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JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.1977 of 2016

Rafaqat Ali *alias* Phakoo vs The State etc.

Murder Reference No.489 of 2016

The State vs Rafaqat Ali *alias* Phakoo

Criminal Appeal No.413 of 2017

The State vs Sarwat Begum

JUDGMENT

| | |
|------------------|--|
| Date of hearing: | <u>07.10.2020</u> |
| Appellant by: | M/s Muhammad Ahsan Bhoon and Nighat Saeed Mughal, Advocates. |
| State by: | Ms. Nuzhat Bashir, Deputy Prosecutor General. |
| Complainant by: | Syed Mubashar Ali Naqvi, Advocate. |

Farooq Haider, J:- This single judgment shall dispose of **Crl. Appeal No.1977 of 2016** filed by Rafaqat Ali *alias* Phakoo (appellant/convict), **Murder Reference No.489 of 2016**, sent by learned trial court under Section 374 Cr.P.C. for confirmation of death sentence awarded to Rafaqat Ali *alias* Phakoo (appellant) and **Criminal Appeal No.413 of 2017** filed by the State against the order of acquittal of Sarwat Begum, as all the matters have arisen out of one and the same judgment dated: 31.10.2016 passed by learned Additional Sessions Judge, Gujranwala/trial court.

2. Rafaqat Ali *alias* Phakoo (appellant) alongwith his three co-accused persons i.e. Mst. Sarwat Begum, Mudassar and Rasheed *alias* Sheeda was tried in case arising out of F.I.R. No.215, dated: 24.05.2014, registered under Sections: 302, 34 PPC at Police Station: Qila Dedar Singh, District: Gujranwala and after conclusion of trial, learned trial Court *vide* impugned judgment dated: 31.10.2016, while acquitting all co-accused persons namely Mst. Sarwat Begum, Mudassar and Rasheed *alias* Sheeda, has convicted and sentenced the appellant as under: -

| <u>Conviction</u> | <u>Sentence</u> |
|--|--|
| <u>Under Section:</u> 302(b) PPC | <u>Under Section 302 (b) PPC</u> to “ <i>Death</i> ” as <i>Taz’ir</i> (for committing <i>Qatl-e-amd</i> of Muhammad Boota) with payment of compensation Rs.4,00,000/- to the legal heirs of the deceased and in default thereof to further undergo S.I. for six months and said compensation has been ordered to be recovered as arrears of land revenue. |

3. Briefly, the prosecution case as per application (Ex.PC) submitted by Muhammad Ali *alias* Abu Bakar complainant (PW-6) to Ghulam Mustafa S.I. (PW-1) at Police Station: Qila Didar Singh, is that he is resident of Dera Bhagat; his father namely Muhammad Boota had contracted two marriages; he was born from the womb of Mst. Abida (first wife of his father); his father contracted second marriage with Mst. Sarwat Begum about 16 years prior to the occurrence; his stepmother i.e. Mst. Sarwat Begum developed illicit relations with Rafaqat *alias* Phakoo (appellant); they started meeting with each other and their said meeting came into the knowledge of his father, who started advising and forbidding his stepmother, due to which, they often remained in dispute with each other; on 23.05.2014, severe dispute arose between them (i.e. Mst. Sarwat Begum and Muhammad Boota) on the same issue and after hearing news regarding said dispute, Mst. Muqadas Tahira (paternal aunt "پھوپھی" of the complainant), Muhammad Riaz (paternal uncle "پھوپھا" of the complainant) and Haidar Ali (relative of the complainant) came to their house for patching up the matter between them; Muhammad Boota (father of complainant) was at his shop of milk situated at Mauza Ludhianwala Warraich and came back to home at about 11:00 p.m.; aforesaid Mst. Muqadas Tahira (paternal aunt "پھوپھی"), Muhammad Riaz (paternal uncle "پھوپھا") and Haider Ali sat in the northern western room of the house; they were sitting on charis when paternal aunt "پھوپھی" started discussion about reconciliation during which the dispute further aggravated and in the meantime, stepmother of the complainant i.e. Mst. Sarwat Begum went out towards courtyard on the pretext of urination, at that time, electric bulbs of courtyard and room were lightening; meanwhile, Muhammad Boota laid down on the cot lying in the room and after some time at about 01:20 a.m. (night) Mst. Sarwat Begum alongwith Rafaqat *alias* Phakoo armed with pistol and two unknown accused persons armed with pistols, entered into the room and Mst. Sarwat Begum (stepmother of the complainant) asked to teach lesson to Muhammad Boota for defaming and torturing her, due to which, two unknown accused persons pointed their weapons towards them and threatened not to make any movement; Mst. Sarwar Begum at once sat on the legs of Muhammad Boota and caught him tightly whereas Rafaqat Ali *alias* Phakoo made fire with his pistol on his ear, due to which, he became seriously injured and succumbed to that injury at the spot; after hearing report of firearm shot, sister, brother and mother (Mst. Abida Bibi) of complainant, who were sleeping in the adjacent room, also reached there while crying and on hearing their hue and cry, accused persons fled away from the spot while brandishing weapons; it has been also alleged by the complainant in aforesaid application (Ex.PC) that he can identify the unknown accused persons, if they come before him; his stepmother (Mst. Sarwar Begum) and Rafaqat *alias* Phakoo alongwith two unknown accused persons have committed the occurrence.

