co-accused) who have already been acquitted by the learned trial Court, whereas, the prosecution case against the appellant of making fire shot which landed on the right side of the abdomen of Ahsan (deceased) has substantially been supported by the medical evidence and there is no conflict between the ocular account and the medical evidence of the prosecution to the extent said role played by the appellant during the occurrence. We have further noted that in the contents of the FIR, as well as, in their statements before the learned trial Court, prosecution eye witnesses stated that after sustaining firearm injury on the right side of the abdomen, Ahsan (deceased) fell on the ground in injured condition and thereafter, the appellant made two more fire shots on the deceased however, the same did not hit him. Under the circumstances, there was every possibility that one out of the two additional fire shots made by the appellant, had hit the deceased but the same could not be noticed by the prosecution eye witnesses due to the falling of the deceased on the ground, as well as, on account of sensation & panic created due to the firing of the appellant. It is by now well settled that an eye witness cannot give the photo picture of each and every injury sustained by the deceased due to the panic & sensation developed at the time of occurrence due to the firing of the accused. Reliance in this respect may be placed on the cases of *'Ellahi Bakhsh Vs Rab Nawaz and another'* (2002 SCMR 1842) & *'Abdur Rauf Vs the State and another'* (2003 SCMR 522). We are therefore, of the view that there is no serious conflict between ocular account and medical evidence and the medical evidence has substantially supported the ocular account of the prosecution.



**14.** Insofar as the recovery of pistol (P-7) on pointing out of the appellant and positive report of PFSA (Exh.PW) is concerned, we have noted that Anwar-ul-Haq HC (PW-4), who was Moharrar of Malkhana of the police station, has not uttered a single word that any parcel of pistol was handed over to him and thereafter, he kept the same in safe custody at the Malkhaana and finally handed over the said parcel to any prosecution witness for its onward transmission to the office of PFSA. We are therefore, of the view that safe custody of the parcel of pistol (P-7), allegedly recovered on pointing out of the appellant, has not been proved in this case therefore, recovery of pistol (P-7) and positive report of PFSA (Exh.PW) are of no avail to the prosecution.

**15.** According to the prosecution case, motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between Ahsan (deceased) and the accused party on account of fight of children. No specific date, time and place of the said quarrel has been mentioned by any of the prosecution witness. None of the prosecution witnesses stated that they were present at the time of abovementioned quarrel. A vague and general motive was alleged by the prosecution which has not been proved in this case.

**16.** We have disbelieved the prosecution evidence *qua* the recovery of pistol (P-7) on pointing out of the appellant & motive of the occurrence due to the reasons mentioned in para Nos. 14 & 15 above, however, if the prosecution evidence *qua* the recovery of pistol (P-7) and motive is excluded from consideration, even then sufficient incriminating evidence is available on the record to prove the prosecution case against the appellant. As discussed earlier, the prosecution case has been proved against the appellant through the reliable and confidence inspiring evidence of eye-witnesses, namely, Asad Aslam complainant (PW-8) & Sheraz Butt (PW-9). They stood the test of lengthy cross-examination but their evidence could not be shaken regarding the role played by the appellant during the occurrence. They corroborated each other on all material aspects of the case. The ocular account of the prosecution as given by Asad Aslam complainant (PW-8) & Sheraz Butt (PW-9) about the role of the appellant is substantially supported by the medical evidence furnished by Dr. Ayad Akhtar (PW-5), Dr.

Muhammad Owais Qureshi (PW-10), Dr. Zulqarnain Haider (PW-11), MLC of Ahsan (deceased) in injured condition (Exh.PC), as well as, postmortem report of Ahsan (deceased) (Exh.PJ) & pictorial diagrams (Exh.PJ/1 & Exh.PJ/2). The time of occurrence, the kind of weapon used, the nature and seat of injuries inflicted by the appellant to Ahsan (deceased), all these facts as stated by the abovementioned eye-witnesses were substantially supported by the aforementioned medical evidence. We are therefore, of the view that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

**17.** Now coming to the quantum of sentence, we have noted some mitigating circumstances in favour of the appellant. *Firstly* recovery of pistol (P-7) on pointing out of the appellant has been disbelieved by us due to the reasons mentioned in paragraph No. 14 above, *Secondly*, prosecution evidence qua motive has been disbelieved by us due to the reasons mentioned in paragraph No. 15 of this judgment. Under the circumstances, the death sentence awarded to the appellant is quite harsh and the sentence of imprisonment for life shall meet the ends of justice.

**18.** While treating it a case of mitigation, the conviction of Muhammad Sarwar appellant under Section 302(b), PPC awarded by the learned trial Court is maintained but his sentence is altered from **death to imprisonment for life**. The compensation awarded by the learned trial Court against the appellant and sentence in default thereof are maintained and upheld. The benefit of Section 382-B of Cr.P.C. is extended in favour of the appellant.

**19.** Consequently, with the above said modification in the sentence of Muhammad Sarwar appellant, **Criminal Appeal No. 56707 of 2019** filed by the appellant is hereby **dismissed**. Murder Reference (**M.R. No. 275 of 2019**) is answered in the **negative** and death sentence of Muhammad Sarwar appellant is **not confirmed**.

**20.** Insofar as **Crl. Appeal No. 50403 of 2019**, filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar *alias* Shana and Muhammad Arslan Sarwar *alias* Fana is concerned, it is noteworthy that the allegation of giving beating to Ahsan (deceased) by the aforementioned accused has not been supported by the medical evidence as the Medical Officers did not note any blunt injury on the body of the deceased therefore,

mere oral assertion of the complainant party is not sufficient to convict the said accused. Moreover, merely presence of the aforementioned respondents at the place of occurrence does not mean their participation in the alleged occurrence and prosecution has brought on record no evidence regarding sharing of the common intention by the aforementioned acquitted accused/respondent Nos. 2 & 3. The observations of the learned trial Court regarding acquittal of the aforementioned respondents are based on sound reasons which do not call for any interference by this Court. There is no substance in the appeal filed by the complainant (**Crl. Appeal No. 50403 of 2019**) against the acquittal of the said respondents therefore, the same is hereby **dismissed**.

(FAROOQ HAIDER)  
JUDGE.

(MALIK SHAHZAD AHMAD KHAN)  
JUDGE.

**APPROVED FOR REPORTING.**

(FAROOQ HAIDER)  
JUDGE.

(MALIK SHAHZAD AHMAD KHAN)  
JUDGE.

*This judgment has been dictated &  
pronounced on 02.11.2023, prepared  
and signed on 06.11.2023.*

*\*Ajmal Rana.*