4. On the basis of aforementioned application (Ex.PC), case *vide* F.I.R. No.215/2014 (Ex.PA), dated: 24.05.2014, under Sections: 302, 34 PPC was registered at Police Station: Qila Didar Singh, District: Gujranwala. During investigation, on 17.06.2014, complainant nominated Mudassar and Rasheed *alias* Sheeda also as accused *vide* supplementary statement.

After completion of investigation, challan report under Section 173 Cr.P.C. was submitted in the Court; appellant and his co-accused persons (since acquitted) were formally charge sheeted, however, they pleaded not guilty and claimed trial whereupon prosecution evidence was summoned; after recording of prosecution evidence, accused persons were examined under Section 342 Cr.P.C. but they refuted the allegations levelled against them; they did not opt to appear as their own witnesses under Section 340(2) Cr.P.C, however, produced Mazhar Ali (DW-1), Muhammad Tariq Javed (DW-2) and some documentary evidence i.e. Ex.DA to Ex.DG, in their defence.

Learned trial court after conclusion of trial while **acquitting co-accused persons namely Mst. Sarwat Begum, Mudassar and Rasheed *alias* Sheeda,** has convicted and sentenced the appellant as mentioned above through the impugned judgment dated: 31.10.2016.

5. Learned counsel for the appellant has submitted that conviction recorded and sentence awarded to the appellant through impugned judgment is against the 'law and facts' of the case; ocular account is neither trustworthy nor corroborated/supported by any other evidence. Learned counsel for the appellant finally prayed for acquittal of the appellant.

6. Conversely, learned Deputy Prosecutor General and learned counsel for the complainant have supported the impugned judgment to the extent of conviction and sentence recorded against Rafaqat Ali *alias* Phakoo (appellant) and prayed for dismissal of his appeal; they in support of appeal filed against order of acquittal of Sarwat Begum, have submitted that said order of acquittal is against the 'law and facts'; result of misreading and non-reading of evidence; prosecution has proved its case against her too, up to hilt. Lastly prayed for setting aside the order of her acquittal.

7. **Arguments heard. Record perused.**

8. It has been noticed that occurrence allegedly took place at 01:20 a.m. (during night) on 24.05.2014 and statedly reported to the police through written application (Ex.PC) at 04:00 a.m. on 24.05.2014, moved by Muhammad Ali *alias* Abu Bakar (complainant/PW-6) in police station, which is at a distance of six miles from the place of occurrence; however, documents for postmortem

examination over dead body of Muhammad Boota (deceased of the case) were given to the doctor at 06:15 p.m. on 24.05.2014 and autopsy was conducted over the dead body at 06:30 p.m. on 24.05.2014 i.e. after about more than 17 hours of death of the deceased; said fact is clearly mentioned in postmortem examination report (Ex.PE appended at Page No.120 of the Paper Book) and in this regard, relevant portions of the postmortem examination report (Ex.PE) are being reproduced: -

“DATE & TIME OF: 1)Death 24/05/2014 2) Received Dead body In Dead House 24/05/14
01:20 a.m
3) Receiving Complete documetns from Police 24/05/14 4) Conducting Autopsy 24/05/14
06:15 p.m. 06:30 p.m.

INFORMATION FURNISHED BY POLICE: 24/05/14 6:15 p.m.”

Furthermore, in this regard, relevant portions of statement of Dr. Ejaz Ahmad (PW-8) are also being reproduced: -

*“However, I was informed at 6:15 pm and I conducted the postmortem examination 6:30 PM. **It is correct that as soon as, I received police papers, I conducted the Postmortem examination and there is no delay on my part.**”*

(emphasis added)

“It is correct that after 17 hours of the death of the deceased, I conducted the postmortem of Muhammad Boota deceased.”

In view of above, it is crystal clear that no delay was caused by the doctor in conducting postmortem examination and as soon as police papers were handed over to him at 06:15 p.m., he immediately conducted postmortem examination at 06:30 p.m. This state of affairs i.e. unexplained delay in conducting postmortem examination over the dead body of the deceased, clearly reflects that neither complainant nor any other cited eye-witness was available at the relevant **“time and place”** of occurrence, assailants were not known, this time was consumed by the prosecution for tailoring story for registration of the case, arraying the accused and planting/procuring witnesses after consultation and deliberation; this situation further establishes that case was not registered at the stated time rather at belated stage with much delay, however, ante-time was shown in the record; in this regard, guidance has been sought from the case of **“Haroon Shafique versus The State and others”** (2018 SCMR 2118), **“Mian Sohail Ahmad and others versus The State and others”** (2019 SCMR 956), **“Muhammad Rafique alias Feeqa versus The State”** (2019 SCMR 1068), **“Sufyan Nawaz and another versus The State and others”** (2020 SCMR 192) and **“Muhammad Yasin and another versus The State through P.G. Punjab and others”** (2020 SCMR 1237); furthermore, perusal of Rapt No.4 dated: 24.05.2014 (Ex.DG, available at Page No.147 of the Paper Book) also shows that police was having intimation about the occurrence since 01:40 on 24.05.2014 on the basis of information furnished by

Fayyaz (whose cell number was also mentioned in the said report as 03008670294) and it was categorically mentioned in the same that Sio+SHO reached at the place of occurrence and got information that Muhammad Boota (deceased of the case) was sleeping in his house when unknown persons while entering in his house, fired and killed him; relevant portion of the same is reproduced: -

ضلع گوجرانوالہ

کال ڈیٹا مورخہ 24-5-14

ریسکیو 15

| نمبر | تھانہ | اطلاع دہندہ نام نمبر | وقت اطلاع | حکایات | کڑا آفیس موقع پر گیا | دائیں تفصیل |
|------|----------------|----------------------|-----------|--|----------------------|--|
| 4 | تھانہ دیوارنگو | قباقر 03008670294 | 01/40 | یہ تھانہ دیوارنگو میں واقع ہے۔ یہاں پر ایک شخص نے ایک شخص کو قتل کر دیا۔ قتل کے وقت یہاں پر ایک شخص بھی تھا۔ قتل کے بعد یہاں پر ایک شخص بھی تھا۔ قتل کے بعد یہاں پر ایک شخص بھی تھا۔ | قباقر SIO + SHO | منشی یونس احمد صاحب نے قتل کے وقت یہاں پر ایک شخص کو قتل کر دیا۔ قتل کے بعد یہاں پر ایک شخص بھی تھا۔ قتل کے بعد یہاں پر ایک شخص بھی تھا۔ |

Ex-DG

Incharge
Rescue 15
Gujranwala.

188
200

MUHAMMAD Ali
Advt. District Judge
24/5/2016

This state of affairs further reflects about registration of case at belated stage after concoction. It is trite law that first information report lays foundation of the criminal case and when same is unnecessarily delayed, as in this case, then it is fatal for the case of prosecution.

As far as ocular account in the case is concerned, prosecution produced Muhammad Ali *alias* Abu Bakar (complainant/PW-6) and Haider Ali (PW-9) as eye-witnesses of the occurrence; complainant/PW-6 stated in his statement as under:

“It is correct that usually my step mother Sarwat Bibi accused and my father deceased used to sleep in the same room.”

Since in the entire occurrence, only one firearm shot has been made and that too in the room of the deceased and his 2nd wife, at the odd hours of the night i.e. at 01:20 a.m., therefore, question of presence of the complainant and other cited eye-witnesses at that time, at said place of occurrence is of crucial/vital importance in the case.

It is case of prosecution that reason for presence of complainant (PW-6) and Haider Ali (PW-9) in the room of the deceased and his second wife (Sarwat Begum) i.e. stated place of occurrence was an attempt to settle the dispute between the deceased and his said second wife, arisen due to illicit relations between Sarwat Begum (second wife of the deceased) with Rafaqat Ali *alias* Phakoo (present appellant). After scanning entire available record in the case, it

has been found that prosecution has not produced any cogent evidence to prove aforesaid illicit relations; so much so, complainant/PW-6 as well as Haider Ali (PW-9) did not depose that they ever saw Rafaqat Ali *alias* Phakoo and Sarwat Begum in any such condition, which can be referred to say that they were having any illicit relations *inter se*; they even did not state that they had seen above dispute, which took place due to this reason on 23.05.2014; complainant/PW-6 simply claimed in his statement before the Court that his father told him about alleged illicit relations of Mst. Sarwat Begum; relevant portion of his statement is being reproduced: -

“My father told me about the illicit relations of accused Sarwat Bibi.”

However, on the one hand, no detail about the same was given by complainant/PW-6 and on the other hand, it was hearsay evidence and even he did not mention in the application for registration of case (Ex.PC) that his father told him about those illicit relations, whereas Haider Ali (PW-9) clearly stated that he never acted as instrument in the patch up of any quarrel between anybody; in this regard, relevant portion of his statement is given hereunder: -

“I was not instrumental in the patch up of any quarrel between anybody.”

So, any confidence inspiring evidence could not be produced by prosecution to prove said motive or any dispute due to said motive between the deceased and Sarwat Begum. Therefore, claim of the prosecution that due to any such illicit relations, any dispute arose and for settling the same, complainant alongwith other cited eye-witnesses was present in the room of his father and step mother at the odd hours of the night i.e. time of occurrence, could not be established.

Complainant (PW-6) stated that he usually sleeps at 08/09:00 p.m.; relevant portion of his statement is being reproduced: -

“I usually used to sleep at about 8/9.00 p.m”

hence, presence of complainant/PW-6 in the room of occurrence at odd hours of night i.e. 01:20 a.m., is not in his routine; so, he is chance witness with respect to his stated presence at the **“time and place (i.e. in the room)”** of occurrence and he could not establish any valid reason for his presence there at that time.

Furthermore, complainant/PW-6 mentioned in the application for registration of case (Ex.PC) that fire was made by the appellant at the “ear” of the deceased but did not disclose whether on right or left ear; case of the prosecution is that Sarwat Begum (co-accused) sat on the legs of the deceased, caught him forcefully/tightly and then Rafaqat Ali *alias* Phakoo (appellant) made firearm shot, which hit at ear of the deceased but in said situation, if

complainant (PW-6) was present there, then he must have noticed and mentioned in the application for registration of case (Ex.PC) that fire hit on the left or right ear; hence, said omission leads to the conclusion that neither complainant nor any other cited eye-witness was present at the relevant time, at the place of occurrence and when they reached there, they noticed presence of wound on the left parietal region as well as right parietal region of the deceased, however, they could not make distinction between entry and exit wound, therefore, complainant simply mentioned in application for registration of case (Ex.PC) that fire hit at the “ear” without mentioning right or left ear.

Perusal of case of prosecution also reflects that complainant in his application for registration of case (Ex.PC) nominated two accused persons i.e. Rafaqat Ali *alias* Phakoo (present appellant) and Sarwat Begum (co-accused, since acquitted) and further mentioned therein that two companions of the accused were unknown, however, subsequently, on 17.06.2014, nominated said two unknown accused persons as Mudassar and Rasheed *alias* Sheeda, said fact can be seen from the statement of Ashiq Hussain S.I./Investigating Officer (PW-11); relevant portion of his statement is being reproduced: -

“On 17.06.2014, complainant Muhammad Ali nominated accused persons Mudassar alias Kalu and Rasheed in his supplementary statement.”

Admittedly, Mudassar (co-accused, since acquitted) is resident of the same locality i.e. Dera Bhaghat where occurrence allegedly took place; it goes without saying that according to Ashiq Hussain S.I./Investigating Officer (PW-11), Dera Bhaghat is a small locality comprising upon 15/20 houses; relevant portion of his statement is hereby reproduced: -

“Dera Bhaghat a small locality consisting to 15 to 20 houses.”

whereas, complainant/PW-6 in his statement before the Court deposed that Dera Bhaghat is comprising upon 35/40 houses, he further deposed that Mudassar (co-accused, since acquitted) lives in other street but surprisingly, he did not nominate him in the application for registration of case (Ex.PC) despite the fact that he was resident of the very same small locality and living in the other street; relevant portions of his statement are hereby reproduced: -

“Dera Bhaghat is consisting upon 35/40 houses. House of Mudassar is situated in the other street”

“Mudassar is a son of Muhammad Munsha. Mudassar and Munsha reside in our village since birth. I have not mentioned the name of Mudassar and Rasheed in my application Ex.PC submitted by me for registration of case.”

In this scenario, if complainant was present at the “time and place” of occurrence, then name of Mudassar (co-accused, since acquitted) would have been definitely mentioned in the application (Ex.PC) moved by the complainant for registration of case; complainant/PW-6 even could not tell about police official who came first at the place of occurrence and in this regard, relevant portion of his statement is being reproduced: -

“I do not know the name of police official who came first at the place of occurrence.”

Similarly, Haider Ali (PW-9) is resident of Lawerey, which is at a distance of 40 k.m. from the place of occurrence; in this regard, relevant portion of statement of Haider Ali (PW-9) is being reproduced: -

“My village is at a distance of 40 kilometer from Dera Bhaghat”

furthermore, Haider Ali (PW-9) during his statement himself stated that he is not a regular visitor of the house/locality of occurrence and in this regard, relevant portions of his statement are also being reproduced: -

“I only visited Dera Bhagat one or two times in my life.”

“I cannot tell about the above said case as I had no regular visiting terms in village Dera Bhaghat.”

Therefore, he is also a chance witness, who could not establish any valid reason regarding his presence at the odd hours of the night, at the place of occurrence; he even could not tell that fire hit on left or right ear of the deceased. Nutshell of the above discussion is that presence of both the witnesses i.e. complainant/PW-6 and Haider Ali (PW-9) at the “**time and place**” of occurrence, could not be proved; their testimony is neither confidence inspiring nor trustworthy, hence, cannot be relied in this case of capital punishment; in this regard, guidance has been sought from the case of “**Mst. Sughra Begum and another versus Qaiser Pervez and others**” (2015 SCMR 1142), “**Imtiaz alias Taj versus The State and others**” (2018 SCMR 344), “**Nazir Ahmad versus The State**” (2018 SCMR 787), “**Sufyan Nawaz and another versus The State and others**” (2020 SCMR 192) and “**Mst. Mir Zalai versus Ghazi Khan and others**” (2020 SCMR 319). Resultantly, in the peculiar facts and circumstances of the case, ocular account has not been established/proved.

As far as medical evidence is concerned, since, no exact locale of entry wound i.e. left or right ear was mentioned in the ocular account, therefore, medical evidence cannot give any confirmation to the ocular version; furthermore, by now law is well settled that medical evidence is mere supportive

type of evidence; it can tell about locale, nature, magnitude of injury and kind of weapon used for causing injury but it cannot tell about identity of the assailant who caused the injury; therefore, same is also of no help to the prosecution in peculiar facts and circumstances of the case, in this regard, case of “**SAJJAN SOLANGI versus The STATE**” (2019 SCMR 872) can be safely referred.

As far as recovery of pistol (P-6) from Rafaqat Ali *alias* Phakoo (appellant) is concerned, suffice to say that same is inconsequential for the reason that as per report of Punjab Forensic Science Agency, Lahore (Ex.PP), one empty, which was statedly secured from the place of occurrence, did not match with allegedly recovered pistol from the appellant, so, same is of no help to the case of prosecution.

As far as motive is concerned, as discussed above, prosecution could not prove the same and even otherwise, when substantive piece of evidence in the form of ocular account has been disbelieved, then motive is of no help to the case of prosecution as the same loses its significance.

It goes without saying that deceased of the case was arrayed as an accused in the year 2010 in a murder case of one Gulfam Constable, he was also declared proclaimed offender in said case and in said regard, relevant portion of statement of complainant/PW-6 is being reproduced: -

“My father was arrested in the murder of Gulfam constable who was our relative. I do not know where he was murdered. My father was arrested by the P.S. Ichhra, Lahore.”

In this regard, copy of challan report of said case as Ex.DA, copy of application for issuance of proclamation of Muhammad Boota (deceased of instant case) in said case as Ex.DB, copy of statement of Process Server regarding execution of his warrant of arrest in said case as Ex.DC, copy of his warrant of arrest in said case as EX.DD, copy of his non-bailable warrant of arrest in said case as EX.DE and copy of “*Saza Slip*” in said case as Ex.DF, were produced by the defence; when this aspect and contents of report (Ex.DG) are examined while keeping them in juxta position, then chance of murder of the deceased of the case by unknown assailants, in odd hours of the night, cannot be outrightly ruled out.

9. Nutshell of the above discussion is that prosecution has been failed to prove its case against the appellant, therefore, **Crl. Appeal No.1977 of 2016**, filed by Rafaqat Ali *alias* Phakoo (appellant) is allowed; conviction recorded and sentence awarded to the appellant through impugned judgment dated: 31.10.2016, are hereby set aside. Appellant is acquitted of the charge, he be released from jail forthwith, if not required in any other case.

10. **Murder Reference No.489 of 2016** is answered in **negative** and death sentence awarded to Rafaqat Ali *alias* Phakoo is not confirmed.

11. We have gone through the order of acquittal of Sarwat Begum, recorded through the impugned judgment by learned trial Court and found that the order of her acquittal is neither perverse nor capricious/arbitrary/fanciful rather reasons mentioned therein have been found as perfectly in accordance with law, facts and record of the case. After acquittal, accused has attained double presumption of innocence and courts are always slow to disturb the same and in this regard, reliance can be placed upon the case of **“Haji Paio Khan versus Sher Biaz and others”** (2009 SCMR 803) and **“Muhammad Shafi alias Khddoo versus The State and others”** (2019 SCMR 1045); from, later case law, relevant portion is reproduced:-

“It is by now well settled that acquittal carries with it double presumption of innocence; it is reversed only when found blatantly perverse, resting upon fringes of impossibility and resulting into miscarriage of justice. It cannot be set aside merely on the possibility of a contra view.”

Even otherwise, in the light of observations mentioned above, we have observed that prosecution has been failed to prove its case, thus, **Criminal Appeal No. 413 of 2017** is dismissed.

(Sardar Ahmed Naeem)
Judge

(Farooq Haider)
Judge

APPROVED FOR REPORTING

(Sardar Ahmed Naeem)
Judge

(Farooq Haider)
Judge